

Rex V. Dunham

N. B. Supreme Court, Appeal Division, Nov. 8, 1949.

Accused coming to the aid of a person resisting arrest and being choked by a constable — use of force against constable — reasonable and probable grounds for believing the constable would cause serious injuries — misdirection as to use of reasonable force.

Officer Donner, a constable of the R.C.M.P. at Havelock, Kings, County, N. B., was serving a summons in the restaurant of the accused under the Intoxicating Liquor Act. He also possessed a search warrant to search the premises. In the course of the search the constable was hampered by one Cussack, who apparently intoxicated, resisted arrest. A violent struggle ensued, in which Dunham, the accused, fearing for Cussack's life, struck Donner on the head with a pop bottle. The arrest of Cussack and Dunham followed.

Dunham was charged on three counts: (1) that he unlawfully and intentionally did assault Harry Donner, R.C.M.P., occasioning him bodily harm; (2) that he unlawfully and intentionally did assault a police officer engaged in the execution of his duty; (3) that he unlawfully assaulted Donner with intent to resist the lawful apprehension of himself by said Donner.

The trial judge acquitted the accused, when the jury affirmed his question "If the accused had reasonable apprehension that Constable Donner was going to kill Cussack, he would be justified in trying to prevent the killing." The crown appealed the case under section 1013(4) of the Criminal Code, claiming the jury was misdirected. As the amount of force used by the accused had not been indicated, the Crown felt this would have greatly influenced the jury's verdict. The Appeal Court held that there was a misdirection which warranted a new trial on counts (1) and (2) and with respect to (3) the appeal should be dismissed.

Among the interesting questions this case develops is the right a person has to interfere with an officer carrying out his duty. Interference with an officer should be permissible, as in this case, the person reasonably believed that without interference the officer would have killed the other party. As to the reasonableness or the force employed, that is a question for the jury to decide. A pop bottle might seem like too much force. Seeing a man being choked to death by a police officer would motivate the ordinary reasonable man into trying to prevent a possible death.

It is quite possible the officer's excessive force was due to malice created by the victim's forceful attempt to resist arrest. The police officer suffered no after-effects from the blow of the pop-bottle, therefore there is a prima facie case that the force used was not excessive.

Salmond respecting defence of other persons, points out that old books placed a distinction between defence of persons with whom one is closely connected (a wife, child, or master; *Leeward v. Blasely* (1695) 1 Ld. Raym. 62) and the defence of a mere stranger. Today this distinction is obsolete and every person has the right of defending any person by reasonable force against unlawful force. (Salmond on Torts 10th Edition, P. 334).

Prosser seems to have the same view as Salmond. He believes that an honest defence of a third party should enable the person to receive the same consideration by the court as the third party who was attacked. (*Morris v. McClellan*, 1908, 154 Ala. 639).

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