

R. v. G__

"Successful appeal of client's assault conviction after Court agreed with argument that Trial Judge had ignored vital evidence."
[COMMENTS BY RICHARD NEARY]

R. v. G__

Between
Regina, Respondent, and
E__ G__, Appellant

[2008] B.C.J. No. 12

2008 BCSC 15

77 W.C.B. (2d) 406

Docket: 134355

Registry: Victoria

British Columbia Supreme Court
Victoria, British Columbia

P.D. Leask J.

Heard: December 17, 2007.
Judgment: January 4, 2008.

(25 paras.)

Criminal law — Appeals — Grounds — Misapprehension of or failure to consider evidence — Appeal by accused from conviction on charges of assault and uttering threats allowed — Trial judge failed to appreciate relevant evidence of victim's admission that she was considering making a false criminal allegation against the accused — Admission went to the heart of victim's credibility — New trial ordered.

Appeal by accused from conviction on charges of assault and uttering threats allowed — The accused was charged with five criminal offences — The trial judge acquitted the accused on one count of assault and on one count of allegations of assault, but convicted the accused on one count of assault and one count of uttering threats — The accused argued that the trial judge erred in failing to address evidence that the victim was contemplating making a false allegation against the accused, in applying the legal test for credibility and reasonable doubt and that the trial judge's verdict was unreasonable — HELD: Appeal allowed — The victim's admission that she was considering making a false criminal allegation against the accused was a matter that went to the heart of her credibility which the trial judge needed to analyze before accepting her credibility over that of the accused's — The judge failed to appreciate relevant evidence that was at least as important as the issues that were discussed.

Counsel:

Counsel for the Crown: L. Ruzicka.

Counsel for Appellant: R. Neary.

Reasons for Judgment

P.D. LEASK J.:—

Introduction

1 Mr. G__ was charged with five criminal offences, all resulting from complaints made to the police by S K__, a young woman who was living with Mr. G__ during the relevant period. At the beginning of the trial, the Crown entered a stay of proceedings on Count 1, which alleged that Mr. G__ had unlawfully confined Ms. K__ on October 5, 2005. The trial commenced on May 10, 2006. Further evidence was heard on August 10, 2006. Counsel made their submissions on November 7, 2006 and the learned trial judge gave oral reasons for judgment on December 7, 2006.

2 The learned trial judge acquitted Mr. G__ on Count 3, an allegation that he assaulted Ms. K__ on October 1, 2005. He also acquitted Mr. G__ on Count 4, an allegation of assaulting Ms. K__ on September 17, 2005. He convicted Mr. G__ on Count 2, assault of Ms. K__ on October 5, 2005. He also convicted Mr. G__ on Count 5, uttering threats to Ms. K__ between August 1, 2005 and October 5, 2005. Mr. G__ appealed his convictions.

3 In dealing with Counts 2 and 5, the learned trial judge had to make findings of fact concerning the events of October 5, 2005. Both Ms. K__ and Mr. G__ testified and both were basically in agreement concerning the background facts. They began living together on June 1, 2005. They were both addicted to heroin and crack cocaine and they both supported their drug habits by dealing in drugs. Mr. G__'s role was to deliver drugs to their customers. He frequently used Ms. K__'s car for that purpose.

4 On October 5, 2005, both Ms. K__ and Mr. G__ had been on a crack cocaine binge for approximately two days. On the previous day, Mr. G__ had delivered drugs to one of their customers named Tammy, who was a prostitute. In the weeks leading up to October 5th, there was considerable tension between Mr. G__ and Ms. K__, particularly concerning financial matters. On October 5th, Tammy telephoned the residence enquiring when Mr. G__ was going to return. Ms. K__ conceded that she was jealous of Tammy.

5 The telephone call precipitated a quarrel between Ms. K__ and Mr. G__. He wanted to take her car and make another drug delivery to Tammy. Ms. K__ did not want him to take the car. Ms. K__ testified that Mr. G__ punched her "fairly hard" into a wall in the kitchen, causing bruising to her arm and back. According to her, he broke a vase and pointed the broken end towards her in a stabbing motion while saying, "Give me your keys" and "I'll kill you". She also said that he held her down on the bed, put his arm over her neck and applied sufficient force so that she passed out.

6 Mr. G__ said that when Tammy telephoned, Ms. K__ got angry and started screaming at him. She accused him of sleeping with prostitutes. They started fighting over a cell phone, which got broken. Mr. G__ said he got the car keys from a roommate and Ms. K__ started to attack him by reaching for his glasses to rip them off his face. Because she was clawing at his face, he pushed her away and Ms. K__ hit her head on the back of a door. He denied ever threatening her. Both agreed they were lying on the bed together when the police attended in response to a 9-1-1 call from Ms. K__'s aunt.

7 Counsel for Mr. G__ advanced three grounds of appeal:

- (1)

Did the learned trial judge err in failing to address an aspect of the evidence that was crucial to a proper assessment of the complainant's credibility; specifically the evidence that in the days leading up to her allegations against the appellant she was contemplating making a false allegation against him?

- (2)

Did the trial judge err in law in his application of the R. v. W.(D.) test, [1991] 1 S.C.R. 742, in relation to credibility and reasonable doubt?

- (3)

Was the trial judge's verdict unreasonable and unsupported by the evidence?

8 At the beginning of the hearing of the appeal and in response to a suggestion from this Court, counsel for Mr. G__ abandoned the "unreasonable verdict" ground.

Did the Trial Judge Misapprehend a Significant Aspect of Ms. K___'s Evidence?

9 The trial judge began his analysis of the case by saying, "The central issue of the case is credibility" In assessing Ms. K___'s evidence, the trial judge said (at para. 28):

- Ms. K___ gave her evidence in a straightforward, clear and concise manner. She withstood very vigorous cross-examination by Mr. Neary. She was unshaken on virtually every point.

10 As to Mr. G___'s evidence, the trial judge said (at para. 29):

- I found the evidence of Mr. G___ in relation to this count to be unbelievable on the critical points and unclear on many.

11 In comparing the two versions of the events of October 5, 2005, the trial judge said (at para. 30):

- I reject as a matter of fact that Ms. K___ was motivated by other factors to fabricate and concoct this story ... I find that the events of October 5th unfolded largely as described by Ms. K___ in her evidence, and I have no doubt that on October 5th, 2005, Mr. G___ assaulted Ms. K___ as she described and also threatened her as alleged.

12 In arriving at these conclusions, the trial judge specifically rejected three alleged motives that he identified as the defence's grounds for attacking Ms. K___'s credibility (at paras. 26 and 27):

- (1)

"That Ms. K___ had fabricated this allegation because she was jealous of Mr. G___'s relationship with Tammy."

- (2)

"It was also suggested to her that she was planning to defraud ICBC by allowing Mr. G___ to take the car and then reporting it stolen, but I find that she addressed this allegation directly and that there is no substance to it."

- (3)

"It was also suggested that she had fabricated this story because she had sometime later found Mr. G___ in bed with another woman."

13 The ground of appeal alleging that the trial judge misapprehended a significant aspect of Ms. K___'s evidence relates to the comments of the trial judge concerning "planning to defraud ICBC". During a statement given by Ms. K___ to the police, she said: "... I said, you can take the car, and then ...' Yeah, I was going to get him to just take the car, and then report it stolen. And then, at least I'd have some money at home."

14 When defence counsel began cross-examining Ms. K___ about her statement to the police, he first suggested to her that she was planning to obtain money by making a false report to ICBC that Mr. G___ had stolen her car. At first, Ms. K___ did not understand counsel's suggestion. When she understood it, she denied it and the trial judge correctly concluded, "there is no substance to it."

15 However, defence counsel continued his cross-examination and made a different suggestion. His second suggestion was that Ms. K___ was thinking about falsely reporting her car stolen so that Mr. G___ would be arrested and that she could then get money and belongings out of the house while he was in custody. She agreed with that suggestion. (Transcript — May 10 excerpt, evidence of S K___, p. 53, line 46 to p. 54, line 8).

16 In his submissions, defence counsel specifically addressed this point. (Transcript — Nov. 7, pp. 9-16). In particular, he said:

- So what we have there is evidence that in the days before she calls the police on October 5th, she's thinking about making a false allegation, falsely accusing my client of a crime so that he'll get arrested and she ... can get her things and money out of the house ...
- (Transcript — Nov. 7, p. 14, lines 41-46)

17 Crown counsel at trial understood the submissions (Transcript — Nov. 7, p. 46, lines 1-6) and acknowledged:

- That is obviously a statement of a dishonest intention ... there's no doubt about that.
- (Transcript — Nov. 7, p. 47, lines 34-36)

18 Both counsel in this Court made careful submissions on the law governing this issue. As Binnie J. stated in *R. v. Lohrer*, [2004] 3 S.C.R. 732 at 734:

- The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle ... that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction."

19 The case most closely parallel to the case at bar that has been brought to this Court's attention is *R. v. W.R.P.*, 2007 ABCA 187. In *W.R.P.*, the Alberta Court of Appeal dealt with a case where evidence from the father of the accused had been adduced at trial. The father's evidence was that the complainant had previously attempted to extort money from the appellant under threat of laying rape charges against him. The Court of Appeal allowed the appeal, stating at para. 20:

- Although there is no positive duty for trial judges to demonstrate, in the reasons, every aspect of relevant evidence, trial judges must consider important points and cannot disregard them ... Motive and animus are important points. The extortion evidence relates to both. It was therefore incumbent on the trial judge to deal with it. Motive and animus affect credibility and although the trial judge outlined minor inconsistencies in the girlfriend's evidence when considering her credibility, he chose not to even consider the far more important concerns that arose as a result of her alleged earlier extortion attempt. That error in itself demands appellate relief.

20 In the case at bar, the trial judge recognised the importance of Ms. K___'s credibility. He identified three grounds for challenging her credibility and specifically rejected each of them. In my respectful opinion, Ms. K___'s admission that she was considering making a false criminal allegation against Mr. G___ was a matter that went to the heart of her credibility. The trial judge needed to analyze that evidence before her credibility could be accepted and Mr. G___'s rejected. In submissions on this appeal, respondent Crown counsel conceded that, having identified three bases for attacking Ms. K___'s credibility, if the trial judge had failed to deal with one of them in his Reasons, such a failure would have required the Court to order a new trial. In my respectful opinion, this issue, which he failed to discuss, was at least as important as the issues he identified and discussed.

21 Crown counsel says that the trial judge's language about "defrauding ICBC" should be read to include her idea for having Mr. G___ arrested by the police in order to give her an opportunity to remove money and goods from their residence. I do not agree. In reading the Reasons for Judgment, the trial judge clearly rejects the "false ICBC claim" idea. His language gives no clear indication that he has considered the "false report to the police" idea.

22 Crown counsel also asks this Court to distinguish *W.R.P.* on the basis that the complainant in *W.R.P.* had acted, whereas in this case Ms. K___ claimed to have only thought about acting. It must be remembered that, if Ms. K___ had conceded that she acted on that thought, the trial judge would certainly have acquitted. Taking her admission that she thought about laying a false charge, combined with trial Crown's concession that her evidence was "a statement of dishonest intention", I am persuaded that the trial judge was obliged to deal with this issue. My own view is that *W.R.P.* is a weaker case than the case at bar. The evidence in *W.R.P.* came from the father of the accused, hardly a disinterested witness. Here, we are dealing with an admission by the complainant.

23 I find myself in respectful agreement with the B.C. Court of Appeal in *R. v. Fife*, 2004 BCCA 261 at para. 20:

- ... an appellate court has a duty to review the record in order to ensure that a trial court has properly directed itself upon all of the evidence and the relevant law. Moreover, if the record discloses a lack of appreciation of relevant evidence then the appellate court has a duty to intercede.

24 In the result, the appeal is granted and a new trial ordered. Considering the result of the appellant's first ground of appeal, it is unnecessary to deal with the second ground.

25 I would not wish to conclude this matter without complimenting both counsel on their well-written submissions and their thoughtful oral presentations.