C.A.C. No. 126612

NOVA SCOTIA COURT OF APPEAL

Chipman, Bateman and Flinn, J.A.

Cite as: R. v. McQuaid, 1997 NSCA 209

BETWEEN:		
HERMAN MCQUAID		John D. O'Neill for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Kenneth W.F. Fiske, Q.C. for the Respondent
	Respondent	
		Appeal Heard: September 11, 1996
		Judgment Delivered: January 15, 1997

THE COURT: The appeals from conviction for aggravated assault on Watts and Charman are dismissed; leave to appeal the sentences is allowed; the appeal from sentence imposed for the aggravated assault upon Watts is dismissed. The appeal of the sentence imposed for the aggravated assault upon Charman is allowed. The reasons of the majority were delivered by Chipman, J.A.; Flinn, J.A. concurring. Bateman, J.A. dissenting, would have allowed the appeal from conviction for aggravated assault on Watts, and ordered a new trial. In all other respects, Bateman, J.A. concurs with the majority.

CHIPMAN, J.A.:

This appeal by Herman McQuaid from his convictions for aggravated assault upon Darren Watts and John Charman was heard following Spencer Dixon's appeal from a conviction for aggravated assault upon Watts. The appeals arose out of the trial jointly

of Dixon, McQuaid and others held in the Supreme Court. My reasons for judgment in **Dixon** are being released simultaneously with these reasons.

Mr. McQuaid also makes an application for leave to appeal and if granted appeals from his sentences of eight years for the aggravated assault upon Watts and two years consecutive for the aggravated assault upon Charman.

CONVICTION APPEAL

In **Dixon**, I recited the relevant facts.

The issues in this appeal are the same as those in **Dixon**. I would dispose of them in the same way. My reasons for so doing are the same as in **Dixon** with the exception of the reasons for dealing with the issue of due diligence by counsel. It is necessary here to address separately the issue of due diligence on the part of McQuaid's counsel in connection with his failure to demand production of the statements not disclosed by the Crown upon learning of them, and to raise the matter before the trial judge.

Appellant's counsel deposed in his affidavit of September 6, 1996 in support of the application for fresh evidence:

> 13. That during the course of the trial, Police Occurrence Reports were provided to Defence Counsel and that upon having reviewed the supporting Affidavit of Stanley W. MacDonald, I verily believe that the Reports were disclosed sometime in and around February 8, 1996.
>
> 14. That owing to the demands of the trial, I did not review the Reports immediately.
>
> 15. That I subsequently had discussion regarding the Reports and their contents with other defence counsel.
>
> 16. That given my understanding of the Reports, I did not request copies of the statements of Terris Daye, Terrance Tynes, Edmond (T.J.) Levia or Travia Carvery from the Crown.
>
> (emphasis added)

Appellant's counsel also tendered in addition to the four witness statements affidavits of Stanley W. MacDonald, trial counsel for Cole, Peter Katsihtis, trial counsel for Cyril Smith, and Anthony Brunt, an articled clerk in the office of counsel for a young

offender/co-accused. These affidavits had been tendered and accepted by the panel at the hearing of **R. v. Cole**. See **R. v. Cole (D.)** (1996), 152 N.S.R. (2d) 321.

Because of concerns of this panel respecting the state of counsel's knowledge of the existence of the statements, counsel's knowledge of what the four individuals were saying and counsel's apparent change of heart respecting the statements following conviction, the Court gave counsel for each party the opportunity to file additional material.

In response, counsel for the appellant filed his supplementary affidavit on September 27, 1996 in which he deposed **inter alia**:

> 4. **THAT** I have not interviewed or attempted to interview Terris Daye, Terrance Tynes, Travia Carvery and Edmond (T.J.) Levia to this date.
>
> 5. **THAT** on September 12, 1996, I was provided with a copy of the Affidavit of Mr. L. W. Scaravelli, sworn to on the 6th day of September, 1996 by the Public Prosecution Service and that I reviewed that Affidavit for the first time on September 12, 1996. That this Affidavit I verily believe to be the same Affidavit referred to by the Court during the course of oral argument in the Appellant's appeal on September 11, 1996.
>
> 6. **THAT** with respect to paragraph 13 of Mr. Scaravelli's Affidavit, I state that I did not engage in a brief huddle on Monday, February 12, 1996 with Mr. MacDonald and other defence counsel wherein Mr. MacDonald advised us of what he saw nor did I agree with other defence counsel that there did not appear to be anything from what we saw that would aid us in making a full answer in defence. That I also state that at no time did I make or participate in a "strategic" decision to not pursue any of the above-noted statements.

Counsel for the appellant also filed a supplementary affidavit from Stanley MacDonald, counsel for Damon Cole, in which he deposed **inter alia**:

> 3. **THAT** on Thursday, September 26, 1996 I was provided with an Affidavit of Mr. Lance Scaravelli sworn to the 6th day of September, 1996 by Mr. John O'Neill, counsel for the Appellant herein. I reviewed that Affidavit for the first time on September 26, 1996.
>
> 4. **THAT** with respect to paragraph 7 of Mr. Scaravelli's Affidavit, I can state that no such meeting was held prior to the

> trial which began on February 5, 1996. No meeting of all trial counsel was ever held prior to trial to discuss strategy. 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.
>
> 5. **THAT** with respect to paragraph 11 of Mr. Scaravelli's Affidavit, I recall asking Mr. Botterill for a photocopy of the occurrence reports on more than one occasion over a period of two court days. I recall that Mr. Botterill did not provide photocopies to defence counsel. Instead, he asked Cst. Tom Martin to make copies and provide them to defence counsel, which he did on Thursday, February 8, 1996.
>
> 6. **THAT** with respect to paragraph 13 of Mr. Scaravelli's Affidavit, I can state that the information deposed to therein by Mr. Scaravelli is not correct. I and other defence counsel did not have a "brief huddle" on Monday, February 12, 1996 pertaining to the issue of the statements of Terris Daye, Terrance Tynes, Travia Carvery and Edmund Levier. At no time did I advise co-counsel of the contents of the occurrence reports. I assumed that co-counsel would have also read the occurrence reports and there would have been no need for me to advise anyone of their content.
>
> 7. **THAT** with respect to paragraph 13 of Mr. Scaravelli's Affidavit, I can state that at no time did I engage in a tactical decision, either alone or in concert with co-counsel, not to request disclosure of the four statements referred to in the preceding paragraph of this my Affidavit. I can also state that there was no agreement among defence counsel as to the contents of the occurrence reports and their import, as deposed by Mr. Scaravelli.
>
> 8. **THAT** the reasons why I did not request copies of the four statements are contained in my Affidavit sworn May 9, 1996, which Mr. O'Neill informs me is on file in this proceeding. That decision was made without consultation with co-counsel..
>
> (emphasis added)

In **Dixon** I referred to case law relating to the obligation of due diligence on the part of counsel to pursue disclosure and bring non-disclosure to the attention of the trial judge at the earliest opportunity. I concluded that counsel for Dixon was not diligent.

Appellant's counsel was questioned respecting an affidavit filed by Lance Scaravelli, counsel for Dixon whose appeal was heard immediately prior to the hearing of

this appeal. Mr. Scaravelli deposed in part:

> That I recall on Monday, February 12, 1996 Stanley MacDonald and the other defence counsel had a brief huddle wherein Mr. MacDonald advised us of what he saw and of course we all agreed that there did not appear to be anything that we saw that would aid us in making a full answer and defence.

When an application is made to a court of appeal to adduce fresh evidence, counsel must be scrupulously careful to present to the court everything which might possibly bear upon the subject matter. This is of particular importance in a motion of this nature where the issue is whether the trial process was fair. Of necessity, much of the information, particularly relating to counsel's due diligence, rests exclusively with counsel. Appellant's counsel has responded, indicating that Mr. Scaravelli's affidavit was first drawn to his attention at the argument on September 11, 1996, and first reviewed by him on September 12, 1996.

Whether or not a huddle took place is not itself the issue, although it may be relevant in resolving the issue. The issue is whether counsel exercised due diligence to pursue disclosure and bring the non-disclosure to the attention of the trial judge. Whether counsel made a tactical decision not to pursue disclosure is relevant in determining whether or not there was due diligence.

One of the occurrence reports referred to in paragraph 13 of the appellant's counsel's affidavit of September 6, 1996 summarized Terris Daye's statement:

> After being given young offender caution and explained in detail, it was decided by Terris Daye that he would give a statement. He places himself and the other players at the Frat party, 1770 Robie Street he cannot describe the clothing being worn by others that night. He states he seen four white guys walking south on Robie Street following Terry Dixon and Shannon Burke who were arguing. He reviewed the four pictures of the victims and identified John Charman as the first guy who got hit and went down. He stated Damon Cole punched him first and Spencer Dixon kicked him when he was down, because that's what Spencer likes to do. He points out Dennis MacDonald as the second man being punched and he states Spencer Dixon did the punch and the kicking. Then he

> was unable to ID Robert Gillis' photo, but he knew Darren Watts' face from seeing it in the news. But he couldn't ID Watts as the man getting the beating that night. As it turns out Darren Watts was a friend of his brother Troy Daye.
>
> Terris Daye after some questioning places himself on the outer circle surrounding Darren Watts. It is quite clear that he does not want to ID the key players as he is scared of them. Terris Daye places Cyril Smith, Danny Clayton, Terrence Tynes running west on Cedar Street after Guy Robart screams police. When questioned about the assault on the police officer he described that Guy Nathanial Robart ran in the same direction and were chased by the policeman. He described the police car as a burgundy shadow . . . The writers were unable to get Daye to name any of the persons in the inner circle around Darren Watts. The mother seems to know more and if interviewed away from her son might give some useful information.

(emphasis added)

I am of the opinion that given the knowledge of counsel for the appellant of the existence of the statement acquired during the course of the trial, he was faced with a choice either to call for the statements or risk having to live without them. I repeat paragraphs 15 and 16 of the original affidavit of counsel for the appellant:

> 15. That I subsequently had discussion regarding the Reports and their contents with other defence counsel.
>
> 16. That given my understanding of the Reports, I did not request copies of the statements of Terris Daye, Terrance Tynes, Edmond (T.J.) Levia or Travia Carvery from the Crown.

I cannot accept that counsel would merely accept this summary of the occurrence report as an alternative to production of the statements, unless he had decided not to pursue them. As an officer of the court, he had a duty to call for the statements and draw the non-disclosure to the attention of the trial judge if he wished to use the statements in support of his client's cause. I am unable to infer incompetence on his part, given his affidavit that (impliedly) he reviewed the reports, subsequently had discussion with other defence counsel and, given his understanding of the reports, did not request copies. This, to my mind, is an informed choice, an election.

In particular, one would expect that appellant's counsel, knowing that his client was charged with assaulting Charman, would have called for the statement in view of the indication in the occurrence report that Daye said that John Charman was assaulted by Damon Cole and Spencer Dixon. Counsel's silence in the face of this reinforces the conclusion that he did not want the statement.

The same observations I made in **Dixon** with respect to the other points that should have interested counsel in pursuing the statements if they were wanted, apply here.

That the appellant's counsel fully appreciated the fact that there were statements from Terris Daye and Terrance Tynes is suggested by the following portion of his cross-examination of Daniel Clayton:

> Q. But you didn't think that these statements or these portions of these statements that were provided by other people were provided by Terrance Tynes, did you? You didn't think you were hearing Terrance Tynes' statement being read to you did you?
>
> A. Right.
>
> Q. Because you and Terrance were still good friends at that time?
>
> A. No. His name was involved in some statements.
>
> Q. I realize his name was involved in some statements.
>
> A. Right.
>
> Q. O.K. So that's on one basis that you felt it wasn't Terrance's statement?
>
> A. Yes.
>
> Q. O.K. As well, you didn't think that it was Terris Daye's statement, did you?
>
> A. Because again his name was involved in some statement.
>
> Q. But aside from that, you were good friends with those two individuals, weren't you?
>
> A. Yeah.

Q. You'd see them regularly?

A. Yeah.

Q. And you didn't think that they had been picked up and provided a statement by the police, up to that time in time, did you?

A. I don't know.

In his supplementary affidavit, counsel did not address this Court's concern with respect to the sudden interest taken by him in the statements following the trial. Stanley MacDonald's supplementary affidavit sheds light on this. This affidavit reveals the presence of the appellant's counsel at a meeting on April 2, 1996 for the purpose of discussing appeal issues. At that time, the appellant had been convicted. Stanley MacDonald advised his partner, Garson, about the statements. Garson obtained them. On April 16, appellant's counsel obtained them. Thereafter he took the position that they should have been disclosed at the trial.

These subsequent developments, coupled with the failure of appellant's counsel to answer questions from this Court about the change of heart regarding the statements after the trial, reinforce the conclusion that a decision was made not to pursue the statements at trial, albeit quickly reversed following the trial.

In spite of counsel's assertion that no conscious election was made not to pursue the statements, all of the circumstances surrounding disclosure made by the Crown and counsel's course of action point to no other conclusion than, if not consciously, then unconsciously, the choice was made not to seek the statements. Viewed objectively, counsel's actions present the unmistakable appearance of a tactical decision not to pursue this disclosure.

It follows from these reasons and for the reasons given in **Dixon** that the conviction appeal herein should be dismissed.

SENTENCE APPEALS

The sentence appeal respecting the aggravated assault on Watts should be dismissed for the reasons given in **Dixon**, leave to appeal being granted.

I would also give leave to appeal the sentence for the aggravated assault upon Charman. On consideration, I think it should be allowed.

In his sentencing remarks, the trial judge said:

> The primary consideration is always protection of the public. In addressing that primary concern, the sentencing judge is obliged to ask whether such protection may best be achieved by specific deterrence of the offender, general deterrence of those similarly disposed, rehabilitation of the offender, or some combination thereof. The weight to be given to each of those three factors depends on the circumstances of each case. These were violent crimes. The law tells us that in cases of violence, emphasis or weight must be placed on general and specific deterrence. One must never lose sight of the prospect for rehabilitation and reform of the offender. While always emphasizing general and specific deterrence in punishing violent crime, one must also give some weight to the rehabilitation of the offender. In light of the reality that one day the prisoner will be released, one must reflect on the prospects for that individual's safe and productive return to her or his community. I have considered all of these things when determining a just and fit sentence for every one of you.
>
> . . .
>
> Conduct such as that for which you have all been convicted deserves clear and unequivocal punishment. The public needs to be protected from you and your actions. By your conduct September 10 and 11, 1994, you sent a blatant signal that you had denounced the rules by which society seeks to govern itself and forfeited the right to be at large. For it is actions such as these that have caused so many in this community to be in fear for their own safety and legitimately concerned for the well-being of friends and family. People want their neighbourhoods back. Whether they live on Robie and Cherry Streets or Gottingen and Creighton Streets, law-abiding citizens want to be able to walk about freely, day and night, without having to worry about criminals like you.
>
> . . .
>
> Herman McQuaid and Stacey Skinner, I also found you guilty of the aggravated assault of John Charman. Fortunately, the permanent damage to his teeth was repaired with restorative dental intervention. His wounds were sutured, and they have healed.

Apparently neither the academic nor athletic pursuits of either Mr. Gillis or Mr. Charman were affected by the aggravated assaults inflicted upon them.

. . .

In addressing mitigation, I have considered, in each of your cases, such mitigating factors as your relatively young age; where applicable, the absence of a criminal record; where applicable, the absence of a criminal record involving crimes of violence; your education and work records.

. . .

I agree wholeheartedly with counsel, who properly cite the law in this country, that a lack of remorse is never an aggravating circumstance to be taken into account during the sentencing process. I also agree with Mr. Coady that there is simply no evidence before me of remorse or lack of remorse. In my view, it is a non-issue.

Other mitigating factors I have taken into account are family support, if any; the fact that there is no evidence of planning or deliberation or premeditation on the facts presented during the course of this lengthy trial; and, finally, that there is no evidence the incident was anything other than a spontaneous, horrible result of something that got entirely out of control.

. . .

Mr. McQuaid, I listened carefully to the representations made on your behalf by your counsel, John O'Neill. You are 22 years of age. You are said to be the father of a four-year-old son. You reside with your parents. You have some intelligence and initiative. You were able to complete Grade 12 in 1993. Although your employment record since that time may have been intermittent, it is not, at least on the facts before me, due to any laziness on your part.

. . .

With great respect to your counsel, I do not accept his submission (shared by others) that because of a close nexus in time and place between these various assaults, I should impose concurrent sentencing.

. . .

With respect to the aggravated assaults involving Rob Gillis and John Charman, both as related to each other and, as well, as related to the subsequent aggravated assault of Darren Watts, while separated by perhaps only moments on the

> spectrum of time, these aggravated assaults by those persons responsible were distinct. They involved different victims and different assailants, and they must, therefore, in law, be treated as offences requiring consecutive sentences. Having said that, I am also mindful of the totality principle.
>
> . . .
>
> Herman McQuaid, please stand. For the aggravated assault of Darren Watts, I sentence you to a period of imprisonment of eight years. For the wounding of John Charman, I sentence you to a period of imprisonment of two years, consecutive to the sentence imposed with respect to Darren Watts.

We have the power to interfere with a sentence if it is unreasonable, ie. manifestly excessive or lenient, or that the trial judge has erred in the application of the appropriate principles. While I am satisfied that the trial judge has not erred in the application of the appropriate principles and, in particular, in the imposition of consecutive sentences, I am of the opinion that the sentence of two years in the circumstances is manifestly excessive. I have already commented, as has the trial judge, upon the viciousness of the attack on Darren Watts. The trial judge imposed a substantial sentence for that and it should stand. However, in assessing the appellant's conduct with respect to Charman, it is important to recognize that the appellant's conduct with respect to Watts has already been considered and dealt with. It is important, particularly if the sentences are to be imposed consecutively, to look upon the assault upon Charman without regard to the subsequent assault of Watts.

The trial judge, in his reasons for sentence, recognized that the aggravated assaults upon Gillis and Charman were distinct from that upon Darren Watts. The assaults involved different victims and different assailants. Accordingly, it was his opinion that they must be treated as offences requiring consecutive sentences. I agree.

Standing alone, the assault upon Charman was a cowardly, unprovoked act of violence. It was administered in the course of escalating violence and helped lead to

what followed. It must be denounced, but in my opinion, a sentence of two years is manifestly excessive to accomplish that end.

The appellant was 20 years old at the time of the offence. He had a grade 12 education. He is not married but has a child from a prior common-law relationship. At the time of the offence he was unemployed. He has no other violence related convictions, but was convicted of theft under $1,000.00 and had been placed on probation for six months and ordered to perform 20 hours of community service.

Counsel for the Crown did not point to any case where a sentence as long as two years was imposed for a similar assault by an offender with a similar background to that of the appellant. This Court's decision in **R. v. Cormier** (1994), 130 N.S.R. (2d) 327 dealt with circumstances somewhat analogous, but in my opinion more serious. There the sentence for aggravated assault was six months incarceration. In my opinion, a period of incarceration of three months is an appropriate period of sentence for the assault on Charman.

I would allow the appeal accordingly and substitute a sentence of three months for the two year sentence for the aggravated assault on Charman, to be served consecutive to the time served for the assault upon Watts.

Chipman, J.A.

Concurred in:

Flinn, J.A.

BATEMAN, J.A.: (Dissenting)

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