

Ontario Court of Justice

Her Majesty The Queen

Against

Kerr-Ann Jackson

Reasons for Judgment

Before the Honourable Justice L.M. Buszinski
At Toronto, Ontario, on February 11, 2011

Appearances:

C. Igwe
M. Rombis

Counsel for the Crown
Counsel for the Accused

Judgment

THE COURT: My first impression, subject to argument, is that I have been a judge since 1992, and I have never heard witnesses all being so nice to each other. I do not find anything improper in the police behaviour. I find—initial impression, the officer is very credible. I find the accused is a credible person, or at least an honest, credible person too. And there is no allegation here that I sense in her evidence in some way she was intimidated by the police. And the officer's comments about the Children's Aid seem to have been made in the context of her concern, in the sense that there is no one to care for the children, and this is the alternative. So everyone is being nice to each other. I am having a hard time distinguishing the credibility of anyone because I found the officers very frank and open, giving both sides of the story, being precise, and I find the accused to be somewhat open and precise. I can be manipulated, of course, and misinformed, but that is the first impression.

The question I ask the Crown, though, is this. One guy, there is the fact that he selected the officer, Small, to come and bring the device, could be argued that there is a delay factor there, but the delay factor is so small that I would ask defence counsel to argue why is it so significant, because my first impression is it is not a significant amount of time. The danger is, by selecting the officer, he could have made it a significant amount of time, and been stuck with a problem. But right now, my first impressions are it is not significant.

But, the fact that they only used the one straw, and that they both agree that she was given numerous opportunities—if everyone is so credible, then the only way that can sort of be refuted or dealt with is if the officer, say, for example, had given her another straw or re-demonstrated the device. That is the problem I have, is that when everyone is being so frank about everything, does that create the reasonable doubt? The only way that could be sort of refuted, I think, that something was not defective, is had the officer said : Look, let me re-demonstrate this to you, take this other straw. Take the straw she was using and examine that for a defect, that would

have—if that evidence were before me, then there might have been something more. So that is the struggle I am having right now. Okay?

MR IGWE: Okay. Well, Your Honour, let me respond this way. I agree that if the officer had, for example, re-demonstrated to her how to blow into the machine, or if the officer had changed the mouthpiece and given her a different mouthpiece just out of the abundance of caution to ensure that the mouthpiece was not defective, it would be, if I may put it that was, a stronger case...

THE CORUT: Right.

MR IGWE: ...for the Crown in terms of establishing her guilty beyond a reasonable doubt. But in any event, Your Honour, the Crown's submission is that when Your Honour looks at the – the totality of the circumstances and the manner in which this event unfolded, the fact that the officer did test this machine the initial time and found it to be in a proper working condition. The officer gave her a new mouthpiece, which she agreed with me that she unsealed herself. The officer did – she did confirm that the officer said, that the first couple of times that she tried, she was not—the air was not going in, so there was no buzzing sound...

THE COURT: Right.

MR IGWE: ...whatsoever. If that was all we have, and then coupled with the fact that the officer did not re-demonstrate, or that the officer did not give her a new mouthpiece, in my submission, that may likely raise some doubts in Your Honour's mind with respect to the working condition of the machine.

THE COURT: I think the machine---

MR IGWE: But---

THE COURT: I mean, I do not think that there was any doubt that the machine was—I should not say that. The—

MR IGWE: Or the mouthpiece –

THE COURT: That is right. The mouthpiece. That is right.

MR IGWE: The—that the mouthpiece was defective.

THE COURT: Right.

MR IGWE: If that was all. But in my submission, she continued to try and the officer noted that at subsequent times that she tried, the officer heard buzzing sounds, but she wasn't trying long enough. And the officer continued to reiterate to her that she needed to give a continuously longer blowing into the machine for him to be able to get the right result to get the reading.

THE COURT: Right.

MR IGWE: So I think that's very significant, because if it was just a situation where she claimed that she was blowing and the officer claimed he was not getting any buzzing sound to indicate that air was going into the machine, it would be—it would be –the—the issue that my friend raises or would raise, I assume, about the effectiveness of the mouthpiece would have been more significant. But the fact that subsequently the officer now started to get buzzing sounds, but she did not blow long enough for the officer to get any result and the officer indicated, and this was one of the issues that we litigated when I was reexamining him...

THE COURT: Right.

MR IGWE: ...that at all the instances, she would only blow for a second or for a couple seconds.

THE COURT: No, you are right. I accept—I understand your argument. But the problem is that, if the mouthpiece is defective, okay? If the mouthpiece is defective then there would be never enough air getting into the machine itself, so it is not the machine that is defective, the mouthpiece was defective. Now, you know, these mouthpieces are just little plastic tubes, and the chance of it being defective is not that high, but we are talking about reasonable doubt here. Once, you know, she is indicating that she is blowing, and the machine is not going on, then he could have done two things. He could have recovered the mouthpiece after she used it, and brought it here or used it as an exhibit to show the mouthpiece was not defective, or he could change the mouthpiece and put another one in, which would decrease the chance of a defective mouthpiece. I am not faulting the officer for that, but it is that piece of evidence that would tend to rebut or deal with her evidence. You know, they were both trying to work this out together, and she blew a number of times and just could not get the machine to blow. There is nothing about the officer saying she was puffing her cheeks. He does claim that the first time she placed her mouth on the mouthpiece at an unusual position.

MR IGWE: Yeah.

THE COURT: But there is nothing to indicate other than that, after she corrected it, but to say that she was, you know, doing something. I mean, there are suspicions there, but the question is the reasonable doubt. There is nothing in her evidence really that, you know, she tends to explain and rationalize and – or explain the situation, and you know, there is no issue that there is an animosity between her and the officer of the officer and her. Everyone seems to be working together, and the officer had to do what he thought he had to do, and she was doing what she—so that is where the reasonable doubt is sort of coming from in my mind. Anything else you wish to say?

MY IGWE: No, Your Honour.

THE COURT: Okay, thank you. Well, I am not going to ask for the defence to make a reply. I mean, there is always the issue that, you know, a shrewd witness, highly experienced, could come and, you know, tell it so that, you know, she appears very believable. I mean, that is on both sides of the equation. Both witnesses were very frank, and no witness really attempted to sort of case a bias of negativism towards the other witness.

So I am left with the difficulty to assess credibility. Like I say, it is highly suspicious because these are simple devices, but it is not above what one would call reasonable doubt that the mouthpiece could have been defective. Because of that and the lack of evidence, no fault of the police, to support the effectiveness of the mouthpiece, I am obliged to find an acquittal on this case.

MR ROMBIS: Thank you very much, Your Honour.

THE COURT: Okay, well, thank you very much. Okay, you are free to go.