

R v. Gravesande: The Unspeakable Problem of Bias in Judicial Decision-Making (c)

*By Selwyn A. Pieters, B.A., LL.B., L.E.C.**

"Detention facilities are not nice places for nice people. They are institutions for confinement of people either charged with or convicted of crimes." *R. v. Aziga* [2008] O.J. No. 3052, 78 W.C.B. (2d) 410, 2008 CanLII 39222 (ON SC)

INTRODUCTION

Deryk Gravesande is an African-Canadian Lawyer,¹ who practised law in Toronto, Ontario since 1993. He is of Guyanese by birth, went to Secondary School on the East Coast Demerara, attended the University of Guyana and was a student activist in 1979 during a time when the Working People's Alliance initiated a civil revolution for the removal of the Forbes Burnham government. Mr. Gravesande studied Law at Osgoode Hall Law School in Toronto and was called to the Bar in 1993. At the time of his trial he had long salt and pepper hair. In other words, Mr. Gravesande is not a cookie-cutter lawyer.²

Mr. Gravesande practised primarily in the area of criminal law. A criminal law practice entails taking on and defending criminal cases. Most criminal cases are files funded by Legal Aid Ontario on certificates since most clients could not afford the expense of lawyer. Lawyers in such cases, particularly where clients are detained pending the disposition of their preliminary inquiry and/or trial are required to take collect calls from detention facilities and visit detention facilities to take instructions from clients and review their disclosure.

¹ That Mr. Gravesande is a Black male is totally absent from any of the documents in the case. See, David Tanovich, "The Further Erasure of Race in Charter Cases" (2006), 38 C.R. (6th) 84; Rose Voyvodic, "Lawyers Meet the Social Context: Understanding Cultural Competence" (2006), 84 Can. Bar. Rev. 563

² Gravesande and I are cut from the same cloth. I am a citizen of Guyana, Canada and the United Kingdom. I am Black, tall, bearded and have dreadlocks. In other words, I am told I carry myself as a distinguished middle-aged Black man. I am a lawyer who is called to the Bars of Trinidad and Tobago, Guyana and Ontario, Canada. I practise employment law, civil litigation, human rights law and criminal litigation. These attributes in no way immune me from being stereotyped and/or profiled: criminal, racially or otherwise. His case presents fertile ground for analysis of the criminal justice system and its interaction of those who are insider-outsider.

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* Lawyer & Notary Public (Ontario, Canada), Attorney-at-Law (Republic of Guyana, Island of Trinidad)

At the time of the incident at the Toronto Jail, Mr. Gravesande was 61 years old and suffered from clinical depression for which he was taking the prescribed drug “Effexor”. Mr. Gravesande “has been struggling with depression on and off since 2005 or 2006.”³

BACKGROUND FACTS ON EVENTS OF JANUARY 20, 2012

The chain of events that led to the investigation, charges and conviction are set out in paragraphs 6 and 12 of the Court of Appeal decision in *R. v. Gravesande*:⁴

[6] The appellant had represented Rowe in a trial which ended with Rowe being found guilty. Rowe had asked the appellant to represent him on a retrial for the same charges. According to the appellant, he was visiting Rowe to let him know that the appellant would not be able to represent him.

[7] The appellant arrived at the Toronto Jail around 7:10 p.m. He passed through security. The two guards on duty at the front desk spent about two minutes with him, but noticed nothing unusual – in particular, no unusual smell despite one of them being within 10 feet of the appellant.

[8] After passing through security, the appellant proceeded to the second floor where he was met by Beaulieu. At trial, Beaulieu testified that he immediately noticed a “strong smell of cologne and what I thought was marijuana mixed in with that smell”. Sava also testified that he noticed an odour of marijuana when the appellant arrived on the second floor – despite the fact that he was not in the hallway but at a table reserved for guards located at least 10 or 20 feet away.

[9] After directing the appellant to an interview room, Beaulieu contacted his supervisor, conveyed his suspicion that the appellant was carrying drugs, and asked for instructions. Beaulieu’s supervisor told him to follow the Standing Orders. The Standing Orders required a strip search of the inmate and a search of the interview room, before and after every professional visit. As will be discussed in greater detail later on, the correctional officers on duty did not comply with the Standing Orders.

[10] Beaulieu retrieved Rowe and took him to a room out of range of surveillance cameras in order to search him. Beaulieu had asked another correctional officer, William Greene, to be present for the search. However, Greene left shortly after the search began. Video surveillance played at trial

³ *R. v. Gravesande*, C58782, Factum of the Appellant, paras. 23 and 26.

⁴ *R. v. Gravesande*, 2015 ONCA 774 (ONCA)

showed Beaulieu briefly handling Rowe's orange jumpsuit. Beaulieu gave the jumpsuit back to Rowe within three or four seconds of receiving it. Rowe was in the room for 75 seconds.

[11] During his examination-in-chief at trial, Sava testified that the interview room had been searched. However, when confronted with evidence to the contrary, he admitted that he had not searched the interview room.

[12] The appellant spent about 35 minutes in the interview room with Rowe. Following the meeting, Rowe was searched again and a black sock containing eight cellophane wrapped packages of marijuana, a package of lidocaine, some rolled marijuana cigarettes, and a piece of cellophane with lubricant on it was found in his underwear.

THE CASE AT THE ONTARIO COURT OF JUSTICE

The trial took place before an "out of town" Judge, The Honourable Justice Wayne G. Rabley. Mr. Gravesande testified on his own behalf. The prosecution called several witnesses including Correctional Officers Beaulieu and Sava. Mr. Gravesande was found guilty.

The Court⁵ listed circumstantial evidence that heightened suspicion of Mr. Gravesande and led to the finding of his guilt as follows:

[48] The case against Mr. Gravesande is a circumstantial one. The facts are important and I would make the following findings of fact for the reasons that I have set out:

- 1) Rowe did not know in advance that Mr. Gravesande was coming to see him when he did as was confirmed by Mr. Gravesande in his evidence;
- 2) The selection of room 202 was done by McMaster and Rowe could not have known this in advance;
- 3) No one had been in room 202 for some time as evidenced by the video;
- 4) The value of the drugs was too significant to believe that anyone would simply leave them in the jail unattended;
- 5) There was no smell of marijuana in the unit until Mr. Gravesande arrived as confirmed by Beaulieu and Sava;
- 6) Mr. Gravesande had the smell of mixed cologne and marijuana on his person as testified to by Beaulieu;
- 7) After making these initial observations, Beaulieu relayed them to his supervisor William Horevetz;

⁵ *R. v. Gravesande*, unreported decision of the Ontario Court of Justice, issued on February 13, 2013, Rabley J., court file 12-10002445

- 8) Beaulieu then discussed his observations about Mr. Gravesande with his partner Sava as evidenced by the gestures on the video;
- 9) Rowe did not have the black sock with the marijuana in it when he was searched initially by Beaulieu;
- 10) The odour of fresh cut marijuana found on Rowe was strong as evidenced by Sava, Beaulieu and Constable Doe;
- 11) There is no evidence that the correctional officers detected the smell of marijuana while transferring Rowe from 3A to 2B or else they would have noted it;
- 12) There was no evidence that anything had been hidden in room 202 such as tape to attach the sock somewhere or anything else that might help secret such an object in the room involved;
- 13) The photographs taken of 202 show that nothing could be hidden in the room without significant effort;
- 14) There was a strong smell of marijuana coming from the room that Mr. Gravesande and Rowe were in once they entered it.⁶

In finding Mr. Gravesande guilty, the Court observed that:

- 50) There was no evidence of animus towards Mr. Gravesande that would suggest that McMaster, Beaulieu and Sava were working together to set up a lawyer whom they did not know. Appropriately, this was not a position advanced by the defence.

In paragraphs 58 – 61, the Judge went on to observe that all of the inferences points squarely to Mr. Gravesande as the person who would have had the motive and opportunity to bring the drugs into the jail for Mr. Rowe.

Arguments for Mr. Gravesande on Appeal

Mr. Gravesande lawyers on appeal argued that all of the circumstantial evidence relied up by the Trial Judge can be explained away and in their totality does not give rise to proof beyond a reasonable doubt of criminality.⁷ Mr. Gravesande argued in his factum that there were serious deficiencies in the officers' job performance that should have led to reasonable doubt:

⁶ Para. 48.

⁷ *R. v. Gravesande*, C58782, Factum of the Appellant, paras. 2- 3 and 63.

67. Cross-examination exposed the following deficiencies with how the officers performed their duties:

They failed to search the visiting room prior to the visit as required by the Standing Orders;

They did not ask the Appellant to leave once they suspected that he was attempting to smuggle drugs into the jail;

They did not ask the Appellant to submit to a search once they suspected him of having drugs in his possession; ,

They did not use gloves in their initial search of Mr. Rowe as required by the Standing Orders;

Also in contravention of the Standing Orders, they failed to log either search of Mr. Rowe;

They failed to ensure that a second correctional officer was present for the initial search of Mr. Rowe as required by the Standing Orders;

They failed to conduct a strip search of Mr. Rowe prior to his meeting with the Appellant as required by the Standing Orders.

The Gravesande case provided an opportunity for me to look into the trafficking of narcotics in Ontario Correctional facilities using critical race based lens.⁸

THE ONTARIO COURT OF APPEAL DECISION

The Honourable Justice Gladys Pardu whose judgement in *R. v. Gravesande*, 2015 ONCA 774 was concurred in by Associate Chief Justice Alexandra Hoy and Justice Karen M. Weiler set aside the verdict of guilty and allowed Mr. Gravesande appeal for two reasons:

⁸ I have worked in the capacity as Correctional Officer at the Toronto Jail from 1994 – 1994. I have also represented Correctional employees from the ranks of Correctional Officer to Director and litigated cases on their behalf: *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2012 CarswellOnt 8965, 2012 HRTO 1393, 2012 C.L.L.C. 230-022 reconsideration denied in 2013 CarswellOnt 1033, 2013 HRTO 180, 2013 C.L.L.C. 230-019 (HRTO); *McKinnon v. Ontario (Community Safety and Correctional Services)*, 2010 CarswellOnt 7452, 2010 HRTO 2002 (HRTO); *Medeiros v. Ontario (Ministry of Community Safety and Correctional Services)* [2010] O.P.S.G.B.A. No. 2 (Ont. PSGSB); *Charlton v. Ontario (Ministry of Community Safety & Correctional Services)* 2007 CarswellOnt 4099 (Ont. PSGSB).

As well, I have represented detainees who have complained of Charter and Human Rights breaches in Ontario jails: *Steele v. Ontario Ministry of Community Safety and Correctional Services*, 2010 CarswellOnt 2943, 2010 HRTO 1019; *Steele v. Ontario (Community Safety and Correctional Services)*, [2010] O.H.R.T.D. No. 1885, 2010 HRTO 1877; *Steele v. Ontario (Minister of Community Safety and Correctional Services)*, 2010 HRTO 1428 (HRTO); *R. v. Aziga* [2008] O.J. No. 3052, 78 W.C.B. (2d) 410 (Ont. S.C.J.)

[5] First, a review of the trial judge's reasons demonstrates that he applied a stricter level of scrutiny to the appellant's evidence than to the prosecution witnesses. Second, the trial judge erred in concluding that certain third-party records requested by the appellant were not likely relevant to an issue in the trial and, on that basis, refusing to review documents that had already been produced.

Stricter scrutiny of the Appellant's evidence

The Court of Appeal set out the test to be met by an appellant advancing this ground:

[19] For an appellant to successfully advance this ground of appeal, she must identify something clear in the trial judge's reasons or the record indicating that a different standard of scrutiny was applied and something sufficiently significant to displace the deference due to a trial judge's credibility assessments: *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 59 (Ont. C.A.); *R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362, at para. 98.

The Court in analyzing the decision found that Justice Rabley engaged in impermissible speculation and most of his findings of facts were faulty for that reason.

Rob Ford versus Deryk Gravesande

Justice Rabley commented on Toronto's Mayor Rob Ford use of drugs as a puzzling example of person's of influence doing dumb things:

[39] One might similarly ask why would the Mayor of Toronto smoke crack cocaine? Why would Tiger Woods jeopardize his place in history by his conduct? Why would Halley Berry's husband cheat on her? It really isn't my position to speculate in such a case. What is important is that a proper analysis is done of the evidence and that the Crown is put to the burden of proving the charge beyond a reasonable doubt.

Robert Ford and Deryk Gravesande are not similarly situated however. Rob Ford is White, Anglo, Saxon, Protestant. He is part of the establishment and very wealthy. Whilst Ford was subjected to an intense investigation by Toronto Police he was never criminally charged. As mentioned previously, Mr. Gravesande is Black, an immigrant, not rich, and definitely not part of the establishment. A more apt characterization of Gravesande would be an "outsider-insider".

Like *R. v. S. (R.D.)* (1997), 118 C.C.C. (3d) 353, (SCC), *Gravesande* case:

... presented several contrasts which appeared as dichotomies of the objective versus the subjective; normative versus "other" perspectives; the legal versus the moral and political; the reasoned and reasonable versus the passionate and experiential; the powerful "insiders" versus the powerless "outsiders"; public versus private; and white versus black.⁹

Integrity Does Not Necessarily Depend on One's Income and/or Mental Health

Justice Rabley in a decision that smacked of discrimination and impermissible pre-judgement wrote:

[41] There were some weaknesses. At the time of the visit, Mr. Gravesande was suffering from depression. He was taking a medication to help him deal with his distress.

[42] He was vigorously cross-examined about his income and personal circumstances. He disclosed that he had been suffering from depression from 2005 or 2006 and had changed medications. He had separated from his wife in 2010. When asked how much money he had earned in 2010 and 2011, he offered the figures of \$80,000 to \$100,000. He then acknowledged that the figures he had given were his gross billings and that he had office and other legal related expenses. When it was put to him on more than one occasion that his real income was below \$30,000 he disagreed but would only guess as to what he had claimed on his income tax statement.

[43] Ultimately, Mr. Gravesande offered that he had claimed an income of \$60,000 to \$65,000. In fairness, this seems to be somewhat generous given the obvious expenses of running an office, incurring costs for secretarial services, paying for Law Society fees, Errors and Omissions etc. In any event, it may have been the case that Mr. Gravesande did not really keep track of the details of his income, but a sole practitioner not only runs a law practise, he runs a business. It is hard to believe that he had no idea of what his bottom line was.

Mr. Gravesande in his appeal factum argued that:

27. The Crown questioned the Appellant extensively on his financial circumstances, apparently attempting to show some financial motive for the

⁹ Burey, April, "No Dicothomies: Reflection on Equality for African Canadians in *R. v. R.D.S.*", (1998), 21:1 Dalhousie Law Journal, 199

offence. He denied that his separation in 2010 had caused him financial difficulty. Asked how much he was earning from his practice at the time, he gave a "ballpark" figure of \$65,000.³⁵ He denied the Crown's suggestion that he brought the marijuana to Rowe out of financial desperation because his practice wasn't earning enough for him to support himself. He maintained he was carrying on a busy practice and was not in any such dire straits.³⁶ The Crown presented no evidence to support its theory of a financial motive.

Integrity, honesty, tenacity, hard-work and humility are fundamental commodities of lawyers who are caught up in defending persons accused of committing serious crimes. Integrity is a product of one's mental discipline and internal regulation, it does not depend on the factors considered by Justice Rabley without more.

There is no doubt that some inmates in correctional facilities will do virtue testing of lawyers and other professionals by asking them to bring drugs into the institutions and/or using clothing exchanges as a way to introduce drugs into facilities.¹⁰

To suggest that Mr. Gravesande would risk it all to be a two-bit drug dealer is stereotyping at its highest. A lawyer with 22 years at the Bar and an unblemished disciplinary record deserved more credit in respect to his integrity:

28. Paul Copeland, C.M., L.S.M., told the court about the Appellant's reputation for honesty and integrity. Mr. Copeland is a respected senior member of the bar, Life Bencher, and recipient of a number of awards including the G. Arthur Martin Medal, the Law Society Medal, and the Order of Canada. Mr. Copeland knew the Appellant through a variety of activities in the legal community such as the Law Union of Ontario. According to Mr. Copeland, the Appellant enjoyed a fine general reputation in the community for honesty and integrity. He personally knew the Appellant to possess respect for the courts, the legal process, and the administration of justice.¹¹

The focus on Mr. Gravesande's depression and his finances is an overreach.¹² A lawyer with a strong moral compass can be expected to walk away from a case where an inmate in a detention

¹⁰ Laura Liscio case where was an unknowing and unwilling dupe is but one example.

¹¹ *R. v. Gravesande*, C58782, Factum of the Appellant, para. 28.

¹² Gravesande has had no Law Society of Upper Canada issues in respect to misappropriation of client funds, real estate fraud or any of the other conduct that lawyers find themselves in when in desperate financial straits: See *Law Society of Upper Canada v. Hamalengwa*, 2014 ONLSTH 187 (finding of misconduct. Hamalengwa is now

facility approaches him or her to act as a mule to smuggle drugs into a detention facility. The lawyer's sense of integrity and pride should not be disrespected by anyone.

The Court also found significant fault with the reasoning of the Trial Judge holding that:

[24] With respect, it is difficult to see how any of the issues identified by the trial judge constitute "weaknesses" in the appellant's testimony. The fact that, at the time of the visit, the appellant was suffering from depression does not make it more likely that he committed a criminal offence or was less credible at trial. The trial judge's conclusions about a sole practitioner's knowledge about his business, the appellant's schedule, or the size of his file are all based on speculation.

[25] The trial judge described the deficiencies in the appellant's evidence as "small weaknesses". He said he would not reject his evidence on the basis of these small issues but indicated "they are a bit troublesome and cause me some concern." In respect of the size of the file brought to the jail, the trial judge stated that "[again], this is a small issue and the explanation could be true, but it didn't give me the sense that I was hearing the actual facts when I was listening to [the appellant]." Reading the trial judge's reasons as a whole, it is inescapable that he took these matters into consideration in evaluating the appellant's credibility.

[40] Similarly, the trial judge accepted and placed a great deal of emphasis on Beaulieu and Sava's evidence that they noticed an odour of marijuana as soon as the appellant arrived. The trial judge never considered the fact that smell evidence can be highly subjective and suspect: *R. v. Polashek* (1999), 134 C.C.C. (3d) 187 (Ont. C.A.). Nor did he ever turn his mind to the fact that the two guards who had interacted with the appellant moments ago, when he was passing through security, did not notice any such smell.

[41] Finally, the trial judge concluded that Sava was a credible witness on at least some issue, even though he had been "shaping" his evidence. At the same time, he rejected the appellant's otherwise credible evidence on the basis of weaknesses which even the trial judge admitted were small and insignificant. In the context of this case, the trial judge's decision to accept the evidence of Sava while rejecting the evidence of the appellant as not "compelling enough to say that I believed him" is deeply incongruous.

disbarred *Law Society of Upper Canada v Hamalengwa*, 2015 ONLSTH 57 (CanLII); *Law Society of Upper Canada v. Davies Bagambiire*, 2013 ONLSHP 55 (finding of misconduct, two months suspension); *Law Society of Upper Canada v. Davies Bagambiire*, 2008 ONLSHP 70 (2 months suspension for overbilling in addition to various licence restrictions); *Law Society of Upper Canada v. Edmund Anthony Clarke*, 2011 ONLSHP 1; *Law Society of Upper Canada v. Aliamisse Omar Mundulai*, 2012 ONLSHP 35 (finding of misconduct, licenced revoked) appeal dismissed *Law Society of Upper Canada v. Aliamisse Omar Mundulai*, 2013 ONLSAP 0008; *Law Society of Upper Canada v. Pradeep Bridglal Pachai*, 2010 ONLSHP 130.

[42] When read as a whole, the trial judge's reasons demonstrate a degree of scrutiny of the prosecution evidence that was tolerant and relaxed as compared to the irrelevant, tenuous and speculative observations largely about collateral matters applied to unfairly discount the appellant's evidence.

[43] Even if the evidence was capable of supporting a conviction, where the trial judge has applied different standards to the assessment of prosecution and defence evidence the appellant has not received a fair trial, and thus has been the victim of a miscarriage of justice: *R. v. T.T.*, 2009 ONCA 613, 68 C.R. (6th) 1, at para. 74.

All this is to say that it is evident that Mr. Gravesande's presumption of innocence was not respected by the trial judge at his trial and conviction was a foregone conclusion before that trial judge.

The Relevance of third-party records on the Availability of Drugs in Ontario's Detention Centres

In Correctional facilities, detainees whether or remand or serving sentences have the availability of contraband such as cigarettes, lighters, rolling paper, marijuana, cocaine, hash, knives and cellular telephones. In Ontario, the availability of such items in jails is notorious. The contraband can be introduced into institutions through many methods and sources.

- i. Detainees coming from court or serving intermittent sentences;¹³
- ii. Kitchen staff;¹⁴
- iii. Correctional Employees;¹⁵
- iv. Service providers;
- v. Dropped into the Exercise Yard by Drones.

¹³ *R.v. Quincy Williams*, unreported

¹⁴ Inmates brag online of using kitchen staff to smuggle drugs and other contraband into facilities

¹⁵ *R. v. Andrew Bell*, 2005 ONCJ 438, [2005] CarswellOnt 5320; [2005] OJ No 4657 (QL); 67 WCB (2d) 602 (Ont. C.J.). "On August 10, 2005, Mr. Bell was convicted of four counts of possession for the purpose of trafficking "cannabis marijuana" and two counts of possession for the purpose involving both cocaine and hashish. In addition, he was found guilty of two counts of possession of a weapon, to wit a (straight) razor for a purpose dangerous to the public peace."

In *Gravesande*, as noted by the Court of Appeal, the appellant sought the following third party records:

[46] The appellant brought a written application for the production of a number of third-party records in the possession of the Ministry of Community Safety and Correctional Services, the Ministry's Correctional Investigation and Security Unit, the Toronto Jail, and the Toronto Police Service, for a period roughly five years before the date of the alleged offence, January 20, 2012. The documents requested included the following:

- Prison records for each incident in which a Toronto Jail employee was suspected, investigated or convicted of smuggling contraband into the jail between January 1, 2007 and January 20, 2012.
- Internal correspondence, memoranda, emails and similar communication between the Toronto Jail staff and the Correctional Investigation and Security Unit concerning smuggling activity by inmates, prison staff, custodians and visitors between January 1, 2007 and January 20, 2012.
- Investigation files and reports for any staff working at the Toronto Jail in January 2012 who have been investigated or disciplined for smuggling contraband into jails.
- Statistical documents or reports showing the number of investigations into drug smuggling by Toronto Jail staff for the years 2007 to 2012.

[47] As noted by the trial judge, the appellant was seeking production of these documents in order to assist him to test the reliability of the Crown's circumstantial case, and to develop evidence of pervasive drug smuggling at the Toronto Jail.

Gravesande lawyers argued that because of the Crown's contention of motion and opportunity for the accused to bring the drugs into the jail, it sought third party records in respect to trafficking drugs in the jail:

77. Exclusive opportunity was the crux of the Crown's case. The defence wanted to obtain jail records that would allow it to develop evidence of pervasive drug smuggling at the Toronto jail, which could undermine the theory of exclusive opportunity. The Crown needed to prove, indirectly, that the Appellant must have brought the marijuana into the jail because there was no other way for it to have gotten there. The defence needed to raise a reasonable doubt that the drugs could have gotten there otherwise - and showing the high frequency of drug smuggling at the Jail by guards and prisoners alike would have gone some distance toward

discharging that evidentiary burden. As defence counsel put it in submissions, "where the Crown asks Your Honour to infer from the circumstances that Mr. Gravesande had the exclusive opportunity to supply the drugs, I should be entitled to attack that argument, to challenge that premise, and show that it wasn't an exclusive opportunity."⁸⁶

85. On this record, the dichotomy was a false one. The nature and frequency of drug smuggling at the Jail in general was directly relevant to the Appellant's effort to raise a reasonable doubt in this case. Any evidence that increased the likelihood of drugs being present inside the jail and available to Rowe before his meeting with the Appellant (coupled with the ineffective search and the Appellant's believable denial) was capable of making clear doubt that the Appellant was the only possible source for the drugs found on Rowe. It was seriously prejudicial to the defence to erect an artificial wall between this available information and the inquiry into the accused's guilt or innocence. And the trial judge did so precipitously - at the first stage of O'Connor, without ever according himself the opportunity to assess the true relevance of the material.

In *Gravesande*, the appellant submitted that the crux of his case is as follows:

88. The Appellant's defence was, in a sense, akin to an unknown third-party suspect defence: somebody passed the drugs to Mr. Rowe at some point, but the Appellant insisted it wasn't him. Evidence about the nature and frequency of drug smuggling at the Jail could well have increased the likelihood that the drugs had a source other than the Appellant, thereby raising a reasonable doubt. At the very least it would have provided a factual basis for the cross-examination of Beaulieu and Sava on the significance of failing to follow the Standing Orders.

The Court of Appeal set out the procedure for third-party record as specified in *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 20.

It then observed that "(t)he appellant's application, in this case, could not be characterized as a fishing expedition or unmeritorious request."

The Court of Appeal set out part of Mr. Gravesande's evidence including evidence of the Code of Silence that exists in detention centres:

[56] The application was amply supported by an affidavit. The affidavit also indicated that the information was unlikely to be available pursuant to the Freedom of Information and Protection of Privacy Act, R.S.O 1990, c. F-31

because of concerns that divulgence could impair jail security. The affidavit filed in support of the application cited a 2003 University of Toronto study indicating that 45% of inmates housed within a provincial institution in Ontario had used drugs in the preceding year. The affidavit also referred to a June 11, 2013 Ombudsman's report about the code of silence that exists among correctional officers:

The Applicant is unlikely to obtain information by speaking to current or former jail staff. In a June 11, 2013 report entitled "The Code", Ontario Ombudsman André Marin detailed the "code of silence" that exists among correctional officers in Ontario. It is "essentially an unwritten social incentive for staff to conceal information that might have negative consequences for a co-worker." Correctional officers who break "the code" are "shunned, threatened, and risk personal harm for "ratting" on their colleagues." The Ombudsman spoke to one jail superintendent who is "aware of cases where threats of death and physical violence have been made against those who told the truth in the face of the code." [Footnote omitted.]

The subcultural context is significant. It is indeed a breach of natural justice that goes to trial fairness to exclude evidence of the disabling effects of the subculture of the correctional institutions and its correctional officers/prison guards.¹⁶

In Gentles v. Gentles Inquest (Coroner of) 165 D.L.R. (4th) 652, at 667 (Ont. Div. Ct.) the Court found that:

XV. Conclusions

In my view, because the death took place in Kingston Penitentiary and because of the history of the "subculture" in Kingston Penitentiary, the rejection of the relevant "subculture" evidence discussed earlier, had such an impact on the fairness of the inquest that the rejection of "subculture evidence" produced a breach of natural justice. In my view, there was an excess of jurisdiction that requires the granting of judicial review and an order quashing the two (2) impugned orders, dated May 25, 1998.

The Court of Appeal in *Gravesande* ultimately held that the error of Justice Rabley in denying Mr. Gravesande the records he sought is serious enough to warrant a new trial:

¹⁶ See, *McKinnon v. Ontario (Ministry of Correctional Services)* 2002 CanLII 46519 (ON H.R.T.), 2002 CanLII 46519 (ON H.R.T.); *McKinnon v. Ontario (Correctional Services)*, 2007 HRTO 4 (CanLII), para. 391 and *McKinnon v. Ontario (Ministry of Correctional Services)* 2009 HRTO 862 (CanLII) (Hubbard).

A criminal trial is not a public inquiry into jail management. A more focused time range, of say two or three years around the date of the offence could well have been sufficient. The trial judge's failure to conclude that the records were likely relevant was clearly wrong. This error is sufficient to require a new trial.

The problem of the Toronto [Don] Jail: Anti-Black Racism and Stereotypes are Rampant

Justice Kofi Barnes recently repeated and iterated in *R. v Brooks*, 2015 ONSC 6299:

[16] Several courts have affirmed as “a sociological fact that racial stereotyping is usually the result of subtle unconscious beliefs, biases and prejudices”: *Peel Law Assn. v. Pieters*, 2013 ONCA 396 (CanLII), 116 O.R. (3d) 81, at paras. 111-12; Parks, at para. 59; *Find*, at para. 32; *R. v. Douse*, [2009] O.J. No. 2874 (S.C.), at para. 281

And, as April Burey argues "Judicial notice of anti-black racism in Canadian society would give general, legal recognition to the centrality of the African Canadian experience."¹⁷

Gravesande lawyers argued in written arguments that:

90. Three years ago, the Appellant visited a client in jail as a respected lawyer. Since then he has lived every criminal defence lawyer's nightmare. He now comes before this Court as a convicted criminal, his career in ruins, because of drugs discovered on the client following the Appellant's departure. The Appellant was convicted of trafficking notwithstanding numerous opportunities for the client to have obtained drugs inside the institution. The unfortunate result for the administration of justice is a chilling effect on lawyers meeting with incarcerated clients. For the Appellant, of course, the consequences are even more dire. It is respectfully submitted that the trial judge's errors render the conviction unsafe.

Could stereotypical assumptions have influenced how the Toronto Jail, the police and the Trial Court dealt with this matter? Lawyering whilst Black, a form of racial profiling of this professional class, is a reality within our justice system.¹⁸ In as much as the availability of drugs are rife, so is the stereotypes of whom the carriers and/or mules are.

¹⁷ No Dicothomies, at 206.

¹⁸ *Peel Law Association v. Pieters*, 2013 CarswellOnt 7881, 2013 ONCA 396, 228 A.C.W.S. (3d) 204, 116 O.R. (3d) 81, 306 O.A.C. 314, 9 C.C.E.L. (4th) 233, [2013] O.J. No. 2695(Ont. C.A.)

The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer for Ontario, 1995), spoke extensively to the anti-Black racism facing persons working and living in Ontario jails.

Anti-Black racism, harassment and discrimination at the Toronto Don Jail, continued to be rampant, overt and virulent.¹⁹ That jail closed its doors in 2013. From 2005 a series of events involving hate mail and death threats of Black correctional officers and managers by one or more persons within the institution who was employed therein took place.

In *Charlton v. Ontario (Ministry of Community Safety & Correctional Services)*, 2007 CanLII 24192 (ON PSGB) provides some information on the hate mail and threats to which Black Correctional Officers were subjected:

HA HA HA
 YOU THOUGHT YOU WERE SAFE YOU
 STUPID NIGGA BITCH
 TELL YOUR NIGGA FRIENDS TO WATCH
 WHERE THEY LEAVE YOUR ADDRESS
 LAYING AROUND
 YOU WALK AROUND PRETENDING TO BE A
 MANAGER WHEN YOUR JUST A STUPID
 NIGGA BITCH THE BRAIN DEAD FAT SLOP
 DOWN THE HALL HIRED
 YOU AND YOUR SLUT LIAR OF A NIGGA
 FRIEND
 SHE THINKS THAT SHE CAN SLEEP HER WAY
 TO THE TOP AND BE PROTECTED BY THAT
 NIGGA LOVA BLOCK HEAD ROBO COP
 BOYFRIEND OF HERS
 ONE BY ONE YOULL BE TAKEN OUT
 WEARING ORANGE BLUE OR WHITE OR
 BEING A NIGGA LOVA YOUR ALL THE SAME
 DIRTY NIGGA SCUM BAGS
 KKKKKKKKKK FOREVER

¹⁹ *OPSEU (Tardiel) v. Ontario (Ministry of Community Safety & Correctional Services)* 2011 CarswellOnt 6066 (Ont. G.S.B.); *Charlton v. Ontario (Ministry of Community Safety & Correctional Services)* 2007 CarswellOnt 4099, 162 LAC (4th) 71, 2007 CanLII 24192 (ON PSGB) and *OPSEU (Simon) v. Ontario (Ministry of Community Safety & Correctional Services)* (September 18, 1998) GSB # 2568/96, (Dissanayake).

Gravesande is a textbook case on the erasing of race in the case of judicial bias

As Professor Richard Devlin observed:

"non white" groups have been either so subordinated to, or marginalized from, the Canadian legal system that it has been unreceptive to their experiences, perceptions, concerns or complaints. In other words, the issue of race has been a non-question in the law of judicial bias.²⁰

In *Québec (Commission des droits de la personne et des droits de la jeunesse), et al. v. Bombardier Inc. (Bombardier Aerospace Training Center), et al.* 2015 SCC 39, para. 1, the Court held that:

1 Discrimination can take a variety of forms. Although some of them are easy to identify, others are less obvious, such as those that result from unconscious prejudices and stereotypes or from standards that are neutral on their face but have adverse effects on certain persons.

That the Toronto Jail was a place where racism was rampant, where Black employees were subjected to harassment including being stereotyped as "drug dealers" by inmates and White Correctional Officers, make it a live issue for trial of Mr. Gravesande being a Black, male, lawyer and does call out for a race-based analysis or a critical race based analysis that considers his race, gender, disability and perceived class and any "unconscious prejudices and stereotypes" that influenced Justice Rabley's decision-making in Gravesande's case.²¹

Justice Rabley's suggestion that Gravesande's psychological condition and his lack of substantial earnings would have made him vulnerable to trafficking drugs in prison to the inmate on the material day in question, without more is sort of reasoning smacks of stereotypical thinking and a racial bias. Camille Nelson wrote "given the legacy of discrimination, in all its many unfortunate forms, it is not surprising that the legal profession would fall victim to the same prejudices as

²⁰ Devlin, Richard, "We Can't Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S", (1995) 18 Dal. L.J. 408, 422-423

²¹ See *R. v. S. (R.D.)* (1997), 118 C.C.C. (3d) 353 . See also, Richard Devlin and Dianna Pothier, "ReDressing the Imbalances: Reflections on Judicial Decision-Making After R.D.S.," (1999-2000) 30 Ottawa L. Rev. 1-37 and Reg Graycar, "Gender, Race, Bias and Perspective: OR, How Otherness Colours Your Judgment" (2008) 15 International Journal of the Legal Profession 73-86; Scot Wortley "Hidden Intersections: Research on Race, Crime and Criminal Justice in Canada." (2004) 35 (3) Canadian Ethnic Studies Journal J 99-117

does society generally."²² Stereotyping a Black lawyer as a drug dealer or drug courier certainly falls within the realm of profiling that is a form of discrimination.

In the event there is a retrial in this matter. Mr. Gravesande's race has to be a consideration in the how and why Correctional Officers would stereotype him in that matter and indeed took steps to criminalize him from the calling of the police to "shaping" of the evidence to secure a conviction.

What is to be Done?

As Mr. Justice Cory observed in RDS:

95 Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the Charter. Section 27 provides that the Charter itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin. This is a far more difficult task in Canada than it would be in a homogeneous society. Remarks which would pass unnoticed in other societies could well raise a reasonable apprehension of bias in Canada.

Based, in part, on these observations, April Burey argues that "it is this very diversity which the judiciary needs in order to fulfill its adjudicative function in this multiracial and multiethnic society."²³

Devlin, and others, observed at that "a recent study of Canada's appellate court judges conclusively conclude that judging is a 'human process' that 'likely ... bears close relation to the

²² Nelson, Camille A., "Out of Sync: Reflections on the Culture of Diversity in Private Practice", (1999), 19 (1&2) Canadian Woman Studies Journal 199 at 200.

²³ No Dicothomies, at 208.

background and family contexts of the judges."²⁴ They call for the judiciary to be reflective of society.²⁵ Devlin observed "the concern is that of systemic discrimination and distributive injustice; positions of power, privilege and respect are being inequitably allocated, thereby perpetuating inequality A proportionally representative judiciary may help challenge such practices and, therefore recognise the individual abilities of members of historically excluded groups. "²⁶

There is little doubt that appointing (and having) a representative judiciary that is reflective of the race, ethnic, religious, cultural, linguistic and gender of society is a powerful impetus in moving closer to bias free judging. Further, judicial education particularly in social context judging, and on subjects relating to Canada's Indigenous, Black and other historical disadvantaged groups is another positive step forward.²⁷

Conclusion

Deryk Gravesande conviction of the offense of trafficking has been set aside. He is no longer at risk of serving time in jail and can carry on with his life and practise of law free from the stigma of a criminal conviction. His case is a cautionary tale to lawyers really to avoid face-to-face jail visits with clients whom the lawyer does not trust. Fundamentally however, this case says a lot about judgement, bias, presumption of innocence and the role of judges in a society that is premised on the rule of law and the Judge as the embodiment of this social compact. Justice Rabley fell way below the mark in his role in Gravesande's case.

²⁴ Devlin, Richard, Kim N. and MacKay, A.W., "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Toward a "Triple P" Judiciary" (2000) 38 Alberta L.W. 734 at 757

²⁵ Reducing the Democratic Deficit, at 739.

²⁶ Reducing the Democratic Deficit, at 790.

²⁷ Sean Fine, "Chief Justice says Canada attempted 'cultural genocide' on aborigines," May 28, 2015, The Globe and Mail.

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