

**IN THE MATTER OF POLICE SERVICES ACT  
R.S.O. 1990, C.P. 15, as amended:**

**POLICE CONSTABLE JOSEPH McMAHON(#2356) - DECISION**

Police Constable Joseph McMahon is charged with two counts of misconduct occurring on June 26, 2010, while assigned to the G-20 Summit detail in Toronto:

1. That he did, without good and sufficient cause, make an unlawful or unnecessary arrest contrary to Section 2(1)(g)(i) of the Schedule Code of Conduct of Ontario Regulation 268/10 and therefore, contrary to Section 80(1)(a) of the Police Services Act, R.S.O. 1990, as amended.

The particulars allege that he “arrested F.S. for breach of peace without having the requisite grounds for doing so.”

2. That he acted in a disorderly manner or in a manner prejudicial to discipline or likely to bring discredit upon the reputation of the Police Service contrary to Section 2(1)(a)(xi) of the Schedule Code of Conduct of Ontario Regulation 268/10 and therefore, contrary to Section 80(1)(a) of the Police Services Act, R.S.O. 1990, as amended.

The particulars allege that the officer “arrested F.S. and made no attempt to secure F.S.’s property.”

## BACKGROUND

It is not disputed that the G-20 Summit in Toronto, in June, 2010 sparked numerous large and widespread protests in the city. Not all protestors engaged in violence - far from it – but there were large numbers of persons who did commit criminal acts – including physical assaults directed toward police officers, damage to police cars and equipment, and willful and extensive damage to private property. Police cars were overturned and burned, store windows smashed. Much of this criminal activity occurred on June 26, 2010, a day on which P.C. McMahon was assigned to G-20 Summit detail.

In the morning of June 26<sup>th</sup>, P.C. McMahon was on duty in the area of Richmond Street West and University Avenue. He personally witnessed demonstrators smashing glass windows as they moved through the area. The Public Order Unit was summoned. The officer’s testimony was unchallenged that many demonstrators wore masks or disguises, obviously to conceal their identity, and that 90% of those who wore such disguises were engaged in violence and property damage. At one point the crowd surrounded a police vehicle occupied by officers.

Later in the day, P.C. McMahon was assigned to Front and Yonge Streets where barriers had been placed to prevent vehicles proceeding west on Front Street toward Bay Street.

Bay and Front Streets was the location of part of a large perimeter security fence erected to protect those participating in the G-20 Summit. It was at the corner of Front Street and Yonge Street at around 6:45 pm to 7:00 pm. that P.C. McMahon had his first contact with Faraz Siddiqui, the complainant.

In June 2010 Mr. Siddiqui was employed by Ryerson Student Union. He is now a public health consultant and will be attending law school commencing September, 2014. On the day in question, Mr. Siddiqui took part in the protest and demonstrations against the G-20 Summit. He acknowledges that he was an “active protestor” during that day. He joined a group of friends at Queen’s Park that morning. He and his friends walked down University Avenue to Queen Street West then to Spadina “keeping it lively” and moving around with the crowd. In the afternoon they made their way back to the Bay Street and Yonge Street area. It was in the downtown core that police cars had been vandalized and extensive property damage inflicted by demonstrators. Mr. Siddiqui played no part in that illegal activity but saw the remnants of it after the events occurred. In due course, Mr. Siddiqui was in the vicinity of Yonge Street and Front Street having become separated from his friends when he took a washroom break. He was trying to catch

up to them when he approached the corner of Yonge and Front Streets. It was about 6:00 pm according to Mr. Siddiqui. He had been in the protest since about 10:00 am that morning. Mr. Siddiqui had not participated in violence of any kind all day. All day he had been wearing a kaffiyeh, which is head gear like a scarf wrapped around the head in a manner that permits it to cover all or part of one's head and all or part of one's face. He was wearing the kaffiyeh when he first met P.C. McMahon.

Mr. Siddiqui testified that he wore the kaffiyeh as a sign of protest and resistance and sometimes for cultural reasons. He also said he wore it as a protection against teargas.

#### EVENTS IN QUESTION

Mr. Siddiqui testified that he was walking south on the west side of Yonge Street, approaching the northwest corner of Front Street. There were barricades in place preventing vehicular traffic westbound on Front Street, but the sidewalks were open, with pedestrians walking east and west on both sides of Front Street. The kaffiyeh was covering Mr. Siddiqui's head and much of his face. Only his eyes were visible when he encountered P.C. McMahon. According to the complainant, the officer looked agitated, so he opened the kaffiyeh to show his face. At this point the two were about 6-7 metres apart.

Mr. Siddiqui had with him a vuvuzela – a plastic horn like the ones which became well-known during the 2010 World Cup in South Africa. It was flimsy and about 2 feet long and was collapsible to one foot.

Mr. Siddiqui testified that the officer asked him where he was going to which he replied, pointing west, “this way”. The complainant testified the officer said “I know where you’re going, I know where you’re going.” and that he pulled the horn out of his hand and bent it with both hands, destroying the horn. He then handed it back to Mr. Siddiqui who refused to take it, saying “who’s going to pay for this now?”

The officer then directed Mr. Siddiqui to go up Yonge Street and the officer threw the horn onto the street. Mr. Siddiqui walked north on Yonge Street on the west side, as directed. He then stopped when about 5 – 6 metres away, and took 2 photos of the scene, showing the officer and the broken horn in the gutter.

According to his testimony, Mr. Siddiqui decided to return to recover his horn because he thought he might be able to bend it back into shape. He walked up to the officer intending to ask to have it back.

The officer approached him saying “I told you to go that way,” held him by the hand, twisting it. Mr. Siddiqui testified he said “I’m sorry, I’ll go.” The officer forcefully tried to remove his scarf in a way that hurt the complainant. A second officer arrived and removed the scarf “properly”. Mr. Siddiqui was then

handcuffed behind his back and seated on the curb. He was not told that he was under arrest and was not read his rights.

P.C. McMahon asked him various questions to which he did not respond. He waited on the curb for about half an hour to 40 minutes and then was placed in a Police “paddy wagon” where he was held for about an hour before being transported to a detention centre on Eastern Avenue. While waiting in the paddy wagon he was told he was arrested for a breach of the peace. Twenty hours later he was released without charge.

Mr. Siddiqui had been carrying a bag with him, in which there was a small unopened package of 5/8” nails. He had helped hang pictures at a community centre and he hoped to return these nails to the store for a refund.

In cross examination, Mr. Siddiqui acknowledged that a police officer would be concerned if he encountered a demonstrator whose face was covered. He acknowledged that P.C. McMahon was agitated and looked concerned when they first met – that is why he pulled his head covering down to reveal his face.

Concerning the damage to the horn, the complainant emphatically denied that the horn was bent when the officer grabbed it, rather he bent it deliberately with both hands. “It was very intentional.” His testimony to the OIPRD revealed a less severe description – namely that the officer “grabbed my vuvuzela and broke it, it was out of shape.....he actually broke it and bent it out of shape.”

Under cross examination, Mr. Siddiqui first said that when he returned to the corner to retrieve his horn, his face was uncovered, but on further cross examination said he was not sure whether his face was covered again with the kaffiyeh. He denied that he was trying to walk west on Front Street to Bay Street.

Joseph McMahon testified that he has been 35 years with the Toronto Police Service, 31 years at the time of these events. He is now 54 years of age. He has not been the subject of any formal discipline proceedings in his entire 35 years with the force. Only once before in his career, in the 1980s, did he ever arrest anyone for breach of the peace.

P.C. McMahon arrived at Front Street and Yonge Street at about 6:45 pm, being stationed there to prevent vehicles from travelling west on Front Street. There was an ongoing disturbance at the security fence at Bay and Front Streets, but pedestrians were permitted to walk in that direction. The officer had no cause for concern for any other of the people in the area where he was stationed.

P.C. McMahon testified that when Mr. Siddiqui approached, he was walking "with purpose" and only his eyes were visible. Mr. Siddiqui lowered the scarf to show his face. He told Mr. Siddiqui that he could not go any further "wearing that disguise" and he would have to take it off to be allowed to go further. Mr. Siddiqui refused. He took the horn and looked in the horn to see if anything dangerous was concealed in it. He did not deliberately damage it and

offered it back to Mr. Siddiqui several times but he refused to take it. The complainant then put his scarf back up and headed easterly. The officer threw the horn on the ground since he was unable to carry it with him for the rest of the night.

In a couple of minutes the complainant returned to the corner and was walking on the north side of Front Street in the direction of Bay Street. His face was covered except for his eyes. He was not walking toward the officer. The officer told him he couldn't go there. The complainant tried to go around the officer and he arrested him, told him he was arrested for a breach of the peace, and read him his rights. The officer testified that on his return to the corner, Mr. Siddiqui ignored him; he did not say he was there to retrieve the horn.

P.C. McMahon assisted Mr. Siddiqui by making a call for him to a lawyer indicated by Mr. Siddiqui. The complainant, in examination in chief, said it was a passerby who assisted, but after being referred to his evidence before the OIPRD, conceded that the officer assisted him.

Later in the evening, the officer was repositioned to the security fence at Bay Street and Front Street – there was an ongoing disturbance. Projectiles were being thrown by demonstrators in disguises.



ANALYSIS:      COUNT #2

The defence concedes that the property of Mr. Siddiqui was not secured, but submits that it had been abandoned by the complainant.

On the evidence, I accept this submission.

The officer tendered the damaged horn to Mr. Siddiqui at the first interaction between them but Mr. Siddiqui did not take it, saying “who’s going to pay for this now?”

Even when he returned to the intersection when he testified his purpose was to retrieve it, he did not tell the officer his purpose (although he testified he wanted to ask to retrieve it). Furthermore, after being detained and sitting on the curb for 30 -45 minutes there is no evidence that he tried to explain to the officer that all he wanted was to retrieve the horn. Nor did he assert anything like that while being detained in the paddy wagon.

In these circumstances it was reasonable to conclude that he had abandoned it. However, the prosecution submits that in deliberately damaging the horn, the officer was guilty of the offence charged, namely, discreditable conduct, and the particulars give him more than sufficient notice of the allegations.

I disagree. The particulars allege that the officer “made no attempt to secure F.S’s property.” There is no suggestion in those particulars, nor was there in the evidence of Mr. Siddiqui before the OIPRD, that the officer deliberately bent

the horn out of shape. The focus of the particulars lies in failing to attempt to secure or preserve the property – a far different allegation than one of deliberately damaging a person’s property.

CONCLUSION: COUNT #2

For the foregoing reasons, this charge is dismissed.

ANALYSIS: COUNT #1

Mr. Siddiqui could not recall whether his face was covered when he returned to the corner. P.C. McMahon was firm and without hesitation in his evidence that his face was covered. There is nothing in the officer’s testimony as a whole that would cause me to doubt this aspect of his evidence.

Thus, even though when Mr. Siddiqui approached the officer the first time he saw the officer’s agitation and concern, and recognized the wisdom of showing his face by lowering his scarf, he did not do so when he returned.

Furthermore, although he testified that when he returned he intended to ask for his horn back, he did not say that to the officer – nor did he say that to the officer before he started to walk in the direction of the officer – nor did he mention it at any time over the course of the next hour to hour and a half while detained at the scene.

Mr. Siddiqui testified that he was approached and confronted by the officer when he, Mr. Siddiqui, returned to the area of the corner. The officer denied that and testified that despite his direction that the complainant was not to head in the direction of Bay Street, he tried to walk by the officer and at that point was arrested.

I am not satisfied that the evidence of the complainant is convincing on this point for the following reasons.

Under cross examination, he firmly denied having covered his face when he returned. Then he conceded that he wasn't sure whether he did or not. He also at first denied that the officer assisted him in the making of a phone call to his lawyer, then conceded that he did. His evidence before the OIPRD concerning the breaking of the horn was not nearly as precise or emphatic as his evidence at this hearing.

Finally, although I do not place much weight on this point, when Mr. Siddiqui was booked he was asked if he had ever been arrested before he replied no, when in fact he had been detained for 2 – 3 days in Lebanon, in circumstances in which he was detained in error.

In order to convict, the offence must be established on clear and convincing evidence. While I am satisfied that Mr. Siddiqui did his best at the

hearing to give accurate evidence, four years after the event, I am obliged on the evidence to make the following findings of fact.

There was a breach of the peace occurring at Bay and Front Streets. When Mr. Siddiqui first encountered the officer, he recognized that the officer was concerned about his face covering, so he lowered it to show his face. Yet when he returned, his face was covered and remained so until his arrest. This would obviously signal defiance on the part of Mr. Siddiqui. He did not tell the officer before returning, that all he wanted to do was retrieve his horn. When he returned, he was heading in the general direction of Bay and Front Streets with his face covered except for his eyes.

In these circumstances, the officer believed that when Mr. Siddiqui returned, he was attempting to walk by him in the direction of Bay Street. There were reasonable grounds for such belief.

Sec. 31(1) of the Criminal Code provides:

“Every peace officer who witnesses a breach of the peace and every one who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or re-new the breach of the peace.”

The question thus remains whether the officer had reasonable and probable grounds to believe Mr. Siddiqui was about to join in the breach of the peace that was occurring at Bay Street and Front Street.

In *R. v. Storrey* [1990] 1 SCR 241 at page 249, the Supreme Court of Canada per Cory J. discussed the requirement of reasonable and probable grounds:

“In order to safeguard the liberty of citizens, the *Criminal Code* requires the police, when attempting to obtain a warrant for an arrest, to demonstrate to a judicial officer that they have reasonable and probable grounds to believe that the person to be arrested has committed the offence. In the case of an arrest made without a warrant, it is even more important for the police to demonstrate that they have those same reasonable and probable grounds upon which they base the arrest.

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected from crime. Thus the police need not establish more than reasonable and probable grounds for an arrest. The vital importance of the requirement that the police have reasonable and probable grounds for making an arrest and the need to limit its scope was well expressed in *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.), wherein Scott L.J. stated at p. 329:

The power possessed by constables to arrest without warrant, whether at common law for suspicion of felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt. That requirement is very limited. The police are not called on before acting to have anything like a *prima facie* case for conviction; but the duty of making such inquiry as the circumstances of the case ought to indicate to a sensible man is, without difficulty, presently practicable, does rest on them; for to shut your eyes to the obvious is not to act reasonably.

There is an additional safeguard against arbitrary arrest. It is not sufficient for the police officer to personally believe that he or she has reasonable and probable grounds to make an arrest. Rather, it must be objectively established that those reasonable and probable grounds did in fact exist. That is to say a reasonable person, standing in the shoes of the police officer, would have believed that reasonable and probable grounds existed to make the arrest. See *R. v. Brown* (1987), 33 C.C.C. (3d) 54 (N.S.C.A.), at p. 66; *Liversidge v. Anderson*, [1942] A.C. 206 (H.L.), at p. 228.

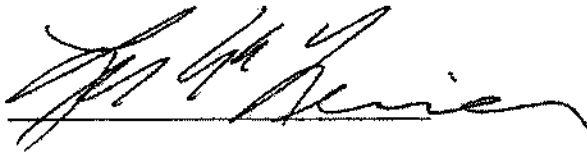
In summary then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.”

Considering that he had been told he would have to “remove the disguise” if he wanted to head to Bay Street, that he himself recognized that a fully covered face garb caused concern in the officer, that it would be reasonable to interpret his actions in covering his face again as an act of defiance, and to similarly interpret the attempt to walk by the officer, I conclude that it was indeed reasonable for the officer to conclude that Mr. Siddiqui was about to join the breach of the peace at Bay and Front Streets.

CONCLUSION: COUNT #1

Accordingly, for the above reasons, Charge #1 is dismissed.

Dated at Toronto, this 18th day of June, 2014.

A handwritten signature in black ink, appearing to read "Lee K. Ferrier", written over a horizontal line.

The Hon. Lee K. Ferrier, Q.C.