

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Clarke, C.J.N.S., Jones and Freeman, JJ.A.

**Cite as: R. v. Ogden, 1993 NSCA 38**

BETWEEN:

ROBERT GEORGE OGDEN

appellant

- and -

HER MAJESTY THE QUEEN

respondent

) Gregory M. Warner, Q.C.  
) for the appellant  
)  
) W. D. Delaney  
) for the respondent  
)  
) Judgment Heard:  
) January 28, 1993  
)  
) Judgment Delivered:  
) January 28, 1993  
)

THE COURT: Appeal dismissed per oral reasons for judgment of Jones, J.A.; Clarke, C.J.N.S. and Freeman, J.A. concurring.

The reasons for judgment of the Court were delivered orally by:

JONES, J.A.:

This is an appeal by the appellant from his conviction on a charge of assaulting Joseph Bower causing him bodily harm at Yarmouth on December 29, 1990, contrary to s. 267(1)(b) of the **Criminal Code**.

The victim, Joseph Bower, was visiting Yarmouth with his friend, Kevin Dwayne Hammond. During the course of the evening they consumed a case of beer and at least part of a bottle of wine at Hammond's house. The two men then proceeded to walk to downtown Yarmouth. In the area of the town clock they met the appellant, Robert Ogden, Kevin Miller and Gary Woods. Joseph Bower testified that they were standing there talking. He turned his head and then was struck by something and that is the last he remembered. When he went to the hospital the next day he had a broken cheekbone. He did not recall any argument with the other men.

Kevin Hammond testified that they stopped at the new Chinese restaurant on Main Street. He stated that he was knocking on the restaurant door and that Joey went around the side of the building to talk to the three men including the appellant. Kevin Hammond got no answer at the door and came around the building where he saw Joseph Bower on the ground and the three men beating and kicking him. Kevin Hammond ran around to the back door of the restaurant to get help and gained entrance. Donald Sweeney ran back with him to the scene. Kevin Hammond then entered the fray and was knocked down. The fighting then ceased. He acknowledged that he had been drinking and was feeling pretty good. He denied he was drunk.

Gary Woods testified for the defence. He stated that he got into an argument and a fight with the victim and pushed him and punched him. The victim fell and hit his head. He denied punching the victim in the face or kicking him. The accused was showing Kevin Hammond the back entrance to the restaurant at the time. The appellant was 20. He testified of meeting the boys on the street. He stated that Hammond was trying to get into the restaurant and that he took him around to the side door. He said when he came back to the parking lot he saw the victim on the ground. He then got into a fight with Hammond.

There was a great deal of conflict in the evidence. Haliburton, J.C.C. after reviewing the evidence entered a conviction. The appellant contends that the learned trial judge failed to apply the law regarding identification and alibi. The defence contended that the appellant was not at the immediate scene but around the side of the building. The appellant contends the trial judge did not properly assess the evidence. The trial judge summarized the issues as follows:

"We've heard a number of witnesses and spent some considerable time hearing the evidence in this matter. In essence, the question which ultimately has to be answered by the Court is whether or not it has been proven beyond a reasonable doubt that there were three persons and not two persons in the parking lot at the time the victim was beaten. There's no question but that at the time and place the victim was beaten and bodily harm resulted.

The defence position, as I understand it, is that the accused was not in the parking lot at that particular time, that he returned after the victim had suffered all his injuries and was lying in a semi-comatose state against the building and that his only involvement in any fight or altercation was as an innocent bystander.

...

It basically comes down to what I accept of the evidence of Mr. Hammond and what I accept of the evidence of the accused."

He then proceeded to weigh and consider the evidence of the witness. He accepted the evidence of the victim and Hammond.

He concluded:

"Defence counsel has made a vigorous argument with respect to the question of identification and the frailties of eyewitness testimony. Certainly, there are such frailties. This is not a conventional identification case. It is one, as I say, which in the end boils down to the question of whether there were two people or whether there were three people. There's a clear conflict on that point between the prosecution and defence evidence.

I'm satisfied beyond reasonable doubt that the prosecution evidence is the correct version with respect to the number of people there and the result flows from that."

We find no substantial error on the part of the learned trial judge in assessing the evidence. This was not the usual case of identification or alibi. There was no doubt that the appellant was at the scene, the only question was whether he participated in the assault. The trial judge accepted the evidence of the victim and Hammond which established that he was a participant. In coming to that conclusion the trial judge was fully aware of the position of the defence that the appellant was not immediately present. Having resolved

the credibility issue there was evidence that could reasonably support the verdict. See **Yebe v. The Queen**, 36 C.C.C. (3d) 417. Accordingly the appeal is dismissed.

J.A.

Concurred in:

Clarke, C.J.N.S.

Freeman, J.A.