C.A.C. No. 128183

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Pugsley, JJ.A.
Cite as: R. v. G.D.G., 1996 NSCA 263

BETWEEN:		
G. D. G.	Appellant	J. Brian Church, Q.C. for the Appellant
- and -		
HER MAJESTY THE QUEEN	Respondent	Dana W. Giovannetti for the Respondent
		Appeal Heard: November 29, 1996
		Judgment Delivered: December 16, 1996

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: The appeal is dismissed as per reasons for judgment of Chipman, J.A.; Hallett and Pugsley, JJ.A., concurring.

CHIPMAN, J.A.:

The appellant appeals from convictions in the Supreme Court for buggery and gross indecency committed between January 1, 1972 and December 31, 1973.

The evidence offered by the Crown consisted of that of the complainant who described having been subjected to acts of anal intercourse and fellatio when he was a teenager.

The complainant testified that while in Mantua, Hants County, he was picked up by a group of young men driving around in a Mustang. He thought the driver was a man named S.. The accused was in the vehicle and while the complainant did not know much about him, he knew that he was a brother of an acquaintance. The occupants of the Mustang were drinking, and liquor was given to the complainant. He eventually felt ill from consuming liquor. After a time, he and the appellant left the Mustang and the appellant offered to drive him home in his own motor vehicle. He first drove the complainant to a gravel pit where an act of buggery and fellatio took place. By reference to evidence relating to the opening of the hockey rink to which the complainant was going on that evening, the events were established to have taken place late in the year 1973 when the complainant was 16 years of age.

The complainant testified about another occasion, probably in early 1974 when the appellant approached him on a snowmobile and took him to a horse barn where he attempted to have anal intercourse again. The complainant succeeded in pushing the appellant away and eventually got away from him.

The complainant did not see the appellant again until some 10 years later when he was at a construction site. At no time did he tell anyone about the events in issue until the police investigated his own activities respecting his common law wife's daughter.

The appellant testified, denying knowledge of the complainant and the acts of which he complained. The appellant called his wife who testified with respect to his lack of sex drive when drinking. He called S. who testified as to the unlikelihood of him having associated with the appellant at the material time.

The trial judge, in an oral decision following the trial, briefly summarized the evidence. He concluded that he had no doubt that the complainant was assaulted in the manner that he described. The remaining question then was whether the perpetrator was the appellant. The trial judge said:

> The question then is purely one of identity. Was the perpetrator Mr. G., or some other person? Mr. N., at the time the incidents occurred, was familiar with the accused. He knew of the accused, he knew him to see him. In fact he apparently was quite familiar with a brother of the accused. Apparently he also knew of the accused's reputation. As Mr. F. pointed out, it is very significant that Mr. N. said that when he asked this person who assaulted him why he was doing it, that the person replied: "If you've been in prison as long as I have, anything would feel good." It was acknowledged that during the time period when these incidents occurred that Mr. G. had recently been released from prison, as indicated by exhibit #3. The information contained there is consistent with the evidence of Mr. N.. Also, it is confirmed by Mr. S. that he indeed did occasionally drive a Mustang. Although he didn't own it, a friend of his had one and that is consistent with what Mr. N. said about the vehicle these men were travelling in being a Mustang and that Mr. S. was one of the persons in the vehicle and indeed, may have been the driver at the time.
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> Mr. G.'s answer to all of this essentially is that it just didn't happen because he didn't know the accused. Essentially, it is a straight denial. Mr. G. admits to having had a criminal record and the letter that he has put in evidence, through exhibit 3, from the Correctional Services of Canada, would indicate that he must have had a fairly significant history of criminal offences. I have no idea what these offences were but certainly it is a factor that the Court is entitled to take into account in assessing credibility.
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> Having considered all of the evidence and in particular the factors that I have referred to, I am satisfied beyond a reasonable doubt that Mr. N. has properly identified the accused as the person who committed the perverted acts upon him. I reject the evidence of Mr. G., when he denies having known Mr. N. and that the events occurred. Accordingly, I am satisfied that the Crown has proven its case beyond a reasonable doubt and I find Mr. G. guilty of both counts as charged.

Following conviction, the appellant was sentenced on each count to 30 days intermittent to be served on weekends, the sentences to be consecutive, 300 hours of

community service and two years probation.

It was not disputed on this appeal that convictions on both counts could be entered on the basis of the events established to have happened in 1973.

Two issues arise on this appeal:

(1) Whether the verdict was unreasonable; and

(2) Whether the trial judge erred in law in taking into account the appellant's history of criminal offences in assessing his credibility.

(1) Unreasonable Verdict:

By virtue of s. 686(1)(a)(i), this Court is entitled to review the evidence for the purpose of determining whether the trial judge could reasonably have reached the conclusion that he did on the evidence before him: **R. v. Yebes** (1987), 36 C.C.C. (3d) 417 (S.C.C.).

The appellant's counsel points to a number of inconsistencies and improbabilities in the complainant's testimony which were not addressed by the trial judge in his decision. Taken as a whole, he submits that these were so numerous that we must conclude that the verdict was unreasonable.

With respect, the appellant is asking us to do what the Supreme Court of Canada held in **R. v. Burns** (1994), 89 C.C.C. (3d) 193 was not a basis for allowing an appeal under s. 686(1)(a) of the **Code**. At p. 199 the court said:

> Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see **R. v. Smith**, [1990] 1 S.C.R. 991, 109 A.R. 160, 111 N.R. 144; affirming 95 A.R. 304, 7 W.C.B. (2d) 374, and **MacDonald v. The Queen** (1976), 29 C.C.C. (2d) 257, 68 D.L.R. (3d) 649, [1977] 2 S.C.R. 665. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself,

permit a court of appeal to set aside the verdict.

We were in effect asked to retry the case. Apart from the powers conferred by s. 686(1)(a) of the **Code**, we cannot substitute our view for that of the trial judge or order a new trial on the basis of doubts we may have regarding the evidence.

I have reviewed the evidence fully with a view to determining whether the trial judge could reasonably have reached the conclusion that the appellant is guilty. The trial judge accepted as credible the complainant's evidence that the appellant performed the acts of buggery and gross indecency upon him. The complainant testified to these matters. While his evidence was challenged at the trial, it was evidence which, if believed, established without question the appellant's guilt of the charges. The trial judge did believe the evidence. He could reasonably have reached the guilty verdicts upon it. I would reject this ground of appeal.

(2) Error in law:

During the argument, the court permitted the appellant leave to amend the notice of appeal to clearly encompass his contention that the trial judge erred in taking into account the appellant's history of criminal offences in assessing his credibility.

The appellant admitted on direct examination that he had a criminal record. Exhibit 3 which was put in evidence on his behalf did not give the particulars of the offences of which he had been convicted. It was apparent only from the exhibit that he had been convicted of offences for which he had served time in a federal institution. No details of the convictions appear and the question is whether the trial judge should have assigned weight to them in such circumstances.

Section 12(1) of the **Canada Evidence Act** provides:

> 12(1) A witness may be questioned as to whether he has been convicted of any offence, and, upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove the conviction.

This Court questioned counsel closely on whether there was a duty on the

part of the trial judge to ascertain the precise nature of the convictions before he could take them into account in assessing credibility. On consideration, I am satisfied that this was not necessary.

In **R. v. Patrick** (1994), 94 C.C.C. (3d) 571, the Quebec Court of Appeal in discussing s. 12 of the **Canada Evidence Act** said at p. 572:

> However, evidence of prior convictions of an accused is admissible only for the limited purpose of assessing his credibility in the testimony he has given before the court. It cannot be used to establish bad character or to prove that the accused is the kind of person who is more likely to have committed the offence with which he is charged or that he has had a tendency to commit this kind of crime or is more "liable" to have committed it because he has done so in the past.
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> Evidence of a criminal record can only be used to evaluate the testimonial reliability of the accused and not to decide his guilt or his propensity for committing crimes . . .

In **R. v. Stratton** (1978), 42 C.C.C. (2d) 449, Martin, J.A. speaking on behalf of the Ontario Court of Appeal said at p. 461:

> Unquestionably, the theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial reliability of the witness . . .
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> It is obvious that a jury may find it difficult to distinguish between the allowable use of the accused's character, as evidenced by prior convictions, for the purpose of assessing his reliability as a witness, and its forbidden use, for the purpose of leading to the conclusion that he is a person likely from his criminal conduct or character to have committed the offence charged. This problem does not, of course, arise in the case of the ordinary witness.
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> And at p. 467 he said:
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> . . . It is clear that Parliament has not limited the right to question a witness with respect to convictions, to convictions for offences involving dishonesty or moral turpitude, since it permits cross-examination with respect to summary convictions. However tempting it may be to rewrite the statute by confining its application to convictions which in our view are substantially relevant to credibility, I do not think we are empowered to substitute our words for the words used by

> Parliament. Parliament has determined the standard of relevancy by providing that a witness may be questioned with respect to convictions for "any offence".

See also **R. v. Gonzague** (1983), 4 C.C.C. (3d) 505 (Ont. C.A.).

Finally, in **Corbett v. The Queen** (1988), 41 C.C.C. (3d) 385, Dickson, C.J.C. speaking for the majority of the Supreme Court of Canada said at p. 395:

> . . . What lies behind s. 12 is a legislative judgment that prior convictions do bear upon the credibility of a witness. In deciding whether or not to believe someone who takes the stand, the jury will quite naturally take a variety of factors into account. They will observe the demeanour of the witness as he or she testifies, the witness' appearance, tone of voice, and general manner. Similarly, the jury will take into account any information it has relating to the witness's habits or mode of life. There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness. Of course, the mere fact that a witness was previously convicted of an offence does not mean that he or she necessarily should not be believed, but it is a fact which a jury might take into account in assessing credibility.

From the foregoing, it is clear that a trier of fact need not be satisfied that a conviction is of any particular nature before taking it into account in assessing credibility. The extent to which criminal convictions affect the credibility of a witness is a matter for the trial court. I have concluded that the trial judge did not err in law in considering the appellant's history of criminal convictions in assessing his credibility, even though the precise nature of the offences was never established.

I would dismiss the appeal.

Chipman, J.A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.