

*Case Name:*  
**R. v. Graham**

**Between**  
**Her Majesty the Queen, and**  
**Roy Graham**

[2014] O.J. No. 5936

Ontario Court of Justice  
Brampton, Ontario

**G.S. Gage J.**

Heard: October 2, 2014.  
Judgment: October 2, 2014.

(42 paras.)

**Counsel:**

C. Vanden Broek, Counsel for the Crown.

J. Goldlist, Counsel for the accused.

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**REASONS FOR JUDGMENT**

**1** G.S. GAGE J.:-- As a result of events occurring at an apartment building at 9 Lisa Street, in the City of Brampton, on January 17, 2013, Roy Graham was arrested and charged with trafficking in marijuana, possession of crack cocaine, assault Constable Bothman (ph) in the execution of his duties to resist arrest, assault Constable Oxley (ph) with intent to resist arrest, and attempt to disarm Constable Bothman.

**2** Constable Bothman and Oxley were in the building at 9 Lisa conducting a roving surveillance in the north and south staircases as a result of general complaints of drug activity, and as a result of a more targeted investigation of a specific individual known to live in the building.

**3** Mr. Graham is not a resident of the building, nor was he identified as the subject of the targeted investigation.

**4** In order to secure a better sense and perception of the location at which the offences were said to have occurred, the court ordered that a view be taken of the scene. My observations of the scene

taken during the view were read into the record. The court also saw a video of the booking procedure, and a search conducted in the cell. Those videos make it clear that on the evening in question, Mr. Graham was wearing exceedingly loose fitting jeans, so loose that they immediately fell to the ground when his belt was removed in the booking area.

5 It is the evidence of Constable Shipp (ph) that Mr. Graham voluntarily produced a bag of marijuana from his pants after he had been placed in the cruiser.

6 At this point, Graham had been searched by Officers Bothman and Oxley in the hallway of the 15 floor. I have some considerable difficulty in accepting this version of events for the following reasons; one, given the nature and character of Mr. Graham's jeans, it is inconceivable to me that the bag would not have been dislodged in the course of the violent struggle, described by all concerned, unless it was in one of his pockets, and even then that would have been problematic.

7 If it was in one of his pockets, it is inconceivable to me that the search performed on the 15 floor would not have discovered the baggie, especially given that that is exactly what the officers were looking for.

8 And leaving aside the question of whether it is likely that Graham would have been suddenly inspired to cooperate in this fashion, it seems highly unlikely that he would be able to access and hand over said drugs with his hands tightly cuffed behind his back.

9 I am not persuaded beyond a reasonable doubt that Mr. Graham was in possession of cannabis in the manner described.

10 Entirely apart from that, there is absolutely no evidence that Mr. Graham ever trafficked in marijuana, and, on that basis, count 1 is dismissed.

11 The remaining counts stand on two intertwined pillars; one, that the arrest was lawful, and two, that the evidence of the officers that form the basis for the arrest can be accepted.

12 Constable Bothman purported to arrest Mr. Graham and a person identified as Derrick Wolcott (ph) for trafficking based on his evidence that he was able to observe Mr. Graham conduct a hand-to-hand purchase with the subject of the targeted investigation in the south stairway of the building, combined later with his observation of Mr. Graham and Mr. Wolcott in the hallway of the 15 floor. I have difficulty with reconciling the evidence of Constable Bothman with my assessment of the scene as taken in the view. In his notes, Constable Bothman noted in relation to the person he says is Graham,

"Observed male black enter 15 floor stairway from hallway."

13 This is something that, on my observation of the scene, he clearly could not do.

14 In his examination in-chief, set out at page 12 and 13 of the transcript, he says at page 12,

"I observed the male black enter the 15 floor stairwell from the hallway."

15 Again, something that he could not have observed on the view that was taken in the stairwell. Further,

"So I heard the door open at which time

I looked down from the 17 floor, noticed a male enter the stairwell and stand there quietly."

16 Notably "enter the stairwell," not "climb the stairs to a mid-floor landing."

17 Again, at page 13,

"So basically I'm able to look over the railing directly into the 16 floor." Again, not possible.

18 On the view, the 16 floor landing is directly below where the Constable is standing.

19 Again, at page 13,

"I then observe another male, black, enter the stairs from the level 16 floor hall, which is basically just below me."

20 That part is true.

"The male then walks down to the 15 floor."

21 Not to the 15 floor landing, or the mid-floor landing between the 15th and 16th floor.

22 Then at page 15, near the bottom,

"Then they returned back to their respective doorways that they had originally walked in through."

23 On my examination of the scene, the Constable would not be able to see where the person descending from the landing that he was able to observe would have gone, although he might be able to infer that the person he identifies as the trafficker re-entered the door below him.

24 It was not until challenged on cross-examination that the officer purported to clarify by locating the transaction on the mid-floor landing between the 15th and 16th floor, an area one half of which is observable from the 17 floor landing.

25 The notation in his notes, and the evidence given in examination in-chief was at best misleading, and the fact that it was not clarified until cross-examination is troublesome.

26 On an appreciation of the entirety of his evidence, I am not persuaded he saw the transaction he testified to based on a lack of reliability.

27 Although it is not necessary for me to decide what he actually saw, it seems to me far more likely that he saw and heard some human presence and activity in the staircase somewhere in the vicinity of the 15 floor. That he went to the 15 floor when the parties left the staircase without knowing the identities of the participants, and that he there saw Messrs. Graham and Wolcott, who he immediately arrested, assuming, without knowing, that they were involved in the transaction in the stairway, which he assumed to involve drugs. That would be a more logical, in my view, explanation, both for why he would purport to arrest a purchaser for trafficking, and why he would purport to arrest Mr. Wolcott on the basis of nothing more than appearing to nod to Mr. Graham, and holding open the elevator door.

28 The long and short of it is that he lacked an objectively reasonable basis to arrest either Wolcott or Graham for either trafficking or possession. It is dead-certain that he lacked a legally sustainable basis for arresting either man for trafficking.

29 In the result, the arrest was not lawful. Mr. Graham was entitled to resist. In that regard, it matters not whether I accept Mr. Graham's contention that he was a passive victim, or the officer's version of the more robust encounter.

30 On that basis, as well, the ensuing search in the cells was not lawful, and the conviction, therefore, on the crack cocaine possession charge cannot be sustained, nor can a conviction on the counts of assault in relation to either Constables Bothman or Oxley.

31 On the evidence of the officers, the purported attempt to disarm Bothman occurred while Bothman had Graham in a choke-hold. I accept that Graham's arms, in that circumstance, were likely flailing, and that one of them may have contacted the officer's gun, but the evidence falls short, in my view, of showing an attempt to disarm.

32 A finding of not guilty on that count, as well, would follow, although I note that although there was reference to amending the Information, that was not done.

33 Apart from the lawfulness of the arrest and search, I would have been hesitant to convict on the drug charges given the difficulties with respect to continuity that came out in the course of the evidence of Constables Shipp and, I think, Mohammed (ph).

34 The path of reasoning that I have followed to reach the results here today does not require me to either credit or discredit the evidence of Mr. Graham. I would think, however, given the difficulties that I perceive arise with respect to at least parts of his evidence, he might be hesitant to pursue that evidence in any other forum.

35 MS. GOLDLIST: Thank you, Your Honour.

36 THE COURT: Now, he was arraigned on one Information. There was a re-lay that I don't think he was arraigned on.

37 MS. VANDEN BROEK: That has to be withdrawn, Your Honour--

38 THE COURT: Thank you.

39 MS. VANDEN BROEK: --obviously, it would be a double problem.

40 MS. GOLDLIST: Thank you, Your Honour.

41 THE COURT: You are free to go then. Thank you.

42 MS. GOLDLIST: I thank my friend.

