Docket: CAC 162988
Date: 20001006

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Downey, 2000 NSCA 110]

Roscoe, Hallett and Saunders, JJ.A.

BETWEEN:

THOMAS SPEEDY DOWNEY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	In Person James C. Martin, for the Respondent
Appeal Heard:	September 27, 2000
Judgment Delivered:	October 6, 2000

THE COURT: The appeal from conviction is dismissed and leave to appeal from sentence is granted, but the appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Hallett and Saunders, JJ.A., concurring.

ROSCOE, J.A.:

[1] This is an appeal from a conviction entered by Judge Frances Potts of the Provincial Court on a charge of trafficking in cocaine, contrary to s. 5(1) of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19. The sole issue raised on the conviction appeal is whether the identification evidence was sufficient to prove beyond a reasonable doubt that the appellant was the person who sold crack cocaine to the undercover police officer on the date in question. The appellant also appeals from the sentence of three years incarceration imposed by Judge Potts.

[2] Constable Blair Hussey testified that on February 27, 1998 just after 9:00 p.m., while he was working undercover, he approached two black men in the area of Jackson Road, Dartmouth and indicated he wanted to buy crack cocaine for his girlfriend. One, referred to as suspect number 1, was wearing a three quarter length black leather jacket, a black hat, blue jeans and white sneakers. The other, suspect number 2, was approximately 26 years old, five foot eight, had short hair and was wearing a blue shell jacket. The two men and Constable Hussey went to 32 Primrose Street, a block away, where after discussions with a third person, suspect number 1 took $40.00 from him, went

in and later returned with a tinfoil wrapped substance. While they were waiting outside, suspect number 2 told Constable Hussey that his name was Speedy and that the other man's name was Jamie. Constable Hussey left the area and later examined the substance and believed it to be gyproc.

[3] Constable Hussey returned to the area an hour later, found the two suspects outside 32 Primrose Street, and confronted them about the "ripoff". After some discussion, the three of them travelled in Constable Hussey's car to a house on Trinity Avenue. Again, Constable Hussey waited outside with suspect number 2 while the other man took the money, went in, and returned with a tinfoil wrapped substance. He returned the two suspects to Primrose Street. Constable Hussey believed the substance to be crack cocaine.

[4] Constable Hussey then contacted Constable Perry Astephen and asked him to go to the Primrose Street area and attempt to get names of the two suspects which he described to him by their race, height, approximate ages and their clothing. Constable Astephen testified that at about 12:35 a.m. on February 28th, he and Constable Scott Bowers drove to the north end of Dartmouth and observed two men matching the descriptions given by

Constable Hussey outside 32 Primrose Street. One was wearing a leather coat and the other a blue jacket. They approached the men and stated that there had been a report of a gunshot in the area. They were asked to supply their names as potential witnesses. The person dressed in the leather coat, suspect number 1, said his name was Clinton Ralph Slawter and left the area. The second suspect, dressed in the blue jacket, identified himself as “Dash”. After further questioning, he indicated his name was Stephen Johnson. Constable Astephen testified that he knew another person by the name of Stephen Johnson, so he told the suspect that he was not telling the truth and pressed him further. Then the suspect said his name was Thomas Downey and his date of birth was November 16, 1970.

[5] The officers left the area and notified Constable Hussey of the names of the two suspects. Constable Hussey testified that after hearing from Constable Astephen, he retrieved a police file on Thomas Downey which contained a photograph and satisfied himself that the person that he had met with earlier, suspect number 2, with the blue jacket, was the person in the photograph. Constable Hussey testified that charges against Mr. Slawter were not pursued because he was not one hundred percent sure of his identity.

[6] In court, Constables Hussey and Astephen identified the accused, Thomas Downey, as the person they met on February 27th - 28th who was wearing the blue jacket. Constable Bowers was unable to make an in-court identification.

[7] Other evidence was offered proving that the substance obtained in the first buy was a component of gyproc and the substance obtained through the second transaction was crack cocaine.

[8] The appellant testified that he met Constables Astephen and Bowers on the night in question and that they jumped out of the car, grabbed him, searched him and then told him about the gunshot and asked his name. He said it was earlier, about 9:00 o'clock, and that he was by himself. He said he was wearing a burgundy coloured jacket and that the police officers threatened him and detained him for 45 minutes. He denied meeting Constable Hussey that evening and denied being involved in the selling of cocaine. He agreed that he went by the nickname "Speedy" and that he was the person in the photograph to which Constable Hussey had referred.

[9] The argument made by counsel for the appellant at trial was to the effect that there was insufficient evidence to prove beyond a reasonable doubt that the appellant was the person who sold the cocaine to Constable Hussey.

[10] In her decision, Judge Potts acquitted the appellant on the first count which related to the first buy because, as a result of the intrusion of the third person, she was not satisfied beyond a reasonable doubt that the appellant was actually instrumental in arranging the sale . With respect to the second count, she focused on the issue of identity and extensively reviewed the evidence of Constable Hussey's opportunity to observe and converse with the person in the blue jacket who arranged the second sale of cocaine. Having accepted that evidence, she concluded that, on the whole, the evidence of identification was sufficient to meet the burden of establishing beyond a reasonable doubt that it was the appellant who was involved in the sale of cocaine to Constable Hussey.

[11] On the conviction appeal the appellant submits that the trial judge erred in finding that the Crown had proven the identity of the appellant beyond a reasonable doubt. In effect, he says that the verdict is unreasonable as it is

not supported by the evidence (s. 686(1)(a)(i) of the **Criminal Code**).

[12] As noted recently by Bateman, J.A. in **R. v. Barrett and Campbell**, 2000 NSCA 76:

> The Supreme Court of Canada in **R. v. Biniaris**, [2000] S.C.J. No. 16 (Q.L.) has recently reiterated the test to be applied on an appeal alleging an unreasonable verdict (s. 686(1)(a)(i) **Criminal Code**). The Court confirmed the continuing validity of the long accepted test in **R. v. Yebes** (1987), 36 C.C.C. (3d) 417 (S.C.C.): the Court of Appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it. Arbour, J. cautions in **Biniaris**:
>
> > [para24] Triers of fact, whether juries or judges, have considerable leeway in their appreciation of the evidence and the proper inferences to be drawn therefrom, in their assessment of the credibility of witnesses, and in their ultimate assessment of whether the Crown's case is made out, overall, beyond a reasonable doubt. Any judicial system must tolerate reasonable differences of opinion on factual issues. Consequently, all factual findings are open to the trier of fact, except unreasonable ones embodied in a legally binding conviction. . .

[13] In **R. v. Burke**, [1996] 1 S.C.R. 474, the Supreme Court of Canada found that acceptance by the trial judge of unreliable identification evidence led to an unreasonable verdict. Justice Sopinka, for the court said, at para. 52:

> The cases are replete with warnings about the casual acceptance of

> identification evidence even when such identification is made by direct visual confrontation of the accused. By reason of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of "the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection": *R. v. Sutton*, [1970] 2 O.R. 358 (C.A.), at p. 368. In *R. v. Spatola*, [1970] 3 O.R. 74 (C.A.), Laskin J. A. (as he then was) made the following observation about identification evidence (at p. 82):
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> > Errors of recognition have a long documented history. Identification experiments have underlined the frailty of memory and the fallibility of powers of observation. Studies have shown the progressive assurance that builds upon an original identification that may be erroneous.... The very question of admissibility of identification evidence in some of its aspects has caused sufficient apprehension in some jurisdictions to give pause to uncritical reliance on such evidence, when admitted, as the basis of conviction....
>
> The trial judge made no comment on the frailty of the identification evidence other than the general statement that she found L.'s evidence credible and accepted it. No reference is made to the fact that the appellant was not identified in court and that no explanation for failure to ask L. to do so was given. No reference is made to the erroneous identification made by T. using the photograph of the appellant. Given the unsatisfactory nature of L.'s evidence in general, this uncritical reliance on the unorthodox identification evidence renders the conviction unreasonable. Pursuant to s. 686(1)(a)(i), I would quash the conviction.

[14] Having reviewed and reweighed the evidence, I am satisfied that the conviction was reasonable. The identification of the appellant by Constable Hussey was not based on a fleeting glance or brief view of the accused. The totality of the circumstances leading Constable Hussey to identify the appellant as the person involved in the drug sale were:

- He observed and spoke with the person in the blue jacket during two

separate lengthy transactions on the same evening.

- The person he spoke to said his name was Speedy. The appellant’s nickname is Speedy.

- The person he dealt with wore a blue jacket and was hanging around with a man in a long leather jacket in the Primrose Street area, late at night in February. The person Constable Astephen said identified himself as Thomas Downey wore a blue jacket, was with a man in a leather jacket and was in the same area where Constable Hussey had interacted with them.

- Constable Hussey examined a photograph of the appellant shortly after last meeting with him.

[15] In addition, both Constables Astephen and Hussey agreed that the Thomas Downey sitting in court was the man with the blue jacket that they met on February 27-28, 1998. Furthermore, the appellant agreed that he was the person in the photograph.

[16] In my view the evidence, re-examined and reweighed, is sufficient and is reasonably capable of supporting the trial judge's conclusion. Accordingly, I would dismiss the conviction appeal.

[17] Judge Potts sentenced the appellant to a period of incarceration of three years. It is apparent that she considered his lengthy criminal record, the nature of the offence, the pre-sentence report, the failure of the appellant to abide by terms of probation orders in the past and his denial of a substance abuse problem.

[18] Our role on a sentence appeal is, as stated recently by Justice Chipman in **R. v. Barkhouse**, 2000 NSCA 65:

> On sentencing appeals we are required by decisions of the Supreme Court of Canada and of this court, e.g., **R. v. Shropshire** (1995), 102 C.C. C. (3d) 193 and **R. v. Cormier** (1974), 9 N.S.R. (2d) 687, to accord deference to the decision of the trial judge. Mere disagreement with the sentence imposed does not entitle us to interfere. We may only do so where there has been an error in the application of the principles of sentencing or where the sentence is clearly excessive or inadequate, or to put it another way, as stated by the courts: "unreasonable" or " demonstrably unfit".

[19] In this case, the most significant factor demonstrating the reasonableness and fitness of the sentence imposed is, in my view, the appellant's criminal record. It consists of a total of 28 prior offences, three of which were for possession of a narcotic and two of which were drug trafficking. As well, the appellant was on probation at the time of this offence. In my opinion, the trial judge considered all the relevant factors and applied

proper principles of sentencing.

[20] The sentence imposed here is not manifestly excessive, especially considering that the maximum penalty is life imprisonment, and having regard for decisions of this court concerning the necessity to impose severe penalties in cases involving trafficking in cocaine. See for example **R. v. Byers** (1989), 90 N.S.R. (2d) 263 and **R. v. Smith** (1990), 95 N.S.R. (2d) 85.

[21] I would grant leave to appeal but dismiss the appeal from sentence.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Saunders, J.A.