

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

J.C.

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE MR. JUSTICE J. CASEY

On November, 2009, at TORONTO, Ontario

Courtroom K

APPEARANCES

Mr. Wright

Counsel for the Crown

Mr. Scarfe

Counsel for the Accused

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2009

J.C. is charged that on or about the ninth day of February 2008 in the city of Toronto that he did assault Jason Wher, a police officer for the city of Toronto engaged in the execution of his duties and further at the same time and place did obstruct Jason Wher by attempting to interfere in a lawful investigation. The Crown has elected to proceed by way of summary conviction. J.C. has entered pleas of not guilty to both charges and the trial has been held before me.

On the trial, seven witnesses have given evidence. Officers Wher, Peterson, Kozak and Kennedy all members of the Toronto Police Services were called by the Crown. J.C. testified in his own defence and in addition called his brother R.C. and a friend, W. H.

It is not my intention for the purposes of these relatively brief oral reasons to set out in detail all of the evidence of the various witnesses. Many of the surrounding circumstances are not in dispute and the following is I believe sufficient to understand the factual background and the positions of the parties.

On the evening of Friday February 8, 2008

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and into the early morning hours of February the 9th, Officer Wher, his partner Officer Peterson and Officer Kozak and his partner Officer Kennedy who were in full uniform and driving marked police vehicles had been assigned to patrol what is known as the club or entertainment district.

It was Officer Wher's evidence that this is an area of Toronto which at this time of night is extremely overcrowded, there are a lot of people, some of whom are having fun, some who are drunk, that there is also guns, drugs and violence.

The Afterlife nightclub is situated at or near the northwest corner of Duncan and Adelaide Streets. To the north there is a laneway, which runs westbound off Duncan, which dead ends in the area of the rear of the club to the north of which there is a parking lot which fronts on Nelson, the first street north of Adelaide.

The evidence indicated that approximately 1:30 in the morning of February the 9th, due to the fact that the club was at that time over capacity there was a large crowd of people standing outside in front of the Afterlife nightclub.

The officers were given information from one

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of the clubs bouncers that a number of persons were attempting to kick in the rear door of the club. Upon receipt of that information Officers Wher and Peterson and it appears other officers including Officers Kozak and Kennedy attended at the rear area of the club.

When Officers Wher and Peterson got to that location, they observed several persons running from the area. Officer Peterson starting speaking with the brother of the accused, Ryan C., who was one of the individuals seen running from the area of the rear of the club.

Earlier in the evening, J.C., his brother R. and some friends, including W. H., had gone to the entertainment District arriving at about one in the morning with the intention of going to the Afterlife nightclub.

When they arrived, it appears that the club was over capacity. The group then headed north on Duncan Street towards Richmond Street. R.C. testified he had to use the washroom so he went into the alley where he urinated. It was his evidence that when he was in the alley, he saw a couple of people banging and prying the door trying to get into the club. He overheard security say, call the police, he saw lights, everyone started

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running and he ran in the same direction. Ryan further testified to his subsequent interaction with Officer Peterson on Nelson Street.

It was during this time when Officer Peterson was interacting with R.C. that J.C. and W.H. returned to the area. Shortly thereafter an interaction took place between J.C. and Officer Wher, which forms the subject matter of these charges.

It was the evidence of Officer Wher that when his escort was speaking with Ryan C., he being Officer Wher, was standing by because there was a large crowd in the area.

It was Officer Wher's evidence that at this time the accused approached him, he was screaming what are you doing to which, he the officer, replied we are investigating this male in relation to something that happened across the street. Officer Wher further testified that J.C. whom he indicated had alcohol on his breath was becoming verbally belligerent and was swearing loudly. At which time the Officer told the accused to go to the other side of the road while they investigated the male to which the Officer indicated J.C. said, I'm not leaving until I find out what is going on.

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It was further Officer Wher's evidence that a friend grabbed the accused and walked him over to the corner that, he being the Officer, turned his back to see what was going on with the initial investigation and as he was turning back, he observed the accused approximately two feet in front of him with his fist clenched, breathing rapidly at which time he yelled, I am not leaving until I find out why you were talking with my brother.

Officer Wher testified that the accused then pushed him, being the officer, on the right shoulder with enough force to put him off balance at which time, he being the Officer, grabbed J.C.'s arm. The Officer further testified that J.C. pulled away and, he being Officer Wher, advised the accused that he was under arrest for assault police and cause disturbance.

The evidence indicates that other officers assisted Officer Wher and J.C. who it appears was not complying with the Officer's demands was taken to the ground and subsequently handcuffed.

It was the evidence of J.C. that as he was walking north he heard noises, he observed a crowd, and he noticed that his little brother and one of the other friends

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were not with him. He turned around and went south on Duncan Street. J.C. testified he then observed his brother bent over the hood of a police car. He, being J.C., attempted to walk over to where his brother was and was stopped by an officer who indicated he could not go over there. J.C. indicated that he asked why, to which the officer replied, because they are investigating something.

Mr. C. further testified that he explained to the officer,

"It's my little brother, he was with me two minutes ago, so why can't I go over there?"

To which the officer replied that he needed to get off the street and leave and, he being J.C., had no right to know what was going on.

It was J.C.'s evidence that, he J.C., started to get upset. He did not leave or attempt to get closer to where his brother was. It seemed to him that the officer was getting frustrated with him because, he being J.C., was not leaving.

J.C. further testified that the officers screamed out, he's on drugs, and

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attempted to grab his face, that he being J.C., had his hands up to protect his chest and to try to block the officers attempts to grab him following which he was taken to the ground and arrested.

Officer Kozak testified that when he arrived, he observed Officer Peterson investigating someone and Officer Wher standing on the north side of Nelson with the accused who appeared to be angry. It was his evidence that the accused was loudly screaming profanities.

Officer Kozak indicated that after being briefly pulled away by another male the accused then came towards Officer Wher who had been telling him to go away, this doesn't involve you and that the accused screamed, I'm not leaving and pushed Constable Wher's right shoulder with his open right hand as if he was trying to push through him to approach where Constable Peterson was.

Officer Wher told the accused he was under arrest. The accused took a solid position as if to defend himself and he, being Officer Kozak, along with other officers took the accused to the ground and handcuffed him.

It appears that Officer Peterson was involved with R.C. and he did not observe the interaction between Officer Wher and the

accused. Officer Kennedy it appears was concerned with the persons, whom she testified,

"Were closing in from behind so I'm kind of going back and forth looking around just for officer safety reasons."

She testified,

"I can't tell you everything that transpired because I honestly don't know."

While she was able to testify regarding the altercation, she has indicated she did not see how it began and her evidence is therefore of little assistance on the main issues on the trial.

W.H. testified that after leaving the area of the Afterlife nightclub he was walking with the accused. They noted that J.C.'s brother was not with them and that he and the accused turned and went back at which time they observed Ryan on the hood of the police car.

W.H. further testified that the accused told the officers who were with Ryan C. that, he being Ryan, was his little brother and was asking the officers what was going on. W.H. indicated that because J.C. and the officer were some 15 to 20 yards away and because of the noise, the

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accused whom he indicated was concerned or annoyed, but was not mad or upset had to yell.

It was W.H.'s evidence that one officer told the accused it was not his right to ask and that he couldn't be there. He told him once or twice to go across the street.

W.H. further indicated that when the accused did not go across the street an officer who was different from the officer who asked the accused to cross the street tried to push or grab the accused. The accused's arm came up; he, being the accused, backed up into two officers and was subsequently arrested.

It is the submission of Mr. Scarfe, counsel for J.C. that while there is a common thread, which runs through the evidence of the Crown's witnesses, there are internal inconsistencies in the Crown's case.

It is his position that the accused believed he had useful information to provide to the officers and became frustrated. That the officers became concerned because of the crowd, which was forming. The accused was annoyed but not screaming. The officers misread the situation and the accused's refusal to leave caused the officer to attempt to grab him.

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It's Mr. Scarfe's submission noting the decision of the Supreme Court of Canada in *D.W.* that the evidence adduced by the defence should, at the least, raise a reasonable doubt in my mind and Mr. C. should be found not guilty on both charges.

It is the position of Mr. Wright, Crown counsel, that I should be concerned with the reliability of the evidence adduced by the defence and submits that it has been tailored.

He notes particularly in this regard the testimony of R.C. and J.C. that they discussed their evidence. He submits that the evidence of Officers Wher and Kozak regarding the incident is similar and that the other officers were dealing with other matters and as such their evidence is not inconsistent it just does not assist.

It's his position that the officers are consistent with respect to the details regarding how the altercation began that I should accept their evidence reject the evidence of the defence and find the accused guilty on both counts.

In considering the evidence given by the various witnesses, I take into account, in addition to the manner in which the evidence was given, the location of the witness.

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Specifically whether they were in a position to observe the altercation, whether the evidence is supported by other evidence and whether it is logically consistent with what common sense would dictate.

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Mr. C. having testified and credibility being a significant issue on the trial, I instruct myself in accordance with the decision of the Supreme Court of Canada in *D.W.* particularly the comments of Justice Cory speaking for the majority at page 409 of the Canadian Criminal Cases reference. If I believe the evidence of Mr. C. or it raises a reasonable doubt in my mind I must acquit. And even if I am not left in doubt by his evidence I must ask myself whether on the basis of the evidence which I do accept I am convinced beyond a reasonable doubt by that evidence of his guilt.

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The burden in this case is of course upon the Crown to prove the guilt of Mr. C. on each count beyond a reasonable doubt. In this regard, I note the comments of Justice Cory speaking for the Supreme Court of Canada in *Litchus* at page 13 of the Canadian Criminal cases judgement where he states, a reasonable doubt is not a doubt based upon sympathy or prejudice, rather it is based upon reason and common sense. It is logically connected to the evidence or absence of evidence it does

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not involve proof to an absolute certainty. It is not proof beyond any doubt nor is it an imaginary or frivolous doubt and more is required than proof that the accused is probably guilty. A jury which concludes only that the accused is probably guilty must acquit.

Similar comments are found at paragraph 242 in the judgment of Justice Iacobucci in *Starr and the Queen* where he notes, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

I agree with the Crown that the evidence of Officer Wher is supported by that of Officer Kozak. I appreciate that Officers Peterson and Kennedy prior to the incident appeared to have had their attention directed towards other matters and I do not find the fact that they are unable to assist with how the incident happened of concern regarding either the veracity or reliability of the evidence of Officer Kozak and Wher.

I accept Mr. Wright's submission that the fact that R.C. and J.C. spoke about their evidence is a factor to consider in assessing their evidence. I note that the evidence of J.C. while not

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identical to that of W.H. is in some material respects supported by that of W.H..

This incident, it appears, took place over a fairly short time span and I believe would likely have been stressful for all concerned.

The Court of Appeal for Ontario has stated in cases such as *R. v. Ward*, *Dastows* and *R. v. Anderson* that a criminal trial is not a credibility contest and credibility is not to be determined on an either/or basis.

In the case of *R. v. Miaponoose*, which deals with the issue of identification evidence, under the heading of inherent frailties, Justice Charron quoted the law reform commission of Canada study paper on Pre-trial Eye Witness Identification Procedures at page 10 as follows: Simply by way of illustration, psychologists have shown that much of what one thinks one saw is really perpetual filling in. Contrary to the belief of most laymen and indeed some judges, the signals received by the sense organs and transmitted to the brain do not constitute photographic representations of reality.

The work of psychologists has shown that the process whereby sensory stimuli are converted into conscious experiences is prone to error

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because it is impossible for the brain to receive a total picture of any event. Since perception and memory are selectively processed, viewers are inclined to fill in perceived events with other details; a process which enables them to create a logical sequence. The details people add to their actual perception of an event are largely governed by past experience and personal expectations. Thus the final recreation of the event in the observers mind may be quite different from reality.

Her ladyship continued, Witnesses are often completely unaware of the interpretive process whereby they fill in the necessary but missing data. They will relate their testimony in good faith and as honestly as possible, but without realizing the extent to which it has been distorted by their cognitive interpretive processes.

Thus, though most eyewitnesses are not dishonest, they may nevertheless be grossly mistaken in their identification. As I say that was a matter, which dealt with eyewitness identification evidence.

Finally, I note the comments of Justice Rosenberg in the case of *R. v. Minuskin* at paragraph 22, when discussing the principles in *W.D.* where he stated, one of those

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principles is that it is not necessary for the trier of fact to believe or accept the defence evidence for there to be a reasonable doubt. Even if the trier of fact believes the prosecution witnesses, the evidence as a whole may leave the trier of fact with a reasonable doubt.

In this case when I take into account all of the evidence, the submissions of counsel and the test to be applied, I find that the evidence adduced by the defence has raised a reasonable doubt in my mind. And as a result, Mr. C. will be found not guilty on both counts.

FORM 2 CERTIFICATE OF
TRANSCRIPT (SUBSECTION 5(2))
EVIDENCE ACT

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I, SHERRY RACICOT, certify that this document is a true and accurate transcript of the recording of R. v. C. heard in the Old City Hall held at 60 QUEEN STREET WEST taken from Recording No. 370 (K), which has been certified in Form 1.

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