

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Daley, 1993 NSCA 183

Jones, Chipman and Roscoe, JJ.A.

BETWEEN:

BRIAN CARL DALEY

T. Gerald Lukeman

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

) for the Appellant

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Dana Giovannetti
for the Respondent

Appeal Heard:
September 30, 1993

Judgment Delivered:
September 30, 1993

THE COURT: Appeal allowed and the conviction and sentence quashed per oral reasons for judgment of Jones, J.A.; Chipman and Roscoe, JJ.A. concurring.

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

JONES, J.A.:

In mid-November, 1991 two garages situate in Antigonish County were broken

into and tools were stolen.

At about 3:00 p.m. on November 29, 1991 R.C.M. Police officers searched the residence of Tony Creamer, situate at Phillips Harbour, and they found the stolen tools. The evidence did not allow any doubt concerning the identification of the stolen property.

Constable Shermerhorn testified at trial that he encountered Brian Daley inside Creamer's residence. He testified that, upon entering the residence, "...Mr. Daley came down the stairs carrying a t.v.". The stolen tools were apparently only a short distance away, within the officer's sight. Creamer and Daley were arrested for unlawful possession at 3:45 p.m.

The police had been acting on information received from Neil George. George operates an autobody shop at Cook's Cove, Guysborough County. He testified at trial that on November 29th he was visited by Creamer and another individual. He spoke only with Creamer. Creamer offered to sell tools to him. George knew that they were stolen property that belonged to his brother-in-law. George purchased one item from Creamer, a file board, and at 8:30 p.m. he turned that over to the police. This item was identified as part of the stolen property.

Neil George testified that Creamer and his companion arrived at his garage in a blue car. Constable Shermerhorn testified that from the information he received he was looking for "an older model blue Phoenix with license plate CBX 527". The officer found that vehicle at Creamer's residence.

George testified that Creamer's companion was driving the vehicle. It was Creamer who approached George and Creamer's companion carried the tools from the trunk of the car into the shop. George was not introduced to Creamer's companion. However,

George testified as follows:

"Q. Alright. But he was identified by Mr. Creamer as Brian Daley?

A. Yes.

Q. Were you introduced to him?

A. No. I asked Mr. Creamer like...I don't know if I asked him who's car it was or who was driving the car and he said 'Brian Daley', that was the words that he said. He didn't really identify the guy, you know."

George was unable in Court to identify the accused as the "Brian Daley" he saw at the garage. His evidence is that the person at the garage was of larger physique. George stated on direct examination that he "didn't really pay too much attention to him"

In cross-examination he testified:

"MR. LUKEMAN: Mr. George, from your evidence in direct-examination, I take it that what you are saying is that the individual seated in the front of the courtroom in the front row with the grey jacket on is not the person who was with, ah, Mr. Creamer the day you bought the air (sic) board from him?

A. No, not from my recognition of him that day. This guy doesn't even look the same. He's smaller."

The appellant, Brian Carl Daley, was charged on January 16, 1992 that he did, on November 29, 1991 have in his possession property to wit: tools of a value exceeding one thousand dollars, knowing that all of the property was obtained by the commission of an offence punishable by indictment contrary to s. 354 of the **Criminal Code of Canada**.

The trial was held before Anderson, J. in the County Court. The defence did not call any evidence. The trial judge convicted the appellant. The appellant has appealed the

conviction. The appellant contends that the verdict is unreasonable as the evidence did not prove the appellant's guilt beyond a reasonable doubt.

The standard to be applied by this Court in reviewing the verdict is set out in **Yebe v. R.** (1987), 36 C.C.C. (3d) 417. 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. In our view the Crown failed to prove beyond a reasonable doubt that the appellant was guilty. The only evidence that placed Daley at the George residence was the hearsay evidence of Creamer. That evidence was not consistent with the evidence of the independent witness George. Faced with George's evidence the hearsay evidence could scarcely be called reliable. The evidence of finding Daley at the Creamer residence was suspicious but standing alone did not place the goods in

the possession of Daley with knowledge that they were stolen. The appeal is allowed and the conviction and sentence are quashed.

J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.