

PART 3—FRANK PAUL’S FINAL DAYS

E. Discussion of Factual Issues

1. Events at the Jail

a. Validity of Frank Paul’s 8:00 p.m. arrest

I am left with no doubt, on the evidence, that by any measure Frank Paul was not capable of caring for himself when he was arrested, at approximately 8:00 p.m., for being in a state of intoxication in a public place. The evidence of the arresting officers, the videotape evidence and the eyewitness accounts all lead to only one conclusion—that Mr. Paul was intoxicated and was, for that reason, clearly unable to care for himself.

I appreciate that there is a basis for suggesting Mr. Paul had Wernicke-Korsakoff Syndrome, but the evidence in this case supports the further conclusion that he was in fact intoxicated by alcohol that night.

He was virtually unresponsive, limp in the arms of the officers, and uncommunicative to the point of stating only a word or two. He smelled of rice wine and I am satisfied, for the reasons I explore below, that there were many ways he could have obtained that drink in the few hours since his release from the Jail that afternoon. Indeed, he may have used the two-dollar coin that Cst. Prince kindly gave him to purchase some or all of a bottle of rice wine, which he then consumed.

There was ample evidence that Frank Paul was severely intoxicated, and required shelter in the Jail’s sobering cell or at the sobering unit of the Detox Centre.

b. Jail staff involvement in assessing whether Mr. Paul was capable of caring for himself

While it is fair to say that staff members expressed surprise that Mr. Paul had become intoxicated so soon after having been released at 5:00 p.m., I am not satisfied that members of the Jail staff, other than Sgt. Sanderson, participated in the decision that Mr. Paul was capable of caring for himself. The elevator was at the Jail floor for only a few minutes and,

during that time, Mr. Paul remained inside the elevator. Although several people apparently looked into the elevator, there is no suggestion that anyone other than Sgt. Sanderson attempted an assessment of Frank Paul’s condition.

- c. Did Sgt. Sanderson believe that Frank Paul was capable of caring for himself?

The more difficult question is what was truly in the mind of Sgt. Sanderson. We have no contemporary record, pre-dating the discovery of Frank Paul’s body, that directly informs us what Sgt. Sanderson believed. The videotape does not capture the interaction within the elevator, and the audiotape is equivocal on this point.

There are many problems with Sgt. Sanderson’s evidence, and I find it in virtually every respect unsatisfactory. In some respects it was implausible, and clearly was contradicted by other evidence. For example, I have difficulty with his response to being asked to compare the state of Mr. Paul’s intoxication when leaving the Jail earlier in the day, with his later state when he was returned to the Jail by Csts. Peterson and Turner. Sgt. Sanderson was asked to rate Mr. Paul’s level of intoxication, as seen on three different video clips. He rated the images showing Mr. Paul crawling into the Jail that morning as “most drunk,” but the images of Mr. Paul departing the Jail at 5:30–6:30 p.m. and his return at 8:30 p.m. (being dragged by Cst. Instant) both tied for “least drunk.”¹ It is difficult to accept that he was more drunk at a time when he was able to crawl on his own, drink a cup of coffee and eat a bag of chips, than when he had to be dragged into the police station.

This evidence was, in my view, the product of Sgt. Sanderson’s determination to hold to his story, rather than an honest review of the videotapes and a meaningful reflection on the events of that night. Indeed, Sgt. Sanderson was so determined that he suggested that the toxicology finding, proving that Frank Paul’s blood-alcohol level was very elevated before he died, could have been the result of Mr. Paul leaving the laneway, getting alcohol, and then for no reason returning to the same

¹ Transcript, Jan. 9, 2008, pp. 79–80.

exposed laneway after becoming intoxicated.² This absurd suggestion demonstrates starkly what I would have to accept in order to support Sgt. Sanderson's assessment at the Jail, that Frank Paul was not intoxicated.

Sgt. Sanderson testified that his decision not to admit Mr. Paul was motivated by concerns for the legality of holding him and for ensuring he did not breach his rights under the *Canadian Charter of Rights and Freedoms*. Given his conclusion that Mr. Paul was not drunk, there was in his mind no lawful basis to keep him in custody at the Jail. He testified:

... I believe that he had been arrested in error and the arrest was unlawful which meant that there [was] no power to detain Mr. Paul and that he should be released immediately as it was contrary to his rights and freedoms.³

Despite this apparent interest in ensuring the legality of Mr. Paul's detention, Sgt. Sanderson went on to authorize a breach of the peace under the *Criminal Code*, which he accepted was a tool of convenience rather than a proper legal basis for keeping Mr. Paul in custody and relocating him within the city. In response to questions from lawyer Steven Kelliher, he stated:

Q He's being released on a breach?

A He's being released.

Q Pursuant to a breach?

A Well, it was not my idea that it was going to be a breach. He was just being taken home as far as I was concerned.

Q But isn't that what Officer Instant said to you, "Look, am I going to treat this as a breach?"

A Technically that's what he said, yes.

² Transcript Jan. 8, 2008, p. 144; and Jan. 9, 2008, pp. 23–26. Moreover, it is logically inconsistent to suggest, as Sgt. Sanderson seemed to, (1) that Mr. Paul could not have obtained alcohol at about 6:00 p.m. in the Downtown Eastside, but (2) that he *could* have found alcohol in a laneway a dozen blocks away, a few hours later.

³ Transcript, Jan. 7, 2008, pp. 34–39 (quotation p. 39).

Q And you said yes?

A I did not consider it a breach in my own mind, though.⁴

Furthermore, rather than releasing Mr. Paul “immediately” in the absence of any lawful authority to hold him, as Sgt. Sanderson described, he instead authorized Mr. Paul to be held in custody for a further period while he was “breached” elsewhere. The logic requiring immediate release was apparently forgotten with the direction that Cst. Instant keep Mr. Paul in the wagon and release him elsewhere.

Sgt. Sanderson testified that there were two questions in a H/SIPP scenario. First, was the person intoxicated and creating a disturbance? Second, was the person so intoxicated by drug or alcohol that he was unable to care for himself?⁵ The focus in Mr. Paul’s case had to be on the second part of the test. I pause to consider this “test.” It focuses on whether the person can “care for himself.”

VPD policy required consideration of a person’s state of intoxication for the purpose of determining whether the person can care for himself.⁶ Indeed, if a person was found so intoxicated as to be unable to care for himself, but was a businessman or a teenager overtaken by excessive consumption of alcohol, they could be released into the custody of a friend or family member who was prepared to undertake to warrant their safety.

Although Sgt. Sanderson said he could not believe Mr. Paul could be drunk approximately two hours after his release, he did concede that a chronic alcoholic, given access to alcohol upon release from jail, could be expected to drink it in a short period. Sgt. Sanderson’s disbelief in Mr. Paul being intoxicated appeared to stem from his view that, logistically, a person in Mr. Paul’s physical condition could not obtain alcohol that quickly at that time on a Saturday night. The following evidence does not support the view that it was impossible for Mr. Paul to get drunk in a two-hour period after leaving the Jail area.

⁴ Transcript, Jan. 8, 2008, pp. 128–37 (quotation pp. 128-29).

⁵ Transcript, Jan. 7, 2008, p. 41.

⁶ Transcript, Jan. 7, 2008, p. 41.

- Witness Barry Conroy worked for Saferide and at the Lookout Shelter in the Downtown Eastside in 1998. He knew Frank Paul, through many dealings on an almost daily basis. He testified that a person could get drunk very quickly in the area of the police station, even without money: the person could panhandle, or run into another group of people who had alcohol, or might have enough money in their pocket to get to a corner store to buy alcohol.⁷ At the time, rice wine was available in corner stores in the Downtown Eastside for approximately two dollars a bottle.
- Cst. Turner testified that in late 1998, rice wine was readily available in most of the stores in Chinatown, and corner markets were selling it as well. Cst. Turner said, in the area where Mr. Paul was found, “I’m certain that there would have been corner stores” that sold rice wine. He also stated that Mr. Paul’s breath smelled of rice wine, a readily discernible odour.⁸
- Retired Insp. Kenneth Frail testified that there were 17 convenience/corner stores in the Downtown Eastside selling rice wine in the mid to late 1990s: “It was real cheap and it was available on the Downtown Eastside.” The cost was as low as \$1.25 a bottle to a high of \$7.00 on “Welfare Wednesdays.” He said: “I know that it was quite easy to get access to it at just about any hour.” He added that, in the area of the Jail, one would not have to go far to find such a store, perhaps not more than a block.⁹

With the benefit of the post-mortem report and a toxicology analysis placing Mr. Paul’s blood-alcohol level at a very high level, the only reasonable conclusion is that Mr. Paul was indeed intoxicated when Cst. Instant brought him into the Jail. Sgt. Sanderson refuses to acknowledge, even today, that he may have erred in his assessment.

Sgt. Sanderson’s “assessment” of Mr. Paul was quick and cursory, taking approximately four minutes. It was founded in part by his hearing four words: “no,” and “Broadway and Maple.”¹⁰ The “no” may have sounded more like a grunt. He did concede that Mr. Paul smelled of rice wine.

Sgt. Sanderson’s evidence, to the effect that Mr. Paul was in the same condition as when released earlier, is not tenable. When Mr. Paul left the

⁷ Transcript, Nov. 16, 2007, p. 55.

⁸ Transcript, Nov. 26, 2007, pp. 148–50.

⁹ Transcript, Jan. 29, 2008, pp. 124–26, 164–67, 175–76.

¹⁰ Transcript, Jan. 8, 2008, p. 93.

Jail after 6:00 p.m., he was able to walk off the elevator, sit down, dress himself (albeit awkwardly), eat food, drink coffee, rise to his feet and walk away. He left of his own volition and “under his own steam.” When Cst. Instant brought him back to the Jail that night, he was immobile and had to be dragged. Nothing indicated that he could move on his own initiative, or that he had the motor skills to eat food or dress himself. Ultimately, two good-sized men had to drag Mr. Paul out of the Jail and back into the wagon.¹¹

I contrast Sgt. Sanderson’s cursory assessment of Mr. Paul with what ambulance attendant James Douglas described as his usual practice. In response to questions during our hearings, he stated:

A Our initial approach would be to try to gain the person’s attention verbally by introducing ourselves, asking are you all right? If that didn’t work, the next procedure would be then to actually put hands on the person, give them a shake, perhaps use a pain stimuli to elicit a response.

Q What do you mean first with a shake, what would you do for that?

A I might put my hands on their shoulder and give them a gentle shake and also a verbal hello, can you hear me, can you hear me, and see if there’s a response from that.

Q When you say pain stimulus, what sort of steps would you take there?

A The classic method of a pain response on a person in this condition would be to squeeze the trapezius muscle at the base of the neck hard enough to instill some pain is a classic method.¹²

Mr. Douglas stated that he would then move into a patient assessment model, the elements of which would depend on whether the person was considered unconscious or not. Particular attention would be given to signs of intoxication, such as:

Slurred speech, involuntary eye movement, uncoordinated motor function, obvious smells of alcohol, odour of alcohol in the immediate

¹¹ Transcript, Jan. 8, 2008, pp. 85–91.

¹² Transcript, Nov. 16, 2007, p. 76.

vicinity, right down to any physical evidence of alcohol on the person or in the immediate area.¹³

One of Sgt. Sanderson's major failings was not taking any steps to properly assess Mr. Paul's actual state—in particular, his medical condition. It would not have taken much. A nurse or medical practitioner could have examined Mr. Paul to determine his condition.

The Jail sergeant bore the responsibility for ensuring Mr. Paul's safety. He was the sergeant in charge and this man was under his control. His approach to the situation was inadequate and set in motion the events leading directly to Mr. Paul's death.

Sgt. Sanderson's only regret or ambivalence related to his instructions to Cst. Instant. He remained steadfast that Mr. Paul was not drunk when Cst. Instant brought him in. Whatever his views at that time, I would have expected that after having the benefit of the toxicology analysis, the post-mortem report and the facts as they have since emerged, he might now acknowledge some possibility that he got it wrong.¹⁴

Sgt. Sanderson testified that when Cst. Instant arrived with Frank Paul, he believed Mr. Paul was capable of caring for himself. It seems to me that there are three views that may be taken of this assertion:

- he was lying, and did not actually believe this;
- he was indifferent, and did not take appropriate steps to answer the question; and
- he did, in fact, believe Mr. Paul was sober and capable of caring for himself.

I have concluded that the evidence establishes the second proposition, but does not go so far as to prove that Sgt. Sanderson was lying. I wish to set out the basis for this conclusion.

¹³ Transcript, Nov. 16, 2007, p. 78.

¹⁴ As noted previously, this led him to imply that Mr. Paul could have consumed alcohol after his release by Cst. Instant in the Detox Centre laneway: Transcript, Jan. 8, 2008, p. 144; Transcript, Jan. 9, 2008, pp. 23–26.

There is nothing in the evidence before me—whether in the accounts of witnesses, the Jail video, or the audio recordings—that establishes any motive for rejecting Mr. Paul at the Jail. Mr. Paul was not violent or abusive; the evidence does not suggest he was refused because of disruptive or combative behaviour. Nobody expressed a positive refusal to admit him to the Jail because he had quickly become intoxicated again, and nobody said that the Jail should not be a hotel or should refuse a second admission in the same day. It is true, as Sgt. Sanderson's counsel points out, that Mr. Paul was disabled both physically and mentally, even when sober. In support of this is the evidence of forensic pathologist Dr. John Butt, which I review in Part 4 in discussing the pathology evidence in this case. Dr. Butt concluded that Mr. Paul may well have had Wernicke-Korsakoff Syndrome, which would result in obvious physical and mental impairments that would be present regardless of whether he had consumed alcohol. As it happens, Sgt. Sanderson's conclusion to this effect—although medically untutored—may have been accurate. That is, Mr. Paul was a man who, even when sober, would have difficulty communicating, and difficulty with his gait, balance, and mobility. He would, and did, have good upper-body strength, as attested to by some of those responding to “man down” calls.

Having said this, the inescapable conclusion from the evidence is that Mr. Paul was *not* exhibiting his “usual post-jail” symptoms, when Sgt. Sanderson refused to admit him at the Jail. While the evidence of Dr. Butt suggests that Mr. Paul may have appeared intoxicated, even when sober, it does not go so far as to suggest Mr. Paul would be immobilized and virtually nonresponsive as a result. To the contrary, I have already outlined just how big a difference there was between Mr. Paul's condition upon leaving the Jail in the late afternoon, and when he was dragged back in, soaking wet, in the evening. In these circumstances, I have concluded that Sgt. Sanderson was indifferent as to Mr. Paul's true state. On the whole of the evidence, I conclude he did not direct his mind in any meaningful way to assessing Mr. Paul's physical condition.

The general circumstances support an inference that Jail staff members were tired of caring for Mr. Paul, and that their cursory attention to him that night may have been influenced by the fact he was a chronic alcoholic and homeless.

I conclude that Sgt. Sanderson exhibited callous indifference in the exercise of his duties by failing to properly assess Frank Paul before refusing him entry into the Jail when, by any objective measure, Mr. Paul was grossly intoxicated and incapable of caring for himself.

2. Cst. Instant's actions after leaving the Jail

One might view Cst. Instant's explanation of what he did and how he did it with skepticism. In the photographs, Frank Paul's pants are down below his waist with his torso showing, and his shoes are off. The position of the body and the condition of the clothing are consistent with someone dragging Mr. Paul and leaving him where his body was found.

Notwithstanding the appearances shown by the photographs, I found Cst. Instant sincere and convincing. He made admissions that were personally detrimental, which suggests that he was not simply trying to portray events in a favourable light. If anything, he avoided obvious opportunities to blame others for his actions. For example, the audiotape of the Jail conversation suggests clearly that it was Sgt. Sanderson who authorized a breach, but Cst. Instant took responsibility for that decision. Similarly, he accepted responsibility for deciding to leave Mr. Paul in this alleyway, despite clear evidence that it was Cst. English who first suggested it after Cst. Instant asked him for advice.¹⁵

¹⁵ Where Cst. English's evidence departs from that of Cst. Instant, I prefer Cst. Instant's. Cst. English's evidence that they discussed seeking the advice of a sergeant (when one was smoking a few feet away and unoccupied at the time of their conversation), or seeking the advice of an inspector in Car 10, is without any credence or support in the circumstances or other evidence. I infer that Cst. English would prefer that he had not participated in that brief and fateful conversation, and in his mind believes they must have discussed alternatives. Unfortunately, I find that Cst. English's involvement worsened rather than improved the situation that Cst. Instant found himself in. Indeed, although the laneway behind the Detox Centre might be expected to have ambulance and other police traffic passing through later in the evening (which did not happen), it would have been preferable in many ways for Cst. Instant to have carried on to Broadway and Maple, since any release in that area of the city was far more likely to result in Frank Paul's condition being noticed by someone else.

It is fair to observe that some of Cst. Instant's testimony was self-serving, such as his comment to the effect that he had sought "shelter" for Mr. Paul from a building overhang, when there was no such protection. However, he was forthright in describing how he handled Mr. Paul. He admitted that his actions were inadequate and were the product of bad judgement. I accept that the circumstances of homeless chronic alcoholics were new and alien to him, and that life in the Downtown Eastside in many ways challenged what he understood until then about acceptable standards of living.

I accept that he testified honestly, and I find that events occurred within the alley as he testified.

Cst. Instant was placed in a difficult position that evening. As a junior officer still under probation, he was eager to satisfy his superiors and the regular and experienced officers serving with him that evening. It would have been exceptional to question Sgt. Sanderson's direction, or seek to revisit it with another sergeant.¹⁶ Yet he bore the ultimate responsibility for ensuring Mr. Paul's safety, and if this required him to question or even disobey an improper order, that was the course he should have taken.

I will not minimize the seriousness of Cst. Instant's conduct that night. He may have felt he was carrying out Sgt. Sanderson's direction to return Mr. Paul to the streets, and that he'd be fine there. But his conduct suggests that he knew Mr. Paul would *not* be fine. The fact that Cst. Instant sought out advice from Cst. English shows that he was concerned about Sgt. Sanderson's directions. He had other options. He could have spoken with Sgt. Wood, or called back to Sgt. Sanderson, or called for Car 10. He could have created a pretext that Mr. Paul's condition had worsened, if he needed to justify a departure from Sgt. Sanderson's direction. He could have asked Cst. English, or other officers at the Cobalt Hotel, to look at Frank Paul. He could have sought the name of an overnight shelter that would have accepted Mr. Paul. He could have asked the Detox Centre to accept Mr. Paul, or he could at least have asked the Centre's on-duty nurse to examine him. After leaving Mr. Paul in the alleyway, he could have returned later to check on him. Any of these steps may have prevented Frank Paul's death that night.

¹⁶ See, to this effect, the testimony of B. Porter, Transcript, Jan. 14, 2008, pp. 34–35.

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It was Cst. Instant's deference to an organizational model that discouraged questioning a superior officer that was Frank Paul's undoing that evening, coupled with the fact that Cst. Instant's training had not equipped him to seek an appropriate answer when confronted with an order that made no sense to him. The fact that someone with such an excellent training record (and such an excellent service record since that event) could have made this decision rebounds against the VPD's training in relation to ethics generally, and specifically with regard to understanding the medical and other realities of the homeless chronic alcoholic population who occupied a good deal of police officers' professional attention in the Downtown Eastside.

In such a situation, it was not surprising that Cst. Instant relied heavily on the advice and directions that his superiors gave. Yet, he had a professional and moral duty to Mr. Paul, to provide for his safety, and he failed to fulfil that duty.