

IN THE MATTER OF:

***The Law Enforcement Review Act*
Complaint #2004/158**

AND IN THE MATTER OF:

**A hearing pursuant to Section 17 of
The Law Enforcement Review Act,
C.C.S.M., c. L75**

BETWEEN

**J.W.
Complainant**

) **Mr. Gary Robinson**
) **For the Complainant**

- and -

**Constable P. N.
Constable N. B.
Respondents**

) **Mr. Paul McKenna**
) **Representing the Respondents**

) **Hearing dates scheduled:**
) **December 8 – 12, 2008**
) **Decision date: January 22, 2009**

ROB FINLAYSON P.J.

Ban on Publication

It should be noted that pursuant to the provisions of s. 25 of the *Law Enforcement Review Act*, I have ordered that no person shall cause the respondents’ names to be published in a newspaper or other periodical publication or broadcast on radio or television pending the determination of the merits of the complaint.

[1] The respondent officers are members of the Winnipeg Police Service. The Law Enforcement Review Commissioner referred the above noted matter to the

NOTE: For the purposes of distribution, personal information has been removed by the Commissioner.

Provincial Court for hearing to determine the merits of the complaint which alleges the commission of certain disciplinary defaults as defined under s. 29 of the *Law Enforcement Review Act*. Namely the officers are charged that:

(a) On or about June 8, 2004 abused their authority by using unnecessary violence or excessive force, contrary to s. 29(a)(ii) of the *Law Enforcement Review Act*, and

(b) On or about June 8, 2004 abused their authority by using oppressive or abusive conduct or language contrary to s. 29(a)(iii) of the *Law Enforcement Review Act*.

[2] At the conclusion of the evidence and during closing arguments it was agreed by counsel for the complainant that the court could dismiss the allegations against Constable N. on the basis that there was no evidence of identification of the said officer. Accordingly the charges against Constable N. were dismissed.

THE STANDARD OF PROOF

[3] The burden of proof in these proceedings is on the complainant to prove that the respondent officer committed the alleged disciplinary default. What this means is that the respondent officers do not bear any burden to prove that they did not commit any disciplinary defaults.

[4] The standard of proof under the Act is set out in s. 27(2) as follows:

The provincial judge hearing the matter shall dismiss a complaint in respect of an alleged disciplinary default unless he or she is satisfied on clear and convincing evidence that the respondent has committed the disciplinary default.

[5] The term “clear and convincing evidence” has been the subject of prior judicial comment.

[6] Wyant, P.J., as he then was, in the unreported L.E.R.A. decision of **J. G. v. Cst. G. and Cst. B.** dated August 14, 2000, made the following comment on the standard of proof at paragraph 7:

...But ‘clear and convincing evidence’ speaks of the quality of the evidence necessary to meet that standard of proof on a balance of probabilities.

At paragraph 8, Wyant P. J. referenced the case of **Huard v. Romualdi** 1 P.L.R. 1993, at page 217 of 328, where it was stated:

...It means that the proof must be clear and convincing and based on cogent evidence because of the consequences to a Police Officer's career flowing from an adverse decision were very serious.

[7] In the unreported L.E.R.A. decision NO. 3181 of **A. v. Constables D. & K.**, Chartier, P.J., as he then was, held that the standard of proof under section 27(2) of the *Act* is a high standard. At page 3 of his decision he stated:

The evidence must be clear; it must be free from confusion. It must also be convincing which, when combined with the work 'clear', in my view means that it must be compelling.

[8] Based on the review of the cases I conclude that a complainant must satisfy a relatively high standard of proof. While proof beyond a reasonable doubt is not required I must be convinced by clear and compelling evidence.

THE EVIDENCE

[9] In the present case the court heard from a total of seven witnesses. To say that the sum total of the evidence was extremely contradictory would be an understatement. The contradictory nature of the evidence was certainly due in part to the delay of some four and a half years between the time of the allegation and the hearing into the matter. However, the differences in testimony are so great that the passage of time is not the sole explanation. The real issue in this case is credibility.

THE WITNESSES

The Complainant – J. W.

[10] The complainant, J.W., testified that on the evening of June 8, 2004, he and two female guests were in his suite drinking beer. An argument ensued and one of his guests, P.S., grabbed a knife and cut him on the throat.

[11] Mr. W. testified that he threatened to call police, whereupon Ms S. unplugged his telephones, put them in a bag and left his suite.

[12] A few minutes later Mr. W. and his second guest, L.S., left his suite looking for P.S. They found her in a parking lot beside his apartment block. Mr. W. confronted P.S. and reached for her bag containing his telephones.

[13] According to Mr. W., P.S. punched him in the face. He proceeded to punch her back. L.S. then jumped on Mr. W. and he turned and punched her as well.

[14] At this point Mr. W. claims he went blank. When he came to he was face first on the ground with a knee in the back. He was subsequently handcuffed and then taken to a cruiser car, and later placed in an ambulance and was taken to hospital.

[15] Mr. W. claims that he received no medical attention from the police officers. He advised the court that in response to a smart remark that he admits making he was elbowed in the back by one of the officers, namely Constable B.

[16] Mr. W. claims that as a result of the entire altercation he suffered the following injuries:

- 1) a cut to the head;
- 2) black eye;
- 3) broken ribs;
- 4) cuts/scrapes to his right arm;
- 5) possible punctured lung;
- 6) bruise to his left side.

A series of photographs were filed which depicted all of Mr. W.'s various injuries.

[17] Mr. W. could not testify as to how he suffered most of the injuries in question. Based solely on Mr. W.'s testimony it would be reasonable for a court to conclude that all of Mr. W.'s injuries were caused either by his fight with his two female companions or by being body blocked to the ground by Constable B. on the rough surface of the parking lot. It should be noted that all witnesses agreed that the parking lot in question is comprised of both compact and loose gravel.

[18] Mr. W. did specifically recall being elbowed in the back by one of the police officers at the location of the cruiser car. Yet this was at the same time when Mr. W. was being bandaged by police officers. The latter fact was something attested to by all witnesses except Mr. W. who denied that the officers provided any medical assistance to him.

[19] My conclusion is that based solely on the evidence of Mr. W. the court could find no disciplinary default on the part of the officers.

G.M.

[20] The second witness called by the complainant was Mr. G.M. Mr. M. was a tenant in the block for which Mr. W. was the caretaker. There is no suggestion that there was any kind of personal relationship between Mr. W. and Mr. M. at the time of the alleged assault.

[21] Mr. M. testified that on the evening of June 8 he heard a loud noise outside that caused him to go to his window. He looked outside and saw a gentleman grab for bag from a lady. A second lady pushed the man from behind and the man went down to the ground.

[22] According to Mr. M. two police officers one male and one female appeared on the scene. The male officer began hitting the male with a flashlight and kicking him with his boots about the head and chest area. Mr. M. indicated that the male was hit about twenty times with the flashlight.

[23] After the incident the male was then handcuffed and taken to the cruiser car. Mr. M. testified that another cruiser car arrived on the scene and a police officer from that car got a towel from the trunk and wrapped it around Mr. W.'s head.

[24] Mr. M. indicated that the incident shocked him and throughout his testimony he referred to the entire matter as "showbusiness".

[25] Mr. M. testified that there was sufficient light in the parking lot for him to see everything that occurred. He testified that there was a full moon out which provided much light. Upon close examination there are serious concerns with respect to Mr. M.'s testimony. Firstly, it is clear that Mr. W. exchanged fist-a-cuffs with the two women in the parking lot. It is clear from Mr. W.'s evidence that he punched Ms P.S. and that Ms P.S. punched him back. It is also clear that L.S. jumped on Mr. W.'s back and then Mr. W. subsequently punched her. Mr. M. either did not see this exchange between the parties or missed it or has forgotten about it.

[26] Secondly, it is clear that Constable B. not Ms S. pushed or tackled Mr. W. to the ground. Again Mr. M. either did not see this or missed this occurrence.

[27] Finally, based on the records filed I am satisfied that there was no full moon on June 8th, 2004 and therefore the lighting in the parking lot could not have been as favorable as Mr. M. described.

[28] There are therefore major discrepancies between Mr. M.'s version of the events and the evidence of all the other witnesses in this hearing. These discrepancies were not simply differences occasioned by the passage of time. Mr.

M.'s version of events is markedly different than the rest of the witnesses. In fact the court finds that it is so markedly different to make his entire testimony inherently unreliable. Accordingly, I cannot accept that the events occurred as described by Mr. M.

Ms E.O.M.

[29] The next witness was Ms E.O.M. Ms M. was the wife of G. M. at the time of this incident and she was in her bedroom on the evening of June 8, 2004 when she also heard a loud noise outside.

[30] Ms M. testified that she looked out her bedroom window and saw two to three male police officers kicking and punching a male who was on his back. She did not count the number of blows, but testified that it was more than three times. She testified that there were kicks and punches over the upper part of Mr. W.'s body (head, chest and side). Ms M. did not see the officers use any weapon in striking Mr. W.

[31] Ms M. also testified that other officers attended the scene and also joined in the kicking and punching. Ms M. indicated there were somewhere between three to four officers involved in the assault on Mr. W.

[32] Ms M. said there was enough light in the parking lot for her to see what was occurring although she could not identify anyone. She did say she thought she recognized her caretaker's voice as the person being assaulted by police. This fact was confirmed the next day when she saw Mr. W. and observed his injuries. At some point in time Ms M. joined her husband in the living room and subsequently she stopped watching the incident.

[33] There are again serious discrepancies between Ms M.'s evidence, the evidence of her husband and the other witnesses.

[34] Firstly, Ms M. did not see the altercation between Mr. W. and the two females in the parking lot. As well it is clear that Ms M. did not observe the initial involvement of Constable B. in tackling Mr. W.

[35] Secondly, Ms M. stated emphatically that there were two to three officers beating Mr. W. while her husband stated that there was only one.

[36] Finally, Ms M. did not observe the officers using a flashlight to strike the victim, while Mr. M. was adamant that a flashlight was used.

[37] Despite these discrepancies, the court did find Ms M. to be a more credible witness than her husband. However, there are two main difficulties with Ms M.'s evidence.

[38] Firstly, she did not witness the entire incident. Ms M. did not see what occurred between Mr. W. and the two women and she also stopped watching before the entire incident ended. So what we are left with is a snapshot of the entire incident that took place.

[39] Secondly, it is clear that the court should be slow to accept the evidence of a witness based solely on the sincerity of the testimony rather than the reliability of their testimony. Counsel for the respondent brought to the court's attention the case of **R. v. Zimmerman** 1997 CANLII 12617 (BC SupremeCrt). In the **Zimmerman** decision at paragraph 16 the court stated:

It is not the sincerity of the witness, but the reliability of the witness that is important on the issue of credibility. Where there is conflicting evidence, a conviction should not be based solely on the demeanour of a witness. In **R. v. S.(W.)** 1994 CanLII 7208 (ON C.A.), (1994), 90 C.C.C. (3d) 242 (Ont.C.A.) Finlayson J.A. stated at p. 250:

The issue, however, is not the sincerity of the witness but the reliability of the witness' testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record: see **R. v. Norman** 1993 CanLII 3387 (ON C.A.), (1993), 87 C.C.C. (3D) 153 AT PP. 170-4.....for a discussion on this subject.

[40] The evidence of Mr. and Mrs. M. is inconsistent with each other and inconsistent with the remaining witnesses. In short, the evidence is so inconsistent as to not serve as corroboration for each other.

Constable D.M.

[41] Constable M. indicated that she was on duty on the evening of June 8, 2004 when she and her partner received a call to attend at 200 Good Street. Upon attending 200 Good Street she met with Constables B. and N. Shortly thereafter Constable B. returned to the cruiser car to check some information on CPIC. Moments later she heard a radio message from Constable B. that he required assistance.

[42] Constable M. immediately started to follow Constable N. to the location of the parking lot. She observed a body on the ground with Constable B. placing the man into handcuffs.

[43] Constable M.'s attention was drawn to two females by Constable B. She proceeded to attend to these two females and noted that they had been drinking. She also noted that one of the females had a goosehead to her forehead. This would be consistent with Ms S. being assaulted by Mr. W.

[44] Constable M. spent the next number of minutes dealing with the two females and subsequently attended with one of them to the hospital. She indicated that she advised one of the other constables present at the scene of the incident that the females did not wish to press charges against Mr. W.

[45] Constable M. denied seeing either Constable B. or Constable N. place any kicks or hits to the body of Mr. W.

Constable N. B.

[46] Constable B. testified that he responded to a call at 200 Good Street at approximately 11:23 p.m. on June 8, 2004. Subsequently he returned to his cruiser car and very shortly thereafter heard an argument. The argument turned to screaming and subsequently a fight broke out. Constable B. left his cruiser car and started moving towards the fight. He saw one female get hit and fall to the ground. Constable B. radioed to his partner for assistance. He saw a male grab a second female and start punching her repeatedly in the face.

[47] Constable B. testified that he yelled "police, stop....police, stop" a couple of times. He then ran into the male with his shoulder knocking him to the ground on his right side.

[48] According to Constable B. as he was moving towards Mr. W., Mr. W. tried to turn onto his back and started flailing his arms and thrashing around – swinging wildly. According to Constable B. he tried to get control of one of Mr. W.'s arms and he finally succeeded in doing so by putting one of Mr. W.'s arms in an arm bar. The Constable then pinned Mr. W. to the ground with his shin in his back and managed to place the handcuffs on one of Mr. W.'s hands.

[49] Constable B. testified that his partner arrived as he was putting the second handcuff on Mr. W. He described the entire altercation with Mr. W. as a dangerous situation.

[50] Constable B. testified that Mr. W. was taken back to the cruiser car where another officer, Constable D.B. wrapped up Mr. W.'s head. Constable B. denied elbowing Mr. W. in the back at the cruiser car.

[51] It is virtually impossible to reconcile the differences between Constable B.'s evidence and that of the witnesses G. and E. M. While the M. witnesses could be described as independent or disinterested, there are, as I have noted earlier, significant discrepancies between each others testimonies.

[52] Constable B. was dealing with a volatile situation on his own without backup. He was dealing with an intoxicated individual who was in the midst of an assault upon two females. It is my opinion that it was not unreasonable for Constable B. to use whatever force he required to subdue Mr. W. in the circumstances.

[53] Counsel for the respondents have referred the court to the decision of **R. v. Bottrell** 60 C.C.C. (2d) p. 211. The court's attention was drawn to page 218 of that decision where the court stated:

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude.

Constable P. N.

[54] Constable N. testified that he attended with his partner Constable B. to 200 Good Street on the evening of June 8, 2004. He attended along with Constables B. and M. into a stairwell at that location. Subsequently his partner returned to the cruiser car to make some CPIC checks. Constable N. heard Constable B. call for assistance and he immediately ran downstairs.

[55] Constable N. testified that when he came out of the apartment door he looked around and heard Constable B.'s voice. He ran over and saw his partner applying handcuffs to Mr. W. Mr. W. was on his stomach and Constable B. had him in a shin pin. Constable N. indicated there was no one else in the area, but that he noted Constable M. come up behind him, whereupon Constable B. told Constable M. to deal with the girls.

[56] Constable N. testified that he helped his partner help Mr. W. up to his feet and subsequently escorted him to his cruiser car.

[57] Constable N. denied ever kicking or punching Mr. W. or seeing his partner punch or kick Mr. W. or use a flashlight to hit him.

[58] Constable N. testified that while at the cruiser car Constable B. bandaged Mr. W.'s head and that he himself did not talk to Mr. W. but heard Mr. W. speaking to his partner. Constable N. indicated that it appeared to him that Mr. W. was evasive and that he smelled of liquor.

[59] In essence Constable N.'s evidence was consistent with that of his partner and also consistent with the evidence provided by Constable M.

CONCLUSION

[60] The reality in this case is there is a great deal of contradictory evidence. Much of the evidence presented is confusing. The evidence is not clear and convincing and the evidence certainly does not convince me that the officer has committed any disciplinary defaults. Accordingly the allegations are dismissed.

[61] As the matter is dismissed there will continue to exist a publication ban on the name of the respondent officers pursuant to s. 25(b) of the *Act*.

original signed by

Rob Finlayson, P.J.