C.A.C. No. 116711

NOVA SCOTIA COURT OF APPEAL

Hallett, Pugsley and Bateman, JJ.A.

Cite as: R. v. J.I.L., 1995 NSCA 198

BETWEEN:

J.I.L., a young offender Appellant - and - HER MAJESTY THE QUEEN Respondent	Chandrashakhar Gosine for the Appellant Robert C. Hagell for the Respondent Appeal Heard: October 5, 1995 Judgment Delivered: October 11, 1995

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

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

HALLETT, J.A.:

The appellant, a young offender, was convicted of:

(i) An assault using a weapon contrary to s. 267(1)(a) of the **Criminal Code**; and

(ii) Uttering a threat contrary to s. 264.1(1)(a) of the **Code**.

The appellant asserts on this appeal that the verdict is unreasonable and cannot be supported by the evidence and that the trial judge erred in law on the issue of identification. These grounds of appeal are intertwined.

Facts

At the time of the offence the complainant was a 17 year old boy who lived with his mother [...]. Although he was enrolled as a grade 11 student he was in a special education program as he suffered from a learning disability. His mother's evidence was to the effect that he had the mental ability of a child of seven or eight years of age and performed school work at a grade 3 or 4 level.

On the date of the offence he had peddled his bicycle to a large parking lot [...] to meet his mother's boyfriend when he got off work. While waiting in the parking lot he was accosted by two boys on bicycles, who surrounded him so to speak. One of the boys, who he identified later that day as the appellant, told the complainant that he had heard that the complainant wanted to fight him, which the complainant denied. The appellant told the complainant that if he did not fight him he would kill him. The two boys produced knives, one a very large knife, sometimes described as a military style or a Rambo knife and the other a smaller knife that appears to be in the nature of a Swiss army knife and which was referred to by the complainant in his testimony as a pocket knife. One of the boys identified later as the appellant, flashed the knife he had under the complainant's chin and then punched him a couple of times in the face. The complainant was subsequently punched in the face by the other boy and then, again, punched by the appellant. The two assailants then left the area.

The complainant went to a nearby office and telephoned his mother who came

and took him home. The R.C.M.P. were called. Constables Tardif and Hamel arrived at the complainant's home where they were told by the complainant that he had been assaulted by two white males. He was not able to provide the R.C.M.P. officers with their names or a physical description. The officers then took the complainant in their car and drove about the area where the offences occurred with the hope of finding the assailants. At about 6 p.m., approximately an hour and one-half after the assault, the appellant and another boy by the name of J.H., were outside [...] when the complainant pointed them out to the officers as the boys who had assaulted him. The boy identified as H. tried to hide a knife under a vehicle parked in the driveway but then placed it behind the appellant who was sitting on the steps of the residence. That knife was immediately seized by the police. The appellant produced a smaller knife and gave it to Constable Tardif. Both knives were entered in evidence at the trial. The complainant identified the two knives as those used by the boys who had assaulted him. Constable Tardif testified that when the appellant was arrested he stated to him that "he didn't do nothing".

On reading the evidence of the complainant as a whole it was clear that while under both direct and cross-examination he was prone to respond affirmatively to leading questions. In his evidence the complainant had the appellant wielding the larger of the two knives. We have examined the two knives introduced as exhibits. The so-called pocket knife, silver in colour, is in the nature of a swiss army knife which contains four blades that fold in, one being a can opener, another a bottle opener and screwdriver, a third, a short sharp blade and the forth, a substantial blade about two or more inches in length. The larger knife is very large with a seven inch blade. The blade has one smooth sharpened edge and another serrated edge; it has a very large handle with a compass insert at the end of the handle. It is a very substantial weapon.

The trial judge's decision:

After reviewing the evidence the learned trial judge stated in his written decision:

> "Constable Tardif connects H. with the larger of the two knives in evidence; however, T. [the complainant] associated the accused with the larger knife and H. with the smaller of the two.
>
> It should be remembered that who had which knife on apprehension may not be the same as who had which at the time of the alleged assault, there having been a time lapse.
>
> For the purposes of the charges before the Court, I am satisfied beyond a reasonable doubt that a knife was held to the complainant's face on June 1st, 1994, by the accused. Whether it was the larger or the smaller knife is not crucial; I am satisfied that it was one of the two exhibits.
>
> Both knives were recovered from the accused and his companion; that is, ultimately both knives were retrieved from these two individuals and from no one else. There is no indication that either individual had more than one knife. Each had one in his possession on apprehension.
>
> In any case, on cross-examination, the complainant did concede that he did not give a detailed physical description to the police of the other two youths. On his evidence, though, I am satisfied beyond a reasonable doubt that he knew who his attackers were, that he could and did identify them upon a search of the area, and that his identification was based on his own recollection and observations, not something planted by a police officer.
>
> In reaching this conclusion, I find the complainant knew the two youths to see them before June 1st last year although their exact names were not known to him."

In dealing with the s. 264.1(1)(a) charge the learned trial judge stated:

> "I have carefully reviewed T.'s testimony from my notes and I have also reviewed the tapes of the testimony. The complainant's uncontradicted evidence is to the effect that the accused said to him,

> 'If you don't fight me, I'm going to kill you.' The complainant felt that the accused was 'really going to do it', to use the complainant's words.
>
> With that uncontradicted evidence before the Court, I find that the Crown has established this offence beyond any reasonable doubt. I find the words spoken with an intent to instill fear and anxiety in the complainant. That this intimidation attempt proved successful is evident as measured by the victim's responses. These were not innocent words misconstrued, or idle threats."

The task of the Court of Appeal on a challenge to the reasonableness of a verdict of guilty is spelled out in **R. v. Yebes** (1987), 36 C.C.C. (3d) 417 (S.C.C.):

> "The function of the Court of Appeal, under 613(1)(a)(i) of the **Criminal Code**, goes beyond merely finding that there is evidence to support a conviction. The court must determine on the whole of the evidence whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have rendered. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence. This process will be the same whether the case is based on circumstantial or direct evidence."

The principle challenges to the verdict are that the complainant did not tell the police when they came to his home that he knew the two boys who assaulted him and the conflicting evidence as to whether or not Constable Tardif pointed out the two assailants to the complainant prior to the complainant identifying the appellant and J.H. as the assailants. These two points are obviously of concern to this Court.

Constable Tardif testified respecting their drive up Hornes Lane with the complainant in the back seat:

> "Q. Now what happened?
>
> A. Well, like -- like I was saying, we were driving up the road on [...] there, the victim pointed at the accused and one of his friends, as being the people

> who assaulted him.
>
> At that point, I got out of the vehicle and I observed the other accused in this case, trying to hide a knife underneath a car."...

After stating that the two boys were arrested at 6:05 he was asked under direct-examination the following questions and gave the following answers:

> "Q. Okay, Now I just want to go back a minute again with a couple of very, very brief questions. At the time that you say that T.G. identified the two boys sitting on the step as the ones that he says assaulted him, what was his demeanor like at this time?
>
> A. I don't recall. All I got in my note is: 'While driving on [...], complainant pointed at Mr....' --'...at the two accused, H. and J.L.'
>
> Q. Okay, Was there any hesitation in his voice?
>
> A. No, no. I remember that he pointed them out right away and said 'it's them.'"...

He was asked if he or Constable Hamel, who was in the vehicle with him, had pointed out the appellant and J.H. to the complainant prior to his identification of them as the assailants. He answered:

> "No, No. Not at any point, no."

With respect to the question of identification of the appellant as one of the assailants, the complainant testified on direct examination as follows:

> "Q. Okay. Prior to this incident did you know J.L.?
>
> A. I knew him through a guy upstairs, his name is J.R..
>
> Q. How did you know J.L.?
>
> A. Because J.R. used to hang around with him all the time.
>
> Q. Okay. Was J.L. a friend of yours?
>
> A. No.
>
> Q. Did you know his name?

A. No.

Q. But you're saying that you had seen him? Because you knew him.

A. Yes, with the guy upstairs.

Q. And what about J.H.? Prior to this incident did you know J.H.?

A. Mm-hmm.

Q. How well did you know him?

A. Because me and him used to go the junior high together."

On cross-examination he was asked the following questions and gave the following responses:

"Q. Who told you J.L.'s name? [J.L. is the appellant]

A. One of the officers did.

Q. And the officer told you that was J.L.?

A. Mm-hmm. He pointed - he pointed him out and said, Is that him?

Q. And he pointed out J.L. and said, 'J.L. is there and is that him?"

A. Mm-hmm.

Q. All right. And he did that while you were in the car?

A. Mm-hmm.

Q. All right, So you don't really know J.L.

A. No.

Q. You did tell the officer what he looked like.

A. I showed the officer where he was and what he looked like.

Q. You didn't tell the officer anything like that.

A. No." ...

Further questions on the issue of identity were asked as follows:

"Q. You don't know who assaulted you, do you?

A. J.L. did.

Q. All right. And J.L. is the person who was pointed out by the police, isn't that right?

A. That's correct.

Q. All right. But you couldn't describe J.L. to the police, could you?

A. No, I had to show him.

Q. And you showed him what the police pointed out, didn't you?

A. Yes, I did."

Just after the previous cross-examination he was examined on re-direct as follows:

"Q. Mr. Gosine asked you if J.L. was pointed out by the police.

A. Mm-hmm.

Q. When did that happen?

A. That night that the officer took me up in that lane and he went over and grabbed him and he said, Is this J.L. and I said, Yes, it is."

Counsel for the appellant has quite properly drawn the court's attention to judicial pronouncements on the danger of convicting persons where the identification evidence is questionable. (**R. v. Atfield** (1983), 25 Alta. L.R. (2d) 97 (C.A.); **R. v. Quercia** (1990), 60 C.C.C (3d) 380 (Ont. C.A.).

Counsel for the appellant asserts that the learned trial judge made a fatal error in applying the test of credibility to the evidence of the identification witness as opposed to the

test of correctness of the identification evidence.

Disposition of the appeal:

We have examined and weighed the evidence. The complainant was confronted by the two boys for a period of time. This was not identification based on a fleeting glimpse of an accused. It was broad daylight. He had ample opportunity to see who they were. Most importantly, he had known them to see prior to the assault. In our opinion it is not fatal to the identification of the two boys as his assailants that he failed to tell the police when first questioned that he had known them to see prior to the assault. There is no evidence that he was asked if he knew them to see. It must be recognized that the complainant operates at the level of a seven or eight year old. Allowances must be made for this fact which also accounts for his inability to articulate a description of the boys who assaulted him. As the evidence shows he was taken by police car to the area where the assault occurred and according to Constable Tardif's evidence the complainant pointed out the appellant and J.H. as the assailants. The evidence of Constable Tardif satisfies me that the complainant did not have the two boys pointed out to him by the police prior to making the identification. Identification was made within an hour and one-half of the assault. The two boys had in their possession the knives that the complainant described in his testimony as having been used in the assault. There clearly is evidence that the complainant was capable of being confused by leading questions. It is also clear that some of the questions asked of him on cross-examination were not all that clear. There is also evidence that certain terminology confuses him. When first asked at trial if he consented to the assault he said that he had. This was clearly incorrect; it was cleared up by subsequent questioning. There was evidence that he may have mistaken which of the boys had which of the knives and while it is in a realm of speculation it may be that at the time of the assault the appellant used the Rambo knife although it was in the possession of J.H. just prior to his arrest. However, even

assuming he was mistaken as to which boy had which knife, he would not be mistaken as to the nature of the assault and the nature of the weapons used. The types of knives possessed by the boys would be clearly etched in his mind. The two boys, when apprehended, had such weapons. Considering his mental capacity it would be too much of a stretch to assume he made up his evidence after having seen the weapons at the time the boys were arrested.

It is understandable that he could possibly be confused as to which of the assailants had which knife but as pointed out by the learned trial judge which of the weapons the appellant used is irrelevant. It is important in our review of the evidence (not having had an opportunity to observe the demeanour of the complainant) to remind ourselves that the trial judge found him to be honest.

The evidence of Constable Tardif, which was uncontradicted, shows that the complainant immediately identified the two boys as his assailants upon sighting them on [...]. Reading the complainant's evidence in its entirety, despite its deficiencies, supports Constable Tardif's evidence; the complainant testified he showed the assailants to the police.

The appellant did not testify. This court can take into account his failure to do so. Therefore, there is no evidence of a denial of the alleged assault nor any explanation.

Having reviewed and weighed the evidence I am satisfied that the verdict is reasonable. The evidence supports the learned trial judge's finding that the complainant correctly identified the appellant as one of the boys who assaulted him and that the appellant made the threat to kill him if he did not fight.

The appeal is dismissed.

Hallett, J.A.

Concurred in:

Pugsley, J.A.

Bateman, J.A.