

IN THE PROVINCIAL COURT OF NOVA SCOTIA

**Citation:** R v. Sarty, 2004 NSPC 11

**Date:** 20040225

**Docket:** 1324152 & 1340029 - 1324153 & 1340028

**Registry:** Bridgewater

**Between:**

R.

v.

Arnold Sarty and Adam Sarty

Defendant

**Judge:** The Honourable Judge Crawford

**Heard:** February 9, 2004, in Lunenburg, Nova Scotia

**Counsel:** Lloyd Tancock, for the Crown  
Michael Power, for the Defence

## **By the Court:**

### **Facts**

[1] Arnold and Adam Sarty are a father and son who are involved in a boundary dispute with Monte Johnson. Mr. Johnson testified that on June 16, 2003 he went to the area of the disputed boundary to take photographs of the results of recent activity there. After taking pictures of a missing boundary tree and the area where some maples had recently been cut, he went onto Adam Sarty's land to photograph a woodpile which he believed contained wood from the cut maples.

[2] A car was parked between the wood pile and a nearby building. Mr. Johnson put the trunk lid of the car down so that he could photograph the licence plate and as he did so, both accused emerged from the building.

[3] Arnold Sarty was carrying a four foot long 2"x2" stick of milled wood and asked Mr. Johnson "what the f\*\*\*" he was doing there.

[4] Mr. Johnson said he was taking photos, and without another word being said, Arnold Sarty came toward Johnson and, as Johnson was backing away, hit him a two handed blow with the stick on his ribcage. That was immediately followed by another two-handed blow on the other side.

[5] Mr. Johnson said those two blows knocked the wind out of him, but as he backed up he tried to take a picture of Arnold Sarty with the stick. In hindsight he said he did not know why he took the picture; it escalated the situation.

[6] Arnold Sarty hit him a few more times in the left side, but Mr. Johnson wanted to protect the valuable camera, which he had borrowed from a friend. He turned and tried to run.

[7] He said he got only a few feet when he saw Adam Sarty run at him from the side. Adam Sarty tackled him football style, caught him and brought him down.

[8] They landed together in a pile of brush, which meant in Mr. Johnson's mind that they were definitely off the property in dispute.

[9] Mr. Johnson was more concerned about Arnold Sarty and his stick than he was about Adam Sarty. Arnold was continuing to hit him and Johnson was trying to protect his head, thinking, "I'm a dead man."

[10] He held the camera up, thinking it might get him out of the situation. He said things went quiet and he got up and got out of there. As he went, he looked back, still not sure he was going to be allowed to leave, and saw Arnold Sarty beating the camera with the stick, pieces going everywhere.

[11] He said he looked at the clock when he got home and it was 3:15 p.m. He called his lawyer and then called a friend, Wallace Llewellyn, who took him to the hospital. He said he was told he had a possible cracked rib and a ruptured bicep. He was given pain medication and released.

[12] He went to the RCMP detachment office at Cookville, where he gave a video statement and was photographed. The photographs of his injuries were entered as an exhibit in these proceedings. They show a number of deep red marks on Mr. Johnson's arms, shoulders, neck, and side. Some are 2" in width, clearly suggesting the type of stick Mr. Johnson says was used; others are narrow, as if such a stick landed on its edge. Mr. Johnson says that the worst part of his injuries was not the pain and bruising from the blows themselves, but from the complication of shingles, which developed within a week of the injuries at the site of one of the blows to his side, and which he attributes to the beating he received.

[13] Mr. Johnson said that he replaced his friend's camera and he provided receipts which establish the cost to him in the amount of \$963.22.

[14] The defendants each took the stand and denied being involved in the beating or being at the location at the time in question, after a number of witnesses testified in support of their alibi evidence.

[15] The crucial period is from 2:30 p.m., when Mr. Johnson says he arrived at his property and began to take photos, to 3:15 p.m. when Mr. Johnson says he arrived back at his home.

[16] Both Arnold Sarty and his son Adam admit that they arrived at Adam's home property, where the offence is alleged to have occurred, at approximately 2:30 p.m., as that is the time Adam's children were dropped off at home by the school bus. They

say that they went into the house briefly, that the two children left to play with friends, and that sometime around 2:45 p.m. each left again. Arnold drove back to his own home in Italy Cross and Adam went to look for his son.

[17] Loretta Sarty, Arnold's wife, testified that Arnold was at home at 3 p.m. when her favourite soap opera, "Days of our Lives" concluded and before "Oprah" started.

[18] Christine Mullock, a neighbour of Adam Sarty, testified that she saw Adam drive down the road around 2:45 p.m. that afternoon, shortly after the school bus had come. She thought he must be looking for his son because he turned in the yard of Bianca Kielburger, another neighbour, spoke to his son then backed out and left. Ms. Mullock said she was walking along the road at the time with another neighbour, Scott Whynot. They were on their way to Ms. Kielburger's to assist her in setting up a new above-ground swimming pool.

[19] Scott Whynot testified that he saw Adam that afternoon, but he thought it was not while he and Mullock were walking on the road, but after they had been at Ms. Kielburger's for an hour or so, helping to install the pool. He said that Adam stopped in there to look for one of his children.

[20] The Crown informed me in summation, and Defence did not dispute, that neither Crown nor police received any notice of this evidence until it was proffered in testimony on the date of trial.

## **Issue**

[21] The Crown has established a *prima facie* case on each charge and the only issue in regard to all three charges is the value of the alibi evidence adduced by the defence.

## Discussion

[22] In *R. v. Cleghorn*, [1995] 3 S.C.R. 175 Iacobucci, J stated:

As outlined by my colleague, proper disclosure of an alibi has two components: adequacy and timeliness. This principle was recently reiterated in *R. v. Letourneau* (1994), 87 C.C.C. (3d) 481 (B.C.C.A.), where Cumming J.A. wrote for a unanimous court at p. 532:

It is settled law that disclosure of a defence of alibi should meet two requirements:

- (a) it should be given in sufficient time to permit the authorities to investigate: see *R. v. Mahoney*, supra, at p. 387, and *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 at pp. 62-3 ... (Ont. C.A.);
- (b) it should be given with sufficient particularity to enable the authorities to meaningfully investigate: see *R. v. Ford* (1993), 78 C.C.C. (3d) 481 at pp. 504-5 ... (B.C.C.A.).

Failure to give notice of alibi does not vitiate the defence, although it may result in a lessening of the weight that the trier of fact will accord it ....

¶ 4 As stated above, the consequence of a failure to disclose properly an alibi is that the trier of fact may draw an adverse inference when weighing the alibi evidence heard at trial (*Russell v. The King* (1936), 67 C.C.C. 28 (S.C.C.), at p. 32). However, improper disclosure can only weaken alibi evidence; it cannot exclude the alibi.

[23] Applying the foregoing to the present case, the fact that the defendants' alibi evidence was not revealed until they testified at trial seriously weakens, indeed almost negates, its value. Therefore I can place little reliance on the defendants' testimony that they were not present and did not see Mr. Johnson beside Adam Sarty's woodpile.

[24] And, although I believe the other defence witnesses, they do not provide the defendants with a complete alibi. I believe that it was entirely possible for them to be at the woodpile, where Mr. Johnson says they were, at the relevant time and to do to Mr. Johnson what he says they did and still be where their witnesses say they were at "approximately 2:45 p.m." and "around 3 p.m." – especially when one considers the inconsistency between Ms Mullock and Mr. Whynot as to exactly where they were when they saw Adam Sarty and the fact that it took only 6 or 7 minutes to drive from Arnold Sarty's residence to Adam Sarty's.

## **Conclusion**

[25] I do not believe the defendants' denials nor their alibi; neither raises a reasonable doubt in my mind. On the basis of the remaining evidence which I do accept, I find that the Crown has proven beyond a reasonable doubt that Arnold and Adam Sarty are each guilty of the offence(s) charged against them.