NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Schneider***, 2004 NSCA 99

Date: 20040817
Docket: CAC 200119
Registry: Halifax

Between:

Annie Marthe Schneider & Marguerite Schneider

Appellants

v.

Her Majesty the Queen

Respondent

Official French Translation Released Concurrently

Judges:	Cromwell, Saunders & Fichaud, JJ.A.
Appeal Heard:	January 19, 2004, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and the appeal is dismissed per reasons for judgment of the Court
Counsel:	Annie Marthe Schneider, self-represented appellant and representative for the appellant, Marguerite Schneider Pierre Muise, for the respondent

By the Court:

I. Introduction:

[1] Ms. Annie Schneider lives on Fairmount Road in Halifax. For much of the relevant period, Ms. Schneider's mother Mrs. Marguerite Schneider, resided with her. Their neighbours were Robert Marchand, his wife Alison Gillan and their children.

[2] The Crown alleged that from May through October, 1999, Ms. and Mrs. Schneider harassed Mr. Marchand and his family in various ways, including spitting, shaking their fists, running at the Marchands' car, throwing rocks at their house, shining a flashlight into the windows at night, verbal harassment, blocking entry, cutting branches, banging pipes, scattering glass on the Marchands' property, cutting pieces of the Marchands' porch and photographing the Marchands against their will.

[3] Chief Judge Batiot (as he then was) in the Provincial Court convicted Annie Schneider and Marguerite Schneider of criminal harassment contrary to s. 264(2)(c) and mischief contrary to s. 430(1)(d) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. He sentenced Annie Schneider to a total of three months in jail and three years probation while Marguerite Schneider received a suspended sentence and three years probation. Justice Cacchione in the Summary Conviction Appeal Court ("SCAC") dismissed the appeals from the convictions but reduced Annie Schneider's period of incarceration to two months and the period of probation for both appellants to one year. Ms. and Mrs. Schneider apply for leave and, if granted, appeal under s. 839(1) which permits appeals based on questions of law alone.

[4] On this appeal, as in the courts below, Ms. and Mrs. Schneider were unrepresented by counsel. Annie Schneider filed a written submission and made oral argument on behalf of herself and her mother. Marguerite Schneider submitted a signed supplement and added oral argument on her own behalf. At the trial before Chief Judge Batiot, Annie Schneider questioned the witnesses and made submissions for both defendants. In both courts below, Annie Schneider spoke for both her mother and herself, and Marguerite Schneider was given the opportunity to add her own comments.

[5] Marguerite Schneider is fluent in French but does not speak English, while Annie Schneider is fluent in both languages. The trial was conducted bilingually with the aid of an interpreter. Chief Judge Batiot is fluently bilingual. Any party or witness was free to speak in either language, and English was translated to French for the benefit of Marguerite Schneider. In practice, the prosecutor and Ms. and Mrs. Schneider and Chief Judge Batiot spoke French. Questions to English speaking witnesses were posed in French, translated to English for the witness, and the English answers were translated to French by the interpreter.

[6] The appeal to the Supreme Court also was bilingual. Justice Cacchione is fluent in both languages and at the outset told Ms. and Mrs. Schneider that they could proceed in either language. They made their presentations in French, as did counsel for the Crown.

[7] In the Court of Appeal the presentation of argument was bilingual. Ms. and Mrs. Schneider had the option of giving oral and written submissions in either or both languages. They chose to file their factum and address the Court in French as did counsel for the Crown. There was simultaneous translation of the hearing from each language to the other.

II. Issues:

[8] The issues are:

1. Was there a contravention of the appellants' language rights particularly under ss. 530 or 530.1 of the **Criminal Code**?

2. Was there bias by the Provincial Court Judge, misconduct by the Crown or police or an abuse of process committed by those parties?

3. Was there an improper search and seizure which led to the introduction of inadmissible evidence at the trial?

4. Was there unreasonable delay contrary to s 11(b) of the **Charter**?

5. Were the verdicts unreasonable?

6. Were the sentences (as varied by the Supreme Court) unfit?

III. Analysis:

1. Language Rights under ss. 530 and 530.1:

[9] Sections 530 and 530.1 govern language rights of a person accused of an offence under the **Code**:

> Language of accused
>
> 530. (1) On application by an accused whose language is one of the official languages of Canada, made not later than
>
> (a) the time of the appearance of the accused at which his trial date is set, if
>
> (i) he is accused of an offence mentioned in section 553 or punishable on summary conviction, or
>
> (ii) the accused is to be tried on an indictment preferred under section 577,
>
> (b) the time of the accused's election, if the accused elects under section 536 to be tried by a provincial court judge or under section 536.1 to be tried by a judge without a jury and without having a preliminary inquiry, or
>
> (c) the time when the accused is ordered to stand trial, if the accused
>
> (i) is charged with an offence listed in section 469,
>
> (ii) has elected to be tried by a court composed of a judge or a judge and jury, or
>
> (iii) is deemed to have elected to be tried by a court composed of a judge and jury,
>
> a justice of the peace, provincial court judge or judge of the Nunavut Court of Justice shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be,

who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

Idem

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than whichever of the times referred to in paragraphs (1)(a) to (c) is applicable, a justice of the peace or provincial court judge may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the justice or provincial court judge, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

Accused to be advised of right

(3) The justice of the peace or provincial court judge before whom an accused first appears shall, if the accused is not represented by counsel, advise the accused of his right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

Remand

(4) Where an accused fails to apply for an order under subsection (1) or (2) and the justice of the peace, provincial court judge or judge before whom the accused is to be tried, in this Part referred to as "the court", is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.

Variation of order

(5) An order under this section that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or the official language of

Canada in which the accused can best give testimony may, if the circumstances warrant, be varied by the court to require that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages of Canada.

Where order granted under section 530.

530.1 Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,

(a) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;

(b) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused;

(c) any witness may give evidence in either official language during the preliminary inquiry or trial;

(d) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language that is the language of the accused;

(e) except where the prosecutor is a private prosecutor, the accused has a right to have a prosecutor who speaks the official language that is the language of the accused;

(f) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;

(g) the record of proceedings during the preliminary inquiry or trial shall include

(i) a transcript of everything that was said during those proceedings in the official language in which it was said,

(ii) a transcript of any interpretation into the other official language of what was said, and

> (iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and
>
> (h) any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused.

[10] The appellants say:

(a) Annie Schneider was improperly denied her request to have her trial heard in English, separate from her mother's trial in French. This involves ss. (1), (4) and (5) of s. 530.

(b) The prosecutor at the trial did not speak fluent French contrary to s. 530.1(e).

(c) English exhibits were not translated to French which involves s. 530.1(g)(iii).

(d) The trial transcript was inadequate and erroneous which involves s. 530.1(g)(i) and (ii).

(a) Trial in English:

[11] Section 530(3) prescribes notice to the unrepresented accused that the accused may request a trial in English or French. On application conforming with s. 530(1), the accused is entitled to a trial in her choice of English or French, subject to the court's assessment of her ability to instruct counsel in the chosen language and subject also to the concluding words of s. 530(1), that the court may order a bilingual trial if "circumstances warrant". In **R. v. Mackenzie**, 2004 NSCA 10, paras. 10-15, this Court reviewed the principles from **R. v. Beaulac**, [1999] 1 SCR 768 which govern ss. 530(1) and (3), and which we will not repeat here.

[12] Ms. and Mrs. Schneider’s first appearances were in November, 1999 and January, 2000 in the Provincial Court. Marguerite Schneider chose to be tried in

French. Annie Schneider chose to be tried in English. There was a further appearance in Provincial Court on April 3, 2000. Judge Randall decided that there was to be a joint trial with an interpreter.

[13] On June 30, 2000 Annie Schneider applied for a severance of the two trials. Chief Judge Batiot denied the severance and confirmed that there would be a joint trial of both defendants and that the trial would be bilingual. Chief Judge Batiot noted on the appearance record that arrangements were made for an interpreter at the trial. This was necessary because there would be English speaking witnesses.

[14] On July 28, 2000, Annie Schneider appeared before Judge Curran (as he then was) to again request that the joint trial be severed, that her trial be in English and that her mother's trial proceed in French. Judge Curran declined this request and confirmed that there would be a joint bilingual trial. This is how the trial later proceeded, as discussed above.

[15] Annie Schneider submits that she has been denied her right under s. 530 to be tried in English.

[16] In our view there was no contravention of s. 530.

[17] Marguerite and Annie Schneider initially chose to be tried in French and English respectively. This appears from the transcripts of January 10 and 24, 2000. This complied with s. 530(1).

[18] Section 530(5) states that the initially directed language "may, if the circumstances warrant, be varied by the court to require that the accused be tried before a...provincial court judge...who speak[s] both official languages of Canada". Similar wording appears in the concluding words of ss. (1), (2) and (4) of s. 530.

[19] On April 3, 2000 Judge Randall ordered a joint trial with an interpreter. This would permit witnesses to speak either language with translation.

[20] Chief Judge Batiot on June 30, 2000 and Judge Curran on July 28, 2000 decided and confirmed that circumstances warranted a joint trial before a bilingual judge (with an interpreter as required) instead of two unilingual trials in different languages as requested by Annie Schneider in her severance applications.

[21] In our view Judge Randall, Chief Judge Batiot and Judge Curran acted within their permitted discretion under s. 530(5). The Crown's witnesses spoke only English. Marguerite Schneider speaks only French. So an interpreter would have been necessary in any event for Mrs. Schneider's trial. The Crown's evidence against both defendants and the defences were very similar and, for the most part, identical. The same witnesses would testify. Annie Schneider represented herself and her mother. If there had been two trials, Annie Schneider would twice present a similar defence. There was no need for separate duplicative trials.

[22] In **R. v. McNamara (No. 1)** (1981), 56 C.C.C. (2d) 193, at 264, the Ontario Court of Appeal stated:

> Appellate Courts in various Canadian Provinces have also held that accused persons allegedly acting in concert or engaged in a common enterprise should be jointly tried and that the trial Judge's discretion in refusing severance will not be disturbed unless the decision has resulted in a miscarriage of justice. ...

[23] In **R. v. Garcia** (1990), 58 C.C.C. (3d) 43, at 45-6 the Quebec Superior Court applied this passage from **McNamara** to deny a request for severance resulting from requests by different groups of accused for English and French trials. The court stated that these circumstances warranted a bilingual trial under the concluding words of s. 530(4).

[24] Similarly in **R. v. Lapointe** (1981), 64 C.C.C. (2d) 562 (Ontario General Sessions of the Peace) at 574-5 the Court stated:

> In my judgment, Parliament has recognized the possibility of joint trials wherein one accused speaks French and the other English, or any other language for that matter. This is clear from the language of s. 462.1(1), (2), (4) and (5) [now s. 530(1), (2), (4) and (5)], namely, that in the circumstances delineated in each subsection the Court may, if the circumstances warrant, order that the accused be tried by a Justice of the Peace, Magistrate, Judge or Judge and jury who speak both official languages — French and English.

[25] We agree with these principles and that the circumstances here warranted a joint bilingual trial instead of two trials, one in French with translation and the other in English. There was no error by the Provincial Court or the SCAC.

(b) The Prosecutor:

[26] The appellants say that the trial prosecutor was insufficiently fluent in French. We disagree. The Crown prosecutor conducted the trial almost entirely in French, questioning witnesses and presenting submissions fluently and with obvious comprehension. This is clear from a review of the transcript.

[27] Section 530.1(e) of the **Code** refers to a prosecutor "who speaks the official language that is the language of the accused". If this provision had applied here, we would rule that the prosecutor satisfied the standard.

[28] Section 530.1(e) did not apply to this trial. Section 530.1 opens with:

> Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,

This order is a condition of the particular rights which follow.

[29] The individual subsections of s. 530 specify three types of orders, namely orders which direct a trial either (1) in "the official language of Canada that is the language of the accused" (2) or in "the official language of Canada in which the accused...can best give testimony" or (3) "if the circumstances warrant" before a judge or jury "who speak both official languages of Canada".

[30] The opening words of s. 530.1 clearly apply only to the first and second types of order. Annie and Marguerite Schneider were tried further to the third type of order, for a bilingual trial before a bilingual court, to which s. 530.1 does not apply.

(c) Exhibits:

[31] The appellants say that the trial exhibits were not translated. Since most of the exhibits were photographs, this submission would refer to two letters introduced by the appellants and to the Information to obtain the search warrant which the Crown tendered in the midst of Ms. Schneider's cross examination of Constable Burton respecting the basis for the search.

[32] Section 530.1(g) did not apply to this trial for the reason discussed above. The Provincial Court's order that this trial occur before a bilingual judge is not the type of order that triggers s. 530.1.

[33] Section 530.1(g)(iii) requires that the trial record include "any documentary evidence that was tendered during those proceedings in the official language in which it was tendered". If this provision had applied, we would rule that there was no contravention. The record includes the exhibits in the official language in which they were tendered. There is no requirement that all exhibits be translated: see **R. v. Rodrigue** (1994), 91 C.C.C. (3d) 455 (Y.S.C.), at 461-5, appeal dismissed on jurisdictional grounds (1995), 95 C.C.C. (3d) 129 (Y.T.C.A.), leave to appeal denied [1995] 3 SCR vii.

[34] Section 530.1(f) requires the court to "make interpreters available to assist the accused, his counsel or any witness during the...trial". There was an interpreter available throughout the trial to assist as needed including any translation of exhibits for purposes of examination, cross-examination or argument.

[35] There may be occasions where an exhibit must be translated to ensure that the accused has a full answer and defence and a fair trial under s. 11(d) of the **Charter**. No such issue arises here. The only written exhibit tendered by the Crown in English was the Information to obtain the search warrant. Annie Schneider, who represented both accused, is fluent in English and capable of understanding the language of that exhibit. There was a translator available to assist. Neither accused requested the assistance of the translator to translate that exhibit. That the exhibit was in English had no bearing on the fairness of the trial.

(d) Transcript:

[36] The appellants say that the transcription of the spoken French at the trial was both inaccurate and insufficient.

[37] As to the accuracy, the transcript concludes with a certificate that the contents are a true and accurate transcript of the translation of the evidence. The **Court Officials Act**, R.S.N.S. 1989, c. 373, s. 9, as am. by S.N.S. 1996, c. 23, s. 28 states that a transcript so certified is the “official record of the proceedings.” The appellants said nothing to persuade us that this record is inaccurate.

[38] The appellants point to the occasions when the trial transcript says "inaudible" and say that the transcript omitted important evidence. They cite examples of poor grammar recorded in the transcript. They say that the transcript "massacred" their testimony and reflects the anti-French bias of the judicial system.

[39] The Court has read the transcript. For most witnesses the transcript has an occasional reference to "inaudible", no more frequently than in many cases. The court reporters certified in writing the accuracy of the transcript and therefore certified that these moments of testimony in fact were inaudible.

[40] The highest frequency of "inaudibles" in the transcript is in the testimony of Marguerite Schneider. Many of the “inaudibles” in the transcript occurred while Annie Schneider and/or the Court were locating, obtaining, verifying the number of, or otherwise managing, exhibits, particularly photographs. These instances obviously do not relate to anything of substance. Annie Schneider often posed leading and argumentative questions on direct examination to the appellants' witnesses. This was particularly apparent on the direct examination of Marguerite Schneider. This prompted objections from the Crown, comments from Chief Judge Batiot and sometimes combative replies from Annie Schneider, often followed by resumed leading and argumentative questions. Despite more than adequate allowances by the trial judge for the appellants' self-representation and absence of counsel, Ms. Schneider persisted with inappropriate forms of questions. This generated initially gentle directions and, as the trial proceeded, clear-cut rulings from Chief Judge Batiot.

[41] The transcript has references to "inaudible" testimony because the words overlapped the speech of others, usually because of Ms. Annie Schneider’s inability to understand the process of questioning and her failure to follow the directions from the trial judge.

[42] Section 530.1(g) of the **Code** requires, for applicable trials, a transcript of everything said in the official language in which it was said and a transcript of any interpretation into the other official language. We need not comment on the degree of tolerance permitted by s. 530.1(g) of transcribed references to "inaudible" testimony. As noted above, this trial was not further to an order cited in the opening words of s. 530.1 and therefore was not subject to the requirements of s. 530.1(g).

[43] Apart from s. 530.1, s. 682(2) of the **Code** requires that a transcript of the evidence be furnished for an appeal, which requirement is incorporated for this court by s. 839(2).

[44] In **R. v. Hayes**, [1989] 1 S.C.R. 44 at p. 48 Justice L'Heureux-Dubé for the majority stated:

> A new trial need not be ordered for every gap in a transcript. As a general rule, there must be a serious possibility that there was an error in the missing portion of the transcript, or that the omission deprived the appellant of a ground of appeal.

[45] In **Hayes** there were gaps in the transcript, not just "inaudible" words as here. The Supreme Court decided that the gaps did not violate the standard in the quoted passage and affirmed the decision of the Nova Scotia Court of Appeal that the conviction involved no miscarriage of justice under s. 613(1)(b)(iii) [now s. 686(1)(b)(iii)] of the **Code**.

[46] The principle from **Hayes** has been applied in: **R. v. R.(S)** (1993), 26 B.C.A.C. 149 (C.A.) at 155; **R. v. Noble** (1996), 106 C.C.C. (3d) 161 (B.C.C.A.) at 167-8, affirmed without reference to this point [1997] 1 S.C.R. 874; **Canadian Union of Public Employees, Local 301 v. Montreal (City)**, [1997] 1 S.C.R. 793 at para. 77; and **R. v. Dobis** (2002), 163 C.C.C. (3d) 259 (O.C.A.) at 267.

[47] There is no transgression of the **Hayes** standard here. For the most part the "inaudibles" are isolated words when the speaker's voice overlapped another voice. On a number of occasions involving English-speaking witnesses, words in the French question are transcribed as “inaudible”, but the interpreter’s translation of the question into English for the witness is fully transcribed. The appellants have not lost any ground of appeal. Finally, the appellants were given extraordinary leeway by the trial judge to state their position in their testimony, in prefaces to questions by Annie Schneider, in mid-trial submissions which often interrupted the testimony of a witness, and in post-trial submissions. Justice Cacchione in the SCAC gave both appellants the opportunity to state fully their positions, as did this Court. If a particular comment at trial was not transcribed as "inaudible", then the trial judge heard what was said. The appellants have had the opportunity in all three levels of court to state and restate their positions.

[48] In our view the transcript satisfies the requirements of the Supreme Court in **Hayes**.

(e) Summary of Language Issues:

[49] In the Court's view there is no error of law in the decision under appeal.

2. Was there bias by the Provincial Court judge, misconduct by the Crown or police or an abuse of process committed by those parties?

[50] The appellants allege that the trial judge committed a host of errors in his conduct of the trial and submit that he acted toward them not only with bias, but malice. They claim that this is evident in the manner in which the trial was conducted and from the sentences imposed. On their appeal to this Court, the issue is whether the SCAC erred in law by failing to give effect to these submissions. For the reasons which follow, we find no error of law on the part of the SCAC with respect to these issues.

[51] It will be helpful first to give a brief account of the nature of this trial then to turn to consideration of the applicable legal principles.

[52] This was a difficult trial. Ms. Schneider appeared unable or unwilling to accept the trial judge’s directions concerning the proper conduct of the trial. She was unable or unwilling to refrain from asking highly leading questions of her own witnesses. She failed to accept that it was not proper for her to simply ask witnesses to confirm statements she herself had made. She also misunderstood, or was unwilling to accept, the proper scope of relevant evidence at trial. As the trial judge attempted to have her conform her behaviour to the rules governing the conduct of a trial, she became belligerent and disrespectful towards him.

[53] The trial judge accurately described Ms. Schneider’s behaviour in court in his reasons for judgment:

> [TRANSLATION] THE COURT ... She is constantly trying to control not only the way the evidence is adduced, but the evidence itself by asking leading questions. She objects when her witnesses – when her own witnesses do not

> provide the testimony she expects and then accuses them of lying. She begins ranting on with her arguments at the most inopportune times, thereby impeding the normal course of the trial. ...

[54] At trial, Ms. Schneider, among other things, accused the trial judge of favouring the Crown, of preventing the presentation of the defence and expressed doubt as to whether the Court was entitled to respect. The trial judge found it necessary to inform and to remind Ms. Schneider of the law concerning contempt of court and, as a result of her conduct, to have her removed from the court room while he was giving his reasons for judgment.

[55] The judge insisted that Ms. Schneider's examination of witnesses be directed to eliciting relevant evidence and he attempted to stop Ms. Schneider from asking leading questions of her own witnesses or from asking witnesses to repeat what she had told them. While Ms. Schneider may have perceived these interventions as impeding the presentation of the defence, the trial judge in fact acted to enforce fundamental rules of trial procedure which he had explained to Ms. Schneider. On the occasions that he terminated her examination of a witness, he did so only after giving every reasonable opportunity to Ms. Schneider to elicit relevant evidence in an appropriate manner. Ms. Schneider was argumentative, disrespectful and failed to follow the judge's directions.

[56] In this case, the trial judge cut off Ms. Schneider's direct and cross-examinations of some witnesses and refused to allow her to call certain witnesses. These were, to be sure, extraordinary measures. Limiting the examination or cross-examination of defence witnesses or the right to call defence witnesses will only be justified in clear and compelling circumstances. But in a proper case, these measures are within the discretion of the trial judge and will be interfered with on appeal only if the judge's use of his discretion is based on a wrong principle or causes the trial to be unfair.

[57] The main duty of a trial judge is to do everything he or she can reasonably do to ensure that the trial is fair. Where, as here, the accused persons are not represented by counsel, this duty includes providing a measure of assistance to the accused to the extent that this is possible and consistent with the judge's role as an impartial decision-maker. But how these duties ought to be undertaken in the course of a trial cannot be reduced to a series of rules or a list of "do's" and "don't's". The trial judge must be left a large measure of discretion as he or she

responds to the particular challenges of a specific case. At the end of the day, what counts is that a trial be free of legal error and conducted with fairness: see for example, **R. v. Taylor** (1995), 142 N.S.R. (2d) 382; N.S.J. No. 290 (Q.L.) (C.A.) at paras. 21 - 30; leave to appeal dismissed [1998] S.C.C.A. No. 186.

[58] The rights afforded accused persons cannot be permitted to undermine the object for which they are given – the holding of a fair trial according to law. As Chipman, J.A. said on behalf of the Court in **R. v. Howell** (1995), 146 N.S.R. (2d) 1; N.S.J. No. 483 (Q.L.) (C.A.), aff'd [1996] 3 S.C.R. 604 "... the many safeguards built into the criminal justice system for an accused, particularly an unrepresented one, cannot be allowed to give rise to a right in an accused person to disrupt the orderly process of a trial." (para. 55)

[59] We turn now to address the various matters raised by the appellants.

[60] The appellants say that the trial judge erred because he interfered with the order of testimony of their witnesses. The circumstances were these.

[61] The defence intended to call Inspector Sykes and Laurie Ehler. They had been subpoenaed to attend on an earlier date, but had not been subpoenaed for May 4, the day on which Ms. Schneider wished to call them. Another defence witness, Ms. Nicholson, was present on May 4 and Ms. Schneider decided to proceed with her evidence. Following Ms. Nicholson's testimony, Ms. Schneider proceeded with the testimony of her father which completed the day.

[62] When the trial resumed on July 19, 2001, Inspector Sykes was not present because he was on vacation although apparently under subpoena for that date. The judge, after inquiry, determined that the proposed testimony from Inspector Sykes would be neither relevant nor admissible and denied the defence an adjournment to a date when his evidence would be available. The judge's oral reasons set out the background facts and his conclusion:

> [TRANSLATION] **THE COURT**: This is an application by Ms. Schneider who defends... who is defending herself as well as her mother, Mrs. Schneider, in these proceedings. An application, as I was saying, to adjourn or postpone this hearing because Inspector Sykes is not... cannot attend before the court to testify for the defence.

Ms. Schneider says it is important that Inspector Sykes be present so she may confront him and especially confront his testimony with that of other witnesses she intends to call. Ms. Schneider has much to say about the interruption that has occurred during the examination of her witnesses. But, most of all, she needed to have this witness testify in this order, in other words, starting with him now, and then moving on to other witnesses.

She does not specify what kind of evidence Inspector Sykes can bring to this case. Ms. MacDonald indicates that apparently Inspector Sykes, who had said to her when they spoke that he could not contact Ms. Schneider, simply reviewed a review of a complaint lodged by Ms. Schneider before the Police Commission, which complaint had been dismissed. Therefore, according to the evidence that I have here, the only evidence that could be adduced by Inspector Sykes would be going to the weight of certain pieces of evidence.

MS. SCHNEIDER: Your Honour

THE COURT: You were saying that you were constantly interrupted.

MS. SCHNEIDER: Yes, I do it but it is done also to me.

THE COURT: And that this evidence will be used to impeach other evidence in order to establish a police bias and so I think this witness will be called to testify during Ms. Schneider's allegations that there was abuse of process as a result of bias (inaudible ...) police bias in its prosecution.

. . .

As I have already indicated, Ms. Schneider did not want to tell us what evidence he could bring and the only evidence I have before me is that Inspector Sykes cannot talk about the review of a review. This is hearsay within hearsay, it is not substantial evidence and so the application ...

MS. SCHNEIDER: Your Honour.

THE COURT: ... is dismissed.

[63] The judge made the same ruling with respect to the proposed witness Laurie Ehler:

Ms. Schneider, I believe, is showing us a postponement of proceedings for the continuation of this proceeding because Laurie Ehler of the Elizabeth Fry Society,

> who spent all day here, on this day July 19, 2001, pursuant to a subpoena of June 22, 2001, did not stay and was gone by the time she was called to testify at 4:43 pm. Ms. Schneider says that her testimony is important because she is a member of the Elizabeth Fry Society and that Ms. Schneider had given her access to her file so that Ms. or Mrs. Ehler could discuss it with the police. I don't know when this was done but Ms. Schneider tells us that Ms. or Mrs. Ehler can bring, can say or can speak about the photos (inaudible...) that Ms. Schneider showed her. She can repeat what the police told her. She can speak of the bias or the fascism or the racism of the police who did not do their work properly, claims Ms. Schneider, and who gave more credence to the word of an English-speaking male than that of a French-speaking female and therefore she can give an opinion as to the proceedings before the Court.
>
> Ms. MacDonald disputes this application on the two (inaudible ...) grounds. The evidence is neither admissible nor relevant. Given Ms. Schneider' stated arguments, I cannot say that that person is liable to give important evidence. I cannot say as much, I cannot conclude as much. And therefore I am dismissing the application.
>
> Court will resume tomorrow. Tomorrow morning at 9:30 am. Thank you.

[64] The trial judge has a discretion to limit the evidence if it is not relevant or admissible: see, for example, **R. v. Kim**, [2004] B.C.J. No. 244 (Q.L.) (C.A.) at para. 41; **R. v. Fabrikant** (1995), 97 C.C.C. (3d) 544; Q.J. No. 300 (Q.L.) (C.A.), leave to appeal dismissed [1995] S.C.C.A. 211. While the exercise of this discretion is truly exceptional, such extraordinary actions may properly be taken where necessary to preserve the integrity of the process. The trial judge did not err in doing so here.

[65] The appellants suggest that the judge went too far in asking about the relevance of proposed evidence. We do not agree. Faced with the appellants' requests for adjournments because witnesses were not present, the judge quite properly attempted to determine whether the adjournments should be granted. His questions were not probing or intrusive of defence strategy but merely sought some assurance that the proposed evidence would be relevant and admissible. In the circumstances confronting him, we do not think the judge erred in doing so.

[66] It is submitted that the trial judge erred by questioning Mrs. Schneider directly during her testimony. Our review of the record persuades us that the judge intervened to ensure that the relevant and admissible evidence which Mrs.

Schneider wished to give was elicited from her. While, of course, a trial judge must exhibit great caution in questioning an accused person who testifies, the judge acted carefully and in the interests of justice in this case.

[67] The appellants' claim that the judge was biased is based mainly on his conduct of the trial and the sentences he imposed at its conclusion. However, in our view, the trial judge did not err in his conduct of this trial and the sentences he imposed do not provide evidence of bias.

[68] Nothing is more important in the legal system than the impartiality of judges. The standard of impartiality which judges must meet is a stringent one. However, judicial impartiality is properly and necessarily presumed and as the Supreme Court stated recently, "... the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.": **Wewaykum Indian Band v. Canada**, [2003] 2 S.C.R. 259 at para. 59. The party alleging bias must put forward serious and substantial grounds supporting the allegation and has the burden of proving it: **Wewaykum** at paras. 59 and 76; **R. v. R.D.S.**, [1997] 3 S.C.R. 484 per Cory, J. at paras. 113 - 114. The threshold for a finding of real or perceived judicial bias is high: **R.D.S.** at para. 113.

[69] In our view, the appellants' attack on the judge's impartiality is groundless. The judge's duty in this case required him to make rulings adverse to the appellants and to rein in, as best he could, the improper and disrespectful conduct of Ms. Schneider at trial. He did so with patience and restraint. Many judges might well – and properly so – have found it necessary to act more forcefully and sooner. There is no basis for the allegation of bias, let alone of malice, on this record.

[70] The appellants contend that the prosecution was an abuse of process. They claim that the police pursued them out of malice, fabricated evidence against them and acted in a racist, sexist, biased and malevolent manner. At trial they asserted that the police were corrupt and were bandits. They complained that the police failed to charge Mr. Marchand instead of them. They say that the Crown misconducted itself by failing to cross-examine Mrs. Schneider and ensuring that the trial was held before a Francophone judge to give the proceedings a veneer of respectability.

[71] None of these allegations is supported by the evidence. The appellants fail to appreciate that the police were entitled to act on what in their opinion were

reasonable and probable grounds to believe that the appellants had committed an offence. The burden of proof was on the appellants to support their allegations of abuse of process with credible evidence. They did not do so.

3. Was there an improper search and seizure which led to the introduction of inadmissible evidence at the trial?

[72] The appellants submit that the SCAC erred in law by failing to find that the police search of Ms. Schneider's home was illegal. If the search were found to be illegal, then it would be necessary to consider the question of whether the evidence adduced at trial arising from it ought to have been excluded.

[73] For the reasons that follow, we are not persuaded that the SCAC erred in law by failing to find that the search was illegal. As a result of that conclusion, no question about the exclusion of evidence arises.

[74] The evidence at trial was that the search of Ms. Schneider's home was conducted on the authority of a search warrant obtained on the information of Constable Burton. The appellants argued at trial that the search was illegal because there was no evidence justifying the issuance of the search warrant. The trial judge held that he was satisfied that reasonable and probable grounds existed and were proved before the issuing justice and, therefore, that the search warrant had been properly issued and the search was lawful. This conclusion was upheld by the SCAC.

[75] A justice of the peace who issues a search warrant must be satisfied by information on oath that there are reasonable and probable grounds to believe that an offence has been committed and that evidence of it is to be found in the place of search: see **Criminal Code** s. 487 and **R. v. Morris** (1998), 134 C.C.C.(3d) 539 (N.S.C.A.). The standard is one of credibly based probability: **Hunter v. Southam Inc.**, [1984] 2 S.C.R. 145 at 167. The affiant's reasonable belief does not have to be based on personal knowledge, but the Information to obtain the warrant must, in the totality of circumstances, disclose a substantial basis for the existence of the affiant's belief: **R. v. Yorke** (1992), 115 N.S.R. (2d) 426, aff'd [1993] 3 S.C.R. 647. On review of the issuance of a search warrant, as in this case by the trial judge, the question is whether the record before the justice of the peace who issued

the warrant, as properly amplified on review, provides a proper basis upon which the search warrant could be issued: **R. v. Grant**, [1993] 3 S.C.R. 223 at 251.

[76] The Information to obtain the search warrant, sworn by Constable Burton, contains detailed information concerning the events providing his reasonable grounds for believing that the appellants had committed offences and that the search of Ms. Schneider's residence would afford evidence in relation to them. He refers to the detailed notes kept by Mr. Marchand and to incidents alleged to have been captured by Mr. Marchand on video tape.

[77] The appellants' position at trial was that there was no evidence that they had committed the offences charged so that the warrant should not have been issued. This position is based on their assertion that Mr. Marchand was lying and that they were, in fact, the victims. However, these assertions do not show that the warrant was improperly issued.

[78] A police officer investigating an alleged crime and a justice of the peace asked to issue a search warrant are not trial judges deciding guilt or innocence. The police officer may proceed on the basis of belief that reasonable and probable grounds exist which have a credible basis and the justice of the peace may issue a search warrant if satisfied that this is so. Constable Burton was examined at length at trial and, at the end of it all, it could not have been clearer that he believed the appellants had committed offences. It was also clear that he thought that Mr. Marchand's detailed records and video tape provided a reasonable and credible basis for that belief. The justice of the peace was evidently satisfied that the requirements had been met as were the trial judge and the SCAC .

[79] In light of the Information to obtain the warrant we see no error of law in these conclusions. There were detailed allegations by Mr. Marchand of acts by the appellants that could constitute a criminal offence. These allegations were supported to some degree by video taped incidents. Constable Burton believed the allegations were credible and he had a reasonable basis for his belief. The material placed before the justice on its face provided a proper basis for the issuance of a search warrant. None of the evidence at trial detracted from this conclusion. The appellants did not demonstrate at trial that the warrant was improperly issued. The search was therefore authorized by law.

4. Was there unreasonable delay contrary to s. 11(b) of the **Charter**?

[80] The appellants complain that their s. 11(b) **Charter** right to be tried within a reasonable time was violated. In our respectful opinion there is no merit to this ground of appeal. The Information in this case was sworn at Halifax, on November 24, 1999. The case initially was set down for trial for September 20, 2000. When the parties appeared on January 24, 2000, the trial date was changed and moved up a week to September 14, 2000. When the parties next appeared on April 3, 2000, the trial date was changed again and moved up to August 31, 2000. On June 2, 2000, the parties appeared to set a date for the appellant Annie Schneider's application to adjourn the trial. It was set down for hearing on June 30. On that date, Batiot, J. granted her request and set a new trial date for October 18, 2000. On October 6, 2000, following a further request by the appellants for an adjournment, the trial date was postponed until November 24, 2000. The trial began on November 24 and continued over five other days, ultimately concluding with sentencing on September 21, 2001.

[81] Section 11(b) of the **Canadian Charter of Rights and Freedoms** provides:

> Any person charged with an offence has the right to be tried within a reasonable time.

The approach to a determination of whether this right has been infringed was considered by the Supreme Court of Canada in **R. v. Morin**, [1992] 1 S.C.R. 771, where at 787, Sopinka, J., for the majority explained:

> The general approach to a determination of whether the s. 11(*b*) right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which inevitably lead to delay. The factors to be considered are:
>
> (1) the length of the delay;
>
> (2) waiver of time periods;
>
> (3) the reasons for the delay, including

(a) inherent time requirements of the case,

(b) actions of the accused,

(c) actions of the Crown,

(d) limits on institutional resources and

(e) other reasons for delay; and

(4) prejudice to the accused.

[82] In this case 12 months elapsed between the laying of the Information and the start of the trial. Applying the list of factors from **Morin**, there was no waiver here. The record confirms that the appellants themselves, twice asked for the trial to be postponed, first on June 20, 2000 and again on October 6, 2000. On each occasion the court acceded to the appellants' request. The Crown never sought a postponement of this trial. There is no evidence before us with respect to the Provincial Court's own institutional resources, but from our own appreciation of its heavy workload, we see nothing unusual or untoward in the scheduling or ultimate disposition of this matter. The fact the appellants themselves asked that their trial be postponed on two occasions, suggests that they suffered no prejudice from the delay.

[83] Neither are we persuaded the appellants suffered any prejudice by the fact that the trial lasted six days, spread over some 10 months. Such was simply a factor of the court's own busy docket and its attempt to find dates that would accommodate both the Crown and the defence witnesses and the added time occasioned by Ms. Schneider choosing to represent her own and her mother's interests.

[84] The appellants complain that when they appealed to the SCAC they had to wait a further eight months for the transcript to be prepared and that this delay and its added cost added significantly to the "inhumane" stress felt by Ms. Schneider and her parents. There is no merit to this submission. Section 11(b) of the **Charter** does not apply to a delay in respect of an appeal from conviction brought by an accused. See, for example, **R. v. Potvin**, [1993] 2 S.C.R. 880.

[85] Accordingly, we are not persuaded that the constitutional right of the appellants to be tried within a reasonable time was in any way prejudiced. This ground of appeal must fail.

5. Were the verdicts unreasonable?

[86] The appellants say that their convictions should be set aside as being unreasonable or unsupported by the evidence. In the circumstances of this case the appellants' appeal against their convictions is brought on further appeal to this court, with leave, pursuant to s. 839(1) of the **Criminal Code**, incorporating by reference s. 686, *inter alia*, with such modifications as the circumstances may require. Such an appeal, with leave, is restricted to matters that involve a question of law alone. In challenging the trial judge's verdict in this case the test is whether or not the verdict is one which a properly instructed jury acting judicially could reasonably have rendered. In making that assessment, findings of fact and credibility by the trial judge are owed great deference. In conducting our assessment we are obliged to review, analyse and within the limits of appellate disadvantage, weigh the evidence. See for example, **Corbett v. The Queen**, [1975] 2 S.C.R. 275; **R. v. Yebes**, [1987] 2 S.C.R. 168; **R. v. Biniaris**, [2000] 1 S.C.R. 381; **R. v. Francis** (2001), 190 N.S.R. (2d) 138; N.S.J. No. 38 (Q.L.)(C.A.); **R. v. Diggs**, 2004 NSCA 16.

[87] It will not be necessary for us to identify or comment separately upon every single complaint listed by the appellants under this ground of appeal in both their written and oral submissions. It is enough to observe that four principal assertions lie at the heart of this part of their appeal.

[88] First, Ms. Annie Schneider says there is no proof whatsoever that she was the one who took photographs of Mr. Marchand.

[89] Second, that whatever their actions, they were doing nothing more than defending themselves and their property from the harassment she and her mother say they suffered at the hands of Mr. Marchand, his family and friends.

[90] Third, that she was the victim of "double jeopardy" in that she was "found guilty by association" after she and her mother were charged jointly in the same Information.

[91] Finally, the appellants complain that the verdict is "scandalous" and stands as a "parody of justice" because the only "proof" is the "fabricated" and uncorroborated accusations made by Mr. Marchand against them. This, so Ms. Annie Schneider asserts, was all motivated by Mr. Marchand's ill will towards them, stemming from a stop work order she had once obtained which had the effect of temporarily halting some yard work undertaken by Mr. Marchand. The appellants say the abuse they themselves suffered was compounded by their treatment at the hands of the Halifax police who were, so it is alleged, intent on "revenge" after the appellants telephoned them more than fifty times to complain that they were "in a state of emergency . . . under siege" due to Mr. Marchand's actions, and further because the appellants had accused the police of fabricating and hiding evidence.

[92] Having carefully considered the entire record, we see no merit to any of the appellants' complaints under this ground of appeal.

[93] Proceeding summarily against both appellants charged jointly in the same Information was a matter of prosecutorial discretion. The manner of charging an accused person is within the Crown's prerogative, subject to the court's own superintending powers to protect against abuse and ensure a fair trial. See generally **Ewaschuk**, *Criminal Pleadings and Practice in Canada* (Canada Law Book, 2nd Ed., 2004) Vol. 1 Chapter 9:13000, and 12:4000; and **R. v. Lafrance**, [1975] 2 S.C.R. 201; and **R. v. Power**, [1994] 1 S.C.R. 601. There is no evidence here that the appellants' rights were violated by the manner in which the Crown chose to proceed.

[94] The presentation of evidence lasted several days. The main witnesses for the prosecution were Robert Marchand and his wife Alison Gillan. They described what happened in the months leading up to the appellants being charged. According to them, the harassment carried out by their neighbours Annie and Marguerite Schneider was intense, uninterrupted and relentless.

[95] At the suggestion of the police, Mr. Marchand and Ms. Gillan kept a record of the appellants' activities by videotaping them and by maintaining a journal. They testified that the appellants' bizarre and disruptive behaviour included: yelling, spitting, shaking their fists, berating them verbally, running towards their vehicle, taking photographs or videotaping them as they were driving away from

their home, taking pictures of Mr. Marchand while he mowed his lawn, taking pictures of their children, throwing stones or other objects against their house, banging against the side of their house, using flashlights to light up their upstairs bedroom windows every night for a month, blocking the entry leading to their house, cutting branches off their cedar trees, making noise by banging on metal bars, strewing pieces of broken glass in their yard and cutting pieces off their porch with a knife.

[96] Mr. Marchand and his wife said they no longer felt safe in their home. They feared for their children's safety, their two boys aged five and two at the time. They were effectively denied any enjoyment of their property. They described how they were forced to limit their activities in their yard and on their patio. They felt harassed. They swore they had never done anything to the Schneiders. They said they dared not allow their children to play outdoors, or invite friends over to enjoy a barbeque or permit their friends' children to play outside. They developed the habit of always getting into or out of their vehicles in the garage with the door down to avoid any encounters with the appellants.

[97] Their babysitter testified. She is a university student who occasionally looked after the complainants' two young children. She described an incident when Mr. Marchand was driving her to his home, when all of a sudden a woman in her 30's or 40's ran from the house next door, pointing a camera and who began to take their pictures. She and Mr. Marchand were the only people in the car at the time.

[98] The main witnesses for the defence were the appellants, together with Mr. Jean Schneider (Ms. Annie Schneider's father and Ms. Marguerite Schneider's husband). The appellants denied most of the allegations against them or tried to explain them as innocent or justified in the circumstances. For example, Ms. Marguerite Schneider said she only ever banged on the side of Mr. Marchand's house to try to get him to stop his own noise-making. They complained that Mr. Marchand caused damage to Ms. Schneider's property, had trespassed and frightened them by throwing rocks, and, by going out late virtually every night, managed to harass them in one form or another. This, they said, caused them to take turns sleeping in their garage in the early morning hours hoping to catch him "in the act." The numerous photographs they took were not intended to harass their neighbours, but were prompted by a need to defend themselves. They

complained that Mr. Marchand and Ms. Gillan were constantly mocking them with "victory" signs or making other rude and contemptuous gestures.

[99] All of this was before Chief Judge Batiot, an experienced trial judge. He had the opportunity, extended over several days, to see and hear the witnesses as they testified. This is a particular advantage not available to an appellate court. It is all the more important in a case where, as here, the alleged "unreasonableness" of the trial court's decision rests upon the trial judge's assessment of credibility. See, for example, **R. v. W.(R.)** [1992] 2 S.C.R. 122.

[100] This difficult trial lasted six days, spread over several months. Batiot, C.J. was able to conduct his own careful assessment of the evidence and reach his own conclusions as to the credibility of those persons who testified in his presence. An appellate court is required to show great deference to findings of credibility made at the trial. See for example **R. v. W.(R.)**, **supra**; **R. v. Patriquin**, 2004 NSCA 27. In rendering his decision, Batiot, C.J. presented a concise and thorough review of the prosecution and defence evidence. He explained how impressed he was by Mr. Marchand's and Ms. Gillan's calmness, perseverance, objectivity, civility and measured response in the face of such a vexing situation. He accepted their testimony.

[101] By contrast, the trial judge made strong findings of fact against the appellants. As is made plain in reading the transcript of the entire proceedings, Ms. Annie Schneider was unable to remain calm during the trial. Whole pages are replete with personal invective. The trial judge showed remarkable restraint and patience in the face of such vitriol. Ms. Schneider's interventions and incivility towards the trial judge arose, she submits, out of frustration over what she says was Mr. Marchand's fabricated evidence and her "treatment" at the hands of the police and the justice system. On the contrary, Batiot, C.J., who had the opportunity to closely observe Ms. Schneider during this long and difficult trial, found that Ms. Schneider "... continually tries to control not only the manner in which the evidence is offered, but also the evidence itself ...".

[102] The trial judge commented in his reasons that Mr. Jean Schneider seemed to be a reasonable individual, but who did not happen to be in Nova Scotia when many of the incidents described by his wife and daughter were alleged to have occurred. Thus, the trial judge was not prepared to give much weight to Mr. Schneider's evidence. In particular, when referring to Mr. Schneider's evidence

regarding the identification of Mr. Marchand, Batiot, C.J., said that the gentleman's testimony ought to be largely discounted, as it was based on a split-second glance at night, peering through the branches of a shrub, from far away, and only later recalled many months afterwards in court.

[103] The trial judge thought it significant that despite the appellants' strategy of sleeping in "shifts" in their garage throughout the night, hoping to catch Mr. Marchand "in the act," they never did. Chief Judge Batiot rejected the appellants' evidence and in particular their identifying Mr. Marchand as the man responsible for the damage to their property.

[104] The appellant, Ms. Annie Schneider, forgets that the harassment for which she was convicted is not restricted to taking photographs, an activity she now ascribes to her mother Marguerite, but which she herself denies. The evidence is that the appellants' conduct, whether undertaken jointly or in other respects shown to have occurred individually, amounted to an assortment of unlawful activity and once accepted by the trial judge constituted proof of criminal harassment and mischief. In our view, the verdict was in no way unreasonable and is clearly supported by the evidence.

[105] Batiot, C.J. considered the appellants' submission that their acts were innocent or only brought on by having to defend themselves and their property. The trial judge rejected that position but went on to say that even if he had accepted the evidence put forward by the appellants identifying Mr. Marchand as the person responsible for damaging their property, it would have not had affected the verdict. The allegations against Mr. Marchand would not - even if shown to have occurred - have justified the appellants' actions. As the trial judge put it, harassment is not a defence to harassment.

[106] The trial judge heard the testimony of the police investigators involved in the case as well as the evidence given by Mr. Marchand. Batiot, C.J. was well aware of the appellants' assertions that they had been victimized by misconduct and unlawful activity on the part of Mr. Marchand and the police. Batiot, C.J. clearly rejected any such suggestion. There is nothing in the record to persuade us he was wrong in concluding that there was no substance to the appellants' allegations.

[107] Deciding credibility, what evidence to accept or reject, in whole or in part, and what weight to assign to particular evidence, is entirely within the purview of the trial judge. In our opinion it cannot be seriously suggested that Batiot, C.J. erred in any way in his assessment of the evidence or his findings of fact and credibility. Having conducted our own review, analysis and weighing of all of the evidence presented at trial, we are satisfied that there is no merit to this ground of appeal.

6. Were the sentences (as varied by the Supreme Court) unfit?

[108] The appellants submit that the sentences substituted by the SCAC are unfit. Assuming, without deciding, that we have jurisdiction to deal with the fitness of sentence on this appeal, we would not interfere with the sentences as varied by the SCAC.

IV. Disposition:

[109] Leave to appeal is granted and the appeal is dismissed.

Cromwell, J.A.

Saunders, J.A.

Fichaud, J.A.