SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Walker, 2011 NSSC 279

Date: 20110418
Docket: PtH 339447
Registry: Port Hawkesbury

Between:

Mary Virginia Kim Walker

Plaintiff

v.

Her Majesty The Queen

Defendant

Judge:	The Honourable Justice Patrick J. Murray
Heard:	April 18, 2011, in Port Hawkesbury, Nova Scotia
Written Decision:	July 8, 2011
Counsel:	Darcy MacPherson, for the Respondent Stanley W. MacDonald, Q.C., for the Appellant

By the Court (orally):

[1] We are here today for me to render my decision regarding the appeal of Mary Virginia Walker. This being an oral decision, I do reserve the right to edit or make appropriate corrections to the wording and the grammar and expand on the reasons and provide case cites as deemed necessary, but of course, the decision itself will not change.

[2] I will start by giving a brief summary of the facts, which are contained in the Appellant's brief, and which have been agreed to by the Crown. In an information sworn August 24, 2009 the Appellant, Virginia Walker, was charged that on July 23, 2009 she committed the offence of assault against her estranged husband, James Edward Walker, and also that she had committed two counts of breaching an undertaking.

[3] On October 26, 2009 the Appellant pleaded not guilty to the charges. Her trial proceeded in Port Hawkesbury Provincial Court on August 10, 2010 before the Honourable Judge Robert A. Stroud. On that date the Crown called its witnesses in the following order, Jeremy Daniel Gillis, Mark Anthony MacIsaac, Allison Boucher, and James Edward Walker. At the conclusion of the Crown's

case, given there was no evidence on a breach of undertaking, both of those charges were dismissed upon application for directed verdicts.

[4] In her defence, the Appellant called, John Thomas King, as a witness and she also testified. On September 2, 2010 the trial judge released his decision dated September 1, 2010. Judge Stroud found the Appellant guilty of assault.

[5] On October 29, 2010, Judge Stroud sentenced the Appellant to a suspended sentence and placed her on probation for a period of 12 months. The probation order required assessment, counselling, and treatment as deemed appropriate by her probation officer. The Appellant was also ordered to have no contact with James Walker except in accordance with a Family Court Order or through counsel.

[6] By Notice of Summary Conviction Appeal dated November 4, 2010 and filed with this Honourable Court on November 9, 2010, the Appellant gave notice of her intention to appeal both her conviction and sentence. The Appellant later abandoned its appeal and sentence.

[7] The issues on appeal are as follows:

> "I. That the trial judge predetermined the guilt of the Appellant before hearing all the evidence and submissions of counsel, and
>
> II. That the trial judge erred in his decision of September 1, 2010 in his application of the test in **R. v. W.D.** 1991, 1 S.C.R. p. 742, Supreme Court of Canada and misapplied the burden of proof."

Ground # 1 - Appearance of Bias

[8] In regard to the first ground of appeal, it is that the trial judge predetermined the issue of guilt of the Appellant before hearing all the evidence and submissions of counsel. The basis for this ground of appeal is that the trial judge made certain comments giving rise to the appearance of bias. These comments were made in the course of submissions following an objection by Crown attorney, Mr. MacPherson, to an aspect of the cross examination of James Walker. During cross examination of Mr. Walker, Defence sought to elicit evidence to the effect that Mr. Walker had lied to the police about an amount of cash that was contained in a safe that he reported as stolen to the police. Mr. Walker alleged that there was $25,000 in the safe but admitted, allegedly, at a previous discovery hearing, that he had inflated the amount in the hope that the police would work more diligently to recover the safe.

[9] The Defence position was that Mr. Walker had either lied to the police, or lied under oath at the discovery hearing. Crown counsel objected to this aspect of the cross examination of Mr. Walker and made lengthy submissions with respect to the objection. In the course of Crown counsel submissions, an exchange occurred between the trial judge, Mr. MacPherson, and the Defence counsel, Mr. MacDonald, at pages 158 to 160 of the appeal book.

[10] I will now refer to pertinent parts of that exchange. The Judge asked what the prejudicial effect on the accused would be for these questions to be asked. The Crown argued, stating first that, “It is to the effect, it is to affect the credibility of the accused.”, and then concluded by saying that, “it was going to prejudice the witness.” The court replied, “It is only going to prejudice him if I give any weight to the, I mean he can be made out to be a complete liar, we got three independent witnesses besides that so I don’t know where the defence hopes to get with this quite frankly but if it was a **W.D.** situation, yes, but it’s not so.” Then Mr. MacDonald, for the Defence indicated, “It isn’t yet, your Honour.” Later on the trial judge indicated that, “That’s why maybe I should be talking too quickly (meaning that he “shouldn’t” be talking too quickly), but I don’t know what the defence is going to be.”, and then the Crown said, “it didn’t either”, and then the

court said, “so anyway, I don’t see where its prejudicial to the accused just to have his credibility questioned”. Those are the pertinent parts of the exchange.

[11] No objection, at that point, was raised by the Defence counsel, nor was an application made by Defence counsel for the judge to recuse himself from the trial proceedings.

[12] The law in respect of this point is that there is a strong presumption of impartiality. This point is set out at page 11 of the Appellant’s brief where in paragraph 26, referring to the Supreme Court of Canada case of **R. v. R.D.S.** [1997] S.C.J. No. 84, it is stated in part:

> “Judicial decision makers, by virtue of their positions have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias.”

[13] And further on page 12 of the Appellant’s brief stated:

> “In the absence of convincing evidence, the courts have been hesitant to make a finding of bias or perceive a reasonable apprehension of bias on the part of the trial judge.”

[14] The Defence now says that there was a reasonable apprehension of bias in this matter, and that led to the Judge predetermining the issue of guilt with respect

to Ms. Walker. It is with that back drop that I assess whether or not this ground of appeal has merit.

[15] Here the approach the court must take is also a matter of law. The test is, what would an informed person viewing the matter realistically, and practically, and having thought the matter through, conclude? Would he or she think that it is more likely than not that the decision maker, in this case the learned judge, conscientiously or unconscientiously would not decide the case fairly? Further, as has been stated in a number of cases, including **Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)** [2010] O.J. No. 212, a 2010 case of the Supreme Court of Canada:

> "The test is an objective one and that the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences from the perspective of a reasonable observer throughout the trial."

[16] In short, if the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, then the trial will be rendered an unfair trial.

[17] In this case, I have thoroughly reviewed the transcript, heard the submissions, read the briefs, and considered the entire matter in the totality of the trial record. I have viewed it from the manner of the informed and reasonable person.

[18] The focus of the objection by Crown counsel was whether the questioning and cross examination by the Defence was proper. That is the context in which the learned judge's comments arose. The learned judge put a supposition to the Crown, "supposing he is made out to be a complete liar" (paraphrased). In doing so, the trial judge described the Crown witnesses as independent witnesses. He appeared to be saying this is but one witness for the Crown and the weight, if any, given to it would have to be considered in the context of the entire Crown's case, in terms of prejudicial affect on the accused. The judge's statement that it may only be prejudicial to the witness was, in fact, correct. Whether it was prejudicial to the accused would have to be considered in the context of all the evidence. The point is, he was not considering guilt or innocence of the accused at that stage, but solely whether to allow the cross examination and determine the potential effect. He did so in attempting to determine whether the questioning was to be allowed.

[19] At page 60 of the trial record he said, “I don’t see where it’s prejudicial to the accused just to have his credibility questioned.” (meaning this particular witness, who was the complainant). The fact that he addressed it in a hypothetical fashion is, in and of itself shows that as an experienced judge he can distinguish and compare and weigh evidence of all witnesses and accept none, part, or all the evidence of a witness.

[20] Contrary to what the Crown says, I don't accept that the trial judge was referring only to the alleged missing money in the safe, when he made the relevant comment. Otherwise, he wouldn't have referred to the other witnesses called by the Crown who gave no evidence in regard to that matter. However, just because he referred to other Crown witnesses, doesn't mean that he was biassed or had predetermined the outcome of the case.

[21] As already stated an appeal court must look at the entire transcript of the proceedings and the evidence to determine whether there is a reasonable apprehension of bias, in other words, not simply the comments of the judge made in isolation.

[22] The approach I take in this matter is in terms of whether the learned trial judge kept an open mind to the evidence and the Crown's obligation to prove the case beyond a reasonable doubt after all the evidence is heard.

[23] First, I look to the words he used which are a caution to himself for example, "if this was a **W.D.**, situation, yes". This shows that he was "alive" to the onus of proof of the Crown beyond a reasonable doubt and possible defence evidence yet to be called.

[24] Secondly, and in this vein, when he stated, "that's why maybe I shouldn't be talking (meaning, too quickly) but I don't know what the defence is going to be. What he was saying in effect, I cannot predetermine this because i don't know what the defence is going to be. The defence may bring forward evidence of their own and so on and if it does, it will be a **W.D.** situation and I would have to address that, at that time. I think these are logical inferences that can be taken from the statements of the trial judge, which suggest that he had not reached a premature decision.

[25] In his ruling on the objection, he said at page 168:

> "Most of the material relates to juries becoming confused and involved with matters that are not particularly relevant."

[26] Here he's making the point that he, as a judge alone, does not face that difficulty and is capable of separating the relevant from the collateral as well as deciding what is admissible from what is not admissible.

[27] He then went on to refer to the authority provided by the Crown which suggested that there should be wide latitude in cross examination and concluded his ruling as follows:

> "So I adopt that reasoning and will allow Mr. MacDonald to carry on with his line of questions."

[28] Once again at page 159 of the trial record he stated:

> "It's only going to prejudice him not the accused."

[29] That was correct. As well his further his comment: "I don't know where the defence hopes to get with this" , should be taken literally. He didn't know because he hadn't decided anything. One cannot, in my view, interpret this to mean that he decided something already, anymore than he was waiting to see what the defence was going to be. He didn't know. He may have even doubted whether they could

get anywhere with the line of questioning. If he did, it doesn't mean he was not intending to weigh and decide on the evidence when all the evidence was "in" and at the appropriate time.

[30] I pause here to suggest we don't know exactly what the judge meant because it was not brought to his attention. No objection was made by the Defence to the comments and if it had been, he might have clarified his state of mind at that point. This is one of the reasons why the case law states the matter should be raised at the first possible opportunity. In this case, the Defence argues that raising the issue of bias requires a litigant to "walk a fine line". The Defence suggests by raising the issue of perceived bias, the spectre arises that the trial judge will be "affronted by an allegation", making matters worse.

[31] In this case, the Defence argues that as trials unfold, decisions have to be made quickly. This, they submit, is particularly true in Provincial Court where dockets are heavily laden with cases. The Defence further submits that a decision not to ask a judge to withdraw on the basis on an apprehension of bias is understandable, in rapidly unfolding events. They respectfully submit they should

not be penalized for not making a recusal application on the date of the trial of August 10, 2010.

[32] For its part, the Crown, in its brief, referred to a majority ruling of the Supreme Court of Canada in the 1997 case of **R. v. Curragh Inc**, [1997] S.C.R. 537 S.C.C. where at para 11, the court stated:

> "Our colleagues contend that allegations of bias should be made in a timely fashion and cite American cases for this proposition. We accept that in order to maintain the integrity of the courts authority, such allegations must, as a general rule, be brought forward as soon as is reasonably possible to do so. The Crown moved in a timely, appropriate, and reasonable manner. The Crown certainly cannot be faulted on that score."

[33] The Crown, in the present case, argues that while the Appellant has not waived her right to make the argument, her position, Ms. Walker's, is weakened by the virtue of the fact, that neither she nor her counsel raised the issue at the time the relevant comment was made by the trial judge.

[34] Further relevant aspects for consideration in respect of this ground of appeal can be found in the transcript.

[35] In its summation, the Crown referred to its policy in respect of proceeding with charges against one of the Defence witnesses, Mr. King. The Crown referred to public documents posted on the internet. The learned trial judge asked whether he could take judicial notice of that and stated, “It’s hard to take judicial notice of something I am not aware of.” He then said, “Maybe that’s something I can do in the meantime”. He then said, “Nothing much turns on it.”. This type of comment, which appears at the conclusion of the trial, shows the trial judge’s state of mind. It shows once again that he was “alive” to the issue of the charge against the accused, what evidence related to it, what turns and doesn’t turn on it, and displays both an open mind and one that has not yet made a decision.

[36] Finally, the Appellant argues the decision itself supports that there was a reasonable apprehension of bias in that the trial judge ended up doing what he said, by accepting the Crown witnesses over that of the Defence. I do not accept that it necessarily follows that just because the trial judge decided against the Appellant, that the apprehension of bias, was real or reasonable.

[37] First, the trial Judge, in citing **W.D.** referred to the Crown needing to prove the essential elements of the offence beyond a reasonable doubt. This issue also

relates to the second ground of appeal. That aspect, however, of his self instruction shows that he was at least aware that he had to turn his mind to the onus of proof and that the onus of proof lied with the Crown.

[38] Secondly, as to the application of the burden of proof, the trial judge rejected certain aspects of the Defence evidence and accepted the evidence of the Crown witnesses.

[39] Setting aside for a moment whether I agree with that assessment of the evidence, the point is that the trial judge considered and weighed the Defence evidence. Therefore, I am not persuaded in the final analysis that the trial judge's decision supports this ground of appeal, that he was bias just because the decision supported the Crown's position and he found the accused guilty.

[40] Accordingly, I find that the Defence has not rebutted this strong presumption of impartiality and I reject this ground of appeal.

Ground # 2 - Application of test in "R. v. W.D. 1991, 1 S.C.R. "

[41] The second ground of appeal is based on the trial judge misapplying the **W.D.** test and misapplying the burden of proof. This ground of appeal is that the trial judge erred in his decision of September 1, 2010 in his application of the test in **W.D.**, and misapplied the burden of proof.

[42] The Appellant states that the trial judge neither stated nor applied the correct test and that his decision was reduced to a credibility contest between the Crown's witnesses, of which there were four, and the defence witnesses, of which there were two. The Appellant argues the judge simply chose the Crown witnesses over the defence witnesses. This, she argues is the type of credibility contest that the decision in **W.D.** was intended to avoid.

[43] In order to assess whether the Crown misstated the correct approach, I must look at what the trial judge said. The test as recited by the learned trial judge in his decision was as follows:

> "While this is not the typical, he said, she said, situation, clearly **R. v. W.D**. applies. Therefore, if I accept the defence evidence, I must acquit the accused or in the alternative, if I accept the Crown's

> evidence and reject the defence evidence, I must convict the accused. On the other hand, even if I'm not prepared to reject all the defence evidence, I must determine on the totality of the evidence, whether the Crown has proven all elements of the offence beyond a reasonable doubt."

[44] The Crown's position on the test as set forth by the trial judge, without conceding it was in error, is that it was poorly phrased. The argument of the Defence is that there is a complete absence of the second principle in **W.D.** and that at no point did the trial judge consider whether evidence called on behalf of the Defence, left him with a reasonable doubt as to the Appellant's guilt.

[45] I must now look again at what the judge said. He said first, in effect, if I accept the Defence evidence, I must acquit the accused. This is essentially correct except for the distinction between "defence evidence" and "the accused". Then he said as a second part of that sentence, "or in the alternative, if I accept the Crown's evidence, and reject the defence evidence, I must convict the accused". With respect, this second part is not consistent with **W.D.** in that he can reject the defence evidence but still have a reasonable doubt about the accused's guilt. That is the point of **W.D.**

[46] Next the learned trial judge said “On the other hand, even if I am not prepared to reject all of the defence evidence, I must determine on the totality of the evidence whether the Crown has proven all the elements of the offence beyond a reasonable doubt”. With respect to this statement, determining on the “totality of the evidence” whether the Crown has proven all the elements of the offence beyond a reasonable doubt, is the third and most critical step in the **W.D.** analysis. However, it is not predicated on the trial judge rejecting some but not all of the defence evidence. Rather, it is based on the trial judge not being, at that point, left with a reasonable doubt by the evidence of the accused, and then only on the basis of the evidence he does accept.

[47] Accordingly, therefore, I find, as the Defence has argued, that the second stage of the **W.D.** analysis was absent from the learned trial judge’s statement and that the remainder of the test was not stated so as to convey clearly whether the defence evidence would be analysed to determine whether it left a reasonable doubt.

[48] At this point it must be noted that misstatement of the test does not alone constitute an error of law. It has been stated in many of the leading cases that the

W.D. steps need not be worded verbatim, or repeated verbatim, and that the key point is whether the evidence as a whole convinces the trier of fact of the accused's guilt beyond a reasonable doubt.

[49] In a leading case of our Nova Scotia Court of Appeal, **R. v. Lake** 2005 NSCA 162, Fichaud, J.A. stated:

> "The trier of fact should assess both whether the Crown witness are believed and whether the accused is disbelieved."

[50] While conceding that the test was poorly worded, the Crown does not concede that the test was improperly applied in this case. Once again, I must look to what the judge said in his analysis and in his reasons to determine whether he properly applied the test. I now refer to the summary of the learned trial judge's reasons:

> "After a careful review of the evidence, I have concluded that generally speaking there were similarities in the evidence of all the witnesses in this case. However, I believe the material difference in the time of the incident according to the evidence of, John King, in the description of the details of that incident by both Mr. King and the accused were designed to suggest that he and the accused were not under the influence of alcohol at the time of the incident and is not credible. Therefore, I accept the evidence of the Crown concerning the essential elements of the offence and reject any self serving evidence to the contrary by the accused and her common law partner, and I find Ms. Walker guilty as charged."

[51] I agree with the Crown that the trial judge did not accept the Defence evidence. As stated, he carefully reviewed all of the evidence and found there were similarities in the evidence of all of the witnesses. He then found that certain aspects of the Defence evidence, those as to time and details, material differences, as he described them, were designed to suggest that the accused and Mr. King were not under the influence of alcohol at the time of the incident, and as he said, is not credible.

[52] In another leading Nova Scotia Court of Appeal case that of **R. v. P.B.S.**, 2004 NSCA 25 Cromwell J.A. stated in reference to the trier of fact not believing the accused's evidence:

> "However, even if the trier of fact does not believe that evidence, the trier of fact must ask him or herself, if it nonetheless gives rise to a reasonable doubt."

[53] The trier of fact, in the present case, did not ask that question. Instead he stated:

> "Therefore, I accept the evidence of the Crown concerning the essential elements of the offence and reject any self serving evidence to the contrary by the accused and her common law partner, and I find, Ms. Walker, guilty as charged."

[54] The Crown argues it is implied in his decision that the whole of the evidence did not leave a reasonable doubt of the accused's guilt. Further analysis of this is required. On the one hand, the trial judge's reasons make it clear, in general, that where the Defence evidence conflicted with the Crown's witnesses, he accepted the evidence of the Crown witnesses. On the other hand, he did not give reasons for believing the Crown witnesses other than rejecting the Defence witnesses. This is evident by his use of the word "Therefore", as in "Therefore I accept the evidence of the Crown...". To this extent then, his reasons are couched in language that suggest a credibility contest with the trial judge preferring one over the other. Given the brevity of the reasons, it is reasonable for this court to infer that the trial judge meant what he said.

[55] The Defence relied heavily, in its submission, on the case of **R. v. Liberatore** 2010 NSCA 82. In that case, the learned trial judge identified a key point in the case, that point being whether or not the accused exchanged a business card or something else. In that case the trial judge rejected the defence explanation. In doing so, the court held on appeal that **W.D.** prohibits rejecting the Appellant's evidence solely because it was inconsistent with the crown's evidence. **Liberatore** is similar to the present case except the trial judge in the present case

considered all of the evidence and made a finding of credibility, before accepting the evidence of the Crown witnesses.

[56] In, **Liberatore** , the trial judge mentioned he was satisfied beyond a reasonable doubt. In the present case "reasonable doubt" was not mentioned in the reasons portion of the decision, that I referred to in paragraph 50 herein, but mentioned in the initial discussion of the test in **W.D.** In the present case the learned trial judge was experienced and undoubtedly knew the law and the proper test. He referred to **W.D.** throughout the decision and during the trial. He was therefore aware of the issue of **W.D**.

[57] It was stated by Fichaud, J.A., in **R. v. W.E.M.** [2003] M.J. No. 81 (in dissent) referring to Justice Corey in **R. v. Dinardo**, 2008 SCC 24, that in cases that turn on credibility, the trial judge must direct his or her mind in the decision to the question of whether the accused's evidence raises a reasonable doubt as to his/her guilt.

[58] In the present case the trial judge combined, in his analysis, the accused's evidence with that of John King. The accused can be found guilty if the evidence

of the Crown has displaced any reasonable doubt that could be found as to any essential element of the offence. (**R. v. W.E.M**. [2003] M.J. No. 81.) In the present case, the reasons of the trial judge were brief and did not track, *per se*, the steps of the **W.D.** analysis after expressly omitting certain of the **W.D.** factors in instructing himself. He carefully reviewed the evidence but did not, in his decision, evaluate in detail the testimony of the various witnesses in support of his conclusion on credibility, particularly the testimony of the Crown witnesses.

[59] In finding the accused guilty, no mention was made by the trial judge, when accepting the evidence of the Crown, whether the Defence evidence left him with a reasonable doubt. He may well have concluded that it did not, but it is not apparent from his reasons. Accordingly, I cannot presume the learned trial judge properly applied the law and gave adequate consideration to the factors in **R. v. W.D.**

[60] Now even though a court of appeal is of the opinion that there was an error of law at trial, s. 686.1(b)(ii) empowers this court to dismiss this appeal if there has been no substantial wrong or miscarriage of justice. This was not argued "*per se*"

by the Crown but the Crown did argue (in its oral and written submissions), that the verdict was the only reasonable conclusion the Court could have reached.

[61] The Defence argued, although this is not strictly speaking a ground of appeal, that aside from **W.D.** principles, the trial judge's conclusions were not supportable, in any event, by the evidence.

[62] Where the burden of proof and credibility are concerned, I cannot say with certainty that the verdict would necessarily be the same had the law been properly applied. Hallet J. in the case of **R. v. Robichaud** [1994] N.S.J. No. 478 at paragraph 19 stated that the correct question for an appeal court to ask itself is, "Whether a trial judge or jury applying the law correctly to the evidence could not possibly entertain a reasonable doubt as to the guilt of the accused ?"

[63] In this case, I have reviewed and re-weighed the evidence. There is little or no evidence from the Crown as to intoxication of the Defence witnesses. What evidence there was came first from the Crown witness, Mr. Gillis, who said, that he based his conclusion that Ms. Walker was intoxicated on the fact that she had called Mr. Walker a "fat pig", or words to that effect. With respect to the Crown

witness, Mr. MacIsaac, the extent of his evidence as to the Defence witnesses intoxication, was that he believed they were drinking. They were. Their evidence is that they had one drink and were working on a second drink. Mr. King said they stopped drinking when they saw Jimmy Walker as they expected there may be trouble, or words to that effect.

[64] As far as the evidence being designed to show that King and the accused were not under the influence of alcohol, this suggests a level of fabrication. Upon review of the evidence, it is difficult to draw that inference. King says they arrived at 9:30 possibly 10 o'clock on the evening of the incident. They saw Jimmy Walker a half hour after arriving but it could have been an hour. He also said he could be mistaken. Therefore even if it was not 10 p.m. but instead was 11 p.m., this would mean they saw him an hour later which would be 12 midnight. That evidence would be (more) consistent with the Crown's evidence. The Defence indicated they (the Defence witnesses) watched him " perform all night" prior to the incident (these are the alleged gestures and so on that they had referred to). For her part, Virginia Walker, the accused, in fact corrected Mr. King and said he was wrong as to the time. She said the time was later when they arrived so there did

not appear to be any collusion there and less still evidence that they were intoxicated.

[65] As to the, “description of the details of the incident” the accused denied the assault by her as did Mr. King. Both stated Mr. Walker raised his hand and when he did Mr. King hit him. They gave evidence that Jimmy Walker charged at Mr. King with his chest stuck out and arms by his side. Mr. Gillis described something similar in his evidence stating “it looked as though Mr. Walker would be hit” but in fact Mr. Walker denied this in his evidence.

[66] In terms of whether the witnesses were independent, there was a relationship between Mr. Gillis, Mr. MacIsaac, and Mr. Walker. Ms. Boucher, a witness for the Crown, was the most “independent” of the Crown witnesses although she did know Mr. Walker’s sister. She did not see what happened after the “slap” as she left to find help but she did see the “slap”. She said emphatically she had an unobstructed view. There was some evidence that she had been drinking as well.

[67] It is appropriate in these circumstances, where credibility and proof beyond a reasonable doubt are at issue, for a trial judge to re-hear the evidence and make

the appropriate findings. I cannot say with absolute confidence that a trial judge or jury applying law correctly to the evidence could not possibly entertain a reasonable doubt as to the guilt of the accused. Accordingly, I allow the appeal under s. 686.1(a)(ii) and I set aside the judgement of the trial court and I order a new trial.

J.