

 [R. v. Byabagamba](#)

Ontario Judgments

Ontario Superior Court of Justice

K.P. Wright J.

Heard: May 9-11, 17-20, 24, 25 and 27, 2016.

Judgment: June 17, 2016.

Court File No.: CR-14-10000521

[2016] O.J. No. 3343 | 2016 ONSC 4041

Between Her Majesty the Queen, and Ivan Byabagamba, Defendant

(52 paras.)

Case Summary

Criminal law — Criminal Code offences — Offences against the administration of law and justice — Corruption and disobedience — Breach of trust — Fraudulent transactions relating to contracts and trade — Trial of accused charged with four fraud-related offences — Accomplices of accused provided customers with false identification which customers used to obtain genuine driver's licence or health card from accused, a Service Ontario employee — Accused claimed he had no knowledge of scheme — Evidence of accomplice lacked transparency, clarity and detail — Accused did not assist all of accomplice's customers, which he would have done had he been aware of scheme — Accused provided believable explanation for amounts he received from his accomplice.

Trial of an accused charged with making false documents, possession of identification with the intent to commit fraud, using forged documents and breach of trust as a public official. In 2012, the accused was employed by Service Ontario. Accomplices of the accused provided customers with false identification. The customer would then attend at Service Ontario where they would obtain a genuine Ontario driver's licence or health card from the accused. The co-accused had pleaded guilty. One of them alleged that he had proposed the scheme to the accused and the accused agreed to it. The accused denied knowledge of the fraudulent scheme. He admitted to helping clients of the co-accused, whom he alleged was a friend, but denied knowing that the documents were fraudulent. He further claimed that amounts he received from his co-accused were gifts.

HELD: Accused acquitted.

The evidence of the co-accused lacked transparency and detail and his evidence was often confusing and lacked clarity. Text messages between the accused and the co-accused were given little weight as context was absent. Furthermore, the accused did not assist all of the clients of his co-accused. It was likely that if he had knowledge of the scheme, he would not have allowed other agents to assist them, for fear of the scheme being discovered. In addition,

the accused provided a believable explanation for the amounts he received from his co-accused.

Counsel

M. Coristine, J. Zarudny for the Crown.

J. Rybak and S. Feldman for the Defendant.

REASONS FOR JUDGMENT

K.P. WRIGHT J.

Introduction

1 Ivan Byabagamba comes before this court on four counts of fraud related offences. These offenses consist of making false documents, possessing identification with the intent to commit fraud, using forged documents, and breach of trust as a public official in the year 2012 when he was employed by Service Ontario.

2 It is alleged that he was part of a scheme, along with three other individuals, whereby they provided a customer with false identification which would then be used to obtain a genuine Ontario Driver's Licence and/or Ontario Health Card. Essentially, the customer would obtain the false identification from one of the co-accused and then attend at Service Ontario College Park location, where he/she would be processed by Mr. Byabagamba who was employed as a customer service representative.

3 Mr. Byabagamba has pled not guilty to these charges and elected to be tried by a judge alone.

4 Mr. Byabagamba was originally charged with three other individuals all of whom resolved their matters prior to trial by way of guilty pleas.

5 The evidence on the trial was heard succinctly over the course of 6 days. The Crown relied on the evidence of four witnesses and Mr. Byabagamba testified on his own behalf. Cumulatively, 19 exhibits were filed on consent.

6 This is my judgment.

Overview of Evidence

7 I will now give a brief overview of the evidence. I will further develop the evidence when necessary in my analysis.

8 The undisputed facts in this case are as follows:

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- * Mr Byabagamba was a Service Ontario customer service agent working out of the College Park location from January 1, 2012 to December 10, 2012. His duties included processing G1 driver's licences and Ontario Health Cards.
- * During the year 2012 Mr. Byabagamba knew of, and was friends with, co-accused Michael Mitchell, and, when requested to do so he personally processed and/or prioritized Mr. Mitchell's clients.
- * In 2012 Mr. Byabagamba processed 18 fraudulent G1 applications all of which were in some way connected to Mr. Mitchell. Mr. Byabagamba received direct text messages from Mr. Mitchell in relation to three of these applicants in advance of their attendance. There were text messages between Mr. Mitchell and Mr. Duncan, another co-accused naming three other applicants that were processed by Mr. Byabagamba. There are no text messages between Mr. Mitchell and Mr. Byabagamba in relation to the other 12 applicants.

9 The evidence of Constable Sidhu from the Toronto Police Service is not contentious and not disputed. He participated in the investigation and the ultimate arrest of the individuals involved. He also compiled the 23 profiles found in exhibit #9 and there is no dispute that they are all fraudulent.

10 The evidence of Sergio Danieli, a fraud analyst for the Ministry of Transportation is also not disputed or contentious. He provided the court with an overview of the G1 application process and an overview of the Ministry of Transportation's fraud investigation unit.

11 The Crown also relied on the evidence Monica Simion. She was Mr. Byabagamba's direct supervisor during the relevant time periods. She testified about the day-to-day operations at the College Park location. She also alluded to observing Mr. Byabagamba acting suspiciously. In my view, this part of her evidence came dangerously close to opinion evidence. It was not helpful and would be improper to consider.

12 The most contentious evidence came from Michael Mitchell. Mr. Mitchell was originally co-accused with Mr. Byabagamba. He entered a plea of guilty on May 9, 2016. At the time of his testimony, he had not yet been sentenced. Mr. Mitchell testified that he met Mr. Byabagamba in 2011 or 2012 at the Driver's Centre located at College Park. He said that he proposed the fraudulent scheme and Mr. Byabagamba agreed to it. He said that he would tell Mr. Byabagamba in advance each time a client was coming in to be processed. He said Mr. Byabagamba knew that the supporting documents would be fraudulent. He said each application could cost anywhere from \$500 to \$2000 depending on the needs of the client. He went on to say the he would pay Mr. Byabagamba in cash after each transaction. He said that he only ever had a business relationship with Mr. Byabagamba.

13 Mr. Byabagamba testified on his own behalf. He said that he knew nothing of this fraudulent scheme. He said that he met Mr. Mitchell in late 2010 and that they had a friendship, not a business relationship. He readily admitted that in 2012 Mr. Mitchell would ask him to help process his clients that were applying for a G1 licence. He said the College Park location was always busy and that it was not uncommon for employees to help family and friends skip the

line. He said he believed that Mr. Mitchell was a driving instructor and the people that were referred to him were his clients. He admitted to receiving gifts of money from Mr. Mitchell over the course of their friendship, but said the gifts were not in any way related to the help he was providing in his role at Service Ontario.

Guiding Principles and Law

14 The principles to be applied in this case are the same as those to be applied in any criminal trial.

15 In this case, Ivan Byabagamba is presumed to be innocent, unless and until the Crown has proven each essential element of these offences beyond a reasonable doubt.

16 Reasonable doubt is based upon reason and common sense. It is logically connected to the evidence or the lack of evidence.

17 It is not enough for me to believe that Mr. Byabagamba is possibly or even probably guilty. Reasonable doubt requires more. As a standard, reasonable doubt lays far closer to absolute certainty than it does to a balance of probabilities. At the same time, reasonable doubt does not require proof beyond all doubt, nor is it proof to an absolute certainty.

18 In assessing the credibility of the witnesses in this case, I have reminded myself of the principles articulated by the Supreme Court of Canada in *R. v. W.(D.)*, (1991) 63 C.C.C. (3d) 397.

19 The issue in this case is not whether the applications processed by Mr. Byabagamba were fraudulent, it is admitted that they were. The issue is whether Mr. Byabagamba knew they were fraudulent.

20 In order to find Mr. Byabagamba guilty, I must be satisfied beyond a reasonable doubt, that he had actual knowledge that the application(s) he processed were fraudulent or, alternatively, that he was willfully blind.

21 The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. *Sansregret v. The Queen* [1985] 1 S.C.R. 570; *R. v. Briscoe* [2010] 1 S.C.R. 411 at para. 21.

22 In *R. v. Jorgensen*, [1995] 4 S.C.R. 55 at para. 103, Justice Sopinka framed the definition of wilful blindness in the form of the following question: did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?

23 It is with these principals firmly implanted in my mind that I move on to my analysis.

Analysis

24 The Crown's case is admittedly a predominately circumstantial one.

25 Apart from the fraudulent profiles and the text messages, the Crown's case rises and falls on the evidence of Mr. Mitchell.

26 After a thorough review of Mr. Mitchell's evidence, I find myself unable to place much weight upon it.

27 And here is why.

28 In my view, Mr. Mitchell's evidence suffered from a lack of transparency. I find his inability to recall details, specifically those around the proposal of the plan to Mr. Byabagamba and how the whole scheme was initially formed, as a deliberate attempt to minimize the role he played in it. He was not forthcoming. He was hesitant and resisted giving the names of other individuals involved in this scheme. In my view he was being very careful to pick and choose what he said in the course of his testimony.

29 His evidence was often confusing and lacked clarity.

30 His evidence about the amount of money he paid Mr. Byabagamba for processing the applications lacked any air of reality. He offered the following example; he said that if the client was charged \$1500 Mr. Byabagamba's share could easily be \$1000. If that were true, the remaining \$500 would be split between Mr. Mitchell, Mr. Duncan and potentially Mr. Adekula. If accepted, his evidence would suggest that Mr. Byabagamba was getting the lion's share of money which simply makes little to no sense at all. I do not accept that he is an unsophisticated witness who was flustered in cross-examination by counsel's disparaging comments. Quite the opposite. I found Mr. Mitchell could hold his own. He often challenged counsel's questions and even refused to answer on a couple of occasions. I find that this was simply another attempt on his part to minimize his role in this fraudulent scheme.

31 I was also struck by the degree of contrast in certainty between his evidence in chief and in cross-examination. In examination in chief, Mr. Mitchell testified with confidence and certainty about the application process and the steps involved for each client. In cross-examination, his memory seemed to fail him. He suddenly knew very little about the clients or how much money was exchanged or who was involved.

32 These are only some of the many difficulties with Mr. Mitchell's evidence which cumulatively impinged significantly on his credibility and reliability.

33 In terms of the text messages, I am cautious about attaching too much weight to them. The Crown argues that they have a sneaky, nefarious and covert quality them. I disagree. They are, for the most part, fragmented sentences that lack any kind of punctuation. The absence of context makes accurate interpretation highly problematic. It was for this same reason that Mr. Mitchell and Mr. Byabagamba were unable to decipher many of their own texts.

34 I will now turn to the evidence of Ivan Byabagamba. I found Mr. Byabagamba to be a soft-spoken, thoughtful, respectful witness. His evidence was not perfect, but, like any witness, it is not expected to be.

35 He admitted to helping Mr. Mitchell with his clients but said he did not know that the supporting documents were fraudulent. He said most customer service representatives underwent some form of fraud training. He explained that he did not receive this training because of the unorthodox route he took to obtain the position. I accept his evidence in that regard. In any event I have no evidence of how significant or effective the fraud training actually is. Mr. Byabagamba said that it was his understanding that fraud detection was not the job of front line customer service agents but was something overseen by the fraud prevention team. This is consistent with the evidence of Mr. Danieli, who testified that the Ministry of Transportation has a whole team of trained individuals dedicated to the detection and prevention of fraud. Mr. Danieli confirmed that they have built in checks and balances that happen after the initial processing but before the official documents are issued.

36 What was most compelling to me was Mr. Byabagamba's evidence that he did not personally assist all of Mr. Mitchell's clients despite being requested to do so. He said that if he could have, he would have, but he was not adverse to providing them with a priority ticket and having another agent help them. I accept his evidence on this point. It is undisputed that, on at least five occasions, Mr. Byabagamba was referred clients by Mr. Mitchell via text message that he did not end up helping. Given the thoroughness of the investigation, if any of the five were processed by Mr. Byabagamba, I am confident this would have been discovered by the fraud investigators. Although Mr. Byabagamba has no memory of these people, the only logical inference is that he gave them priority tickets and they were processed by another agent. In my view, if Mr. Byabagamba was part of this scheme, he would have never have let a client of Mr. Mitchell's be processed by another agent and risk getting caught. Mr. Byabagamba says he didn't know, nor did he think about it. Mr. Byabagamba says that his only objective was to assist his friend in getting his clients through the line quicker.

37 He also readily admits receiving significant monetary and other gifts from Mr. Mitchell. He says this was in no way payment for processing his clients. He says he was receiving these types of gifts from Mr. Mitchell long before he was ever asked to process his clients. Crown counsel argues that this makes no sense especially given the lack of demonstrated gratitude in the text messages. Be that as it may, for reasons already articulated, I am not prepared to place much weight on the text messages. Moreover, Mr Byabagamba explained that many of their conversations were over the phone or in person.

38 Crown counsel argues that this culture of gift-giving as articulated by Mr. Byabagamba lacks believability. I disagree. Mr. Byabagamba is openly gay and believed that he and Mr. Mitchell had a special relationship or bond. I am not sure of the exact nature of their relationship. I am not prepared to accept Mr. Mitchell's testimony that it was only a business relationship. Of course, it would not be the first time that two people interpreted the nature of their own relationship differently. However, Mr. Byabagamba explained that this form of generosity in the gay culture is quite common. As a result, receiving gifts from Mr. Mitchell did not arouse his

suspicions at all. I accept his evidence in that regard. Moreover, I am not prepared to disregard his evidence simply because it falls outside of heterosexual or societal norms.

39 Crown counsel argues that the monetary gifts combined with the number of applicants referred by Mr. Mitchell should have, at least, aroused Mr. Byabagamba's suspicions, and that his lack of inquiry under the circumstances amounts to wilful blindness.

40 Again I disagree.

41 Monica Simion testified that it was not uncommon for employees to help friends and family bypass the very long wait lines at the College Park location. Mr. Byabagamba says that is exactly what he was doing for Mr. Mitchell, helping a friend and nothing more.

42 The Crown argues the number of referrals by Mr. Mitchell were significant and at the very least should have aroused the suspicions of Mr. Byabagamba. I am not so sure. In support of this position the Crown points to the 18 fraudulent applications processed by Mr. Byabagamba in 2012. They breakdown is as follows:

- (a) Two months - no applications processed
- (b) Seven months - one application processed a month
- (c) Three months - 11 applications processed, many on the same day.

43 In my view, this was not an excessive number of applications to process for a friend over the course of a year. Especially in light of Mr. Byabagamba's evidence that he believed them all to be Mr. Mitchell's driving students. Moreover, given the long periods of time in between each application coupled with the busyness of the College Park location, I am not convinced that Mr. Byabagamba would have been aware of exactly how many times he had helped out Mr. Mitchell.

44 Crown submits Mr. Byabagamba's evidence that he thought Mr. Mitchell was a driving instructor lacks believability. I disagree. Mr. Byabagamba's testimony that he thought Mr. Mitchell was a driving instructor is not inconsistent with Mr. Mitchell's employment history. Mr. Danieli testified that early on in his career, he and Mr. Mitchell were both employed by the Ministry of Transportation as driver examiners. Their employment in this capacity overlapped for a period of 2 to 3 years. It is curious that Mr. Mitchell did not recall this when he was cross-examined about his past employment. He did, however, testify that he was currently in the habit of helping or consulting with people on how to obtain a driver's licence, which is not inconsistent with Mr. Byabagamba's belief.

45 What is interesting is that Mr. Mitchell eagerly offered this evidence about his role as driver consultant in examination in chief, but when cross-examined on whether he was paid for this service, he quickly began to back away and withdraw from that position.

46 I am mindful that Mr. Byabagamba's evidence was not without its problems.

47 Crown counsel argues that because Mr. Byabagamba testified to a number of significant points that were not put to Mr. Mitchell in cross-examination, his evidence should be given less weight. I agree that Mr. Mitchell was not cross-examined about specific monetary and other gifts that Mr. Byabagamba testified about. However, he was cross-examined generally about money and his relationship with Mr. Byabagamba. I am also mindful that Crown counsel could have asked to recall Mr. Mitchell and did not. In any event, in my view, the lack of pointed cross-examination on these subjects did not create an imbalanced or unfair playing field.

48 I have thoroughly reviewed Mr. Byabagamba's evidence and despite its difficulties and, at times, lack of clarity, I still find myself unable to reject it.

49 After a consideration of all the evidence and for the reasons stated, I am not convinced that Mr. Byabagamba had actual knowledge of the frauds he is alleged to have committed and participated in. Crown argues that, at the very least, Mr. Byabagamba was wilfully blind to the otherwise highly suspicious nature and circumstances of his interactions with Mr. Mitchell. I am not so persuaded. I do not find the circumstances to be so suspicious that they should have triggered an inquiry by Byabagamba and that he simply shut his eyes to that possibility.

Conclusion

50 In conclusion, after a thorough review of the evidence, the law, and the submissions of counsel, I find that the Crown has not met its onus. I find myself left in a state of reasonable doubt as to the guilt Mr. Byabagamba.

51 Our law directs that Mr. Byabagamba receive the benefit of that reasonable doubt.

52 Accordingly, Mr. Byabagamba, I find you not guilty on all counts.

K.P. WRIGHT J.