Date: 20001228
Docket: CAC 164242

NOVA SCOTIA COURT OF APPEAL

Glube, C.J.N.S.; Bateman and Oland, JJ.A.
[Cite as: R. v. Graves, 2000 NSCA 150]

BETWEEN:

GARY GRAVES

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Michael S. Taylor for the appellant James A. Gumpert, Q.C. for the respondent
Appeal Heard:	November 22, 2000
Judgment Delivered:	December 28, 2000
THE COURT:	The appeal is granted and a new trial is ordered, per reasons for judgment of Glube, C.J.N.S.; Bateman and Oland, JJ.A. concurring.

GLUBE, C.J.N.S.:

[1] On March 9, 2000, Judge Hughes Randall of the Provincial Court convicted the appellant, Gary Graves, of aggravated assault on Clarence Briand. On May 12, 2000, the trial judge sentenced Mr. Graves to seven years consecutive to the time already being served. Mr. Graves appeals his conviction and seeks leave to appeal his sentence.

[2] In light of my conclusion that there must be a new trial, I will briefly summarize the evidence.

Background

[3] Mr. Graves and Clarence Briand met in the summer of 1998. According to Mr. Graves, they were best friends although they did have occasional verbal arguments. They shared an apartment for several weeks until September 5, 1998.

[4] Mr. Briand, his stepsister, Rachel LeTarte (who was dating Mr. Graves at the time), his stepbrother, Denis LeTarte, and Nadine Watson spent the afternoon of September 4, 1998 drinking beer at the apartment shared by Mr. Briand and Mr. Graves. Mr. Graves joined the group after work. They all continued drinking and late that evening went to a nearby lounge where they continued to drink and stayed until the 2:00 a.m. closing time. Shortly before

2:00 a.m., Mr. Graves left with another woman to go elsewhere for a drink. Mr. LeTarte and Mr. Briand returned to the apartment. Mr. Briand went to bed in the bedroom and Mr. LeTarte slept on the living room floor. Ms. LeTarte was “mad” at Mr. Graves so she went with Nadine Watson to another friend’s house.

[5] When Mr. Graves returned to the apartment around 3:30 or 4:00 a.m., he had to knock and call out loudly to wake Mr. LeTarte to open the door. His knock and his voice were loud enough to wake up a neighbour, Carol Pothier, whose apartment was in a building directly across from the Briand apartment building and separated by the width of a driveway.

[6] Mr. Graves went into the apartment, opened a beer and made a telephone call to Ms. LeTarte. He spoke loudly and angrily to her. He was angry because he had asked her to wait for him at his apartment when she left the lounge and she had not done so. His loud remarks were heard by Ms. Pothier in her apartment and by Mr. LeTarte who were both trying to sleep. During the call, Mr. Briand said to Mr. Graves from the bedroom, “Quiet down. I’m trying to sleep.” According to Mr. LeTarte, he heard Mr. Graves say, “Don’t be saucy.” Mr. Graves put the phone down and went into the bedroom.

[7] At this point the evidence of Mr. LeTarte, Ms. Pothier and Mr. Graves differs. Mr. LeTarte did not see what happened in the bedroom. He heard some hits but no conversation, and said that Mr. Graves was only in the room for about 30 seconds. Ms. Pothier, from her apartment, heard the phone slam down and then heard what sounded like some kind of fighting - shuffling, or pushing or bumping and then nothing. She thought it lasted quite a while, but on cross-examination said it was about a minute. Mr. Graves said he went into the bedroom, there was some conversation with Mr. Briand and then, after a minute or two, Mr. Graves turned to leave. He claims Mr. Briand came at him, swung at him and missed. Mr. Graves hit Mr. Briand twice quickly with a left and a right and again turned to leave. He heard movement on the floor behind him, turned and found Mr. Briand standing there. Mr. Graves hit Mr. Briand “fast” and “fairly hard” twice more with one hand.

[8] After Mr. Graves left the bedroom he again telephoned Ms. LeTarte. She testified that he told her that he had knocked Clarence out and he was lying on the bed unconscious. Although Ms. LeTarte testified to this, the part about Clarence lying on the bed unconscious was not in her statement to the police. Mr. Graves denied telling this to Ms. LeTarte.

[9] Mr. Graves left the apartment around 8:30 or 9:00 a.m. and went with Scott Cooms to Cape Breton to work for several days. According to Mr. Cooms, Mr. Graves told him about hitting Mr. Briand. He described Mr. Graves' hand as swollen and noted that he could not make a fist. At the time of the trial, Mr. Graves was still having problems with his hand.

[10] Ms. LeTarte discovered Mr. Briand around 11:00 a.m. lying on the bed. She saw blood all over his face. He was not moving. Mr. Briand suffered a severe head injury, a mid-facial fracture, intercranial bleeding and was in a coma. The doctor who testified at trial could not estimate the force needed to cause the injuries nor could he say whether they were caused by more than one blow. A year and a half later, Mr. Briand's walking and talking were still significantly impaired.

[11] According to the evidence there was blood on Mr. Briand, and stains on the bed and on a covering on the window next to the bed which several witnesses referred to as blood. Although Mr. Briand took the stand, he has no recollection of what took place in the bedroom.

Issue

[12] Although the appellant raised several grounds of appeal, I only need to deal with the following issue: whether the trial judge erred in law by failing to give sufficient reasons for his decision?

Analysis

[13] On an appeal against conviction, the Court of Appeal may allow the appeal where it is of the opinion that there has been an error of law. (S. 686(1)(a)(ii) of the **Criminal Code**.) As a general rule, a judge does not have to demonstrate that he or she knows the law and has considered all aspects of the evidence. As stated by McLachlin, J. (as she then was) in **R. v. Burns** (1994), 89 C.C.C. (3d) 193 at p. 199:

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

> know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case.

[14] However, Chief Justice Lamer said in **R. v. McMaster**, [1996] 1 S.C.R. 740 at p. 750, "I do not interpret these cases [referring to **R. v. Burns** and **R. v. Barrett**, [1995] 1 S.C.R. 752] as suggesting there is no obligation on trial judges to write reasons."

[15] A failure to provide reasons in some cases could amount to reversible error. Major, J. in **R. v. R. (D.)**, [1996] 2 S.C.R. 291 at p. 317 stated:

> It is my view that the trial judge erred in law by failing to address the confusing evidence, and failing to separate fact from fiction....

[16] In certain circumstances, reasons are required. As Major, J. said in **R. v. R. (D.)** at p. 318:

> ... Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere. Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions. The trial judge in this case did not do so. She failed to address the troublesome evidence, and she failed to identify the basis on which she convicted D.R. and H.R. of assault. This is an error of law necessitating a new trial. [Emphasis added.]

[17] As Bateman, J.A. said in **R. v. Haché (A.J.)** (1999), 175 N.S.R. (2d) 297 at para. 19:

When, however, the result is dependent upon factual findings and there is confused or contradictory evidence on material points, the trial judge is generally expected to provide reasons responsive to the issues raised at trial. The reasons, while including conclusions of fact, should provide a window into the rationale behind those conclusions, where material. When such reasoning is absent, an appellate court must decide whether the absence of reasons speaks of a misapprehension of significant evidence or a failure to consider relevant evidence. If so, the appeal succeeds, not on the basis of insufficient reasons per se, but because the verdict is unsafe.

Also, see **R. v. Morrissey (R.J.)** (1995), 97 C.C.C. (3d) 193 (Ont. C.A.); **R. v. Braich**, [2000] B.C. J. No. 552 (B.C.C.A.); and **R. v.**

Guyatt (1997), 119 C.C.C. (3d) 304 (B.C.C.A.), leave to appeal to S.C.C. refused.

[18] After hearing evidence and argument over a period of two days, Judge Randall reserved his decision, first for twelve days and then for another nine. In his decision, the trial judge purports to recite the evidence but makes few actual findings of fact based on that evidence.

[19] There are a number of conflicts between the evidence of Mr. Graves and that of the several Crown witnesses and also among the Crown witnesses themselves. As one example, Mr. LeTarte heard nothing but hits or "smacks" from the bedroom, but Ms. Pothier heard a scuffle which lasted longer than the 30 seconds described by Mr. LeTarte. The evidence of both those witnesses differed from Mr. Graves' evidence previously related as to

what happened in the bedroom. Another example is the difference between Ms. LeTarte's evidence and that of Mr. Graves in what was said during the telephone conversation after Mr. Graves was in the bedroom. Although credibility was clearly in issue, the trial judge did not resolve the conflicting evidence.

[20] After reciting the Crown evidence, the trial judge referred to the testimony of Mr. Graves, the only defence witness. The judge wrote:

> In his evidence Gary Graves claims that he was threatened by the movements towards him by Clarence Briand to act in self-defence and position himself between – posted himself between the bed and door.
>
> Gary Graves, to protect himself, says he hit Clarence Briand twice and then twice again and Clarence Briand came at him again. The blows occurred around 4 to 4:30 a.m.
>
> I feel that to accept this version of events there has to be found some blood spats [sic] on the floor having regard to the serious injuries received by Clarence Briand. The only bloodstains in this matter are on the pink blanket on the bed and the stains on the puff hanging on the window in place of the curtain. And it is in this area of the room that the blows to Clarence Briand were struck by Gary Graves in regard to the only blood being found in the bedroom which was found on that pink blanket and the puff in the window.
>
> Therefore, with respect to the theory of self-defence being rejected I find Gary Graves beyond a reasonable doubt guilty of aggravated assault contrary to Section 268 of the **Criminal Code.**

[21] Mr. Graves had raised the issue of self-defence. At no time in the decision did the trial judge analyse this defence other than to say that he rejected it because there were no blood “spats” (spots) on the floor. On that basis, it appears the trial judge drew inferences about where Mr. Briand was when the blows were struck and as a result, rejected the appellant’s testimony that the assault occurred off the bed. Without further comment, the judge rejected self-defence and found Mr. Graves guilty beyond a reasonable doubt.

[22] The respondent submits that the court should read the decision as a whole along with the trial judge’s remarks during counsels’ submissions. The Crown says that the trial judge, by implication, accepted the evidence of Mr. LeTarte and rejected the evidence of Mr. Graves and that his decision was adequate when read in the context of his remarks to counsel at trial. With respect, I cannot agree.

[23] I would find that the reasons given by the trial judge are inadequate. They do not resolve the issues of credibility and fail to address conflicts in the evidence. The judge failed to consider self-defence in the context of all the evidence. Even if he did not believe Mr. Graves’ version of events in the bedroom, the judge should then have considered whether or not his evidence or any other evidence which the judge did accept gave rise to a reasonable

doubt. (**R. v. W.(D.)** (1991), 63 C.C.C. (3d) 397 (S.C.C.).) In short, there was confused and contrary evidence which in these circumstances required reasons. Insufficient reasons were given. The verdict is unsafe.

Disposition

[24] Although the appellant argued that there should be an acquittal, I would order a new trial. I am unable to find that there was no evidence upon which facts could be found leading to a guilty verdict. The verdict of the trial judge is set aside.

[25] The appeal is granted and a new trial is ordered before a different Provincial Court judge.

Glube, C.J.N.S.

Concurred in:

Bateman, J. A.

Oland, J.A.