

ONTARIO COURT OF JUSTICE

DATE: 2018 10 04
COURT FILE No.: Owen Sound 17-800

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

CRAIG GAMMIE

Before Justice J.A. Morneau
Heard on August 20 & 21 and September 14, 2018
Reasons for Judgment released on October 4, 2018

Mr. Brotherston..... counsel for the Crown
Ms. Barefoot..... counsel for the defendant Craig Gammie

Morneau, J.

[1] Mr. Gammie is charged with assaulting Mr. Kirkland on September 5, 2017 in the municipal offices of the Town of the South Bruce Peninsula. Both men served on the municipal council at that time. Mr. Gammie testified denying the allegations made against him.

[2] The evidentiary onus in a criminal prosecution rests solely with the crown. The standard of proof is beyond a reasonable doubt. If I believe the defendant's testimony then I must acquit him. If I do not believe the defendant's testimony but it raises a reasonable doubt I must acquit him. If his testimony does not raise a reasonable doubt I can only enter a finding of guilt if there is credible evidence that proves the charge beyond a reasonable doubt. If there is any reasonable doubt raised it must be resolved in favour of the defendant.

[3] I can accept some, all or none of any witness' evidence. I can also be left in a position of not knowing whom to believe. In that case I must enter an acquittal.

[4] In assessing the credibility of witnesses' testimony I am required to consider all of the evidence.

[5] There is no evidentiary onus at all resting on the defendant to explain any motive on the part of the Crown witnesses. The defence argued that the charge was politically motivated with the defendant expressing his belief that Mr. Kirkland and Ms. Jackson lied so that they could have him removed from council. I will address this issue as it was raised by the defence.

[6] There are some facts that are not in issue which are summarized below in paragraphs 6 to 11.

[7] On September 5, 2017 there was a municipal council meeting scheduled in the Town of the South Bruce Peninsula. There was an in camera session set before the public meeting. The mayor, Ms. Jackson, arrived in council chambers as did Mr. Gammie. A report in her material and some other councillors' material was not included in Mr. Gammie's. Mr. Kirkland was not in chambers yet. Ms. Jackson told Mr. Gammie he could not have a copy of the report on advice of the municipal solicitor. Mr. Gammie attempted to take Mr. Kirkland's copy from his materials but Ms. Jackson took that copy, left the chambers with it and took it to the Clerk's office to prevent Mr. Gammie from taking it.

[8] Mr. Gammie, Ms. Jackson, the Clerk and eventually Mr. Kirkland and a municipal employee ended up in the Clerk's office. Unknown to the others Mr. Gammie was surreptitiously recording what went on in this office and later outside it. The recording demonstrates that there were raised voices though Mr. Gammie's was not the loudest. Mr. Gammie was clearly upset that he could not get the report. He identified his voice on the recording where he said *Get the hell out of my way before I move you and show me that damn report*. The people in this office left with Mr. Gammie, Ms. Jackson and Mr. Kirkland the last to leave. Mr. Gammie still did not have the report.

[9] Shortly after the 3 left the Clerk's office Mr. Gammie turned back toward the Clerk's office and in response to that Mr. Kirkland did as well. Mr. Kirkland was closest to the Clerk's office door. They ended up in the recessed area just outside the Clerk's office door. Mr. Gammie's intention was to go back into the Clerk's office and find the report. Mr. Kirkland's intention was to prevent Mr. Gammie from doing that.

[10] There were words exchanged in the recessed area between Mr. Gammie and Mr. Kirkland. Ms. Jackson was close by and she could see and hear what was going on between the 2 men.

[11] Mr. Kirkland went to the police about this encounter the next day. Mr. Kirkland and Ms. Jackson provided statements to the police. The police charged Mr. Gammie with assaulting Mr. Kirkland.

[12] Analysis

[13] There is conflict in the evidence. Mr. Kirkland's account of what happened differed in part from Ms. Jackson's and from Mr. Gammie's. Ms. Jackson's account of what she saw differed in part from the accounts of Messrs. Gammie and Kirkland. Mr. Gammie's account differed with both Ms. Jackson's and Mr. Kirkland's testimony.

[14] Mr. Kirkland testified that Mr. Gammie pushed him twice from behind quite heavily slamming his face into the door or the door frame. He suffered no injuries.

[15] Ms. Jackson described Mr. Gammie lunging at Mr. Kirkland and pushing him from behind and a second time from a flat footer position with Mr. Kirkland's left shoulder and left side of his face hitting the door. She said Mr. Kirkland had a sore chin.

[16] Mr. Gammie denied that he lunged at or pushed Mr. Kirkland. He described placing his left hand between the open door and its frame with Mr. Kirkland closing the door gently on it and then he removed his hand. He did not recall where his right hand was and may have accidentally put it up. He testified that he was absolutely sure he did not push Mr. Kirkland and that no part of Mr. Kirkland's body hit the door or its frame. After he got his hand out of the way he gave up. He testified that Ms. Jackson may have had her hands on Mr. Kirkland's back.

[17] Mr. Gammie prepared a number of electronic demonstrations where he extrapolated the location of Mr. Kirkland, Ms. Jackson and himself during the encounter in order to demonstrate that what Ms. Jackson and Mr. Kirkland described could not have occurred.

[18] Mr. Gammie also testified to his belief that Ms. Jackson and Mr. Kirkland lied about this matter with the goal of removing him from council indicating there was a history of problems with Ms. Jackson.

[19] Unknown to Mr. Kirkland and or Ms. Jackson, Mr. Gammie had a concealed recording device in his shirt pocket while he was at the municipal offices that day. Portions of the recordings of these events were put to Mr. Kirkland and Ms. Jackson, who prior to trial had not heard the recordings. Some of the recordings are of poor quality. They are filled with static or rustling sounds perhaps caused by the recording device's location in Mr. Gammie's shirt pocket. Many of the words and sounds are indecipherable. However some words are clear and were identified by Mr. Gammie, Mr. Kirkland and Ms. Jackson.

[20] Analysis:

[21] Witnesses' memories are interesting. It would be rare for any 2 people to agree exactly on what they saw during any altercation. That is particularly the case when they do not anticipate they need to focus on the tiniest details at the time, store the same in their memories and then explain them later – either within hours, days or a year later as in this case. Even the most benign situation described later by honest witnesses can result in conflicting accounts. Those conflicts can occur due to the viewing angle – the simplest example being where the witness was standing in relation to the event.

[22] Witnesses writing out their own statements for police or answering questions put to them by police cannot be expected to anticipate questions experienced lawyers might ask them at a later point in time. What a witness considered material when giving their statement may not be what a lawyer identifies as such at a later point in time. For instance was every detail of an event disclosed in a chronological order? Sometimes they are not.

[23] The passage of time can also compromise memories. Statements made at the time of an event or shortly thereafter can assist in refreshing memories. Formal statements may not include every detail especially when made by a civilian witness untrained in the expectations of note taking, statement making. The fact that some details are missing from a prior statement requires some explanation but does not make the details recounted at trial automatically unreliable.

[24] The use of particular words can hold a particular meaning for one person and a different meaning for others. It is therefore helpful to hear the witness' description of what the word means to them.

[25] Context matters especially when considering the tone of speech. What might be perceived as words said with humour may not in fact be the case. Past history between witnesses can also affect perception and credibility.

[26] Demeanour can be troublesome as well. A visible reaction to an event caught on video or otherwise may or may not speak for itself. Again an explanation may be required.

[27] In order to assess the credibility and reliability of the witnesses' evidence I have considered the existence of or lack of corroboration. That corroboration can be found in the evidence of other witnesses, the video recording of the hallway area outside the Clerk's office door and the audio recordings Mr. Gammie made.

[28] I also have the benefit of Mr. Gammie's engineering analysis of what could or could not have happened within the recessed area outside the Clerk's office door.

[29] Findings on credibility and reliability.

[30] None of the witnesses had a perfect memory. Mr. Gammie at times said he could not remember certain things that were said or done. Mr. Kirkland acknowledged he could not remember everything said or done. Ms. Jackson was perhaps more sure of herself, yet the evidence demonstrated that some of that assurance was misplaced.

[31] Of all of the evidence Mr. Gammie's audio recording provides the most accurate account of what was said in the recessed area outside the Clerk's office. The following is a summary:

Mr. Kirkland: *What now? You're not going back in the office.....there.*

Mr. Gammie: *Get out of, get out of my road, Jay.*

Mr. Kirkland: *You're not going back.*

**Ms. Jackson: *Hey Hey, Oh, look at that.*

**Mr. Kirkland: *Don't push me.*

**Ms. Jackson: *That's assault. I love it.*

Mr. Kirkland: *Don't push me around.*

Mr. Gammie: *Get out of my road then. You're obstructing my...*

Mr. Kirkland: *I'm closing the door of the clerk's office.*

Mr. Gammie: *You're obstructing my, you're obstructing my free passage.*

Mr. Kirkland: *No I am not.*

Mr. Gammie: *Yes you are.*

Mr. Kirkland: *I'm locking the door. Don't ever push me again from behind.*

Mr. Gammie: *Want to go outside?*

Mr. Kirkland: *That's funny Craig. You're not going to rev me up. Let's go. We're not going into the clerk's office.*

Mr. Gammie: *Okay have it your way.*

Mr. Kirkland: *Perfect*

** Ms. Jackson's words and Mr. Kirkland's words are being said almost over top of each other.

[32] This audio recording represents the verbal "res gestae" or spontaneous utterances of the immediate people involved in the incident. These utterances were made as the event was unfolding. In the case of Mr. Kirkland and Ms. Jackson they did not know they were being recorded.

[33] Mr. Kirkland's testimony in chief about what was said that day was without the benefit of this recording. His testimony was essentially what was recorded. He remembered that Ms. Jackson had spoken up when Mr. Gammie slammed him into the door. He did not recount what happened in the exact words of the recording.

[34] In the case of Mr. Gammie while he could not remember exactly what he said that day he accepted this recording was accurate. During testimony he said that at the time of the incident he forgot that he was recording everything. Given his level of agitation and focus on getting the report and getting into the Clerk's office that is possible.

[35] I conclude that this recording is accurate and reliable. It provides contemporaneous corroboration of the witnesses' evidence.

[36] The video is also accurate but due to the angle of the camera it failed to record the incident in the recessed area outside the Clerk's office door.

[37] Ms. Jackson was clear in her evidence that she has had difficulties with Mr. Gammie. She agreed with Ms. Barefoot that she would describe Mr. Gammie as very disruptive, unreasonable and very troubled. She explained that he has been removed from council meetings twice and had been directed to not speak to the Clerk. She did not agree that she had called him a moron but said he has called her that.

[38] Ms. Barefoot reminded Ms. Jackson that she gave evidence under oath in December of 2017. The transcript of that evidence included Ms. Jackson saying that Mr. Gammie put *his full body weight into .. and he went into the door face and shoulders first.* She was adamant that what she saw was Mr. Kirkland's left shoulder most definitely connected. That he hit the door on his left side. Ms. Jackson did not have the benefit of

listening to her evidence from December of 2017 and while I hold the transcriptionist in the highest regard it is possible that there was an error in transcription.

[39] Ms. Barefoot put to Ms. Jackson the assertion that she said at the time of the incident "*that's assault I love it*". Ms. Jackson replied with *that's an absolute lie*. It was not. Mr. Gammie's recording was played for her. She identified her voice and said she did not remember saying that. I attribute that failure to recall those words to her memory.

[40] Ms. Barefoot put to Ms. Jackson that she laughed as she said the words *that's assault. I love it*. She replied "not at all". In the audio recording it sounds like she is laughing.

[41] Ms. Barefoot questioned Ms. Jackson on her use of the word "lunge". Ms. Jackson described what she meant. She did this more than once. I understand what she was describing when she used that word.

[42] The difficulty with Ms. Jackson's evidence is that she was so clear that that she did not say the phrase "*I love it*" and characterized that assertion as a lie. That was not a lie and her confidence in her position causes me to be very cautious with the use of her evidence as her memory is not reliable on some details and there is a history between her and Mr. Gammie.

[43] I am left in no doubt at all that Mr. Kirkland made up his own mind to go to the police. He was not influenced by anyone in making that decision. In the video after the encounter and Mr. Gammie has left the frame Mr. Kirkland looks mystified about what had just happened. That reaction is consistent with him telling Mr. Gammie that he was not going to "*rev him up*" after Mr. Gammie suggested they take it outside.

[44] The video demonstrates that after the incident Mr. Kirkland did walk around and have conversation with the clerk and another municipal employee. He can be seen pointing and doing a demonstration. He is smiling at some point and shaking his head. While Mr. Kirkland did not recall doing this the video clearly shows that he did. This suggests to me that Mr. Kirkland's memory is not reliable on some of the peripheral details.

[45] Mr. Kirkland was an honest witness. His testimony about Mr. Gammie pushing him from behind twice is consistent with the words he spoke while he and Mr. Gammie were within the recessed area and out of the sight line of the video. His account of what happened is consistent with Mr. Gammie's audio recording. While the audio does not show the picture of what happened, his words twice referring to being pushed corroborate his memory of what happened.

[46] Mr. Kirkland did not include in his police statement reference to Mr. Gammie trying to "climb over his left arm" to get into the office during this event. That may well have happened given Mr. Gammie's description of his efforts to get around Mr. Kirkland's left side.

[47] Mr. Gammie was highly agitated that afternoon. That agitation has affected his memory. For instance he testified that at the time of the events he forgot that he was

recording what was happening. That may well be true given his level of agitation. When listening to the audio recording with the benefit of headphones Mr. Gammie can be heard speaking under his breath as he leaves the Clerk's office saying *God damn it. Fucking asshole.*

[48] Mr. Gammie's comments in the Clerk's office, which he recorded, demanding the report, swearing and threatening to move the municipal employee out of the way and his words to Mr. Kirkland noted above including his invitation to Mr. Kirkland to "take it outside" are consistent with Ms. Jackson's assessment that Mr. Gammie was highly agitated.

[49] Mr. Gammie's power point presentation focused on the entrance to the Clerk's office. It shows that the door is hinged on its left side as you face the entrance. The door knob is on the right side if you are looking into the office. There is other evidence that the door is steel and has a window in it. [The complete door is not shown in the power point.]

[50] There is an occlusion angle created by the location of the camera recording this area. The effect is to conceal the recessed area. The power point locates markers designed to show where Mr. Gammie says his feet, Mr. Kirkland's feet and Ms. Jackson were. One of the premises underlying this presentation is Mr. Gammie's evidence that he was not standing behind Mr. Kirkland in the recessed area – but to his left, with both men facing the open doorway and Ms. Jackson close behind. He explained that it was physically impossible for the assault to have occurred at all and in particular as described by either Mr. Kirkland or Ms. Jackson.

[51] Mr. Gammie's evidence on where the 3 of them were in the recessed area is conflicted. In chief he said at one point that he and Ms. Jackson were side by side with Mr. Kirkland at the door. That would put Mr. Kirkland in front of him. Later he said he was perpendicular to Mr. Kirkland.

[52] Mr. Gammie also testified that Ms. Jackson did see him touch Mr. Kirkland without his consent and she laughed and said that was assault. This evidence was very difficult to follow as he said that Ms. Jackson stepped back from this incident when she saw his hand near Mr. Kirkland's shoulder or when she saw his chest near Mr. Kirkland's left shoulder. In this evidence he was denying that he ever touched Mr. Kirkland.

[53] Mr. Brotherston asked Mr. Gammie to comment on the fact that he did not challenge Mr. Kirkland's assertion at the time that he had pushed him. His reply was that it was not an accusation made in a court. That answer made no sense. Given Mr. Gammie's interest in asserting his perceived rights that afternoon it strikes me as remarkable that he would not have corrected Mr. Kirkland when he accused him of pushing him.

[54] I am satisfied beyond any doubt that neither Mr. Kirkland nor Ms. Jackson concocted a claim that Mr. Gammie assaulted Mr. Kirkland in a planned effort to have him removed from council. The fact that Mr. Gammie was not able to attend council meetings at some point in time after this incident was a function of his release terms set by a judicial officer.

[55] There is no doubt at all that Mr. Gammie was highly agitated and acting unreasonably as he attempted to re-enter the Clerk's office. That conduct was on display earlier in the Clerk's office. There was no reason for him to demand entry to the Clerk's office and try and force his way in. Mr. Gammie should have calmed down and consulted with his lawyer or brought the matter up later in the council meeting.

[56] I cannot say that any of the witnesses were untruthful. They were asked to dissect an encounter within the recessed area that lasted only seconds. However given the conflicts in the evidence I cannot safely conclude the extent of Mr. Gammie's use of force. He says he was just reaching to get his hand into the open door well and if his right hand touched Mr. Kirkland he did not intend that. Ms. Jackson clearly reacted to something she saw as the video shows. Mr. Kirkland clearly reacted to a push and told Mr. Gammie so.

[57] Mr. Gammie most likely did push Mr. Kirkland from behind. Mr. Gammie clearly did not disagree at the time with Mr. Kirkland's remarks about being pushed. Saying Mr. Gammie most likely pushed Mr. Kirkland however does not meet the requisite standard of proof in a criminal prosecution.

[58] Fortunately Mr. Kirkland was not injured. He acted responsibly and wisely declined Mr. Gammie's invitation to take it outside – which I interpret to be an invitation to a fight. There was nothing Mr. Kirkland did to suggest he was the least bit interested in Mr. Gammie's approach to resolving a difference of opinion over whether he was entitled to see a report.

[59] There will be an acquittal entered.

Dated October 4, 2018

Signed: Justice J.A. Morneau