

Ontario Court of Justice

Her Majesty The Queen

Against

Jorge A Poblete

Reasons for Judgment

Before the Honourable Justice W.A. Gorewich  
At Newmarket, Ontario, on February 23, 2011

Appearances:

C. Goodier  
M. Rombis

Counsel for the Crown  
Counsel for the Accused

## Reasons for Judgment

THE COURT: A few observations. I would commend the officer in this case because of the frankness of his testimony. There might have been a few things that—in terms of the investigations that could have been done differently but I must say that the officer was as straight forward as any officer I have ever heard testify, as I could not tell you now many thousands of officers I have heard testify in my years in this business.

The evidence was not without its problems. There is difficulty. For example, it is important to note an odour of alcohol. Now, of course, that became less important as the accused testified, but had the accused not testified, that would have been a major issue in the case.

I took some notes of the fact that you were going to get more grounds later after cuffing him and arresting him. The Crown might have got past that hurdle, but certainly it was a hurdle and it would have caused some problems in the matter.

In any event, I do commend you, Sir, because of the straight forwardness with which you gave your evidence and you did what you thought you had to do in that particular circumstance.

As far as evidence of the accused, and just in this general scenario where the officer attends and finds Mr. Poblete in the circumstances in which he found him, that is, sitting behind the steering wheel of his car, in the seat normally occupied by the driver, with the motor running at somewhere at around four o'clock in the morning or thereabouts, and making observations of not being able to arouse or awaken this gentleman. When he finally does, the gentleman, in effect, stumbles out of the vehicle.

At face value, without anything more, it may well be that there was a good care and control, notwithstanding some other criticisms a moment ago, but the accused takes the stand and testifies.

He does not deny he was drinking and, in fact, he may well have been impaired. But he explains that he went to this area behind the Winners store, very close to this café called Gotcha and he made a decision to stay there. It was very late or very early in the morning, a number of hours just prior to 7 a.m. when the shop or restaurant was doing to open. He worked at that restaurant. He worked, I presume, for a friend. He did not want to let his friend down and he wanted to be there at seven o'clock. There was going to be some work done on some pipes and he was also going to train someone. He did get there through the good graces of his cousin who had driven him from the Luxy to the parking area near—near the café.

I heard the story about why it was the cousin who drive him there and how the cousin left his BMW in a less vulnerable position. He did not want to get it scratched. I can relate to those kinds of things.

The accused testified that he was not going to move the vehicle, in fact, for the first while, he did not have the motor on. Then he got cold and he turned it on and had his music going and he fell asleep. He did not go home because he was conceded that if he went home to his comfortable bed where he had, I think he said nature music, something to that effect, he simply feared that he would not get up.

He said he occupied the driver's seat because he felt more—more secure. There was some reference to he had a better position sitting in the driver's seat if someone had decided to highjack his car, but generally he felt more secure, he had his radio controls, and stated he was not going to drive the vehicle. He was going to get to work there and I heard all the reasons about why he was there and I have indicated the reasons in my comments this far.

I have to say I accept his evidence. This is another honest witness here. I watched him, I listened to him. Even the manner in which he responded to questions not only from his own counsel but from the challenged by the Crown and this gentleman was telling the truth.

Certainly I refer to WD, the test for credibility. I do not—I do not have to go past the first prong of the WD test to say that I accept this gentleman's evidence. In fact, often when judges refer to the case of R v WD, there are areas where a judge will comment about certain parts of the evidence where not believable, but they are still left in a state of reasonable doubt.

In this case, I think from A to Z, this gentleman told the truth and I accept his evidence and he rebuts the presumption that he occupied the seat of the driver for the purpose of setting the vehicle in motion. He is acquitted on the charge. Thank you.

MR ROMBIS: Thank you very much, Your Honour.

MS GOODIER: If the other count could be marked withdrawn, at the request of the Crown, please. The over 80.

MR ROMBIS: Thank you, Madam Crown.

THE COURT: Yes. The other charge is withdrawn. Thank you.