Citation: **R. v. Thorne**

COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR JUDGMENT: Before: THE HONOURABLE MADAM JUSTICE RYAN April 21, 1999 THE HONOURABLE MR. JUSTICE BRAIDWOOD THE HONOURABLE MR. JUSTICE MACKENZIE Victoria, B.C. BETWEEN: REGINA RESPONDENT AND: JAMES THORNE APPELLANT

Clark R. Purves appearing for the Appellant
Robert A. Mulligan appearing for the (Crown) Respondent

[1] BRAIDWOOD, J.A.: The appellant was convicted by a judge sitting without a jury on an Indictment charging that on or about 2 June, 1995 he did sexually assault L.P. contrary to s.271 of the *Criminal Code*.

[2] The appellant argues that the verdict is unreasonable and cannot be supported by the evidence. In particular, two errors are cited. One, that the learned trial judge failed to adequately deal with the inherent frailties of eyewitness evidence. Two, that the learned trial judge relied on "other significant evidence" to convict the appellant, without appreciating that the evidence was inconsistent, contradictory and unreliable.

[3] The appeal is brought pursuant to s.686(1)(a)(i) of the *Criminal Code*. The appropriate test is found in the case of *Yebes v. The Queen* (1987), 36 C.C.C. (3d) 417 (S.C.C.) at 430 as follows:

> ... The function of the Court of Appeal, ..., goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence.

[4] The evidence of the complainant, who was 17 years old on the date in question, was that she arrived at a party by herself at about 9:45 p.m. on 1 June 1995. During the course of the evening she consumed several drinks of vodka and at one point she and another resident of the premises whom she had just met at the party went into his bedroom where they had consensual sexual intercourse. Following this, they showered, dressed and then went to sleep.

[5] The complainant testified that she was awakened shortly after sun-up by a man having vaginal intercourse with her. She had never seen the person before. She managed to push him away. He initially restrained her by grabbing her forearms but she was able to free herself. She struck him and while yelling, screaming and swearing, she pursued the person across the hall to the bedroom of one Monique Sam, another occupant of the house, where she continued to attack him after he fell onto the bed in that room.

[6] The noise occasioned by the complainant awakened Sam who, after an earlier encounter with the accused in her bedroom, had gone downstairs to the room of another occupant named Mike. Both Sam and Mike came upstairs to see what was going on. Sam testified that when she came upstairs she witnessed the complainant still attacking the man in bed. After the complainant advised them of what was going on Mike escorted the person out of the room. The complaint reported the matter to the police the following day after, and at their insistence she was physically examined at the Victoria General Hospital.

[7] After investigating the incident, the police prepared a photo lineup which was shown to the complainant on 19 June 1995. The lineup included a photograph of the accused, who is a Native Indian, and another Native Indian of similar age and physical characteristics. The appellant's photo was designated number 3 in the photo lineup.

[8] The complainant viewed the photo lineup for 5 minutes and selected the appellant as being her assailant. She then commented to the officer conducting the lineup that "I'm not sure. It's between 1 and 3, and I think it's 3."

[9] The appellant was arrested and charged on 20 December, 1995.

[10] Seneca Ambers, Heather Stuart and Monique Sam testified for the Crown at trial. The appellant also testified. He related the events of the late evening of 1 June prior to coming into the

house on McKenzie Avenue at about 3:00 a.m. on 2 June. He stated that he, Ambers, Stuart and others, were at a night club in Victoria from about 10:00 p.m. to 2:30 a.m. He related the specific number of drinks which he and the others had had at the night club and what he had had to drink after his arrival at the house. He arrived at the house with Ambers and Stuart in his car, with Stuart driving. She drove as he felt he was too intoxicated to risk driving. At some point Ambers and Stuart took the car and left the house, leaving the appellant behind. They testified that they tried to get the appellant to leave with them but he was drunk and would not listen so they left without him.

[11] The appellant said that he became agitated when he could not find Ambers and Stuart anywhere in the house. He had been looking for them in the bedrooms on the upper floor of the house. He said he looked in the room in which the complainant was sleeping beside Rob but did not go in.

[12] He also went into Monique Sam's room. He said he had an argument with Sam about the whereabouts of Ambers and Stuart and she left the room. He denied that he had attempted to get into bed with Sam as she testified. He said that when Sam left he took off his jeans, lay on the top of the bed and dozed off only to be awakened, he said, by the complainant attacking him.

[13] He acknowledged that he was the only Native male of his age in the house that night.

[14] The trial judge, after warning himself as to the dangers inherent in identification evidence, found as a fact at paragraph 18 of the reasons: In the present case, as to the accused's evidence, my general assessment of it was that it was contrived to meet the case for the Crown which he learned of after the preliminary hearing. The trial judge alluded to the intoxication of the appellant and his contradictory statements that appeared during his cross-examination.

[15] He went on to indicate that he agreed with defence counsel that there were certain inconsistencies in the evidence given by the complainant in respect of the accused, and that some of the complainant's evidence may have been coloured by conversations that she had with Stuart and Ambers following the event.

[16] The trial judge went on to indicate the other significant evidence in this case which clearly points to the accused as the person who assaulted the complainant. He wrote as follows: There is, however, in my opinion, other significant evidence in this case which clearly points to the accused as the person who assaulted the complainant. That evidence consists of the complainant's evidence that on finding the accused sexually assaulting her, she pursued and attacked him across the hall, attacking him there, and after he fell onto the bed in Monique Sam's room, creating a commotion sufficient to wake Sam and Mike, who were downstairs, and causing them to come upstairs to check things out. There is Sam's evidence that on coming upstairs she witnessed the attack by the complainant on the accused in her bedroom, and then there is the accused's own evidence of the attack by the complainant on him in Sam's bedroom. That evidence, in my opinion, is only consistent with the accused being the complainant's assailant. That evidence and the evidence as a whole satisfies me beyond a reasonable doubt that the accused sexually assaulted the complainant as charged, and I accordingly find him guilty of the offence.

[17] The duty of the trial judge to deal in his reasons for judgment with the issues before him has been commented on in the Supreme Court of Canada in *R. v. Burns* (1994), 89 C.C.C. (3d) 193 and in *R. v. R.(D.)*, [1996] 2 S.C.R. 291; 107 C.C.C. (3d) 289.

[18] In the latter case Major J., writing for the majority, wrote as follows, at p.308:

> It is my view that the trial judge erred in law by failing to address the confusing evidence, and failing to separate fact from fiction. in *Burns*, supra, McLachlin J., writing for the court, stated, at p.200:
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> > This statement should not be read as placing on trial judges a positive duty to demonstrate in their reasons that they have completely appreciated each aspect of relevant evidence. The statement does not refer to the case where the trial judge has failed to allude to difficulties in the evidence, but rather to the case where the trial judge's reasons demonstrate that he or she has failed to grasp an important point or has chosen to disregard it, leading to the conclusion that the verdict was not one which the trier of fact could reasonably have reached. McLachlin J. clearly set out the law regarding the requirement of trial judges to give reasons in Burns. However, it should be remembered that Burns dealt with a situation where the Court of Appeal agreed the trial judge had evidence before him to support the conclusion he reached, but overturned the verdict due to lack of reasons. The above-quoted passage does not stand for the

> proposition that trial judges are never required to give reasons. Nor does it mean that they are always required to give reasons. Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere. Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions. The trial judge in this case did not do so. She failed to address the troublesome evidence, and she failed to identify the basis on which she convicted D.R. and H.R. of assault. This is an error of law necessitating a new trial.

[19] I am of the opinion that this case does not fall within the type of case under discussion by Major J. He acknowledged the adequacy of the reasons for judgment must be based on the circumstances of the particular case. It is obvious from the passages above cited that the trial judge was aware of the inherent frailties of the eyewitness evidence. In fact, he did not place much, if any, reliance on the evidence of the complainant insofar as the identification of the accused was concerned. There is nothing in his reasons for judgment to demonstrate that he was not aware that the evidence he was accepting contained elements that were inconsistent or contradictory.

[20] Here, the trial judge, having heard the evidence, made clear findings on the basis of it and there is ample evidence in the record to support those findings. The nub of the evidence here is that whoever assaulted the complainant was the person that the complainant pursued and continued to attack across the hall, and who fell onto the bed in Monique Sam's room. Accordingly, once that part of the complainant's evidence is accepted then there is certainly other significant evidence in the testimony of Monique Sam

[21] Monique Sam is a 21 year old student who was living in the house and was present throughout the evening of the party. She saw the appellant on numerous occasions and there was no issue as to her ability to recognize him. She confirmed that he was the only Native male at the party. As she was trying to go to sleep she heard a bang on the wall and screaming. This was coming from the upstairs area of the house. It was L.P. who was screaming and swearing. Monique Sam indicated that, although she could not say whether the sun was up or not, when she ran upstairs she could see without turning on any lights. She saw L.P. at the end of the hall putting on her underwear and pants and she was crying. She was right beside Rob's bedroom door. She told Monique Sam that the appellant had just raped her and she ran into the room and started punching him. Then Mike arrived and told the appellant that he had better leave. As he was attempting to leave, L.P. went after him again and tried to punch him.

[22] The trial judge was careful to distinguish between the unreliable aspect of the complainant's evidence, namely, that of her identification and that of her general evidence apart from the issue of identification.

[23] In these circumstances, I am of the opinion that I cannot say that the verdict is unreasonable and cannot be supported by the evidence. Accordingly, I would dismiss this appeal.

RYAN, J.A.: I agree.

MACKENZIE, J.A.: I agree.

RYAN, J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Braidwood"