

NOVA SCOTIA COURT OF APPEAL

Citation: R. v. O'Brien, 2010 NSCA 61

Date: 20100714

Docket: CAC 310964

Registry: Halifax

Between:

Marty O'Brien

Appellant

v.

Her Majesty the Queen

Respondent

Judges: The Honourable Justice Duncan R. Beveridge with Farrar, J.A. concurring and Fichaud, J.A. dissenting

Appeal Heard: April 8, 2010

Subject: Criminal law. Admissibility of bad character evidence and the availability of the proviso under s. 686(1)(b)(iii).

Summary: The appellant was convicted of robbing a convenience store. A Halloween mask was found a short distance from the store. An Expert witness testified that the DNA profile from that mask matched that of the appellant. The Crown led copious evidence demonstrating the appellant to be a known criminal. There was no legitimate purpose to the evidence. The defence did not object. The trial judge made no mention of the inadmissible evidence during the trial or in his decision. The Crown conceded that the trial judge erred in permitting the evidence to be adduced, but argued the appellant suffered no prejudice. The appellant also argued that the verdict was unreasonable or not supported by the evidence.

Issue: Was the verdict unreasonable or not supported by the evidence, and should the proviso be applied with respect to the admission of the evidence of bad character?

Result:

The majority (Beveridge, J.A., Farrar, J.A. concurring) allowed the appeal and ordered a new trial. The verdict was not unreasonable, but the impugned evidence was patently inadmissible. It made drawing the inference that the appellant was the robber a foregone conclusion. The Crown did not suggest that the result would inevitably have been the same had the evidence not been led. There was no indication that the trial judge disabused himself of this evidence or otherwise made it plain it could play no legitimate role in the trial process. In these circumstances, the burden on the Crown to demonstrate that the error was harmless has not been met.

Fichaud, J.A. dissented, and would have dismissed the appeal, on the ground that there was no substantial wrong or miscarriage of justice under s. 686(1)(b)(iii) of the *Criminal Code*. It was clear from the trial judge's written reasons that the improper character evidence could not have affected the result.

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 61 pages.