C.A.C. No. 126420

NOVA SCOTIA COURT OF APPEAL
Cite as: R. v. Robart, 1997 NSCA 205

Chipman, Bateman and Flinn JJ.A.

BETWEEN:

GUY ROBART	)	Marguerite J. MacNeil
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Kenneth W.F. Fiske, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	September 12, 1996
	)	
	)	Judgment Delivered:
	)	January 15, 1997

THE COURT: Appeals against conviction and sentence dismissed per reasons for judgment of Flinn, J.A., Chipman, J.A. concurring; Bateman, J.A. dissenting on the ground that non-disclosure impaired the appellant's right to make full answer and defence.

FLINN J.A.:

Following a trial in the Supreme Court of Nova Scotia, before a judge without a jury, Guy Robart, along with five others, was convicted of the aggravated assault of Darren Watts. The trial judge sentenced Robart to eight years incarceration.

The circumstances surrounding this offence are set out in detail in the Reasons for Judgment of Chipman J.A. in **Dixon v. R.** (1996 CAC No. 126136) being released simultaneously with the Reasons for Judgment in this appeal. I will, therefore, not repeat the circumstances surrounding this aggravated assault except where it becomes necessary to deal with the particular issues which are raised in this appeal.

Robart appeals both his conviction and sentence.

His grounds of appeal against conviction are as follows:

> "1. THAT the Trial Judge erred in that he considered evidence of prior statements of co-accuseds proffered by the Crown as evidence against the Appellant;
>
> 2. THAT the Trial Judge erred in his use of prior statements by co-accuseds in bolstering the credibility of the Crown's witness who gave evidence against the Appellant;
>
> 3. THAT the Trial Judge misdirected himself and erred as to identification evidence led by the Crown against the Appellant;
>
> 4. THAT the verdict entered is unreasonable and not supported by the entirety of the evidence;
>
> 5. THAT the Crown failed to make full and timely disclosure to the Appellant and/or his defence counsel in failing to provide copies of the witness statements of Terris Daye, Terrance Tynes, Travia Carvery, and Edmond (T.J.) Levia."

His grounds of appeal against sentence are as follows:

"1. THAT the Trial Judge erred in imposing a term of imprisonment which was unduly harsh and not fit and proper in the circumstances.

2. THAT the Trial Judge erred in imposing a sentence which overemphasized the principle of general deterrence to the exclusion of other principles of sentencing."

Grounds of Appeal against Conviction

Grounds 1-4 inclusive

The appellant's first four grounds of appeal against conviction are identical to the first four grounds of appeal raised and dealt with by this Court in **R. v. Cole (D)** (1996), 152 N.S.R. (2d) 321. In **Cole**, Pugsley J.A., writing for the Court, dismissed these four grounds of appeal.

Counsel for the appellant concedes that the issues with respect to these four grounds of appeal are identical to those raised in **Cole**, and that the records with respect to this case, and **Cole**, are virtually identical insofar as these grounds of appeal are concerned. She concedes that the decision in **Cole** is persuasive, if not determinative, with respect to these four grounds of appeal, and she did not press these grounds of appeal in oral argument.

I agree that, with respect to these four grounds of appeal, the issues and the trial records are identical with **Cole**; and for the reasons of Pugsley J.A. in **Cole**, these four grounds of appeal should be dismissed.

Fifth Ground of Appeal

Non-Disclosure

Before dealing with this ground of appeal in detail, it is important that this issue of "non-disclosure" be put in its proper perspective.

Firstly, this ground of appeal alleges failure to make full and timely disclosure of four witness statements; namely, statements of Terris Daye, Terrance Tynes, Travia Carvery, and Edmond (T.J.) Levia. The statements of Tynes, Carvery and Levia are not material, (in the sense that the appellant could not claim that, without them, he was denied the right to make full answer and defence) and counsel for the appellant does not seriously suggest otherwise. The real issue of non-disclosure relates only to the statement of Terris Daye; and that is the only statement upon which I will focus under this ground of appeal.

Secondly, what is meant by "non-disclosure", in this appeal, is that the Crown did not deliver a copy of the Terris Daye statement to counsel for the appellant, until a demand was made for it after the appellant was convicted and sentenced. It is conceded by the Crown that the Crown was clearly under an obligation to deliver a copy of the statement to counsel for the appellant, prior to the trial, and that it did not do so. The Crown's position is that full disclosure was not made because of inadvertence, and counsel for the appellant does not take issue with that position. However, simply because the Crown did not deliver a copy of the statement of Terris Daye to trial counsel for the appellant prior to the trial does not mean that the appellant is automatically entitled to a new trial.

I note, here, that counsel for the appellant, on the hearing of this appeal, was not the appellant's lead counsel at the trial. In these reasons, I will, therefore, distinguish the two counsel by referring to the appellant's counsel at trial as "trial counsel for the appellant".

For reasons which will become apparent, the decision in **Cole**, on the issue of non-disclosure, is not determinative of the issue of non-disclosure with

respect to this appeal. Counsel for the appellant acknowledges distinctions between the two cases, particularly with respect to the issue of the materiality of the statement of Terris Daye.

The appellant has two hurdles to overcome.

Firstly, is the issue of whether the statement of Terris Daye was so material, that the Crown's failure to deliver a copy of it to trial counsel for the appellant, in a timely fashion, impaired the appellant's right to make full answer and defence. Secondly, trial counsel for the appellant was aware, prior to the trial, that Terris Daye had given a statement to the police. His failure to demand production of that statement, or raise the matter before the trial judge, puts the issue of due diligence, and the obligation of trial counsel for the appellant, as an officer of the Court, squarely before the Court on this appeal.

Simply put, if the Terris Daye statement is found to be so material that, without it, the appellant's right to make full answer and defence at his trial was impaired, then the appellant is entitled to a new trial. In addressing this issue the Court will also consider if trial counsel for the appellant exercised due diligence with respect to his right to have delivered to him a copy of the Terris Daye statement.

I have concluded that the appellant fails on both counts and I will set out my reasons for coming to that conclusion.

Before doing so there is another matter, by way of introduction, which should be set out here. In order to consider the "non-disclosure" issue in an appropriate context, the panel hearing this appeal agreed to receive certain material as fresh evidence. The detailed reasons for agreeing to accept this material are set out in the decision of Chipman J.A. in **Dixon**, and I will not repeat them here.

The material which was received was an affidavit of the appellant's trial

counsel as well as affidavits from counsel for two others who were convicted at the trial, namely, Damon Cole and Cyril Smith. The statements which are the subject of the non-disclosure issue were attached to the affidavits. Further, the Crown filed an agreed Statement of Facts which was signed by counsel for the Crown as well as by all other trial counsel, including the appellant's trial counsel. Attached to the agreed Statement of Facts was a diagram of the assault scene, and a chart, or cross-reference sheet, which all counsel, including trial counsel for the appellant had in their possession prior to the trial. Among other things, the agreed Statement of Facts indicates that the Crown Sheet provided to counsel at the trial, lists 37 potential witnesses who were proposed to give evidence at the trial. The name of Terris Daye was not on that list. Further, the Crown Sheet, itself, did not disclose that the police had taken a statement from Terris Daye.

The affidavit of counsel for the appellant deposed to his efforts to obtain full disclosure from the Crown prior to the trial, and the fact that a copy of the statement of Terris Daye was not delivered to trial counsel for the appellant prior to the trial. However, Terris Daye was no stranger to the appellant and his trial counsel, and the affidavit did not indicate whether trial counsel for the appellant had knowledge that Terris Daye had given a statement, in any event; or had knowledge, directly or indirectly, of what Terris Daye had told the police; or whether trial counsel had interviewed Terris Daye. As well, if the statement of Terris Daye was of no interest to trial counsel during the trial, why did interest in that statement suddenly peak following conviction and sentencing? These concerns were raised by the panel during the hearing of the appeal. As a result. the panel invited counsel to file a supplementary affidavit to deal with these concerns, and to allow counsel the opportunity to provide the panel with any further information that might be material

to consideration of the issues raised in this appeal. Trial counsel for the appellant did file a supplementary affidavit.

Due Diligence

As I have indicated, it is not in dispute that the Crown had an obligation to deliver the Terris Daye statement to counsel for the defence. However, and without in any way detracting from that obligation on the Crown, if defence counsel sits back and does nothing, when faced with knowledge that a witness statement exists which has not been delivered by the Crown, then defence counsel runs the risk that the Court will not be receptive to a later complaint by the defence that the Crown failed to deliver a copy of that statement. In **R. v. Stinchcombe** (1992), 68 C.C.C. (3d) 1 (S.C.C.) Sopinka J. said at p. 12:

> "I am confident that disputes over disclosure will arise infrequently when it is made clear that counsel for the Crown is under a general duty to disclose *all* relevant information. The tradition of Crown counsel in this country in carrying out their role as "ministers of justice" and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them."

And further at pp. 12-13:

> "Counsel for the accused must bring to the attention of the trial judge at the earliest opportunity any failure of the Crown to comply with its duty to disclose of which counsel becomes aware. Observance of this rule will enable the trial judge to remedy any prejudice to the accused if possible and, thus, avoid a new trial: see *R. v Caccamo* (1975), 21 C.C.C. (2d) 257, 54 D.L.R. (3d) 685, [1976] 1 S.C.R. 786. Failure to do so by counsel for the defence will be an important factor in determining on appeal whether a new trial be ordered."

In the recent decision of the British Columbia Court of Appeal in **R. v. Bramwell** (1996), 106 C.C.C. (3d) 365 the Court said at p. 374:

> "It is important to emphasize, however, that the disclosure process is one which engages both the Crown and the defence. It is not one in which defence counsel has no role to play except as passive receiver of information. The goal of the disclosure process is to ensure that the accused is not denied a fair trial. To that end, Crown counsel must disclose everything in its possession which is not clearly irrelevant to the defence, but the defence must also play its part by diligently pursuing disclosure from Crown counsel in a timely manner. Further, where, as here, defence counsel makes a tactical decision not to pursue disclosure of certain documents, the court will generally be unsympathetic to a plea that full disclosure of those documents was not made."

An appeal of **Bramwell** to the Supreme Court of Canada was dismissed with short oral reasons (see: [1996] S.C.J. No. 120).

I have concluded that the actions (or inaction) of the appellant's trial counsel are tantamount to a tactical decision on his part not to pursue disclosure of the statement of Terris Daye. As a result, I am not receptive to the plea that a new trial should be ordered for the appellant simply because a copy of the Terris Daye statement was not delivered to his trial counsel.

In coming to this conclusion I have taken into account the following matters:

1. Attached to the agreed Statement of Facts, which was filed in this matter, is a police diagram of the assault scene as well as a chart, or cross-reference sheet. Both documents were prepared by the Crown. It was conceded that these documents were in the hands of trial counsel for the appellant prior to the trial. The cross-reference sheet identified "suspects", "offences" and "evidence" with respect to this entire assault matter. Terris Daye is identified, on this document, as a suspect from whom the police have a statement. In fairness,

it could be read that this referenced statement related to an offence of Terris Daye in respect to his breach of an undertaking, as opposed to being a statement in respect of the assault in question. However, elsewhere on that same one page document, Terris Daye is identified as a possible witness and possible co-accused, in the trial on the aggravated assault charge.

Trial counsel for the appellant says the following in his supplementary affidavit with respect to this Chart:

> "..... THAT the impression I had from the materials which had been disclosed by the Crown, was that despite the fact that these individuals were present and possibly involved at the time that the assault was committed on Darren Watts, no relevant information was obtained from them in the course of the police investigation. THAT, in particular, the Crown Sheet did not list these individuals as potential witnesses, and the chart which was annexed to a police diagram of the assault scene suggested that Terris Daye had not given evidence to the police which was relevant to any of the suspected offenders, other than evidence relevant to his own breach of undertaking." {Emphasis added}

I find it surprising that an experienced defence counsel would take that position. Terris Daye was no stranger to the appellant. The appellant had given a cautioned statement to the police which was read into the record at the trial. In that statement the appellant acknowledges that he went to the fraternity party, from which the assault in question emanated, with, among others, Terris Daye. In that statement, the appellant denied kicking or punching anyone outside of the fraternity

house on the evening in question. However, and importantly, he identified Terris Daye as "kicking and punching" Darren Watts. Terris Daye was never charged with respect to this assault.

Under those circumstances, it would seem to me that since the appellant was denying any involvement in the assault, and was, in fact, accusing someone else who was not even charged with being involved, namely, Terris Daye, that he, and his trial counsel, would have more than a passing interest in anything which Terris Daye had to say about the evening in question. In any event, trial counsel for the appellant did not request a copy of the statement of Terris Daye, nor did he at any time raise its lack of production with the trial judge.

2. The trial of this action commenced on February 5th, 1996. On February 8th, counsel for Damon Cole, following a specific request, received a copy of Police Occurrence Reports. He reviewed them on Sunday, February 11th, 1996, and found that they contained a summary of a statement that Terris Daye had given to the police.

In the affidavit filed prior to the hearing of this appeal, trial counsel for the appellant deposes as follows:

> **THAT** I recall during the course of the Appellant's trial that Stanley MacDonald, trial counsel for Damon Cole, advised other counsel of requesting and receiving copies of police Occurrence Reports from officers involved in the investigation of the assault on Darren Watts. I cannot say with certainty that I reviewed the Occurrence Reports at that time, but I do recall that receipt of Occurrence Reports did not cause me to make further inquiries of the Crown with respect to the statements referenced in the reports." (emphasis added)

In the supplementary affidavit he deposes as follows:

> "4. .....THAT my recollection is that the information contained in the Occurrence Reports, in combination with all of the information which had been disclosed, did not suggest to me that the information which may have been provided by the four individuals in question would be relevant to the Appellant's defence. Therefore, no further investigative steps were considered vis-a-vis the information contained in the Occurrence Reports." (emphasis added)

With respect to Terris Daye, the Occurrence Report states the following:

> "Terris Daye after some questioning places himself in the outer circle surrounding Darren Watts. It is quite clear that he does not want to I.D. the key players as he is scared of them. Terris Daye places Cyril Smith, Danny Clayton, Terrance Tynes, running west on Cedar Street after Guy Robart scream police. When questioned about the assault on the police officer he described that Guy and Nathaniel Robart ran in the same direction and were chased by the policemen. He described the police car as a burgundy sedan.
>
> The statement had to be concluded as Buddy Daye had other commitments but stated he would be willing to return another day. Buddy Day did not want to leave his daughter and her son by themselves. The writers were unable to get Daye to name any of the persons in the inner circle around Darren Watts. The mother seems to know more and if interviewed away from her son she might give some useful information. The mother advised upon leaving that she was surprised that Terris talked to us (police) as much as he did. The writers may hear from the mother in the near future as we feel there may be some interrogation done at home."

At this point in the trial, the next witness to testify would have been

Danny Clayton. He was the key Crown witness who identified, among others, the appellant as having assaulted Darren Watts. Defence counsel knew what Danny Clayton was likely to say in his evidence because of Clayton's prior statements, and evidence which he gave at the preliminary inquiry.

While one would not expect the Occurrence Report to be a complete recitation of the Terris Daye statement, it is clear from that occurrence report:

a) That Terris Daye has given a statement to the police;

b) That he placed himself in an "outer circle" surrounding Darren Watts; and

c) That he would not name any of the persons in the "inner circle" around Darren Watts.

For whatever reason, trial counsel for the appellant decided not to pursue the statement. He never requested the Crown to produce a copy of the statement. He never raised the issue of the Crown's failure to deliver the statement to him with the trial judge. He never requested an adjournment.

This was not a jury trial. The trial judge could have handled a request for adjournment with relative ease in order to have the statement produced, examined by defence counsel, and decisions made as to what, if any, use could be made of it. While it is true that at this point in the trial 23 witnesses had given evidence, that fact can be misleading. These 23 witnesses, as far as the appellant is concerned, provided nothing but background evidence. At the hearing of this appeal counsel for the

appellant conceded that at this point in time "no damning evidence" had been tendered as far as the appellant was concerned.

Quite apart from trial counsel's obligation to his client, as Justice Sopinka said in **Stinchcombe** (supra), defence counsel, as an officer of the court, has an obligation to act responsibly in this regard, and to avoid circumstances which could lead to an unnecessary demand for a new trial. Trial counsel was under an obligation to raise this issue of the non-delivery of the statement, prior to the examination of Danny Clayton, when the trial judge could have properly assessed the matter. The trial judge could have given the appellant's trial counsel time, by way of an adjournment, and, indeed, permitted him to recall witnesses (if any needed to be recalled). Instead of doing that, the issue was left until after conviction and sentence, and this Court is now being asked to order a new trial because of "non-disclosure".

3. During the hearing of this appeal, the appellant's counsel was asked, by the panel, why trial counsel's interest in the statement of Terris Daye suddenly peaked, following conviction and sentence of the appellant, when, during the trial, the statement seemed of such insignificance that its non production was not raised, either with the Crown or with the trial judge. If the statement did not appear to be relevant during the trial, why did the appellant's trial counsel demand its production after conviction and sentencing? In the supplementary affidavit filed by the appellant's trial counsel, which dealt with some of the concerns raised by the panel on the hearing of this appeal, that question was not answered.

4. In **R. v. McAnespie** (1993), 86 C.C.C. (3d) 191 Sopinka J. said the following at p. 192:

> "Specifically, we are of the opinion that the respondent failed to satisfy the criterion of due diligence. While this factor is not applied strictly in criminal cases and is not to be considered in isolation, the strength of the other facts is *not* such that the failure to satisfy the due diligence requirement in this case is overborne by the other factors."

In coming to my conclusion on this issue of due diligence I have considered, in part, my conclusions (which follow) that the Terris Daye statement was not material,in any event; and the failure of the Crown to produce that statement prior to the trial did not impair the appellant's right to make full answer and defence.

Materiality

The onus, on the appellant, with respect to this issue of non-disclosure, is to satisfy the Court that, since his trial counsel did not have production of the Terris Daye statement prior to the trial, he was denied the right to make full answer and defence.

In **Dixon**, Chipman J.A. reviewed in some detail the various cases which have considered this issue, and it is not necessary for me to review them here. The authorities do not require the appellant to establish that had he been armed with the Terris Daye statement, at or before the trial, the result would have been different. However, in assessing whether or not the statement "might" have affected the result, that statement must be measured by some objective standard. Without an objective standard by which to measure, the Court would be left to consider any and all possibilities, no matter how fanciful or conjectural.

For this reason, I adopt the conclusion of Chipman, J.A. that for the appellant to succeed in obtaining a new trial he must satisfy the Court that there is a reasonable probability (a probability sufficient to undermine confidence in the outcome) that had the Terris Daye statement been disclosed the result might have been different. This was the test formulated by Osborne J.A. in **R. v. Petersen** (1996), 106 C.C.C. (3d) 64 (Ont. C.A. - leave to appeal to the Supreme Court of Canada refused).

It is important to note, here, that we are not, in this appeal, reviewing the decision of a trial judge who has already considered this particular non-disclosure issue. It was not raised at the trial. Therefore, we do not have the benefit of the trial judge's assessment of the materiality, or otherwise, of Terris Daye's statement. On the other hand, we have before us all of the evidence at the trial, including the submissions of counsel; and we are able to assess the impact of the failure to deliver the Terris Daye statement "in the context of the whole case". See **R. v. Hamilton** (1994), 94 C.C.C. (3d) 12 (Sask. C.A.) per Jackson J.A. at p. 30.

The question then becomes: What is it about the statement of Terris Daye that without it the appellant was denied his right to make full answer and defence?

Firstly, I will deal with the decision in **Cole** with respect to this issue. Cole, in addition to being convicted of the assault on Watts, was also convicted of an assault on one Gillis. From my reading of **Cole**, this Court concluded that Cole was denied his right to make full answer and defence, and a new trial was ordered, because of the Court's concern that:

1. the Terris Daye statement afforded Cole a possible defence, of self defence, with respect to the assault on Gillis;
2. the Terris Daye statement could be used to challenge the

credibility of Danny Clayton, the only witness at the trial who identified Cole as one of Watts' assailants, because Terris Daye, in his statement, had Cole placed on the "other side" of Cedar Street (from where the attack on Watts took place) at least at one point in the evening; and

3. in the case of Cole, Danny Clayton, in his testimony, did not immediately identify Cole as one of Watts' attackers. Clayton had to be prodded by the Crown.

None of these circumstances exist in the case of the appellant, and, for that reason, the decision in **Cole** is not determinative of the issue of materiality as far as the appellant is concerned.

The first argument of counsel for the appellant, on this issue, is set out in her factum as follows:

> "It is the Appellant's basic submission in relation to this ground of appeal that the four non-disclosed statements contained information that meets the relevancy test, in that the information could have been used to assist the Appellant in either meeting the Crown's case at trial, or advancing a defence to the charge of assault. Perhaps more importantly, had the statements been disclosed to the defence, the information contained in the disclosure may have assisted or impacted upon decisions made by the Appellant and defence counsel regarding the conduct of the Appellant's case. In particular, decisions such as whether or not to call defence evidence, and the approach to cross-examination of various witnesses, may have been influenced by the information in the statements." {emphasis added}

Firstly, relevancy is not the test here. Relevancy is the test by which the Crown determines whether or not it has an obligation to disclose the witness statement in the first instance. Here, counsel for the appellant is asking this Court to order a new trial. To obtain that relief, counsel must establish more than, simply,

relevance. Since the Crown failed to deliver a copy of the statement in this case, and since the matter was not raised at trial, counsel for the appellant has to satisfy this Court that there is a reasonable probability that had the Terris Daye statement been disclosed the result might have been different. Ultimately, it comes down to a question of whether or not the appellant was denied his right to make full answer and defence.

The above submissions of counsel for the appellant, while they would, undoubtedly, be successful submissions at trial on an application requiring the Crown to disclose the Terris Daye statement, do not satisfy me that there is a reasonable probability that had the Terris Daye statement been disclosed the result might have been different. These submissions raise nothing but speculation and conjecture.

In **Dixon**, Chipman J.A. undertook a detailed analysis of the same submission made by counsel in that case under the heading "Advancing a Defence" in his Reasons for Judgment. That analysis is applicable to this appellant, as is Justice Chipman's conclusion at p. 55:

> This statement does not contradict the evidence which supported, to varying degrees, that of Clayton. This evidence was referred to by the trial judge. There is nothing in the statement upon which any of the Crown witnesses could be cross-examined directly. Clayton never denied that Daye was in the group. I do not see in the statement any basis to encourage the appellant or any of the other accused to take the stand if they were not otherwise disposed to do so."

And at p. 56:

> "In all, nothing in the statement would give comfort to counsel preparing the defence of these accused."

Secondly, counsel for the appellant submits in her factum:

> "In the case at bar, where the trial judge's acceptance of the accuracy and credibility of Danny Clayton was so central to the

> conviction of the Appellant and his co-accuseds, it is impossible to predict whether or not the information contained in the four statements in question could have been used to counter, or at least cast a doubt upon the information provided by Mr. Clayton. A review of the statements in question (particularly the statement of Terris Daye) would suggest differences and discrepancies between some of the information contained therein, and the evidence of Danny Clayton. It is not possible for either the Appellant or this Court to speculate whether or not defence counsel may have been able to use these discrepancies to successfully challenge the credibility and accuracy of Mr. Clayton. In short, it is the Appellant's respectful submission that the non-disclosure of the four statements negatively impacted upon the conduct of his case, but more importantly, the Appellant submits that the fairness of his trial was compromised in that it is not possible to determine the impact of the non-disclosed information."

Again, in **Dixon**, the same issue was canvassed in detail by Chipman J.A. Justice Chipman reviewed, in detail, the evidence of Danny Clayton, and the statement of Terris Daye. Justice Chipman further noted, as do I, that Danny Clayton had been vigorously cross-examined by all defence counsel, and the trial judge properly cautioned himself with respect to Clayton's evidence, Clayton being an accomplice. In the face of that, the trial judge gave detailed reasons for accepting the evidence of Danny Clayton. Justice Chipman concluded at p. 66:

> "The statement is significant for the number of things that Terris Daye did not see or was unwilling to discuss. It is confusing and imprecise overall. When stacked up against all of the evidence which the trial judge accepted as adverse to the position of the appellant, it casts no doubt upon the result."

I adopt Justice Chipman's analysis, and his conclusion in **Dixon**, with respect to the appellant Robart.

In conclusion, and to summarize, the Crown had an obligation to deliver to trial counsel for the appellant a copy of the Terris Daye statement, which is the subject of this ground of appeal. The Crown failed in that obligation. That fact, by

itself however, does not mean that the appellant is entitled to a new trial. I have concluded that counsel for the appellant has not discharged the onus of satisfying the Court that without the Terris Daye statement, at or before trial, the appellant's right to make full answer and defence was impaired. There is no reasonable probability (a probability sufficient to undermine confidence in the outcome) that, had there been disclosure of the statement, the result might have been different. Further, I am not receptive to the appellant's position because, in my view, his trial counsel did not act responsibly, or with due diligence, in failing to raise the non-delivery of the Terris Daye statement with either the Crown or the trial judge when he had more than one opportunity to do so.

I would therefore dismiss this ground of appeal; and, accordingly, dismiss the appeal against conviction.

Grounds of Appeal Against Sentence

The appellant, as well as three of the other five persons convicted of the assault on Darren Watts, received a sentence of eight years incarceration. One of the others found guilty, Dixon, was given credit for one year in custody and was sentenced to seven years incarceration. The sixth, Cole, was sentenced to six years incarceration.

The appellant appeals the sentence claiming that it is excessive and unduly harsh; and that the trial judge over emphasized the principle of general deterrence to the exclusion of other principles of sentencing.

The appellant was 25 years of age at the time of sentencing. He has three children, two from a previous relationship, and one from a present common law relationship. His employment and schooling have been sporadic. At the time of the trial he was unemployed. The appellant has a fairly extensive record of 13

different offences between 1985 and 1994, including break, enter and theft; theft; causing a disturbance; participating in an unlawful assembly; possession of a narcotic; and assault. The assault offence in 1988 was the only crime of violence for which he was placed on probation for two years.

In **R. v. Shropshire** (1996), 102 C.C.C. (3d) 193 the Supreme Court of Canada adopted this Court's position on sentencing appeals, as is enunciated by Hallett J.A. in **R. v. Muise** (1994), 94 C.C.C. (3d) 119 at p. 124:

> "The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. If it is a fit sentence an appeal court cannot interfere. . . . . My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. The most that can be expected of a sentencing judge is to arrive at a sentence that is within acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive....."

As to the principles which the trial judge considered in sentencing the appellant, he said the following (**R. v. McQuaid (H.) et al** (1996), 149 N.S.R. (2d) 104 at p. 107:

> ".....These were violent crimes. The law tells us that in cases of violence, emphasis or weight must be placed on general and specific deterrence. One must never lose sight of the prospect for rehabilitation and reform of the offender. While always emphasizing general and specific deterrence in punishing for violent crime, one must also give some weight to the rehabilitation of the offender. In light of the reality that one day the prisoner will be released, one must reflect on the prospects for that individual's safe and productive return to her or his community. I have considered all of these things when determining a just and fit sentence for every one of you."

With respect to the need for protection of the public the trial judge said at

p. 107-108:

> "Conduct such as that for which you have all been convicted deserves clear and unequivocal punishment. The public needs to be protected from you and your actions. By your conduct September 10 and 11, 1994, you sent a blatant signal that you had denounced the rules by which society seeks to govern itself and forfeited the right to be at large. For it is actions such as these that have caused so many in this community to be in fear for their own safety and legitimately concerned for the well-being of friends and family. People want their neighbourhoods back. Whether they live on Robie and Cherry Streets or Gottingen and Creighton Streets, law-abiding citizens want to be able to walk about freely, day and night, without having to worry about criminals like you."

The trial judge found the appellant, and the other five co-accuseds, equally culpable for the aggravated assault on Darren Watts. He could not decide, on the evidence, which of the six co-accuseds administered any particular blow; nor did he decide who, if any, of the six was the "ring leader". In his decision, convicting the appellant and his five co-accuseds, which is reported in (1996), 148 N.S.R. (2d) 321, the trial judge said the following at p. 324:

> "I am satisfied the men in the circle were all there for the same reasons: to kick or beat Darren Watts; or help in administering the beating; or encourage it; or stand - as observed by others - shoulder to shoulder so as to form a circle thereby ensnaring Darren Watts and preventing him from getting away or stopping others from coming to his rescue."

The aggravated assault on Darren Watts is referred to in street parlance as a "swarming" - an unprovoked attack, on a public street, by a group. It was a particularly savage and brutal crime which was exacerbated by the contempt which the appellant, and his fellow attackers, showed for Watts and those who were trying to assist him. The trial judge put it this way at p. 108 [149 N.S.R. (2d)]:

> "The uncontradicted evidence of the merciless and senseless attack on Mr. Watts would raise bile in the throat of any reasonably informed person. To see such an assault on a dog

> would cause any reasonable observer to flinch. The horrible reality that it was inflicted on a human being is shameful and sickening. It would be difficult to imagine more aggravating circumstances. Yet there were more. For after you bolted over to Q.E.H., you then circled back, and, before ultimately scattering, so as to flee the police, you ran by that corner, where people like Commissionaire Lloyd Finter and Nurse Shirley Wall were doing their best to keep Mr. Watts alive, and you then chanted, "If you don't know, now you know."
>
> Such invective could only have been intended to scorn or threaten the victims and those persons comforting them. It was so extraordinary and memorable as to have been described by countless citizens, who recalled it in their testimony before me. Chanting those words in that context, as you fled the scene, was an obscenity and the height (or more properly, depth) of arrogance and disdain for others."

After referring to the numerous cases cited to the trial judge by both counsel for all of those convicted, as well as the Crown, the trial judge said the following at p. 109:

> Having reviewed all of those authorities, I think the range of sentencing in manslaughter cases is more apt to the situation before me. I have paid particular attention to the decision of the Appeal Division of this court in the case of **R. v. Silvea** (1988), 86 N.S.R.(2d) 346; 218 A.P.R. 346 (C.A.), as well as a decision of the Alberta Provincial Court in the case of **R. v. Carolan (R.J.)** (1995), 163 A.R. 238 (Prov. Ct.)."

With respect to the appellant, in particular, the trial judge said at p. 112:

> "You are 25 years of age. That simply makes you the oldest of the other co-accused. It is not unique in your case, Mr. Robart, that, apparently, you lacked a father figure in your life. Although you have a criminal record dating back to 1985, there is nothing on the sheet of offences before me to suggest that any of those previous convictions were for violent crime. There is no evidence before me in this case that you are a person who has displayed any propensity for violence.
>
> It is unfortunate that while attending the Shelburne School for Boys you apparently suffered physical and sexual abuse during your time there. Having said that, you are certainly old enough now to know, Mr. Robart, that such cannot continue to operate

as a perpetual excuse for the balance of your life."

I have considered the submissions of counsel, both oral and written, and both here and in the Court below, as well as the submissions of the Crown on the matter of the appellant's sentence. It is quite clear from reviewing the sentencing decision of the trial judge that he applied correct principles and considered all relevant facts.

Parliament has seen fit to impose a maximum sentence for this offence of 14 years. The sentence of eight years incarceration is certainly within an acceptable range considering:

1) the circumstances of the offence, and particularly the reference by the trial judge that "it would be difficult to imagine more aggravating circumstances"; and,
2) the circumstances of the offender; and
3) the decision of this Court in **Silvea**.

For these reasons the sentence of eight years incarceration is a fit sentence, and this Court should not interfere with it.

I would, therefore, dismiss the appeal against conviction. I would grant leave to appeal against sentence, but dismiss that appeal as well.

Flinn J.A.

Concurred in:

Chipman, J.A.

BATEMAN, J.A.: (Dissenting)

The issues in this appeal are the same as those raised in **R. v. Dixon**. I would dispose of them in the same way. For the reasons set out by me in **R. v Dixon**, I would order a new trial in relation to the aggravated assault by Guy Robart upon Darren Watts.

Bateman, J.A.

C.A.C. No. 126420

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

GUY ROBART

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

FLINN J.A.
CHIPMAN J.A. (Concurring)

BATEMAN J.A. (Dissenting)