

REASONS FOR DECISION OF THE TORONTO LICENSING TRIBUNAL

Date of

Hearing: September 3, 2015

Panel: Ted Yao, Chair; Moira Calderwood and Leigh Lampert

Re: Jeyakumar Balasubramaniam
Holder of Taxicab Driver's Licence No. D01-4296858

Counsel for Municipal Licensing and Standards: Ms. Brennagh Smith

INTRODUCTION

This case is about whether we should allow Mr. Balasubramaniam to drive his cab at any time throughout the day or be restricted for seven out of 24 hours a day.

The licence and conditions

Mr. Jeyakumar Balasubramaniam has had a taxicab driver's licence since July 2012. In 2014, the police charged him with sexual assault on a passenger. At that time, another panel of this Tribunal imposed two conditions on his licence:

1. That Mr. Balasubramaniam report new criminal charges, and
2. That he not be permitted to drive a cab between the hours of 10 p.m. and 5 a.m.

These were interim conditions pending the sexual assault trial. In October 2014, the Crown withdrew the charge but the conditions remained in place. Mr. Balasubramaniam wrote a letter to the City in December 2014 to ask that condition 2 be removed, so he could work nights. A hearing was set for May 21, 2015 at which time the City asked for an adjournment because a witness was not available. The adjournment was allowed, but the Tribunal waived condition 2. So today the issue is whether condition 2 should be *re-imposed*, after six months with no nighttime restriction on the licence, and without incident. The City did not ask for revocation, but suggested we also use our discretion to impose a five to ten day suspension. Our decision is that time of day should not be re-imposed and there should be no suspension.

The witnesses to today's hearing

The City called Detective Clayton Adams (the investigating officer in the criminal case), and Ms. Olga Kuzstelska (supervisor of by-law enforcement), and it was she who dealt with the traffic and by-law offences. Ms. Doe, the complainant in the sexual assault prosecution, did not testify. Mr. Balasubramaniam testified on his own behalf.

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The event

On New Years' Day 2012, Ms. Doe hailed Mr. Balasubramaniam in the Bloor/Markham St. area, after leaving a bar called The Central. The time was early morning, about 6 a.m. and she told him that she had been working as a bartender and wanted him to take her home, to an apartment in the Queen/Bathurst area. He did so. She asked him to stop at the drive-thru at the McDonald's at Bathurst and Dundas, where she ordered some takeout breakfast, which she ate along the way. These are the few undisputed facts.

Ms. Doe's version

This information is contained in statements she made to the police, recounted to us by Detective Adams. According to these statements, Ms. Doe states Mr. Balasubramaniam turned off the meter at McDonald's, which she acknowledges was a kind gesture. (It is not clear from her statement whether it was at her request or a spontaneous gesture of Mr. Balasubramaniam). According to Ms. Doe, when they arrived at her apartment building, he asked her to sit in front with him and share a cigarette, which she did. He also pulled out a water bottle and offered it to her, and told her it contained Grey Goose vodka and orange juice. Ms. Doe declined. She alleges Mr. Balasubramaniam then offered her his business card with the name "Jay" and his cell phone number, which she could use should she require his services in the future. She took it. Ms. Doe paid him ten dollars, the fare and tip, and went to her apartment building.

Ms. Doe alleged that when she was attempting to open the front door, on the street, at approximately 6:05 a. m., she heard Mr. Balasubramaniam calling out her name, and saying "sexy lady". He grabbed her by the left wrist and forcibly kissed her on the lips several times before she could turn away. She told him words refusing his advances but he continued to kiss her and attempted to force his hand down the front of her skirt. He was only able to get his fingers, not his palm down her waist. She indicated that she was able to quickly open the front door and run inside.

At about 8 a.m. the following day, Ms. Doe contacted the Toronto Police, who arrived at her apartment and took her to the station in a cruiser to take a statement. There were three statements: a preliminary account to the uniformed officers with whom she spoke, a second statement to officers specialized in sexual assault and a third videotaped statement. The first two synopses are in evidence in this hearing; the video is not. Before she spoke, the police gave her the standard caution for complainants: that she was not obliged to give a statement, but that if she did, it could be used in court and that if it were found to be untrue, she could be charged. The statement to the initial intake officers is intended to be preliminary and not to get into the specifics of the assault; trained sexual assault officers who work in teams then document the details; one officer conducts the interview while the other takes notes and later writes the synopsis. Detective Adams was the interviewer. Last, the police record a videotaped statement and the complainant reviews and authenticates it before submitting it to the crown attorney.

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The charge and withdrawal

Based on these statements, the police arrested Mr. Balasubramaniam that evening (January 2, 2014), charged him with sexual assault and issued a news release. He states that he racked his brain as to who the complainant could be, of all the hundred or so customers he had carried that night. Mr. Balasubramaniam later was watching TV (it is not clear exactly when) and saw his name mentioned and indicated he was devastated. He says his family supported him and he retained a lawyer, Malcolm McRae, who advised him not to make a statement to the police, and so he did not.

When the Crown reviewed Ms. Doe's statements, she (the crown attorney) advised the police to obtain text messages Ms. Doe indicated she had sent about twenty minutes after the incident to her boyfriend, "to say what happened". Detective Adams, testified that at least three attempts were made to obtain the text messages, which could easily have been forwarded to Detective Adams from Ms. Doe's cell phone. She failed to bring her cell phone to the station; if she had, they would have taken a photograph of the messages. Ms. Doe complained that when Balasubramaniam grabbed her, he bruised her elbow. Detective Adams said the bruise was "slight".

Subsequently, the police attempted to serve a subpoena on Ms. Doe to appear in the sexual assault trial. The process server was unsuccessful. The unserved subpoena came back to Detective Adams, who used various means at his disposal to locate Ms. Adams. He finally concluded that she was evading service. His evidence was that in his experience, some complainants, once faced with the rigours of the justice system, cease to cooperate with the police.

Mr. Balasubramaniam's version

We now recount these events as set out in Mr. Balasubramaniam's testimony. He denies any assault occurred and although he did not use these words, his position is that he has been the victim of an unfounded claim by a person who for reasons unknown has invoked the machinery of the criminal justice system.

Mr. Balasubramaniam agrees about the origin and destination of the fare. He says that Ms. Doe was so drunk "that I didn't want to refuse" the fare. She asked to go to the McDonald's. When they got there, she alleges that he turned off the meter, which Mr. Balasubramaniam denies. He indicated that Co-op is aware when the meter is turned off and if so, the dispatcher assumes the driver is available for a new fare, which is problematic if he has a fare in the cab at the same time.

Mr. Balasubramaniam agrees that she got breakfast at McDonald's but his account is more detailed. He says she asked for burgers and when told that they did not serve burgers because they were on the restricted breakfast cuisine, she got angry. He stated that she ordered breakfast and she paid for the food. He denies that they shared a smoke when they got to her apartment and states that he is very particular about smoking in his taxi because he shares it with another driver and smoking is detrimental to his business. He denies that he offered her Grey Goose vodka and orange juice and stated that he does not smoke or drink.

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Mr. Balasubramaniam agrees that Ms. Doe obtained a business card with his cell phone number on it. According to Ms. Doe, the card was a spontaneous gesture from Mr. Balasubramaniam. His version is that it was she who asked for his business card. In response to this request, he said he pulled out a standard taxi receipt form that had Co-op's dispatch number. Ms. Doe then insisted that it was he (Mr. Balasubramaniam) that she wanted for her future business, not whomever the dispatcher would assign. He gave her his cell number orally, as he was busy driving. She copied it on the taxi receipt along with his nickname "Jay" using the pen kept in the cab. It was this card that the police used to connect the complaint with the accused, not Co-op records.

He says Ms. Doe refused to pay the fare and was belligerent throughout. He is very specific about the amount of the fare, which was \$14.75, and the words she used in refusing to pay. "I asked her to pay. She said, "I don't have money I will pay you the next time." I said, "It doesn't work that way, please pay." He says that she insinuated that she took cabs daily, and that if he gave her a break, there could be more business from her in the future. He refused again. She became angry, got out and slammed the door. He opened his door (driver's side) and shouted to her that he would call the police. He further testified, "She called me a nigger and said, 'I will make sure you get arrested'".

Events after the laying of charges

After police informed them of the charge, Municipal Licensing and Standards investigated and the matter quickly came to a hearing on Feb. 20, 2014 to determine whether conditions should be placed on Mr. Balasubramaniam's licence. The City obtained an order that Mr. Balasubramaniam was to report any new criminal charges and not drive a cab between 10 p.m. and 5 a.m. He has complied with both conditions. At that hearing, Mr. Balasubramaniam was apparently extremely cooperative. Although he gave testimony, the minutes state that the City lawyer did not cross-examine him, although the panel did ask some questions. As far as we can determine, at that point, when the criminal trial lay in the future, he did not appear to oppose the conditions. Portions were played in this hearing. Mr. Balasubramaniam was crying during his answers.

On October 6, 2014, the Crown requested the charge of sexual assault be withdrawn. On December 9, 2014, Mr. Balasubramaniam requested removal of the time of day condition, since it restricted the amount of money he could earn. This hearing came before us on September 3, 2015 and we have decided in his favour, that is, not to re-impose the time restriction.

The City gives licensees notice of the evidence it will call. Its package included a record of four *Highway Traffic Act* charges in 2013 and two charges that are essentially being in a taxi stand improperly. For reason of these six convictions, we maintain the two-year probationary licence condition. However, the City's case with respect to condition 2 rests exclusively on the evidentiary weight we ascribe to two pieces of evidence: Ms. Doe's statement, as outlined by Detective Adams, and Mr. Balasubramaniam's oral evidence before us.

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The test

The test for imposing a condition on a licence or revoking it has three parts and only one needs to be satisfied. If we conclude there are reasonable grounds¹ to believe Mr. Balasubramaniam's conduct affords belief that

1. He has broken the law or is likely to break the law in the future; or
1. He will not carry on the cab driver's business with integrity or honesty; or
2. He has endangered or will endanger the health or safety of members of the public;

then we may impose conditions, such as the time of day limitation. We should go further and state that the by-law says that the licence issuer *must* grant the licence unless some branch of the test is met. Therefore, the onus is on the City, to make the case and if it cannot, then we should not impose the condition. In this case, the criminal charge was withdrawn, and so the City has to prove either part 2 or 3. The remaining two parts are quite different from what the Criminal Court would have had to decide, had the case had gone forward. It would have been asked to determine whether the alleged sexual assault took place. We have to decide whether the City has proved or even provided sufficient evidence that reasonable grounds exist to believe that Mr. Balasubramaniam's conduct manifests lack of integrity or would endanger the public.

Our analysis

This is a conflict between two differing versions of events by two witnesses, one before us and one absent, but who spoke to Detective Adams, who was present before us. Normally the law of evidence is that a person that comes before the Tribunal and testifies is more likely to be believed than someone who swears an affidavit or makes a solemn confession and is not present. The City asks that we not follow that rule because:

- Ms. Doe, even though not present, gave reliable evidence, and
- Mr. Balasubramaniam, though he was present, gave unreliable evidence, because it contained three contradictions.

The City's position is that Ms. Doe's refusal to cooperate with the police is understandable because from Detective Adams' experience and common knowledge, some complainants in sexual abuse prosecutions fail to cooperate with the police because they are daunted by the criminal justice system. We accept that this is a reality. However, in this case, Detective Adams did not say Ms. Doe asked that no further prosecutorial action take place, but he specifically characterized her conduct as "evading service". In addition, we have to consider that she failed to provide the cell phone messages at an early stage of the investigation, despite intense pressure from the police and Crown. Finally, while victims are under no obligation to report crimes or to appear at

¹ Reasonable grounds is a lower standard than balance of probabilities. *Ontario (Alcohol and Gaming Commission of Ontario) v. 751809 Ontario Inc. (Famous Flesh Gordon's)*, 2013 ONCA 157 (CanLII).

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hearings unless summonsed, we have to consider that most people would consider the obligation to prevent harm to others, which her lack of cooperation impeded.

She had been, according to her version of events, subject to predatory and increasingly intrusive unwanted conduct. First the turning off of the meter, which if unrequested, was intended to put the victim in some obligation financially, then the invitation to sit in the front seat of the cab and share a cigarette, and finally the offer of drink and the proffering of a business card, which conveniently had the name and cell number of the driver. If these events occurred, she must have concluded that such a driver was a threat to others for the same unwanted conduct or worse, and this conclusion was underlined by the police taking her complaint extremely seriously, going to the media to warn others and promptly arresting Mr. Balasubramaniam. Putting all this together, there is sufficient evidence to reject the City's reason for her failure to cooperate. It is important to reiterate that our task is not to say whether we believe one person over another, indeed the assault may have occurred. Whether or not it did occur, our focus is whether the City has assembled a sufficient evidentiary basis, which after careful scrutiny and application of the rules of evidence, could or could not enable us to find the test is met.

One of the major tools of this scrutiny is to examine inconsistencies or supposed inconsistencies in each of the two persons' versions of events. Turning first to Ms. Doe's statements, there are inconsistencies in the two police reports as to what she said at a critical time. In both synopses, the respective authors say she said Mr. Balasubramaniam called out her name, which presumably he learned during the course of the smoke. However, in the second synopsis, he is said to have called out "sexy lady", and this is not mentioned in the first synopsis. During the unwanted kissing, just prior to the hand being inserted in her skirt, in the initial synopsis, she is reported to say, "No, no, this is not cool", and in the second the author says she states, "No, I don't want this." Perhaps these inconsistencies could be explained if City had contacted her, but the City decided not to involve her in any way "for reasons of privacy and sensitivity". It did not investigate her new whereabouts or try to interview her. It is our experience that in cases of less serious driver misconduct, for example, refusing to take a blind woman because of her service animal, or submitting false taxi chits, the customer is always interviewed. If the City decided to respect the victim's right not to be contacted, it leaves this Tribunal in a difficult position to fill in gaps in her statement.

Another illogical event is the card with "Jay" on it. We are to conclude that a person planning an assault would give his personal cell phone number to the intended victim. Even if his only motive was to solicit future business from her, he would likely be busy with other clients when she called his cell phone. This type of advertising is only useful to attract clients with fixed and recurring appointments, and the prospective client, Ms. Doe, had already demonstrated that she was a busy person who didn't want to wait for a phoned pick up or pre-arrange an appointment.

Notwithstanding, the City asked us to give "full weight" to Ms. Doe's sworn statement, or make a finding that the assault did happen and that there was a danger to the public. However, this is inconsistent with its failure to ask for a revocation of the cabdriver's licence. If Mr. Balasubramaniam or any other cab driver sexually assaulted a vulnerable woman in the early hours of New Year's Day, the public has a right to expect protection, that is, that a licence should be taken away from the driver, not merely restrict driving during nighttime hours.

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Turning now to Mr. Balasubramaniam's evidence, we do not find inconsistencies. At the February 2014 hearing, he said he never "exited" the cab, whereas today, he says he opened the driver's side door and shouted at Ms. Doe that he would call the police. (A threat that he said he never carried out because it was not cost-effective in terms of waiting for the police to arrive, on the busiest night of the year.) It seems to us that what happened, with his body partly in the vehicle and only one foot on the ground, he did not "exit the vehicle".

The second supposed inconsistency has to do with when he quit work that day. He said that he worked the downtown area for an hour after Ms. Doe's ride, quitting work at around 7 a.m., whereas in cross-examination, he said he arrived at his Scarborough home at 11 a.m. The 7 a.m. quitting time answer meant to him, "When did stop working and start the journey home?" since he mentioned driving along the Danforth so he was still available for fares that would subsidize the fuel costs of the trip towards Scarborough. He also indicated that he needed to get breakfast and that delayed the arrival at home as well. In any case, we don't see this as an important inconsistency. The City's motive in this line of questioning may have been to elicit answers that would show that Mr. Balasubramaniam worked more consecutive hours than the City allows, even though it was New Year's Eve. He swore to tell the truth and did so and from the information he provided, there was probably enough information for the City to come to the conclusion he did exceed the allowable hours.

The final supposed weakness in Mr. Balasubramaniam's version of events was that he never obtained the cab video that would have depicted Ms. Doe not paying for her fare. When we examine this issue, the evidence supports Mr. Balasubramaniam's case for no condition.

The police also did not obtain the video. Why? Detective Adams stated:

"Based on my experience, of issues, we are lucky to ever find the [hard] drive, taxis, they are subcontracted, I'm just saying, in my experience, that it is not easy to obtain the cab video unless it is one they want brought forward, for example if a fare hasn't paid. Had he been arrested in a cab that would have happened immediately. It would be taken up to Jane St where they have the facilities."

This was a Co-op cab and Co-op is a responsible organization. We think they would cooperate with a direct police request. Co-op is the broker. The owner is a person described by Mr. Balasubramaniam as "the garage guy", who had at least one cab with Co-op markings so he was beholden to Co-op's instructions. In this case, the owner leased the cab on alternate days to Mr. Balasubramaniam and his partner, Prakash. The two drivers keep the car at their homes at off-shift times since they live a few blocks from each other, but its location is tracked by Co-op at all times whenever the cab is in use. Its video would have shown Ms. Doe entering the cab, going to McDonald's with the meter turned off, and paying the fare, if these events happened. It would possibly show the smoking incident, obtaining the business card, and the drink offer or it might be turned off at this point. In any case, from what the police knew from her statement, it would have been powerfully supportive of her credibility and form a context for what happened next. The police can draft a search warrant. Co-op could have been telephoned to alert "the garage guy" not to erase the tape and a warrant executed based

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on the cab's GPS location. After all, Co-op did manage to have "the garage guy" delete Mr. Balasubramaniam's pass ID (allowing him access privileges for the cab) immediately after the news release.

Since the video could be exculpatory for Mr. Balasubramaniam, the City is right to ask why he did not obtain it. He was very knowledgeable about how to download the contents of in-cab videos ("you just insert a USB"). His answer was that once Co-op barred him from the cab, "essentially they fired me"; he, like any other fired employee, had no access to his employer's equipment and unlike the police, could not obtain a search warrant.

In conclusion, neither of the City's theories succeed in meeting its evidentiary burden. We cannot give preponderant weight to Ms. Doe's statements. Nor do we find important contradictions in Mr. Balasubramaniam's evidence. Indeed, the inconsistencies were fully explained, and taken as a whole, his evidence had both internal logic and consistency with other facts.

DECISION

The Tribunal does not re-impose a time of day restriction. The licence will be issued with the existing probationary (i.e. the reporting of new charges etc.) condition deleted and replaced by the following, effective immediately:

- (1) immediately upon being issued, the licence will be placed on probation for a period of two years;
- (2) prior to the next two renewals of the licence, Mr. Balasubramaniam must provide to Municipal Licensing and Standards, at his own expense, an updated abstract of his criminal record and an updated provincial driving licence abstract;
- (3) during the probationary period, if Mr. Balasubramaniam incurs any new charges or convictions under the *Highway Traffic Act* or the *Criminal Code*, he must notify Municipal Licensing and Standards, in writing, within three (3) business days. He can do this in any of the following ways:
 - in person at 850 Coxwell Ave., Toronto, Ontario M4C 5R1;
 - via regular mail to: 850 Coxwell Ave., Toronto, Ontario M4C 5R1;
 - via email to mlsconditionreporting@toronto.ca; or
 - via fax at 416-392-3102.
- (4) during the probationary period, if Municipal Licensing and Standards has concerns with any new charges or convictions, those matters and report No. 6387, and any updating material, shall be brought back before the Tribunal for a full hearing.

Decision of the Tribunal: Re: Jeyakumar Balasubramaniam

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Originally Signed _____

Ted Yao, Chair

Panel Members, Moira Calderwood and Leigh Lampert concurring

[Reference: Minute No. 132/15]

Date Signed: September 18, 2015