C.A.C. No. 02898

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Grenkow, 1994 NSCA 240

Freeman, Jones and Roscoe, JJ.A.

BETWEEN:

IRENE GAIL GRENKOW	)	the appellant appeared in person
Appellant	)	
- and -	)	
	)	Kenneth W.F. Fiske, Q.C. for the Respondent
HER MAJESTY THE QUEEN	)	
Respondent	)	Appeal Heard: November 22, 1994
	)	Judgment Delivered: December 28, 1994

THE COURT: Appeal dismissed per reasons for judgment of Jones, J.A.; Freeman and Roscoe, JJ.A. concurring.

JONES, J.A.:

This is an appeal by Ms. Irene Grenkow from her conviction on a charge of arson contrary to s. 433(a) of the **Criminal Code** on March 8, 1993. She was sentenced to a three

year term in penitentiary.

The fire occurred in Granbury Place, a large condominium apartment complex at 45 Vimy Avenue in the City of Halifax. The appellant lived in apartment 812 which she owned. There were 200 units in the building which was occupied by approximately 400 people.

The appellant had two cats. Early in the month of September, 1991 one of the cats got lost. The appellant canvassed the neighbourhood including the complex in search of the cat. With the permission of the building superintendent she posted notices by the elevators offering a reward for finding the cat.

On Monday morning, September 9th, the superintendent found a typewritten note on the floor of the office manager which apparently had been slipped through the mail slot. The note was as follows:

> "Neither Elizabeth nor Bob are to blame for the cat's disappearance. However, someone in the building abducted the cat. If the cat is not returned, dead or alive, by Monday morning at 9 a.m., there is going to be trouble in this building. The trouble will grow worse day by day, and will not stop until the cat is returned."

The following morning a similar note was found on the office floor. The note provided:

> "Neither Elizabeth nor Bob are to blame for the cat's disappearance. If the cat were dead, it would have been turned in by now. Therefore it is obviously alive. Whoever took it will not be punished.
>
> However, the guilty party must return the cat in good health, or the trouble will continue, as promised."

Robin Adair was a security guard posted in the main lobby of the building on September 12, 1991. There are two elevators serving the building. After 11 p.m. when he came on duty he was watching the two elevators. One elevator was out of service. A panel above the elevators tracks the location of the elevators. Three people familiar to Mr. Adair

took one elevator to the seventh floor. He could hear them exit the elevator. About three minutes later the elevator went up to the ninth floor. He could hear the elevator door pinging as someone was holding it open. There is a bell which rings when the door closes. He pressed the button to activate the elevator and it proceeded to descend. This was between 11:20 and 11:30 p.m. The elevator came to the lobby and as the doors opened it was engulfed in flames. There was a large circle burning on the elevator floor and there was a very strong odour of gasoline present. He obtained an extinguisher and was able to extinguish the fire. The fire activated the alarm system throughout the building and the fire department responded immediately. Because of the suspicious nature of the fire the police were summoned by the fire department.

Smoke circulated from the elevator shaft throughout the halls in the building. A large number of people evacuated their units and left the building. District Chief Whiting of the Halifax Fire Department was at the scene and was in charge of the fire units present.

Mr. Martin Currie was a retired R.C.M. Police officer. He resided with his wife and son in unit 810 in Granbury Place. At approximately 11:10 p.m. the fire alarm sounded. He went to the apartment door and looked into the corridor. To his right he saw Ms. Grenkow standing in front of her unit door number 812. He observed her for some ten seconds. She was carrying a red container which he described on the trial as a common everyday gasoline jerrycan. She appeared to be in a hurry and was looking for something on her person. She entered her unit and took the can with her. There was no smoke in the hall. Being suspicious he went down the hall some 85 feet to her front door where he smelled a distinct odour of gasoline. He heard people shouting that there was smoke and fire and to "get out". As he returned to his apartment he again smelled gasoline by Miss Grenkow's door. There was then heavy black smoke in the elevator lobby. He evacuated his apartment and went to the main lobby which was filled with smoke. Mr. Currie advised condominium officials and a police officer what he had seen on the eighth floor. This was about 12:15 a.m.

Constable LeBlanc proceeded to Ms. Grenkow's apartment and knocked on the door identifying himself. He got no response. As a result Michael Chisholm, vice-president of the condominium corporation and District Chief Whiting of the Fire Department and Corporal Fox of the Police Department went to the apartment. Attempts were made to gain entry into the apartment by knocking and calling out with no response. Apparently the lock had been changed on the door and entry could not be made with a building pass key. There was a discussion about obtaining a search warrant but this was not considered feasible because it would take too much time. Because of his concern about the perceived danger Whiting decided to force the door which he did. Upon entering the apartment Whiting saw the appellant coming from the balcony and the officers were confronted by Ms. Grenkow who demanded that they leave the apartment. Words were exchanged during which Ms. Grenkow produced a firearm. Chief Whiting made a cursory search of the apartment. He was advised over his hand phone that a gasoline container had been thrown from one of the apartments at approximately the same time as he was entering apartment 812. He testified that he entered the apartment shortly after 12.

Wayne Anderson and Steven Johnson were residing in apartment 212 of the complex. This unit is directly below unit 812. They heard the alarm and went outside. On returning to the apartment they went out onto the balcony. A red object passed their balcony and struck the ground. They went outside and examined the object and advised the fireman. It was a red gasoline plastic container half full of gasoline.

A search warrant was subsequently obtained and a typewriter was seized from Ms. Grenkow's apartment. Examination of the ribbon disclosed that the notes found in the condominium office before the fire were inscribed on the ribbon. The type matched the notes.

The appellant elected trial by judge and jury and it opened in the Supreme Court on March 1, 1993. The first two days of the trial were occupied by a **voir dire** to determine

whether the entry into the appellant's apartment on the night of the fire constituted an unreasonable search and seizure under s. 8 of the **Charter**. Evidence was called on the **voir dire**.

The trial judge ruled that there was no violation of the appellant's **Charter** rights. He stated in part:

> "I am satisfied that the fireman, Mr. Whiting, or Chief Whiting, acted under the authority of the **Fire Prevention Act** even though witnesses refer to it as the **Fire Marshals' Act**. I do not think anything turns on that point, but for the narrow purposes of this application, I find that their entry was precipitated by a genuine statutory duty to see that the property was secured and protected, and from that point of view, it certainly cannot be determined as being an unreasonable search and, therefore, the matter ends there."

I have generally outlined the evidence of the Crown witnesses on the trial. Dr. Richard Brown, a zoologist, resided in apartment 817 and was called by the defence. He heard the alarm and went to the door. He did not take particular note of who was in the corridor except that there was a "scurry of people" behind him as he locked the door. He saw a female going into apartment 812 whom he assumed was the appellant. He did not see her carrying anything.

Ms. Grenkow testified. She has grade 12. She had no previous record. She purchased her condo in 1988. She denied that she set the fire or made the notes found in the office. She stated that she heard the fire alarm, left her apartment and proceeded down the stairwell. Realizing that she had left her cat she returned to her apartment to retrieve the animal. The cat was frightened by the alarm bells and retreated under the bed. Not being able to remove the animal she decided to remain in the apartment to watch events from her window. She changed into her night clothes and sat on the window seat. She heard a loud knocking on her door at 12:45. Voices outside called for her to open the door. She was frightened because of previous problems with an ex-boyfriend and refused to open the door.

She had experienced damage to her vehicle and harassing phone calls. This is the reason for keeping a gun for which she had a permit.

Upon returning to her apartment from the stairwell she saw Mr. Currie in the hall. She said she was carrying a red purse and not a gasoline can. There was no smoke in the hallway at that time. When Chief Whiting entered the apartment she was not on the balcony. With regard to the notes she said it was possible that other people had access to her apartment. She denied that she threw a gasoline tank from her apartment.

When the jury retired they sent a note to the trial judge requesting that a deputy sheriff stand in the hall some 80 or 90 feet from the jury room with the gas can and the purse so that the jury could take a view. The trial judge declined the request on the basis that the jury had to decide the case solely on the evidence adduced on the trial. They subsequently returned and found the appellant guilty.

The appellant has appealed her conviction. She was not represented by counsel on the appeal and made her own submissions both written and oral. The Court dismissed an application for the introduction of new evidence at the commencement of the appeal. The appellant has raised issues which are at variance with the notice of appeal. Crown counsel has endeavoured to list the main issue as outlined in the appellant's factum. I will endeavour to deal with those issues as I see them. I do not propose to answer all of the appellant's objections as some of them are of no real importance or not substantiated by the record.

The first ground referred to by the Crown is as follows:

> "That the trial judge erred in law in ruling the appellant's right to be secure against unreasonable search or seizure guaranteed by ss. 1 and 8 of the **Canadian Charter of Rights and Freedoms** had not been infringed or denied by reason of the warrantless entry into her condominium unit by officers of the fire and police departments, and in failing to exclude under s. 24(2) of the **Charter** the evidence of what the officers observed in her unit and exhibits 6 and 7, the typewritten notes."

This ground was not raised in the notice of appeal. The trial judge found that District Chief Whiting was authorized by s. 16 of the **Fire Prevention Act** to enter the premises. The appellant contends that the entry was unlawful because it was not made at a reasonable hour or exercised in a reasonable manner. She summarizes her position as follows:

> "If the Court of Appeal finds that the search was unreasonable and unlawful not only within s. 16(1) of **The Fire Prevention Act**, but also under s. 8 of the **Charter of Rights and Freedoms**, then the remedy I am seeking under s. 24(2) is the exclusion of evidence that would not bring the administration of justice into disrepute. This would include the observation of Chief Whiting when he said he allegedly saw me coming in from my balcony at the moment of the break-in and the typewritten notes. Corporal Fox admitted at my Preliminary Inquiry that he saw the typewriter on the desk next to my telephone on September 13, therefore when he came back for the typewriter several days later, his warrant was flawed because it derived from an unlawful entry."

Section 8 of the **Charter** provides as follows:

> "8 Everyone has the right to be secure against unreasonable search or seizure."

Section 16(1) of the **Fire Prevention Act** states as follows:

> "16(1) The Fire Marshal, Deputy Fire Marshal or local assistant, upon receipt of a complaint, or when he deems it necessary without complaint, may at all reasonable hours enter into and upon any building or premises in the Province for the purpose of inspecting same and ascertaining whether or not
>
> (a) in case the building or premises are in a state of disrepair, fire starting therein might spread so rapidly as to endanger other buildings or property;
>
> (b) the building or premises are so used or occupied that fire would endanger life and property;
>
> (c) combustible or explosive material

> is so kept or such other inflammable conditions exist in or about the building or premises as to endanger life or property;
>
> (d) any special fire hazard exists in or about the building or premises.

During the hearing of the appeal the appellant's attention was drawn to Sections 460 and 462 of the **Halifax City Charter** which provide:

> "460(1) The chief officer of the fire department shall have entire and absolute control at any fire at which he is present, and shall not be interfered with by any person whomsoever.
>
> (2) In the absence of the chief officer, his duties shall be discharged by the senior officer present.
>
> 462 The officer in charge at any fire and the firemen may, for the purpose of extinguishing the fire, or preventing its spreading, or the removal of property, break and enter into any building or premises, on fire or threatened therewith or entry into which is deemed necessary."

These provisions of the provincial statutes authorize entry into private premises without a warrant. They are not directed to the prevention of crime as such.

In **Hunter et al v. Southam Inc.** 14 C.C.C. (3d) 97 Dickson, J. in delivering the judgment of the Supreme Court of Canada stated at p. 106:

> "...The **Canadian Charter of Rights and Freedoms** is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action. In the present case this means, as Prowse J.A. pointed out, that in guaranteeing the right to be secure from unreasonable searches and seizures, s. 8 acts as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not in itself confer any powers, even of 'reasonable' search and seizure, on these governments. This leads, in my view, to the further conclusion that an assessment of the

> constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective."

And at p. 108:

> "Like the Supreme Court of the United States, I would be wary of foreclosing the possibility that the right to be secure against unreasonable search and seizure might protect interests beyond the right of privacy, but for purposes of the present appeal I am satisfied that its protections go at least that far. The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from 'unreasonable' search and seizure, or positively as an entitlement to a 'reasonable' expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement."

And at p. 109:

> "I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a pre-condition for a valid search and seizure."

In **Collins v. The Queen** 33 C.C.C. (3d) 1 Lamer J. in speaking for the majority stated at p. 14:

> "This shifts the burden of persuasion from the appellant to the Crown. As a result, once the appellant has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable."

And at p. 15:

> "However, the problem is that the objection raised by

> the appellant's counsel was groundless: this court has held that reasonable grounds can be based on information received from third parties without infringing the hearsay rule (**Eccles v. Bourque, supra**), and the question put to the constable in this case was not outside the ambit of the ground covered in cross-examination."

The appellant has not attacked the constitutional validity of s. 16 of the **Fire Prevention Act**. She argued that in the circumstances the section did not authorize entry and in any event it was not exercised in a reasonable manner.

I have some reservations as to whether s. 16(1) of the **Fire Prevention Act** was intended to apply in the circumstances which occurred in this case. Having regard to s. 16(2) of that **Act**, the section was designed primarily as an inspection and prevention measure. It is unnecessary to decide that issue as the provisions of the **City Charter** clearly authorized entry into all parts of the building where the officer in charge deemed it necessary to do so.

In my view those provisions of the **City Charter** are not only reasonable but necessary. Firemen are called to fires by residents, alarm systems and in many cases by neighbours or passers in the area. The primary duty of firemen is the protection of life and property. They cannot stop at the front door to await the arrival of a search warrant before entering. The right to privacy in such circumstances is secondary to the protection of lives and property. The trial judge heard the evidence and stated:

> "One must look at the events as they unfolded on that particular evening from the vantage point of the persons who attended at that condominium complex at 45 Vimy Avenue. There is no question in my mind that there was a fire in the elevator. There was smoke on the 8th floor according to the evidence of Mr. Chisholm which I accept. The other witnesses, Fire Chief Whiting, came to the 8th floor with the information that someone was seen entering Apartment 812 with a red container. They tried, and I accept the evidence, that there were attempts made to get the occupant of that apartment to respond to knocking on the door and yelling at the apartment or yelling at the door and there is no doubt in my mind that such attempts were made either (it does not make

> any difference by whom) by the fire chief, as I will call him, or by the police corporal or the police constable who was there. In my mind, the fact that there was no answer to the door exacerbated the anxiety and the imminent danger which these people perceived at that time. Had the occupant of the apartment opened the door, then that could be a different situation. It may have changed the state of mind in which these people found themselves but they were faced with an imminent danger; they tried to gain entry voluntarily into the condominium unit. That entry was denied them and I think it is the only thing they could do at that time to secure the other occupants of the condominium or secure the premises themselves was to go in to assure themselves that there was nothing untoward in that particular apartment. What went on once they got in, as they say, is a matter of history and is not relevant I do not think to this application."

In coming to that conclusion he had to weigh the evidence. There were reasonable and probable grounds to believe that the danger persisted. The officers demanded entry which was refused and therefore there was no alternative but to force entry. I am satisfied that the resulting search was carried out in a reasonable manner having regard to the appellant's hostile attitude at the time. It is unnecessary to determine whether the police officer had the power to enter the premises on this occasion. In **R. v. Hern**, 149 A.R. 75 the Alberta Court of Appeal had to consider a warrantless search where a peace officer entered the premises while investigating a break and entry. The Court stated at p. 79:

> "If the criminal activity to be investigated is clearly over but a warrantless search of the dwelling house is continued, anything produced by it may well face s. 8 **Charter** scrutiny. Having said that, it is only good sense that the investigation will not be clearly over if there are reasonable grounds to believe that any of the offenders may still be in the dwelling, if there is a risk of anyone remaining inside who is suffering injury or may be incapacitated by injury, if there is any risk of continuing property damage by vandalism, fire, water or power, or that there may be evidence inside the dwelling that could deteriorate while the absent homeowner's permission to continue or a warrant of search is obtained. This is what the court said in **R. v. Drysko**, supra, and we reiterate it."

I think those comments are appropriate with respect to the entry in this case. I would dismiss this ground of appeal.

Throughout her submission the appellant reviewed the evidence and generally contended that the verdict was unreasonable. This involves, of course, a weighing of the evidence and in particular issues of credibility which was a matter for the jury. There could be no doubt on the evidence that the fire was deliberately set by gasoline. The main issue was whether the appellant had set the fire. The evidence incriminating the appellant was circumstantial. She was present in the building and was seen entering her apartment with a gasoline can immediately after the fire had been set. The two notes which were threatening in tone were traced to the typewriter in her apartment. The gasoline can which was half full of gasoline was thrown from the building at the approximate time that entry was gained into her unit. Having regard to the evidence there is no other reasonable inference except that it came from her balcony. The finding of the can and its contents confirmed the evidence of Mr. Currie and what he observed as she entered the apartment. Her conduct in returning to the apartment and refusing entry was not consistent with what an innocent person would have done given the circumstances. Obviously the jury rejected her evidence. There was ample evidence to support the verdict and I would reject this ground of appeal.

The appellant also contends that the trial judge erred in admitting the two typewritten notes. The notes as I have indicated were threatening in nature. They referred to the missing cat which was a fact at that time. The threats of further action in the notes were carried out shortly after the notes were found. The notes emanated from the appellant's typewriter. They were both relevant and admissible with regard to both motive and intent and as part of the events which unfolded before the fire. There is no merit in this ground of appeal.

In his opening remarks counsel for the Crown made reference to false alarms in the building preceding the fire and to damage to the elevator. The trial judge subsequently

ruled that the evidence was not relevant and possibly prejudicial.

The appellant argued that this was prejudicial to a fair trial and that the trial judge failed to adequately instruct the jury to disregard counsel's remarks.

In his opening remarks Crown counsel stated:

> "...The Crown will introduce two notes that were placed under the door of the manager or the building superintendent involving unsigned notes and those notes are to the effect that there is a missing cat and if the cat doesn't come back bad things around the building are going to happen and a second note of similar effect saying if the cat doesn't come back things will start to get worse around here. This is on September 9th and September 10th early in the morning that these notes are discovered. There were false fire alarms in the building on both dates as well as a spray painting of an elevator. The fire took place approximately 11:30 on the 12th. We will lead evidence through witnesses to indicate that the fire took place approximately 11:30 on the 12th in one of the elevators on the 9th floor and the fire became known when a security guard noticed that the elevator was stuck on the 9th floor and made attempts to have it come down to the main lobby."

After ruling that evidence with respect to the false alarms and the spray painting of the elevators was inadmissible the trial judge instructed the jury as follows:

> "Members of the Jury, it is not that long ago that I made my opening remarks to you as to how this procedure will unfold over the next several days and one of the comments I made to you I am going to repeat at this time. I indicated that Crown counsel will be making an opening statement to you. The opening statement will indicate to you what the evidence will show and what the various Crown witnesses will say. The purpose of the opening statement is to make it easier for you to follow the evidence as the witnesses testify. You must realize that the opening statement is not evidence. It is not given under oath and is provided only to assist you in following the evidence as it comes out through the witnesses.
>
> In your absence, before the lunch hour, I heard argument from counsel with respect to the admissibility of certain of the evidence and after consultation with the legal authorities, I indicated that

> to you, I have ruled that the evidence that the Crown wish to proffer through this witness was not admissible. Now Crown counsel quite properly brought to my attention that he had made reference to this evidence during his opening statement and, and, but I am just saying to you that reinforces the position that the, the, the evidence that you consider is the evidence that comes from the witnesses not from counsel whether it be counsel for the Crown or counsel for the accused...not from their opening statement or indeed their closing statements if those remarks are not supported by the evidence. So your main concern is the evidence that comes out through the witnesses. Okay? I just thought that I owed you an explanation of that. Thank you."

No objection was taken to these instructions by counsel at that time. There was no appeal from the trial judge's ruling that the evidence was inadmissible. Apart from the notes there was no evidence to show that the appellant set off the alarms or caused the damage to the elevator. The appellant argued that in instructing the jury on this issue the trial judge should have referred specifically to the evidence outlined in counsel's remarks. I am satisfied that the instruction was adequate to warn the jury to ignore the remarks. Having regard to the judge's final charge and the issues before the jury I am satisfied that no miscarriage of justice occurred. It is important to note that no such evidence was in fact adduced before the jury.

The appellant also objected to a number of rulings by the trial judge on issues arising during the trial, including the admissibility of evidence and his instructions to the jury on the law and the evidence. These included the dismissal of jurors, continuity of exhibits, references to the location of the Currie apartment, the weight of Dr. Brown's evidence and the failure to allow a view. I have carefully reviewed the charge to the jury and the record and see little merit in those grounds. The appellant's counsel carefully reviewed the evidence in his address to the jury.

One member of the panel was discharged at the opening of the trial. Counsel for the appellant was representing a member of a juror's family in another proceeding. Counsel

agreed to the discharge of the juror. Another juror knew the appellant at school. After inquiry the trial judge was satisfied that the juror was impartial and the juror was not discharged. These were matters in the discretion of the judge and I see no error in exercising that discretion.

The jury asked the judge for a demonstration with the purse. This was not strictly a request for a view of the scene. The demonstration requested would not be directly related to what Mr. Currie saw or was capable of seeing in the hall. It did not therefore relate strictly to the evidence as presented on the trial. I see no error on the part of the trial judge in refusing the demonstration. That refusal did not effect the evidence as adduced on the trial.

I am satisfied that the trial judge's address to the jury was fair and directed the jury to the main issues. There were conflicts in the evidence which the jury had to consider. There was ample evidence to support the verdict. I would dismiss the appeal. The appellant abandoned her appeal against sentence as the sentence has been served.

J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.