

Case Name:
R. v. Singh

Between
Her Majesty the Queen, and
Baljit Singh

[2010] A.J. No. 1113

2010 ABPC 315

90 W.C.B. (2d) 277

2010 CarswellAlta 1984

Docket: 090205931P1

Registry: Calgary

Alberta Provincial Court

H.A. Lamoureux Prov. Ct. J.

September 28, 2010.

(19 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Assaults -- Assault -- Trial of accused on charge of assault -- Accused convicted -- Accused struck complainant, who was physically and mentally disabled, in the face after complainant tried to grab accused's turban -- Accused did not act in self-defence -- His act was an act of excessive force -- Crown proved identification beyond a reasonable doubt.

Criminal law -- Defences -- Self-defence -- Trial of accused on charge of assault -- Accused convicted -- Accused struck complainant, who was physically and mentally disabled, in the face after complainant tried to grab accused's turban -- Accused did not act in self-defence -- His act was an act of excessive force -- Crown proved identification beyond a reasonable doubt.

Trial of Singh on a charge of assault. Singh was a taxi driver who worked for a taxi program which

assisted persons with disabilities in their transportation needs throughout the City of Calgary. Singh was on duty at the time of the alleged assault. The complainant was a 30-year-old female who suffered from a significant congenital disability. She functioned at a cognitive capacity of a child aged six to eight. Singh picked the complainant up from her community group. The complainant attempted to grab his turban, and Singh hit the complainant in the face.

HELD: Singh convicted. The Crown proved identification beyond a reasonable doubt. Two witnesses received inculpatory statements from Singh. Singh did not act in self-defence in striking the complainant in the face. His act was an act of excessive force.

Statutes, Regulations and Rules Cited:

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 34, s. 37, s. 266

Counsel:

B. Mohan, for the Crown.

M. O'Connor, for the Accused.

Decision

1 H.A. LAMOUREUX PROV. CT. J.:-- The Accused is charged under section 266 of the *Criminal Code of Canada*. The Information is laid pursuant to an allegation that on January 21, 2009, the accused assaulted Tara Moffit.

Evidence at Trial

2 The evidence in this case is somewhat unique. The Accused is a taxi driver, who was driving a cab for Access Calgary. Access Calgary is a taxi program which assists persons with disabilities in their transportation needs throughout the City of Calgary. The Accused was on duty and in the course of his activities as a taxi cab driver at the time of the events giving rise to the Information before the Court.

3 This case involves a complainant, Tara Moffit, a 30 year old female who suffers from a significant congenital disability known as Rubinstein-Taybi syndrome. Individuals who suffer from this syndrome have a defect in their DNA makeup which leads to an abnormal physiologic function adversely affecting cognition, logic, motor skills, and overall brain function. Individuals with this condition typically require significant care in their day to day needs.

4 In the course of this trial the Court heard from a number of witnesses for the Crown. The Defence called no evidence. The summary of Crown witness testimony is as follows:

Constable Raimondi

5 Constable Raimondi is a member of CPS, who investigated a complaint of an assault occurring at the Calgary Society for Community Opportunities. The complaint involved an allegation that one of its clients, Tara Moffit, was assaulted by a Handi-Bus/taxi driver on January 21, 2009, in the course of his attending at the Society to pick up the complainant for transportation. Constable Raimondi identified the Accused in the dock as the taxi cab driver who turned himself in to police following the initial complaint by the Society.

Patti Fleuri

6 Patti Fleuri is the legal guardian of Tara Moffit who is a dependant adult. She has been the legal guardian of Tara Moffit for 12 years. Ms. Fleuri's legal obligations, set by a Court Order, include control over every facet of Tara's life including residence, financial matters, and participation in all programs. It is this witness that confirmed that Ms. Moffit, the complainant, is 30 years of age but functioning at a cognitive capacity of age 6 to 8 years as a consequence of the Rubinstein-Taybi syndrome. Ms. Fleuri confirmed that the complainant cannot read, has no ability to reason or logic, and is at risk in the community if her care is not monitored daily. Although Ms. Moffit has an ability to play some basic computer games such as Nintendo her actual cognitive function is between age 6 to 8 years. Ms. Fleuri testified that the complainant's disability is very apparent as it is both physical and cognitive. Ms. Fleuri indicated that upon Ms. Moffit opening her mouth the disability becomes apparent immediately. Ms. Fleuri testified that the complainant lives with an older couple in a private residence and with a supportive roommate approved by Ms. Fleuri. Ms. Fleuri confirmed that Tara Moffit had been served with a subpoena, however, as a consequence of her psychological status she requested that the Crown not require Ms. Moffit to appear in the courtroom. Ms. Fleuri indicated that since the January 21, 2009, incident Tara Moffit has had emotional difficulty and has regressed in some aspects of her behaviour. Ms. Fleuri confirmed that Tara Moffit was, at all material times, attending the Calgary Society for Opportunities in the Community in a vocational day program as she is not capable of any competitive employment. She is transported to and from her home to the program through the Handi-Bus Access Calgary service in a taxi cab. Ms. Fleuri informed the court that on January 22, 2009, she was called by the Executive Director of the Calgary Society in connection with the incident alleged in the Information before the Court. At that point in time, she observed Tara to be in a heightened state of anxiety. In cross examination Ms. Fleuri reconfirmed that Ms. Moffit cannot read but she can express likes and dislikes at a minimal level. She also confirmed in cross examination that if Tara is involved in a physical interaction she does not understand that if she physically hits someone that she might be hit back. Ms. Fleuri testified that Tara does not understand the repercussions of any potential physical interaction that she might have with someone in the community.

Kerry Crawford

7 Kerry Crawford was the third Crown witness. She is also employed by the Calgary Society for Community Opportunities and is Tara Moffit's support worker. She confirmed that Tara is transported to and from the society for her programs through Checker Cabs or Handi-Bus operated through the program Access Calgary. She advised that the protocol requires the cab drivers to come in to the society to advise what client is to be transported. The Society checks out each individual client by allocated cab number and shift number.

8 Ms. Crawford confirmed that on January 21, 2009, the day had ended and Tara Moffit had been signed out to a cab driver. About 20 seconds after the signing out someone came in to get Ms. Crawford and based on information she received from that person she ran outside and stopped the cab driver, whom she identified as the Accused, from leaving the scene. Ms. Crawford testified that the Accused was wearing a brown suit and a blue turban. He appeared to be very upset. At this point in time Tara Moffit was screaming. The cab driver, identified by Ms. Crawford as the Accused, told Ms. Crawford that Tara Moffit slapped his hand when he tried to grab another client's jacket. The cab driver, whom Ms. Crawford identified as the Accused, then told her that Tara Moffit had tried to grab his turban - "so I hit her". At this point in time, Tara Moffit was removed from the cab by Ms. Crawford and taken back into the society premises where her wound on her left cheek was iced to reduce swelling. Ms. Crawford said that Tara's left cheek was swollen and red. She identified Exhibit 1 as the photo of Tara Moffit depicting "really red" left cheek. In cross examination Ms. Crawford reiterated that the sequence of events as related to her by the Accused at the scene, immediately following the incident was as follows:

First Tara Moffit slapped the driver's hand, second Tara Moffit tried to grab the turban of the cab driver, third the cab driver hit Tara Moffit.

9 In cross examination Ms. Crawford also advised that she did see a difference between Tara's physical demeanor in her face from the time that she left the society premises to the point in time where this incident occurred. She also confirmed in cross examination that from time to time the clients of the society do misbehave and are required to be disciplined, however, such discipline involves verbal explanation and never corporal punishment.

Kimberly Nuttall

10 The fourth witness to testify for the Crown is also an employee of the Calgary Society for Community Opportunities. Kimberly Nuttall has known Tara Moffit as a client of the society. On January 21, 2009, she was at the society helping clients of the society sign out to various cab drivers for transport. Ms. Nuttall was standing 3 to 5 metres away from the taxi cab vehicles. Ms. Nuttall testified that when Tara left the society there were no marks on her face. When Tara returned to the interior of the society building there was a mark on left side of her face, a "big red" mark. Ms. Nuttall took a photo of Ms. Moffit's face (Exhibit 1). Ms. Nuttall also confirmed that following the incident, Tara was shaky, upset and speaking faster than usual. Ms. Nuttall confirmed that Exhibit

1, which was taken immediately after the incident, thoroughly and accurately depicted Tara as she was on January 21, 2009, after the alleged incident. She confirmed that after an ice pack was placed on Ms. Moffit's face, she contacted police. She also testified that she saw the driver of the cab that Tara was placed in and she identified that driver as the Accused before the Court. She testified that the Accused was taller, between 5'8 to 5'10, of Middle Eastern decent, and that he was wearing a turban on the day of the incident. She testified that the driver of the cab in which Tara was placed, whom she identified as the Accused, advised her that Tara had asked him what was on his head and had touched his turban so he had hit her. She also confirmed that the cab driver informed her that he had been slapped on his hand by Tara and that Tara had been struck by him after his turban had been grabbed. She denied that the cab driver told her that he had been hit on the head by Tara. She also confirmed that Tara Moffit's cognitive abilities in terms of giving consent to a physical altercation are at age 7, even though she is 30 years of age.

Catherine Walker

11 The fifth witness called for the Crown was Catherine Walker. She flew in from Ontario to give testimony in this case. On January 21, 2009, she was wheelchair bound and was using the Handi-Bus provided through Access Calgary. She testified that at approximately 4pm she was in the rear of the cab, awaiting transportation to her destination. She saw a yellow Checker Taxi operated by Access Calgary pull in behind her taxi van and park approximately three to four feet away. Both her van and the Checker Taxi were close to the front doors of the Society building. Ms. Walker observed three young girls exit with a taxi driver. She saw one girl come into her van. She then saw the taxi driver get out of the taxi and grab one girl with his left hand by the back of her coat in the neck area, in order to pull her away from the van. She did not think he was using excessive force. Ms. Walker observed the other girl, who had exited the society building with a taxi driver, grab the taxi driver's arm trying to pull his hand off of "her friend". She observed the taxi driver use his open hand on the shoulders of this girl to push her back and she heard him say in a very angry tone, "go back inside I don't want you". Ms. Walker said that the pushing by the cab driver on the girl's shoulders was not enough to knock her down. Ms. Walker saw the girl who had been pushed by the taxi driver, enter into the taxi van. She observed the taxi driver to then push this girl into the van and then she testified that she saw the taxi driver hit the girl several times. She thought the striking was strong enough that the taxi van actually moved. She testified that she could see the girl put her hands up to her face in an effort to protect herself. She identified the girl who was struck by the taxi driver, as the girl in Exhibit 1, the complainant, Tara Moffit. She said that Tara Moffit was 5'5 to 5'6, average build, and "significantly smaller" than the taxi driver. She also testified that following this event Tara Moffit was "very upset". Ms. Walker clarified that she was able to see what was happening because she was in a wheelchair that swivelled around. She did concede however that when the striking by the taxi driver occurred that she was observing it from the rear and saw the back of his hand going quickly "hitting and hitting". When Ms. Walker's cab driver came from the society building, she advised him to go back inside to inform the employees that one of the cab customers (the girl identified in Exhibit 1 as Tara Moffit) had "just been assaulted". Ms. Walker said the cab driver who assaulted Tara Moffit, was dressed in a grey suit with a burgundy/red

turban.

12 This is the evidence in the case.

Issues

13 The Defence argues that the Crown has not proven identification beyond a reasonable doubt. The Defence argues that although two Crown witnesses have identified the Accused as the person who struck Tara, there is a difference in their evidence as to the colour of the turban and the colour of the suit. The Defence argues that the Court should have a reasonable doubt on identity given the difference in their testimony on the colour of the turban and suit. The Defence reminds the Court that Ms. Walker was not able to identify the Accused as the perpetrator of the offence.

14 In the alternative the Defence argues that the Accused is entitled to rely on section 34 and 37 of the *Criminal Code* which provide as follows:

34.(1) Every who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

- (2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
 - (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. [R.S. c.C-34, s.34.]

37.(1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

- (2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent. [R.S. c.C-34, s.37.]

15 The Crown submits that the Defence cannot rely upon a consensual altercation or upon the

defence of self defence as the Accused, knew or ought to have known that his passenger, the Complainant, was a person with a cognitive disability. The Crown also argues that while Tara may have placed her hand upon the Accused' arm while she was outside of the cab in an effort to stop him from grabbing the coat of the other girl; there is no evidence that Tara Moffit did anything of a physical nature inside the cab which would require the Accused to administer physical force in an act of self defence.

Decision

16 There are two separate physical incidents in this case. The Crown witnesses who testified in this case are all credible. The Court makes the following findings of fact:

17 The Accused was in fact the cab driver involved in the physical contact with Tara Moffit. The Court accepts the testimony of Ms. Crawford and Ms. Nuttall. Both of these witnesses received inculpatory statements from the Accused. They were close in proximity to the events, had direct conversations with the Accused almost immediately after the event and were not impugned in cross examination. The witnesses' difference in testimony as to the colour of the suit and turban does not give rise to any reasonable doubt on the issue of identity. The Accused did physically attempt to restrain another taxi cab customer from entering into the cab. This act of physical restraint of the other cab customer was not excessive. However, Tara Moffit, a person with a cognitive age of 6-8 years perceived the act as something which required her to intervene. Tara Moffit did grab the Accused' arm in response to his initial act of placing his hand on the customer's coat. The Accused' attempt to stop Tara first involved pushing Tara on the shoulder numerous times to get her to leave the scene. This was not an assault, but rather a reasonable action on the part of the cab driver to stop Tara with interfering with his decisions concerning transport of taxi customers.

18 The second physical interaction between the Accused and Tara Moffit, which was preceded by Tara touching the Accused' turban, followed by the Accused striking Tara on her left cheek; was in fact an act of excessive force. It cannot be characterized as an act of self defence; It was an assault upon the person of Tara Moffit. Tara Moffit could not consent to such an action by the Accused. The Accused knew or ought to have known she was incapable of providing any such consent. Further, the Accused action of striking the complainant on the cheek with sufficient force to leave the mark which is apparent on Exhibit 1 was excessive force in reaction to Tara touching his turban. The Accused action of striking the complainant on her face was clearly a physical assault under section 266 of the *Criminal Code*. The Accused is not entitled to rely on either section 34 or 37 in defence of the act.

19 The Crown has proven the offence of assault beyond a reasonable doubt. The Accused is guilty as charged.

H.A. LAMOUREUX PROV. CT. J.