

THE MATTER OF CONSTABLE Kirk BATSON # 1772
OF THE OTTAWA POLICE SERVICE

APPEARANCES:

Mr. W. Mark Wallace for Constable Kirk BATSON #1772

Ms. Christiane Huneault for the Ottawa Police Service

Hearing Officer:

Deputy Chief Jill Skinner # 744 Ottawa Police Service

Constable Kirk BATSON badge # 1772

It is alleged that you committed the following act of misconduct contrary to the *Police Services Act, R.S.O. 1990 c. P. 15*, as amended:

Count 1- Unlawful or Unnecessary Exercise of Authority:

You are alleged to have committed Unnecessary Exercise of Authority, in that you did use unnecessary force against W S , while in the execution of duty, thereby constituting an offence against discipline as prescribed in section 2 (1) (g) (ii) of the prescribed Code of Conduct, Ontario Regulation 268/10 as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

Count 2- Unlawful or Unnecessary Exercise of Authority:

You are alleged to have committed Unnecessary Exercise of Authority, in that you did unlawfully arrest W S , without good and sufficient cause thereby constituting an offence against discipline as prescribed in section 2 (1) (g) (i) of the prescribed Code of Conduct, Ontario Regulation 268/10 as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

Disposition

I wanted to say at the outset there have been many challenges in expediting this hearing and want to thank all involved parties for their patience and willingness to work through them to ensure that a fair and complete hearing of the evidence was achieved. I wanted to especially thank Mr. Mike Balabuch, the Interpreter who translated for this hearing to ensure everyone clearly understood the evidence and the proceedings.

It is my intention to summarize the evidence provided by the witnesses in this hearing in as succinct a manner as possible while providing a thorough rationale for each of my decisions.

Five witnesses testified in this hearing over a number of days and each provided their version of the events as they perceived them to have occurred. While witnesses are not expected to provide identical versions of events, in fact if they are identical then questions of collusion might arise there should be consistency on the essential aspects. As stated in *Carmichael and Ontario Provincial Police (21 May, 1998, O.C.C.P.S.)* the burden of proof in this case is that of “clear and convincing” evidence. There must be weighty, cogent and reliable evidence upon

which a trier of fact, acting with care and caution, can come to a reasonable conclusion that the officer is guilty of misconduct.”

Counsel have provided case law which I have employed in my assessment of the witnesses’ credibility, notably what is described as the *O’Halloran test* from *Faryna v Chorny*, (1952) 2 D.L.R. 354 (B.C.C.A.) I will only provide a portion of the text but want to indicate it has served as a guide throughout my decision-making.

In the case of *Faryna vs. Chorny*, (1952) 2 D.L.R. 354 (B.C.C.A.) Justice O’Halloran stated:

“If a trial Judge’s finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.

On reflection it becomes axiomatic that the appearance of telling the truth is but one of the elements that enters into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors is combined to produce what is called credibility...

A witness by his manner may create a very unfavourable impression of his truthfulness upon the Trial Judge, and yet the surrounding circumstances in the case, may point sizably to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie”.

And it continues to

“The trial judge ought to go further and say that the evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reason for that conclusion.”

I will begin with the original complaint of a motorcycle pulling a boy on a skateboard as it provides the reason the officers initially attended the residence of the Public Complainant, Mr S . I will then discuss the officers’ arrival at the house leading to the incident on the rooftop and include in that the initial application of the use of force. I will provide an analysis of the use of force and detention which will lead to my final determination of culpability and my reasoning.

I will say from the outset that I agree with the submissions of both the Prosecutor, Mme Huneault and Constable Batson’s Counsel, Mr Wallace that there were numerous areas in Mr S evidence that were either untruthful or intentional attempts to mislead this hearing; the officers on the day of the incident, and subsequently Sergeant Pat Murphy, the Ottawa Police Professional Standards investigator. That being said my role is also to determine whether based on the evidence presented an unlawful arrest occurred and if it did whether the level of force used was appropriate given the circumstances.

Complaint of Motorcycle Pulling Boy on Skateboard

The first aspect of my analysis will be the driving incident. I will discuss the evidence of Mr J P who lives in the area of where the driving infraction took place. He has no connection with anyone else in this incident and he felt there was sufficient danger to the boy being pulled on a skateboard by a motorcycle to call out to the driver to stop and then make a call to the Ottawa Police Service for follow-up. Based on all of the evidence I have heard, I am confident the male driving the motorcycle that day was Mr. S . It is noteworthy that

Mr. S denied having pulled the boy throughout his interactions with the officers on that day in November, 2010 and until Sgt. Murphy indicated that Mr. S son had admitted to being pulled he continued to deny his involvement during that follow-up investigation. During this hearing, Mr. S minimized his inappropriate driving behaviour and continued to deny being aware of being confronted by the independent witness, Mr. P .

While Mr. S involvement in this dangerous activity does not speak to any culpability for the later interactions his testimony about those events does speak to his credibility and his willingness to manipulate the truth to protect himself from any perception of not abiding by the law.

Officers' Arrive at Mr. S Residence

Both Constables Bonita Grozelle & Kirk Batson indicated they arrived at the residence in order to follow-up the original traffic complaint about 5:25 to 5:30 p.m. on November 9th, 2010, with Cst. Grozelle arriving slightly ahead of Cst. Batson. Both officers indicated they were driving fully marked police cruisers, were in full police uniform and that it was dark outside. The officers noted the house was in darkness and there was a tarp covering a motorcycle.

Mr. S said he saw the police cruisers outside his residence and that it was unusual to see a police car on his street. Mr. S said he did not approach the officers as he said he did not believe they were there to speak to him.

Mr. S indicated that he wanted to clean leaves from his roof so made his way from the front of his house to the rear, up onto the roof where he was raking and cleaning leaves by dropping them off the roof, when he was confronted by Cst. Batson after about 20 minutes. Both officers indicated their police radios were transmitting as they walked to the rear

yard and neither saw any leaves being thrown from the roof. Mr. S indicated he had heard “walkie-talkies” but was unsure of the source.

Cst. Grozelle indicated just prior to Cst. Batson’s arrival at the residence she noticed a figure move quickly (she also described as “stealthily”) from the door of the residence to the rear of the completely unlit house. Her observation of the figure was limited inasmuch as she could not say whether it was a man or a woman. She said she had turned on the cruiser’s alley light on the lane but the figure did not respond and was already gone from view, nor did she call out. Cst. Batson testified Cst. Grozelle had told him she had seen the person exit the front door of the residence.

Mr. S provided varying versions of evidence relative to the degree of light that evening. I noted that even during his submission he indicated it was “still bright outside”. While this seems a minor point it also speaks to his credibility, as no typical person would attempt to clean leaves from a multi-level rooftop in the dark, so I am satisfied that Mr. S wanted this hearing to believe it was light when he went onto the roof and when Cst. Batson first got onto the roof. Mr. S testified that Cst. Grozelle should have been able to see him as he moved slowly and it was light outside. It is my conclusion that at about 5:30 pm on an early November evening it would have been dark outside.

Cst. Batson said while accompanied by Cst. Grozelle he had knocked at the front door. He indicated that he did not notice any signs of forced entry on the door. Cst. Grozelle could not recall whether they went to the front door.

Both officers indicated they then went to the rear of the house to investigate what they now deemed to be suspicious activity. Cst. Batson also added that there was a possibility that the

motorcycle owner might be around back since the motorcycle was parked out front and a person had been seen leaving the front of the house.

The prosecution submitted that there was insufficient evidence to justify these officers proceeding to the back yard to investigate the traffic complaint or a suspicious person. It is noteworthy that each of these points when taken in isolation and from our perspective of hindsight give us a 20/20 perspective. These officers did not have that luxury and were compiling and assessing the information in real-time without all of the information now available to us. For all these officers knew the figure seen by Cst. Grozelle might have been the motorcycle owner going to the rear yard. I disagree with the prosecution's submission and based on my hearing and assessing the officers' evidence it is my belief that the officers acted as we would expect. That expectation is that they would try to locate the figure that had been seen leaving the darkened house, identify him as the motorcycle owner, speak to him and close the traffic complaint.

Upon entering the backyard and using flashlights to make their way they noted a window leaning against the wall and an aluminum ladder propped up to the first level of the roof. The prosecution indicated that the window was different from those in the residence but Cst. Batson testified he did not have time to make any assessment of that prior to noting the person on the rooftop. Cst. Batson indicated he also noted a second ladder to the second level of the roof.

The officers testified these factors caused their suspicion to elevate and taken in concert with the lack of interaction by the figure observed at the front of the residence by Cst. Grozelle, they continued to check for any person. Both officers testified they were at a minimum investigating a suspicious person but it might be a break and enter in progress and they indicated they did have this conversation as they walked. Upon seeing the ladders, Cst. Batson said he panned his flashlight on the roof and saw a male peering from the residence's rooftop. Cst.

Batson said he directed Cst. Grozelle to go to the front of the house in the event the person apparently hiding on the roof tried to evade them.

Mr. S testified that when he was working on the roof he was continuously throwing leaves from the roof onto the ground in the rear yard. The officers said they did not see any leaves being thrown. Additionally based on Cst. Grozelle willingness to cover the front of the house in response to Cst. Batson having seen someone on the roof; it is my conclusion that she believed she was involved in a suspicious person call and was not aware of someone cleaning leaves from the roof. It is my conclusion that Mr. S was hiding from the police on the roof and not cleaning leaves.

Cst. Batson testified that he did not communicate that he was the police and instead climbed the ladder. He said that while it was an option for him to call out he was still in the position that he was not sure what he was dealing with on the rooftop with the male apparently hiding near the second ladder and so indicated he decided to go onto the roof to investigate the situation. Based on an officer facing this combination of facts, it would be expected that an officer would continue to investigate the situation, although climbing to the roof alone might not be the most prudent step an officer could take.

Cst. Batson testified he heard scurrying or movement sounds and when asked by the prosecutor if it could have been the sound of raking, he dismissed that possibility as not the same sound and that he never saw a rake during the incident. Mr. S indicated once it began to get dark and after hearing what might have been walkie-talkies he threw the rake into the rear yard. Neither officer mentioned having seen or heard a rake being thrown near them.

Mr. S indicated that he was taken by surprise and was shocked by Cst. Batson's appearance on the roof as Cst. Batson had climbed the aluminum ladder quietly. This

despite Cst. Batson being described as about 240 lbs by Cst. Grozelle and about 200 kilograms by Mr. S and the aluminum ladder being climbed was leaning against the eaves trough of the house. I do not believe Mr. S on this point as it would be virtually impossible for a person the size of Cst. Batson to quietly climb a full-sized aluminum ladder that was leaning against eaves trough.

Mr. S indicated he spoke briefly to the person purporting to be an officer and demanded identification from Cst. Batson. Cst. Batson showed his uniform and said he was with the Ottawa Police. Cst. Batson testified that at that point in the event he knew that the male on the roof would be able to see the two police cruisers parked out front of the residence and indicated a reasonable person would not assume he was an impostor. Mr. S also gave evidence that the street was visible from that vantage point.

Mr. S was not satisfied with Cst. Batson's response and said the uniform could be purchased on the internet. Cst. Batson demanded to know who the male was but in response the male said "I'm the homeowner". The prosecution suggested that this particular response could have been caused by a language barrier since English is not Mr. S first language. Mme Huneault also indicated that Cst. Batson should have surmised that since the traffic complaint that led the officers to the residence indicated a male of about the same age as the one standing before him, that Cst. Batson should have been satisfied. Cst. Batson testified the original complaint merely said "older male" which could have many interpretations. I disagree with the prosecution that Cst. Batson should have concluded that the registered owner of the motorcycle was also the "homeowner". I also do not agree with the prosecution's suggestion that because the person in front of Cst. Batson was about the same age as the registered owner of the motorcycle that he was also the "homeowner". Based on this collection of facts, as known by the officers at the time of this event it is my finding that an reasonable police officer would be

suspicious and continue to investigate to satisfy the concern that this was a person who did not belong on the property.

Additionally, as the defence submitted, if an officer were to have accepted that all three of these entities were the same person at face value and cleared the scene without investigating, but later found that a crime had occurred the officer could be subject to a neglect of duty investigation. Police officers have a common law duty to protect life and property and Csts. Batson and Grozelle had a duty to confirm that the male seen was justified to be on the property given the circumstances as presented to the officers.

Analysis of the Detention

Mr. S testified he was asked “Who are you?” and “What are you doing here?” at which point he turned his back on Cst. Batson. He testified that it was at this point that he felt a heavy weight on his back and he fell onto his face. This is in contrast to the written complaint he sent to the Office of the Independent Police Review Director (OIPRD) dated 11/09/2010 entered as Exhibit # 5, Tab 1. This document indicates that it was completed by Mr. S with help from his partner. In this document he indicated “I asked what he was doing on my property and then he grabbed my arm and forced me face down onto the roof.”

Cst. Batson testified there was a short verbal interaction that did not seem to be resolving the identity of the male, nor was it leading to a viable reason for the male being on the roof in the dark which led to the officers’ suspicion. Cst. Batson testified that when the situation did not seem to be being resolved he suggested to Mr. S that they go down onto the ground to discuss where it was safe. Cst. Batson stated that Mr. S put his hands on his chest and said “No, you get off the roof”. Cst. Batson said he brushed Mr. S hands away and a short struggle occurred. It was at this point that Cst. Batson said he feared for his safety

and decided to control Mr. S by grounding him (onto the roof) and Mr.

S fell to his knees.

Cst. Grozelle indicated when she heard Cst. Batson shouting and issuing a police challenge to “show me your hands” she ran to the backyard and climbed the ladder. She indicated that as she got to the roof she saw Cst. Batson was struggling with the male and Mr. S was on his knees.

It is my conclusion that based on the corroborative aspects of Cst. Grozelle’s evidence with Cst. Batson’s, as it relates to positioning of the two on the roof and the police challenge which drew her back into the rear yard, coupled with Mr. S having provided a similar version in his written OIPRD complaint that Cst. Batson’s version of event on how the two came to be down on the roof, is closer to the truth. The foundation of that conclusion is Cst. Grozelle saying she heard the police challenge so she had climbed onto the roof and that she saw Mr. S on his knees rather than prone as he would have been if Mr. S evidence of being tackled from behind were to be accepted. Cst Grozelle also testified that she participated in a short struggle and admitted that she dragged Mr. S hand on the roof to get the handcuffs on. I find it improbable that Mr. S would turn his back on someone who he did not believe was a police officer. Based on the similar details about the challenging dialogue between Cst. Batson and Mr. S , from their respective evidence I also do not believe that Cst. Batson, without provocation, tackled Mr. S from behind while on a rooftop. I also noted that Mr. S indicated in his written complaint “I should mention that all of this was occurring on a slanted roof, close to the edge, which made me even more fearful for my safety.” Both officers testified in a forthright manner to their fear that someone could get hurt if they did not control the situation and I have concluded that they honestly held that fear and so took steps to control Mr. S .

I have also concluded that these officers held the belief at the time of the incident that there was a suspicious person on the rooftop and this story was not concocted later. I base my conclusion on the facts that both officers gave this as evidence and Mr. S testified that once the situation had calmed down that Cst. Grozelle had told him the officers thought he was a thief.

The prosecution indicated that Cst. Batson had written in his compelled statement to Professional Standards Section (PSS) that Mr. S had been arrested but in his evidence, his duty book notes and Investigative Action report, he had not. Upon cross-examination Cst. Batson admitted he had made an error twice in using ‘arrest’. Cst. Batson was asked why he had not approached Sgt Murphy after he became aware of his erroneous use of ‘arrest’. He admitted he thought of it but felt Sgt. Murphy would assume he was backtracking. I also heard that Cst. Batson was not interviewed by Sgt. Murphy so did not have that opportunity to correct this error in that forum. I have noted that Cst. Batson did not use the word “arrest” in his notes nor did he make notation of a time that he had provided Mr. S his rights to counsel which is normal police procedure subsequent to arrest. While Cst. Batson did not proactively correct this inappropriate use of terminology from his response to PSS, either at the outset of his evidence or as the PSS investigation continued with Sgt. Murphy; he did admit to the prosecutor that he had made that error twice in his compelled statement. His evidence on this point was adamant and appeared truthful.

The prosecution and defence have identified the *Mann* case as being pertinent to the discussion of “investigative detention”, particularly Paragraph 34 and 35. I have reviewed that case and after having examined the evidence in its entirety, it is my conclusion that there were sufficiently reasonable grounds to believe that a criminal offence may have been committed. As stated earlier, both officers testified to this belief and Mr. S testified that Cst.

Grozelle had articulated their belief to him. Cst. Batson was still in the process of conducting this investigation when the interaction deteriorated into a physical altercation where Cst. Batson feared for his safety due to it unfolding on the rooftop. In order that he could ensure all involved parties' safety he tried to control Mr. S by handcuffing him. I find this to be a reasonable and prudent step. I also noted that once the situation had calmed down the handcuffs were removed. Based on all of this information I have concluded that no arrest occurred and therefore find no grounds to proceed further with Count #2, Unnecessary Exercise of Authority, related to an unlawfully arrest of Mr. W S .

Analysis of Use of Force

Basing my analysis on the finding that I have just made, that Mr. S was taken to the ground (the roof) to control and ensure all parties' safety, I will proceed to analyze the use of force applied in this situation. The evidence that has been presented indicates that a struggle occurred where Cst. Batson and Mr. S went to the ground (roof) whereupon Cst. Batson tried to gain control. Both parties indicate Mr. S hands were under his body. I have no evidence to suggest any physical strikes were administered although Cst. Batson did testify that he may have had his knee on Mr. S . Mr. S written complaint indicated that Cst. Batson was kneeling on the back of his neck and chest and continued to do so after he had been handcuffed. Mr. S testified that he felt metal handcuffs shoved inside his mouth as a result of which he said he had a "very sharp angle on his tooth". Both parties indicated there was more struggling with Cst. Batson trying to get Mr. S hands free so they could be handcuffed although Mr. S testified he was merely trying to locate his eye glasses which had fallen off during the event. The fact that Cst. Batson could not place handcuffs on Mr. S due to this behaviour made him non-compliant. Cst. Batson testified and I agree that the use of an officer's knee and body weight

to control a subject is part of police procedures in handcuffing a non-compliant subject. I did note there was no evidence tendered by any counsel that any knee strikes occurred.

Once Cst. Grozelle enters the struggle she testified that she pulled on Mr. S hand to get it free and admitted that she had scraped his hand on the shingles in so doing. In contrast Mr. S testified that as soon as he heard the “kind, gentle female voice” he had provided his hand with no further struggle.

This hearing was provided with photographs taken by Mr. S immediately after the parties left the roof and had entered Mr. S residence (Exhibit # 5 Tab 2 Photos #13 & 14). Additionally there are photos (Exhibit #5 Tab 2, Photos 12 & 15) with those same injured areas covered with adhesive bandages. While those photos do depict cuts and scratches, they are consistent with being scraped while struggling on a shingled roof. I also noted photo #14 (Exhibit #5, Tab 2) shows Mr. S face and mouth area and there are no cuts or any redness shown, which one might expect if handcuffs had been forced into his mouth as alleged. An ambulance was dispatched to the scene but Mr. S refused treatment and no notation of any injury of Mr. S mouth was noted by the officers. The original OIPRD complaint does note a chipped tooth. The officers did not offer any evidence which would suggest they were aware of Mr. S mouth or teeth being impacted during the event.

The use of force necessary to adequately control a non-compliant adult male in order that he can be handcuffed varies and the officer applying force must use only as much as is necessary to gain control. I have utilized the case law provided by the prosecution and defence counsel in assisting me to reach to my conclusion on the use of force. Specifically *Burgess and St. Thomas Police Force (March 22, 1989, O.C.C.P.S.)* where that tribunal provided clarity on the word “unnecessary”.

“The word “unnecessary” as used in the section in question might mean “not absolutely essential” or it might mean “unreasonable under the circumstances”. Clearly to place Claypole in the cell was not absolutely essential. It was essential that Claypole be detained at the station until the officer in charge had time to prepare the release documents. Because of the shortage of manpower, there was no one except Constable Burgess to guard the prisoner while the officer in charge was busy with other duties. (Burgess was going to be busy with the other prisoner). We find that the conduct in this sense was reasonable. Also the attempt to force Claypole to his feet, while not absolutely essential, is nevertheless, under these circumstances, reasonable.”

The evidence in relation to the use of force does not lead me to believe that Cst. Batson used force beyond what was necessary to gain control of Mr. S , so the situation could be calmed and everyone could get down off the roof. It is my finding that the force utilized was reasonable given the precarious location of the event, the initial touching of Cst. Batson by Mr. S and the subsequent non-compliance of Mr. S to being handcuffed. I also noted that once the situation calmed down the handcuffs were removed.

The burden of proof necessary in a *Police Services Act* charge has been defined in *Carmichael* which states I must have “clear and convincing” evidence and further described as “weighty cogent and reliable evidence”. I have assessed the evidence in relation to the force used and have no basis to believe the force applied was excessive to gain control, therefore the threshold for me to find guilt is absent.

Based on my findings I find Cst. Batson not guilty on both counts of the charges against him.

Jill Skinner Deputy Chief