NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Clancey***, 2003 NSCA 62

Date: 20030612
Docket Number: CAC 180927
Registry: Halifax

Between:

The Queen

Appellant

v.

Lennie Daniel Clancey

Respondent

Judges:	Roscoe, Chipman & Hamilton, JJ.A.
Appeal Heard:	June 3, 2003, in Halifax, Nova Scotia
Written Judgment:	June 12, 2003
Held:	Appeal allowed, with an order pursuant to s. 487.052 of the **Criminal Code** issued, as per reasons for judgment of Hamilton, J.A.; Chipman & Roscoe, JJ.A. concurring.
Counsel:	James Gumpert, Q.C., for the appellant Joshua Arnold & Elaine G. Cumming, for the respondent

Reasons for judgment:

[1] This is an appeal from the decision of Judge Castor H. F. Williams dated May 3, 2002, wherein he dismissed the Crown's application pursuant to s.487.052 of the **Criminal Code**, (R.S. 1985 c. C-46) for an order for DNA samples.

[2] The Respondent pled guilty to a charge of aggravated assault, contrary to Section 268(1) of the **Code**. At the sentencing hearing the judge refused to grant an order for DNA samples as requested by the Crown.

[3] The facts on which the guilty plea was entered are as follows. On March 24, 2000, at approximately 3:48 in the morning, the respondent was with a group of males outside of a club in Halifax. At that time the victim and the victim's friends were leaving the same club. One of the victim's friends made a comment that he thought something smelled funny, referring to what he thought was "pot" which appeared to be smoked by the males outside the club. The victim and his friends continued on but were followed by the respondent's group who then swarmed them. The respondent struck the victim in the face and pushed him down, face first, onto the sidewalk. As the victim tried to get up, the respondent kicked the victim in the face. The group the respondent was in continued to attack, but a cab driver called the police and the respondent's group left the area. The police arrived a short time later and the respondent was identified and arrested. The victim suffered facial cuts and serious mouth injuries which involved the loss of three teeth.

[4] The grounds of appeal set out in the appellant's notice of appeal are as follows:

1. THAT the Provincial Court Judge erred in principle in refusing to make an order under s.487.052 of the **Criminal Code**.

2. THAT the Provincial Court Judge erred in his interpretation and application of the provisions of s.487.052 of the **Criminal Code**.

3. THAT the decision of the Provincial Court Judge refusing to make the Order under s.487.052(1) of the **Criminal Code** is in all the circumstances clearly unreasonable.

4. Such other grounds of appeal as may appear from a review of the transcript of proceedings under appeal.

[5] The crime the respondent pled guilty to would have been a primary designated offence as defined in s.487.04 of the **Code** had it been committed after June 30, 2000, the date the **DNA Identification Act,** Stats. Can. 1998, c. 37, came into effect.

[6] The standard of review in this case is as outlined by the Ontario Court of Appeal in **R v. Hendry**, 161 C.C.C. (3d) 275 (Ont. C. A.) at ¶ 8 as follows:

> The options available and the factors that the trial judge must weigh in determining whether to make a DNA order are more limited than in making a sentencing decision. However, as Weiler J.A. said in *Briggs*, the standard of review of orders under s. 487.051(1)(b) and s. 487.052 should be the standard applied to the review of such discretionary orders. Accordingly, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a decision to either make or refuse to make a DNA data bank order if the decision was clearly unreasonable.

[7] Section s.487.052 of the **Code** provides as follows:

> (1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the *Young Offenders Act*, of a designated offence committed before the coming into force of subsection 5(1) of the *DNA Identification Act*, the court may, on application by the prosecutor, make an order in Form 5.04 authorizing the taking, from that person or young person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1), if the court is satisfied that it is in the best interests of the administration of justice to do so.
>
> (2) In deciding whether to make the order, the court shall consider the criminal record of the person or young person, the nature of the

> offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision. 1998, c. 37, s. 17.

[8] In his decision the trial judge said:

> With respect to the DNA application by the Crown, I am satisfied on the submissions of counsel that should the order be made the impact on your privacy and security would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice to be achieved through early detection, arrest, and conviction of offenders. So I will deny the order for the DNA.
>
> I have taken into consideration, also, the nature of the offence and the surrounding circumstances of its commission and the impact such an order will have on your privacy and security. And, in particular, I have taken into consideration the submissions of both the Crown and the Defence, and the reasons why this order is being sought for retroactive purposes, and not for purposes in the future as was indicated by our Supreme Court in the **Jordan** decision. So on that basis, I will not order the DNA sample order. (Emphasis added)

[9] The transcript of the sentencing hearing and the second last sentence of the judge's decision quoted above, suggests that the judge interpreted **R. v. Jordan** (2002), 200 N.S.R.(2d) 371 (NSCA) as standing for the principle that DNA samples are not to be ordered to assist in "cold" or past crimes, just future ones.

[10] The **DNA Identification Act** states its purpose in s. 3:

> 3. The purpose of this **Act** is to establish a national DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this **Act**.
>
> (Emphasis added)

[11] This suggests the purpose of the **Act** includes assisting in solving "cold crimes".

[12] In **R. v. Briggs** (2001), 157 C.C.C. (3d) 38 (Ont. C.A.), the court included the purpose of assisting in solving "cold crimes" when it listed in ¶ 22 some purposes of the DNA data bank:

> (1) deter potential repeat offenders;
>
> (2) promote the safety of the community;
>
> (3) detect when a serial offender is at work;
>
> (4) assist in solving cold crimes;
>
> (5) streamline investigations; and most importantly,
>
> (6) assist the innocent by early exclusion from investigative suspicion (or in exonerating those who have been wrongfully convicted).
>
> (Emphasis added)

[13] This list of purposes was referred to with approval by this Court in **Jordan**, supra, at ¶ 34:

> I do not think that s. 3 of the **Act** is an exhaustive statement of the legislative purpose of the overall legislative scheme established by both the Act and the DNA provisions in the **Criminal Code**. As Weiler, J.A., pointed out in **Briggs**, this legislative scheme intended also, among other things, to deter potential repeat offenders, to promote the safety of the community, streamline investigations and, importantly, to assist the innocent by early exclusion from investigative suspicion. I will comment briefly on each of these. [Emphasis added]

[14] The fact **Jordan**, supra, did not specifically mention the purpose of assisting in solving "cold crimes" does not suggest disapproval of this purpose.

[15] In light of the wording of the **Act** and the cases, I am satisfied the judge erred in law in making his decision on the basis that a DNA order should not be granted where it might be used to solve "cold crimes".

[16] I am also satisfied the judge erred by failing to consider one of the factors s. 487.052(2) of the **Code** mandates he consider, namely, the prior criminal record of the respondent, and by failing to consider the complete lack of any evidence that the order would constitute more than a minimal invasion of the respondent's privacy or security of the person.

[17] After reviewing the record in this case I am satisfied a DNA order should be issued. The respondent's criminal record cannot reasonably support a finding that there is little chance of recidivism, containing as it does 20 prior convictions of which three are primary or secondary offences, including assault with a weapon and two separate assaults. The respondent's actions giving rise to the guilty plea were violent. They resulted in serious injury to the victim who suffered facial cuts and serious mouth injuries which involved the loss of three teeth. If this offence had been committed after the **Act** came into effect, it would have been a primary offence. There is no evidence to suggest the respondent's privacy and security of the person would have any unusual or particular effect on the respondent that would reach beyond the general effects anticipated by this legislation.

[18] Accordingly I would allow the appeal and order that the matter be remitted to the Provincial Court for the issuance of an order pursuant to s. 487.052 of the **Code** requiring the respondent to provide a DNA sample.

Hamilton, J.A.

Concurred in:

Roscoe, J.A.

Chipman, J.A.