

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. Clarke*, 2010 NSCA 1

**Date:** 20100106

**Docket:** CAC 307103

**Registry:** Halifax

**Between:**

Brycen Clarke

Appellant

v.

Her Majesty the Queen

Respondent

**Judges:** Bateman, Oland and Beveridge, JJ.A.

**Appeal Heard:** November 16, 2009, in Halifax, Nova Scotia

**Held:** Appeal allowed and a new trial ordered per reasons for judgment of Oland, J.A.; Beveridge J.A. concurring; Bateman, J.A. dissenting in part on the ground that the trial judge did not err in dismissing the appellant's application to re-open the trial and admit fresh evidence.

**Counsel:** Stanley W. MacDonald, Q.C., for the appellant  
James A. Gumpert, Q.C., for the respondent

**Reasons for judgment (Bateman, J.A. dissenting in part):**

[1] Mr. Clarke appeals his conviction for robbery (**Criminal Code of Canada**, R.S.C. 1985, c. C-46, s. 344(b)) after a trial which took place before Jean-Louis Batiot, J.P.C. on November 20, 2007 and January 3, 2008. Charges of assault (s. 266(b)) and theft (s. 334(b)) were stayed with the entry of conviction on the robbery.

**BACKGROUND**

[2] I will briefly review the circumstances of the crime. Mr. Curtis Fownes was the innocent victim of a severe beating accompanied by a robbery of several hundred dollars from his wallet. The beating and robbery occurred in the early morning hours of May 13<sup>th</sup>, 2007 in Digby, Nova Scotia. Mr. Fownes was new to the town and knew no one. He had met Nancy Stanton earlier that evening at a bar known as Club 98 and at her invitation, accompanied her to an after-party at Nicole Simms' home. The beating and theft occurred a short distance from Ms. Simms' house. Ms. Stanton, who had left the party looking for Mr. Fownes, found him on the ground, beaten and bloodied and surrounded by four men, three of whom were known to her. The attackers were rifling through Mr. Fownes' wallet. Ms. Stanton took a defensive position over Mr. Fownes protecting him from further abuse. In an unreported decision dated February 27, 2008 the trial judge found that Mr. Clarke was one of the perpetrators.

[3] On May 1, 2008 Mr. Clarke applied to re-open his trial for the admission of fresh evidence. The proposed fresh evidence was from Aldean Cromwell and Jermaine Stevenson, both of whom had been identified by Nancy Stanton and were co-accused charged with the same offences. Neither had testified at Mr. Clarke's trial. The application was heard on October 30, 2008. By unreported decision dated January 8, 2009 the judge dismissed that motion.

**ISSUES**

[4] Mr. Clarke says the judge erred in the following ways:

- (i) in his application of the test in **R. v. W.(D.)**, [1991] 1 S.C.R. 742;
- (ii) he misapprehended certain evidence which played an essential part in his reasoning to find Mr. Clarke guilty; and
- (iii) in dismissing Mr. Clarke's application to re-open the trial and admit fresh evidence.

## **APPLICATION TO RE-OPEN THE TRIAL**

[5] As when fresh evidence is tendered on appeal, where counsel seeks the re-opening of a trial the criteria in **R. v. Palmer**, [1980] 1 S.C.R. 759 apply. There McIntyre J. summarized the principles at p. 775:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [ [1964] S.C.R. 484].
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[6] The judge must be correct in the test he applies on an application to re-open a trial (**R. v. Arabia**, 2008 ONCA 565 at para. 55). Assuming the judge applied the correct test, a deferential standard of review is applied to the judge's exercise

of his/her discretion on the application to re-open the trial. It is not for an appellate court to substitute its own view of how the trial judge's discretion should have been exercised. (**R. v. MacGregor**, [1997] N.S.J. No. 128 (Q.L.)(C.A.); **R. v. Sarson**, [1992] N.S.J. No.394 (Q.L.)(C.A.)). In **R. v. Paul**, 2009 ONCA 443, [2009] O.J. No. 2184 (Q.L.), the Court wrote:

13 Absent an error in principle or a misapprehension of material evidence, this court can interfere with a trial ruling based on the exercise of judicial discretion only if that exercise is unreasonable: see *R. v. G. (E.P.)* (1994), 89 C.C.C. (3d) 176 at 180 (Ont. C.A.). ...

[7] An application to re-open a trial after a verdict should only be granted in the clearest of cases (**R. v. Arabia**, *supra*, at para. 52).

[8] The trial judge here recognized his authority to re-open the trial and was aware of the applicable test for doing so. The question is whether, in applying the test, he materially misapprehended the proposed evidence or otherwise reached an unreasonable result.

[9] The judge was satisfied that the first two **Palmer** criteria had been met. However, he concluded that the proposed evidence was not reasonably capable of belief. On this issue Mr. Clarke says the trial judge was mistaken on the substance of the proposed evidence and, in any event, failed to properly assess whether it was reasonably capable of belief. Evidence which is not reasonably capable of belief could not reasonably be expected to have affected the result at trial (**R. v. Arabia**, *supra* at paras. 78 and 80).

[10] In determining whether the proposed evidence is reasonably capable of belief the judge must consider the evidence in the context of the whole of the evidence at trial. I will therefore review the trial evidence in some detail.

[11] It was Mr. Clarke's evidence that he had not been involved in the beating or robbery, having left the party with Linnea Robinson by cab before the incident occurred. The trial testimony of both Ms. Robinson and Matthew (Boo) Johnson purportedly supported that of Mr. Clarke. It was the defence theory that Ms. Stanton was so impaired by alcohol she could not accurately recall the events of that evening. In short, Mr. Clarke said her evidence was unreliable.

[12] Curtis Fownes, the victim, testified that he was intoxicated that evening. He had just arrived in town that day to commence work at the Digby Pines Hotel. He was among strangers and could not identify any of the people who assaulted him nor could he say how many there were, save that it was more than one. He suffered a bad beating. He offered the assailants the money in his wallet to dissuade them from continuing to beat him. They took his wallet and removed the money - about \$200 to \$300. Nancy Stanton came to his rescue.

[13] The key Crown witness was Nancy Stanton, who met Mr. Fownes for the first time at a bar, Club 98, and invited him to an after-party at the home of Nicole Simms. They stayed at the Club until closing, and probably reached Nicole Simms' house around 3 a.m., after a stop at Ricardo's take-out for pizza. Shortly after arriving at the party Ms. Stanton was confronted by Aldean Cromwell in the basement of the house. He told her she must choose between "the white boy" and the "N word". Mr. Fownes was the only Caucasian at the party. The comment made her uncomfortable and she decided that she and Mr. Fownes should leave. She called a cab but could not remember which company. Linnea Robinson decided she would share the cab with them.

[14] Mr. Cromwell tried to dissuade her from leaving the party. He said he wanted to talk to Mr. Fownes. Mr. Cromwell, Ms. Stanton, Jermaine Stevenson, Brycen Clarke and Linnea Robinson went outside to wait for the cab. Ms. Stanton noticed that Mr. Cromwell and Mr. Fownes had disappeared. She knew they had gone up the hill toward the adult school. Ms. Stanton and Ms. Robinson started walking in that direction. Jermaine Stevenson and Brycen Clarke followed closely behind them. Brycen Clarke moved up ahead of them. Ms. Robinson only walked part way up the hill before turning back. Mr. Fownes was in a group with Mr. Cromwell, Mr. Clarke and Mr. Stevenson. She called to him to come back because the cab would be arriving shortly but the group continued to move away. Mr. Stevenson held her back to prevent her from following. Concerned about what might be happening she pulled away from him, kicked off her shoes and ran up to the others. As she approached she heard muffled cries, like someone yelping in pain. Arriving at the site she saw Mr. Cromwell, Mr. Clarke and Mr. Stevenson and an unknown person standing over Mr. Fownes. They had his wallet and took the money.

[15] Mr. Fownes was on the ground, bloodied. She stood over him with his head between her legs and her arms outstretched to protect him. They all kicked him again but then ran off. Ms. Stanton and Mr. Fownes ran in the other direction. The group returned to them, looking for a bracelet or a chain, by which time Ms. Stanton and Mr. Fownes were part way down the hill. Mr. Fownes refused to give it to them. He and Ms. Stanton again ran away from the group and went directly to the hospital where he was treated for his injuries. Ms. Stanton's pant legs were soaked in blood where they had come in contact with Mr. Fownes while she was standing over him. She had no doubt that the three persons she knew - Mr. Cromwell, Mr. Clarke and Mr. Stevenson - were part of the group of four surrounding Mr. Fownes.

[16] Ms. Stanton acknowledged having a substantial amount to drink that night but testified that she did most of her drinking before she left her home for the bar. She has a high tolerance for liquor. The effects of the alcohol dissipated over the course of the evening. She placed her sobriety at midway between completely sober and passed out drunk. She testified that she was able to accurately recall the important events.

[17] Ms. Stanton knows Aldean Cromwell, Jermaine Stevenson and Brycen Clarke as they are all members of the Digby community.

[18] Ms. Stanton acknowledged on cross-examination that she was asked about the events in July of the same year when she encountered Angela Robinson while shopping at Frenchy's used clothing store. She agreed that she may have said: "I was so fucking drunk I don't remember anything". It was her evidence that she would have given such a response not because she did not remember but because she did not want to discuss the details of that night in public.

[19] The defence evidence commenced with Amy Barnaby who testified that she drove an intoxicated Ms. Stanton to Nicole Simms' that night. Ms. Stanton's speech was slurred and she could not walk straight. Ms. Barnaby has a child fathered by Mr. Clarke's brother.

[20] Matthew Johnson is Nicole Simms' boyfriend and was at her home that night. He testified that Mr. Clarke looked sober. Mr. Johnson and Mr. Clarke stood on the front porch of Ms. Simms' house, sharing a cigarette, waiting for the

arrival of a cab that Mr. Clarke had called. When the cab arrived Mr. Johnson went into the house to get Linnea Robinson. He saw Mr. Clarke get into the taxi with her. No one was with them. After the cab departed Mr. Johnson went back downstairs where he observed, among others, Mr. Fownes ("that other guy"), Ms. Stanton, Mr. Cromwell and Mr. Stevenson. Mr. Johnson testified that Nancy Stanton was so drunk she could barely stand up.

[21] Earl Hudson, a taxi driver, recalled picking up two persons whom he believed to be Mr. Clarke and Linnea Robinson sometime that night at Nicole Simms'. He does not know what time it was.

[22] Brycen Clarke was next to testify. He attended both Club 98 and Nicole Simms' after-party, but was not drinking. He noted that Nancy Stanton was drunk when at the bar. He likely arrived at the party at 3:05 a.m. and stayed for about 23 minutes. He then left in a taxi cab with Linnea Robinson. Earl Hudson was driving. He did not participate in the beating of Curtis Fownes and had no contact with him at Nicole Simms' or at all. When asked by his counsel to describe to the court what happened when the taxi arrived Mr. Clarke said:

I was standing out on the front step. I was actually-- and Linnea was saying something that she couldn't find Nancy upstairs in the house -- because that's where she thought she had been-- because Linnea was standing outside with us. "Boo" [Matthew Johnson] was still standing up on the step. I didn't see the Curtis Fownes boy no where and when the cab came up, Boo got Linnea and she came out and she said she couldn't find Nancy. I told her to get in the cab, so she-she started walking like she was going to find her and I told her, "No, get in the cab." She got in the cab. I had to go back in the house to get my jacket. I came back out, said good-bye to Boo and I got in the cab and came home and we drove right up around the corner by the Third Avenue/Mount Street and we didn't see anybody.

[23] Mr. Clarke said that he knew exactly how long he had been at the party because he had asked his cousin what time it was as they were arriving (3:05 a.m.). When he got into the cab it was exactly 3:30. Mr. Clarke explained that he always keeps careful track of time in case he is falsely accused of a crime.

[24] As to when he last saw Nancy Stanton:

Q. And when did you last see her?

A. Before leaving Nicole's.

Q. Before leaving Nicole's?

A. Yeah.

Q. And what was she doing?

A. Laughing, joking, drinking.

Q. And she was inside the house?

A. Yeah.

Q. You heard evidence today and you heard her evidence that she was walking up towards the school- the adult school -- and you were walking behind her and then kept on past her.

A. That's incorrect sir.

...

[25] On cross-examination Mr. Clarke said he assumed that Mr. Cromwell and Mr. Stevenson were still in the house when he was waiting for the cab because he had not seen them leave. He and Ms. Robinson were among the first to depart.

[26] Linnea Robinson testified that Nancy Stanton was drunk that night. Ms. Robinson did not stay long at Nicole's house - only ten or fifteen minutes, then she called her father who called her a cab rather than come get her himself. Brycen Clarke and Nancy Stanton each asked to share the cab. Ms. Robinson spent all the time at Nicole's talking to Mr. Clarke as she waited for the cab. She did not mention Mr. Johnson as waiting with them. Nancy Stanton went up the hill looking for Mr. Fownes. Linnea stayed with Mr. Clarke waiting for the taxi. When asked on direct examination what she did before the cab arrived:

A. Well, I just stayed around. I was talking to Brycen and we just stayed around. Nancy was going to find -- I don't even know his name, but she was going to go



find her friend because he had left and I stayed around Nicole's house to wait for the cab to make sure I never missed it. ...

Q. And you say Brycen was around you at that time?

A. Yes, Brycen stayed with me the whole time because he came out and asked how I was getting home and I told him that I had already called a cab so he waited with me while --

...

Q. Did you have any dealings with him [Curtis Fownes] yourself?

A. No, not really. I seen him in the house right before I went to wait for the cab and then I went outside and then I kind of took off and I never seen him again.

Q. Now when Nancy went outside looking for him did you see which direction she went in?

A. She walked up towards the high school.

Q. And when you say "up" would that mean "up the hill"?

A. Yes.

Q. And you say yourself -- you were standing around waiting for the taxi?

A. We stayed around -- like we were on the road, but I stayed so I could see Nicole's because I didn't want to miss it, I wanted to go home.

Q. And who was with you during that wait?

A. Brycen was with me.

...

Q. Now at any time did you see Brycen go up that hill?

A. No.

[27] Continuing with Linnea Robinson's evidence, now on cross-examination:

Q. So you called your Dad and he arranged for a cab and then you said that Nancy went to look for the guy – for Curtis?

A. Yeah.

Q. Now did you go out with her when she was looking?

A. No, like I stayed on the road. Maybe walked a little bit up with her, but not to where they were.

Q. You walked part of the way up the hill?

A. Yeah, just – but stayed on the road so I could see Nicole's.

...

Q. So you're walking up the hill with Nicole [sic] and you see the – you see the cab come, so you turn around and you walked back down the hill.

A. We went and got the cab there.

Q. And caught the cab. How long did it take you to get from where you were to get into the cab?

A. Like a minute.

Q. About a minute

A. Yeah – or – if that.

Q. Now when you walk up the hill with Nancy was Brycen with you then?

A. Yes, he was – yeah.

...

A. When he found out I called a cab he stayed with me the whole time.

...

Q. He stayed with you. So when you're walking up the hill with Nancy you remember Brycen being there with you?

A. Yeah.

Q. And when you turned around to go back to the cab, Brycen turned around and went back to the cab with you?

A. Yeah, and he got in the cab with me.  
(Emphasis added)

[28] The trial concluded on January 3, 2008 with the judge reserving his decision. On February 27, 2008 the judge delivered his oral reasons finding Mr. Clarke guilty of the offence. He accepted the evidence of Nancy Stanton that Mr. Clarke was a participant in the beating of Mr. Fownes. In detailed reasons the judge reviewed the evidence. He concluded that Ms. Stanton was not impaired by alcohol to the extent that it affected her recollection of events. He found her to be a "highly credible" witness who exhibited great courage in defending Mr. Fownes and in testifying in contradiction to her friends' evidence. He rejected Ms. Robinson's evidence that she was with Mr. Clarke at all times, waiting for a cab, noting that she did not volunteer the information on her direct evidence that she had walked part way up the hill with Nancy Stanton.

[29] The judge accepted that Mr. Clarke shared a cab home with Ms. Robinson that night, but rejected his evidence that he left before Mr. Fownes was assaulted. The judge did not believe Mr. Clarke's evidence that he last saw Nancy Stanton at the Simms' residence. His evidence on this issue was directly in conflict with that of Ms. Robinson, on cross-examination, who said she and Mr. Clarke had walked part way up the hill with Ms. Stanton.

[30] On May 1, 2008 Mr. Clarke made application to re-open the trial to introduce fresh evidence. Aldean Cromwell and Jermaine Stevenson were each awaiting trial on charges of robbery, assault and theft, arising from the beating of Mr. Fownes. Each said that Mr. Clarke left the Simms' residence before the assault and did not participate.

[31] Mr. Cromwell's proposed evidence was in the form of a cautioned statement to a police officer made on March 8, 2008. According to that statement, Mr.

Cromwell had come forward voluntarily on a matter of conscience. He could not allow his best friend, Mr. Clarke, to stand convicted of an offence he did not commit.

[32] In a lengthy and rambling statement Mr. Cromwell provided the following information: He was intoxicated on the day in question, having been drinking all day. He consumed a forty ounce bottle of Smirnoff vodka at 4 p.m., continued drinking and had also taken ecstasy. He was at Nicole Simms' that night recording music in the basement with Matthew Johnson and Jermaine Stevenson. Nancy Stanton brought Curtis Fownes, "this random white guy" who nobody knew, to Nicole's party "that was just black people". When someone asked her who the guy was she said he was "her cousin or whatever". When Mr. Cromwell pressed her about who the guy was she said he had bought her drinks at the bar that night and "he had all this money".

[33] He said that Curtis Fownes was "completely smashed" that night and was "flipping out", worried that the others at the party were targeting him. Mr. Cromwell invited Mr. Fownes outside to talk and to calm him down. Mr. Fownes hesitated but eventually joined him outside. Mr. Cromwell was sitting with Mr. Fownes talking to him and trying to calm him when, suddenly, Mr. Fownes started using the "nigger" word. Mr. Cromwell said:

So then he's [Mr. Fownes] like, whatever, Bla, bla, bla. He starts talking smack to me. So I'm like, Well, come on, man. Come up the street with me then, right?

[34] As the two were walking up the street a person unknown to Mr. Cromwell, but whom he had seen at the party joined them:

And then I see everybody coming out to a cab. And that's when I watched Brycen and Linnea, my cousin Linnea, ... I watched them two and I think there might have been somebody else, but I'm not sure ... jump into a cab and leave.

[35] As Mr. Cromwell, the stranger and Mr. Fownes continued walking up the street he looked back and saw Ms. Stanton and Jermaine Stevenson coming up behind them:

So then we're standing there or whatever, and I said, Well, what ... you said what you said to me down there. Say it now. Then he just was sitting there going off. And then I punched him. And then next thing you know, I was just hitting him. And the other guy that was with me gave him a couple of kicks. And then when Nancy came around the corner, that is when she stood over ... she stood over him like that, and pushed... had her arms out like that, saying, Stop, stop. And I was just yelling, you know what I mean, Call me nigger again, and whatever, bla bla bla. So then I turn around and walk away, and then went down to my cousin's and, you know what I mean, just kicked it for the rest of the night.

(Emphasis added)

[36] At that point in the statement, Mr. Cromwell provided further details about the encounter. He said that Mr. Stevenson, who “knew what was happening”, had tried to hold Nancy Stanton back from the group but she was able to reach them. She protected Mr. Fownes, taking the stance over him that she had described in her evidence.

[37] He said that Nancy Stanton was completely loaded that night. He expressed his surprise that she would provide a statement to the police and that he would be charged with an offence.

[38] Mr. Cromwell initially said that he went directly from the confrontation to his cousin's house but at another point in his statement said that he went back to Nicole Simms' where he saw Mr. Stevenson and then went on to his buddy Ben's.

[39] According to Mr. Cromwell, although Jermaine Stevenson had tried to hold Nancy Stanton back from the group, he did not join the altercation. Mr. Stevenson stayed away and behind Nancy Stanton as she walked over to the protect Mr. Fownes. Mr. Cromwell knew nothing of money being taken from Mr. Fownes. Mr. Cromwell described his conduct as “fighting” Mr. Fownes.

[40] One of the main reasons he did not come forward sooner with his version of events is that he thought Nancy Stanton's evidence at Mr. Clarke's trial would not be believed. He and Mr. Clarke, who was his best friend, have had a falling out over him not testifying at the trial. They “had some words over the computer and it wasn't good . . .”.

[41] Mr. Cromwell elaborated on why he was coming forward after the fact:

. . . she was with the guy, but I didn't think that she would come in here and then say that I did this and I did that, like she did, right. But she was completely loaded. Like, Nancy was drunk. For her to even come in here and give a statement and then me even get picked up on it. I mean, yes, I was there. And that's why I'm here now. The reason that I haven't done this before is because I was nervous. I was scared, I didn't... you know what I mean, I didn't take no money from this cat. And now I'm being charged with something that I might go away for. And I don't want that, man.

So that's pretty much why I'm in here now. Yeah, and that's what happened. I'm not happy. And then... and I hear Brycen's going away. He wasn't even there. And then I see Germaine, and he's getting away, and he was standing there. He is the... he tried to hold Nancy back. And here I am, going to be faced with all of this. So I'm just coming in now to do it myself, man, and... I've just grown up, man, and right now... at that point in time I was going through some hard stuff in my life man ...

(Emphasis added)

[42] He told the police officer that his lawyer had read him Nancy Stanton's statement to police:

And oh wait, I got to say this too, because when I was talking to my lawyer, he read what Nancy Stanton's statement was. She said that I said, Either choose a white boy or the niggers, or something like that. But I didn't even say that. I just want to clear that up too.

[43] At a later point in his statement Mr. Cromwell again described what was happening around the time that he maintains that he saw Mr. Clarke leave in a cab:

And as I started walking, I walked up the street and I looked back and [see] the other guy [who he did not know, but who participated in the beating of Mr. Fownes] was coming up the street. And then everybody was coming out the house that was leaving and got into the cab. And that's when I looked and I saw, I threw a pound, like that, to Brycen. And I kept walking, and then that was it.

(Emphasis added)

[44] On April 4, 2008 Jermaine Stevenson provided a brief written and signed statement:

I Jermaine Davis Stevenson am giving a Written Statement to state that Brycen Clarke was not present nor did Brycen Clarke have any knowledge of the Alleged Robbery, Assault and Thief (sic) on or about May 19th, 2007.

Brycen Clarke has been Wrongly Accused, Wrongfully Charged and Wrongfully Convicted. The evening of the Alleged Crime, I was at Club 98 where I observed Nancy Stanton Intoxicated. After Club 98, I went to a House Party at Ms. Nicole Simms's residence. Nancy Stanton was also at the house party and was with a guy. I stayed at the house party for approximately one hour. As I was leaving, I seen Brycen Clarke get into the Taxi and the Taxi drove off. I then proceeded to walk to my mother's house on King Street. Due to my pending Trial I can not (sic) provide any further details, other than to Repeat Again that Brycen Clark was not there.

[45] On July 21<sup>st</sup>, 2008 Mr. Stevenson swore an affidavit which contained the following information:

He consumed about five beer at Club 98 on the day in question, possibly one beer before but nothing after leaving the club.

Nancy Stanton was at the club and appeared intoxicated.

He went to the after-party at Nicole Simms' where he saw, among others, Brycen Clarke and Nancy Stanton. Nancy appeared to be intoxicated.

Sometime between 3:30 and 4:00 a.m. he left Nicole Simms' place and walked by himself to his mother's home in Digby.

As he was leaving he saw Brycen Clarke getting into a taxi cab and drive away. He had a brief conversation with Mr. Clarke.

While walking home he noticed Nancy Stanton near the adult school. Nancy Stanton told him that some people had gone around to the back of the school. He walked there with her and saw Curtis Fownes sitting on the ground, crying and bloodied. Aldean Cromwell and Anthony Burill were standing near him. He did not see anyone steal any money from Mr. Fownes.

Nancy Stanton took a position around Mr. Fownes to protect him. He did not strike or attempt to strike Mr. Fownes. Mr. Stevenson walked away.

[46] On the application to re-open the trial an affidavit of Christopher Manning, who represented Mr. Clarke at trial, was tendered. Mr Manning deposed:

Prior to trial Mr. Manning learned that Aldean Cromwell had told others that Mr. Clarke played no part in the assault.

He did not have knowledge of what evidence Mr. Cromwell would be expected to give, but issued a subpoena to him.

Aldean Cromwell did not appear at the commencement of Mr. Clarke's trial despite the subpoena.



The trial was adjourned to January 3, 2008 to provide an opportunity for Linnea Robinson and Mr. Cromwell to testify.

On that day Mr. Manning spoke with Mr. Cromwell in the presence of his lawyer.

[47] As to the possibility of calling Mr. Cromwell and Mr. Stevenson to testify at Mr. Clarke's trial, Mr. Manning says in his affidavit:

7. **THAT** on January 3, 2008 Aldean Cromwell attended at the Courthouse in Digby where I spoke with him in the presence of his lawyer, Darren McLeod. Mr. Cromwell was not forthcoming with information. It was my view that he was reluctant to testify. While I understood from previous information that Mr. Cromwell might testify that Brycen Clarke did not take part in the alleged assault, theft and robbery of Mr. Fownes, I was not able to obtain confirmation of that information from Mr. Cromwell on January 3<sup>rd</sup>, nor was I able to obtain additional details with respect to his observations of the incident. I did not call Aldean Cromwell as a witness at Brycen Clarke's trial.

...

11. **THAT** during my representation of Brycen Clarke in relation to the incident involving Curtis Fownes, I was never advised that Jermaine Stevenson possessed any evidence that may be favourable to Brycen Clarke, nor was I advised that Jermaine Stevenson may be prepared to testify at Brycen Clarke's trial.

[48] The proposed fresh evidence was submitted to the judge in written form. On the motion to re-open the trial the Crown did not ask to cross-examine Mr. Cromwell or Mr. Stevenson.

[49] In an unreported written decision dated January 8, 2008 the judge declined to re-open the case. He found that the proposed evidence was not reasonably capable of belief. He noted that the statements lacked important details and observations that would have been known by Mr. Cromwell and Mr. Stevenson. In

finding Mr. Cromwell's statement not reasonably capable of belief the judge noted the following:

Mr. Cromwell could have testified at Mr. Clarke's trial under the protection of s. 5(2) of the **Canada Evidence Act**, R.S.C. 1985, c. C-5 and would, as well, have had the benefit of s.13 of the **Canadian Charter of Rights and Freedoms**, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. He was interviewed by Mr. Manning in the presence of his own counsel who would have explained these safeguards to him. Inexplicably, he did not testify or disclose his possible evidence to defence counsel. There is no reason why he would not provide this important information at the appropriate time.

Mr. Cromwell presents the altercation as arising from a racial slur by a drunken Mr. Fownes which provoked him into physical action. To that extent the statement is self-serving in that it blames the victim.

The statement minimizes the extent of the beating.

Mr. Cromwell's statement that Ms. Stanton stayed at the party for about an hour is at odds with her sworn evidence that she left very quickly after arriving at the Simms' house.

The statement is not under oath.

Mr. Cromwell must have given Mr. Manning a different version of events when interviewed for the trial.

Mr. Cromwell would have known through the Crown disclosure that Nancy Stanton was going to implicate him in the crime. He admitted having hoped that her evidence would not be believed at Mr. Clarke's trial. This is now an attempt to impeach her evidence before his own trial.

[50] In evaluating Mr. Cromwell's evidence, the judge mistakenly said that Mr. Cromwell did not acknowledge Nancy Stanton's role in protecting Mr. Fownes. This was incorrect. In fact, Mr. Cromwell did say that Nancy Stanton had protected Mr. Fownes. Mr. Clarke submits that this was a material misapprehension, pivotal to the credibility assessment and warrants appellate interference.

[51] Mr. Clarke is critical and dismissive of the judge's reasons for finding the proposed evidence not reasonably capable of belief. It is Mr. Clarke's submission that the judge was so enamoured with Ms. Stanton's evidence and her courage in intervening to protect Mr. Fownes, that he failed to consider the proposed fresh

evidence in the context of all of the trial evidence but simply compared it to the facts he had already found and the credibility assessments he had made at trial. I would disagree.

[52] The judge understood the test he was to apply in evaluating the fresh evidence as is evident in his reasons. He said:

[39] This is not an exercise in a vacuum. Fresh evidence, to be admitted, must have the potential to affect the verdict. Its possible credibility (*reasonably capable of belief*) is crucial and must be assessed, not only on its own merits, but also in how it may affect the whole evidence presented at trial.

[53] I would add that the judge here had the considerable advantage of having heard the testimony at trial.

[54] At trial Mr. Clarke, Matthew Johnson and Linnea Robinson all testified that Mr. Clarke could not have participated in the beating because he left with Ms. Robinson in a cab. This was the centerpiece of the defence. However, there were material inconsistencies among their various versions:

Matthew Johnson testified that he and Mr. Clarke stood on the front porch of the Simms' house waiting for the cab (that Mr. Clarke had called) to arrive. When the cab came Mr. Johnson went into the house to alert Ms. Robinson, who exited the house and got directly into the cab with Mr. Clarke. Mr. Fownes, Ms. Stanton, Mr. Cromwell and Mr. Stevenson were still at the house when Mr. Clarke and Ms. Robinson left.

Brycen Clarke testified that he, Matthew Johnson and Ms.

Robinson were standing on the front step. Ms. Robinson was

saying she could not find Nancy Stanton. When the cab came Mr. Johnson “got Linnea” who came out of the house. Mr. Clarke told her to get into the cab. She started walking like she was going to find Nancy, but Mr. Clarke said “No, get into the cab” and she did. They did not see anyone as they drove away. He stayed at the party less than one half hour. He last saw Nancy Stanton and Mr. Fownes inside the Simms’ house before he left.

Linnea Robinson testified that she stayed at the party only fifteen minutes or so before she called her father who called her a cab. Mr. Clarke and Ms. Stanton each asked to share the cab. She spent all the time at the Simms’ house talking to Mr. Clarke as she waited for the cab. She did not mention Mr. Johnson. She saw Mr. Fownes in the house right before she went outside to wait for the cab and did not see him again. Nancy Stanton went outside and walked up the hill toward the high school while they were standing waiting for the taxi. Only on cross-examination did she say that she “might have” walked a little

bit up the hill with Nancy Stanton. Brycen was with her the whole time.

[55] As is obvious, these accounts differ materially one from the other. According to Mr. Johnson, Mr. Clarke and Ms. Robinson got right into the cab from the house while Mr. Fownes and Ms. Stanton were still at the party. Mr. Clarke, who testified after Mr. Johnson, says he got into the cab with Ms. Robinson as soon as she exited the house. He makes no mention of walking up the hill with Ms. Robinson and Ms. Stanton. Indeed, he says he last saw Nancy Stanton in the house before he left.

[56] Witnesses were excluded, therefore Ms. Robinson would not have heard Mr. Johnson's and Mr. Clarke's evidence before testifying.

[57] Ms. Robinson does not mention that Mr. Johnson was with her and Mr. Clarke as they waited for the cab. She said, on cross-examination, that she and Mr. Clarke walked part way up the hill with Nancy Stanton before the cab came. This is at odds with Mr. Clarke's account that he stayed outside the house awaiting the cab and that Nancy Stanton was still in the house when he left.

[58] Given the inconsistencies in the defence evidence at trial, it is not surprising that the judge did not accept the accounts of Mr. Clarke and his supporting witnesses.

[59] With the proposed fresh evidence, the judge was presented with two more versions of these events. Summarizing:

Mr. Cromwell said as he was walking up the hill with Mr.

Fownes a person he did not know joined them. Mr. Cromwell

happened to look back to see Ms. Robinson and Mr. Clarke and

maybe a third person jump into a cab. He said at a later point in

his statement that while walking up the hill he noticed “. . . everybody was coming out of the house that was leaving and got into the cab” and he “threw a pound” at Mr. Clarke.

Mr. Stevenson said that as he was leaving the party between 3:30 and 4:00 a.m. he saw Brycen Clarke getting into a cab. They had a brief conversation before Mr. Clarke left.

[60] The two new versions differ from each other and are inconsistent with the the trial evidence:

Mr. Cromwell, who admits involvement in the beating, denies that there was a robbery - a fact testified to by both Mr. Fownes and Ms. Stanton and not disputed at trial.

Mr. Stevenson says he walked to his mother’s house after witnessing the beating. However, Mr. Cromwell says he encountered Mr. Stevenson back at Nicole Simms’ house after the event.

Mr. Stevenson, who says he had a brief conversation with Mr. Clarke as he was leaving, does not mention the presence of Linnea Robinson.

Mr. Clarke makes no mention of a conversation with Mr. Stevenson as he was leaving.

Mr. Cromwell, who was up the hill with Mr. Fownes, says he threw Mr. Clarke “the pound” from up the hill as he was getting into the cab yet Mr. Clarke testified that Mr. Cromwell was still in the house with Nancy Stanton, Mr. Fownes and others when he left.

Mr. Stevenson does not say he attempted to hold Nancy Stanton back from the beating of Mr. Fownes, yet this was the evidence of both Mr. Cromwell and Ms. Stanton.

[61] At two points in his statement Mr. Cromwell refers to seeing Mr. Clarke and Ms. Robinson exit the Simms’ residence and get directly into a cab, yet at a later point, when describing the walk up the hill, he says:

Q. I’m just trying to think. I want to make sure we clarify as many points as I can. So you ... you walked up the street with this guy, Curtis, and this other unknown guy.



A. The other [unknown] guy wasn't with us. Like, he was coming up the street, though, as I was coming up the street.

Q. Walking behind you, okay. Where was Jermaine and Nancy at that time?

A. I . . . they must have been coming behind Linnea and them guys. Because I heard that Linnea . . . I heard Linnea said in court that Nancy gave her money to get the cab with her, but then she went to go look for the Curtis guy.

Q. Okay.

A. And then that's why we was up the street, and then she came up. And then that's when, like, them guys got into the cab and that's why Nancy was looking for the Curtis guy because they were ready to leave.

. . .

(Emphasis added)

[62] This would imply that Linnea Robinson and others were walking up the hill behind Mr. Cromwell.

[63] Not only does this passage further confuse the timing of Ms. Robinson's leaving by cab it confirms the trial judge's observation that Mr. Cromwell was aware of the testimony at the trial ("I heard Linnea said in Court . . .").

[64] On appeal Mr. Clarke would have us disregard the many inconsistencies among the various accounts of his leave-taking. No two stories are the same yet they all cleave to the bare assertion that Mr. Clarke left the party in a cab before the beating began. He does not acknowledge the fact that the details of the five accounts conflict in significant respects.

[65] Without question the judge erred when he said that Mr. Cromwell neglected to mention Nancy Stanton's role in defending Mr. Fownes. However, I am not persuaded that this mistake was pivotal to his rejection of Mr. Cromwell's proposed evidence. The judge rightly questioned the credibility of Mr. Cromwell's account given his failure to come forth with the information that his best friend did not participate in the beating, even when subpoenaed for trial when he would have enjoyed testimonial protection. Nor did Mr. Cromwell provide that information to

Mr. Clarke's counsel when interviewed on January 3, 2008. These facts markedly detract from his credibility. Mr. Cromwell's minimization of the extent of the beating and denial of the robbery are equally damaging. The inconsistencies in his proposed evidence when compared to that of the other witnesses at trial further diminishes the believability of his story.

[66] Nor am I persuaded that the judge erred when he opined that Mr. Cromwell must have given a different account of the events to Mr. Manning. His affidavit is remarkably vague about what Mr. Cromwell said at his interview on January 3, 2008 (see para. 47 above). It was reasonable to infer that whatever Mr. Cromwell said to Mr. Manning caused him to conclude that his evidence would not be helpful to Mr. Clarke.

[67] Mr. Clarke says the judge further misapprehended the fresh evidence when he said, in summarizing his reasons, that Mr. Cromwell described the altercation with Mr. Fownes as consensual. While Mr. Cromwell, himself, did not use the exact term consensual, I am satisfied that the judge's use of this descriptor was warranted. In his statement Mr. Cromwell said, for example:

Q. I mean, based on what you're telling me, it's more or less a consensual fight with two drunk guys.

A. Yeah, just drunk. Like, that's what I mean like it's ... it is my fault, yes, because I could have been a bigger man and not did nothing. But I was drunk, right. Not an excuse, but ...

Q. No, not at all, but ...

A. ... that's what happened.

Q. But I mean, unfortunately, alcohol makes guys do silly things. But I mean, if that's ... what you're telling me, here, okay, is true, I mean, and it's you and this guy that was talking some smack to you.

A. Uh-huh.

Q. And you guys went out behind a building. You knocked him down, threw a few punches on him and stuff, right. I mean, I'm just trying to understand why that was never told to us before.

A. Because I ... like, that's what I'm saying, is when ... when I got ...

Q. These are serious allegations.

A. Yeah, man, when I got picked up ... when I got picked up, like I said, I was scared, completely scared, because I did ... I did fight this guy. I did throw my hands on him, and now I'm being charged with, you know what I mean, they're looking at time.

This theme was apparent throughout the statement. Mr. Cromwell said the event arose from Mr. Fownes' racial slur; indeed he described himself and Mr. Fownes as "fighting", which clearly implies some participation by Mr. Fownes; Mr. Cromwell speaks of inviting Mr. Fownes to repeat his offending remark and to accompany him up the hill, inferentially to engage in a fight. I am not persuaded that the judge's use of the term consensual reflected a misapprehension of the substance of Mr. Cromwell's evidence. In his statement, he was intent in conveying the impression that Mr. Fownes was a participant in an altercation rather than the victim of a brutal assault and robbery.

[68] As I have already discussed, Mr. Cromwell's evidence is self-serving in that it minimizes the severity of the beating and blames the victim for provoking the attack. It is exculpatory in denying the robbery. The proposed evidence from both Mr. Cromwell and Mr. Stevenson was appropriately described by the judge as superficial, particularly that of Mr. Stevenson. Having reviewed the whole of the record, the reasons provided by the judge for rejecting the proposed fresh evidence as not reasonably capable of belief, do not cause me to conclude that he materially, misconstrued the evidence or erred in the test he applied. I am satisfied that he properly considered the proposed fresh evidence in the context of all of the evidence he had heard at trial.

[69] I am not persuaded that the judge failed to exercise his discretion judicially or reached an unreasonable result in concluding that the proposed fresh evidence was not reasonably capable of belief.

[70] I have reviewed the grounds of appeal assuming that the statement of Aldean Cromwell was indeed fresh evidence in a form sufficient to potentially reopen the trial, if reasonably capable of belief. However, I have serious concerns with the

form of the so-called fresh evidence. With respect, a cautioned statement to a police officer from a potential witness is not “evidence” capable of being put before the court on a retrial. Mr. Cromwell has committed himself to nothing under oath. Indeed, nowhere in his statement does he indicate an intent to testify at a new trial. His version of events should have been put before the trial court in an Affidavit or, at a minimum, he should have taken the stand on the motion to re-open the trial and affirmed that the contents of his statement is true. It is unfortunate that the trial Crown did not seek to cross-examine Mr. Cromwell. Whether there is any relevant evidence from Mr. Cromwell on a new trial will depend upon his availability and willingness to testify and to adhere to the version of events in his statement. As the Crown, neither at trial nor on appeal, has taken serious issue with the form of Mr. Cromwell’s “evidence” my reservations have not influenced my conclusion that the trial judge did not err in refusing to re-open the trial.

### **MISAPPREHENSION OF THE EVIDENCE**

[71] Mr. Clarke says that a miscarriage of justice has arisen because the judge misapprehended the evidence. As Cromwell, J.A., as he then was, wrote for this Court in **R. v. S.D.D.**, 2005 NSCA. 71:

[12] It follows, therefore, that to succeed on appeal, the appellant must show two things: first, that the trial judge, in fact, misapprehended the evidence in that she failed to consider evidence relevant to a material issue, was mistaken as to the substance of the evidence, or failed to give proper effect to evidence; and second, that the judge's misapprehension was substantial, material and played an essential part in her decision to convict.

[72] Matthew Johnson’s evidence, considered as a whole, was not helpful to the defence. It contradicts that of Linnea Robinson, as I have detailed above. Ms. Robinson acknowledged on cross-examination that she had walked part way up the hill with Nancy Stanton before the cab arrived. Mr. Johnson testified that he had gone into the house to get Ms. Robinson who got directly into the cab. He further testified that Nancy Stanton was still in the Simms’ house when Mr. Clarke and Ms. Robinson left in the cab. This could not be so in the face of Ms. Robinson’s admission that she walked part way up the hill with Ms. Stanton while awaiting the cab. In view of these contradictions, Mr. Clarke’s submission that the judge erred in failing to review Mr. Johnson’s “critical alibi evidence” rings hollow. The fact that the judge did not refer to it in any detail is of no consequence.

[73] The trial judge was aware that Nancy Stanton's sobriety was a key issue. He made clear findings in that regard, reviewing the evidence of her consumption of alcohol in detail and specifically referring to the fact that Matthew (Boo) Johnson, Mr. Clarke, Ms. Robinson and Ms. Barnaby all described Ms. Stanton as, variously, drunk, intoxicated, having slurred speech, unable to walk straight, loaded and giggling. The judge concluded that her actions in defending Mr. Fownes were not those of a person who was inebriated but showed a conscious decision and the formation of a plan to intervene. He said:

[30] These are not the actions of a person whose mental and physical abilities were impaired by alcohol. These acts speak much more loudly than the words used to describe her by the witnesses.

[31] I note Ms. Stanton was a somewhat reluctant witness; the Crown was asking her to testify against her own people, some she considered her friends; certainly her acquaintances, siblings of friends, members of this small, tightly knit community; yet she did so without hesitation and unshaken. She is a highly credible witness, who describes her role in this episode quite humbly. But the events show a remarkable deed by a person acting unselfishly, helping a stranger attacked by her acquaintances, because it was not "*right*".

[32] I conclude, from all the evidence, that the manner she testified on direct and on cross-examination, that her acts that night show great presence of mind, demonstrate physical and moral courage, decisiveness, determination, physical abilities and mental acuity.

[74] The trial judge was in error when he said that Mr. Clarke attempted to mislead the court on his state of sobriety. Mr. Clarke admitted on cross-examination that he had smoked a joint with Matthew Johnson. However, in his direct evidence Mr. Clarke did refer to having had nothing to drink that night and to being sober when he arrived home. He did not volunteer that he had smoked the joint. In view of the many conflicts between Mr. Clarke's evidence and that of his own witnesses on the key events, as I have reviewed above, I am not persuaded that the judge's error on this point was material and played a substantial role in his decision to convict.

[75] In summary on this ground of appeal, there was no miscarriage of justice arising from a material misapprehension of the evidence.

## THE APPLICATION OF **R. v. W.(D.)**

[76] Mr. Clarke says the judge erred in his approach to assessing the credibility of the witnesses. In **R. v. W.(D.)**, *supra*, at p. 758 Cory J. suggests the following jury instruction on the question of credibility:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[77] Mr. Clarke says the judge failed to properly apply the second step of the **W.(D.)** analysis. He did not consider whether the defence evidence, while not believed in material respects, created a reasonable doubt. Mr. Clarke submits that the judge believed Ms. Stanton's evidence and thereby marginalised the defence evidence without giving it due consideration (citing **R. v. Lake**, 2005 NSCA 162).

[78] As we said in **R. v. D.W.S.**, 2007 NSCA 16, [2007] N.S.J. No. 47 (Q.L.):

14 In **R. v. P.S.B.** (2004), 222 N.S.R. (2d) 26; [2004] N.S.J. No. 49 (Q.L.), Cromwell, J.A. writing for this Court, explained the significance of the **W.(D.)** instruction in this way:

[56] **W.(D.)** is concerned with how a trier of fact should apply the burden of proof in a criminal case where the accused testifies. In brief, the trier must remember that the issue is not whether he or she believes the accused, but whether the evidence as a whole convinces the trier of fact of the accused's guilt beyond a reasonable doubt. If the trier of fact believes the exculpatory evidence of the accused, an acquittal must follow. However, even if the trier does not believe that evidence, the trier must ask him or herself if it nonetheless gives rise to a reasonable doubt. Finally, if the trier does not believe the accused and is not left in doubt on the basis of that evidence, the trier must still address and resolve the most critical, in fact, the only question in every criminal case:

Does the evidence as a whole convince the trier of guilt beyond a reasonable doubt?

15 **W.(D.)** prohibits a trier of fact from treating the standard of proof as a simple credibility contest - in other words, discounting the evidence of the accused merely because it is inconsistent with that of the complainant, which evidence he prefers. This does not mean, however, that a witness's credibility is assessed in isolation from the rest of the evidence. In conducting that assessment it is unavoidable that the evidence of witnesses be compared. (**R. v. Hull**, [2006] O.J. No. 3177 (Q.L.) (C.A.)). In that process, the evidence of the accused may be disbelieved. That evidence may nevertheless create a reasonable doubt about the persuasiveness of the Crown's evidence, in this case, that of the complainant. In other words, the reasoning process is not complete with the rejection of the evidence of the accused.

16 Only where the absence of reasons for disbelieving the accused's evidence leads to an inference that the judge has misapplied the burden of proof is it reversible error. . . .

[79] To illustrate his point Mr. Clarke says that the judge gave no weight to the defence evidence of Ms. Stanton's intoxication as illustrated by the fact that he did not discuss each witness's evidence on this issue in detail. The defence evidence of Nancy Stanton's intoxication was not complex. The various defence witnesses opined that she was drunk. As I have already discussed at para. 73 above, the judge did focus on Ms. Stanton's sobriety, hence the reliability of her evidence, as a pivotal issue in the case. He mentioned by name the witnesses who had testified about her intoxication. He provided reasons why he did not accept that she was so impaired that her evidence of the assault was unreliable.

[80] I have already discussed the inconsistencies in the Johnson, Robinson and Clarke accounts of Mr. Clarke leaving the party. Mr. Clarke would ignore these contradictions. The judge set out his reasons for disbelieving both Ms. Robinson and Mr. Clarke. When those reasons are read in the context of the record as a whole, it is obvious why the defence evidence did not raise a reasonable doubt. I am not persuaded that the judge misapplied the burden of proof.

**DISPOSITION**

[81] I would dismiss the appeal.

Bateman, J.A.



**Reasons for Judgment (Oland, J.A. concurring in part):**

[82] In the early hours of May 13, 2007 Curtis Fownes was severely beaten and robbed near a high school not far from a party at Nicole Simm's place in Digby. The evidence at trial and the subsequent application before the trial judge is reviewed in detail in the decision of my colleague, Justice Bateman. I have had the benefit of reading her thoughtful reasons and I agree with her disposition of the grounds of appeal pertaining to the conviction for robbery. However, with great respect, I am unable to accept that the trial judge did not err in dismissing Brycen Clarke's application to re-open the trial and admit fresh evidence.

[83] Mr. Clarke, a 19 year old black man, was convicted of robbery that apparently evolved out of an assault on Mr. Fownes, a white man, by one or more of a group of young black men. Mr. Fownes had moved to Digby for the first time the day of the assault. There is no dispute that Mr. Clarke had absolutely no prior contact with the victim. He had no *animus* towards him nor any motive to be involved in any attack or robbery. The only evidence against him was the testimony of one witness, Nancy Stanton who, in essence, claimed that she ran around to the darkened side of a school building to see a battered Mr. Fownes on the ground, a victim of an apparent beating by one or more men. She could not describe what Mr. Clarke was wearing as she said she was not paying attention to him. She could not describe which of the men used a flashlight to examine the contents of the victim's wallet.

[84] Mr. Clarke testified and denied any involvement. Others testified in support of his assertion that he had left the area prior to any assault on the victim.

[85] At trial, the testimony of some witnesses showed internal inconsistencies. There was also evidence that was inconsistent with the evidence of other witnesses. Several of the witnesses had been drinking that night. For example, Ms. Stanton drank before going to Club 98 and while there. Others had consumed alcohol at that bar, at Ms. Simms', or elsewhere. Some had smoked marijuana. With the exception of Mr. Fownes, the other witnesses knew each other. They were friends or were related or had seen each other at events around town.

[86] It fell to the trial judge to determine whether he was satisfied beyond a reasonable doubt that Brycen Clarke was guilty of robbery. In deciding that he

was, he relied on the evidence of Ms. Stanton. She was the only person who testified that he was there and had been involved. The judge rejected Mr. Clarke's denial of involvement and the evidence of several others who testified that Mr. Clarke had left before the confrontation.

[87] After Mr. Clarke's conviction on February 27, 2008, Aldean Cromwell and Jermaine Stevenson came forward and stated that he had not been involved in the assault and robbery. Ms. Stanton had identified them as two of Mr. Fownes' assailants. Both had been charged for the same incident and were to be tried separately from Mr. Clarke and each other.

[88] On March 8, 2008, Aldean Cromwell attended at the RCMP detachment in Digby and gave a lengthy, cautioned statement which was videotaped. In it, he stated that after Mr. Fownes joined him outside Ms. Simm's house, the two started walking up the street. Mr. Cromwell's statement continued:

So then we walk up the street, and as we start walking, I turn around and the guy, like I said that I just met, he starts coming up the street. And then I see everybody coming out to a cab. And that's when I watched Brycen and Linneah (sp?), my cousin Linneah ... I watched them two and I think there might have been somebody else, but I'm not sure ... jump into a cab and leave.

And then we was ... we walk up the street and then I'm like, So what now, whatever, bla bla bla. And the other guy that I had just met that night, he was standing there with me too. Then we look ... or I look back, and then I see Nancy Stanton and Germaine ... Germaine Stevenson (sp), another one who was accused of this with me, walking up the street.

So then we're standing there or whatever, and I said, Well, what ... you said what you said to me down there. Say it now. Then he just was sitting there going off. And then I punched him. And then next thing you know, I was just hitting him. And the other guy that was with me give him a couple of kicks. And then when Nancy came around the corner, that's when she stood over ... she stood over him like that, and pushed ... had her arms out like that, saying, Stop, stop. And I was just yelling, you know what I mean, Call me nigger again, and whatever, bla bla bla. So then I turn around and walk away ...

[89] Elsewhere in his statement, Mr. Cromwell said:

... I saw Nancy and Germaine coming up ... he's holding her back ... I just threw some punches, like I said, and the other guy kicked him, whatever. And I was just punching him. And then Nancy came like that, pushed us both apart. ...

And also:

. . . I called him up the street because he was talking shit to me over here, and calling me nigger or whatever, so I said, Let's go handle it. And then after that, Nancy came . . . Nancy ended up coming around the corner. I mean, she came around the corner. Like I said, she put her hands like this, stood over top of him, pushed us out like that, and then I just told her, Tell your buddy, "Don't say nigger," then.

[90] The video interview of Mr. Cromwell included the following exchange, in which he referred to a diagram he had drawn of the scene:

Q. Was Brycen Clarke there when this assault ... alleged assault-robbery took place?

A. No. Like I said, when I came out . . . when I came out, I was probably right up to about here. And I looked back and Brycen got in the cab. Like, I'm telling you, like . . . and me being here, when I was here, Brycen was gone. When I came back here, from here, Brycen was gone.

[91] Less than a month after Mr. Cromwell's statement to the RCMP, on April 4, 2008 Jermaine Stevenson provided a short statement. In its entirety, it is reproduced at ¶ 44 of my colleague's decision. While the statement is very thin on details, he did stress that Mr. Clarke was not present at the alleged robbery and assault. Mr. Stevenson stated that as he was leaving the house party, he saw Mr. Clarke get into a taxi which drove off.

[92] On July 21, 2008 Mr. Stevenson swore a more fulsome affidavit. Among other things, he deposed that as he left Ms. Simm's place, he saw Ms. Stanton by the school and walked with her around the back of the school. There he saw a bloodied Mr. Fownes on the ground and Mr. Cromwell and Anthony Burrill standing near him. Mr. Stevenson described Ms. Stanton taking a protective stance

to defend Mr. Fownes. He did not strike or attempt to strike Mr. Fownes and walked away.

[93] Brycen Clarke applied to re-open the trial and to admit fresh evidence consisting of this material from Mr. Cromwell and Mr. Stevenson and an affidavit from Christopher Manning, his trial counsel. His application was heard by the trial judge. The Crown chose not to cross-examine any of Mr. Cromwell, Mr. Stevenson or Mr. Manning. Nor did it call any evidence in response to their statements and affidavits.

[94] In his January 8, 2009 decision, the judge determined that the proposed fresh evidence was not reasonably capable of belief and dismissed the application to re-open the trial.

[95] At ¶ 6 of her decision, my colleague explained the appropriate standard of review. The judge must be correct in the test he applies on an application to re-open a trial and, assuming he did so, a deferential standard of review is applied to the judge's exercise of his/her discretion on such an application. For convenience, I quote again from **R. v. Paul**, *supra*:

13 Absent an error in principle or a misapprehension of material evidence, this court can interfere with a trial ruling based on the exercise of judicial discretion only if that exercise is unreasonable . . .

[96] I agree that the judge understood the legal test to be applied in evaluating fresh evidence and that he had the considerable advantage of also having heard the testimony at trial. However, in my respectful view, he misapprehended material proposed fresh evidence and he erred in principle.

[97] As indicated earlier, at trial, the judge had found Nancy Stanton to be a credible witness. In convicting Mr. Clarke, he accepted and relied on her testimony that Mr. Clarke was involved in the robbery. For the reasons set out in his decision, he rejected the evidence of Mr. Clarke, Linnea Robinson and Matthew Johnson that Mr. Clarke had left in a taxi before then.

[98] In my view, the judge's reasons disclose misapprehensions of the proposed fresh evidence serious enough to have affected his disposition of the application to re-open the trial.

[99] The judge erred when he summarized Mr. Cromwell's statement thus:

[8] In summary, A.C. told Corporal Whelan that this was a consensual fight between two impaired men, one white, one black, provoked by the former's racist epithet. Any injuries to Curtis Fownes would have been caused by the unknown black man. There was no robbery. Only he and the unknown black man were involved.

Mr. Cromwell did not describe a consensual fight. Nor did he attribute Mr. Fownes' injuries only to kicks from the "unknown black man". Mr. Cromwell admitted that he punched and hit Mr. Fownes. There was no suggestion in his statement that Mr. Fownes struck or struck back at or tried to strike him. In the passage quoted in ¶67 of my colleague's decision, Mr. Cromwell did not use the word "fighting" at all or in relation to his and Mr. Fownes' actions. His emphasis is on the fact that, at the time, he was drunk. The judge's characterization of the confrontation, accordingly to Mr. Cromwell, as a "consensual fight" is not supported by the evidence.

[100] His decision reads in part:

[31] A.C., according to his police statement, was aware of the evidence presented and the reasons for the decision. His statement, aside from placing Mr. Clarke away from the scene, attempts to address some of the findings of fact, attributes the racial slur now to the victim, and away from himself, would postpone by some half-hour (or one hour) the time of departure; would claim for himself, alone, the original confrontation, the provocation and his physical reaction to the victim, is silent as to the scene of the confrontation and the role Nancy Stanton played in protecting Curtis Fownes, all the while professing not to remember very much (because of the amount of alcohol and drug in his system); while attributing the more serious acts to a stranger (we know now his name, from J.S.).

[32] Such statement can be described as self-serving, blaming the victim, Curtis Fownes, for his injuries, excusing his own actions, and ignoring the facts in issue at trial and to which he would have been an eye witness. That Mr. Clarke took a taxi is not an issue, only its timing, before or after the crucial events.

[33] It is at odds with the evidence of Nancy Stanton who, testifying under oath, said she decided very quickly, and without having any drink at the house, to leave a few minutes after arriving at Ms. Simms' (not nearly one hour after, as

A.C. states) because of A.C.'s racial comment which made her very uncomfortable. A.C., J.S. and Ms. Stanton are African-Canadian. Ms. Stanton has no stake in the outcome of this trial. She was a volunteer. A.C. and J.S. are accused.

[101] The judge's statement that Mr. Cromwell made no mention of the scene of the confrontation nor of Ms. Stanton's actions in protecting Mr. Fownes is simply wrong. His statement and his diagram described where and when it took place, how it unfolded, and who else was there.

[102] Furthermore, and most significantly, Mr. Cromwell was not silent as to the role Ms. Stanton played. His statement said that Nancy Stanton "came around the corner, that's when she stood over him like that, and pushed ... had her arms out like that, saying, stop, stop ." It described her and her actions not once, but several times. Nevertheless, the judge emphasized its silence in that regard as a factor for finding the proffered statement as not reasonably capable of belief. This is a critical misapprehension of Mr. Cromwell's statement.

[103] The trial judge summarized:

[40] In the case at bar, I must conclude A.C.'s statement and J.S.'s affidavits are insufficient and not *reasonably capable of belief* because:

they are untimely, coming to light after the trial and decision, so that the authors, both facing the same charges, may tailor their evidence to that already presented;

they circumvent an order for exclusion of witnesses during the trial;

they are superficial and ignore some crucial pieces of evidence presented at trial;

they are self-serving;

in the case of A.C., his silence, or different statement -- the evidence is silent on this point -- at the time of the trial is both unreasonable and highly suspicious;

in the case of J.S., it took two affidavits, several months apart, to address some of the relevant issues;

in ignoring the presence of Ms. Stanton at the scene of the confrontation, neither addresses the crucial facts, which occasioned these charges, and are thus irrelevant;

they repeat evidence which was rejected at trial as not credible.  
(Emphasis added)

[104] In the emphasized portion, the judge states that not only Mr. Cromwell, but also Mr. Stevenson failed to mention the presence of Ms. Stanton. But Mr. Stevenson had also put her at the scene and had also described her stance over Mr. Fownes: "...Nancy Stanton approached Curtis Fownes and took a position around him to protect him." Again, the trial judge was simply wrong.

[105] Of particular concern is the judge's dismissal of the proffered evidence of Mr. Cromwell and Mr. Stevenson, because of his mistaken belief that they did not refer to Ms. Stanton, as "thus irrelevant." This emphatic conclusion is not made at the end of his listing of several reasons for determining that their proposed evidence was not reasonably capable of belief. Rather, it immediately follows and is contained in his observation that her presence was ignored. This placement is telling and lends even more weight that his misapprehension of the evidence of Mr. Cromwell and of Mr. Stevenson in this regard had a significant impact on his decision to dismiss the application.

[106] In the first of his itemized list of reasons why the fresh evidence was not reasonably capable of belief, the judge suggested that since their statements and affidavit were given after the trial, Messrs. Cromwell and Stevenson could make their evidence correspond to the evidence which had unfolded at trial. This fails to recognize that as persons charged with robbery, assault and theft arising from this same incident involving Mr. Fownes, these men would have been entitled to Crown disclosure of the evidence against them, including that of Ms. Stanton. They had knowledge from sources other than the trial. Moreover, the judge's third reason, that their accounts ignore some crucial pieces of evidence, conflicts with his first reason. If they knew the exact testimony given in the courtroom, there would likely be no gaps or omissions in their material given after the evidence at trial.

[107] I also observe that the trial judge in his reasons stated:

[34] Of note, A.C. provides a bare statement, not sworn, to reopen the trial. At most, given the fact he said different things to Mr. Clarke's counsel, at the relevant time (before the conclusion of the trial), whatever he said would likely be used to at least show he made an inconsistent statement, at a most crucial time in the trial of Mr. Clarke, thus affecting adversely his credibility (such statement is not privileged).

However, there was no evidence that Mr. Cromwell had said “different things”. Mr. Manning’s affidavit said only that, prior to Mr. Clarke’s trial, Mr. Cromwell was “... not forthcoming with information. It was my view he was reluctant to testify.” Mr. Clarke’s trial counsel did not depose that Mr. Cromwell had given him inconsistent evidence. The Crown chose not to cross-examine Messrs. Manning and Cromwell.

[108] This is not to say that the trial judge could not be suspicious as to why, prior to Mr. Clarke’s trial, Mr. Cromwell was not more forthcoming, particularly when he could have testified with full protection against the use of such testimony. Counterbalanced against this is the fact that Mr. Cromwell was prepared to, and did, on learning of what he called a miscarriage of justice, voluntarily submit to a recorded interrogation by the police. In addition, he lost the protection against the use of his evidence, wherein he admitted to being at the scene and to assaulting Mr. Fownes, at his own trial.

[109] According to the judge, whether the proffered fresh evidence should be admitted depended upon two of the criteria in *R. v. Palmer*, [1980] 1 S.C.R. 759, namely whether it was reasonably capable of belief and whether it could reasonably be expected to affect the result. His summary, explaining why it was not reasonably capable of belief, ended with:

[Mr. Cromwell’s statement and Mr. Stevenson’s affidavits] repeat evidence which was rejected at trial as not credible.

[110] The judge’s rejection of that evidence on this basis shows that, in determining the application to re-open the trial, the judge started with the proposition that the credibility findings he had already made at trial were correct and immutable. Anything that might conflict with them would not be accepted. As the appellant put it, the judge effectively foreclosed any consideration of evidence that was inconsistent with his guilt. This cannot be the correct approach where the



judge is obliged to determine whether the proposed evidence is credible, in the sense of whether it was reasonably capable of belief. In my opinion, the judge therefore erred in principle.

[111] I turn then to his determination that the proposed evidence could not be reasonably expected to affect the result. The judge concluded:

[41] Such evidence would not affect the verdict, as it remains silent about the violent encounter, its participants, the presence of the main witness, the injuries, the bloody victim, and the defence of the victim, all visible to any eye witness, which A.C. and J.S. profess to have been. Applying the words of Roscoe, J.A. in **R. v. Weagle**, 2008 NSCA 122, at para. [19]: *in my view the fresh evidence could not reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.*

[112] As already shown from the extracts and summaries of Mr. Cromwell's and Mr. Stevenson's proposed evidence, they were not silent as to any of these listed elements. There may be omissions and inconsistencies, but the material addressed the assault, named participants, recognized the presence of Ms. Stanton, and described the injured Mr. Fownes and his defence by Ms. Stanton. Again, the judge misapprehended material evidence.

[113] In deciding an application to re-open the trial and to admit fresh evidence, a judge has to consider all the evidence, both that which he or she had heard at trial and that proffered as fresh evidence. However, here the judge failed to assess the fresh evidence with the evidence presented at trial. His focus throughout was on the testimony of the "main witness", Nancy Stanton, whom he had already found credible at trial. He compared the proposed evidence against her testimony on which he relied to convict Mr. Clarke. Nowhere in his decision on the application to re-open the trial and to admit the proposed evidence of two persons who admitted being there and who said or deposed that Mr. Clarke was not, did the judge refer to the evidence at trial by three other persons that could be consistent with Mr. Clarke's innocence.

[114] For completeness, I quickly summarize the evidence upon which the defence relied at trial. Mr. Clarke said that he and Linnea Robinson left the house party in a taxi and that, when he was leaving, he saw Ms. Stanton laughing, joking and drinking inside Ms. Simms' house. He denied having had any contact whatsoever

with Mr. Fownes, going up to the school or being involved in the assault and robbery.

[115] According to Linnea Robinson's evidence, after ten or fifteen minutes at Ms. Simms', she called a cab. Ms. Stanton and Mr. Clarke were going to take it with her. On direct, her evidence was Mr. Clarke was with her the whole time while she stayed around the house to wait for the cab. On cross-examination, while Ms. Robinson stated that she walked part of the way up with Ms. Stanton, she also testified that Mr. Clarke was with her and that when she turned back, he went with her and got into the cab.

[116] According to Matthew Johnson, he waited for the cab with Mr. Clarke. He watched her and Mr. Clarke leave in the cab and then went back downstairs where "everyone", which he said included Ms. Stanton, was still partying.

[117] Furthermore, the trial judge was required to assess the potential effect of the fresh evidence as if it were believed. Both Mr. Cromwell and Mr. Stevenson testified that they were present at the assault on Mr. Fownes. Mr. Cromwell admitted that he struck Mr. Fownes and participated in the assault. Both he and Mr. Stevenson described Ms. Stanton protecting Mr. Fownes, just as she had testified. Both insisted that Mr. Clarke was not there and was not involved in the assault. If this proposed fresh evidence were believed, then it clearly could affect the verdict. The judge's conclusion that it would not is insupportable.

[118] In determining that the judge erred, I am not suggesting that Mr. Cromwell and Mr. Stevenson are credible or that every word in their statement and affidavit is true. Nor am I suggesting that Ms. Stanton is not credible. This is not the role of this court on this appeal of the dismissal of the application. What I am emphasizing is that the proposed evidence of Messrs. Cromwell and Stevenson as it pertains to Mr. Clarke's alleged involvement in the assault of Mr. Fownes is consistent with the evidence of Mr. Clarke, Ms. Robinson and Mr. Johnson.

[119] At ¶70 of her decision, my colleague expressed a concern regarding the form of some of the proffered fresh evidence, namely, the statement by Mr. Cromwell. The Crown did not object to that form before the trial judge nor on appeal. Mr. Cromwell is a competent, compellable witness. Moreover, his statement was

cautioned and videotaped and may be available on a re-opened trial in that form should events require.

[120] In dismissing the application to re-open the trial and admit fresh evidence, the trial judge misapprehended the evidence and erred in principle. I would allow the appeal and order a new trial.

Oland, J.A.

Concurring:

Beveridge, J.A.