NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Magloir***, 2003 NSCA 74

Date: 20030703
Docket: CAC 184011
Registry: Halifax

Between:

David Clarence Magloir

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Roscoe, Chipman and Oland, JJ.A.
Appeal Heard:	June 3, 2003, in Halifax, Nova Scotia
Held:	Appeal against conviction allowed and a new trial is ordered as per reasons of Oland, J.A.; Chipman and Roscoe, JJ.A. concurring.
Counsel:	Lawrence O'Neil, for the appellant Dana Giovannetti, Q.C., for the respondent

Reasons for judgment:

[1] In the early morning hours of July 8, 2000 a fight broke out outside a pub in Antigonish, Nova Scotia. A beer bottle wielded by an assailant he did not see struck Kevin Starzomski on the side of his head.

[2] Justice Douglas L. MacLellan of the Supreme Court of Nova Scotia found the appellant guilty of aggravated assault contrary to s. 268 of the **Criminal Code**. He sentenced him to twelve months' imprisonment to be served in the community with conditions on release. The appellant appeals against his conviction on several bases, including the ground of a wrong decision on a question of law pursuant to s. 686.

[3] It would be helpful to begin with some background and a brief summary of the most significant evidence before the trial judge. A crowd of some 50 to 60 people gathered outside the Piper's Pub after it closed at 2 a.m. The fight in which Mr. Starzomski was injured was one of several altercations on the sidewalk and street. There were people yelling and screaming, pushing and shoving, and the scene was described as intense, chaotic, and very high energy.

[4] At trial, Mr. Starzomski testified that when the pub closed, he left with two friends, one of whom got into a fight. Others joined in. When his friend fell to the ground during the fray, Mr. Starzomski went over to pull someone off him. As he was doing so, he was hit from behind. He did not see who struck him on the left side of his head. The emergency room physician described the injury as life threatening had it not been addressed. An artery had been severed, Mr. Starzomski lost about a litre of blood, and stitches were required to stop the bleeding and to close the wound.

[5] Two Crown witnesses, Gerald Brown and Corey Fougere, identified the appellant as the antagonist. Mr. Brown, who testified that he was sober that night, was walking to his grandmother's home when he saw Kevin Starzomski, whom he knew, involved in a fight on the sidewalk outside the pub. According to this witness, he was five or six feet away and saw the person who hit Mr. Starzomski from behind with a beer bottle. He identified that person as the appellant, whom he recognized from previous employment and from around town. Mr. Brown also testified that after Mr. Starzomski was hit, he heard Santana Anderson say "Don't fuck around with Mookie."

[6] Mr. Brown's evidence was that he saw the appellant's face clearly. He had described the assailant to the police as a short, black guy with dreadlocks and, on cross-examination, Mr. Brown maintained that the person he saw strike Mr. Starzomski had had his hair tightly braided across the top of his head.

[7] Among other things, Mr. Brown testified that after the assault, he ran in, put his arm around Mr. Starzomski, and walked him across College Street. People came to help and after a few minutes he left the scene. None of the other witnesses, including Mr. Starzomski and staff of the pub, indicated that he had been taken across the street or moved away from the pub. Mr. Brown did not come forward as a witness until some time had passed after the assault and Mr. Starzomski had spoken to him.

[8] The second main Crown witness, Corey Fougere, acknowledged that he was probably impaired that night. He testified that after he left the pub, he saw Mr. Starzomski trying to break up a fight and that things happened really fast. According to this witness, from eight to ten feet away he saw the appellant hit Mr. Starzomski on the side of the head with a beer bottle. He said that he knew who the appellant was because they had had some of the same friends through school, and that he knew him by his nickname, Mookie.

[9] After he heard the bottle smash, Mr. Fougere headed home. On the way, he came across the appellant seated in the back of a police vehicle and he yelled into the car that that was the guy who did it. At trial, an officer confirmed this encounter and Mr. Fougere's identification of the appellant at the patrol car.

[10] In both a statement given to the police that day and at the preliminary inquiry, Mr. Fougere described seeing Mr. Starzomski sucker punched and taking a powerful blow to his face just before he was hit by a bottle. After sustained cross examination at trial, he said that his recollection of this was hazy. None of the other witnesses, including Mr. Starzomski, described such a punch.

[11] Neither Mr. Brown nor Mr. Fougere could say how many black men other than the appellant, if any, were at the scene. When the trial was heard in the spring of 2002, these two witnesses had been living together since the previous fall.

[12] The appellant did not dispute that he was outside Piper's Pub that night, but he denied that he had hit Kevin Starzomski with a beer bottle. His evidence was

that when he saw a friend fighting with Mr. Starzomski, he went over and grabbed Mr. Starzomski around the back. As he was holding him, he heard a smash and Mr. Starzomski fell back and appeared to go limp. The appellant testified that he did not see Mr. Starzomski get hit nor did he see who did it.

[13] The appellant confirmed that his nickname was Mookie. He believed that there had been other black individuals outside the pub, but they were not people he recognized. He described his hairstyle that night as a full Afro which went around his whole head, two or three inches out from the scalp, and said that he was wearing a tan baseball cap turned backwards. An officer who picked him up after the fight confirmed that the appellant had had an Afro, not dreadlocks or braided cornrows.

[14] Josh MacKenzie, a friend of the appellant, was with him that night. Mr. MacKenzie testified that he saw the appellant grab Mr. Starzomski from behind and that the appellant did not have a bottle in his hand when he was holding onto him. He too did not see Mr. Starzomski get hit or who hit him.

[15] The central issue at trial was identification; that is, whether it was the appellant who struck Mr. Starzomski with the bottle. The judge rendered his decision the day after hearing two days of evidence and the submissions of counsel. It consisted of nineteen paragraphs. After reviewing the evidence in a summary manner, the trial judge in finding the appellant guilty of aggravated assault stated:

> [15] Crown and Defence counsel have addressed with me the issue of eye-witness identification and the inherit dangers of that kind of evidence. I accept the law as has been discussed before me. I am also aware of the case law dealing with a situation where the accused has testified and has denied involvement in the crime.
>
> [16] I conclude that in this case I accept the evidence of Corey Fougere and Gerald Brown when they testified that they saw the accused strike the complainant. I find that the evidence of Mr. Brown is very credible and reliable. He was not drinking on the night in question and I believe him when he said that he saw the accused strike the victim. The fact that he described the accused as having braided hair does not cause me to find that his evidence is unbelievable. He knew the accused before the incident and I reject the suggestion that he was making up a story. He told Mr. Starzomski that he had seen the incident but did not run to the police to help. He waited until he was contacted by the police to give a statement. His evidence is supported by the evidence of Mr. Fougere. Mr.

> Fougere also knew the accused prior to the incident. I find that his evidence is supported by Mr. Brown's evidence. They support each other in what happened and I do not find any evidence to suggest that they got together to make up the same story.
>
> [17] The evidence is clear that the accused was at the scene. The comment made by the bystander Mr. Anderson is, I find, consistent with what the Crown witnesses say.
>
> [18] I reject the evidence of the accused. His evidence is hard to believe in that he testified that he was holding Mr. Starzomski when he was struck but did not see who hit him. I also reject the evidence of Mr. MacKenzie when he testified that the accused did not have a bottle in his hand. The evidence of the accused does not raise with me a reasonable doubt and I therefore find that the Crown has proven its case beyond a reasonable doubt. (Emphasis added)

In his notice of appeal, the appellant set out several grounds pertaining to his conviction. In my opinion, this appeal can be determined on the basis that the trial judge erred by admitting evidence that was not admissible and in relying upon that evidence to find the appellant guilty of aggravated assault.

[16] Over defence objection, the trial judge had admitted Mr. Brown's evidence as to what Santana Anderson had said just after the assault. It is my respectful view that in accepting into evidence the words "Don't fuck around with Mookie", the trial judge erred in law.

[17] Brown testified on direct examination as follows:

> Q. All right, and the person who hit Kevin Starzomski, you said you didn't know him by name?
>
> A. No.
>
> Q. Or by nickname?
>
> A. I heard Santana Anderson call him Mookie, actually.
>
> Q. Al (sic) right. Were you familiar with this name prior to, prior to that night?
>
> A. No.

Q. You heard the name Mookie being used, did you?

A. ...

Q. And ah, what exactly did this person you mentioned, what did he say?

A. He said something along the lines like, “Don’t fuck around with Mookie.”

MR. O’NEIL: Objection.

THE COURT: I’m sorry, Can you establish who you were getting him to refer to, Mr. Murray?

MR. MURRAY: He referred to an individual named.

A. Ah, Santana Anderson.

Q. Santana Anderson.

The Court: Yes.

Mr. Murray Ah, let me just ask a preliminary question perhaps. The ah, the comment you were about to make referring to the words of Santana Anderson, when did he speak these words?

A. He was after, just after Kevin went down and they were all around and he was bouncing around and he said, “Don’t fuck around with Mookie.” That’s all I heard.

MR. O’NEIL: Our objection relates to the comment, obviously. It’s out there now.

THE COURT But it seems to me it’s part of what happened at the scene Mr. O’Neil. I’m going to permit that. Go ahead.

MR. MURRAY Ah, all right, and ah, and again, just to clarify, when did Mr. Anderson say those words at the scene?

A. Ten seconds after he was hit.

> Q. All right, and did he say them once or more than once?
>
> A. He was just bouncing around and that's all I picked out. I don't know what he was exactly saying. I don't know.
>
> Q. All right.
>
> A. I know he said that though.

(Emphasis added)

[18] No other witness testified that he heard Santana Anderson say these words. Santana Anderson did not testify at the trial.

[19] During submissions by counsel, the trial judge asked numerous questions regarding the evidence, including Mr. Brown's description of the assailant having had braided hair and his testimony that he had pulled Mr. Starzomski across the street, Mr. Fougere's evidence that Mr. Starzomski had first been sucker punched, and how it was that the appellant did not see the man he was holding struck on the head. Crown counsel referred to Mr. Anderson using the term "Mookie" after the blow in only one sentence of his closing submission and defence counsel did not draw any attention to it. The judge did not raise or mention this aspect of Mr. Brown's evidence in the extensive exchanges he had with counsel.

[20] However, after accepting the eye-witness identification by Messrs. Fougere and Brown and before rejecting the evidence of the appellant and Mr. MacKenzie, the trial judge stated that the evidence established the appellant's presence at the scene and found that the comment made by Mr. Anderson was consistent with the evidence of the Crown witnesses.

[21] The statement attributed to Santana Anderson which was made other than in testimony at the trial of the appellant would be hearsay and inadmissible, if it was tendered as proof of the assertion. In **R. v. Starr, [**2000] 2 S.C.R. 144, Justice Iacobucci at ¶ 160 referred to the central hearsay dangers which were described by Lamer, C.J. in **R. v. D.(K.G.)**, [1993] 1 S.C.R. 740 at p. 764 as:

> ... "the absence of an oath or solemn affirmation when the statement was made, the inability of the trier of fact to assess the demeanor and therefore the credibility of the declarant when the statement was made (as well as the trier's inability to

> ensure that the witness actually said what is claimed), and the lack of contemporaneous cross-examination by the opponent." ...

[22] To be admissible, the comment made by Santana Anderson must either not be hearsay evidence, or come within one of the exceptions to the hearsay rule, or satisfy the requirements pursuant to the principled approach to hearsay as developed in the line of cases which followed **R. v. Khan**, [1990] 2 S.C.R. 531.

[23] Hearsay evidence is defined not by the nature of the evidence *per se*, but by the use to which that evidence is sought to be put: namely, to prove that what is asserted is true (see **R. v. Starr** at ¶ 162). Narrative is not considered hearsay as it is not given for the truth of its contents. Where the truth of an assertion is not in issue and the only question is whether the statement was made, the loss of the right to cross-examine is not of consequence (see **R. v. Evans**, [1993] 3 S.C.R. 653; 85 C.C.C. (3d) 97). Narrative is evidence necessary to understand the unfolding of events surrounding the offence (see, for example, **R. v. J.E.F.** (1993), 67 O.A.C. 251; 85 C.C.C. (3d) 457 (C.A.)).

[24] Although the trial judge stated when he admitted the words made by Mr. Anderson that it seemed to him that they were a part of what happened at the scene, it is clear that he did not treat them as narrative. His use of this evidence was not restricted to the obtaining of a fuller understanding of the assault or the police investigation of the events. Rather, the trial judge relied upon these words in determining the central issue of identification.

[25] I cannot accept the respondent's argument that ¶ 17 of the trial decision is mere surplusage which can safely be ignored. That passage consists of two sentences. The first states that the evidence was clear that the appellant was at the scene. However, this fact was never in dispute and did not have to be established at trial. The appellant's own testimony placed him not only outside the pub that night, but in close contact with Mr. Starzomski during the altercation in which the latter was injured. In the second sentence, the trial judge found that the comment made by the bystander Santana Anderson is consistent with the testimony of Crown witnesses.

[26] There is no mistaking the significance the trier of fact placed upon the two sentences which comprise ¶ 17:

> The evidence is clear that the accused was at the scene. The comment made by the bystander Mr. Anderson is, I find, consistent with what the Crown witnesses say.

In finding that the appellant was the person who assaulted Mr. Starzomski, the trial judge relied on the presence of the appellant at the fight scene, the words "Don't fuck around with Mookie", and the testimony that the appellant's nickname was Mookie as inculpatory evidence. The weight he gave the comment is underlined by the fact that he did not simply recount that it was consistent with Crown evidence but described this as a finding. The comment was not treated as narrative, nor was it surplusage.

[27] The statement attributed to Santana Anderson might be an excited utterance and therefore part of the *res gestae*. However, there is nothing in the record to indicate that the trial judge considered whether this exception might apply and if so, determined that the statement satisfied the requirements of contemporaneity and spontaneity discussed in cases such as **R. v. Teper,** [1952] 2 All E.R. 447 (P.C.) and in **R. v. Ratten,** [1971] 3 All E.R. 801 (P.C.), referred to in **R. v. Clark** (1983), 7 C.C.C. (3d) 46 (Ont. C.A.) and in **R. v. Mahoney** (1979), 50 C.C.C. (2d) 380 (Ont. C.A.), affirmed without comment in [1982] 1 S.C.R. 834.

[28] Nor was that statement admissible pursuant to the principled approach to hearsay. The respondent acknowledges that the Crown at trial would have had substantial difficulties in establishing necessity and reliability. The record does not indicate whether or not Santana Anderson was available to testify. Nor was there any information as to the circumstances under which the statement was made other than Mr. Brown's testimony set out in ¶ 17 of this decision. It is also worthy of note that the utterance "Don't fuck around with Mookie" is capable of having more than one meaning. It could be interpreted as a reminder to the crowd watching the events involving Mr. Starzomski that anyone getting into a scuffle with the appellant was risking bodily harm by him. Just as easily, the comment could be consistent with Santana Anderson having intervened to assist or protect the appellant and warning the crowd to stay back.

[29] In my view, by admitting into evidence the words Mr. Brown attributed to Santana Anderson and by making substantive use of them on the issue of identity, the trial judge erred in law within the meaning of s. 686(1)(a)(ii) of the **Code**. Section 686 reads in part:

> 686 (1) On the hearing of an appeal against conviction ... the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> ...
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (b) may dismiss the appeal where
>
> ...
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a) (ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred ...

[30] The respondent submits that there is no reasonable possibility that the verdict would have been different had the error not been made. It argues that nothing in the impugned evidence was elevated to a role of any decisional significance and suggests that ¶ 17 of the decision did not form part of the judicial analysis leading to conviction. I am unable to agree.

[31] The lengthy and detailed discussions the trial judge initiated with counsel in the course of their closing submissions demonstrates his concern about significant inconsistencies in the evidence going to identification. Mention was made of some, but not all, of these in his decision. I am not saying that the trial judge substantially failed in his duty to give adequate reasons. In all the circumstances of this case, his decision is sufficiently intelligible to permit the exercise of the legal right to appeal in a criminal case: **R. v. Sheppard**, [2000] 1 S.C.R. 869 at ¶ 33. Nevertheless, his economical reasons could have been expanded to more clearly show his reasoning in accepting or rejecting the evidence on identification, particularly the more troublesome aspects.

[32] From my examination of the trial record and the wording of ¶ 17 of the decision, it is my view that the trial judge placed considerable reliance on the

comments attributed to Santana Anderson, which were inadmissible evidence, in reaching his verdict on the charge against the appellant. I am not persuaded that although the trial judge erred in law, no substantial wrong or miscarriage of justice has occurred.

[33] I would allow the appeal, quash the conviction, and order a new trial.

Oland, J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.