C.A.C. No. 126473

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Smith, 1997 NSCA 207
Chipman, Bateman and Flinn, JJ.A.

BETWEEN:		
CYRIL J. SMITH		Peter J. Katsihtis for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Kenneth W.F. Fiske, Q.C. for the Respondent
	Respondent	
		Appeal Heard: September 12, 1996
		Judgment Delivered: January 15, 1997

THE COURT: The appeals from conviction for aggravated assault on Watts and Gillis are dismissed; leave to appeal the sentences is allowed; the appeal from the sentence imposed for the aggravated assault upon Watts is dismissed. The appeal of the sentence imposed for the aggravated assault upon Gillis 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 appeals from conviction for both aggravated assaults on Watts and Gillis, and ordered a new trial.

CHIPMAN, J.A.:

This is an appeal by Cyril J. Smith from his conviction for aggravated assault upon Darren Watts and Rob Gillis. It 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, Smith and others held in the Supreme Court. My reasons for judgment in **Dixon** are

being released simultaneously with these reasons.

Mr. Smith 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 Gillis.

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 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 Smith'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 6th, 1996 in support of the application for fresh evidence:

> 8. THAT shortly after the trial commenced, I received a copy of Police Occurrence Reports. These Reports commenced from the start of the investigation and were both in handwritten and typed form and had been prepared by the various police officers involved in investigating this case;
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> 9. THAT I did not have an opportunity to review the Police Occurrence Reports until Sunday, February 11, 1996. Those Reports did refer to statements having been taken from Terris Daye, Terrance Tynes, Edmond Levier and Travia Carvery in September of 1994. This was the first time I had been made aware that these four individuals had provided statements to the police. The descriptive portion of the Police Occurrence Reports pertaining to the statement of Terris Daye is attached hereto as Exhibit "A";

> 10. THAT given the information contained in the Police Occurrence Reports as to the contents of the statements of Terris Daye, Terrance Tynes, Edmond Levier and Travia Carvery, I did not request copies of those statements from the Crown.

Appellant's counsel also tendered the four witness statements, together with affidavits of Stanley W. MacDonald, trial counsel for Cole, his own affidavit of May 3rd, 1996, that of Anthony Brunt, an articled clerk in the office of counsel for a young offender co-accused, and an affidavit of Gary Levine, assisting counsel for Robart. 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 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 a supplementary affidavit on September 27th, in which he deposed, ***inter alia***:

> 3. THAT as stated in my earlier Affidavits, I did not see the written witness statements of Terris Daye, Terrance Tynes, Travia Carvery, and Edmond (T.J.) Levia, until copies of them were provided to me by the firm of Garson, Knox & MacDonald in April of 1996. Until the time that I viewed the statements, I did not have any knowledge from any source other than the Police Occurrence Reports, of what those four individuals had to say about the Reports, of what those four individuals had to say about the incident which led to the appellant being charged for the assaults upon Rob Gillis and Darren Watts. Although the materials which were disclosed by the Crown indicated that these four individuals were present at the fraternity party and that possibly some of these individuals may have been involved with assaults, my impression was that no relevant information had been obtained from them by the police. The Crown Sheet did not list these individuals as possible witnesses and the chart which was annexed to a police diagram of the assault scene suggested that Terris Daye had only given evidence relevant to his own breach of undertaking and that he had not provided any evidence which was relevant to any of the suspected offenders. It is to be noted that on the same chart, in the row which lists the possible offences, there is not even a column for the appellant's assault upon Rob Gillis. As such, I was not aware that these four individuals had given statements which respect to the appellant's care;
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> 4. THAT I say without hesitation that I did not either in consultation with

> any other counsel or on my own, make a tactical or strategic decision to not pursue the four witness statements. For the reasons given in my earlier affidavits and during the oral argument of the appellant's appeal, in respect to the circumstances I found myself in which I received and reviewed the Police Occurrence Reports, I feel it is accurate to say that I did not make a conscious decision in relation to the pursuit of the four witness statements.

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 Dixon's counsel was not diligent.

Whether or not a decision was made in consultation with other counsel is not itself the issue although it may be relevant in resolving the issue. The issue is whether counsel for this appellant 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 to determining whether or not there was due diligence.

One of the occurrence reports referred to in paragraph 8 of the appellant's counsel's affidavit of September 6th, 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.
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> 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 paragraph 10 of appellant's counsel's affidavit which must be read with the extract from the occurrence report which I have quoted:

> 10. THAT given the information contained in the Police Occurrence Reports as to the contents of the statements of Terris Daye, Terrance Tynes, Edmond Levier and Travia Carvery, I did not request copies of those statements from the Crown.

I cannot accept that counsel would merely accept a 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 he reviewed the occurrence reports on Sunday, February 11th, and then made his decision. This, to my mind, is an informed decision, an election.

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.

In his supplementary affidavit, counsel did not address this Court's concern with respect to the sudden interest taken by him following the trial in the statements. The affidavits of Stanley MacDonald and Michael Brunt show that on March 15th, 1996, very shortly following the convictions and sentencings, Brunt specifically sought out the statements. By April 2nd, Macdonald informed Craig Garson, appeal counsel for Cole, of the existence of the statements. Garson requested them from the Crown on April 3rd and on or shortly after April 16th counsel for the appellant secured them. Counsel has not, however, answered the Court's specific request respecting the sudden interest in the statements. These bare events which I have listed show that nothing other than conviction and sentence intervened between the conscious decision in February not to seek the

statements and the subsequent seeking of them in April. These developments reinforce the conclusion that a decision was taken 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 by the Crown and counsel's course of action point to no other conclusion that, if not, consciously, then unconsciously, the choice was made not to seek the statements. Viewed objectively, counsels' actions present the unmistakable appearance of a tactical decision not to pursue the disclosure.

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

SENTENCE APPEALS

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

I would also give leave to appeal the sentence for the aggravated assault upon Gillis. 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.
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> . . .

> 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.
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> . . .
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> First, concerning Cyril Smith and the submissions made by your counsel. You were 19 at the time of this offence and are 21 years of age now. I accept that you have many family members in attendance here, to show their love and support for you. Evidently, you were thought to be a person of some considerable merit, to have been given the responsibility for working with young children at the YMCA and as a day camp counsellor. Apparently you are an athlete of some considerable prowess, if you were able to play sports at St. Mary's University and attend the Canada Games as a representative athlete. I also take into account and underline the fact that you have no prior criminal record. I accept your counsel's representations that you appear to be, from those who have vouched for you, a person of decent and caring character.
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> I also agree with Mr. Katsihtis's comments that whatever sentence is imposed in your case, and in any other case, it must not be so hard as to crush you and leave you without any hope for your future of your rehabilitation. Finally, I was impressed by your reference to Malcolm X and Dr. Martin Luther King, Mr. Smith, when you asked to address the court. Dr. King is a hero of mine, as well. His story is an inspiration to communities around the world. I hope that his perseverence, in the face of adversity, will be of some help to you and perhaps serve as an anchor as you face your sentence.
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> . . .
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> I am going to ask Cyril Smith to stand up, first. Cyril Smith, for the aggravated assault of Darren Watts, I sentence you to a period of imprisonment of eight years. For the aggravated assault of Rob Gillis, I sentence you to a period of imprisonment of two years, consecutive to the sentence imposed with respect to Darren Watts.

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 would allow the sentence appeal accordingly and substitute a sentence of three months for the two year sentence for the aggravated assault upon Gillis, to be served consecutive to the sentence 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 assaults by Cyril Smith upon Darren Watts and Rob Gillis.

Bateman, J.A.