C.A.C. No. 94-02970

# NOVA SCOTIA COURT OF APPEAL

**Cite as: R. v. Neve, 1994 NSCA 144**

**Hallett, Roscoe and Pugsley, JJ.A.**

**BETWEEN:**

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| JOHN PATRICK NEVE<br><br>Appellant<br><br>- and -<br><br>HER MAJESTY THE QUEEN<br><br>Respondent | ) | Roger A. Burrill<br>for the Appellant<br><br>William D. Delaney<br>for the Respondent<br><br>Appeal Heard:<br>June 23, 1994<br><br>Judgment Delivered:<br>June 30, 1994 |

**THE COURT:** Appeal dismissed per reasons for judgment of Pugsley, J.A.; Hallett and Roscoe, JJ.A. concurring.

**PUGSLEY, J.A.:**

The appellant, age 28, appeals his conviction on a charge of break and enter contrary to s. 348(1)(b) of the **Criminal Code,** as well as his conviction on a charge of having in his possession, instruments for the purpose of breaking into a place under circumstances that give rise to a reasonable inference that the instruments had been used or were intended to be used for such purpose contrary to s. 351(1) of the **Code**.

The grounds of appeal allege that the trial judge erred in entering a conviction on the circumstantial evidence presented at trial "such that the verdict could not reasonably be sustained on the facts."

The evidence establishes that :

(1) On February 4, 1993, while finishing up his night shift at the Subway shop located in the Forest Hills strip mall at Cole Harbour, Robert Chapman, heard a light knock at the rear doors which he had bolted when he came on shift some seven hours earlier. The knock was followed by a series of "loud bangs" for four or five minutes. Alarmed that someone was intending to break in, he called the police. The call was transferred to a police cruiser operating in the district. The operator of that cruiser could hear a "banging noise" over the police radio.

(2) Within minutes, the cruiser arrived and the officers observed a vehicle with a driver and two occupants, leaving the area. The police stopped the car shortly thereafter, but it was then only occupied by the driver and the appellant, who was sitting in the rear seat. A cursory search of the vehicle revealed some gloves, a large knife in the front seat, duffel bags on the rear seat, and underneath the front seat, several crowbars. The appellant had access to the crowbars from the position he occupied. The crowbars were virtually identical in size and shape.

(3) The car was seized and a more thorough examination at the police station revealed in the trunk - a crowbar, a black tire iron, a hacksaw blade, and within the car itself, gloves, wrecking bars and a flashlight.

(4) The rear doors of the Subway were extensively damaged consistent with an attempt to pry them open. Loose paint chips on the doors and scattered in the snow matched up with the paint specks on the crow bars located under the front seat.

The appellant testified that while he was watching television and having a few beers with his girlfriend at 3:30 a.m. on February 4th, two acquaintances arrived at the door of his apartment in Dartmouth to inquire if he wanted to smoke a joint. One of whom (Dave), he had met a month earlier, the other (Dennis), he had met a week earlier. He did not know their addresses or their surnames.

He stated that he did not allow the smoking of drugs in the place where his girlfriend or her children lived, so after a quick beer, the three left to "find a place to park and smoke a joint where there were no other vehicles." Dennis drove, Dave occupied the front passenger seat, and the appellant sat in the rear seat. The appellant noticed only a "few pairs of gloves scattered on the back seat". He did not see any tools or duffel bags.

According to the appellant after leaving the apartment, Dennis drove the car around for a good half hour and eventually parked in a location a short distance from the Subway. The area benefited from some artificial light and was not far from a Tim Hortons, open 24 hours a day.

The appellant stated that after sharing a joint, Dave left the car to "go to the bathroom" and took with him a kit bag that had rested on the floor of the front seat. There was a "clanking" noise when Dave struck the kit bag against the door as he exited and went behind the vehicle. After what seemed an unusually lengthy time, the appellant said to Dennis "what is going on? He should be back by now". Dennis started the car, Dave came running, opened the back door, shoved the kit bag on the

floor behind the driver, jumped into the front seat, reached down and put "something" under his seat, producing a further "clank", and exclaimed "let's get out of here."

The appellant maintained in his examination in chief that the radio was on, the windows were closed (being the early hours of a cold February morning) and that he heard no other noises while Dave was absent.

After they passed a police vehicle, Dave opened the front passenger side door, and jumped out. The vehicle was stopped by the police shortly thereafter.

The appellant's counsel acknowledges that the trial judge appreciated the evidence was circumstantial in nature and that he applied the appropriate test, namely that before a finding of guilt could be determined, the proven facts must not only be consistent with an inference of guilt, but also would not lead to any other reasonable inference (**R. v. Cooper** (1977), 34 C.C.C. (2d) 18, S.C.C.).

The trial judge subsequently assessed the evidence of the appellant, concluded that it was not plausible, and accordingly rejected the appellant's explanation. His counsel submits that the Crown had failed to establish sufficient evidence on which a conviction could be founded and that the positive evidentiary value required to establish the appellant's guilt beyond reasonable doubt was only reached after the trial judge rejected the appellant's evidence. This type of analysis, counsel argues, constitutes an error, citing in support **R .v. Levy** (1991), 62 C.C.C. (3d) 97, a decision of the Ontario Court of Appeal.

An examination of the decision, reveals however, that after reviewing the circumstantial evidence presented by the Crown, the trial judge concluded that the Crown had made out a *prima facie* case and that the circumstances were not only consistent with an inference of guilt but "on their face would lead to no other reasonable inference."

It was only after this conclusion was reached that the trial judge entered into a examination of the evidence of the appellant and concluded it was not believable.

This Court is denied the opportunity afforded to the trial judge to assess the appellant's demeanour and to listen to his evidence. We have no hesitation, after examining the transcript, in concluding that the trial judge was entirely justified in rejecting the implausible story advanced by the appellant.

Without detailing all of the incredible elements, the acceptance of the appellant's version of evidence would depend upon a suspension of disbelief involving the following points:

(1) Two men, who surnames and addresses were unknown to him arrived at his apartment at 3:00 a.m., in the middle of winter, to smoke a joint.

(2) The vehicle had been packed with burglary tools as part of a carefully crafted plan to break into a commercial establishment, yet, the two men stopped at the appellant's house, on their way to commit a crime, for a social get together.

(3) In search of a secluded rendezvous, where the smoking could be undetected, the three drove around for one-half hour and ended up parking near a restaurant that was open 24 hours a day.

(4) Because the windows were rolled up and the radio was on, the appellant testified he did not hear any noise outside the car. On cross-examination his answers led to the conclusion the radio was not on. Independent evidence established a loud banging noise that occurred every two seconds and continued for three or four minutes, was heard in the interior of the Subway shop and also heard by the police over the car radio. The expert evidence determines that both crowbars found in the vehicle were used to strike the rear door of the Subway.

After reviewing, re-examining, and re-weighing the evidence, I conclude that the trial judge could reasonably have reached the conclusion the appellant was guilty (**Queen v. Burns** April 14, 1994, McLaughlin, J. at p. 7 (S.C.C.)).

I would therefore dismiss the appeal.

J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.