
REGINA v. BARR

Provincial Court of Alberta, Oliver A.C. Prov. Ct. J. January 14, 1982.

P. Knoll, for the Crown.
D. Armstrong, for accused.

OLIVER A.C. PROV CT. J.:—The accused, Mark Allan Brian Barr, is charged under s. 401(*a*) of the *Criminal Code*, in that on or about September 11, 1981, at Calgary, Alberta, he did wilfully and without lawful excuse injure a dog, the property of the City of Calgary Police Service, that was kept for a lawful purpose. Having pleaded not guilty to the charge, he appeared before me for trial in Provincial Court at Calgary, Alberta, on December 8, 1981, represented by counsel, D. Armstrong. Judgment was reserved until today.

The relevant evidence is as follows:

Constable C. Marsh (a constable attached to the Canine Division of the Calgary City Police Service) testified that, on September 11, 1981, at approximately 3:55 a.m., together with "Companion Police Service Dog 'Apollo' ", he was engaged in a perimeter check of the Sherwood School at 2011-66 Avenue. S.E. in the City of Calgary.

He saw two youths run out from a dark area, an alcove near a door at the rear of the school. They came out into the yard of the school where he was and which was lighted by mercury lamps. The first youth ran past him to the east and was pursued by the dog. The second youth ran west and, because he was carrying something, the dog "keyed" on to him and changed his route to follow the youth. When the dog was about 15 ft. away from the youth, Constable Marsh yelled "stop police". The youth, whom he identified as the accused from seeing him at this time in the lighted school-yard, looked at him but continued to run west with the dog in pursuit. Constable Marsh then gave the dog the attack command "Take Him" to stop the accused from running. He was about 10 ft. from the accused when he gave the dog this command. The accused turned and the dog came in at an angle to bite him on the right arm. Holding a long metal bar resembling a crowbar with both hands, the accused swung at and hit the dog in the shoulder area at the front. The dog yelped and the accused swung the bar back in the opposite direction, hitting the dog again with

the other side of the bar. The accused started running again but the dog stopped chasing him. The dog was sent in numerous times, however, when he would get 15 ft. to 20 ft away, the accused would turn around and show the dog the bar and the dog would back off. This activity continued with the dog limping after the accused, trying to keep up with him.

At this point, Constable Vanderlinden, who is also attached to the Canine Division of the Calgary City Police Service, arrived in a police vehicle with police service dog "Czar". Constable Marsh told Constable Vanderlinden that his dog was hurt and to "stop that man running". Constable Vanderlinden sent his dog on attack as the accused continued running.

Constable L. Vanderlinden testified that on September 11, 1981, at about 4:00 a.m., he exited his police vehicle with his police service dog "Czar". He heard yelling and saw a youth, whom he later identified as the accused, running north from the north-west corner of the Sherwood School across 66th Ave. and into some bushes near a lodge. At the same time, he heard Constable Marsh yell "get that man". The accused, who was behind some bushes, looked at him and came towards him then turned and ran north along the east side of the lodge. He yelled at the accused and set his dog on him. The accused had gone about 50 paces when he turned to swing a long object at the dog. The dog bit the accused on the right elbow and the object flew out of the grasp of the accused. The object was later recovered and is marked as ex. 1 in these proceedings, being a steel bar, about two and a half feet long with a claw at one end and a point resembling a chisel at the other, described as a crowbar or pinch bar. The accused was bitten in a number of places by the dog "Czar", *i.e.*, on the right arm, rib cage and back of the head. After being tackled by Constable Vanderlinden, the accused was subdued and handcuffed by Constable Vanderlinden and Constable Marsh, who had arrived at the scene.

Constable Marsh said that, as far as he knew, the dog "Apollo" had not bitten the accused.

Constable Marsh testified that the dog "Apollo" was bleeding profusely from the chest area near the upper right shoulder and was taken to a veterinary surgeon who administered penicillin and stitched up a gash measuring 1.5 cm. long and .5 cm. deep: "The dog is now fine physically but a little bit gun shy when he goes in for the attack."

Constable Marsh testified that the attack command is given when you want a dog to stop a fleeing culprit. The dog will go in and bite that person and stop him any way he can.

Constable Vanderlinden testified that the police do not allow the dogs to chew. The dog will usually go for an arm but a trained dog will go anywhere on the body if he is threatened or if his master is threatened: "If the culprit quits, the dog quits, and holds him at bay."

Constable Vanderlinden afterwards witnessed evidence of a break-in at the Sherwood School. When asked to comment on the condition of the accused when he interviewed him at about 5:30 a.m. on September 11, 1981, Constable Vanderlinden said he noticed nothing in particular about the accused worthy of comment.

Mr. D. Shannon, an employee of the Calgary Public School Board, who was called to the scene, testified to evidence of a break and enter at the Sherwood School September 11, 1981, where he witnessed damage to an outside door panel and a broken window in the main office. This damage had not existed prior to September 11, 1981.

The accused in direct examination by defence counsel said, with regard to his recollection of events during the early hours of September 11, 1981, "to tell you the truth, none". He remembers being bitten and believes he hit a dog after that. He explained this by saying he had received a letter the evening before with bad news concerning his mother and had been drinking beer (a dozen or more) and had taken Valium (5 mg.) seven to ten tablets.

Cathy Staels, an occupant of the house where the accused boarded, confirmed the fact that the accused had received a letter and afterwards was drinking beer and took "a bunch of yellow pills" and was drunk when she went to bed at 10:30 p.m. to 11:00 p.m., September 10, 1981.

Phillip Staels, the brother-in-law of Cathy Staels, called in rebuttal by the Crown, and who is serving one year in gaol for breaking and entering the Sherwood School on September 11, 1981, testified that he left home in the company of the accused after midnight September 11, 1981. He said he had a crowbar stashed up near the school and was planning a break-in there. He also had two pairs of white gloves hidden near the school and gave the accused a pair as they were "heading in". He described the break-in at the school and the accused's participation. At one point they went outside and saw police and took off. He said the accused was not so much drunk as high on pills. He was not staggering but "not walking careful". He gave no evidence of consumption of alcohol or pills by the accused from the time they left home until they ran from police.

The accused, on cross-examination, said he remembers the dog biting him and hitting the dog. He said he does not remember the school but remembers the dog. He does not remember where he got the crowbar and does not know why he was wearing gloves. He could not say if there was one dog or two dogs. He said he knew a dog had bitten him and he had swung to stop him from biting again. He said he does not remember anyone yelling for him to stop. He admitted to a criminal record of convictions in Cornwall, Ontario, for breaking and entering in 1975, 1976, 1977 and 1979.

Criminal Code s. 401(*a*):

> 401. Every one who wilfully and without lawful excuse
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> (*a*) kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and are kept for a lawful purpose, or . . .

See *R. v. Deschamps* (1978), 43 C.C.C. (2d) 45. Clearly, the dog in this case is covered by this section in the *Code*.

Criminal Code, s. 25(1), (3) and (4):

> 25(1) Every one who is required or authorized by law to anything in the administration or enforcement of the law
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> (*a*) as a private person,
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> (*b*) as a peace officer or public officer,
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> (*c*) in aid of a peace officer or public officer, or
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> (*d*) by virtue of his office,
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> is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
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> . . . . .
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> (3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.
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> (4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

See also *Criminal Code*, s. 450.

Criminal Code s. 25(4) is, however, tempered by s. 26, which provides:

> 26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess.

Note especially the heading of Part IX of the *Code* wherein s. 401(*a*) appears, "Wilful and Forbidden Acts in Respect of Certain Property".

Clearly, the dog in this case is meant to be considered as property.

The defence to this charge is provided by s. 386(2):

> 386(2) No person shall be convicted of an offence under sections 387 to 402 where he proves that he acted with legal justification or excuse and with colour of right.

The accused in this case could have been charged under s. 387(3)

> 387(3) Every one who commits mischief in relation to public property is guilty of
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> (*a*) an indictable offence and is liable to imprisonment for fourteen years, or
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> (*b*) an offence punishable on summary conviction.

Section 386(2) also provides a defence to a charge of public mischief.

The accused's main defence is that he acted with legal justification or excuse and with colour of right within the meaning of s. 386(2) and therefore should not be convicted.

An alternative defence put forward by defence counsel is that: "He was not in a rational state and was either too drunk or high on drugs to form the intent to cause the dog grievous bodily harm."

In commenting on the defence provided by s. 386(2), defence counsel referred the court to the *Criminal Code* sections on "self-defence", namely, ss. 34 to 37, inclusive.

However, I find great difficulty in attempting to apply the wording of these sections in the present situation. Section 34(1), for example, speaks about a person being justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm. Surely, grievous bodily harm to an animal is not intended.

Section 34(2) speaks of an "assailant" and must be taken to refer in that regard to a person and not to an animal.

The defence provided by s. 386(2) must not be thought of as an alternative to a defence under ss. 34 to 37. It is a much broader defence than is provided under those sections and, in addition, must be taken to include them where their wording can be made to apply.

Legal justification or excuse and with colour of right

See *Crankshaw's Criminal Code of Canada*, 8th ed. (1981), vol. 3, pp. 9-3-4:

> 386§4 *Defences — Legal justification — Colour of right.* A defence of legal justification or excuse and colour of right requires the establishment of belief by accused in a state of facts which, if it had existed, would constitute justification. The defence fails in the case of accused persons who cut a submarine cable in the belief that it was for sale. Their conclusion that they had a right to cut the cable, for the purpose of investigating its quality, was wrong in law and ignorance of their legal rights was not an excuse: *R. v. Ninos*, [1964] 1 C.C.C. 326 (N.S. C.A.).
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> "Legal justification or excuse" is an absolute defence to either criminal or civil proceedings, and is thus distinguishable from "colour of right". Some rules of justification will be found in ss. 7(2) and 25-44 inclusive, but this is largely a matter of civil law. The common law is expressly made applicable by s. 7(2) and "justification or excuse" must be determined largely according to its principles, and to statutory provisions in various provinces. The common law, for example, applies to justify, and therefore to excuse, an accused who shoots a dog, in the reasonable belief that this is necessary to protect his property: *O'Leary v. Therrien* (1915), 25 C.C.C. 110 (Que. K.B.).

See Mozley and Whiteley's Law Dictionary, 5th ed.: *Justification* is showing a sufficient reason in Court by a defendant why he did what he is called upon to answer, *e.g.*, In an action for assault, showing the violence to have been necessary."

See Jowitt's Dictionary of English Law, 2nd ed. p. 1045: "*Justification.* In the law of torts and crimes, justification is where the defendant in an action or prosecution shows that the act complained of was justifiable, that is, lawful."

See *R. v. Hastings* (1947), 90 C.C.C. 150, [1947] 4 D.L.R. 748, 21 M.P.R. 23: "If an arrest is unlawful there is a common law right to resist the arrest."

See *Goff v. Peasley* (1942), 78 C.C.C. 237 at p. 250:

> In *R. v. Johnson* (1904), 8 Can. C.C. 123 the High Court of Justice of Ontario held as in the headnote stated: "The 'colour of right' on the part of the defendant, which under Cr. Code, sec. 481(2), removes the criminal character of an act of damages to property, means an honest belief in a state of facts, which if it actually existed, would constitute a legal justification or excuse.
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> "Proof of such 'colour of right' in respect of the destruction of a fence complained of under Part XXXVII of the Criminal Code, ousts the jurisdiction of the magistrate to summarily try the charge under sec. 507."
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> Boyd J. at p. 128 is reported as follows: "According to Sir John Thompson's exposition of this clause in the House of Commons, legal justification and colour of right must both be absent in order to make the accused liable: Crankshaw's Criminal Code, 1st ed., p. 871."
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> Boyd J. quotes with approval the words of Mr. Justice Edwards in a New Zealand case *Reg. v. Fetzer* (1900), 19 N.Z. L.R. 438 at p. 443: " 'The context of the words shews the sense in which they are used in this section. Legal

> justification or excuse is an answer to a criminal charge under this Part of the Act as it would be in a civil action. Then follow the words "and without colour of right". This means, I think, an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. This would not be an answer to a civil action, but it is properly made an answer to a criminal charge, because it takes away from the act is criminal character. Less than this, in my opinion, cannot be held to be "a colour of right." ' "

See *Clerk & Lindsell on Torts*, 12th ed. (1961), p. 240, Chapter 9, "Self Redress and Self Protection". In the case of unlawful arrest, "The person arrested may use force to avoid being arrested, but he must not use more force than necessary": *R. v. Wilson*, [1955] 1 All E.R. 744 at p. 745, *per* Lord Goddard C.J.

See *Salmond on the Law of Torts*, 14th ed. (1965), p. 184: "It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force."

See *R. v. Ninos and Walker*, [1964] 1 C.C.C. 326, 48 M.P.R. 383, headnote:

> Accused, believing that a certain submarine cable owned by the Crown was no longer in use and that it was going to be sold as salvage, cut into the cable and exposed the core in order to determine whether it was worth buying. They made little or no inquiries concerning the disposition of the cable before proceeding to cut it and were charged with wilfully damaging public property contrary to s. 372(3) of the *Cr. Code*, and were acquitted on the ground that they had acted under "colour of right" which is made a defence by s. 371(2) of the *Code*. On appeal by the Crown, *held*, that accused must be convicted.
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> The accused "wilfully damaged" the property when they intentionally cut the cable knowing that whatever damage resulted would result, however slight such damage might be, and whether they intended to do wrong or not is not the test. Unless, therefore, they could establish "colour of right" in the circumstances, the burden of proof of which is upon the accused, they must be found guilty. Ignorance of legal rights is not an excuse and to establish "colour of right" the accused must show that they believed in a state of facts which, if they had actually existed, would constitute legal justification for their conduct. In the instant case the belief of the accused that the cable was for sale, even if true, would not give them the right to cut into it in order to investigate its quality and their conclusion that they were entitled to do so was wrong at law. Accordingly the accused did not establish "colour of right" and it follows that they must be convicted.

Was the force used excessive, i.e., was the arrest unlawful?

Crown counsel asks the court to consider the police officer and the police service dog (man and dog) as one unit acting together. While at first blush this would appear to be an attractive concept, a glance at s. 25(4) will show that it is not countenanced by law.

Section 25(4) speaks of a peace officer, etc., and "every one" lawfully assisting a peace officer. "Every one" is defined in s. 2 and does not include a dog.

As stated above, the dog in this case is meant to be considered as property. Also, in my view, a police service dog should be considered as a weapon of the police officer in the same sense as a firearm is a weapon.

Crown counsel asks the court to consider the analogy of a police officer pursuing and lunging at a person who then turns and strikes him and a police service dog in the same situation. The assault on the dog should, he says, be considered in the same light as an assault on the police officer. I agree but only for the reason that the dog is the property of and the weapon of the police officer, *i.e.*, if the police officer, by commanding the dog to attack, is found to have used excessive force he is guilty of an offence. The dog cannot be charged. If the police officer by commanding the dog to attack is found *not* to have used excessive force he will not be guilty of an offence and the person who strikes the dog will have difficulty in pursuing his defence under s. 386(2).

Crown counsel urges that s. 401(*a*) protects the police service dog from persons engaged in unlawful activities. This, however, is only true where the police officer, his master, acts in accordance with the law.

The jurisprudence on this subject deals mainly with the use of firearms by police. There are some cases involving the use of tear-gas but none that I could find dealing with the use of police service dogs.

The following is a list of authorities considered in this connection: *R. v. Smith* (1907), 13 C.C.C. 326, 7 W.L.R. 92, 17 Man. L.R. 282; *Maratzear v. C.P.R.* (1920), 37 C.C.C. 297, 69 D.L.R. 230, 26 C.R.C. 437; *Vignitch v. Bond* (1928), 50 C.C.C. 273, [1928] 1 W.W.R. 449, 37 Man. L.R. 435; *R. v. Purvis* (1929), 51 C.C.C. 273; *Merin v. Ross* (1932), 60 C.C.C. 18, [1933] 1 W.W.R. 109, 46 B.C.R. 471; *R. v. Mitchell* (1937), 69 C.C.C. 406; *Savard and Lizotte v. The King* (1945), 85 C.C.C. 254, [1946] 3 D.L.R. 468, [1946] S.C.R. 20; *Robertson and Robertson v. Joyce* (1948), 92 C.C.C. 382, [1948] 4 D.L.R. 436, [1948] O.R. 696; *R. ex rel. A.-G. Can. v. Sandford et al.* (1957), 118.C.C.C. 93, 11 D.L.R. (2d) 115, [1957] Ex. C.R. 210; *Priestman v. Colangelo and Smythson* (1959), 124 C.C.C. 1, 19 D.L.R. (2d) 1, [1959] S.C.R. 615; *Woodward v. Begbie et al.* (1961), 132 C.C.C. 145, 31 D.L.R. (2d) 22, [1962] O.R. 60; *Beim v. Goyer*, [1966] 4 C.C.C. 9, 57 D.L.R. (2d) 253, [1965] S.C.R. 638.

Writers on the subject usually deal with the problem by considering the use of what is termed "deadly force" in the apprehension of fugitives from arrest.

I think it appropriate to refer to three works on this subject:

1. Article entitled "Use of Force by Police to Effect Lawful Arrest", Bruce C. McDonald, 9 Crim. L.Q. 435 at p. 466 (1966-67):

> Finally, this essay has treated the problems of force in a rather conservative fashion, with the main object of reducing friction between the police and members of the public. Deadly force is always a very serious thing, and the firearm is its most important and most easily regulated agency. Evaluation of a more basic question, namely, whether our peace officers should even carry firearms apart from extraordinary circumstances, concerns a more firmly entrenched North American tradition. An argument to change this tradition is unlikely to succeed unless and until it is illuminated by presently unavailable data. On the other hand, as far as s. 25(4) is concerned, the evidence is clear that it exists as a result of historical inertia alone to perpetuate an irrational and sometimes vicious rule which has fallen out of general favour.

2. Editorial "Use of Force to Effect Arrest", 10 Crim. L.Q. 257 (1968).

3. Article entitled, "The Use of Deadly Force in the Apprehension of Fugitives from Arrest", David M. Doubilet, 14 McGill L.J. 293 at p. 311 (1968):

> Society requires protection against criminals. Since arrest is a condition precedent to imprisonment, whatever facilitates arrest benefits society unless there are concomitant consequences which are socially harmful. Obviously, the right to use deadly force facilitates arrest. Its legalization notifies the criminal that flight invites the risk of injury or death. On the other hand, if injury or death does occur, social injury results. Therefore, the right to use deadly force should be limited.
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> The limitations which Canadian law imposes are adequate to meet the needs of both society as a whole and the rights of individuals as well. It is sufficient to require that the arrest must be lawful and that deadly force can only be applied as a last resort. To go beyond this point and to require certainty on the part of the arresting officer or to restrict the criminal offences to which deadly force may be applied is to confer upon the criminal an immunity which both he and society do not deserve. If effective law enforcement is to be maintained the race should not be to the swift. The fleeing criminal regardless of his offence, must be considered as the author of his own misfortune.

The answer to the question: "Was the force used excessive; *i.e.*, was the arrest unlawful?" depends on a consideration of the facts and here one must consider among other things that, *before* Constable Marsh ordered the dog to attack:

(a) he had seen the accused and another run out from a dark area near a door at the rear of a school, at approximately 4:00 a.m. in the morning;

(b) one of these two persons had already escaped;

(c) the accused was carrying something, and

(d) Constable Marsh yelled, "stop police" but the accused kept running.

In my view, the force used was not excessive, *i.e.*, this was not a case of unlawful arrest.

Let us now consider the main defence of the accused, namely, that he acted with legal justification or excuse and with colour of right within the meaning of s. 386(2) and therefore should not be convicted.

I could find no authority on the subject of self-protection where a police service dog was involved.

Defence counsel asks the court to consider that there is a difference in what treatment an accused might expect to receive from a police officer as opposed to a police service dog. He says the accused would anticipate more danger from the dog "a very large dog with very large teeth" than from the man, even though the police officer had a service revolver.

All of this, however, depends on the actions of the police officer and not the dog, *i.e.*, the police officer controls the timing of the dog's attack in the same way as he controls the use of his revolver.

The short answer is that the accused in this case should have thought about the large dog and his large teeth earlier.

There is evidence before me that:

(a) before he and his companion ran from the school, they had broken into the school and were looking for something to steal;

(b) the accused had previously been convicted of offences involving break and enter;

(c) the accused had a crowbar or a pinch bar as he fled from the school;

(d) the accused must have seen the police officer and his dog in the lighted yard of the school;

(e) the accused could have stopped when ordered to or before;

(f) the accused turned around when the attack command was given, indicating he had heard it;

(g) even after the attack by the first dog, the accused continued to run and continued in possession of the crowbar;

(h) the accused must have seen the second police officer, Constable Vanderlinden, as he came towards him then turned and ran again, still holding the bar, and

(i) the accused attempted to strike the second dog when he came in to attack.

In my view, the accused fully appreciated the risk he was taking and exposed himself to it.

Finally, the force used in attempting to stop the accused was not excessive.

The evidence in the present case does not warrant a finding that the accused acted with legal justification or excuse and with colour of right within the meaning of s. 386(2).

This leaves for consideration by the court only one further matter, *i.e.*, the contention of defence counsel that the accused was not in a rational state and was either too drunk or high on drugs to form the intent to strike the dog.

First of all, there is the question of credibility and I find it incredible that the accused could have done all the things he did and remember virtually none of the events that took place in the early hours of September 11, 1981.

Some of the facts I have taken into consideration in deciding that the accused cannot be believed with regard to his inability to remember because of alcohol and drugs are:

(a) There is no evidence of alcohol or drug consumption by the accused from approximately midnight to 4:00 a.m.;

(b) the accused appears to have been running without difficulty;

(c) the accused kept the crowbar with him at all times;

(d) Constable Vanderlinden could find nothing remarkable about the accused's condition at 5:30 a.m., and

(e) the criminal record of the accused.

Apart from the question of credibility, which I have decided in favour of the Crown, I could not in any event, for the reasons enunciated in *Director of Public Prosecutions v. Beard*, [1920] All E.R. 21, and *Director of Public Prosecutions v. Majewski*, [1976] 2 All E.R. 142, entertain this defence to a charge under s. 401(*a*). Even if the defence of drunkenness or over-consumption of drugs, or both, were available to him, in my view, on the evidence, he was not so drunk or high on drugs as to be incapable of forming the intent necessary to commit the offence.

Police are aware of the potential danger to themselves in effecting an arrest, especially where the culprit is armed. They have difficult decisions to make concerning the force necessary to effect an arrest, *i.e.*, whether the arrest can be made in safety without the use of firearms or, as in this case, without the use of a

police service dog. The police service dog on the other hand simply does what he is told to do. It is regrettable that dogs must be used like this because it is essential that they be taught to have no fear and in training are always triumphant.

However, there is a proper use for them, just as there is a proper use for firearms and they must be protected by law if injured in situations where their masters have acted properly in ordering them to attack.

My decision in this case is based solely on its facts. It must not be considered as sanctioning the indiscriminate use of police service dogs to attack. I can think of many situations where an accused could have legal justification or excuse and colour of right. It is obvious that great care must be exercised by police in the use of police service dogs. In all the circumstances, I find that the Crown has proven its case beyond a reasonable doubt and I find the accused guilty as charged.

Accused found guilty.