NOVA SCOTIA COURT OF APPEAL
Citation: R. v. Reddick, 2011 NSCA 36

Date: 20110420
Docket: CAC 336643
Registry: Halifax

Between:

Joseph Nolan Reddick

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	Hamilton, Fichaud and Farrar, JJ.A.
Appeal Heard:	March 21, 2011, in Halifax, Nova Scotia
Held:	Appeal is allowed and new trial ordered, per reasons for judgment of Hamilton, J.A., Fichaud and Farrar, JJ.A. concurring.
Counsel:	Douglas L. Lloy, for the appellant James A. Gumpert, Q.C., for the respondent

Reasons for judgment:

[1] Joseph Nolan Reddick appeals his convictions for assault causing bodily harm (s. 267(b)), robbery (s. 344(b)) and breach of probation (s. 733.1(1)). He argues that Provincial Court Judge Robert A. Stroud erred by rendering an unreasonable verdict or one that cannot be supported by the evidence and by giving insufficient reasons in his one-page oral decision. While I am not satisfied the verdict is unreasonable or not supported by the evidence, I am satisfied the judge's reasons are insufficient. They do not allow effective appellate review. A new trial should be ordered.

[2] The role of appellate courts in assessing the sufficiency of reasons is explained in **R. v. R.E.M.**, 2008 SCC 51:

> [52] In *Sheppard*, the Court, *per* Binnie J. enunciated this "simple underlying rule": "[I]f, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law [under s. 686 of the *Criminal Code*] has been committed" (para. 28).
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> [53] However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.
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> [54] An appellate court reviewing reasons for sufficiency should start from a stance of deference toward the trial judge's perceptions of the facts. As decided in *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25, and stated in *Gagnon* (para. 20), "in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected". It is true that deficient reasons may cloak a palpable and overriding error, requiring appellate intervention. But the appellate court's point of departure should be a deferential stance based on the propositions that the trial judge is in the best position to determine matters of fact and is presumed to know the basic law.
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> [55] The appellate court, proceeding with deference, must ask itself whether the reasons, considered with the evidentiary record, the submissions of counsel and the live issues at the trial, reveals the basis for the verdict reached. It must look at the reasons in their entire context. It must ask itself whether, viewed thus,

> the trial judge appears to have seized the substance of the critical issues on the trial. If the evidence is contradictory or confusing, the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions. If there is a difficult or novel question of law, it should ask itself if the trial judge has recognized and dealt with that issue.
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> [56] If the answers to these questions are affirmative, the reasons are not deficient, notwithstanding lack of detail and notwithstanding the fact that they are less than ideal. The trial judge should not be found to have erred in law for failing to describe every consideration leading to a finding of credibility, or to the conclusion of guilt or innocence. Nor should error of law be found because the trial judge has failed to reconcile every frailty in the evidence or allude to every relevant principle of law. Reasonable inferences need not be spelled out. For example if, in a case that turns on credibility, a trial judge explains that he or she has rejected the accused's evidence, but fails to state that he or she has a reasonable doubt, this does not constitute an error of law; in such a case the conviction itself raises an inference that the accused's evidence failed to raise a reasonable doubt. Finally, appellate courts must guard against simply sifting through the record and substituting their own analysis of the evidence for that of the trial judge because the reasons do not comply with their idea of ideal reasons. As was established in *Harper v. The Queen*, [1982] 1 S.C.R. 2, at p. 14, "[a]n appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. . . . Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede."
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> [57] Appellate courts must ask themselves the critical question set out in *Sheppard*: do the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review? To conduct meaningful appellate review, the court must be able to discern the foundation of the conviction. Essential findings of credibility must have been made, and critical issues of law must have been resolved. If the appellate court concludes that the trial judge on the record as a whole did not deal with the substance of the critical issues on the case (as was the case in *Sheppard* and *Dinardo*), then, and then only, is it entitled to conclude that the deficiency of the reasons constitute error in law.

[3] The judge's reasons, in full, are as follows:

> The Court: Identification is the only issue here, and obviously the jurisprudence has indicated time and time again that it is something that has to be taken very seriously and is very difficult on some occasions to prove, and results in unjust convictions from time to time.
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> Very often it's a fleeting glimpse of someone which is more dangerous to accept. This is not exactly that type of case. The victim, Gus Bezanson, and Const. Lloyd were unable to identify Mr. Reddick as the person involved in the incident. Gary Dooley's evidence was that he saw someone wearing similar clothing run through Dooley's around about the same time. He did say he saw blood on that person's knuckles. He may not have indicated that earlier but I have no reason to doubt his evidence here today, and he saw the victim who he knows somehow through the outside glass window.
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> And then we have Cst. Pitts, who, again I have no reason to doubt his evidence, who said he recognized Mr. Reddick in the video that he saw of the actual incident. That, combined with the evidence of Tom Rundle, which again was tentative, but particularly, looking at the evidence of those three witnesses in totality, as far as I'm concerned, that is sufficient to establish beyond a reasonable doubt that it was Mr. Reddick who was involved in the two incidents.
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> **So, I am going to convict him on counts 1 and 2. I'll give him the benefit of the doubt on 3, although I suppose I could ... I guess it would be inconsistent of me not to find him guilty on count # 3 as well.**
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> **Mr. Young: Right.**
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> **The Court: So, I'm going to find him guilty on all three counts.**
> (Emphasis added)

[4] The judge's reasons indicate that he was alive to the problems of identification evidence and understood that identification of the assailant was the only issue before him. They indicate he relied on the identification evidence of three of the five witnesses, Gary Dooley, Cst. Chris Pitts and Tom Rundle, in reaching his first conclusion, that the appellant was guilty on the first two counts of assault and robbery.

[5] His reasons also indicate that immediately after relying on the identification testimony of these three witnesses to find the appellant guilty of assault and robbery, he was going to "give [Mr. Reddick] the benefit of the doubt" on the third

count and acquit him on that count. The third count alleged that the appellant had breached a term of his probation order that prohibited him from being "in any place or establishment where alcohol is the primary product for sale", such as Dooley's.

[6] The judge quickly recognized a flaw in his reasoning – that it was inconsistent to find Mr. Reddick guilty on counts one and two, but not on count three. The judge then found the appellant guilty on count three.

[7] The judge's final comments concerning doubt and inconsistency cause concern. While the judge expressed his doubt only with respect to the third count, given his comment concerning the inconsistency of finding Mr. Reddick guilty of assault and robbery but not of breach of probation, and given the interconnectedness of the events underlying the three counts, occurring at the same time and place, it is reasonable to assume any doubt the judge had may also have applied to counts one and two. If, as appears from the reasons, the judge had a doubt on count three and felt that all three counts should be treated consistently, then the appeal court is left to wonder - What would the verdict be if the judge had considered count three before the other two counts? Would we have an acquittal on all three? It is trite to say that it would be an error of law if the judge found the appellant guilty on any count if he had a reasonable doubt concerning that count.

[8] The Crown submits that the correct interpretation of the judge's final comments concerning doubt and inconsistency is that the judge had no doubt on the third count, but was merely trying to give Mr. Reddick a break by finding him not guilty on one of the three charges he faced. It says this interpretation is supported in the record by the Crown's prior submission to the judge, that he dismiss count three for lack of evidence that Mr. Reddick was inside Dooley's.

[9] The Crown agrees however, that there is a second possible interpretation of these final comments – that the judge had a doubt and that it related to all three counts. If this is the correct interpretation, the judge erred.

[10] Nothing in his reasons indicates which interpretation is correct, suggesting they may be insufficient.

[11] However, as indicated in the paragraphs quoted from **R.E.M.** in paragraph 2 above, this Court is not to find lightly that reasons are insufficient. We are not to intervene because we think the judge did a poor job of expressing himself – that his reasons do not explain every detail or reconcile every frailty in the evidence – that they are not ideal. We are to afford deference to his decision because he is in the best position to determine the facts and is presumed to know the law. We are not to substitute our own analysis of the evidence for his. Rather, we are to ask ourselves whether his "reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of meaningful appellate review".

[12] As indicated in paragraph 4 above, the judge's reasons make it clear he understood that identification was the only live issue at trial and that he was attuned to the difficulties of identification evidence. Identification was the only issue argued before him. Thus, the only question is whether the reasons, considered in the context of the evidentiary record, allow us to determine if the judge erred in finding Mr. Reddick guilty of the three charges.

[13] As I would order a new trial, I will not refer to the evidence in depth.

[14] The undisputed facts are that Mr. Bezanson, the victim, was beaten and robbed by a black male just outside the front door of Dooley's bar in New Glasgow around midnight on April 29, 2010. The assailant punched the victim several times outside the front door, went inside Dooley's, came back out while talking on his cell phone, punched, kicked and robbed the victim, went back into Dooley's and ran out the side door when the police arrived. He was wearing a "hoodie". The appellant was arrested about ten minutes later in another part of town wearing a "hoodie". The attack was caught on video by a camera located 20 to 30 feet from where the incident took place. The video was not introduced into evidence.

[15] The evidentiary record indicates there was conflicting evidence about whether the assailant's hood was up or down. Mr. Rundle, who witnessed the incident from a distance of no more than five feet, testified it was up. Cst. Pitts, who viewed the video as part of his investigation, testified it was down. Whether the hood was up or down could have an impact on the weight to be given to Mr. Rundle's in dock identification of the appellant, based on his ability to see the profile of the lower part of the appellant's face in court, which he indicated he

could not see in the photo lineup he was shown during the investigation from which he was unable to identify Mr. Reddick. Whether the hood was up or down could also impact the reliability of Cst. Pitts' identification of Mr. Reddick from the video. He was not questioned extensively about his prior contact with the appellant, but the evidence he did give suggested rather minimal contact. He agreed the video showed only dark and shadowy figures. The tape was not seen by the judge and no determination was made as to whether the judge required Cst. Pitts' opinion evidence to aid him in identifying the assailant in the video. The judge made no finding on whether the assailant's hood was up or down.

[16] The evidentiary record also indicates that both the assailant and Mr. Reddick were wearing "hoodies". The judge's reasons indicate he relied on Mr. Dooley's testimony that the assailant's clothing was similar to Mr. Reddick's, when he found the appellant guilty. There is no indication in the record that he considered what weight should be given to clothing of this type, given its lack of distinctiveness.

[17] The video is not part of the record. We are unable to view it, just as the judge was unable to view it. Assuming, without deciding, that Cst. Pitts' evidence was properly admitted on this issue, there was no analysis by the judge of Cst. Pitts' identification evidence.

[18] After reviewing the judge's reasons, in the context of the evidentiary record, I am satisfied his reasons are insufficient. The judge's failure to make findings of fact with respect to the contradictory evidence and to address critical questions raised by the evidence, leave me unable to reconcile what appears to be an internal inconsistency in his reasons - that the judge had a doubt that applied to all three counts, yet found the appellant guilty. Without more, there can be no meaningful appellate review.

[19] Accordingly, I would allow the appeal and order a new trial.

[20] I would order that the sheriff bring Mr. Reddick before the Registrar of the Court of Appeal, at the Law Courts, 1815 Upper Water Street, Halifax, NS, B3J 1S7, at a time to be arranged between defence counsel and the Registrar, to be released from custody upon his entering into a Recognizance in the amount of Two Thousand Dollars ($2,000), with his father, also named Joseph Nolan Reddick, of 5947 Merigomish Road, R.R. # 1 Linacy (New Glasgow area) Nova Scotia, B2H

5C4, a member of the Canadian Armed Forces, as surety to justify in that amount, without the deposit of cash or other valuable security, and upon the following conditions, namely, that he:

1. Report to the New Glasgow Police Services each Friday, in person, at 225 Park Street, New Glasgow, Nova Scotia during the time period from 10:00 a.m. to 3:00 p.m.

2. Abstain absolutely from the consumption or possession of alcohol or other intoxicating substances.

3. Abstain absolutely from the consumption or possession of drugs except in accordance with a medical prescription.

4. Not to have in his possession any firearms, crossbow, or prohibited weapon, restricted weapon, prohibited device, prohibited ammunition or explosive substances.

5. Remain within the Province of Nova Scotia.

6. Remain away from Dooley's Bar in New Glasgow.

7. Remain away from all liquor stores, lounges, taverns, bars, pubs, beverage rooms, pool halls, show bars and cabarets and any other place where alcohol is sold as a primary product.

8. To have no contact or communication with Gus Bezanson and to remain away from Mr. Bezanson's place of residence and work.

9. To reside with his father, also named Joseph Nolan Reddick, at 5947 Merigomish Road, R.R. # 1 Linacy (New Glasgow area), Nova Scotia, B2H 5C4, and remain within that residence from 10:00 p.m. to 6:00 a.m. each day.

And if the appellant shall abide by the foregoing conditions, the said Recognizance shall be void, otherwise it shall stand in full force and effect.

[21] These terms of release are intended as an interim measure only, until such time as Mr. Reddick appears before a judge in connection with his new trial, at which time the judge may impose any terms of release appropriate in law.

Hamilton, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.