



# ONTARIO CIVILIAN POLICE COMMISSION

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DATE: 29 November 2016  
FILE: OCPC-15-ADJ-006  
CASE NAME: SGT. DOUGLAS ROSE (#3478) AND SGT. MICHAEL FERRY (#2943) AND TORONTO PS AND RYAN MITCHELL

## **IN THE MATTER OF THE POLICE SERVICES ACT, R.S.O. 1990, C.P.15, AS AMENDED**

BETWEEN:

SGT. DOUGLAS ROSE (#3478)

APPELLANT

-and-

TORONTO POLICE SERVICE

RESPONDENT

-and-

RYAN MITCHELL

PUBLIC COMPLAINANT

BETWEEN:

SGT. MICHAEL FERRY (#2943)

APPELLANT

-and-

TORONTO POLICE SERVICE

RESPONDENT

-and-

RYAN MITCHELL

PUBLIC COMPLAINANT

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## DECISION

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Panel: D. Stephen Jovanovic, Associate Chair  
Winston H. Tinglin, Member  
John Kromkamp, Member

Hearing Location: Ontario Civilian Police Commission  
250 Dundas Street West, Suite 605  
Toronto, ON M7A 2T3

Hearing Date: May 25, 2016

### **Appearances:**

Richard L. Diniz, Counsel for the appellant  
Sgt. Douglas Rose

Alan D. Gold and  
Melanie Webb, Counsel for the appellant  
Sgt. Michael Ferry

Sharon Wilmot, Counsel for the respondent  
Toronto Police Service

Lynette D'Souza, Counsel for the Independent Police Review  
Director (Statutory Intervenor)

## I. Introduction

1. These Appeals arise from the decisions of the Hon. Lee K. Ferrier, Q.C., ("the Hearing Officer") dated January 26 and June 1, 2015, following a joint hearing of charges against the appellants under section 80(1) of the *Police Services Act*, R.S.O. 1990, c.P.15 ("the PSA").
2. Sgt. Rose was found guilty of misconduct under sections 2(1)(g)(i) and (ii) of the *Code of Conduct*, set out as a schedule under Ontario Regulation 268/10 ("Code of Conduct"), which reads as follows:
  - 2(1) Any Chief of Police or other police officer commits misconduct if he or she engages in
    - (g) Unlawful or Unnecessary Exercise of Authority, in that he or she,
      - (i) without good and sufficient cause makes an unlawful or unnecessary arrest, or
      - (ii) uses any unnecessary force against a prisoner or other person contacted in the execution of duty.
3. The charges stemmed from the arrest of the public complainant, Ryan Mitchell (Mitchell). The Hearing Officer imposed a penalty of a reprimand on Sgt. Rose, which has not been appealed.
4. Sgt. Ferry was also found guilty of misconduct under the same sections of the *Code of Conduct* for his role in the arrest of Mitchell. The Hearing Officer subsequently ordered that Sgt. Ferry be demoted to the rank of Police Constable

(First Class) for a period of two months, after which time, he was to be automatically reinstated to the rank of Sergeant.

5. Other charges against the appellants arising from the arrest of Lisa Walter (Walter), Mitchell's companion in the events leading up to the arrests, were dismissed by the Hearing Officer.
6. Given the joint hearing of the charges before the Hearing Officer, the appeals, were, on consent, heard together.

## **II. Decision**

7. Pursuant to section 87(8)(a) of the *PSA*, the Commission confirms the findings of misconduct against Sgt. Rose under sections 2(1)(g)(i)(ii) of the *Code of Conduct*.
8. The Commission further confirms the findings of misconduct against Sgt. Ferry under sections 2(1)(g)(i)(ii) of the *Code of Conduct*.
9. Pursuant to section 87(8)(b) of the *PSA*, the Commission substitutes a penalty of a one month demotion of Sgt. Ferry to the rank of Police Constable (First Class) with an immediate return thereafter to the rank of Sergeant.

## **III. Background**

10. On the weekend of June 26-27, 2010 Toronto was the site of the now infamous G20 Summit. As had happened at earlier such events, the Summit attracted protesters and demonstrators. On Saturday, June 26, widespread violent protests occurred in the downtown core. Some police officers were surrounded and attacked, police vehicles were burned

or otherwise destroyed, property was damaged and stores were looted.

11. Sgt. Rose was in the area and was directly involved when police were attacked. Both he and Sgt. Ferry were of the view that appropriate steps needed to be taken to ensure that such violence did not reoccur on Sunday, June 27, the final day of the Summit.
12. On the morning of Sunday, June 27, together with other police officers, they received a briefing indicating that police had information that protestors planned to damage business premises in the Yorkville area. It was suggested that, where justified, officers might use arrests for breaches of the peace in order to defuse potential problems before anyone could cause damage.
13. The appellants, each twenty-seven year veterans of the Toronto Police Service ("TPS"), were part of a team of police officers assigned to patrol the area of St. Thomas and Bloor Street in the Yorkville area that morning.
14. Walter approached Sgt. Rose repeatedly to ask for information about some of those detained. He would repeatedly instruct her to go outside the perimeter. She initially accused him, before the Hearing Officer, of using vulgar language towards her during the course of their encounter, but conceded in cross-examination that it may have been another officer who did so.
15. Sgt. Ferry testified that he had three distinct interactions with Walter and during the last of which, she said to him: "You bastards deserve what you got yesterday." Walter

testified that she saw Mitchell taken to the ground by the appellants. When she ignored Sgt. Rose's commands to leave the scene, he ordered other officers to arrest her.

16. Walter claimed that, after this arrest, Sgt. Rose called her several derogatory names, concluding with the comment that she was just a "crazy bitch" and was "the bitch in school that couldn't get laid." She also claimed that Sgt. Rose and other officers constantly referred to her as "Sir" or "Mister." Sgt. Rose denied having made any of these comments.
17. Sgt. Ferry testified that he saw Mitchell ignore warnings, on multiple occasions, to leave the area where officers were processing arrested individuals. He heard Mitchell make comments such as "this is not a police state...we don't have to go" and then called him a "fucking pig." As Mitchell did begin to back away, he allegedly said to Sgt. Ferry "If we take Yorkville, it is going to be expensive." It was at this point that Sgt. Ferry decided to arrest Mitchell for breach of the peace.
18. Sgt. Rose was a short distance away from Sgt. Ferry and Mitchell, but testified that he could tell from their body language that Mitchell was not obeying Sgt. Ferry's instructions. As he approached Sgt. Ferry and Mitchell, Sgt. Rose allegedly heard the comment "if we take Yorkville, it'll be expensive." According to Sgt. Rose, Mitchell then began to run west on Bloor Street as Sgt. Ferry tried to grab him on the arm.
19. Sgt. Ferry ran after Mitchell, caught him, at which time, Sgt. Rose arrived. The three of them went to the ground, and Mitchell was eventually handcuffed. Sgt. Rose, during the Hearing, stated that Sgt. Ferry was the arresting officer,

while he was the assisting officer. Sgt. Ferry agreed at the Hearing that this was the case. Mitchell said that Sgt. Ferry arrested him with Sgt. Rose assisting. The importance of this distinction will become evident below. Sgt. Rose used the standard technique of placing his knees on Mitchell's back while handcuffing him.

20. Sgt. Ferry's evidence was considerably more detailed about his arrest of Mitchell. He testified that Mitchell was actively resisting arrest and struggling. He put Mitchell in a headlock and each time he began to release the headlock, Mitchell would either bite or attempt to bite his hand.

21. Mitchell gave a different version of his arrest. When directed by Sgt. Ferry to leave the area or be arrested for breach of the peace, he made a dismissive motion with his hand and said "get off it." Sgt. Ferry then commanded him to get down on the ground which he started to do when he was placed in a headlock by Sgt. Ferry, who, livid and screaming, began to choke him while yelling "stop fighting me, you fuck." While being choked, a second officer, later identified as Sgt. Rose, called him a vulgar name and threatened to shove his baton up Mitchell's ass. Sgt. Rose denied making these comments.

22. Although Mitchell was detained for eight hours, as was the case with many other individuals arrested during the G20, he was not subsequently charged with any offence, nor was Walter charged.

23. The Hearing Officer, before beginning his analysis of the conflicting evidence, set out the nine factors enumerated in **Pitts and Director of Family Benefits Branch**, [1985] O.J. No. 2578, the second of which, was whether the witness had

an interest in the outcome of the matter.

24. The Hearing Officer also considered the conflicting case law on the standard of proof to be applied in *PSA* cases. He concluded that the statutory requirement that there be “clear and convincing evidence” established a higher standard of proof than that of a normal civil standard of a balance of probabilities.
25. The Hearing Officer concluded that Walter’s behaviour, during the arrest of Mitchell by Sgt. Rose, was distracting, potentially threatening, and interfered with his arrest of Mitchell, thereby establishing grounds for her arrest.
26. The Hearing Officer acquitted Sgt. Rose of the discreditable conduct charge arising from his contact with Walter after a careful analysis of her evidence, comparing it to that of Sgt. Rose and Officer Montis, who arrested Walter at the direction of Sgt. Rose, and some video evidence. He concluded that while he was satisfied that one or more officers directed vulgar and abusive language at Walter, the evidence was not clear and convincing that it was Sgt. Rose who made the offensive remarks.
27. The Hearing Officer preferred the evidence of Mitchell over that of Sgt. Rose, whose testimony, he did not find to be reliable or truthful. He concluded that Sgt. Ferry was the arresting officer and Sgt. Rose was the assisting officer despite the prosecutor’s argument that they were both arresting officers. The Hearing Officer summarized his findings about the arrest of Mitchell in the following words:

168 Mitchell had committed no offence, and even if he had said "If we take Yorkville, it will be expensive," this statement and his conduct were not a breach of the peace.

169 What happened here was that Ferry lost his temper, after Mitchell and Walter had caused inconvenience and annoyance to the officers and when Mitchell dismissed Ferry and said "get off it" Rose joined Ferry in the take down.

28. The Hearing Officer did not find Sgt. Ferry to be a credible witness, writing that he was combative, evasive, failed to answer questions, made speeches, committed errors and fabrications in his evidence, while saying anything, no matter how absurd, to defend himself.

### **The Issues**

29. Sgt. Rose raised the following issues:

- (i) The Hearing Officer erred by finding that Sgt. Rose required independent grounds to assist in the arrest.
- (ii) The Hearing officer erred in law in finding that he had a motivation to lie to avoid discipline.

30. Sgt. Ferry raised the following six Grounds of Appeal regarding his conviction:

- (i) The Hearing Officer erred in applying a stricter standard of scrutiny in his assessment of credibility to the appellant, his co-accused, Sgt. Rose, and his fellow officers, who testified for the defence, in comparison to his assessment of the evidence of the complainant and other civilian witnesses who testified for the prosecution.
- (ii) The Hearing Officer erred in placing excessive weight on the personal background of the complainant Mitchell, being a graduate student, in his assessment of Mitchell's credibility and in his rejection of the appellant's and his co-accused's evidence, specifically regarding Mitchell's alleged utterance that "if we take Yorkville, it will be expensive."
- (iii) The Hearing Officer erred in failing to consider the relevant evidence of the items discovered in Mitchell's bag following the arrest, which included a mask, in assessing Mitchell's credibility and his testimony overall.

- (iv) The Hearing officer erred in failing to consider the provocative conduct of Mitchell on the video (that he winked and blew a kiss to the camera), and his comment to the officers that he loved it when cop cars were burned, in comparison to his presentation in the witness box at the Tribunal.
  
- (v) The Hearing Officer erred in failing to consider the significance of the lack of evidence, physical or otherwise, to corroborate the allegation of Mitchell being choked.
  
- (vi) The Hearing Officer erred in finding that the appellant did not have reasonable and probable grounds to arrest Mitchell and that the appellant used excessive force against Mitchell, in light of the circumstances of the G20 weekend and the appellant's specific experiences.

31. The four Grounds of Appeal of Sgt. Ferry, regarding the penalty, may be summarized as follows:

The Hearing Officer erred by:

- (i) penalizing the appellant for the manner in which he testified.
  
- (ii) his treatment of the appellant's past disciplinary record.

- (iii) penalizing the appellant for circumstances beyond his control, including the length of time Mitchell was on hold in custody.
- (iv) Imposing a penalty that was harsh and excessive in all the circumstances.

32. The submissions of the parties on these issues will be detailed below.

#### **IV. Analysis**

33. The standard of review to be applied by the Commission on an Appeal from a decision of a Hearing Officer is reasonableness on questions of fact, and correctness on questions of law, generally: **Ontario Provincial Police v. Purbrick**, 2013 ONSC 2276 (CanLII) (Div.Ct.). This standard was also recently confirmed by the Court of Appeal in *Ottawa Police Services v. Diafwila*, 2016 ONCA 627 (CanLII). Findings of fact and credibility are owed considerable deference by the Commission: **Toronto Police Service v. Constable Juan Blowes-Aybar**, 2004 CanLII 34451 (ON SCDC); **Dr. Q v. College of Physicians and Surgeons of British Columbia**, [2003] 1 SCR 1.

#### **Appeal of Sgt. Rose:**

34. The first Ground of Appeal, or issue, raised on behalf of Sgt. Rose is that the Hearing Officer erred in finding that he, as the assisting officer, required independent grounds to assist Sgt. Ferry in the arrest of Mitchell.

35. After reviewing the conflicting evidence, the Hearing Officer ultimately concluded that Sgt. Ferry was, in fact, the arresting officer, while Sgt. Rose was the assisting officer. Sgt. Rose submits that, because of this finding he was in effect, insulated from the requirement that an officer have reasonable and probable grounds to arrest a suspect. He further submitted that the Hearing Officer failed to properly apply the decision in *R. V. Debot*, [1986] O.J. No. 994 (ONCA) aff'd [1989] 2 SCR 1140.
36. The following passage from *Debot* was considered by the Hearing Officer and relied upon by Sgt. Rose for the argument that he did not require independent grounds to assist in the arrest of Mitchell.

Frequently, in modern times, the particular officer making an arrest or conducting a search is not the only officer concerned in the investigation, out of which the search or arrest arose. It seems to me to be unrealistic and incompatible with effective law enforcement and crime prevention, when a police officer is requested by a superior or fellow officer to arrest or search a person suspected by the commission of a crime and to be fleeing from the scene, to require the police officer to obtain from his or her superior, or fellow officer, sufficient information about the underlying facts to enable him or her to form an independent judgment that there are reasonable

grounds upon which to arrest or search the suspect. A dangerous offender might escape, in the interval, if this were required.

37. The Independent Police Review Director (the Director) submits that, on the facts of this case, the distinction in the roles and responsibilities between an arresting officer and an assisting officer is not applicable given the finding by the Hearing Officer of the involvement of Sgt. Rose in the arrest. The TPS submits that **Debot** does not go so far as to say that when an officer knows that there are no reasonable grounds to assist with an arrest, he or she is, nevertheless, entitled to proceed with the arrest with impunity.

38. The Hearing Officer pointed out that, in his statement to the Director, Rose said that "both he and Sgt. Ferry decided to arrest Mitchell." Sgt. Rose acknowledged, in cross-examination, that he and Sgt. Ferry both arrested Mitchell. The Hearing Officer did conclude that Ferry was the principal actor among the police, and at paragraph 160 of his decision, wrote the following:

160 However, on his own evidence, Rose was in the immediate vicinity of the events leading to Ferry's actions in arresting Mitchell. Indeed he was so close to be able to immediately assist Ferry. Rose saw what happened leading up to Ferry making his move. On my findings, he neither saw nor heard anything in Mitchell's

conduct which justified an arrest.

39. Sgt. Rose submitted that the Hearing Officer's decision was not only incorrect but dangerous in its implications as officers must be able to assist other officers without having to fully satisfy themselves that the arresting officer had "legitimate, reasonable, and probable grounds" to make the arrest. This submissions, however, appear to ignore the facts of the arrest of Mitchell, as found by the Hearing Officer. The example was given of an officer driving, observing another officer struggling to arrest an individual, and coming to his or her immediate assistance, without having to take the time to query the officer about the reasons for the arrest. That was not the situation faced by Sgt. Rose, as found by the Hearing Officer.

40. Finally, Sgt. Rose submitted that the Hearing Officer ignored **Debot**, and, in doing so, committed a serious legal error. In reviewing this decision, we note that the Hearing Officer did immediately go from quoting **Debot** to his analysis of section 25 of the *Criminal Code*. However, a fair reading of the decision indicates that his findings as to the knowledge of Sgt. Rose of the situation, and his proximity to Mitchell and Sgt. Ferry, were the basis for his not applying **Debot**.

41. The second issue raised by Sgt. Rose deals with the Hearing Officer's approach to assessing credibility. He submits that the Hearing Officer committed an error in law in finding that he (Sgt. Rose) had a motivation to lie to avoid discipline.

42. The Hearing Officer, at paragraph 103 of his decision, sets out the seven factors to be considered in assessing credibility from *Pitts, supra*. The second factor listed was “whether the witness has an interest in the outcome of the matter.” Before conducting his assessment of the credibility of the witnesses, he dealt with the standard of proof holding that the reference to “clear and convincing evidence” in the *PSA* was a higher standard than that of a balance of probabilities.

43. The Hearing Officer then made some general observations about the credibility of Mitchell, Walter and the third prosecution witness, Horwatt, a friend of the two, who observed some of the events, before and after, the arrest of Mitchell and Walter. The Hearing Officer then concluded that he was satisfied that none of the prosecution witnesses had an interest or bias in the proceeding. The Hearing Officer wrote the following:

116 By contrast, the subject officers have a great deal to lose in this proceeding and have a significant interest to exaggerate or even fabricate evidence to avoid discipline.

117 The witness officers, while not themselves directly interested in the outcome, have a significant interest in defending the conduct of their fellow officers and of police during the G20, in general.

44. Sgt. Rose relies on the following passage from *R. v. Laboucan*, [2010] 1 SCR 397 at para. 13:

It falls into the impermissible assumption that the accused will lie to secure his acquittal, simply because, as an accused, his interest in the outcome dictates that course of action. That flies in the face of the presumption of innocence and creates an almost insurmountable disadvantage for the accused. The accused is obviously interested in being acquitted. However, it cannot be assumed that the accused must lie in order to be acquitted, unless his guilt is no longer an open question. If the trial Judge comes to the conclusion that the accused did not tell the truth in his evidence, the accused's interest in securing acquittal may be the most plausible explanation for the lie. The explanation for a lie, however, cannot be turned into an assumption that one will occur.

45. The trial Judge in *Laboucan*, in giving reasons for disbelieving the accused, considered, "the fact that he has a very great motive to be untruthful given the consequences of being convicted of the offences charged." This impugned statement is not dissimilar from the Hearing Officer's statement at paragraph 116 of his decision.
46. The Court, in *Laboucan*, refused to adopt an absolute prohibition on a trier of fact considering an accused's motive

to lie in assessing his or her credibility as a witness, writing that, to do so would be contrary to established principles of appellate review, one of which is that reasons should be read as a whole. At paragraph 23 of the decision, Justice Charron wrote the following:

As stated at the outset, while some of the language used by the trial Judge in his reasons may give cause for concern, when viewed in isolation, when the reasons are read in their entirety, and in light of the context of the trial, as a whole, they reveal that the trial Judge properly assessed and weighed the evidence of all witnesses, including the accused, without undermining the presumption of innocence or the burden of proof.

47. The Hearing Officer, beginning at paragraph 124 of his decision, explained why he did not find parts of Sgt. Rose's evidence to be reliable or truthful. The Hearing Officer pointed out the inconsistencies between Sgt. Rose's evidence, his notes and his interview with the Director. By way of an example, Sgt. Rose wrote in his notes that Mitchell was yelling obscenities, but then, in cross-examination, he conceded that this was not, in fact, what had happened. Sgt. Rose also wrote in his notes that he approached Mitchell with Sgt. Ferry, while testifying that Sgt. Ferry was already dealing with Mitchell when he approached the two of them.
48. It is clear that the Hearing Officer critically assessed the evidence of both the complainant and Sgt. Rose and found his evidence to be more credible. This acquittal further

illustrates that the Hearing Officer conducted a critical assessment of the evidence of all the witnesses and found in favour of Sgt. Rose on some issues, but not others. He articulated reasons for doing so that were not simply based on a presumption that Sgt. Rose would lie in his evidence.

49. For the foregoing reasons, we find that the decision of the Hearing Officer with respect to Sgt. Rose was reasonable and that he did not commit any errors in law that would require us to revoke the decision.

### **Appeal of Sgt. Ferry**

50. The first four issues raised by Sgt. Ferry, as set out in paragraph 29 above, essentially, relate to the Hearing Officer's assessment of credibility. Our earlier comments in dealing with that assessment regarding Sgt. Rose apply equally to the Appeal of Sgt. Ferry.

51. As stated in *Blowes-Aybar*, *supra*:

Unlike the trier of fact, we do not have the advantage of hearing and observing the witnesses as they testify. Deference must be accorded to the Hearing Officer's findings, unless an examination of the record shows that the Hearing Officer's conclusions cannot be reasonably supported by the evidence.

52. Bearing this in mind, we do not intend to review in this decision every criticism of the Hearing Officer's assessment of credibility, although some should be mentioned.

53. Sgt. Ferry questioned the Hearing Officer's characterization of Mitchell and Horwatt as being graduate students that he considered to be "thoughtful, careful people, with an intellectual bent." He questioned why the Hearing Officer did not comment on the items found in Mitchell's (or Walter's) backpacks after the arrest, including a mask and swimming goggles. He also raised, as an example of the unfair scrutiny the Hearing Officer applied to the prosecution witnesses versus all of the officers who testified, the failure of the Hearing Officer to comment on Mitchell's behaviour and demeanour on camera after his arrest. Mitchell was shown on the video (Exhibit 6.2), according to Sgt. Ferry, "defiantly winking and blowing a kiss to the camera." As has been previously stated, a decision-writer need not refer to every piece of evidence in a proceeding in a Decision. The Hearing Officer was obviously aware of the video and we cannot say that his failure to include reference to it somehow adversely affected his finding of credibility.

54. The Hearing Officer did, however, as he did with the evidence of Sgt. Rose, conduct an analysis of the credibility of Sgt. Ferry. At paragraph 130 of his decision, the Hearing Officer commented: "Ferry's demeanour did not inspire confidence in his credibility. He was combative, evasive, he failed to answer questions, and he made speeches."

55. Sgt. Ferry, who claimed that Mitchell was biting him during the arrest, changed his statement later that Mitchell tried to bite him, and did not mention anything about the biting or Mitchell's attempt to do so, in his interview with the Director. Officer Gough testified in his cross-examination that he "saw" Mitchell actually biting Sgt. Ferry. The Hearing Officer found that Sgt. Ferry's statements were part of a

ruse, noting that Mitchell was not charged with assaulting a police officer or resisting arrest, as someone would have expected. That conclusion was one open to him to make on his assessment of the evidence.

56. Reading the Hearing Officer's entire Decision, we are satisfied that his overall assessment of credibility was reasonable and that there is no basis for us to intervene. The Hearing Officer's reasons may not have been perfect, but that is not a standard by which they are to be measured. As stated in **R. v. R.E.M.**, [2008] 3 S.C.R. 3:

Assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

57. As was the case with Sgt. Rose, it is worthwhile noting that the Hearing Officer's analysis of Sgt. Ferry's evidence, and his comments about credibility, notwithstanding, did lead him to acquit Sgt. Ferry of the misconduct charges arising from the arrest of Walker.

58. The fifth issue or ground of appeal raised by Sgt. Ferry was that the Hearing Officer failed to consider the significance of the lack of evidence to corroborate the allegation of Mitchell being choked. Despite some conflicting evidence, the Hearing Officer stated that "Ferry choked Mitchell." Sgt. Ferry testified that he had placed Mitchell in a headlock, a distinction that may not be obvious to everyone. The Hearing Officer also held that, if the arrest of Mitchell was unlawful, as he found it to be, then any force employed loses any legal justification and is itself unlawful, and by

definition, excessive. Accordingly, whether choking was the appropriate word used, or whether a headlock was employed by Sgt. Ferry, he did so on a compliant Mitchell and it appears that the difference in what actually happened could not affect the finding of excessive use of force.

59. The final ground of appeal deals with Sgt. Ferry's submission that the Hearing Officer erred in finding that he did not have reasonable and probable grounds to arrest Mitchell, and that he used excessive force. He presented no case law in his factum dealing with reasonable and probable grounds, neither did the TPS or the Director. The Hearing Officer accepted the evidence of Mitchell, as corroborated to some extent by Walter and Horwatt, that when he was ordered by Sgt. Ferry to leave the area or face arrest for breach of the peace, he responded with a dismissive wave of his hand and uttered the words, "get off it" as he walked away, which prompted Sgt. Ferry to effect the arrest.

60. The Hearing Officer concluded that Mitchell had committed no offence and that his conduct was not a breach of the peace. He further concluded that the arrest of Mitchell was unnecessary and that Sgts. Ferry and Rose did not have the requisite grounds to arrest Mitchell. On the findings of fact made by the Hearing Officer, this was a conclusion that was open to him to make.

### **Appeal by Sgt. Ferry against Penalty**

61. Before the Hearing Officer, the prosecution sought a penalty of demotion to the rank of Constable (First Class) of twelve months and a reprimand. The defence submitted

that the forfeiture of ten days' salary and a reprimand was an appropriate penalty. At the Appeal, Sgt. Ferry submitted that the loss of five days' pay would be appropriate.

62. The Director took no position on the penalty imposed, while the TPS submitted that the penalty was reasonable.

63. The Commission's approach as to appeals on penalty is set out in *Kobayashi et al and Waterloo Regional Police Service*, [2015] O.N. C.P.C. 12 (CanLII) where it wrote the following:

The Commission is not permitted to reweigh the disposition factors to come to a conclusion on penalty which it believes is more appropriate. Unless there has been an error in principle or relevant factors have been ignored, the Commission cannot interfere with a decision on penalty even if it might have come to a different conclusion at hearing the matter at first instance.

64. Sgt. Ferry's principal submission during oral argument was that the Hearing Officer committed an error in principle when he considered that an aggravating factor in deciding the appropriate penalty was "the finding of elements of untruthfulness with respect to Sgt. Ferry's testimony." In reviewing the reasons of the Hearing Officer, we note that he referred to the untruthfulness of Sgt. Ferry on at least five occasions.

65. We accept Sgt. Ferry's submission that it is an error in

principle to treat an accused's testimony that he did not commit an offence as an aggravating circumstance when deciding a sentence.

66. **In R. v. Bradley**, [2008] O.J. No. 955, the Court of Appeal stated that it was an error for a trial Judge to treat an accused's fabricated evidence as an aggravating factor in deciding an appropriate sentence. See also **R. v. Andalib-Goortani**, [2015] O.J. No. 1028 and **R. v. Kozy**, [1990] O.J. No. 1586.

67. The Hearing Officer set out the following non-exhaustive factors to be considered in proportionality in an assessment of a penalty:

- a) the public interest
- b) seriousness of the misconduct
- c) recognition of the seriousness of the misconduct
- d) procedural fairness
- e) employment history
- f) potential to reform the subject officer
- g) effect on the subject officer and the subject officers family
- h) consistency of the disposition
- i) specific or general deterrence
- j) organizational issues
- k) damage to the reputation of the police force, and
- l) effect of publicity

68. At paragraph 14 of the penalty decision, the Hearing Officer wrote that a critical component of (b) above was truthfulness and trustworthiness and that Sgt. Ferry's

evidence was incredible and deliberately dishonest. He then gave five examples of what he found to be untruthful evidence given by Sgt. Ferry which he concluded supported a demotion as a proportionate response to the severity of the misconduct.

69. Neither the TPS nor the Director provided us with any cases to support the Hearing Officer's use of Sgt. Ferry's untruthfulness as a permissible factor to be taken into account in either imposing a penalty or increasing what otherwise would be an appropriate penalty.

70. The Commission does have the authority under section 87(8)(b) of the *PSA* to substitute its own decision from that of the Hearing Officer. In our view, the penalty of a demotion for one month would be a reasonable one, given the circumstances of the arrest of Mitchell, based on the facts as found by the Hearing Officer.

71. In paragraphs 15 and 16 of the penalty decision, the Hearing Officer considered the specific and general deterrence factors. He decided that the penalty must be one that denounces and deters "groundless retaliating arrests of civilians by police." He did recognize that Sgt. Ferry experienced extraordinary difficulties and unprecedented violence directed towards him and his fellow officers the previous day. He then wrote the following:

But those difficulties do not excuse misconduct of this nature. Sgt. Ferry must be held to a higher standard both as a police officer and as a superior of lower-ranking

officers. There were no exigent circumstances in this case. There was no ongoing riot or public demonstration at Bloor Street and St. Thomas on June 27, 2010. Sgt. Ferry received specialized training in order to deal with anticipated G20 issues. He failed to use that training and instead carried out an arrest, with no reasonable and probable grounds, because he got angry. In so doing, Sgt. Ferry has fallen far below the high standard of conduct that the public demands of its commission and its supervising officers.

72. With the exception of the Hearing Officer's consideration of the untruthfulness of Sgt. Ferry in his evidence, we adopt the balance of his consideration of the aggravating and mitigating circumstances in arising at a reasonable penalty. As the Hearing Officer placed undue emphasis on the untruthfulness of Sgt. Ferry in arriving at an appropriate penalty but fairly considered other factors, in our view an appropriate penalty would be a one month demotion to the rank of First Class Constable. To an extent, such a demotion may appear largely symbolic, but given the supervisory authority of a Sergeant, a demotion is important to deflect the failure to properly exercise that authority in this case.

73. Finally, Sgt. Ferry submitted that he was penalized for factors beyond his control and in particular, the amount of time Mitchell was held in custody before he was released without being charged. Sgt. Ferry's arrest of Mitchell triggered his being held in custody. We see no reason why Sgt. Ferry should not be held accountable for the time

Mitchell remained in custody. In any event, the ultimate penalty, as modified herein, is reasonable and not unduly harsh.

## V. Disposition

74. Pursuant to section 87(8)(a) of the *PSA* the Commission confirms the findings of misconduct against Sgt. Rose under sections 2(1)(g)(i)(ii) of the *Code of Conduct*, Ontario Regulation 268/10.

75. The Commission further confirms the findings of misconduct against Sgt. Ferry under sections 2(1)(g)(i)(ii) of the *Code of Conduct*, Ontario Regulation 268/10.

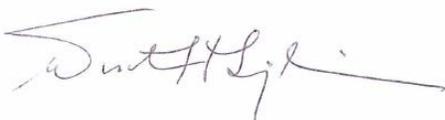
76. Pursuant to section 87(8)(b) of the *PSA*, the Commission substitutes a penalty of a one month demotion of Sgt. Ferry to the rank of Police Constable (First Class) with an immediate return thereafter to the rank of Sergeant.

DATED AT TORONTO THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2016



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D. Stephen Jovanovic, Associate Chair



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Winston H. Tinglin, Member

A handwritten signature in blue ink, appearing to read "JK Kromkamp". The signature is fluid and cursive, with a large loop at the end of the last name.

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John Kromkamp, Member