

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: The Honourable Justice Oland
The Honourable Justice Beveridge
The Honourable Justice Bateman (dissenting in part)

Appeal Heard: November 16, 2009

Subject: Conviction Appeal - Credibility - Misapprehension of the Evidence -
Application to Re-Open a Trial after Verdict

Summary: The appellant appeals his conviction of robbery and the trial judge's subsequent dismissal of his application to re-open his trial for the admission of proposed fresh evidence. At trial, the judge relied on the evidence of a witness who had acted to protect the victim when, in the early morning hours, he was assaulted and robbed by a group of men. She identified the appellant as one of that group. The appellant testified that he had left the area before the confrontation. While his evidence was supported by that of several others, their testimony included inconsistencies and internal contradictions. The proposed fresh evidence upon which the appellant sought a re-opening of his trial was a cautioned and videotaped statement by one man, and a statement and affidavit by another man, that the appellant had not been at the scene. The witness who had identified the appellant had also identified these two men as part of the group and they had also been charged with criminal offences. Neither had testified at the appellant's trial.

Issues: Whether the trial judge erred: (a) in his application of the test in **R. v. W.(D.)**, [1991] 1 S.C.R. 742; (b) by misapprehending certain evidence which played an essential part in his reasoning in finding the appellant guilty; (c) in dismissing his application to re-open the trial and admit fresh evidence.

Held: Appeal allowed and new trial ordered.

The judge did not err in his approach to assessing the credibility of the witnesses at trial in accordance with the test in **R. v. W.(D.)**. Nor, on a consideration of the evidence of the witnesses, had the judge misapprehended the evidence such that a miscarriage of justice had arisen when the appellant was convicted of robbery.

Oland, J.A. (Beveridge, J.A. concurring) - The trial judge understood the legal test to be applied in evaluating proffered fresh evidence. However, in dismissing the application to re-open the trial and admit fresh evidence, his reasons disclose misapprehension of the proposed fresh evidence serious enough to have affected his disposition of the application. Moreover, in his application of the criteria in **R. v. Palmer**, [1980] 1 S.C.R. 579, he erred in principle in determining whether the fresh evidence was reasonably capable of belief and whether it could reasonably be expected to affect the result.

(Bateman, J.A. dissenting) when the trial judge's reasons on the motion to re-open are considered in the context of the proposed fresh evidence and the evidence at trial, it is clear that the judge did not fail to exercise his discretion judicially or reached an unreasonable result in concluding that the proposed fresh evidence was not reasonably capable of belief. Not only was the defence evidence at trial full of inconsistencies, the proposed fresh evidence was internally inconsistent and presented further different versions of events.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 43 pages.