C.A.C. No. 126474

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Skinner, 1997 NSCA 208

Chipman, Bateman and Flinn, JJ.A.

BETWEEN:

STACEY SKINNER	)	Warren K. Zimmer
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Kenneth W.F. Fiske, Q.C.
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	December 11, 1996
	)	
	)	Judgment Delivered:
	)	January 15, 1997
	)	
	)	
	)	
	)	

THE COURT: Appeal from conviction for aggravated assault on Darren Watts dismissed per reasons for judgment of Flinn, J.A., Chipman, J.A. concurring; Bateman, J.A. dissenting on the ground that non-disclosure impaired the appellant's right to make full answer and defence. Appeal from sentence imposed for aggravated assault on Darren Watts dismissed per reasons for judgment of Flinn, J.A., Chipman, J.A. concurring. Appeal from conviction for aggravated assault on John Charman dismissed; appeal from sentence imposed for aggravated assault on John Charman allowed and sentence reduced per reasons for judgment of Flinn, J.A.; Chipman and Bateman, JJ.A. concurring;

FLINN, J.A.:

Following a trial in the Supreme Court of Nova Scotia, before a judge without a jury, Stacey Skinner, along with five others, was convicted of the

aggravated assault of Darren Watts. He was also convicted of the aggravated assault of John Charman. The trial judge sentenced Skinner to eight years incarceration for the aggravated assault of Darren Watts; and a consecutive period of incarceration of two years for the aggravated assault of John Charman.

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

Skinner appeals both his conviction and sentence.

His ground of appeal against conviction is as follows:

> "That the Crown Attorneys who conducted the proceedings failed to make full and timely disclosure to the Defence of certain relevant information, namely, the existence of and copies of witness statements given to the Halifax Police Department by Terris Daye, Terrance Tynes, Travia Carvery, Edmond (T.J.) Levier."

His grounds of appeal against sentence are as follows:

> "(i) That the sentences imposed by the Trial Judge on both counts of the Indictment are manifestly excessive, having regard to the circumstances of the offence and the circumstances of the offender;
>
> (ii) That the sentences imposed by the Trial Judge on both counts over-emphasize the principle of general deterrence; and
>
> (iii) That the Trial Judge erred in imposing consecutive sentences."

At the commencement of the hearing of this appeal, counsel for the

appellant made two concessions:

1) he acknowledged that he had no sustainable ground of appeal against the conviction for the aggravated assault of John Charman. The appellant had acknowledged, in a cautioned statement which he gave to the police, and which was admitted in evidence at the trial, that he "hit" John Charman on the evening in question. The trial judge found that there was no evidence to support a defence of self defence. Counsel for the appellant, therefore, albeit informally, abandoned the appeal against conviction for the assault on John Charman. However, he does not abandon his appeal against the sentence imposed on him with respect to that Charman assault; and

2) in the grounds of appeal against conviction, the appellant submits that the Crown failed to make full and timely disclosure of four witness statements; namely, statements given to the Halifax Police Department by Terris Daye, Terrance Tynes, Travia Carvery and Edmond (T.J.) Levia. Counsel for the appellant acknowledged that the statements of Tynes, Carvery and Levia are not relevant, and that the failure to disclose those statements could not possibly have affected the result of the trial. Therefore, for the purpose of this appeal, the only witness statement that is relevant to the ground of appeal against conviction is the statement of Terris Daye.

Ground of Appeal against Conviction

Non-Disclosure

What is meant by "non-disclosure", in this appeal, is that the Crown did not deliver a copy of the Terris Daye statement to counsel for the appellant, until a demand was made for it, by other counsel, after the appellant was convicted and sentenced. It is conceded by the Crown that the Crown was clearly under an obligation to deliver a copy of the statement to counsel for the appellant, prior to the trial, and that it did not do so. The Crown's position is that full disclosure was not made because of inadvertence, and counsel for the appellant does not take issue with that position. Because defence counsel were provided with police occurrence reports, during the course of the trial, which occurrence reports disclosed the existence of the Terris Daye statement, the Crown describes its failure as "late disclosure of the existence of the Terris Daye statement". However it is described, simply because the Crown did not deliver a copy of the statement of Terris Daye to trial counsel for the appellant prior to the trial does not mean that the appellant is automatically entitled to a new trial.

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

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

In order to consider the "non-disclosure" issue in an appropriate context,

the panel hearing this appeal agreed to receive certain material as fresh evidence. The detailed reasons for agreeing to accept this material are set out in the decision of Chipman J.A. in **Dixon**, and I will not repeat them here.

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

The affidavit of trial counsel for the appellant deposed to her efforts to obtain full disclosure from the Crown prior to trial, and the fact that a copy of the statement of Terris Daye was not delivered to her prior to the trial.

At the hearing of this appeal, counsel for the appellant was invited to file a further supplementary affidavit of the appellant's trial counsel to deal with concerns which members of the panel had expressed during the hearing of the appeal.

Trial counsel for the appellant was admitted to the Bar in June of 1994; however, she did not commence to practice law until October of 1994. The appellant's trial commenced on February 5th, 1996. She deposes that the appellant's trial was her second criminal trial in the Supreme Court.

In her supplementary affidavit, on which the Crown did not request that she be cross-examined, trial counsel for the appellant deposed as follows:

> 4. **THAT** further to paragraph 8 of my Affidavit sworn the 13th day of November, 1996, on file herein, I wish to confirm that I was not aware of the existence of the statements of Travia Carvery, Terris Daye, Terrence Tynes, and Edmond (T.J.) Levia until such time as I received them, unsolicited, in the mail on or about April 17th, 1996, from Mr. Stanley MacDonald;
>
> 5. **THAT** during the course of Mr. Skinner's trial, and at a time before Danny Clayton was called as a witness, I received copies of a number of police reports including the report of Cst. Alex Carmichael which has been attached as Exhibit "G" to the Affidavit of Mr. Stan MacDonald, sworn the 9th day of May, 1996;
>
> 6. **THAT** when I read the report of Cst. Alex Carmichael, it was my belief that the statement of Terris Daye was contained within that report, that is, that there was no other statement of Terris Daye other than what was contained in the said report;
>
> 7. **THAT**, as a result of my belief aforesaid, there was no reason for me to approach the Crown Attorney, Mr. Botterill, to seek the additional statement of Terris Daye, in light of my belief that I was already in possession of his statement to the police;
>
> 8. **THAT** there was no tactical decision on my part not to pursue further information, as it was my belief that I had, at that time, the statement of Terris Daye.
>
> 9. **THAT** following the disclosure of Cst. Carmichael's report, I did not meet with any other Defence counsel to discuss the contents of that or any other report;
>
> 10. **THAT** if any conversations occurred among the other Defence lawyers concerning that report or other of the police reports, I was not aware of those conversations and certainly

was not a party to them;

11. **THAT** I understand from Warren K. Zimmer that he has read the Affidavit of Stanley MacDonald, filed with This Honourable Court, and dated December 27, 1996, and in that Affidavit, at paragraph 4, Mr. MacDonald states:

'On the evening of April 2, 1996, a meeting attended by Mr. Scaravelli, Mr. Kevin Coady, Mr. Peter Katsihtis, Mr. John O'Neill, and myself was held at Mr .Coady's office for the purpose of discussing appeal issues.'

12. **THAT** I did not attend the aforesaid meeting on April 2, 1996. I was no longer representing Mr. Skinner at that point;

13. **THAT** on or about April 11, 1996, I wrote to Mr. Warren K. Zimmer and advised him that I had spoken with Stacey Skinner's mother and had learned that Mr. Zimmer had been retained to represent Mr. Skinner on his appeal, and advised him that my involvement in the matter had been completed. A copy of that letter is attached hereto and marked Exhibit "A" to this my Affidavit;

14. **THAT**, as I indicated in paragraph 8 of my Affidavit dated November 13, 1996, I subsequently received the statement of Terris Daye, along with others, from Mr. Stanley MacDonald. The receipt of these statements came as a surprise to me as I was not aware of their existence and had not asked for them to be sent to me since I was no longer representing Mr .Skinner;

15. **THAT** during the course of my preparation and the conduct of Mr. Skinner's trial, there was nothing that came to my attention that caused me to believe that Terris Daye had provided a statement to Cst. Alex Carmichael of the Halifax Police. As I stated earlier, it was my belief that the report which was disclosed to me contained, in total, the statement of Terris Daye;

16. **THAT** the fact that Terris Daye's name appeared in the chart, cross-reference sheet, and Mr. Skinner's Undertaking did not lead me to

> believe that Terris Daye had provided a statement to the Halifax Police as those documents did not reference any such statement;
>
> 17. **THAT** during my cross-examination of Danny Clayton, I asked him questions concerning Terris Daye and others, however, their names had been mentioned earlier in the trial and my cross-examination was conducted without any knowledge or belief that Mr. Daye had provided a statement to the Halifax Police;
>
> 18. **THAT** during my preparation for Mr. Skinner's trial, I attended the Crown Attorney's office on three separate occasions in an effort to obtain full disclosure of all information relevant to Mr. Skinner's defence. At no time did I receive any information that caused me to believe that Terris Daye had given a statement to the Halifax Police. It was not until I received the police reports that I realized Terris Daye had given a statement, however, upon reading that report, it was my belief that it contained the content of his statement and there was nothing further to pursue by way of disclosure."

Due Diligence

In the reasons for judgment of the majority, in the other appeals heard by this panel, and arising out of this one trial, various issues were dealt with (which I will not reiterate here) which were of sufficient concern to the majority, that a finding of lack of due diligence was made with respect to the conduct of trial counsel. That conduct was the failure - after being aware that Terris Daye had given a statement to the police (which had not been produced by the Crown) to demand production of the statement, or to bring the matter to the attention of the trial judge so that it could be dealt with at that level.

In **Robart**, after referring to the cases of **R. v. Stinchcombe** (1992), 68

C.C.C. (3d) 1 (S.C.C.);**R. v. Bramwell** (1996), 106 C.C.C. (3d) 365 (B.C.C.A.)and also **R. v. McAnespie** (1993), 86 C.C.C. (3d) 191 (S.C.C.), I made such a finding with respect to trial counsel for Robart. Further, I concurred in similar findings made by Chipman, J.A. in **Dixon**, **McQuaid** and **Smith**.

However, I am not prepared to make that finding, of lack of due diligence, with respect to this appellant's trial counsel for the following reasons:

1. Of particular significance to me, in the other appeals, was the failure of any of the trial counsel to answer the following question, which was put to them in various forms: If the Terris Daye statement seemed so insignificant to them at the time of the trial, that they did not demand its production, or take the matter up with the trial judge, what prompted them to demand production of the statement after their clients had been convicted and sentenced? Not one of the trial counsel, in the other appeals heard by this panel, answered that question.

   That question is not relevant to trial counsel for the appellant. As appears from her affidavit she did not demand production of the Terris Daye statement after her client was convicted and sentenced. Following conviction and sentencing of the appellant, trial counsel for the appellant had nothing further to do with this matter. Other counsel was retained to conduct the appellant's appeal.

   Further, as appears by her affidavit, she was not even aware, at the time of the trial, that a separate statement of Terris Daye existed. It was her belief that the statement of Terris Daye was

contained within the police occurrence reports, and that there was no separate statement. As she deposes, since she thought she had everything in her possession, there was no reason for her to make any further demands for production.

2. In the affidavits of other trial counsel, there is reference to trial counsel having a discussion, during the course of the trial, with respect to the relevance of the police occurrence reports and the statements referred to therein. As trial counsel for the appellant deposes in her affidavit, and there is no evidence to the contrary, she did not participate in those discussions.

3. There is further reference in the affidavits filed by other trial counsel of a meeting of trial counsel on the evening of April 2, 1996, "for the purpose of discussing appeal issues". Trial counsel for the appellant was not present at that meeting.

In summary, the circumstances which led to my conclusions, in the other appeals, that trial counsel did not act responsibly, or with due diligence in failing to raise the non-delivery of the Terris Daye statement with either the Crown or the trial judge when they had more than one opportunity to do so, do not apply to trial counsel for the appellant.

I am, therefore, not prepared to make a finding of lack of due diligence on her part.

Materiality

The following, from my reasons for judgment in **R. v. Robart** (C.A.C. No. 126420) being released simultaneously with the reasons for judgment in this appeal, is applicable here as well:

> "The onus, on the appellant, with respect to this issue of non-disclosure, is to satisfy the Court that, since his trial counsel did not have production of the Terris Daye statement prior to the trial, he was denied the right to make full answer and defence.
>
> In **Dixon**, Chipman J.A. reviewed in some detail the various cases which have considered this issue, and it is not necessary for me to review them here. The authorities do not require the appellant to establish that had he been armed with the Terris Daye statement, at or before the trial, the result would have been different. However, in assessing whether or not the statement "might" have affected the result, that statement must be measured by some objective standard. Without an objective standard by which to measure, the Court would be left to consider any and all possibilities no matter how fanciful or conjectural.
>
> For this reason I adopt the conclusion of Chipman, J.A. that for the appellant to succeed in obtaining a new trial he must satisfy the Court that there is a reasonable probability (a probability sufficient to undermine confidence in the outcome) that had the Terris Daye statement been disclosed the result might have been different. This was the test formulated by Osborne J.A. in **R. v. Petersen** (1996), 106 C.C.C. (3d) 64 (Ont. C.A. - leave to appeal to the Supreme Court of Canada refused).
>
> It is important to note, here, that we are not, in this appeal, reviewing the decision of a trial judge who has already considered this particular non-disclosure issue. It was not raised at the trial. Therefore, we do not have the benefit of the trial judge's assessment of the materiality, or otherwise, of Terris Daye's statement. On the other hand, we have before us all of the evidence at the trial, including the submissions of counsel; and we are able to assess the impact of the failure to deliver the Terris Daye statement "in the context of the whole case". See **R. v. Hamilton** (1994), 94 C.C.C. (3d) 12 (Sask. C.A.) per Jackson J.A. at p. 30.
>
> The question then becomes: What is it about the statement of Terris Daye that without it the appellant was denied his right to make full answer and defence?"

In order to put the submission, of counsel for the appellant, in its proper perspective, it is necessary that I review some of the facts which led to the assault on Darren Watts. The following is extracted from the decision of the trial judge:

"From the evidence I accept as credible and reliable, I am satisfied that the events which occurred may be briefly described as follows. The Phi Kappa Pi Fraternity hosted a party at its frat house located at 1770 Robie Street in Halifax, to celebrate the end of initiation or Frosh Week. Many young people gained admission by producing identification or being vouched for by others. The evening was uneventful until those on the door agreed to admit a young woman later identified as Shannon Burke. She sought admission on the pretence of looking for Terrence Dixon said to be "the father of her child". The six accused, Cyril Smith, Damon Cole, Stacey Skinner, Bam McQuaid, Guy Robart and Spencer Dixon, together with Danny Clayton and others, were admitted to the frat party earlier.

Shannon Burke found Terrence Dixon dancing with Nina Mohammed. She assaulted Ms. Mohammed, apparently in an attempt to separate those persons. An ugly physical confrontation ensued between Dixon and Burke which resulted in Dixon dragging Burke out by the hair and down the front steps of the frat house, with others following. Frat member David Kuhn pinned Dixon's arms behind him and held him saying "Calm down, relax" thinking Dixon was hurting Burke. Kuhn let Dixon go but Dixon still had a hold of the girl as he dragged her off the frat house property and down the sidewalk towards Cedar. Cyril Smith was one of those who told people trying to intervene to mind their own business.

One of those who attempted to intervene and help Shannon Burke was Rob Gillis. He had consumed five alcoholic beverages that evening and was feeling the effects. I accept that from what Gillis and others said repeatedly, he simply wanted to be sure the girl was all right and wasn't hurt. At some point he had a hold of Shannon Burke and may also have come into physical contact with Terrence Dixon.

Suddenly and without any warning or provocation Damon Cole stepped forward, threw a punch at Rob Gillis which knocked him down immediately. Gillis struck the back of his head as a result of falling from this punch, and was bleeding badly.

. . . . .

John Charman was also one of those who attempted to intercede and separate Shannon Burke from Terry Dixon. At 5'7" and 140 pounds he was obviously the smaller of his friends Gillis and Watts. He saw Gillis struck and on the ground about 10 feet away. Moments later, perhaps two or three seconds, a circle started to form around him and without warning he was hit from behind and had his teeth knocked out.

> By his own admission in the second statement he gave to the Halifax Police officers (Exhibit 15), Herman McQuaid struck John Charman. In Stacey Skinner's statement to the police (Exhibit 17) he admits striking John Charman. These admissions by McQuaid and Skinner tend to corroborate Danny Clayton's testimony when he said he observed Stacey Skinner and another man whom he thought might have been Stevie "D" Nelson attack a short, blond-haired guy.
>
> . . . . .
>
> Darren Watts went to the aid of his friend, John Charman. As soon as he did, the circle of men that had formed around Charman, switched their focus and attention to Darren Watts.
>
> One from that circle of men, which included all of the accused and Danny Clayton, eventually caught him with a punch, knocking him to the ground with such force that the sound of his head striking the concrete was heard by witnesses at the Camp Hill Hospital across the street.
>
> Charman, with his teeth knocked out and bleeding from the gash in his mouth and chin caused by his teeth having been driven through it, was unable to come to the help of his friend, Darren Watts. He saw these men kicking Mr. Watts and, consistent with the observations of others, one of the kickers was doing it in such a way that it looked like he was stepping on a hornet's nest with the heel of his foot.
>
> Darren Watts lay on the ground, unable to defend himself as he was repeatedly kicked by the men forming the circle surrounding him. He had absolutely no malice or ill will toward any of his assailants. He did nothing to provoke them. He was finally abandoned when these men took Guy Robart's lead and followed him across the street, running towards QEH."

The assault on Darren Watts had followed the assault on John Charman. The Crown witness Daniel Clayton described this in his testimony, as he, unequivocally, testified as to the involvement of the appellant Stacey Skinner:

> "**MR. BOTTERILL**: Who attacked this short blond fellow? [John Charman]
> A. Stacey and Dee, I think.
> Q. What's Stacey's last name?
> A. Skinner.

Q. And did you see what happened to this short blond fellow?
A. He went down.
Q. Did you see anybody land a blow on him?
A. Stacey.
Q. And to what part of his body?
A. The face.
Q. So did anybody come to that short blond fellow's assistance?
A. Yes.
Q. Who was that?
A. That was Darren Watts.
Q. And what happened to Mr. Watts?
A. Well, he was coming to his assistance, people were ...
THE COURT: Speak up please Mr. Clayton.
A. People were punching him.
MR. BOTTERILL: Did Mr. Watts stay on his feel?
A. No.
Q. Who is the first person you saw punch Darren Watts?
A. Guy Robart.
Q. And then what happened to Mr. Watts?
A. Eventually he went down.
Q. What happened when he went down?
A. Just ... we started kicking him and things.
Q. Now, Mr. Clayton, when you say "we started kicking him", were you involved in that?
A. Yes.
Q. Who else was involved in kicking Darren Watts once he went down?
A. Spencer Dixon, Cyril Smith, Stacey Skinner, Bam McQuaid and Guy Robart.
Q. You say you were involved, as well, yourself?
A. And myself.

. . . . .

MR. BOTTERILL: Sir, I'm going to ask you, Mr. Clayton, if you know particular individuals. You've mentioned Guy Robart's name, how do you know Mr. Robart?
A. We live in the same area.
Q. Do you know a Stacey Skinner?
A. Yes.
Q. How do you know Mr. Skinner?
A. We live in the same area.
Q. All right, what can you say about Mr. Skinner with respect to this incident on Mr. Watts?
A. Well, he hit him too.
Q. Sorry?
A. He hit him too.
Q. O.K., do you know a fellow by the name Damon Cole?
MR. MACDONALD: Excuse me, My lord, this is extremely

> leading. This is an extremely leading question of this witness. Absolutely. I mean this is not a permissible question in my humble submission.
> **MR. BOTTERILL**: I will do it another way then.
> **THE COURT**: Do you wish to reply Mr. Botterill?
> **MR. BOTTERILL**: Sure. Mr. Clayton, would you have a look in this courtroom and tell His Lordship if any of the people that struck Mr. Watts that night are here in this courtroom.
> A. Yes.
> Q. Take your time.
> A. Yes.
> Q. Would you name them for His Lordship please?
> A. Bam McQuaid, Stacey Skinner, Guy Robart, Cyril Smith, Spencer Dixon and Damon Cole."

The appellant did not testify at his trial, nor did any witness testify on his behalf. The trial judge accepted the evidence of Daniel Clayton and convicted the appellant of both the aggravated assault on Darren Watts, and the aggravated assault on John Charman.

Counsel for the appellant submits that had the Crown delivered a copy of the Terris Daye statement to counsel for the appellant prior to the trial, there is a reasonable probability that the result of the trial might have been different.

Counsel for the appellant refers to the following which appears in the Terris Daye statement: (The entire Terris Daye statement is attached, as an appendix, to the Reasons for Judgment of Chipman, J.A. in **Dixon**.)

> "Me, Terrence Tynes, Danny Clayton, Michael Barton, Stevie Dee is the crowd I was with and we were standing north of the corner of Cedar and Robie. Another crowd of people were over on the other side, more black than white. Stacey, [the appellant Stacey Skinner] Damon Cole. And more black people were still in the house .....".

Counsel's submission, with respect to this portion of the Terris Daye statement, as stated in his factum, is as follows:

> ".....this evidence could very well have influenced the trier of fact with respect to the question of the location of Mr. Skinner

> at the time of the assault on Darren Watts and may have changed the decision as to whether or not Stacey Skinner should testify once some corroboration was available for his Statement."

The essence of counsel's argument is that the assaults on Darren Watts and John Charman were happening simultaneously; and that Terris Daye, in his statement, had the appellant at the "other corner" of Cedar and Robie Streets, some 30 feet south of the location where Darren Watts was beaten. This information, counsel argues, could have been used in the cross-examination of Daniel Clayton to cast doubt on his identification of the appellant as one of the Watts' attackers.

I reject this submission for the following reasons:

1. The above quoted reference, in the statement of Terris Daye, must be looked at in its proper context. The following extract, from the Terris Daye statement, is what precedes the above quoted reference. It commences with the police constable questioning Terris Daye as to what took place after people left the fraternity house, and before any of the fighting started:

> "Q. What did you see once you were outside?
> A. I seen Terry and Shannon walking down Robie, and a bunch of people following them.
> Q. What did you see and hear?
> A. I'm hearing Terry telling people to mind there business.
> Q. What do you do then?
> A. I just stood with the rest of the people.
> Q. Where?
> A. Right on the corner, on that street he said (pointed to Cst. Carmichael). Melinda Daye asks where Frat House is - Cst. Carmichael shows her a map - Photocopy.
> Q. Where did you see Terry and Shannon arguing?
> A. (Plotted it on the map). South side of Cedar and Robie.
> Q. Who are you with <u>at this point</u>?

> A. Mr. Terrance Tynes, Danny Clayton, Michael Barton, Stevie Dee is the crowd I was with and we were standing north corner of Cedar and Robie. Another crowd of people were over on the other side, more while and black, Stacey, Damon Cole. And more black people were still in the house. Trivia and people were with him. People at the Frat House wouldn't let them out. Trivia told me he came out when it was all over." (emphasis added)

When the statement of Terris Daye is read as a whole, it is clear that Terris Daye is only placing Damon Cole and Stacey Skinner on the southwest corner of Cedar and Robie Street at the time Terrance Dixon and Shannon Burke were arguing, and before any fighting started.

2. The three assaults (on Gillis, then Charman, then Watts), while close together in time, were not simultaneous. Further, by his own admission, in a cautioned statement which he gave to the police, and which was tendered in evidence at the trial, the appellant did not remain fixed at the southwest corner of Cedar and Robie Streets. The following is the appellant's own account of what happened following the argument between Terrance Dixon and Shannon Burke near the corner of Cedar and Robie Street:

> ".....The white guys were talking and then put his hands on Terry, Shannon and her friends were screaming, leave her alone. Terry screamed, ...ah... mind your business. That's when I grabbed Terry and Shannon and take them back up to the corner of Cedar and Robie Street. Just around the corner. I told Terry to take her home. I was talking to them and then I see a fight starting. There

> was a white guy laying on the ground. There was black guy and some girls picking him up. I think the black guy was the bouncer. They pick him up and walk him down Cedar Street where the fight started. I see Damon Cole, Spencer Dixon, Stevie Dee or Danny Clayton. A couple feet away, there was Doobie Beals, Bam McQuaid, Terrance Tynes, Terry Teris guy ... Doobie Beals is like ready to leave. He's saying to Bam, let's go to Gottingen Street. That's when we started to leave. That's when Terry and Shannon ... then the white guy [John Charman] with the blond is saying, you bunch of assholes, stuff like that. He's right in the middle of Cedar and Robie Street. We all cross Cedar Street getting ready to leave. I look at him. This guy is really going on, like something is going to happen. He sort of brushes Stevie Dee as he is walking by Stevie Dee, has a cast on and he's sort of pushes the guy back. The white guy moves back past us, me and Stevie Dee and that's when he got hit, actually that's the guy I hit. [John Charman]. (emphasis added)

Clearly, from his own statement, the appellant admits that he left the southwest corner of Cedar and Robie Streets and headed across Cedar Street. It is at this point that he encountered John Charman. This is before the attack on Darren Watts.

3. It is clear from the evidence that Darren Watts was beaten immediately upon his coming to the rescue of his friend John Charman, after Charman was assaulted. The appellant admits assaulting Charman and, therefore, the appellant, by his own

statement, puts himself at the scene of the beating of Darren Watts.

Since Daniel Clayton unequivocally identified the appellant as one of Watts' attackers, and since the trial judge accepted that evidence, and since the appellant, by his own statement, puts himself at the center of the action, there is, in my opinion, no possibility that the statement of Terris Daye would have had any effect on the result of this trial, as is suggested by the appellant's counsel.

The circumstances with respect to this appellant are entirely different than the circumstances which persuaded this Court, in **R. v. Cole(D)** (1996), 152 N.S.R. (2d) 321, to grant a new trial to Damon Cole, who had also been convicted of assaulting Darren Watts, and who had been convicted of assaulting Rob Gillis. In **Cole** (supra), there were three factors which persuaded the Court to order a new trial:

1) The Terris Daye statement offered Cole a possible defence, of self defence, with respect to the assault on Gillis. Here, counsel for the appellant acknowledges that he has no sustainable ground of appeal with respect to the appellant's conviction for the assault on John Charman.

2) The Terris Daye statement could be used to challenge the credibility of Danny Clayton, the only witness at the trial who identified Cole as one of the Watts' assailants, because Terris Daye, in his statement, had Cole placed on "the other side" of Cedar Street from where the attack on Watts took place, at least at one point in the evening. That factor is of no significance to the appellant, because the appellant, by his own admission, placed

himself at the scene of the assault on Darren Watts. At the trial, there was no statement of Damon Cole before the Court.

3) In the case of Cole, Daniel Clayton, in his testimony, did not immediately identify Cole as one of Watts' attackers. Clayton had to be prodded by the Crown. In the case of this appellant there was no hesitation by the Crown witness, Daniel Clayton, to identify him as one of the Watts' attackers.

As a result, the decision of this Court in **Cole** is of no assistance to this appellant.

For these reasons, the reasons which I expressed in **Robart**, and for the reasons expressed by Chipman, J.A. in **Dixon**, the appellant has not discharged the onus upon him to satisfy this Court that, since his trial counsel did not have production of the Terris Daye statement prior to trial, that he was denied the right to make full answer and defence, and therefore should be entitled to a new trial.

I would dismiss this ground of appeal against conviction. While the Crown failed in its obligation to deliver a copy of the Terris Daye statement to trial counsel for the appellant, that failure did not result in an unfair trial.

Grounds of Appeal Against Sentence

(a) For the Assault on Darren Watts

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

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

In **Robart**, I outlined the standard of review in sentence appeals. I reviewed in detail the circumstances which the trial judge took into account in sentencing Robart, and I concluded that the sentence of eight years incarceration for Robart, was a fit sentence and this Court should not interfere with it.

The same reasoning applies to this appellant. There is a difference, however, between Robart and this appellant. At the time of sentencing the appellant was 21 years of age, had no prior criminal record and a Grade 11 education. Robart had a prior criminal record. However, the trial judge did not give that prior record more than passing reference in imposing his sentence on Robart.

Prior to sentencing the appellant, the trial judge said the following:

> "Stacey Skinner, Ms. Cain-Grant has made representations on your behalf. I realize that you have no criminal record and that you are 21 years of age. You live with your mother and two brothers. Your mother, as have other persons who vouched for your co-accused, have indicated that these attacks were, in their view, entirely out of character. Really, I have to tell you, Mr. Skinner, that that is the shame of this, isn't it? That these incidents happened and that they were so out of character, according to these responsible citizens, when they recall your background and some of the things you have done in your community.
>
> I have considered Mr. Garnet Wright's correspondence, at least the extracts Ms. Cain-Grant read into the record, and the fact that you, evidently, have helped young people in your community. I also am mindful of the positive things said on your behalf by Mr. Ray Sheppard. You have completed Grade 11 at St. Pat's High School. I accept what your counsel says; that is, that you recognize and respect the emphasis that has to be placed on general deterrence, while at the same time acknowledging that one cannot lose sight of the principles of rehabilitation and reformation, important in the case of any young adult sentenced for serious crime. I agree with Miss Cain-Grant's eloquent representations that the sentence

> ultimately imposed in your case, and the other cases, ought not strip any one of you of a reasonable chance to make a life for yourself. It should, as it were, 'leave a light at the end of the tunnel'."

The question is whether, because of his age, and a lack of criminal record, the sentence of eight years incarceration was manifestly excessive.

In the recent decision of **R. v. Fraser** (C.A.C. No. 126997), this Court increased the sentence of a 19 year old male, with no previous criminal record, from three years to six years for the robbery of an elderly woman in her home. In that case, Pugsley, J.A. said the following:

> "Mr. Fraser's age, and his previous unblemished record, while factors, should not materially lessen the length of the sentence. The Court must always consider the opportunity to reclaim the individual when fashioning a sentence, but that objective, must in cases of this kind, yield to the primary object of protection of the community (**R. v. Helpard** (1996), 145 N.S.R. (2d) 204 at 207).
>
> In **R. v. Hingley** (1977), 19 N.S.R. (2d) 541, this court sentenced a 16 1/2 year old male, who had robbed an individual as well as three banks, to a total of 15 years' imprisonment.
>
> Chief Justice McKeigan stated at 545:
>
> > The principle of going lightly with first offenders of tender years to facilitate rehabilitation has here little relevancy. Such serious crimes require substantial emphasis on deterrence even if rehabilitation possibilities are thus not improved but reduced.
>
> The Court, in **Hingley**, approved the following remarks of Tysoe, J.A. in **R. v. Nutter, Collishaw & Dulong** (1972), 7 C.C.C. (2d) 224 (B.C.C.A.) at 228:
>
> > I do not think the age of persons makes much difference when they are committing these violent crimes. Young men who persist in committing crimes of this sort cannot expect that

> their ages will be regarded as mitigating circumstances.
>
> . . .
>
> Crimes of this sort will not be stopped if men who commit them run the risk of only comparatively short terms of imprisonment. The judges owe a duty to the community and to the vast majority of law abiding citizens who comprise it to protect them as best they can and to impose sentences that will constitute real deterrence. I stress the word "real" deterrence as not only to the persons who have committed the crimes, but to persons who might tend or be disposed to thinking about committing them."

These statements are particularly appropriate to this case. For this horrendous crime of violence, against Darren Watts, the appellant's age and the fact that he has no prior criminal record, should not have any material effect on the length of his sentence.

For these reasons, and for the reasons which I expressed in **Robart**, the sentence of eight years incarceration is a fit sentence and this Court should not interfere with it.

(b) For the Assault on John Charman

For the assault on John Charman, the appellant was sentenced to a consecutive period of imprisonment of two years. In **Smith**, Chipman, J.A. said the following about the same two year consecutive sentence imposed upon Smith for his assault on John Charman:

> "In my decision with respect to the appeal of Mr. McQuaid I set out reasons why the sentence of two years imposed upon him for the assault upon Charman was excessive. The same reasoning leads me to conclude that the sentence imposed upon the appellant for the assault on Rob Gillis was also excessive. The appellant here has no prior

> criminal record. Considering the circumstances of the offence and the offender, I would impose a sentence of three months incarceration for the assault on Gillis."

I adopt Justice Chipman's reasoning, in **McQuaid** and **Smith**, and conclude that the consecutive sentence of two years is excessive and should be reduced to three months.

In conclusion:

1. I would dismiss the appeal against both convictions;
2. I would grant leave to appeal both sentences. I would dismiss the appeal with respect to the sentence for the assault on Darren Watts. I would allow the appeal with respect to the sentence for the assault on John Charman and substitute a sentence of three months to be served consecutive to the sentence for the assault upon Darren Watts.

Flinn, J.A.

Concurred in:

Chipman, J.A.

BATEMAN, J.A.: (Dissenting)

The issues in this appeal are the same as those raised in **R. v. Dixon** (C.A.C. No. 126136). I would dispose of them in the same way.

For the reasons set out by me in **R. v Dixon**, I would order a new trial in relation to the aggravated assault by Stacey Skinner upon Darren Watts.

I would dismiss Mr. Skinner's appeal from conviction in relation to the assault upon John Charman. In that regard, I agree with my colleague that the sentence appeal for that conviction should be allowed and the sentence reduced to three months.

Bateman, J.A.

C.A.C. No. 126474

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

STACEY SKINNER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

FLINN, J.A.

BATEMAN, J.A. (Dissenting)