

CITATION: R. v. Blackman, 2024 ONSC 3595
COURT FILE NO.: CR-22-8288-AP
DATE: 2024-06-21

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	John Wright, for the Crown
	)	
	)	
Appellant	)	
	)	
– and –	)	
	)	
	)	
EVAN BLACKMAN	)	Christopher Fleury, for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	
	)	HEARD: June 19, 2024

DECISION - SUMMARY CONVICTION APPEAL

PHILLIPS J.

[1] Evan Blackman was charged with the Criminal Code offences of mischief and obstructing a peace officer. He was acquitted after a one-day trial before Crewe J. of the Ontario Court of Justice on October 23, 2023. The trial judge's decision was rendered orally that same day. This is a Crown appeal of those acquittals.

[2] The offences were said to have occurred on or about February 18, 2021, in the context of a large and sustained police effort to remove protesters from Ottawa's downtown core at the tail end of what has become known as the "Freedom Convoy".

[3] The evidence at trial was limited to a 14-minute video captured by a police aerial drone, supplemented by the testimony of the arresting officer, Sergeant Jason Riopel.

[4] The video warrants some description. It is taken from what appears to be a height of about a 100 feet, with a camera that zooms in and out allowing for up close perspective as well as an overview. The key events occur on what would ordinarily have been the busy roadway between the old train station and the Rideau Centre. Because snowplows had not been by in a while, the area is an expanse of white, almost like a field. A line of about 100 police were dressed in various "crowd control" uniforms. A similarly sized line of protesters were dressed for winter, albeit with some banging drums and some waving flags. Lots of spectators were there as a peripheral tier, with many photographing and filming.

[5] For a long while the two sides stand facing each other. The police maintain a rigid line, basically across Colonel By parallel to Rideau Street. The protesters hold to the same line, interacting disagreeably with the police, and by the gestures of many one can tell that emotions are escalating. Several at the front have their arms interlocked. Some are hugging in clusters of twos and threes as if something meaningful is about to happen. A subset of the protesters at the front drop to their knees. Mr. Blackman is one of those people. He becomes, therefore, on the front line of the protester group, part of a line now kneeling in front of the police. This scene sits as a sort of a stand-off for a few minutes, then the police advance and Mr. Blackman, still on his knees, is overtaken by the police and arrested along with others.

[6] The trial judge acquitted Mr. Blackman of obstructing the police because he found himself with a reasonable doubt on the question of whether Mr. Blackman knew he had to leave the area. The trial judge characterized the offence of obstruct police as requiring breach or defiance of some kind of police order. Because he was not satisfied that Mr. Blackman had been told to leave, or that he had been given sufficient chance to do so if he was so informed directly or indirectly, he was not obstructing the police by dropping to or staying on his knees in the circumstances.

[7] With respect, this characterization of the offence of obstruct as requiring proof of breach of some kind of clearly articulated police order or instruction is an error. Because the trial judge was focussed so singularly on that characterization of the offence the acquittal cannot stand.

[8] The essential elements of the s.129 offence of obstructing a peace officer are set out by Paciocco J. (as he then was) in *R. v. Yussuf*, 2014 ONCJ 143. First, there must be a peace officer

who is engaged in the execution of a lawful duty. Second, the accused person must know or be wilfully blind to the fact that this person is a police officer and must know or be wilfully blind to the act that the officer is executing. Third, the alleged obstructive conduct must be an intentional act by the accused person. Fourth, that act must make it more difficult for a peace officer to carry out their duties. Finally, the accused person must intend to make it more difficult for the police to execute their duty.

[9] The trial judge was obliged to consider the act of kneeling in a way broader than how it coincided timing-wise with the police movement forward that immediately preceded the arrest. The trial judge clearly held the view that the police had a duty to inform the accused of their intentions and that he could only be obstructing them if he both received their message and then defied it. This is not the law. What communications the police managed to get through to Mr. Blackman was not the point. His kneeling on its own could constitute as an act to obstruct the police. The trial judge had to consider whether Mr. Blackman could have been at least wilfully blind about what the police were doing and that his kneeling could have been intended by him to make the police job harder.

[10] In the circumstances, the act of kneeling at the front of the protester line could be construed as a wilful act of obstruction. By kneeling, as here, a person takes his legs out of commission, rendering himself non-ambulatory. Mr. Blackman arguably wished to convert his body into an obstacle for the police to have to work around, to perhaps have to move with lifting-force rather than be ushered along with words. Was Mr. Blackman wilfully blind about whether the police were engaged in the execution of a lawful duty and did he intend his act of kneeling to make their task more difficult? The trial judge did not say. He focussed instead on a timing issue related to what he apparently saw as a necessary pre-arrest warning and dismissed the obstruct count because he had doubt about that non-essential element.

[11] I turn now to the mischief counts. The Crown had argued that Mr. Blackman could be convicted of mischief as a party to the larger protest. This is unsurprising in the circumstances. There is a large body of authority addressing the offence of mischief in the context of protests and other large assemblies of persons. The Crown cited *R. v. Mammolita* (1983) 9 C.C.C. (3d) 85 (ONCA) and focussed its pitch on the idea that Mr. Blackman was liable because he wilfully

participated in a group activity that displayed a common intention, or that he aided or abetted others. The trial judge did not deal at all with the subject of party liability in his decision.

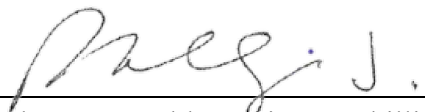
[12] The Ontario Court of Justice is the busiest trial court in the country. This trial judge was admirably efficient, getting the matter completed within the court-day allotted for it. He gave his reasons following a brief recess which occurred immediately following the closing submissions of counsel. The reasons should be read with a measure of latitude for their brevity given the need for judicial efficiency.

[13] At the same time, however, reasons must disclose, even in a basic way, the thought process through which the result was arrived at. Appellate review is impossible if no reasoning path is discernable.

[14] No trial judge is obliged to articulate thoughts about every issue that came up or could be imagined. In this case, however, the issue of party liability was central to the prosecution's argument and deserved at least some kind of mention. Presently, there is no way to tell how that area was considered, even if I adopt the "functional" or "contextual" approach set out in *R. v. Sheppard* 2000 SCC 26. While the trial judge did challenge Crown counsel on the subject during submissions and thereby demonstrated keen awareness and engagement with it, he never explained how he ultimately came to settle his thoughts.

[15] The obstruct acquittal cannot stand because the trial judge focussed on a non-essential element to the exclusion of the essential ones. The mischief acquittals cannot stand because of insufficiency of reasons.

[16] The acquittals are set aside. A new trial is ordered.


The Honourable Justice K. Phillips

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B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

– and –

EVAN BLACKMAN

Applicant

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Released: June 21, 2024