



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Graham*, 2022 NLCA 44

Date: July 19, 2022

Docket Number: 202001H0026

BETWEEN:

WILLIAM GRAHAM

APPLICANT/APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Fry C.J.N.L., Welsh and O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador,
St. John's

Appeal Heard: May 19, 2022

Judgment Rendered: July 19, 2022

Reasons for Judgment by: Welsh J.A.

Concurred in by: Fry C.J.N.L. and O'Brien J.A.

Counsel for the Applicant/Appellant: Daniel W. Bennett

Counsel for the Respondent: Arnold W. Hussey, Q.C.

Authorities Cited:

CASES CITED: *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Samaniego*, 2022 SCC 9; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282; *R. v. Arradi*, 2003 SCC 23, [2003] 1 S.C.R. 280; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397; *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R.193; *R. v. Willis*, 2019 NSCA 64; *R. v. Hillier*, 2016 NLCA 21, 377 Nfld. & P.E.I.R. 121; *R. v. Churchill*, 2016 NLCA 29, 381 Nfld. & P.E.I.R. 1.

STATUTES CONSIDERED: *Criminal Code*, sections 675(1.1), 675(1).

Welsh J.A.

[1] William Graham was charged with a combination of indictable and summary conviction offences, and convicted on counts of uttering threats, prowling at night without lawful excuse, and confining and assaulting the complainant, contrary to provisions of the *Criminal Code*. He was sentenced to time served, together with ancillary terms including fines and probation.

[2] Mr. Graham seeks leave to appeal the convictions and, if granted, appeals on the basis of an apprehension of bias by the trial judge, and error by the judge regarding the introduction of evidence.

BACKGROUND

[3] Obsessive jealousy is at the root of the offences which occurred in 2016 and 2017. The convictions were based on findings by the trial judge in his oral decision. Mr. Graham and the complainant were not married, but he threatened her with bodily harm if she “cheated on him”. He spied on her and watched her residence and her place of employment. On one occasion, he pushed her repeatedly and then confined her to the bathroom and bedroom. On another occasion, he shook her by the shoulders and again threatened her with bodily harm. After he was arrested and released on bail, Mr. Graham violated the conditions of his release by threatening the complainant and contacting her at her place of work.

[4] In assessing Mr. Graham’s submissions, it is relevant that he dismissed his counsel, and represented himself for portions of the proceedings before

engaging new counsel. In the result, the judge took a more active role in portions of the proceedings.

ISSUES

[5] The first issue is whether leave to appeal should be granted. Leave is required because a combination of indictable and summary conviction offences were considered at the trial (section 675(1.1) of the *Criminal Code*). If leave is granted, at issue is whether a reasonable apprehension of bias was demonstrated by the judge's conduct of the trial, and whether the judge erred in refusing Mr. Graham's application to re-cross-examine the complainant.

ANALYSIS

Leave to Appeal

[6] The appeal against a summary conviction where indictable and summary conviction offences are heard together is governed by section 675(1.1) of the *Criminal Code*, and requires leave of the court:

A person may appeal, pursuant to subsection (1), with leave of the court of appeal or a judge of that court, to that court in respect of a summary conviction ... as if the summary conviction had been a conviction in proceedings by indictment if

- (a) there has not been an appeal with respect to the summary conviction;
- (b) the summary conviction offence was tried with an indictable offence; and
- (c) there is an appeal in respect of the indictable offence.

In this case, these three criteria are satisfied.

[7] It is necessary, then, to consider the application of section 675(1) which determines the type of appeal. In this case, paragraph (1)(a) applies; that is, a person who is convicted in proceedings by indictment may appeal the conviction on any ground "that involves a question of law alone".

[8] In determining when a question constitutes a question of law, Brown and Martin JJ., for the majority, in *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, reiterated earlier decisions of the Court:

[23] ... The application of the law to a given factual matrix, that is, whether a legal standard is met, amounts to a question of law and attracts a correctness standard (*Shepherd* [2009 SCC 35], at para. 20; *Grant* [2009 SCC 32], at para. 43).

See also: *R. v. Samaniego*, 2022 SCC 9, at paragraphs 16 to 18.

[9] In this case, the issues on appeal raise questions of law, thereby engaging section 675(1)(a) of the *Code*. That is, application of the law to the facts is necessary in order to determine Mr. Graham’s allegation of bias by the trial judge, and application of the rule in *Browne v. Dunn*, in which a party intending to introduce independent evidence to impeach the credibility of a witness must first confront the witness with the evidence in cross-examination.

[10] The final question in determining whether leave should be granted is whether the appeal “is frivolous in the sense of having no arguable basis or sufficient merit” (*R. v. Hillier*, 2016 NLCA 21, 377 Nfld. & P.E.I.R. 121, at paragraph 7). The low threshold that applies to this test is satisfied in this case. I would not characterize the appeal as frivolous, considering the particular circumstances and Mr. Graham’s argument that the judge’s conduct of the trial resulted in a reasonable apprehension of bias. Further, the evidentiary rule regarding re-cross-examination of a witness seldom comes before this Court, and may benefit from consideration on the facts of this case.

[11] Accordingly, I would grant leave to appeal.

The Appeal

Apprehension of Bias

[12] In submitting that the judge’s conduct of the trial resulted in a reasonable apprehension of bias, Mr. Graham relies on the judge’s interventions during the proceedings, particularly related to the accuracy of Mr. Graham’s criminal record and use of that record to assess his credibility.

[13] The test that applies where apprehension of bias by a judge is alleged is discussed in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282. Abella J., for the Court, explained:

[20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:

...what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]

(*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting))

[21] This test – what would a reasonable, informed person think – has consistently been endorsed and clarified by this Court [citations omitted]. ...

...

[25] Because there is a strong presumption of judicial impartiality that is not easily displaced (*Cojocaru v. British Columbia Women's Hospital and Health Centre*, [2013] 2 S.C.R. 357, at para. 22), the test for a reasonable apprehension of bias requires a “real likelihood or probability of bias” and that a judge’s individual comments during a trial not be seen in isolation [citations omitted].

[26] The inquiry into whether a decision-maker’s conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias [citation omitted].

...

[27] That said, this Court has recognized that a trial judge’s conduct, and particularly his or her interventions, can rebut the presumption of impartiality. In *Brouillard v. The Queen*, [1985] 1 S.C.R. 39, for example, the trial judge had asked a defence witness almost sixty questions and interrupted her more than ten times during her testimony. He also asked the accused more questions than both counsel, interrupted him dozens of times, and subjected him and another witness to repeated sarcasm. Lamer J. noted that a judge’s interventions by themselves are not necessarily reflective of bias. On the contrary,

It is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order. [p. 44]

...

[30] In *Miglin* [2003 SCC 24], another case where the allegation of bias arose because of the trial judge’s interventions, this Court agreed with the Court of Appeal for Ontario that while many of the trial judge’s interventions were unfortunate and reflected impatience with one of the witnesses, the high threshold necessary to establish a reasonable apprehension of bias had not been met. ...

(Emphasis added.)

[14] A fundamental consideration in the analysis is whether the judge “is open to the evidence and arguments presented”, with a recognition that “the cumulative effect of the alleged improprieties is more relevant than any single transgression” (*Yukon Francophone School Board*, at paragraph 30).

[15] Mr. Graham’s first submission relates to his criminal record, which was introduced when, during the trial, he applied for judicial interim release. His criminal record, which was tendered by the Crown, was a factor that was relevant to whether his application for release would be granted. Mr. Graham contended that the record contained errors. On appeal, he submits that, during the hearing, when he did not have legal representation, the judge improperly interfered in the process by obtaining the records in the court file to ascertain whether there was an error in the tendered copy of the criminal record. The judge’s intention was to ascertain whether the record included offences which Mr. Graham said were included in the record in error. The judge indicated that he had access to the court records which would be a reliable source.

[16] The intention was, in fact, to provide assistance to Mr. Graham, and to ensure that his application for release was not negatively affected by an inaccurate record. This was to Mr. Graham’s advantage since, if Mr. Graham was correct, offences included in error in the tendered record would not be considered for purposes of his application. In the circumstances, it cannot be said that the judge’s intervention would lead an informed person, viewing the matter realistically and practically, and having thought the matter through, to conclude that the judge would not decide the application fairly. The judge’s intervention in these circumstances would not support a determination of reasonable apprehension of bias.

[17] Further, the judge’s intervention at Mr. Graham’s application for judicial interim release is only relevant to this appeal because he raised his criminal record during the continuation of the trial. Again, this was at a time when Mr. Graham did not have legal representation. While giving evidence in his defence, Mr. Graham raised the issue of his criminal record. The judge cautioned him against this, advising Mr. Graham that his criminal record was not relevant to the issues at trial, but that his raising his record would open the door for the Crown to cross-examine him on that record. That cross-examination could be relied upon for purposes of the judge’s assessment of Mr. Graham’s credibility. (See, for example, *R. v. Arradi*, 2003 SCC 23, [2003] 1 S.C.R. 280, at paragraph 47; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at paragraph 15.) Again, this assistance was to Mr. Graham’s advantage, and cannot be said to demonstrate a reasonable apprehension of bias on the part of the trial judge.

[18] Nonetheless, Mr. Graham did not heed the judge's caution, and continued to make an issue of his criminal record during the trial. In the result, the Crown cross-examined Mr. Graham on his criminal record for the purpose of impugning his credibility. It was open to the judge to consider Mr. Graham's denial regarding his criminal record, together with his responses on cross-examination, in assessing Mr. Graham's credibility. Indeed, as set out in his oral decision, the judge considered the evidence as a whole, mentioning Mr. Graham's denial regarding his criminal record as only one factor. This conclusion is best demonstrated by a quotation from the transcript of trial proceedings (pages 1253 to 1254):

... Mr. Graham's testimony lacks credibility. His demeanor presents as arrogant and condescending. Much of his testimony is uncorroborated. Crown counsel raised some interesting points on cross-examination. While [Mr. Graham] claimed he had emails and/or text messages that would exonerate him, he didn't produce any of them. While [Mr. Graham] testified that he had been at Barry Kenny's residence on February the 3rd, 2017 and therefore not present as alleged by [the complainant], he failed to call Mr. Kenny to corroborate his alibi. It's interesting to note that Mr. Kenny was present many times in court whether for bail hearings or for portions of the trial. While [Mr. Graham] claims that the residence in [the community] was his residence, the evidence of [two other witnesses and the complainant] contradicts him on that point. While [Mr. Graham] submits that the text message and exhibit WG3 contradicts [the complainant's] evidence regarding threats he made while wearing the survival suit, he chose to write the words, "Just busted my knee coming down your driveway," which confirms it was her residence and it was in his mind it was her residence which confirms the testimony also of [two other witnesses] on that point. ... His continuing denial of his criminal record despite the production of the original file by the court to prove same defies logic and speaks more to his arrogance and demeanor. I therefore ... reject Mr. Graham's testimony.

(Emphasis added.)

[19] Clearly, the trial judge gave detailed reasons for concluding that Mr. Graham lacked credibility, with the reference to the denial of his criminal record being only one factor.

[20] Finally, on the question of interventions by the trial judge, Mr. Graham relies on the decision in *R. v. Churchill*, 2016 NLCA 29, 381 Nfld. & P.E.I.R. 1, which sets out several considerations that may be relevant in assessing the effect of such interventions. In general, the enumerated considerations relate to interference with the accused's ability to make full answer and defence as a result of interference by the judge in the examination or cross-examination of

witnesses (paragraphs 18 to 20). As discussed above, that is not the issue in this case.

[21] Rather, interventions by the trial judge during the proceedings were intended to assist Mr. Graham when he was without legal representation. They worked to Mr. Graham's advantage, and do not support a conclusion that the judge's conduct of the trial resulted in a reasonable apprehension of bias (*Yukon Francophone School Board*, at paragraph 27).

The Rule in Browne v. Dunn

[22] Mr. Graham was represented by counsel, not his current counsel, when the complainant was examined and cross-examined. He is not asserting ineffective assistance by the original counsel. However, Mr. Graham submits that the trial judge erred by denying him the opportunity to recall the complainant for further cross-examination as part of his defence case, even though, before the Crown's case was closed, he had the opportunity to conduct full cross-examination of the complainant. The judge advised Mr. Graham that, in the circumstances, he was limited to calling the complainant for purposes of direct examination as a witness for the defence. Mr. Graham did not consider this to be satisfactory since cross-examination provides more scope for challenging a witness.

[23] To support his submission, Mr. Graham refers to the rule in *Browne v. Dunn*, which stands for the proposition that a party intending to introduce independent evidence to impeach the credibility of a witness must first confront the witness with the evidence during cross-examination. The underlying rationale is discussed in *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R.193:

[64] ... The rationale for the rule was explained by Lord Herschell, at pp. 70-71:

... I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. ...

To give the witness the opportunity to explain a point on which an attempt will be made to impeach him "is essential to fair play and fair dealing with

witnesses” (*Lyttle*, at paragraph 64). See also: *R. v. Willis*, 2019 NSCA 64, at paragraphs 26 to 39. Finally, in *Lyttle* the Court cautioned:

[65] The rule, although designed to provide fairness to witnesses and the parties, is not fixed. The extent of its application is within the discretion of the trial judge after taking into account all the circumstances of the case. ...

[24] In this case, any application of the rule in *Browne v. Dunn* would be to the benefit of the Crown. It was a Crown witness, the complainant, who would have been denied the opportunity to explain her evidence if Mr. Graham intended to impeach her credibility with independent evidence during his defence, without first challenging her on the point by means of cross-examination during the Crown’s case.

[25] On the other hand, the rule would not assist Mr. Graham because he failed to comply with it. He had the opportunity to cross-examine the complainant and knew what evidence he would be leading after the Crown’s case was closed. Had he wished to challenge the complainant on any points relative to the expected defence evidence, he had the opportunity to do so. The rationale for requiring a party to complete the examination of a witness before he or she leaves the stand is to prevent the splitting of a party’s case which may prejudice a party and lead to the inefficient introduction of evidence. Mr. Graham was represented by counsel when the complainant gave evidence, and he is not alleging ineffective assistance by counsel.

[26] Nonetheless, the trial judge did not shut the door entirely on Mr. Graham’s determination to recall the complainant to answer additional questions. Rather, he advised Mr. Graham that, while he was precluded from recalling the complainant for re-cross-examination, he could call her as part of his defence case. He would, however, be limited to conducting direct examination which is more limited in scope than cross-examination.

[27] In the result, in the circumstances, there is no basis on which to conclude that the trial judge failed to deal fairly with, or erred by denying Mr. Graham’s application to re-cross-examine the complainant.

SUMMARY AND DISPOSITION

[28] The requirements for leave to appeal were satisfied. On the appeal, Mr. Graham did not demonstrate a reasonable apprehension of bias by the judge’s conduct of the trial. Further, the judge did not err in refusing Mr. Graham’s application to re-cross-examine the complainant.

[29] Accordingly, I would grant leave to appeal, but dismiss the appeal.

B.G. Welsh J.A.

I concur: _____

D.E. Fry C.J.N.L.

I concur: _____

F.P. O'Brien J.A.