SUPREME COURT OF YUKON

Citation: *R. v. Sawrenko*, 2018 YKSC 35

Date: 20180725
S.C. No. 17-AP010
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND

NICHOLAS PAUL SAWRENKO

APPELLANT

Before: Mr. Justice L.F. Gower

Appearances:
Lauren Whyte — Counsel for the respondent
Vincent Larochelle — Counsel for the appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a summary conviction appeal. The appellant, Nicholas Paul Sawrenko, was tried on February 2 and June 29, 2017 and found guilty of operating a motor vehicle with a blood alcohol concentration over 80 milligrams percent, contrary to s. 253(1)(b) of the *Criminal Code*. The trial judge's reasons can be found at *R. v. Sawrenko*, 2017 YKTC 67.

[2] The Crown called two witnesses: Braden Lefler, a civilian who called 911 to report a motorhome being driven erratically; and Constable Derek Turner, the RCMP investigator who arrived on the scene and eventually arrested the appellant. The

defence called one witness, the appellant himself. The trial was relatively straightforward. The only issue was whether the appellant was the driver of the motorhome.

EVIDENCE

Mr. Lefler

[3] Mr. Lefler, who was 19 at the time of the trial, testified that he called 911 to make a complaint about a motorhome driving erratically on the Alaska Highway and within Whitehorse going down Two Mile Hill. Mr. Lefler was a passenger in his own vehicle and his girlfriend was driving. He testified that he and his girlfriend followed the motorhome on 4th and then 2nd Avenue, then left on Black Street, then right on Front Street, then right again on Wood Street. Mr. Lefler saw that the motorhome had parked near the 98 Hotel, on the north side of Wood Street and that there was a police vehicle "right beside" the motorhome. He said that he was "kind of a little late around the corner" of Front Street and Wood Street, and that the motorhome and the police vehicle "had been pulling in as we were taking that corner". Mr. Lefler did not see who was driving the motorhome. He testified that he was "in the area" of the 98 Hotel "like half a minute, maybe" and that he and his girlfriend drove away from the scene "as soon as the cops had pulled in". He did not see the police officer get out of the police vehicle.

Constable Turner

[4] Constable Turner testified that after receiving the call from the 911 dispatcher for a possible impaired driver, he followed directions by the radio, proceeding north towards the intersection of Front Street and Wood Street. Upon approaching the intersection he observed the motorhome turn west off Front Street onto Wood Street. Constable Turner

did not see who was driving the motorhome. When he arrived at the intersection he noticed another vehicle containing a young male and young female. Constable Turner testified that the young male was making hand gestures towards the direction of the motorhome. He said that he turned left onto Wood Street and observed the motorhome pull into a parking spot at the far end of Wood Street, right on the corner of Wood Street and 2nd Avenue. He activated his emergency equipment on his marked police vehicle and pulled in behind the motorhome, blocking it. Constable Turner testified that "there might have been a lag of five to 10 seconds" from the time he turned left onto Wood Street until pulling the police vehicle in behind the motorhome.

[5] Constable Turner testified that he approached the motorhome on the driver's side. He saw that the windows were open on that side of the vehicle, but he said that he "couldn't see what was going on [on] the other side". He said that he heard loud music coming from the cab of the motorhome, as well as female and male voices and laughing. Constable Turner testified that when he approached the driver's window of the motorhome he identified the driver as Mr. Sawrenko, as he knew him from previous dealings. He further recognized Bobby Netro in the front passenger seat, whom he also knew previously. Constable Turner testified that he had to identify himself "a number of times" to Mr. Sawrenko. He was not sure if Mr. Sawrenko had noticed him there or if he was ignoring him due to the noise of the music and the laughter of the passengers. When he finally got Mr. Sawrenko's attention, he informed him that he was being investigated for impaired driving. At that point, Constable Turner heard male and female voices coming from the back of the motorhome. He then noticed three individuals (he

was not sure of the exact number), as well as Mr. Netro, get out of the vehicle and go into the 98 Hotel.

[6] Constable Turner asked Mr. Sawrenko for his driver's licence and eventually formed grounds for making a breath sample demand and arresting him for impaired operation of a motor vehicle. He then placed Mr. Sawrenko in the police vehicle, took him to the detachment and obtained breath samples from him, which were both over 80 milligrams percent.

[7] Constable Turner made no mention of Mr. Netro, the music or any of the other passengers in his notes which were made at the time, or shortly thereafter. These details only emerged in his general report, which was prepared approximately one month later.

[8] Constable Turner was unable to remember if the motorhome was running when he approached the open driver's side window. He was also unable to remember where the keys were when he arrived, but he remembered the appellant having them in his hands at some point.

[9] Before the trial, Constable Turner received an affidavit sworn by Mr. Netro stating that he was the driver of the motorhome, but that he had not "had a chance" to get a statement from Mr. Netro or investigate that allegation. He disagreed with defence counsel at the trial that it was possible that Mr. Netro was the driver of the motorhome when it pulled up to park near the 98 Hotel.

The Appellant

[10] Mr. Sawrenko testified that that he had received some bad news about his health from his doctor earlier that day. He said he later picked up his friend, Bobby Netro, and

they subsequently drove to Fish Lake in the motorhome. Mr. Sawrenko testified that he drank about a quarter of a 26 ounce bottle of vodka, as well as another mickey, which he "just downed". He said that he became "pretty intoxicated", at which time he gave Mr. Netro the keys to the motorhome and that Mr. Netro drove the vehicle from that point on. Mr. Sawrenko testified that he and Mr. Netro picked up a male and female passenger from Fish Lake and gave them a ride into Whitehorse. On the way, the group stopped for a few minutes at the Kopper King gas station and convenience store. Mr. Sawrenko then stated that he blacked out on the way downtown due to his alcohol consumption. He remembered "coming to" at the 98 Hotel, when the door to the motorhome was slammed shut by someone getting out of the vehicle. At that point there was no one else in the motorhome and when he woke up he was somewhat disoriented. As he then attempted to leave the vehicle through the rear camper door on the passenger side, he was intercepted by Constable Turner and ultimately arrested.

VICS Recording

[11] The appellant's counsel (not the same counsel as at the trial) included this as a subheading in his statement of facts in the appellant's factum. He stated "the RCMP was unable to produce a VICS [video in car system] recording of the incident". He further submitted that this failure to produce lost or missing evidence is a serious matter affecting the fairness of the trial process.

[12] However, there is no evidence in the record that a VICS recording of the occurrence was ever made. Nor was the issue raised at trial or included within the grounds of appeal.

[13] Accordingly, other than mentioning it, I am ignoring this argument entirely.

ISSUES ON APPEAL

[14] The appellant's grounds of appeal are as follows:

1) That the trial judge erred in his interpretation and application of the rule in *Browne v. Dunn,* (1893), 6 R. 67 (H.L.));
2) That the trial judge erred by misapprehending the evidence;
3) That the trial judge erred by applying different standards of scrutiny when assessing the evidence of the appellant and that of Constable Turner; and
4) That the verdict of guilty was unreasonable.

ANALYSIS

1. The Rule in Browne v. Dunn

[15] This issue arises because defence counsel at trial (not the same as counsel on appeal) failed to cross-examine Constable Turner about Mr. Sawrenko's evidence that he was attempting to get out of the motorhome via the passenger side camper door, when Constable Turner confronted him. According to this evidence, Constable Turner never saw Mr. Sawrenko in the driver's seat of the motorhome. The trial judge concluded that this lack of cross-examination breached the rule in *Browne v. Dunn* and that that diminished the weight of the contradictory evidence led by the defence and negatively affected Mr. Sawrenko's credibility (para. 23).

[16] In *R. v. Poole*, 2015 BCCA 464, at para. 42, the British Columbia Court of Appeal adopted the description of the rule by Paciocco and Stuesser in their text, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015), at p. 472, referring to the description as "simple and accurate":

> A party who intends to impeach an opponent's witness must direct the witness's attention to that fact by appropriate questions during cross-examination. This is a matter of fairness to the witness. If the cross-examiner fails to do so, there is no fixed consequence; the effect depends upon the circumstances of each case. The court should first see if the witness can be recalled. If that is not possible or appropriate, the weight of the contradictory evidence or submission may be lessened, or such evidence may be rejected in favour of the testimony of the opponent's witness. (my emphasis)

The Court then went on to repeat that there "is no fixed consequence" for an infringement of the rule, stating, at para. 43:

> … A trial judge enjoys broad discretion in determining the appropriate consequence. The goal must always be to ensure that, notwithstanding the breach of the evidentiary principle, the trial is a fair one … (my emphasis)

[17] The Ontario Court of Appeal in *R. v. Quansah*, 2015 ONCA 237 ("*Quansah*"), similarly stated:

> [80] As a rule of fairness, the rule in *Browne v. Dunn* is not a fixed rule. The extent of its application lies within the sound discretion of the trial judge and depends on the circumstances of each case [citations omitted] … (my emphasis)

Further, because of the broad discretion afforded to a trial judge on this issue, any such decision "is entitled to considerable deference on appeal" (para. 90).

[18] Both counsel are agreed that there is an emerging consensus in the case law that the rule is not a fixed and inflexible one which is to be applied strictly. They further agree that not every piece of anticipated contradictory evidence must be put to a witness and that the rule is not to be applied mechanically.

[19] Rather, the argument of appellant's counsel here is threefold: (1) the rule did not apply at all; (2) if it did, it was never brought to either counsel's attention by the trial

judge; and/or (3) the trial judge ought to have offered defence counsel an opportunity to remedy the breach.

[20] The appellant's counsel argues that the rule had no application in this case because Constable Turner testified in chief that he saw Mr. Sawrenko in the driver's seat of the motorhome. Therefore, it would have been "futile" to ask him further questions regarding Mr. Sawrenko's anticipated evidence that he got out of the vehicle by the passenger side camper door, when he was intercepted by Constable Turner.

[21] I disagree. The identity of the driver was the only issue at trial. Consequently, Mr. Sawrenko's position in the vehicle when Constable Turner arrived was a pivotal piece of evidence. Indeed, a close inspection of the transcript reveals that when Constable Turner asked Mr. Sawrenko to get out of the motorhome, Constable Turner said that "He did so", and was led back to the police vehicle, but he did not specifically testify as to which door Mr. Sawrenko used to get out of the motorhome[1]. As the Ontario Court of Appeal stated in *Quansah*, cited above, compliance with the rule in *Browne v. Dunn* does not require that every scrap of evidence on which a party desires to contradict a witness for the opposite party be put to that witness cross-examination. However, the cross-examiner should at least confront the witness with "matters of substance" (paras. 81 and 89). In my view, the placement of Mr. Sawrenko in the motorhome when Constable Turner approached the vehicle was a matter of substance.

[22] The second prong of the argument by appellant's counsel here is that even if the rule is applicable, "it was never brought to either counsel's attention" and therefore the trial judge's reference to it in his reasons "amounts to an ambush by the trial judge".

[1] Transcript, February 2, 2017, p. 13.

However, no authority was provided in support of this rather impudent proposition. Further, as the second and third prongs of the appellant's argument here really dovetail, I will address them both more fully next.

[23] The third prong is that the trial judge ought to have offered defence counsel an opportunity to remedy the breach. Again, no authority was offered in support of this proposition. On the contrary, in *R. v. Giroux*, (2006), 210 O.A.C. 50, the Ontario Court of Appeal dealt with a similar situation where there were a number of instances in which significant aspects of the appellant's evidence were not put to the Crown's police officer witness for his version of the events. Accordingly, the trial judge told the jury that they "could ascribe less weight to the appellant's testimony" in regard to any matter about which the police officer was not given the opportunity to comment (para. 45). The appellant argued that this instruction was unnecessary because the officer could have been recalled by the Crown. The Court of Appeal dealt with this issue as follows:

> 48 The appellant argues further that the *Browne v. Dunn* instruction was unnecessary because Sgt. Nicholson was available to be recalled and the Crown could have done so in reply, but chose not to: see *R. v. McNeill* (2000), 144 C.C.C. (3d) 551 at 564 (Ont. C.A.). I am not persuaded that the recall of Sgt. Nicholson was a pre-condition to the giving of the *Browne v. Dunn* direction in the circumstances of this case, however. Neither counsel suggested that Sgt. Nicholson be brought back to deal with these points -- although he was available for either to do so -- and the trial judge was **not obliged** to recall him on her own initiative: *R. v. Paris, supra* at para. 18.
>
> 49 In the end, while it might have been preferable if the Crown had made a *Browne v. Dunn* objection to the accused's evidence at the time it was tendered, the trial judge is entitled to considerable deference in the manner in which she chose to deal with this issue. I am satisfied that the instruction she gave was appropriate in all the circumstances. (my emphasis)

[24] The British Columbia Court of Appeal came to a similar conclusion in *Poole*, where the trial judge had similarly exercised discretion in determining the appropriate consequence for a breach of the rule in *Browne v. Dunn*:

> 44 Frequently, trial fairness can be restored by re-calling witnesses. Here, the trial judge did not direct the re-calling of the police officers. Instead, he chose to treat the absence of cross-examination as a factor in assessing credibility. That was an option open to him, and is unobjectionable. (my emphasis)

[25] Further, it must be remembered that this was a trial that was taking an excessively long time to come to an end. The offence occurred on July 25, 2015. There had been two previous adjournments of the trial, one by each party, prior to the trial commencing on February 2, 2017. Even then, the trial could not be completed because of the unavailability of Mr. Netro as a proposed defence witness. Accordingly, the trial was adjourned further to June 29, 2017. Mr. Netro again failed to appear and Mr. Sawrenko was the only witness for the defence. Had the trial judge allowed the Crown, on his own motion, to recall Constable Turner, yet a further adjournment would have been necessary.

[26] These kinds of problems were addressed briefly by the Alberta Court of Appeal in *R. v. Werkman*, 2007 ABCA 130:

> 11 A trial judge who calls (or recalls) witnesses of his or her own motion creates a number of problems and complications, including fragmentation of the Crown's case and of each witness' evidence. [citations omitted] … Avoiding those problems has some weight. …
>
> 12 In any event, this remedy of lesser weight had little impact on the ultimate outcome, as the trial judge had other reasons not to believe Werkman's evidence on critical issues

> and when it conflicted with the two Crown witnesses' evidence. …

[27] The same can be said for the case at bar. The breach of the rule in *Browne v. Dunn* was not the only reason the trial judge rejected the appellant's testimony. Indeed, he stated several other reasons for doing so (paras. 15 to 20, and 24).

[28] In conclusion on this point, there was a legitimate basis for the trial judge to apply *Browne v. Dunn* in this case and, in these circumstances, there was no obligation on him to bring the breach of the rule to counsels' attention or to give either of them an opportunity to recall Constable Turner. Accordingly, the trial judge committed no error here.

2. Misapprehension of the Evidence

[29] A misapprehension of the evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence: *R. v. Morrissey*, (1995), 80 O.A.C. 161, at para. 83.

[30] That said, a trial judge's findings of fact and factual inferences are entitled to considerable deference. Appellate courts should not interfere with them absent a palpable and overriding error. In other words, the error must be plain to see. This was recently confirmed by the British Columbia Court of Appeal in *R. v. Fan*, 2017 BCCA 99 ("*Fan*"):

> *Standard of Review*
>
> 47 A trial judge's findings of fact and factual inferences are entitled to considerable deference. An appellate court may not interfere with such findings and inferences unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable. In addition, the error must be plain to see and it must have affected the result to justify appellate interference. In other words, a trial judge's factual findings

> and factual inferences must be respected by an appellate court, absent a palpable and overriding error …

[31] The appellant's counsel submits that the trial judge misapprehended the following evidence:

1) Whether the appellant's medication interfered with his memory;
2) The level of the appellant's state of intoxication;
3) That it would have been illogical for the appellant to use the back camper door;
4) That Constable Turner could not have known that Mr. Netro was present on the appellant's version of events; and
5) That Constable Turner's evidence was consistent with Mr. Lefler's evidence.

Impact of medication on memory

[32] Like the respondent Crown counsel on this appeal, I too have difficulty understanding the basis for the appellant's argument on this point. It arises from the following exchange between Crown counsel and the appellant during cross-examination:

> Q So you weren't at your best for remembering because you'd had a lot to drink.
> A Yes.
> Q And how about the medications you were taking at the time? Do they have an impact on your memory?
> A No. It has an impact when I drink because I do painkillers for my shoulder and my side and my back that I broke years ago. It's acting up. Real painful. And I was taking Ativan that you put underneath your tongue.
> Q So those things, though, when you drink with those medications, they can play — you know, it makes you — harder for you to remember it. It impacts your memory.
> A No, the — it doesn't impact my memory.
> Q I thought you just said that it does when you drink.
> A When I drink — oh, yeah, when I — okay, yeah, when I drink.
> Q Right.
> A Yeah.

> Q Yeah. And you'd been drinking that day.
> A Yeah. Just that day. I remember half the trip coming back.[2] (my emphasis)

[33] Based on this exchange, the trial judge held that the appellant "admitted that the medication he was taking, when combined with alcohol, impacts his memory" (para. 16). The appellant's counsel submitted that this interpretation is not only "wrong, it is "troubling", because the emphasized question and answer in the passage "is ambiguous, and insufficient to allow the trial judge's conclusion". I disagree.

[34] Rather, I agree with the respondent's counsel (not the same as trial counsel for the Crown) that any ambiguity in Mr. Sawrenko's evidence was resolved when he agreed with Crown counsel's emphasized question, and the trial judge was entitled to rely on this answer. There was nothing improper or unfair in Crown counsel's questions. On the contrary, the questions were entirely appropriate, as they gave Mr. Sawrenko multiple opportunities to clarify his evidence.

Level of appellant's intoxication

[35] The trial judge held that the appellant had a "self-proclaimed level of extreme intoxication" (para. 19). The appellant's counsel submits that this is unsupported by the evidence.

[36] The appellant also admitted to being in a "blackout stage" for part of the journey from Fish Lake to Whitehorse. His counsel on appeal argued that blackouts are not necessarily associated with extreme states of intoxication. No expert evidence was provided on this point and the only authority put forward supporting the submission is a passage from *R. v. Kodwat*, 2017 YKTC 66:

[2] Transcript, June 29, 2017, p. 9.

> 47 In this case, the complainant has memory loss. The expert, Ms. Dagenais, produced in Exhibit 3 comments which touched on memory loss. She distinguishes between fragmentary memory loss, which may be due to moderate to heavy intoxication, and blackouts. With the former, fragmentary memory loss, significant events or, as she described it, intensely experienced events are later recalled while less memorable events are not. With blackouts, nothing is recalled, whether significant or not. Blackouts can be associated with binge drinking, with high blood alcohol in excess of 200 milligrams per cent, or with a prior history of blackouts, which is what A.G. told us she has. A blackout is simply lost time, the memory of which is never recovered. (my emphasis)

I fail to see how this passage supports the appellant's argument on the point, particularly in the context of the other evidence from Mr. Sawrenko at the trial:

> A I went up there to fish, and after the doctor said that I was going to die, I said, "Well, I might as well just go out good", so I drank about this much out of a 26er and a mickey. I just downed it. And with the medication I was on, I got pretty intoxicated …
>
> …
>
> Q And why weren't you driving?
> A Because I was drunk.
>
> …
>
> A Well, I don't know if I woke up or if I came to because when I left Fish Lake I was intoxicated.
>
> …
>
> A …
> Oh, no, I remember everything 'cause — but not coming back from Fish Lake because I was intoxicated.
> Q Okay.
> A You know, like I was in a blackout stage, more like. And I remember them other two people jumping in.
> Q So you weren't at your best for remembering because you'd had a lot to drink.
> A Yes.[3]

[3] Respondent's Outline of Argument and Authorities, filed April 3, 2018, p. 7.

…

Q Because looking at Constable Turner's report, that's — that's what it says here, that you told him that you had four or five beers.

A No. I told him exactly what I drank, and I told him why. I told him I had maybe a quarter bottle out of a 26er and a mickey I just downed because of the news I got. But my doctor didn't explain anything to me.[4]

[37] Given the entire tenor of this testimony regarding the amount of alcohol Mr. Sawrenko drank, the speed at which he drank it and that he blacked out due to his level of intoxication, I do not accept that the trial judge misapprehended the evidence in concluding that the appellant admitted to a "level of extreme intoxication".

Appellant's use of the camper door was illogical

[38] The trial judge held that it was illogical for the appellant to have attempted to use the camper door to get out of his motorhome when he awoke in front of the 98 Hotel, because of the difficulty he normally encountered in opening that particular door (para. 20).

[39] The appellant's counsel submits that this finding is unsupported by the evidence and is highly speculative. He further submits that the appellant "did not have trouble opening the door on this occasion" and also that there is no evidence "that it was normally difficult to use". These submissions are simply incorrect. When Mr. Sawrenko was cross-examined by Crown counsel about opening the door after he woke up, he testified as follows:

A ... But when I'm sober, yes, I just — I wake up and after I have my coffee, I go up there and I tinker around the door because it — I have a lot of problems opening it from the inside. And then you gotta click it because you gotta click it in, click it up and push it over.

[4] Transcript, June 29, 2017, p. 10.

Q But —
A It's kind of a complicated thing.

…

Q So you kind of took your time to get to the side door.
A Yeah. I was there for a little while.

…

Q So where did you go after you couldn't get out the side door?
A Well, the door was opened by Constable Turner.
Q Which door?
A The side door.[5]

[40] The entire tenor of this evidence is that Mr. Sawrenko was having "a lot of problems" opening that camper door and that it was taking him some time to fiddle with it to get it open before he claimed it was opened by Constable Turner. As a result, it cannot be said that the finding of the trial judge that it was illogical for him to use that door is unsupported and highly speculative.

Mr. Netro's presence

[41] This issue arises because the trial judge concluded that if the appellant's evidence was to be believed that "everyone was gone" from the motorhome when he woke up[6], then Constable Turner would not have had any reason to know that Bobby Netro had been present in the passenger seat (para. 24). The appellant's counsel submits that the trial judge was engaging in "significant speculation" here. He argued that, according to Mr. Sawrenko's evidence, he was woken by someone slamming a door to the motorhome. Counsel submits that this "could have been Mr. Netro" and

[5] Transcript, June 29, 2017, p. 8.
[6] Transcript, June 29, 2017, p. 7.

therefore Constable Turner "could have seen Mr. Netro leave the RV as he approached" it. In my view, these suppositions are entirely speculative.

[42] The evidence of Constable Turner and Mr. Sawrenko here was completely contradictory. Constable Turner was entirely clear about seeing Mr. Netro in the passenger seat, and it was open to the judge to accept that evidence.

[43] Moreover, Constable Turner said that when he pulled up behind the motorhome, he was focused on the open driver's side window, and not on the passenger side of the motorhome. That makes perfect sense, because the first thing that Constable Turner logically would have been concerned about would have been who the driver of the vehicle was. There would have no reason for him to have been concerned with what was going on in the passenger side of the vehicle. Further, Constable Turner's view of what was going on in the passenger side of the vehicle would have been almost entirely obstructed by the motorhome itself. Finally, if Constable Turner had seen Mr. Netro outside the motorhome on the passenger side, as he was approaching the scene in his police vehicle, as the appellant's counsel suggests, it makes no sense to me why he would lie about placing Mr. Netro in the passenger seat in the cab of the motorhome. If, as the appellant's counsel also suggests, Constable Turner's evidence was almost entirely fabricated in order to wrongfully convict Mr. Sawrenko of driving over .08, Constable Turner would have gained no advantage by lying about Mr. Netro being in the passenger seat.

[44] Accordingly, I conclude that the trial judge's finding here is not just supported by the evidence, but also by common sense.

The evidence of Constable Turner and Mr. Lefler

[45] The trial judge found that the timing of the events, as described by Constable Turner, was "consistent" with the evidence of Mr. Lefler (para. 40)[7]. He concluded by stating:

> … By the time the vehicle in which Mr. [Lefler] was a passenger was fully turned onto Wood Street, the police vehicle had reached the motorhome. (para. 40)

[46] The appellant's counsel submits that the trial judge misapprehended the evidence here because the "police had not arrived yet by the time Mr. Lefler arrived". Once again, this submission is simply incorrect and does not accord with the evidence. Rather, the evidence was that, as Constable Turner was approaching the intersection of Wood Street and Front Street, he observed a vehicle with a young man and woman in it and the young man was making hand gestures westward towards the location of the motorhome. I infer that this had to be Mr. Lefler's vehicle. Constable Turner then said that he took about 5 or 10 seconds after turning west on Wood Street to catch up with the motorhome and pull in behind it with the police vehicle. At this time, Mr. Lefler's vehicle was also in the process of turning westward on Wood Street, but he said that he was "a little late around the corner", so he did not actually see the motorhome park. By the time he passed by the scene, Mr. Lefler said that the police vehicle was "right beside them there". Clearly, it was open to the trial judge to find that Constable Turner had already pulled in behind the motorhome by the time Mr. Lefler drove past the scene.

[7] Admittedly, the trial judge incorrectly referred to the witness as Mr. Lester, but this minor error is of no consequence.

[47] The appellant's counsel further submitted that Mr. Lefler had testified "that 30 seconds elapsed" between when he saw the parked motorhome and when he saw the police vehicle approach it. He also submitted that Constable Turner would have taken an additional amount of time to park and physically approach the motorhome. Therefore, the total time involved would have been around 45 seconds to 1 minute. This, said counsel, was a significant contradiction with Constable Turner's evidence that after he turned the corner westward onto Wood Street it took him 5 to 10 seconds to pull up and parked behind the motorhome.

[48] It is important to note that this interpretation of the evidence was never argued before the trial judge. Furthermore, it is simply incorrect. What Mr. Lefler said in his testimony was that he was "in the area of the 98" for "like half a minute, maybe". It is also clear from what I just said that the evidence shows that Constable Turner preceded Mr. Lefler's vehicle westward on Wood Street and that Mr. Lefler was "a little late" around that corner. Mr. Lefler further testified: "They had been pulling in as we were taking that corner"[8]. Therefore, it is entirely conceivable that it only took Constable Turner 5 or 10 seconds from the corner of Wood and Front Streets to catch up with the motorhome, whereas it took Mr. Lefler about 30 seconds, plus or minus, from when he first approached that intersection, which is "in the area of the 98", turned the corner westward after a little delay, and then passed by the police vehicle parked right behind the motorhome. Thus, there is no inconsistency on the face of the record, and certainly not one that is "plain to see": *Fan*, cited above, at para. 47.

[8] Transcript, February 2, 2017, p. 8.

[49] Accordingly, I remain unpersuaded that the trial judge misapprehended the evidence here.

3. Differing Standards of Scrutiny

[50] The appellant's counsel submits here that "[o]n the face of the reasons" the trial judge went to great lengths to excuse the improbable and inconsistent aspects of Constable Turner's testimony, while applying a substantially more exacting standard with respect to the evidence of the appellant. Both counsel are agreed that one of the leading authorities on differing standards of scrutiny is *R. v. Howe*, (2005), 192 C.C.C. (3d) 480. At para. 59 of that case, the Ontario Court of Appeal stated:

> This argument or some variation on it is common on appeals from conviction in judge alone trials where the evidence pits the word of the complainant against the denial of the accused and the result turns on the trial judge's credibility assessments. This is a difficult argument to make successfully. It is not enough to show that a different trial judge could have reached a different credibility assessment, or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused, or that he failed to expressly set out legal principles relevant to that credibility assessment. To succeed in this kind of argument, the appellant must point to something in the reasons of the trial judge or perhaps elsewhere in the record that make it clear that the trial judge had applied different standards in assessing the evidence of the appellant and the complainant. (my emphasis)

[51] This quotation was applied by the Manitoba Court of Appeal in *R v. Glays*, 2015 MBCA 76 ("*Glays*"). Immediately after quoting *Howe,* the Court of Appeal continued:

> 16 This case is one wherein, as the judge correctly noted, credibility is the core issue. In dealing with cases of this kind, the trial judge is required to closely consider and review the testimony given by the witnesses. That exercise includes not only the evidence given, but his/her observation of the conduct and demeanor of the witnesses as they testify.

> Thus, the trial judge is in a much preferred position to that of appellate judges in making credibility findings. For this reason, demeanor conclusions are virtually unassailable on appellate review, and deference is owed to trial judges in respect of findings of fact, **even more so findings of credibility**, and the drawing of inferences based thereon. (my emphasis)

[52] It is not sufficient for the appellant's counsel to have simply based this proposition "on the face of the reasons". Not having provided any examples or pointing to anything in the reasons for judgment or the record is fatal to the argument

4. Unreasonable Verdict

[53] The appellant's counsel has argued this ground of appeal as a kind of a 'catchall' based on the previous grounds. He firstly relies primarily on having established that the trial judge misapprehended the evidence, applied unequal scrutiny to the evidence of Constable Turner and that of the appellant, and incorrectly concluded that Constable Turner's evidence was consistent with that of Mr. Lefler regarding the timing of events. As I have already ruled against the appellant on all three of these points, this part of the argument has no force.

[54] Secondly, the appellant's counsel urged me to find that the appellant testified in a straightforward and credible manner, and was honest about his intoxication and his lack of perfect recall. However, it is trite to say that trial judges are in the best position to assess the credibility of witnesses and that appeal courts should not attempt to usurp this role: see *Glays*, cited above.

[55] Lastly, the appellant's counsel made the following submission:

> In a properly functioning criminal justice system, which does not assume that police officers are always credible and reliable, which gives the benefit of reasonable doubt to an accused, and which turns a blind eye to previous criminal

> convictions, there is simply no reason why the appellant's evidence could not be believed….

[56] The obvious implication here is that the trial judge was biased in favour of the police officer, did not give the benefit of reasonable doubt to Mr. Sawrenko, and relied on Mr. Sawrenko's criminal record in assessing his credibility. And yet the appellant's counsel has pointed to nothing in the transcript or in the trial judge's reasons for judgment to substantiate these claims. As a result, they are borderline contemptuous and I disregard them in their entirety.

CONCLUSION

[57] The appeal is dismissed.

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GOWER J.