IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R.* v. *Crawford,* 2007 YKSC 51

Date: 20071003
07-AP001
Registry: Whitehorse

Between:

REGINA

Respondent

And

DANNY COLIN CRAWFORD

Appellant

Before: Mr. Justice L.F. Gower

Appearances:

Lee Kirkpatrick — Counsel for the respondent
Keith Parkkari — Counsel for the appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal by Danny Crawford from the decision of Justice of the Peace G. Burgess which resulted in a conviction under s. 266(1) of the *Motors Vehicles Act*, R.S.Y. 2002, c. 153, for operating a motor vehicle while disqualified. The grounds of appeal are twofold: first, that the Justice of the Peace failed to consider the evidence of the appellant; and second, that the Justice of the Peace failed to apply the test in *R.* v. *W.(D.)*, [1991] 1 S.C.R. 742, in determining whether the offence had been proven beyond a reasonable doubt.

THE TRIAL

[2] The appellant was alleged to have committed the offence on July 28, 2006, in the City of Whitehorse. The trial took place on March 20, 2007. The Territorial prosecutor called two RCM Police witnesses, Constables Buxton-Carr and Ristau.

[3] Constable Buxton-Carr testified that he was off duty driving within the City of Whitehorse on the morning of July 28, 2006. At approximately 9 o'clock he was northbound on Hamilton Blvd. when he noticed a brownish gold GMC Jimmy truck, which he believed to be similar to a vehicle owned by the appellant. When the vehicle passed by him going in a southerly direction, it was travelling at a high rate of speed. Constable Buxton-Carr suspected that the driver looked like Danny Crawford, but could not confirm his identity. Because he believed Mr. Crawford to be disqualified from driving, he contacted the RCMP dispatch and asked them to query the status of Mr. Crawford's driver's licence. Having received confirmation that Mr. Crawford was disqualified from driving in the Yukon Territory, he asked to be transferred to Constable Ristau, a member on duty at the time. He related to Constable Ristau his belief that Mr. Crawford may be operating his vehicle while disqualified.

[4] Constable Buxton-Carr then continued with his personal duties in downtown Whitehorse and at approximately 9:45 a.m. he observed the GMC Jimmy southbound on 4th Avenue passing by him head on as he was travelling northbound. There was no divider between the vehicles and only one lane in either direction. He testified that both vehicles were going at approximately 40 km an hour and that he observed the driver to be Mr. Crawford. He again phoned the RCMP detachment and spoke with Constable

Ristau about what he had just observed and alerted him to be on the lookout, as the GMC Jimmy might be passing by the RCMP detachment on 4th Avenue momentarily.

[5] Constable Buxton-Carr later prepared notes of his observations and determined the times of his phone calls to Constable Ristau by checking the log of calls on his cell phone.

[6] Constable Buxton-Carr also testified that he was previously familiar with Mr. Crawford, having known him for about three years. He said that he had encountered Mr. Crawford many times, both on and off duty. He played against Mr. Crawford in the same hockey league and had spoken with him personally on a number of occasions.

[7] Constable Ristau testified that he was on duty on the morning of July 28, 2006, and noted Mr. Crawford walking at the intersection of 4th Avenue and Main Street at approximately 8 or 8:30 a.m., about half a block from the RCMP detachment. Later, at the detachment, he received a telephone call from Constable Buxton-Carr advising that he believed Mr. Crawford to be driving erratically in the Hamilton Blvd. area. He thought that call came in at about 8:30 or 9 o'clock. About one hour later, he received a second call from Constable Buxton-Carr informing him that he was in the downtown area and had once again seen the GMC Jimmy being driven by Mr. Crawford at about 4th Avenue and Jarvis Street. As Constable Ristau was talking to Constable Buxton-Carr over the phone, he looked out the window of the detachment and observed Mr. Crawford driving the GMC Jimmy past the front of the detachment. He estimated that he was about 50 to 65 feet away from the vehicle at that time.

[8] Later, at about 10:30 a.m., Constable Ristau observed Mr. Crawford in the GMC Jimmy parked outside of the courthouse on 3rd Avenue. He did not then approach the vehicle, but observed Mr. Crawford in the driver's seat and noted that the vehicle was not running.

[9] Constable Ristau testified that he knew Mr. Crawford by photographs and intelligence gathering through the police detachment, but not through personal dealings.

[10] Danny Crawford testified in his own defence. He admitted that he was disqualified from driving on July 28, 2006, and that he owned a brown GMC Jimmy.[1] He denied driving that vehicle on July 28, 2006. He said that on the previous evening, he was heavily intoxicated and had been arrested and pepper sprayed by the police. He testified that he was released from the RCMP cells at about 8:00 or 8:30 a.m. Just prior to being let out, he called his boss (later identified as Mark Kelly) to come to the detachment to pick him up. After being released, he walked to Shoppers Drug Mart on Main Street to purchase some cigarettes. He then returned to the detachment to meet Mr. Kelly who drove Mr. Crawford to his house in Hillcrest. He estimated that it took about 10 minutes to get from the detachment to Hillcrest. He said that he felt sick all day and did not leave his house until that evening.

[11] Mr. Crawford testified that he had two roommates, one of whom was Erik Martensson. He said that he was in the habit of letting his roommates and friends borrow his vehicle for their own purposes and also to chauffeur him around for grocery

[1] Actually, his counsel asked him whether he was suspended on July 28, 2007, but that was obviously a misstatement.

shopping and other chores. In direct examination he was asked the following questions and provided the following answers:

> "Q: That morning, the morning of the 28th, do you know who had your vehicle?
>
> A: Erik Martensson.
>
> Q: Was your vehicle at home when you got home?
>
> A: I don't think so, no. No, actually it wasn't.
>
> Q: Did you have your vehicle the night before?
>
> A: No.
>
> Q: So when you're at the KK, you didn't have your vehicle there?
>
> A: No, I didn't"[2]

[12] The next defence witness was Erik Martensson. He confirmed that Mr. Crawford's vehicle was a 2000 GMC Jimmy and that he was allowed to drive that vehicle when Mr. Crawford was not around. He said that on the morning of July 28, 2006, he was driving the Jimmy. He remembered that because he picked it up at the bar at about 6 o'clock in the morning and went down to the police station to see how Mr. Crawford was doing. He testified that he then did some driving around downtown and that he might have driven up towards Granger and Copper Ridge that day (Hamilton Blvd. is the main thoroughfare connecting downtown Whitehorse with Granger and Copper Ridge). He also said that he might have stopped in the vicinity of the courthouse that morning. In cross-examination, he agreed that he did not

[2] Transcript, p. 19, lines 8 to 15. The "KK" is a Whitehorse tavern.

particularly remember a lot of what happened that day because it was 8 months prior, but that he had Mr. Crawford's vehicle all day.

[13] Mark Kelly was the final defence witness. He testified that he was Mr. Crawford's employer in 2006 and that on July 28th of that year Mr. Crawford did not show up for work. At about 8:15 to 8:30 in the morning, Mr. Crawford telephoned him and said that he had been arrested. Mr. Kelly offered him a ride and said that he arrived at the police detachment between 8:30 and 9 a.m. and had to wait for about 5 minutes for Mr. Crawford to return from the Main Street area of downtown. He then took Mr. Crawford to Hillcrest, estimating the driving time between the police station and Mr. Crawford's home to be about 10 or 15 minutes. He dropped Mr. Crawford off and returned to his work site. He didn't recall whether Mr. Crawford's vehicle was present at his residence at that time.

[14] Defence counsel at trial argued that Mr. Crawford had a partial alibi, given the timing of the various events testified to by the Crown and defence witnesses. However, The Territorial prosecutor countered this argument by noting the following points:

- Mr. Crawford said he phoned Mr. Kelly just prior to being released.
- Mr. Kelly recalled receiving Mr. Crawford's phone call between 8:30 and 9 a.m.
- Mr. Crawford said that he was released from the RCMP cells between 8:30 and 8:34 a.m.
- Constable Ristau said that he saw Mr. Crawford at the corner of 4th Avenue and Main Street at about 8 or 8:30 a.m.

- Mr. Kelly said that he had to wait about 5 minutes for Mr. Crawford, then drove him to his home in Hillcrest, where he dropped him off about 10 to 15 minutes later.
- Constable Buxton-Carr first noted the individual he suspected to be Mr. Crawford at about 9 a.m., at which time he made his first cell phone call to Constable Ristau. He was able to verify that time by checking the call log on his cell phone.
- Constable Ristau estimated that the first call he received from Constable Buxton-Carr was at about 8:30 or 9 a.m.

[15] Justice of the Peace Burgess concluded on this point as follows:

> "The timelines, I find with all this we were talking about the timelines – I think they are all in line. The could be five minutes here or there, whatever, but I think everything is in line. I do not think there is any real discrepancies with the time. I have no issue with the fact that Mr. Crawford's boss, Mark Kelly, picked him up and drove him to his house in Hillcrest and dropped him off."[3]

The appellant's counsel did not challenge this aspect of the reasons for judgment on the appeal. In any event, there is nothing in the evidence which would suggest it was impossible for Mr. Crawford to have been driving the GMC Jimmy on Hamilton Blvd. at 9 a.m. on July 28, 2006.

[16] Rather, the main issue at the trial was the identity of the driver of the GMC Jimmy. Defence counsel argued that both Constable Buxton-Carr's second encounter with the GMC Jimmy and Constable Ristau's observation of the vehicle as it drove past the RCMP detachment were made in circumstances which should have cast doubt upon the accuracy of their identification opinion evidence that the driver in both instances was

[3] Reasons for Sentencing, para. 2

Mr. Crawford. He referred to the matter as a "reasonable doubt" case, in that Mr. Martensson testified that he was driving the vehicle all day and that Mr. Crawford testified that he stayed home because he was not feeling well as a result of his intoxication the night before.

[17] Crown counsel acknowledged that same evidence in the following submission:

> "Now, it's true that Mr. Eriksson (sic) said that he had the vehicle that day. He is the only really inconsistent witness, other than the accused himself. But it's clear that Mr. Eriksson doesn't particularly recall the vents of July 28th. He recalls that he did go and pick up the vehicle at the KK, he recalls that he was driving the vehicle at some point in time that day, he doesn't recall where he went, he doesn't recall when he was actually driving, he doesn't recall where he drove, the doesn't recall what he was wearing. And as he fairly said himself, it was eight months ago. So my suggestion is that his evidence is certainly not to be preferred to the evidence of the two police officers who specifically identified Mr. Crawford driving the vehicle that day."[4] (my emphasis)

[18] Thus, there is no doubt that the accused's evidence was clearly brought to the attention of the Justice of the Peace in the closing submissions of both counsel.

[19] Justice of the Peace Burgess began his oral reasons by stating as follows:

> "Hearing all the evidence on both sides that Mr. Crawford was said to be driving just after being released from cells in the RCMP detachment on the morning of 28th of July, that it was alleged that he was driving his vehicle up Hamilton Boulevard where he was passed by an off-duty RCMP member that thought he may have recognized him on the 28th. He contacted the detachment and gave his belief to another RCMP member. Later that day, on 2nd Avenue, the RCMP member said he definitely recognized Mr. Crawford driving his vehicle on 2nd Avenue.[5]

[4] Transcript, p. 26, lines 12 to 22
[5] Reasons for Sentencing, para. 1

[20] Later, after dispensing with partial alibi defence, the Justice of the Peace continued as follows:

> "What I am having difficulty with is I am not finding that Erik Magnusson (sic) was that credible of a witness. He did not remember what he had actually done that day and provided it was eight months ago. He was not sure where he went or what he was doing. I have to rely on the fact that the RCMP definitely, without issue, identified Mr. Crawford, not necessarily on Hamilton Boulevard but definitely on 2nd Avenue, and passed that information on to Constable Ristau, who, in turn, passed by the courthouse on 3rd Avenue and identified Mr. Crawford at that time also. [6]

He then concluded by noting that both RCMP officers testified that they were previously familiar with Mr. Crawford and stated "So with all the information given, I have to find that the charge is valid and supports a finding that he is guilty."

[21] Nowhere in the reasons for judgment did the Justice of the Peace expressly make any reference to Mr. Crawford's testimony or credibility.

ANALYSIS

Failure to Refer to the Appellant's Testimony

[22] The leading case of *R.* v. *Sheppard*, 2002 SCC 26, reviewed the law on the duty of a trial judge to give reasons, viewed in the context of appellant intervention in a criminal case, and put forward a number of propositions in that regard, which I will return to shortly. Prior to *Sheppard,* the Supreme Court of Canada made the following statement in *R.* v. *Burns*, [1994] 1 S.C.R. 656, at para. 17, which appeared to question the existence of such a duty:

> "Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a

[6] Reasons for Sentencing, para. 3

> basis for allowing an appeal under s. 686(1)(*a*). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see *R. v. Smith*, 1990 CanLII 99 (S.C.C.), [1990] 1 S.C.R. 991, affirming (1989), 95 A.R. 304, and *Macdonald v. The Queen*, 1976 CanLII 9 (S.C.C.), [1977] 2 S.C.R. 665. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict."

[23] However, in *Sheppard*, Binnie J., again speaking for the entire Court, noted at para. 33 that the above statement in *Burns* was a rejection of the notion that the absence or the inadequacy of reasons might constitute a freestanding ground of appeal. Rather, a more contextual approach is required:

> "… The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case."

[24] Later, Binnie J. continued, at para. 37, that the Court's earlier decision in *R.* v. *Barrett,* [1995] 1 S.C.R. 752, should be interpreted to mean that appellate review in cases where there was an absence of reasons would not be available where the disputed finding "is otherwise supportable on the evidence (i.e., the verdict is not unreasonable), or where the basis of the finding is apparent from the circumstances."

[25] Similarly, at para. 42, he quoted Major J., at para. 55 of *R.* v. *R.(D.)*, [1996] 2 S.C.R. 291, as follows:

> "Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the

> evidence is such that no reasons are necessary, appellate courts will not interfere."

This statement, said Binnie J., affirms that deficiency in reasons, by itself, is not a stand-alone ground of appeal.

[26] Still further, at para. 46, Binnie J. stated:

> "These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. …"

[27] On a slightly different tack, Binnie J. continued, at para. 52, that it would be generally sufficient for purposes of judicial accountability if the appellate court, having decided that it understands from the whole record (including the allegedly deficient reasons) the factual and legal basis for the trial decision, then communicates that understanding to the accused/appellant in its own reasons.

[28] In summary, Binnie J. concluded, at para. 53, that the requirement of reasons, in whatever context it is raised, should be given a "functional and purposeful interpretation."

[29] In *R. v. Maharaj* (2004), 186 CCC (3d) 247, Laskin J.A., speaking for the Ontario Court of Appeal said this about *Sheppard*, at para. 21:

> "In R. v. Sheppard, [2002] 1 S.C.R. 869, 162 C.C.C. (3d) 298, Binnie J. gave three rationales for the duty to give reasoned reasons: judges owe an obligation to the public to explain their decisions; judges owe an obligation to the losing party to explain why that party lost -- in criminal cases this means accused persons are entitled to know why they were convicted; and judges owe an obligation to counsel and

> appeal courts to make appellate review of their decisions meaningful."

[30] Later, at para. 23, Laskin J.A. continued:

> "Sheppard warns against conclusory reasons, that is, conclusions without explanations for them. However, as desirable as it is to give reasoned reasons, a failure to do so does not automatically amount to reversible error. … In some cases inadequate reasons do not preclude meaningful appellate review or prevent an accused from knowing why he or she was convicted. For instance, the accused's evidence may be obviously incredible, or the prosecution's evidence may be overwhelming and unchallenged, and thus the basis of the conviction may be clear from the record. …" (my emphasis)

[31] In *Sheppard*, Binnie J. put forward a number of propositions on the duty to give reasons (para. 55). Included among those propositions are the following comments:

> "
> …
>
> 2. … Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. …
>
> …
>
> 6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.
>
> 7. … The trial judge is not held to some abstract standard of perfection. …
>
> 8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.
>
> …

> 10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(b)(iii) proviso. ["… that no substantial wrong or miscarriage of justice has occurred…"]" (my emphasis)

[32] In *R.* v. *Gagnon*, 2006 SCC 17, the majority judgment of Bastarache and Abella JJ. again addressed the issue what constitutes sufficient reasons from a trial judge. At paras. 12 and 13, they acknowledged that the court's approach to that question has "evolved":

> "… In *R.* v. *Burns*, [1994] 1 S.C.R. 656, this Court held that the failure by a trial judge to expressly indicate that he or she had taken all relevant considerations into account in arriving at a verdict was not a basis for allowing an appeal where the record revealed no error in the appreciation of the evidence or applicable law.
>
> Eight years later, in *Sheppard*, a case in which the trial judge's reasons were virtually non-existent, this Court explained that reasons are required from a trial judge to demonstrate the basis for an acquittal or conviction. Failure to do so is an error of law. Finding an error of law due to insufficient reasons requires two stages of analysis: (1) are the reasons inadequate; (2) if so, do they prevent appellate review? In other words, the Court concluded that even if the reasons are objectively inadequate, they sometimes do not prevent appellate review because the basis for the verdict is obvious on the face of the record. But if the reasons are both inadequate and inscrutable, a new trial is required." (my emphasis)

[33] Later, at para. 19, Bastarache and Abella JJ. stated that their Court has "consistently admonished trial judges to explain their reasons on credibility and reasonable doubt in a way that permits adequate review by an appellate court." However, they continued that, having encouraged such expanded reasons:

> "…it would be counterproductive to dissect them minutely in a way that undermines the trial judge's responsibility for weighing all of the evidence. A trial judge's language must be reviewed not only with care, but also in context. Most language is amenable to multiple interpretations and characterizations. But appellate review does not call for a word-by-word analysis; rather, it calls for an examination to determine whether the reasons, taken as a whole, reflect reversible error. The task is to assess the overall, common sense meaning, not to parse the individual linguistic components. …"

[34] Most recently, in *R.* v. *Beaudry*, 2007 SCC 5, Binnie J., in a judgment concurring with the majority, confirmed, at para. 79, that *Sheppard* held that a trial judge's failure to deliver reasons sufficient to permit meaningful appellate review was an "error of law". However, he then continued:

> "… In the eyes of the litigants and the public, where the findings of facts essential to the verdict are "demonstrably incompatible" with evidence that is neither contradicted by other evidence nor rejected by the trial judge, such a verdict would lack legitimacy and would properly, I think, be treated as "unreasonable"."

Fish J., delivering the minority judgment in *R.* v. *Beaudry,* made virtually the same comment at para. 98.

[35] The appellant's counsel relies heavily on this last point and stresses that the Justice of the Peace in the case at bar must have found as a fact that Mr. Crawford was driving in order to find him guilty. However, counsel submits that such a finding was "demonstrably incompatible" with the evidence of both Mr. Crawford and Mr. Martensson that it was Martensson who was driving the GMC Jimmy on July 28, 2006. Further, since the Justice of the Peace did not expressly reject all of that evidence, most notably Mr. Crawford's evidence, then his verdict is unreasonable.

[36] I disagree with that submission for the following reasons. First, the evidence of Mr. Crawford and Mr. Martensson was contradicted by the evidence of the two RCMP officers identifying Crawford as the driver. Second, I conclude that the Justice of the Peace must have rejected Mr. Crawford's evidence, notwithstanding that he failed to do so explicitly.

[37] I acknowledge that the Justice of the Peace failed to expressly reject the appellant's evidence at trial and in that regard his reasons are objectively inadequate. However, in my view, this deficiency has not prejudiced Mr. Crawford's right to meaningful appellate review. On the contrary, despite the absence of any specific reference to Mr. Crawford's testimony in the reasons for judgment, the basis of the conclusion of the Justice of the Peace is apparent from the record, even without being articulated. Put another way, I consider myself able, as the appeal court, to explain the result, notwithstanding that the trial decision was deficient in certain respects. In particular, I note the following points:

1. The Justice of the Peace began his reasons by stating "Hearing all the evidence on both sides…", but then went on in that paragraph to deal exclusively with the evidence of the RCMP witnesses. The appellant's counsel therefore urged me to conclude that the "both sides" referred to by the Justice of the Peace must have been the two officers and nothing else. Once again, I respectfully reject that submission and follow the directions in *R.* v. *Gagnon* to review the reasons of the Justice of the Peace in context, taken as a whole, to access their common sense meaning and not to parse the individual linguistic components. While there is no

reference to the defence evidence in the first paragraph of the reasons[7], there are explicit and implicit references to the defence evidence later on in the discussion of “the timelines”, which the appellant also gave evidence about, as well as the evidence of Mark Kelly, and Erik Martensson. Further, in finding the appellant guilty, the Justice of the Peace noted that he had taken into account “all the information given”. Thus, I conclude that, looking at the reasons of the Justice of the Peace as a whole, his reference to having heard “all the evidence of both sides” must be taken as a reference to the cases of both the Crown and the defence, including the evidence of Mr. Crawford.

2. In dismissing the evidence of Erik Martensson, the Justice of the Peace made the following unfortunate comment “I have to rely on the fact that the RCMP definitely, without issue, identified Mr. Crawford …”. Once again, the appellant’s counsel urges to me to conclude from that comment that the Justice of the Peace was unduly influenced by the Crown’s evidence and did not give full and proper consideration to the defence evidence in deciding whether he had a reasonable doubt about the appellant’s guilt. While it is trite to say that the Justice of the Peace did not “have to rely” on the evidence of the RCMP officers any more than the evidence of any other witness, I take the comment in context and read that portion of his reasons as a whole. What the Justice of the Peace was dealing with there was the contradiction between Mr. Martensson’s evidence and the identification evidence of the RCMP witnesses. He resolved that inconsistency by finding that Mr. Martensson was not credible, since he did not remember what he

[7] These were oral reasons, so the division of the transcribed version into paragraphs is largely the choice of the transcriber.

had actually done that day and was not sure where he went or what he was doing, as the incident occurred 8 months ago. In contrast, he was obviously impressed by the apparent certainty of the RCMP officers as to their identification of Mr. Crawford on 2nd Avenue.

3. As for the fact that the Justice of the Peace did not specifically refer to Mr. Crawford's evidence, I conclude that he had to have rejected that evidence as a direct consequence of having rejected Mr. Martensson's evidence. The evidence of Mr. Crawford and Mr. Martensson were inextricably linked. Mr. Crawford's evidence was not simply a denial that he was driving that day, but rather included the express statement that on the morning of July 28, 2006, he knew that Erik Martensson had his vehicle. He did not waffle and suggest that it could have been his other roommate, another friend, or someone unknown who was the driver, but clearly testified Mr. Martensson in particular was the driver. That dovetailed with Mr. Martensson's evidence that he was indeed in sole possession of the GMC Jimmy the entire morning of July 28th. Thus, when the Justice of the Peace rejected Mr. Martensson's testimony that he was the driver, he implicitly must have rejected the evidence of Mr. Crawford for the same reason. Putting it another way, the appellant said that he was not driving his vehicle that day, yet someone clearly was. By his own evidence and by calling Erik Martensson, the appellant attempted to establish it was Martensson in particular who was the driver, not that it could have been anyone. In rejecting Mr. Martensson as the driver, the Justice of the Peace had to have found that

Mr. Crawford lacked credibility on the point and therefore rejected his evidence in that regard.

[38] In *R.* v. *J.J.R.D.* (2006), 218 O.A.C. 37, Doherty J.A. stated at para. 35:

> "Certainly, a trial judge owes it to an accused to explain his or her reasons for convicting that accused. Where the accused has testified, this will include an explanation for rejecting the accused's denial. However, where the sufficiency of the reasons is challenged on appeal, the outcome of the appeal must turn on whether there can be a meaningful appellate review of the trial proceedings: see *R. v. G.(L.)* (2006), 207 C.C.C. (3d) 353 at para. 14 (S.C.C.). …"

And later, at para. 53, he said:

> "… An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of conflicting credible evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence."

[39] Interestingly, a case decided by the British Columbia Court of Appeal, *R.* v. *Smeets*, 2002 BCCA 236, has a number of similarities to the within appeal. In that case, the accused Smeets was charged with impaired driving causing bodily harm and leaving the scene of an accident. The incident occurred near Pitt Meadows. One of the Crown witnesses, Beckworth, lived in the second floor loft of an apartment with his family. The suspect vehicle, a black Mustang convertible, was being driven on the wrong side of Harris Road and collided with two other vehicles. Beckworth heard sounds outside his window, looked out and saw the driver of the Mustang run across the road and around the side of Beckworth's building. He thought he recognized Smeets as the driver of the Mustang. He said that he personally knew Smeets, having dealt with him previously.

When Beckworth came downstairs and walked outside, he saw the driver of the Mustang being arrested. He then concluded positively that the person was Smeets.

[40] Smeets testified that he was not driving, but rather that the Mustang was being driven by a man named Healy, who was not called as a witness.

[41] The only other witness for the defence was one Murphy, who did not see the accident, but observed Healy driving the Mustang on Harris Road just prior to the accident.

[42] In attempting to reconcile the conflicting evidence, the trial judge referred to the evidence of the Crown witness, Beckworth, and said at para. 16 of his oral reason (unreported, June 7, 2000, X055817, BSCS):

> "I accept the evidence of Mr. Beckworth and I reject the evidence of Smeets where it conflicts with the evidence of Beckworth. Darren Healy was not called as a witness and I conclude that he was not found so he could not have been a witness at this trial. Even if Darren Healy was driving the vehicle on Dewdney Trunk Road I find he was not driving the vehicle on Harris Road and Lougheed Highway. I find the accused Smeets was driving and I find that beyond a reasonable doubt."

[43] Smeets appealed, questioning the adequacy of the trial judge's reasons. Southin J.A., delivering the judgment for the Court of Appeal, said at paras. 5 and 6:

> "… This was a classic case of conflicting evidence and the duty upon the judge was to assess the evidence and to decide whether he was satisfied beyond a reasonable doubt.
>
> In my view the learned judge's reasons meet the standard which the Supreme Court of Canada describes in R. v. Sheppard, [2002] S.C.J. No. 30, and in R. v. Braich, [2002] S.C.J. No. 29. There was nothing the matter with the way in which the learned judge conducted this trial or in his reasons for judgement."

[44] In my view, *Smeets* is instructive for the following reasons. There, the trial judge expressly rejected the evidence of the accused where it conflicted with the evidence of Beckworth. Similarly, Justice of the Peace Burgess expressly rejected the evidence of Martensson where it conflicted with the evidence of the two police officers. Further, in *Smeets*, the trial judge rejected the evidence of the defence witness, Murphy, who claimed Healy was driving the Mustang on Harris Road, without any expressed analysis of Murphy's testimony. Rather, to use the language from *J.J.R.D.*, cited above, the trial judge seems to have rejected Murphy's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of Beckworth's evidence. In the case at bar, the Justice of the Peace similarly rejected the accused's evidence without any expressed analysis of his testimony, but rather based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of the identification evidence of the police witnesses. Finally, this approach was apparently acceptable to the British Columbia Court of Appeal in *Smeets*, as meeting the standard in *Sheppard*.

The W.(D.) Principle

[45] As for the alleged failure of the Justice of the Peace to instruct himself on the *W.(D.)* test for deciding reasonable doubt, I note initially that *W.(D.)*, cited above, focussed on the type of charge that a trial judge may give to a jury on that point. At para. 28, Cory J, for the majority, said as follows:

> "Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused."

[46] Not only is the suggested instruction in *W.(D).* just that, a suggestion, it is obviously one which pertains to cases where the trial judge is sitting with a jury. Different considerations arise when the trial judge is sitting alone. In *R.* v. *Stamp*, 2007 ABCA 140, at para. 12, Berger J.A., delivering the judgment of the Alberta Court of Appeal, quoted with approval from Rosenberg J.A. in *R.* v. *Minuskin* (2003), 1 181 C.C.C. (3d) 542 at 550 (Ont. C.A.), who reviewed the model instruction to the jury in *R.* v. *W.(D.)* and stated:

> "It is important to stress that trial judges in a judge alone trial do not need to slavishly adhere to this formula. This suggested instruction was intended as assistance to a jury and a trial judge does not commit an error because he or she fails to use this precise form of words. Nor is the trial judge expected to approach the evidence in any particular chronology, for example, looking first at the accused's evidence and then at the rest of the evidence. <u>It should, however, be clear from an examination of the reasons that at the end of the day the trial judge has had regard for the basic principles underlying the W.(D) instruction</u>. ..." (emphasis already added)

[47] In a separate concurring judgment in *Stamp*, McFadyen J.A. quoted with approval from Cromwell J.A. in *R.* v. *D.S.C.,* 2004 NSCA 135, at para. 21:

> "... Failure to specifically refer to the *W.(D.)* principle is not fatal on its own in a judge alone trial. <u>The *W.(D.)* principle is not a magic incantation which trial judges acting as triers of fact must mouth to avoid appellate intervention.</u> The question for the appellate court in a judge alone case is whether, upon the consideration of the whole of the judge's

> decision and the evidence at trial, it appears that the judge did not apply the proper test and therefore did not apply his or her mind to the possibility that despite having rejected the evidence of the respondent, there might nevertheless be a reasonable doubt."(my emphasis)

Just prior to those comments, Cromwell J.A. said as follows, also at para. 21:

> "… A trial judge will be found to have erred if, upon review of the judge's reasons in light of the trial record, it appears that he or she simply chose between alternative versions offered by the Crown and the defence and, having done so, convicted if the Crown's version was preferred. …"

[48] In a judge alone trial, the general propositions put forward in *Sheppard*, are applicable, including the presumption that judges know the law with which they work.

[49] Interestingly, in *Sheppard*, Binnie J. noted that the majority of the Newfoundland Court of Appeal had found the absence of reasons from the trial judge prevented them from properly reviewing the correctness of the pathway taken by him in reaching his conclusion. At para. 65, Binnie J. stated:

> "Their problem, clearly, was their inability to assess whether the principles of *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 757, had been applied, namely, whether the trial judge had addressed his mind, as he was required to do, to the possibility that despite having rejected the evidence of the respondent, there might nevertheless, given the peculiar gaps in the Crown's evidence in this case, be a reasonable doubt as to the proof of guilt. The ultimate issue was not whether he believed Ms. Noseworthy or the respondent, or part or all of what they each had to say. The issue at the end of the trial was not credibility but reasonable doubt."

[50] In the case at bar, the reasons of the Justice of Peace, while deficient, do not prevent me, sitting as an appeal court, from assessing whether the principles of *W.(D.)* have been applied. In particular, I am satisfied that the Justice of the Peace addressed his mind to the possibility that, despite having implicitly rejected the evidence of the

appellant, there might nevertheless be a reasonable doubt as to the proof of his guilt. However, the remaining evidence of the Crown did not suffer from the “peculiar gaps” which troubled the Newfoundland Court of the Appeal in *Sheppard*. On the contrary, the identification evidence of both police constables was solid and strong. As noted by the Territorial prosecutor at trial, “This is not a case where the police jumped to the gun and had one single [sighting] of an individual and decided to lay a charge.” Rather, it was a case, where Constable Ristau claimed to have seen Mr. Crawford three times that morning, once, indisputably, at the intersection of the 4th Avenue and Main Street, and the other two times in the GMC Jimmy. Further, Constable Buxton-Carr was obviously cautious in his approach towards the identification, candidly conceding that he could not be certain that it was Mr. Crawford driving the GMC Jimmy on Hamilton Blvd. However, when he later saw the GMC Jimmy being driving towards him at 9:45 a.m., the vehicles passed each at a relatively slow rate of speed within a few feet of each other. Constable Buxton-Carr, who was previously quite familiar with Mr. Crawford, had no doubts about his identity at that time.

[51] I conclude that is what prompted the Justice of the Peace to find as a fact that the RCMP had “definitely, without issue, identified Mr. Crawford”. Not only was the Justice of the Peace not left in reasonable doubt by the evidence of the accused and his witnesses, he was further convinced beyond a reasonable doubt of the guilt of the accused based upon the remaining evidence which he obviously accepted – the identification evidence of the two police witnesses. Thus, upon consideration of the whole of the Justice of the Peace’s decision and the evidence and submissions at the trial, I am satisfied that he did not commit the error of proceeding directly from finding

the Crown witnesses credible to a finding that the allegations were proven beyond a reasonable doubt. Nor did he simply choose between the alternative versions offered by the Crown and defence. While his reasons could have been stated better, they do not indicate a failure to have regard for the basic principle in *W.(D.)*.

CONCLUSION

[52] In the result, while I find that the reasons of the Justice of the Peace were deficient, they have not prevented me from undertaking a meaningful appellate review of the rationale for his decision. The basis for the verdict is obvious on the face of the record, taking the reasons as a whole and in context. The appellant, in my view, cannot maintain that he does not know why the trial judge was left with no reasonable doubt.

[53] Accordingly, I dismiss the appeal.

GOWER J.