

Action No.: 130948805S1
150579522S1
E-File No.: ECQ15TIBUS
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF EDMONTON

HER MAJESTY THE QUEEN

Respondent

v.

SIMONA GABRIELA TIBU

Appellant

PROCEEDINGS
EXCERPT

Edmonton, Alberta
December 11, 2015

Transcript Management Services, Edmonton
1000, 10123 99th Street
Edmonton, Alberta T5J-3H1
Phone: (780) 427-6181 Fax: (780) 422-2826

TABLE OF CONTENTS

Description	Page
December 11, 2015 Afternoon Session	1
Reasons for Judgment	1
Certificate of Record	22
Certificate of Transcript	23

1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

2 _____
 3 December 11, 2015 Afternoon Session

4
 5 The Honourable Court of Queen's Bench of Alberta
 6 Madam Justice Greckol

7
 8 E.A. Gilmour For the Applicant
 9 E.A. Maynes For the Respondent
 10 C. Holloway Court Clerk

11 _____
 12
 13 **Reasons for Judgment**

14
 15 THE COURT: Good afternoon. Please be seated.

16
 17 I am ready to deliver Reasons For Judgment in the matter of Her Majesty the Queen v.
 18 Simona Gabriela Tibu.

19
 20 On August 3rd, 2013, the Appellant, Dr. Tibu, was stopped by a sheriff, Sergeant Behiels,
 21 then on his motorcycle, because he believed her to be speeding.

22
 23 As a result of events that occurred during the traffic stop on Highway 21 near Camrose on
 24 April 15th, 2015, the trial judge convicted the Appellant of two offences under the
 25 *Criminal Code*, and three offences under the *Traffic Safety Act*, RSC 1985, CC-46 RSA
 26 2000, CT-6. The trial judge found her guilty of the offences that:

27
 28 1. She assaulted Sergeant Behiels while he was lawfully engaged
 29 in the execution of his duty as a peace officer, with intention to
 30 resist lawful arrest, contrary to Section 270(1)(b) of the *Criminal*
 31 *Code*.

32
 33 2. She resisted Sergeant Behiels while he was lawfully engaged in
 34 the execution of his duty to arrest her, contrary to Section 129(a)
 35 of the *Criminal Code*.

36
 37 3. She was driving her car at 130 kilometers per hour in a posted
 38 100 kilometers per hour zone, contrary to Section 115(2)(p) of the
 39 *Traffic Safety Act*.

40
 41 4. She failed to comply with Sergeant Behiels' request that she

1 produce to him her subsisting operators license, contrary to Section
2 167(1)(b) of the *Act*.

3
4 5. She failed to comply with Sergeant Behiels' request that she
5 produce to him her subsisting certificate of vehicle registration,
6 contrary to Section 167(1)(e) of the *Act*.

7
8 6. She failed to comply with Sergeant Behiels' request that she
9 produce to him a subsisting financial responsibility card issued in
10 respect of her car, contrary to Section 167(1)(c) of the *Act*.

11
12 In addition to Sections 279(1)(b) and 129(a) of the *Criminal Code*, I have considered the
13 relevant portions of the *Traffic Safety Act* which are Section 115(2)(p), Section 166(1) and
14 Section 166(2), Section 167(1) and 167(7), Section 169(1) and 169(2)(i).

15
16 Turning then to some of the facts.

17
18 The Appellant was born in Romania and is now a Canadian citizen. She qualified as a
19 dentist in Romania. In 2004, she was accepted at the dental school of the University of
20 Toronto where she completed two years of studies so that she qualified to practice in
21 Canada as of 2006. In 2010, she moved to Camrose to practice dentistry. On August
22 3rd, 2013, the morning of these events, the Appellant was scheduled to start a locum for a
23 month in the office of an Edmonton dentist.

24
25 Sergeant Behiels is a Peace Officer employed by the Sheriff's Department of the Alberta
26 Solicitor General and Public Security, with authority to enforce the provisions of the
27 *Traffic Safety Act*.

28
29 As the Appellant drove northbound towards Edmonton, Sergeant Behiels stopped her for
30 speeding on Highway 21 near Camrose. Sergeant Behiels was driving his motorcycle,
31 which was outfitted as a Sheriff's patrol vehicle. The Appellant approached the
32 motorcycle from behind. She accelerated and passed Sergeant Behiels, traveling at least
33 105 kilometers per hour, at approximately 8:23:26 am.

34
35 After the Appellant passed him, Sergeant Behiels activated his radar device and measured
36 the speed of her car to be 130 kilometres per hour. Sergeant Behiels then activated his
37 emergency lights and siren.

38
39 At approximately 8:23:55 am, the Appellant drove her car to the right and entered the
40 northbound lane of Highway 21, a turning lane that allows access to East Bittern Lake
41 Road.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

At approximately 8:24:01, the Appellant's car came to a full stop in the turning lane. Sergeant Behiels gave her a direction to pull over and she moved to the right towards the east shoulder bordering the turning lane, and came to a stop in a position described by Sergeant Behiels as "more or less safe".

Sergeant Behiels then moved his motorcycle into a position behind the Appellant's car and stopped there at approximately 8:24:47 am, and at 8:24:55 am, he walked to the driver's side.

At approximately 8:24:57 am, he began speaking toward the open driver's side window.

At approximately 8:26:12 am, Sergeant Behiels opened the driver's side door of the car, and at 8:26:16, he gestured to her, directing her to get out of the car.

The Appellant exited her car at approximately 8:26:19 am, and stood facing Sergeant Behiels.

Between approximately 8:26:19 and 8:34:50, or 8 minutes and 31 seconds, Sergeant Behiels and the Appellant were engaged in a physical struggle.

On that date, Sergeant Behiels weighed approximately 215 lbs. He is 6'5". The accused was about half his weight, and short in stature.

At approximately 8:34:50 am, the Appellant fell face forward onto the pavement of Highway 21 at an area near the rear trunk of the car while her hands were handcuffed behind her. The Appellant was injured, suffered face abrasions and bruising, and was taken by ambulance to St. Mary's Hospital.

Mr. Frederickson, a local semi-retired farmer, operator of a sand and gravel business and a volunteer at a small town fire department, witnessed some of these events. He testified on behalf of the Appellant.

Ms. Allen lived nearby. When she heard the siren, she looked out her window and was able to see some of the events. She took pictures of the Appellant's injuries as she lay on the ground.

Neither witness could say how the Appellant came to be on the ground.

Constable Jones is an RCMP officer stationed at Camrose, Alberta. He arrived at the scene and found the Appellant agitated and angry with blood on her forehead, asking for

1 an ambulance, her cell phone and her purse. Upon receiving them, she calmed down. He
2 followed her in the ambulance to the hospital and attended there again later that day. He
3 observed swelling and bruising on the Appellant's face and took photographs of her.
4

5 The trial judge considered all the evidence at length. He accepted all of the evidence of
6 Sergeant Behiels, and not that of the Appellant. He gave little weight to
7 Mr. Frederickson's evidence. Ms. Allen's evidence was not controversial. The trial judge
8 considered and dismissed the Appellant's *Charter* arguments and defence arguments and
9 convicted her of all charges.

10
11 Sergeant Behiels' motorcycle was equipped with a video recorder and camera. The audio
12 recorder did not work at the crucial moments leading up to the Appellant's arrest, nor did
13 it record any of the verbal exchanges during these events. The video recorder did record
14 some of the events, Sergeant Behiels approaching the car window and engaging the
15 Appellant in conversation in her car, and the struggle outside the car. The trial judge
16 found that the video recordings supported Sergeant Behiels' evidence. Helpfully, it does
17 provide the digital chronology of these events in minutes and seconds.
18

19 The issues on this appeal are:
20

- 21 1. Whether the late disclosure by the Crown of a statement by
22 Sergeant Behiels to an RCMP internal investigator, and two
23 additional video recordings that showed the back of the
24 Appellant's car and positions of Sergeant Behiels drive to the
25 hospital and to his office after the traffic stop, prejudiced the fair
26 trial rights of the Appellant;
27
- 28 2. Whether the Appellant's arrest was lawful; and
29
- 30 3. Whether the Crown failed to prove the elements of Section
31 270(1)(b) or, alternatively, the Appellant acted in self-defence.
32

33 I turn now to the arguments of the parties, in brief. First on behalf of the Appellant,
34 Dr. Tibu.
35

36 This appeal is based on three arguments.
37

- 38 1. The trial judge erred in not finding that the Appellant's Section
39 7 *Charter* rights were breached by the late disclosure of the
40 Sheriff's witness statement and previously undisclosed videos. In
41 particular, she argues the judge erred in:

1
2 (a) Determining the reliability of Sergeant Behiels'
3 testimony, given that the Appellant was precluded by the
4 late disclosure from conducting a full, contemporaneous
5 cross-examination of Sergeant Behiels' testimony;

6
7 (b) Failing to provide the Appellant with the opportunity for
8 full cross-examination of Sergeant Behiels;

9
10 (c) Placing the onus on the Appellant to show the video had
11 not been tampered with when an anomaly was discovered
12 late in the trial; and

13
14 (d) Not finding that the presence of Sergeant Behiels' wife,
15 who was taking notes in court while he was excluded as a
16 witness, created the appearance of an unfair trial.

17
18 2. The trial judge erred in finding that the Appellant was guilty of
19 Section 129 of the *Criminal Code*. Specifically, he erred by
20 finding the arrest was proper and not in violation of the
21 Appellant's rights.

22
23 3. The trial judge erred in finding the Crown proved the elements
24 of Section 270(1)(b) of the *Criminal Code*. In the alternative, the
25 trial judge erred by not finding that the accused acted in
26 self-defence.

27
28 Turning now to the argument of the respondent Crown. The Crown responds with the
29 following positions:

30
31 1. The Appellant did not raise the issue of late disclosure at the
32 trial level. She raised other allegations regarding breaches of her
33 *Charter* rights and made a lengthy written argument that dealt with
34 a number of issues, but did not include reference to late disclosure.

35
36 2. The Appellant is unhappy with the trial judge's findings of fact
37 and credibility. Although the standard of review with respect to
38 *Charter* breaches is correctness, the trial judge's findings of fact
39 that are inserted into the *Charter* framework are entitled to
40 deference. Unless the Appellant shows the trial judge's findings
41 of fact were unreasonable, those findings must be relied upon.

1
2 3. The Appellant did not argue self-defence at trial, and she should
3 not be permitted to raise this argument now on appeal. Further,
4 the only evidence that the Appellant acted in self-defence is the
5 *viva voce* evidence of the Appellant. The trial judge specifically
6 rejected her evidence.

7
8 I turn now to the standard of review.

9
10 Questions of law are reviewed for correctness; questions of fact are reviewed for palpable
11 and overriding error: *Housan v. Nikolaisen*, 2002 SCC 33 [2002] 2SCR 235.

12
13 The trial judge is entitled to deference with respect to the facts:

14
15 [A]ll factual findings are open to the trier of fact, except
16 unreasonable ones embodied in a legally binding conviction.

17
18 *R. v. Biniaris*, 2000 SCC 15 at para 24 [2000] 1 SCR 381

19
20 Given defence counsel's second argument concerning the trial judge's assessment of
21 evidence at the trial, it is helpful to recall the words of Justice Estee for the majority of
22 the Supreme Court of Canada in *R. v. Harper*, [1982] 1 SCR 2 at 14 65 CCC (2d) 193
23 [Harper], as follows:

24
25 An appellate tribunal has neither the duty nor the right to reassess
26 evidence at trial for the purpose of determining guilt or innocence.
27 The duty of the appellate tribunal does, however, include a review
28 of the record below in order to determine whether the trial court
29 has properly directed itself to all the evidence bearing on the
30 relevant issues. Where the record, including the Reasons for
31 Judgment, discloses a lack of appreciation of relevant evidence
32 and, more particularly, the complete disregard of such evidence,
33 then it falls upon the reviewing tribunal to intercede.

34
35 A misapprehension of evidence may refer to a failure to consider evidence relevant to a
36 material issue, a mistake as to the substance of the evidence, or a failure to give proper
37 effect to evidence: *R. v. Morrissey* (1995) 22 OR (3d) 514, [1995] OJ No 639.

38
39 A At para 83(CA); *R. v. Sinclair*, 2011 SCC 40 at paras 4, 14016, [2011] 3SCR 3.

40
41 Not every misapprehension of evidence renders a trial unfair and results in a

1 miscarriage of justice. An appellate Court must determine the nature and extent of an
2 alleged misapprehension and its significance to the decision under review; *Morrissey* at
3 para 9. In other words, the misapprehension must be material to the reasoning of the
4 trial judge and must play an essential part in the reasoning process, resulting in a
5 conviction, not just in the peripheral narrative of the judgment: *R. v. Lohrer*, 2004
6 SCC 80 at para 2, [2004] 3 SCR 732.

7
8 If such a material misapprehension is made out, it will follow that the Appellant did
9 not receive a fair trial and this results in a miscarriage of justice.

10
11 Concerning relief when there is a misapprehension of evidence, Justice Doherty in
12 *Morrissey*, outlined the following approach, at paragraph 88:

13
14 In my opinion, on appeals from convictions in indictable
15 proceedings where misapprehension of evidence is alleged, this
16 court should first consider the reasonableness of the verdict. . .if
17 the Appellant succeeds on this ground, an acquittal will be entered.
18 If the verdict is not unreasonable, then the court should determine
19 whether the misapprehension of evidence occasioned a miscarriage
20 of justice. If the Appellant is able to show that the error resulted
21 in a miscarriage of justice, then the conviction must be quashed
22 and, in most cases, a new trial ordered. . .

23
24 I turn next to the analysis of the arguments on behalf of the Appellant. First, the
25 question of late disclosure.

26
27 The Appellant has argued that the Crown breached her Section 7 *Charter* rights by its
28 late disclosure of a statement by Sergeant Behiels and additional videos. Whether the
29 Crown breached the Appellant's Section 7 *Charter* rights by late disclosure depends on
30 whether her right to make full answer and defence was impaired: *R. v. O'Connor*,
31 [1995] 4 SCR 411 at para 74

32
33 First, dealing with the statement.

34
35 The *voir dire* portion of the trial began on October 29th, 2014. It is clear the
36 Appellant received this statement after the trial had commenced. It is also clear the
37 Crown could not have disclosed this material before the commencement of trial.
38 Sergeant Behiels gave the statement on November 18th, 2014.

39
40 The Appellant alleges that the Crown did not disclose this statement until January 22,
41 2015, after her counsel had begun cross-examination of Sergeant Behiels. Her counsel

1 did not object to the timing of this disclosure at that time. The trial judge did not
2 make any findings about when the Crown disclosed the statement, or the relevance and
3 materiality of the statement. This is understandable, given that the Appellant did not
4 raise the issue before him. Further, the cross-examination of Sergeant Behiels was
5 adjourned on January 23, and recommenced on March 2. There was ample time for
6 the Appellant to consider her position with respect to this transcript.

7
8 The Appellant's counsel did cross-examine Sergeant Behiels on the contents of this
9 statement. If the Crown disclosed this statement late, it did not impair the Appellant's
10 ability to make full answer and defence. The Crown has an obligation to disclose
11 materials in their possession that may be relevant and material: *R. v. Stinchcombe*,
12 [1991] 3 SCR 326. However, an accused has an obligation to exercise due diligence if
13 she discovers inadequate or late disclosure before or during the course of his or her
14 trial: *R. v. Dixon*, [1987] 1 SCR 244 at paras 36-39.

15
16 Turning then to the question of the additional videos.

17
18 The Appellant was aware of this additional video before the commencement of the
19 *voir dire* portion of her trial on October 29th, 2014. She did not indicate that this late
20 disclosure would affect her ability to proceed, or make an application for an
21 adjournment during the trial.

22
23 The trial judge found that the Appellant received these additional videos approximately
24 four months before Sergeant Behiels testified in January, 2015: *R. v. Tibu*, 2015 ABPC
25 88 para 196. He also specifically found that these video recordings were of limited
26 evidentiary value: *ibid* at para 197. Therefore, I conclude that the Crown's late
27 disclosure of this additional video did not impair the Appellant's ability to make full
28 answer and defence.

29
30 In *R. v. Carosella*, [1997] 1 SCR 80, Justice Sopinka held that if there has been a
31 deliberate destruction of evidence, an accused does not have to prove the lack of
32 disclosure impaired his or her ability to make full answer and defence. The Appellant
33 also alleged Sergeant Behiels did something to interfere with the integrity of the
34 disclosed video.

35
36 In this case, the trial judge specifically found that Sergeant Behiels did not interfere
37 with the video recording: *R. v. Tibu* at para 200. He also found there was no evidence
38 that anyone erased the audio portion of the video: *ibid* at para 204. Therefore, the
39 Appellant does have a burden to prove that the late disclosure impaired her ability to
40 make full answer and defence. She has not discharged that burden.

1 Turning next to the alleged collusion.

2
3 As part of her first ground of appeal relating to disclosure, the Appellant added that
4 the trial judge erred in not finding an appearance of an unfair trial was created by the
5 fact Sergeant Behiels' wife had been taking notes during the trial. There is no
6 apparent connection between this allegation and her submission that the Crown did not
7 make adequate or timely disclosure. I can, however, address this issue quickly.

8
9 During the Appellant's cross-examination of Sergeant Behiels in January, her counsel
10 asked Sergeant Behiels about his relationship to a woman in the court who had been
11 present and taking notes throughout the *voir dire*. The woman was his wife. The
12 Appellant's counsel suggested to Sergeant Behiels that his wife had been taking notes
13 while he was excluded from the proceedings and other witnesses testified, and then
14 had shared those notes with him at home. He specifically denied these allegations.
15 The Appellant's counsel indicated to the trial judge that he intended to call further
16 evidence by way of another witness in regards to his claim of collusion between
17 Sergeant Behiels and his wife. He never did call that witness or any other further
18 evidence in relation to this allegation: Trial Transcript, January 21 to 23, 2015, at 153
19 to 175 [January Testimony].

20
21 The trial judge accepted Sergeant Behiels' testimony and found him to be a credible
22 witness. Sergeant Behiels testified that he did not read his wife's notes about the
23 testimony of other witnesses. The Appellant provided no further evidence that any
24 such collusion occurred. I can find no error, or no appearance of an unfair trial, in
25 relation to this issue.

26
27 I turn next to the question of unlawful arrest.

28
29 The Appellant challenges the findings of the trial judge that the arrest was lawful. In
30 his Reasons, the trial judge found Sergeant Behiels to be a credible witness, that he
31 testified clearly and coherently, that his testimony was, to a great extent, confirmed by
32 the video recording, and that he was truthful. He considered and dismissed the
33 challenges to Sergeant Behiels' credibility raised by defence counsel. With respect to
34 Sergeant Behiels' testimony, the trial judge said:

35
36 I find that Sergeant Behiels' credibility is not adversely affected
37 by any of the issues raised by defence counsel. I accept all of his
38 testimony.

39
40 *R. v. Tibu* at paragraphs 206 to 207.

41

1 The trial judge then made a number of findings of fact. He found that at all material
2 times the Sheriff was a peace officer engaged in the execution of his duties, and the
3 Appellant knew he was a police officer before she stopped her car.
4

5 The trial judge found that at 8:24:01 am, the Appellant stopped her car in the right
6 turning lane on Highway 21. Sergeant Behiels knocked on the passenger window and
7 directed her to move her car further to the right side, for safety reasons. He did not
8 yell or scream at her, but she immediately started screaming at him to stop hitting and
9 damaging her car, though there was no rational basis to do so.
10

11 At 8:24:39, the Appellant parked her car in a "more or less" safe position in the right
12 turning lane.
13

14 At 8:24:47, Sergeant Behiels parked his motorcycle behind the car and walked to the
15 driver's side of the Appellant's car.
16

17 At 8:24:55, Sergeant Behiels "tapped lightly" on the car window, and the Appellant
18 lowered the window. She had her cellular phone in her hand apparently intending to
19 photograph him, but he was not upset or concerned by this.
20

21 At 8:24:57, Sergeant Behiels calmly spoke to the Appellant, advising her that he
22 stopped her for speeding, and asking for her driver's license, registration and
23 insurance. She irrationally responded by demanding that he stop hitting her car.
24

25 The trial judge further found that over 1 minute and 14 seconds, Sergeant Behiels
26 asked her many times to produce her documents, and warned her two or three times
27 that she could be arrested if she did not produce the documents. She did not produce
28 them or offer to produce them or respond rationally to the request.
29

30 At 8:26:12, he calmly opened her door and gestured for her to exit so that he could
31 put her under arrest since he could not identify her or verify her license, registration or
32 insurance.
33

34 The trial judge found that the Sergeant was dealing with an apparently irrational driver
35 beside a busy highway and that he gave her a reasonable opportunity to produce the
36 documents.
37

38 He then found the sheriff gestured for her to leave the car at 8:26:12, waiting by the
39 car until she did so at 8:26:19.
40

41 He found that he did not touch her as she got out of the car.

1
2 He told her she was under arrest.

3
4 He took her cell phone and, by mistake, threw it into the car in such a way that it
5 went through the passenger window and out onto the ground.
6

7 Between 8:26:24 and 8:26:39, Sergeant Behiels moved behind the Appellant and
8 grasped her right wrist and placed it behind her back, while holding her left wrist in
9 front of her breast. The Appellant struggled and yelled for help.

10
11 Between 8:26:39 and 8:26:42, the Appellant was able to free her left wrist and get her
12 body partially back into the car, whereupon he pulled her back out of the car.

13
14 From 8:26:42 until 8:34:50, (8 minutes and 8 seconds), Sergeant Behiels attempted to
15 restrain the Appellant as they moved towards the rear of the car.
16

17 The trial judge found that during this struggle, with Sergeant Behiels attempting to
18 arrest the Appellant, and the Appellant resisting, she attempted to bite his hand and
19 came into contact with his groin. He leaned his body against her back and left side
20 and held her clavicle, but did not choke her or touch her for a sexual purpose. All of
21 the contact was to prevent her from escape and from running onto the highway, and to
22 protect other drivers from her dangerous conduct.
23

24 The trial judge found that Sergeant Behiels did not strike or punch or kick the
25 Appellant, nor did he force her to the ground. Rather, the Appellant moved quickly to
26 the right, lost her balance, and fell to her right, face first onto the pavement. Sergeant
27 Behiels did not assault or threaten her while on the ground, but properly kept control
28 and custody of her until other officers arrived, and eventually ambulance attendants
29 took her to St. Mary's Hospital in Camrose.
30

31 The trial judge found that the Appellant sustained bruising to her body, cuts to her
32 face and soft tissue discomfort: *Ion v. Tibu*, at para 142.
33

34 The trial judge found that the arrest was lawful: At paras 311, 329, 331 and 356. He
35 wrote:
36

37 [292] In any event, I am satisfied that pursuant to s. 166(1) of the
38 TSA, Sgt. Behiels, who was readily identifiable as a Peace Officer,
39 was authorized to stop the defendant's vehicle for speeding,
40 contrary to s. 115(2) of the TSA, and that:
41

1 (a), after stopping the defendant's vehicle, Sgt. Behiels told
2 the defendant that she was stopped for speeding;
3

4 And, (b), pursuant to ss. 166(1)(a)(2) and 167(1) of the
5 *TSA*, Sgt. Behiels properly requested that the defendant
6 produce her driver's license, registration and insurance
7 documents;
8

9 [293] In my opinion, pursuant to ss. 166(2)(b) and 167(1) of the
10 *TSA*, the defendant was required to forthwith furnish Sgt. Behiels
11 with information identifying herself, information respecting the car
12 that she was driving, and with the documents that he requested
13 from her.
14

15 [294] The defendant failed to comply with that obligation, and she
16 failed to respond rationally to Sgt. Behiels' request for that
17 information, notwithstanding that she was told by Sgt. Behiels two
18 or three times that she was liable to be arrested if she did not
19 produce the requested documents.
20

21 [295] It is apparent that Sgt. Behiels was faced with an irrational
22 driver of a car that he had just stopped for speeding at a rate well
23 above the posted speed limit. In my opinion, it was his duty to
24 identify her and to ensure that she was licensed to drive and to
25 ensure that her car was properly registered and properly insured.
26

27 [296] Although Sgt. Behiels did not articulate this concern, the
28 defendant's bizarre behaviour leads me to conclude that he also
29 had a duty to ensure that she was capable of safely operating her
30 car on the highway.
31

32 [297] Sgt. Behiels proceeded to arrest the defendant, pursuant to s.
33 169 (1) of the *TSA*. He was authorized to arrest the defendant
34 without a warrant if he believed on reasonable grounds that the
35 defendant:
36

37 (a), had committed the offence of speeding, contrary to s.
38 115(2) *TSA* and
39

40 (b), had provided him with inadequate or questionable
41 information as to her identification.

1
2 [298] The defendant submits that her response to Sgt. Behiels did
3 not constitute providing him with "inadequate information" as to
4 her identification. The defendant says that Sgt. Behiels should
5 have attempted to ascertain her identity some other way, such as
6 by asking her for her name or by asking her for her passport, her
7 health card, her professional credentials or other non-photographic
8 identification. . .

9
10 [306] In my opinion, the legislative intent of ss. 166(1), 166(2)
11 and 167(1) of the *TSA* is to protect the public by ensuring that
12 vehicles driven on our streets, roads, highways and other public
13 places are properly registered and properly insured, and that only
14 identifiable, licensed drivers are operating those vehicles.

15
16 [307] The public interest is also served by ensuring that alleged
17 violators of the provisions of the *TSA* are properly identified when
18 they are apprehended.

19
20 [308] Therefore, It is imperative that, upon a request being made,
21 drivers produce the information described in Section 166(2)(b) of
22 the *TSA*, and the documents described in s. 167 of the *TSA*. . .

23
24 [310] In these circumstances, Sgt. Behiels' subjective belief that he
25 had reasonable grounds to arrest the defendant is objectively
26 justifiable.

27
28 [311] I find that Sergeant Behiels lawfully arrested the defendant.

29
30
31 It is necessary to consider a summary of the relevant portions of Sergeant Behiels'
32 testimony.

33
34 Sergeant Behiels testified that he began speaking with the Appellant after she rolled
35 down her driver's side window. She immediately screamed at him because he hit or
36 damaged her vehicle: January Testimony at 66, lines 1 - 7. She screamed, "Why are
37 you hitting my car? Why are you bothering me again? " January Testimony at 32
38 lines 30 - 38; *ibid* at 66, lines 1 - 7.

39
40 He testified that, at some point during their conversation, he replied to her accusation,
41 telling her he had not damaged her car. He said something like "I didn't damage your

1 car. I knocked on your window. You've been stopped for speeding": March
2 Testimony at 37, lines 13 - 21.

3
4 He testified that he told her he had stopped her for speeding, and asked her for her
5 driver's license, registration, and insurance. She did not acknowledge his request:
6 January Testimony at 66, lines 9 - 12; *ibid* at 91, lines 7 - 11.

7
8 Sergeant Behiels testified that at one point, the Appellant asked him to take off his
9 sunglasses: January Testimony at 66, lines 1 - 9. He said " Sure": March Testimony
10 at 38 lines 8 - 10; *ibid* at page 39, lines 3 - 8.

11
12 He continued to speak to her for several seconds. He then put his sunglasses back on:
13 January Testimony at 191, lines 29 - 38.

14
15 Sergeant Behiels testified that he asked for the Appellant's documentation 10 to 12
16 times: January Testimony at 32 lines 30 - 38; *ibid* at page 91, lines 7 - 11.

17
18 He stated that he specifically remembered that he asked for the document this many
19 times: March Testimony, at 32, lines 24 - 27:
20

21 Q Ah, I suggest to you, sir, that you may have asked her three or
22 a maximum of four times before you went for your cuffs;
23 would you agree with that?

24 A No, I wouldn't agree with that at all.

25
26 Q Okay.

27 A . . .because I remember specifically asking for her documents.
28 And my recollection is 10 to 12 times before I don't -- I
29 couldn't understand why she wouldn't simply -- we simply
30 couldn't come to the understanding that the simple action of
31 her handing over her documents, as was required by the *TSA*
32 was a foreign concept to her.
33

34 He also testified that he had asked 10 to 12 times before he unzipped his jacket: March
35 Testimony at 38, lines 32 - 38.

36
37 The Appellant's counsel, Mr. Hameed, suggested to Sergeant Behiels that he could not
38 have asked that question so many times before he unzipped his jacket, since the video
39 confirms that he would have had to ask those questions in 44 seconds, the time that
40 elapsed before he unzipped his jacket. He put to him that this would not be possible if he

1 was speaking at a normal speed. Sergeant Behiels replied that his goal was to obtain
2 those documents: March Testimony at 39, lines 10 - 19.

3
4 Mr. Hameed suggested to Sergeant Behiels that he must not have waited for a response
5 after he asked the questions. He admitted there would have been little pause between his
6 questions: March Testimony at 40, lines 11 - 14. He testified that he might have asked
7 the questions in slightly different terms, using slightly different terms each time: *ibid* at
8 43, lines 31 - 34.

9
10 He testified that next he unzipped his jacket to ensure his handcuffs were accessible to
11 him: January Testimony at 30, line 1. At this point, he suspected he may need his
12 handcuffs: March Testimony at 29, lines 37 - 39. He confirmed that he was considering
13 arresting her at this point, 44 seconds into their conversation: *ibid* at 43, lines 31 - 34.

14
15 Sergeant Behiels testified that he wagged his finger at the Appellant, explaining that he
16 could arrest her if she did not give him the documentation and identify herself: January
17 Testimony at 66, lines 14 - 19.) He testified that he warned the Appellant a total of three
18 times that he could arrest her pursuant to the *Traffic Safety Act*, because she was speeding
19 and she would not give him her documents: January Testimony at 33 lines 12 - 17; *ibid* at
20 66, lines 14 - 19. He was very clear about this. He told her "I don't want to arrest you.
21 Just give me your driver's license, registration and insurance": January Testimony at 33,
22 lines 3 - 10. He testified that he asked the Appellant if she understood him, after he told
23 her he could arrest her: March Testimony at 33 lines, 5 - 11.

24
25 When he finally opened the door of her vehicle and told her to get out of the car,
26 Sergeant Behiels testified that he told her "Ma'am, you are under arrest under the *TSA*":
27 January Testimony at 33, lines 12 - 17.

28
29 The crucial findings of the trial judge in the seconds leading up to the arrest of the
30 Appellant must be examined to determine if he had reasonable grounds for arrest within
31 the terms of Section 169(1)(a) and (b) of the *TSA*. For ease of reference, I refer to Section
32 169(1), which provides:

33
34 169(1) A peace officer may arrest a person without warrant if the
35 peace officer, on reasonable grounds, believes that:

36
37 (a) the person has committed an offence in respect of any
38 of the provisions set out in subsection (2) and

39
40 (b), the person
41

1 (i) will continue or repeat that offence if not arrested,
2 or

3
4 (ii) has provided the peace officer with inadequate or
5 questionable information as to the person's
6 identification.

7
8 The Crown proved that the Appellant had committed an offence under Section 169(1)(a),
9 that is speeding.

10
11 Has the Crown proved the Appellant would continue or repeat the offence if not arrested,
12 as per section 169(1)(b)(i)?

13
14 There is no evidence that the Appellant would continue or repeat the offence of speeding
15 if not arrested. In fact, she had pulled over in response to the light and siren; she he had
16 pulled over further into the turning lane when directed, and she exited the car when told
17 do so. However, Section 169(1)(b)(i) is followed by the disjunctive word "or", and so it
18 is sufficient if there is proof that meets the requirement of Section 169(1)(ii).

19
20 Has the Crown proved the second arm of the test that must be met to have reasonable
21 grounds for arrest? That is that the Appellant had provided the peace officer with
22 inadequate or questionable information as to her identification?

23
24 These are the findings of the trial judge in *R v. Tibu* concerning the moments leading up
25 to the arrest.

26
27 [244] At approximately 8:24:57 am, Sergeant Behiels began
28 speaking calmly to the defendant. He immediately told the
29 defendant that he had stopped her for speeding, and he asked her
30 to provide him with her driver's license, her car registration and
31 her car insurance documents.

32
33 [245] In response, the defendant screamed at Sgt. Behiels. She
34 demanded that he stop hitting or stop damaging her car. That was
35 an irrational demand.

36
37 [246] Sgt. Behiels continued speaking calmly to the defendant as
38 she sat in her car with its engine running until approximately
39 8:26:11 am, a period of 1 minute and 14 seconds. Over that period
40 of time:
41

1 (a) Sgt. Behiels asked the defendant many times to produce
2 her documents;

3
4 (b) she continued to scream at him to stop damaging or
5 hitting her car;

6
7 (c) she did not produce the documents Sgt. Behiels
8 requested from her;

9
10 (d) she did not offer produce these documents; and

11
12 (e) she did not respond rationally to his requests that she
13 produce those documents.

14
15 However, though the trial judge accepted all of Sergeant Behiels' evidence, he
16 misapprehended this crucial aspect of this evidence. Sergeant Behiels testified that he
17 asked the Appellant for her documents 10 to 12 times in the 44 seconds after he knocked
18 on her window: March Testimony at 38, lines 24 - 41; *ibid* at 39, lines 1 - 33:

19
20 Q MR. HAMEED: Okay, Sir, the video has been stopped at
21 8:25:39. Do you recognize what you are doing here? It looks
22 like you have stood up, and your right hand is moving over to
23 your jacket.

24 A Yeah. I'm unzipping my jacket at this point.

25
26 Q Okay. Now, in that space of time, sir -- that is. . .44 seconds
27 from when you knocked on her windshield -- is it your
28 evidence that you have asked her in that period of time, you
29 have asked her 12 times for her documents?

30 A Approximately 10. 12 to twelve times --

31
32 Q Okay.

33 A Yeah.

34
35 Q Okay. And in the process, you have also provided some
36 explanation as to why.

37 A Yes.

38
39 Q You have also taken off your glasses, correct?

40 A Yes.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41

Q You also responded briefly. When she asked you to, you said, sure. You went ahead and you did that?

A Yes.

Q I would suggest to you, sir, at your normal tone and cadence -- or rather your normal cadence of voice, you couldn't have asked that question 12 times in 44 seconds. Do you -- we can go through it.

A My --

Q Yes?

A My goal --

Q Yes?

A -- was to obtain those documents.

Q Sure.

A If I ask you for your documents -- I need your driver's license, registration and insurance; somebody is screaming at me; I need your documents. Somebody is screaming at me. I need your documents now, driver's license, registration and insurance -- it doesn't take long to ask for those documents several times.

Q So in your estimation, you can ask that ten times in forty-four seconds, wait for a response as well? Or no response?

A I wasn't getting a response. I was getting screamed at.

Q So you never waited after the question; is that correct?

A Because she wasn't providing me with an answer that was being responsive. She was providing me with. . .loud, verbal abuse.

Thus, according to Sergeant Behiels, there were 10 to 12 demands for the documents in a 44 second time frame; not in the 1 minute 14 second time frame as found by the trial judge.

The requirement under Section 169(b)(ii) that the person has provided inadequate or questionable information about her identification, presupposes a request for such information and an opportunity to provide it. Where the peace officer has articulated the

1 demand in such a rapid fire fashion that it would be impossible to respond, ask a
2 question, or take steps to seek out the document, as would be the case if he made the
3 demand 10 to 12 times in 44 seconds, there would be no opportunity for the subject of the
4 demands to comply.

5
6 The expanse of time, as found by the trial judge, between knocking on the window and
7 Sergeant Behiels opening the car door, was 1 minute and 14 seconds. Other things
8 happened during the broader time frame. Sergeant Behiels removed his glasses at the
9 request of the Appellant. He warned her three times that if she did not produce the
10 documents, she would be arrested. He unzipped his jacket so that he would be able to
11 reach his handcuffs.

12
13 True, Sergeant Behiels was dealing with an irrational driver, but on his own description of
14 events, there was no opportunity for the Appellant to comply with the request to produce
15 the documents since within seconds the situation escalated with his rapid fire demands,
16 while the driver expressed irrational worries about her car.

17
18 When Sergeant Behiels opened the door and directed the Appellant to exit the car, the
19 arrest was initiated. At that point, given what had transpired over the 44 seconds, and
20 even the 77 seconds, the Appellant was not given a real opportunity to respond to the
21 demand for her documents. Therefore, the evidence does not prove, in my view, that the
22 Appellant provided the peace officer with inadequate or questionable information as to her
23 identification, a required pillar of proof necessary to establish reasonable grounds for
24 arrest.

25
26 According to the Supreme Court of Canada in *Harper*, the duty of the appellate tribunal
27 does include a review of the record below in order to determine whether the trial court
28 has properly directed itself to all the evidence bearing on the relevant issues. Where the
29 record, including the Reasons For Judgment, discloses a lack of appreciation of relevant
30 evidence and, more particularly, the complete disregard of such evidence, then it falls
31 upon the reviewing tribunal to intercede. Further, according to the *Morrissey* decision, a
32 misapprehension of evidence may refer to a failure to consider evidence relevant to a
33 material issue, a mistake as to the substance of the evidence, or a failure to give proper
34 effect to the evidence.

35
36 In my view, the trial judge misapprehended the facts as to what occurred in the seconds
37 leading up to the initiation of the arrest. With respect, he ignored the actual evidence of
38 Sergeant Behiels as to how the crucial seconds of the demand for documents unfolded.
39 He failed to give proper effect to Sergeant Behiels' evidence. When it is considered in
40 light of the statutory preconditions to the right of arrest, that evidence fails to meet the
41 test to establish reasonable grounds for arrest without warrant. Since reasonable grounds

1 for arrest did not exist before the arrest was initiated when Sergeant Behiels opened the
2 car door, the arrest was not lawful.

3
4 The assault conviction under Section 270(1)(b) of the *Criminal Code*, and the resist arrest
5 conviction under Section 129(a) of the *Criminal Code*, both rest on proof of the essential
6 element that the peace officer be engaged in the lawful execution of his duty. Where the
7 arrest is unlawful, Sergeant Behiels was not engaged in the lawful execution of his duty.

8
9 Concerning relief when there is a misapprehension of evidence, Justice Doherty in
10 *Morrissey* stated at paragraph 88:

11
12 [O]n appeals from convictions in indictable proceedings where
13 misapprehension of the evidence is alleged, this Court should first
14 consider the reasonableness of the verdict. . .if the Appellant
15 succeeds on this ground, an acquittal will be entered. If the
16 verdict is not unreasonable, then the Court should determine
17 whether the misapprehension of evidence occasioned a miscarriage
18 of justice. . .if the Appellant is able to show that the error resulted
19 in a miscarriage of justice, then the conviction must be quashed
20 and, in most cases, a new trial ordered.

21
22 In my view, the misapprehension of the evidence in this case yielded an unreasonable
23 verdict, and an acquittal must be entered with respect to the convictions under Section
24 271(1)(b) and Section 129(a) of the *Criminal Code* since, on the evidence, the Crown has
25 not proved the existence of reasonable grounds for arrest without warrant.

26
27 Further, this trial spanned many days and included much evidence, all of which was
28 helpfully considered and reviewed by the trial judge. No purpose would be served by
29 ordering a new trial since the question turns on the evidence of Sergeant Behiels which
30 was wholly accepted by the trial judge, and which, properly construed, shows absence of
31 proof of reasonable grounds for arrest.

32
33 Since the Notice of Appeal filed June 23, 2015 does not challenge the convictions for the
34 *Traffic Safety Act* convictions, those convictions will stand.

35
36 The convictions against Dr. Tibu under Sections 270(1)(b) and 129(a) of the *Criminal*
37 *Code* are set aside and acquittals are entered.

38
39 In the event the transcript of these proceedings is ordered, I reserve the right to make
40 editorial corrections to any transcribed decision. Thank you, counsel.

41

1 MS. MAYNES:

Thank you, My Lady.

2

3 MR. GILMOUR:

Thank you, My Lady.

4

5

6 PROCEEDINGS CONCLUDED

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

1 Certificate of Record

2

3 I, Crystal Holloway, certify that this recording is the record made of the evidence in the
4 proceedings in Court of Queen's Bench held in courtroom 315 at Edmonton, Alberta, on
5 the 11th day of December, 2015, and that I was the court official in charge of the
6 sound-recording machine during the proceedings.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

1 **Certificate of Transcript**

2

3 I, Deborah Jane Brower, certify that

4

5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the
6 best of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8

9 (b) The Certificate of Record for these proceedings was included orally on the record
10 and is transcribed in the transcript.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

Digitally Certified: 2016-02-01 15:17:50
Debbie Brower, CSR(A)
Order No. 59051-15-1

35 Pages: 25
36 Lines: 1013
37 Characters: 37220

38

39 File Locator: fa7e26fac92d11e5863c0017a4770810
40 Digital Fingerprint: 78f16ef5b4ecf1de264769b164be612bfe1178c61d313167bca0812ad186ee99

41

Detailed Transcript Statistics	
Order No. 59051-15-1	
Page Statistics	
Title Pages:	1
ToC Pages:	1
Transcript Pages:	23
Total Pages:	25
Line Statistics	
Title Page Lines:	53
ToC Lines:	4
Transcript Lines:	956
Total Lines:	1013
Visible Character Count Statistics	
Title Page Characters:	537
ToC Characters:	91
Transcript Characters:	36592
Total Billable Characters:	37220
Multi-Take Adjustment: (-) Duplicated Title Page Characters	36683