**NOVA SCOTIA COURT OF APPEAL**
**Citation:** *R. v. Veinot,* 2011 NSCA 120

**Date:** 20111229
**Docket:** CAC 348354
**Registry:** Halifax

**Between:**

Kelly Andrew Veinot

Appellant

v.

Her Majesty The Queen

Respondent

| | |
|---|---|
| **Judges:** | MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A. |
| **Appeal Heard:** | December 6, 2011, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A. concurring. |
| **Counsel:** | Michael K. Power, Q.C., for the appellant<br>Mark Scott, for the respondent |

**Reasons for judgment**:

## OVERVIEW

[1] The appellant, Mr. Kelly Andrew Veinot, seeks to overturn his conviction and three-year sentence for arson.

## BACKGROUND

[2] One Timothy Robar set fire to the Shelburne home of one Keith Jacklin, a stranger. Robar admitted this to the police and in fact provided a detailed video re-enactment. In his confession, Robar told the police that Veinot hired him to set the fire. He said that Veinot helped him scout out the location and drove him to the scene to carry out the crime. Apparently, Veinot had a score to settle with Jacklin flowing from a recent court case.

[3] At Veinot's trial, Robar was called as a Crown witness but he refused to cooperate, claiming that he could remember nothing despite having given three detailed videotaped confessions, all implicating Veinot. In response, the judge allowed the Crown to cross-examine its own witness on these statements, an exception permitted in such circumstances under the *Canada Evidence Act*, R.S.C., 1985, c. C-5. As well, the judge granted the Crown's motion to tender Robar's videotaped confessions for the truth of their contents. He did this after finding their admission to be both necessary and sufficiently reliable according to the principles set out by the Supreme Court of Canada in **R. v. B. (K.G.)**, [1993] 1 S.C.R. 740 ("**KGB**") .

[4] The three videos included (a) Robar's initial "warned" statement, (b) his detailed re-enactment where he led the police to the scene describing the entire episode in minute detail, and (c) a sworn "**KGB**" statement (routinely taken on the chance Robar would refuse to or otherwise be unavailable to testify). All three consistently implicated Veinot.

[5] At trial, the defence attacked both Robar's credibility as an unsavoury character and his reliability as a mentally unstable person with a drug addiction. Mr. Veinot did not testify in his own defence.

[6] The judge found Robar's statements, along with other circumstantial evidence, to be strong enough to link Veinot's involvement beyond a reasonable doubt. He sentenced him to three years, prompting the present appeal.

**ISSUES**

[7] Veinot lists the following grounds of appeal:

> 1 The Learned Judge erred in law in failing to note the evidence which could have raised a reasonable doubt as to the guilt of the accused.
>
> 2 The Learned Judge erred in law in failing to follow and apply the law as decided in *Vetrovec* [1982] S.C.R. 811.
>
> 3 The Learned Judge erred in law in allowing the video re-enactment to be used in evidence.
>
> 4 The Learned Judge erred in law in allowing the application by the Crown to use in evidence the prior inconsistent statements of the co-accused.
>
> 5 The Learned Judge erred in law in ignoring the medical evidence as to the mental state of the Chief Crown witness and co-accused, Timothy Robar.
>
> 6 The Learned Judge erred in law in allowing the cross examination of Timothy Robar, Crown witness.
>
> 7 The Learned Judge erred in law in failing to consider the fact that the co-accused lacked the intention to commit arson.
>
> 8 Further the defence appeals the sentence and with respect to this ground states the Judge erred in imposing the three years imprisonment in the circumstances.

[8] With the benefit of oral argument, it appears that with grounds 1, 2, 5 and 7, Veinot is essentially attacking the reasonableness of the verdict in light of Robar's bad character and mental instability. As well grounds 3 and 4 are intertwined, dealing with admission of Robar's three videotaped confessions. I would therefore recast the issues as follows:

1. the reasonableness of the verdict;

2. the admission of the three Robar videos;

3. the Crown's cross examination of Robar;

4. the fitness of the sentence.

## ANALYSIS

### The Reasonableness of the Verdict

[9] An appeal court's role in assessing the reasonableness of a verdict is, for good reason, limited. Specifically, we will defer to the trial judge who has heard and seen the witnesses unless (a) there is no evidence on an essential element of the offence, (b) the judge misapprehends material evidence, or (c) on those rare occasions where the judge's reasoning is illogical to the point of rendering the verdict unsafe. In **R. v. Sinclair**, 2011 SCC 40, Fish, J. (in dissent but not on this issue) recently offered this comprehensive analysis:

> ¶13 In *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), Doherty J.A. explained that misapprehensions of the evidence include not only a mistake as to the substance of the evidence, but also "a failure to consider evidence relevant to a material issue" and "a failure to give proper effect to the evidence" (p. 218). I agree with Justice Doherty that "[i]n cases tried without juries, a finding that the trial judge did misapprehend the evidence can ... figure prominently in an argument that the resulting verdict was unreasonable" (p. 220).
>
> ¶14 While a misapprehension of the evidence may help to establish that a verdict is unreasonable within the meaning of *Yebes* and *Biniaris*, *Beaudry* does not govern an error of this sort.
>
> ¶15 Rather, the *Beaudry* test addresses the reasonableness of the judge's verdict, notably by scrutinizing the logic of the judge's *findings of fact or inferences drawn from the evidence admitted at trial*. A trial judge who is mistaken as to the evidence admitted at trial *misapprehends the evidence*, inviting appellate scrutiny under *Lohrer*, not *Beaudry*; a trial judge who is not mistaken as to the evidence but reaches a verdict by an illogical or irrational reasoning process commits an error under *Beaudry*, not *Lohrer*. These are conceptually distinct

> errors. To conflate them is to disregard the rationale of *Beaudry* and the jurisprudential gap it has filled.
>
> ¶16 An appellate court will thus be justified in intervening, pursuant to *Beaudry*, where a trial judge draws an inference or makes a finding of fact that is (1) plainly contradicted by the evidence relied on for that purpose by the judge, or (2) demonstrably incompatible with evidence that is not otherwise contradicted or rejected by the trial judge.

[10] Here, Veinot takes a two-pronged attack on the verdict. First, he attacks Robar's reliability due to mental illness. Specifically, he isolates one aspect of the judge's decision to suggest that the judge found the evidence of Robar's mental illness to be irrelevant. Here is the impugned passage:

> I do accept that Robar can get things in his head, that he is unpredictable and irrational. He does have, or did, at least at that point, have mental and emotional dysfunction and as the psychiatrist said, his one condition is essentially incurable. But, in my view, it is not relevant.

[11] No doubt it would represent reversible error to discount the evidence surrounding Robar's mental health. However, I read this passage much differently. In my view, the judge found as irrelevant not the existence of his illness but simply the fact that it was incurable. This becomes clear when one reads the following passages where the judge addresses Robar's illness head on, concluding that despite his illness, Robar's account to the police implicating Veinot was nonetheless cogent:

> There is also the fact that it was very shortly after his confession and these videotaped statements that we observed, that he became so mentally unstable that he was confined to the East Coast Forensic Unit. He was diagnosed as having antisocial personality disorder and some drug induced psychoses.
>
> ...
>
> I accept that he was mentally frail. I accept that he is or was, at least, at times irrational. A rational person would not have attempted to burn Jacklin's house. A rational person, seems to me, a rational person would not be travelling around the countryside stealing valuable vehicles, generators and suchlike things, which have to be virtually given away in order to steal, that, what I'm suggesting is, to steal a $5,000 item to sell for a hundred is not the action of a rational person. So, I take that into consideration, but in the end I am persuaded that his story as related to

> the police was cogent, it's consistent, it's corroborated in every detail where corroboration was possible.

[12] Indeed, the judge found Robar's account to be logical and in many ways corroborated by other evidence. As well, Robar's lack of any other possible motive was also found to be highly relevant:

> It implicates the accused. In some respects, the relationship of the accused to that day, is corroborated in peripheral ways. The story flows with such logic as to become irresistible. In the absence of the accused there is an absence of motive. The conduct of that day would be totally irrational in the absence of the accused who had no knowledge whatsoever of Jacklin. Did not know him to see him, had never had any association with him or relationship with him, had never been to his place of residence, unknown to Jacklin. There is no other, to use the word again, rational explanation for his involvement in this attempted arson than that he was there as an actor on behalf of the accused, Kelly Veinot.
>
> The evidence satisfies me beyond a reasonable doubt that Veinot was a party to this offence and that he incited, aided or abetted Robar in carrying it out and is a party therefore to the offence and is convicted of the offence with which he's charged.

[13] In fact, I have viewed these video exhibits and I agree with the trial judge. They represent a logical and consistent account of the events including Mr. Veinot's involvement. The re-enactment in particular is worth noting. It is very detailed, candid and spontaneous. It represented a very solid foundation to support the verdict despite Robar's mental problems. I see no merit to this aspect of the appeal.

[14] Secondly, in attacking the verdict, Veinot also asserts that the judge underestimated Robar's bad character, something that required a great deal of caution particularly when, as here, the witness is implicated in the same crime.

[15] Yet, in my view, the judge was keenly aware of this danger. He cautioned:

> The Defence correctly points out that there are dangers in accepting the evidence of a self confessed arsonist. Robar is a thief, he was addicted to drugs. Can the evidence of such a person in this context be accepted as proof beyond reasonable doubt.

> Defence concedes that there are elements of truth in the statement but argues that his truth is isolated only to that which he did and does not extend to his motivation. His reported motivation does not extend to inculpating the accused. Defence counsel says that Robar is quite capable of initiating such an action on his own, and indeed, he had done so before, in that he had a previous attempt at arson. That theory loses some of its traction, in my view. It would have more traction if I could conclude on the basis of the evidence, or on any other basis, that a mere suggestion from Kelly Veinot that some person deserves to be the receiver of some act of retribution might trigger Robar to go out and accomplish that. But the theory is not, in my view, supported by the evidence.
>
> There was much made of Robar's attempt at arson on the motor vehicle of Greg Veinot. The story, as I understand it, is that Kelly Veinot, the accused, had made some comment in the presence of Robar, or to Robar's knowledge, that this other Veinot deserved to suffer in some way and Robar confessed to attempting to do that, to set fire to Greg Veinot's car. But my recollection of the evidence is that that action was triggered in response to threats made by Greg Veinot to Leanne, was it? Robar's girlfriend and her family by Veinot.
>
> The Defence suggests there's also a possible motive of jealousy, that Robar was somehow motivated by the fact that Kelly Veinot appeared to have lots of money or some easy money, that money was going by and Robar wasn't getting any. That is interesting speculation but it, in my view, is not supported but what I, by what I see to be the facts or the evidence in this case.
>
> ...
>
> As the trier of fact, I'm obliged to consider a number of things. He is a co-conspirator. Is there a possibility that he was trying to lay off some of the blame, for some reason, on someone else. As, I said earlier, he has a record of theft. He is not an honest person. He had previously lied to the police about this arson. Some three weeks before, he had been questioned at length, several hours, but he had emerged from that interview clean and not implicated. As he said, for the first time he took advice from a lawyer and said nothing.

[16] These passages make it clear that the judge was alive to the inherent risks of accepting Robar's evidence implicating Veinot. Nevertheless, he accepted it. Furthermore, it was for him alone to assess the weight of this evidence. See **R. v Kehler**, 2004 SCC 11 at paras. 14-27, and **R. v. MacInnis**, 2006 NSCA 92 at paras. 61-62. I see no error here.

[17] For all these reasons, in my view, this verdict was not unreasonable.

**The Admission of the Robar Videos**

[18] In the face of Robar's apparent "amnesia" at trial, the judge, following a *voir dire*, gave detailed reasons for admitting the three videos for the truth of their contents. First, he framed the issue as follows:

> ... It's now accepted that out of Court statements made by witnesses which conflict or contradict the evidence of that witness given at the trial may now be admitted for the truth of its contents in certain circumstances.
>
> That type of evidence is what we understand to be prior inconsistent statements or evidence where as is essentially the case here the witness when called to trial declined either forgot or declined to give evidence. The leading case is *R. v. KGB*, I'll come back to that later on, but the essence of the present rule, as I understand it, is that there must be a guarantee of reliability, there must be necessity. The evidence is admissible only in so far as the statements would've been admitted in Court, which would exclude hearsay or opinion or other evidence of that sort. A *voir dire* is to be held by the Court and at the end of the *voir dire*, the judge is to determine if the indicia of reliability are established on a balance of probabilities or in the case of a statement by the accused to be used against him or her, it requires proof beyond a reasonable doubt.
>
> The statements which we are here considering, are statements which initially were confessions. Statements against the interest of Mr. Robar himself who was admitting to the commission of the offense of arson. In the present trial, the Crown seeks to have those statements admitted as evidence against the accused, in this matter, Kelly Veinot, essentially a co-accused of Mr. Robar. So, we have a confession of Robar which implicates Veinot. I have to be, I have to caution at the end of the day, the trier of fact, with respect to what's called the *Vetrovec* Principal or Warning. Taking into account the dangers of adopting or accepting as truth this type of evidence.

[19] The judge then found the videos to be reliable; depicting "a rational, competent person":

> The evidence which he gave in the course of those videotapes resulted not from questioning, but from a logical flowing recitation given by himself. He was fully engaged in conveying to the police officers that which he wanted them to hear with gestures, drawings, demonstrations of his clothing, what he was wearing, how he was wearing. The videotape gives every appearance of a rational, competent person, remorseful for his actions ...

[20] The judge, as well, highlighted significant corroborating evidence:

> ... The fire was set exactly in the manner he described. He did approach the house in the manner he described, because he was seen doing it. In spite of his best efforts to avoid detection. He was seen leaving the property, in the manner he described in spite of his best efforts to avoid detection. All those corroborating elements, recited *ad nauseam* by Mr. Fyfe, make it absolutely clear that he did set the fire, that he set it in the manner he described. Having done so, it is further absolutely clear that he ended up at the Ox Bow Motel later on that day, that he rode in a taxi to a mutual friend of his and Kelly Veinot's, that another mutual friend of his and Kelly Veinot's drove him, subsequently to Kelly Veinot's house. Those things really cannot be disputed on the basis of the evidence at least that's been heard to this point.

[21] At the same time, the judge addressed Robar's mental illness head on:

> There is a serious issue which raises doubts, or could raise a doubt about all aspects, or about the evidence of Robar in so far as this accused is concerned, and that is, as has been correctly pointed out, within a very few days, he is found to be suffering a mental infirmity and is placed in the East Coast Forensic Unit. He is, according to the diagnosis of Dr. Brunet, suffering two things. Induced mania and psychosis as a result of amphetamine use and abuse, and the abuse of other drugs. And he also has an underlying dis..., antisocial personality disorder. My understanding of her evidence was that the amphetamine induced psychosis could be expected to impact his memory, and his behaviour. I didn't hear her say what the impact of antisocial personality disorder would be.

[22] Finally, the judge addressed the second "**KGB**" prerequisite necessity:

> If he is to be tried, those, that evidence must be before the Court, and its reliability, or the reliability of the bulk of the evidence. That is, all the details of how the offense was committed and so on, is well established. ...

[23] In my view the judge did not err in admitting these videos, including the video re-enactment. Here Mr. Robar's feigned lack of recall at trial laid the foundation for the judge to reasonably conclude that their admission was necessary. Nor can I take issue with his detailed reasons, supported by the record, concluding that these videos were circumstantially reliable.

[24] Before concluding my analysis on this issue, I would like to address a separate concern Veinot has with the admission of the re-enactment video. He reminds us of the risks inherent in allowing this type of evidence. For example, the Ontario Court of Appeal in **R. v. MacDonald** (2000), 134 O.A.C. 167 offers this apt caution:

> ¶36 We turn now to the applicable legal principles. A serious concern with videotaped re-enactments, particularly those created without the participation of the accused, is their potential to unfairly influence the jury's decision-making. Because a video re-enactment has an immediate visual impact, jurors may be induced to give it more weight than it deserves and, correspondingly, to discount less compelling or less vivid evidence which is nonetheless more probative of the facts in dispute. ...

[25] However, as the court in **MacDonald** concedes, admissibility is ultimately for the trial judge to decide whether the video's probative value outweighs it prejudicial effect:

> ¶41 Despite these concerns, however, we think it would be unwise to lay down rigid rules governing the admissibility of video re-enactments. In an era of rapidly changing technology we would take a step backward were we to prohibit the use of video re-enactments in the courtroom. Further, an outright prohibition would hinder the efforts of today's advocates to devise new and creative ways to promote their clients' causes.
>
> ¶42 In our view, the preferable approach recognizes the dangers of video re-enactments but adopts a case-by-case analysis. As with the admissibility of other kinds of evidence, the overriding principle should be whether the prejudicial effect of the video re-enactment outweighs its probative value. If it does, the video re-enactment should not be admitted. In balancing the prejudicial and probative value of a video re-enactment, trial judges should at least consider the video's relevance, its accuracy, its fairness, and whether what it portrays can be verified under oath. See *R. v. Creemer*, [1968] 1 C.C.C. 14 at 22 (N.S.C.A.). Other considerations may be material depending on the case. And as with rulings on the admissibility of other kinds of evidence, the trial judge's decision to admit or exclude a video re-enactment is entitled to deference on appeal.
>
> ¶43 The appellants contend that another consideration should be necessity, whether the video is needed in the light of the other evidence in the case. According to the appellants, if a taped re-enactment merely repeats what witnesses have already testified to, it adds nothing new and accordingly should not be admitted. This argument, however, applies equally to other kinds of

> demonstrative evidence - charts, graphs, diagrams and photographs - that courts routinely admit to help the trier of fact understand the testimony of witnesses. The question of necessity is, therefore, better dealt with as yet another aspect of evaluating the prejudicial effect and probative value of a video re-enactment in a given case.

[26] Here, as the trial judge recognized, the video was highly relevant to two live issues. Specifically, it depicted Robar having a great deal of difficulty trying to find the Jacklin home despite his obvious intention at that stage to cooperate with the police. This corroborates Robar's assertion that he was driven there by Veinot in the first instance. Secondly and more significantly, it belies the defence assertion that Robar was incoherent and unreliable due to mental illness. In fact, this video makes it clear that whatever his state of mind might have been before or after the re-enactment, on that occasion he was, as the judge observed, "a rational, competent person, remorseful for his action ...".

[27] In this light, I can easily see why the judge felt that the probative value of this evidence outweighed its prejudicial effects. I would dismiss this aspect of the appeal.

**The Crown's Cross Examination of Robar**

[28] Veinot alleges on appeal that the judge erred by allowing the Crown to cross examine its own witness. Again, for the following reasons, I see no merit to this aspect of the appeal.

[29] The judge concluded that as a crown witness, Robar was not sympathetic to the Crown's case against Veinot. This set the stage for the judge to permit cross examination on Robar's previous inconsistent video statement where he provided great detail of his and Veinot's involvement in this crime. As noted, this is permitted under our *Canada Evidence Act*:

> Previous statements by witness not proved adverse
>
> 9 (2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the

> cross-examination in determining whether in the opinion of the court the witness is adverse.

[30] However, Veinot further asserts that the judge allowed a wide-ranging cross examination as opposed to that authorized by s. 9(2) - being limited to his purported inconsistent video statements. Technically, that may be true. Nonetheless, even had the Crown been permitted to stray beyond the reaches of s. 9(2), I would see no harm in the circumstances. After all, counsel for Veinot made no objection at trial. Furthermore, he too enjoyed the benefit of full blown cross examination. I see no prejudice to Veinot and would therefore invoke the curative provisions set out in the *Criminal Code* to dismiss this aspect of the appeal:

> Powers
>
> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> ...
>
> (b) may dismiss the appeal where
>
> ...
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[31] See also: **R. v. Milgaard**, [1971] S.J. No. 264 at para. 59.

**The Fitness of the Sentence**

[32] Veinot asserts that the sentence was too steep but, before us, does no more than repeat his submissions to the trial judge. Of course, it is not for us to second guess the trial judge short of a sentence that is manifestly unfit or one that reflects an error in principle. Neither circumstance applies here. Indeed, the sentence is well within an appropriate range for such a serious arson. I acknowledge that, fortunately for all involved, the fire was caught early with little damage. Even more fortunately, no one was home. That said, to invade someone’s home in order

to set it on fire (with the added risk of injury or even death) is an extremely serious offence. It is all the more serious when, as here, it is motivated by revenge.

[33] Furthermore, the Crown, in its factum, is right to suggest that this sentence falls squarely within the range for this type of crime:

> ¶90 All of the above factors were supported by the jurisprudence provided to the trial Judge. [*R. v. Meer*, 2011 ABQB 46, at paras.18-22, 26-27 (A.B., vol.I, at pp.72-80); *R. v. Mirzakhalili*, 2009 ONCA 905, at paras.3, 5-6, 9-10 (A.B., vol.I, at pp.68-71).] Moreover, in *R. v. Sandouga*, 2002 ABCA 196 (tab 29), [although distinct on its facts], the Court observed:
>
> > 33 The case law suggests that planned, revenge-based acts of destruction of another person's property generally attract a substantial sentence. For example, in *R. v. Etmannski* (2001), 294 A.R. 344 (Prov. Ct.), the offender, to “get back" at her boyfriend's former girlfriend, threw Molotov cocktails through a window of the girlfriend's residence, creating a small fire that was rapidly extinguished. There was little damage and no injury. The accused was 19, pled guilty and had been encouraged by her boyfriend to commit the arson. She had a criminal record, mostly in youth court, with 4 months' closed custody as her longest previous sentence. Etmannski was sentenced to 27 months, in addition to 4 months' pretrial custody. See also *R. v. Wattenberger* (1984), 56 A.R. 238 (C.A.) (grain elevator employee angered by employer's refusal to allow him time off set fire to grain elevator; sentence of three years); *R. v. Sillars* (18 April 1990), Edmonton 9003-0237A6 (C.A.) (lumber company employee whose employment was terminated set fire to lumber company both for revenge and to conceal his theft of $240; guilty plea; effective sentence of three years, with credit for pretrial custody); and *R. v. Allard*, [1999] B.C.J. No. 1912, (B.C.J.) (C.A.) (offender set fire to residence after he was told to leave by his cohabitant; effective sentence of four years, with credit for pretrial custody). [at para.33.]

[34] With no error in principle even asserted, and with this sentence being within the appropriate range, there is no merit to this ground of appeal.

**DISPOSITION**

[35] I would dismiss the appeal against conviction. I would grant leave but dismiss the appeal against sentence.

MacDonald, C.J.N.S.

Concurred:

Saunders, J.A.

Beveridge, J.A.