IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Clarke, 2009 NSPC 24

Date: January 8th, 2009
Docket: 1771901, 1771902, 1771903
Registry: Digby, N.S.

Between:

Her Majesty The Queen

v.

Brycen Clarke

DE C I S I O N

Judge: The Honourable Judge Jean-Louis Batiot

Heard: May 1st, 2008, July 24th, 2008 and October 30th, 2008

Written decision: January 8th, 2009

Charge: 344(b) CC, 266(a) CC, 334(b) CC

Counsel: Murray Judge, for the Crown

Stanley MacDonald, Q.C., for the Defence

By the Court:

[1] Mr. Clarke' s defence was not accepted, in light of all the evidence. He wishes to introduce additional evidence now, from his two co-accused -- but not on the same information -- to pursue his defense. A.C. and J.S., both accused of the same offences, were available for trial. One was not asked, the other did not disclose what he now describes, after the decision adverse to Mr. Clarke was handed down. They both know the case for the Crown, and both are represented by counsel since the beginning. The essential issue is whether that proposed evidence is *reasonably capable of belief.*

[2] The accused was found guilty on February 27th, 2008 on a charge of robbery (s. 344). The two main issues at trial were the defence of alibi, and the credibility of the Crown witnesses. The defence asks for a mistrial, given the specific findings of credibility already made, and a new trial.

[3] I include a copy of the complete decision, rendered on February 27th, 2008, as Schedule "A", and shall, there and in this decision, refer to the two proposed witnesses by their initials, since their trial is still to be held.

[4] Such application may be considered, up to the imposition of the sentence. The test is similar to that applied by an Appeal Court to hear new evidence: **Palmer and Palmer v. The Queen** (1979), 50 C.C.C. (2d) 193 (S.C.C.) at page 205; **R. v. MacGregor**, 159 N.S.R. (2d) 391 (N.S.C.A.); **R. v.**

Kowall (1996), 108 C.C.C. (3d) 481 (leave to appeal to S.C.C. dismissed (without reasons) January 30, 1997, S.C.C. Bulletin, 1997 p. 152) . It is stated as follows, in **Palmer,** supra, at p. 11:

> 1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see **McMartin v. The Queen** [[1964] S.C.R. 484].
> 2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> 3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> 4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

PROPOSED EVIDENCE

[5] At approximately 2:00 p.m. on the 8th of March, 2008, A.C. gave a lengthy video statement (about 55 minutes) to Corporal Whelan, describing his involvement with Curtis Fownes, the victim, on the 13th of May, 2007. He says Brycen Clarke was not there.

[6] A.C. was staying at Nicole Simms', drinking heavily – a forty ounce of vodka – and taking some drugs (ecstasy) before and after the group arrive at Nicole's party. He was downstairs playing, recording and mixing music on the computer; he went to use the bathroom and saw Nancy Stanton

and a *white guy*. Again, later, some noise outside drew him out; apparently an agitated Curtis Fownes (the *white guy*) was making a scene, afraid *they* were all ganging up on him.

[7] A.C. talked to him, telling him to *chill out* and *be cool*, etc... He invited him up to the landing to talk. They then went out. They were both drunk and Fownes made a comment to him using the "N" word. A.C. challenged him. They walked up the street behind the adult school; as they did, A.C. says he looked back and saw Brycen Clarke and Linea Robinson get into a cab. Nancy Stanton and J.S. came behind them, with another unknown black man. Curtis Fownes and A.C. walked up behind the adult school; the latter invited Curtis Fownes to repeat the comments again; he did, and A.C. started to *bash* him, punch him. He was the only one doing so. J.S. was not involved and Brycen was not there. The unknown black would have thrown a few punches.

[8] In summary, A.C. told Corporal Whelan that this was a consensual fight between two impaired men, one white, one black, provoked by the former's racist epithet. Any injuries to Curtis Fownes would have been caused by the unknown black man. There was no robbery. Only he and the unknown black man were involved.

[9] A.C. admits he was interviewed to testify at Brycen Clarke's trial and declined. Brycen Clarke was one of his "bestest" friends. The three of them, Brycen Clarke, A.C. and J.S., were charged for the same offences. Brycen Clarke's case was going first. A.C. hoped Nancy Stanton, the main crown witness, would be discredited, *as she was lying*. He and J.S. have since consented to their committal to stand trial in the Supreme Court.

[10] J.S. has filed an affidavit of April 4th, 2008 simply saying that

> *"the evening of the alleged crime I was at Club 98 where I observed Nancy Stanton intoxicated. After Club 98 I went to a house party at Ms. Nicole Simms' residence. Nancy Stanton was also at the house party and was with a guy. I stayed at the house party for approximately one hour. As I was leaving I seen* [sic] *Brycen Clarke get into a taxi and the taxi drove off. I then proceeded to walk to my mother's house on King Street. Due to my pending trial, I cannot provide any further details other than to repeat, again, that Brycen Clarke was not there."*

[11] A.C., in his statement, says that J.S. was walking with Nancy up the street towards the adult center; because J.S. knew A.C. was in a fight, he was trying to hold Nancy back.

[12] In a further affidavit of July 21st, 2008, J.S. adds that he had arrived at Nicole's place between 2:45 and 3:00 a.m., describing people that he saw there, and that he decided to leave Nicole's place between 3:30 and 4:00 a.m. He saw Brycen Clarke outside the front door and had a brief conversation with him. He adds seeing Nancy Stanton by the adult school and he walked with her around the back of the school.

> "*When I arrived I saw a male person, who* [sic] *I know now to be Curtis Fownes, sitting on the ground. He was crying and had blood on him. I saw A.C. and Anthony Burrill* [the unknown black man?] *standing near Curtis Fownes. I did not see anyone strike Curtis Fownes or steal any money from him."*

DISCUSSION

[13] A.C.'s statement is not under oath, as provided by ss. 557, adopting s. 540 (but for subsections (7) to (9)), that evidence must be *under oath,* or, by section 14.(1) of the Canada Evidence Act, R.S.C. 1985, Chap. C-5,) *solemn affirmation.* It has no value as "evidence", and I will consider it as proposed evidence. J.S. has provided two sworn affidavits.

[14] Of the four prong test -- due diligence, relevance and materiality, reasonably capable of belief and reasonable expectation of affecting the outcome -- the last two are particularly material in this application.

A) **Due diligence**

[15] The trial was held on November 20th, 2007. It was adjourned, at the defence's request, for the attendance of Linea Robinson and A.C.. Mr. Manning, Q.C., a very experienced criminal lawyer,

has filed an affidavit, explaining he interviewed A.C. on the 3rd day of January, 2008, with the latter's lawyer present. He had understood that A.C.

> *"might testify that Brycen Clarke did not take part in the alleged assault, theft and robbery of Mr. Fownes, I was not able to obtain confirmation of that information from A.C. on January 3rd, nor was I able to obtain additional details with respect to his observations on the incident, I did not call A.C. as a witness at Brycen Clarke's trial."*

[16] Further Mr. Manning states he is aware now of A.C's statement to the police, of March 8th, 2008, and it *contains information that was unknown to me on January 3, 2008. I was not aware of the information possessed by A.C..*

[17] As for J.S., Mr. Manning was not informed of any information he possessed, nor that he was willing to testify at Brycen Clarke's trial.

[18] I note that at the inception of these matters, the Crown had applied to join all three accused. This was contested, and the application was eventually abandoned.

[19] The three accused were quite aware of the evidence alleged against them. They were free to subpoena each other. Brycen Clarke, through his lawyer, in fact did so, in the case of A.C..

[20] As for the evidence of J.S, there is no proprietary interest in a witness, he could have been interviewed. He apparently was not. Had he been, his evidence may have been available, even though he was a co-accused. Certainly he could have been subpoenaed, as A.C..

[21] There was due diligence in the case of A.C.. At the same time, the lack thereof in the case of J.S.'s evidence ought not be a factor as strictly applied in a criminal case: (**McMartin v. The Queen**, supra). Given the seriousness of the main charge, such a factor will not play a major role.

B) **Relevance and materiality**

[22] That new evidence addresses both those issues, and if it were believed, might have some bearing on the ultimate conclusion with respect to the defence of alibi. Unfortunately, it lacks important details and observations that would have been known by these two witnesses.

C) **Capable of belief**

[23] This is the central issue: why did A.C. not disclose to Mr. Manning what he stated, over two months later, to Corporal Whalen, after the decision in the case was handed down, convicting one of his best friends, and confirming the credibility of the main witness against both Mr. Clarke, and himself. He speaks of fear, of not thinking straight at that time.

[24] I only have to determine whether both newly disclosed statement are *reasonably capable of belief*.

[25] Aside from specifically stating that Brycen Clarke was not at the scene, A.C. describes a consensual fight between two drunks, and denies any robbery, theft or bodily harm; if such occurred, it was the unknown male who committed them. In effect, he was provoked, is justified in assaulting the victim, did nothing else and did not see anything else done to the victim; if something else was done, it was a stranger who did it, and no one else was present. This is an exculpatory statement, his justification and defence.

[26] He could have provided it in January, in this trial. He could have claimed the protection of s. 5(2) of the **Canada Evidence Act**, supra. He would also be protected by s. 13 of the **Charter of Rights and Freedoms**, (anything that he said could not be used against him except in a case of perjury). He did not, nor did he disclose such possible testimony to Mr. Clarke's defence counsel, at the most relevant time. He says he was scared then, but gave a 55 minutes statement to the police just two months later, one that could be described as garrulous. That is suspicious.

[27] Why would A.C. not disclose such exculpatory statement to Mr. Manning when it was most appropriate, to help his best friend. There was no reason not to reveal that evidence then. There would have been no adverse consequences, except in case of perjury, at his own trial, and only if his testimony gave rise to that issue.

[28] The Supreme Court of Canada is very clear. In **R. v. Noel**, 2002 CarswellQue 2167, it held that the Crown may not use the prior compelled testimony of an accused to incriminate him/her. The quid pro quo is simple: if you are compelled to testify, and you tell the truth, and this evidence may incriminate you in a subsequent proceeding, the State will not use that evidence against you. A Court will recognize and enforce this bargain. It only applies to compelled evidence; therefore, in the case of voluntary testimony, as there is no such bargain, there is no such protection: **R. v. Henry**, 2005 SCC 76; 2005 CarswellBC 2972.

[29] A.C. was interviewed by Mr. Manning, in the presence of his own counsel, Mr. MacLeod, both experienced criminal trial counsel. The issue of legally protected statement -- not in evidence in this application -- that any incriminating statement could not be used against him in a subsequent proceeding, would have been a relevant topic of discussion, to ensure a candid account with counsel and at trial.

[30] A.C., according to his police statement, was aware of the evidence presented and the reasons for the decision. His statement, aside from placing Mr Clarke away from the scene, attempts to address some of the findings of fact, attributes the racial slur now to the victim, and away from himself, would postpone by some half-hour or one hour the time of departure; would claim for himself, alone, the original confrontation, the provocation and his physical reaction to the victim; is silent as to the scene of the confrontation and the role Nancy Stanton played in protecting Curtis Fownes; all the while professing not to remember very much (because of the amount of alcohol and drug in his system); and attribute the more serious acts to a stranger (we know now his name, from J.S.).

[31] Such statement can be described as self-serving, blaming the victim, Curtis Fownes, for his injuries, excusing his own actions, and ignoring the facts at issue at trial and to which he would have been an eye witness. That Mr. Clarke took a taxi is not an issue, only its timing, before or after the crucial events.

[32] It is at odds with the evidence of Nancy Stanton who, testifying under oath, said she decided very quickly, and without having any drink at the house, to leave a few minutes after arriving at Ms Simms' (not nearly one hour after, as A.C. states) because of A.C.'s racial comment which made her

very uncomfortable. A.C., J.S. and Ms Stanton are African-Canadian. Ms Stanton has no stake in the outcome of this trial. She was a volunteer. A.C. and J.S. are accused.

[33] Of note, A.C. provides a bare statement, not sworn, to reopen the trial. At most, given the fact he said different things to Mr. Clarke's counsel, at the relevant time (before the conclusion of the trial), whatever he said would likely be used to at least show he made an inconsistent statement, at a most crucial time in the trial of Mr. Clarke, thus affecting adversely his credibility (such statement is not privileged).

[34] A.C. expresses, in his statement, the hope that Nancy Stanton's credibility could have been impeached in this first trial, before his own trial. Ms Stanton will be the main witness. The withholding of relevant evidence is tantamount to a tactical decision on A.C.'s part, awaiting the outcome of one decision in the first trial, to attempt to present further evidence, hopefully to reverse the original decision, adverse to his interest. It lengthens the proceedings even more, and gives all another chance to try the issue of credibility.

[35] In **Palmer**, supra, (a case of drug trafficking) the Supreme Court of Canada upheld the British Columbia Court of Appeal, which had denied the Accused's appeal to introduce fresh

evidence of the recanting main witness at trial, in light of the trial judge's findings of facts, on the whole of the evidence, even though that witness was supported financially and protected by the police. It upheld also the Court of Appeal's view that the proposed evidence would not be credible.

[36] In **R. v. Tucker**, [1988] N.S.J. No. 33; 83 N.S.R. (2d) 6, a case of fraud (presentation for payment of false invoices by an experienced businessman), the Court of Appeal of Nova Scotia upheld the trial judge's decision to convict, not to accept the defence that the falsification was done with the knowledge and/or complicity of government officials. The appellant made an application to introduce such fresh evidence at the appeal level. It was denied, and the sentence was doubled.

[37] The proposed evidence in **Tucker**, documentary in nature, unknown at the time of trial (part of a 'privileged file"), contained cheques made to two parties. The argument was that it may tend, if considered, to discredit the evidence of the Crown witnesses, as they would have known what the Appellant had done in falsifying the invoices. At pp 11-12 (N.S.J. 33), MacDonald J.A. states:

> In my opinion the documentary evidence now sought to be introduced is not of sufficient strength that it might reasonably, when weighed with all the other evidence presented at trial, be expected to effect the verdict reached by Judge MacPherson. It follows that I would dismiss the application to introduce new evidence on appeal.

[38] This is not an exercise in a vacuum. Fresh evidence, to be admitted, must have the potential to affect the verdict. Its credibility (*reasonably capable of belief)* is crucial and must be assessed, not only on its own merit, but also in how it may affect the whole evidence presented at trial.

[39] In the case at bar, I must conclude A.C.'s statement and J.S.'s affidavits are insufficient and not *reasonably capable of belief* :

> they are untimely, coming to light after the trial and decision, so that the authors, both facing the same charges, can tailor their evidence to that already presented;
>
> they circumvent an order of exclusion of witnesses during the trial;
>
> they are superficial and ignore some crucial pieces of evidence presented at trial;
>
> they are self-serving;
>
> in the case of A.C., his silence, or different statement -- the evidence is silent on this point -- at the time of the trial is both unreasonable and highly suspicious;
>
> in the case of J.S., it took two affidavits, several months apart, to address some of the relevant issues;
>
> in ignoring the presence of Ms. Stanton at the scene of the confrontation, neither addresses the crucial facts, which occasioned these charges;
>
> they repeat evidence which was rejected at trial as not credible.

[40] Such evidence would not affect the verdict, as it remains silent about the violent encounter, its participants, the injuries, the bloody victim, and the defence of the victim, all visible to any eye witness, which A.C. and J.S. profess to have been.

[41] For these reasons, the motion to re-open the trial is dismissed.

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Jean-Louis Batiot, J.P.C.

SCHEDULE "A"

THE COURT: (orally)

1. This is a decision in the trial of the charges contrary to sections 344(b) (robbery), 266(a) (assault) and 334(b) (theft), all of the **Criminal Code**, that occurred in Digby, Digby County, Nova Scotia. The charges are against Bryson Clarke.

2. The evidence at trial was presented through Constable Kelly, the informant, Curtis Fownes, the victim, Nancy Stanton and for the Defence, Amy Barnaby, Earl Hudson, the accused Bryson Clarke and Linea Robinson.

3. Mr. Fownes, in the early hours of the morning received a serious beating and had money taken from him. The Crown alleges that he was robbed by several people including the accused, Mr. Clarke. Mr. Clarke says that he was not there and did not participate in any of this unlawful activity. Should Mr. Clarke's evidence be accepted it is the end of the matter since it exonerates him. If it is not accepted then the Crown still has to prove the case beyond a reasonable doubt on the whole of the accepted evidence in accordance with ***R. v. W.D.***.

4. On May 13th 2007, early in the morning, Mr. Fownes and Ms. Stanton met for the first time at the closing of Club 98 in Digby, Digby County, Nova Scotia at about two a.m.. This is the only club in town. Mr. Fownes was new in town. He had arrived the preceding day to work for the summer at the local hotel. He had graduated from the Nova Scotia Community College in Bridgewater.

5. Ms. Stanton has lived all her life in this area within a group of friends and acquaintances, a member of a local and well established visible minority in this community.

6. Mr. Fownes was inebriated yet not quite ready to call it a night. Ms. Stanton extended an invitation for him to accompany her to a party hosted by Ms. Simms, a friend a Ms. Stanton. They stopped on their way at Recardo's, where they got a ride to Third Avenue in Digby with Amy Barnaby, another friend of Ms. Stanton. Shortly thereafter a serious incident occurred. Mr. Fownes then Ms. Stanton and others were involved. Credibility is a central issue.

7. Upon reaching the Simms residence Ms. Stanton went downstairs to the bathroom. She was then accosted by A.C., Ms. Simms' boyfriend. He told her she had to chose between "*a white boy"* and in her words, "*the N word"*. Mr. Fownes is white. Ms. Stanton and the others are black. This remark made Ms. Stanton very uncomfortable. She checked with Ms. Simms, for whom it was not an issue. Yet Ms. Stanton felt unwelcome and decided to leave. She had been there perhaps ten minutes. J.S. and A.C., acquaintances of hers, entreated her to remain.

8. She made arrangements with Linea Robinson, a younger sister of a friend of hers: they would share a cab, taking Mr. Fownes with them. She did not want to leave him behind. Ms. Robinson recalls receiving two dollars for the short ride.

9. As Miss Robinson arranged for the cab Ms. Stanton looked for Mr. Fownes, she did not see him, but observed a group of people by the highschool – the adult school faces it – up the hill a short distance away. Thinking Mr. Fownes was there, perhaps to smoke marihuana she decided to go and retrieve him. She started to walk up the hill, along Third Avenue, with Linea Robinson. The accused, Bryson Clarke and J.S., followed them. At the top of the hill, by the fence, near the adult school Linea decides to go back, and does. Bryson Clarke moves

ahead of them, toward that small group which, Ms. Stanton observes, is moving toward the darker side of the adult school ahead. Mr. J.S. holds her back preventing her progress.

10. Ms. Stanton apprehends a worse situation. She kicks off her high heel flip flop shoes, frees herself from J.S.'s grasp, runs to the other side of the adult school, hears some muffled sounds "*like somebody was kicking a dog, like it was just like yelping kind of thing"* and she sees Curtis Fownes on the ground surrounded by a group of people kicking him.

11. Assuming that they had taken his wallet she entreats the group to give it back to Fownes (*this was not right).* They ask for the wallet, got it, and each made sure, using a flash light, to take all the money, then threw it to the ground.

12. Ms. Stanton cannot say who asked for or who took the wallet first. Eventually she picks it up from the ground to secure it.

13. There was enough light to observe the scene. Ms. Stanton could see the four assailants. She identifies them as Bryson Clarke, the accused, J.S., A.C. and one other, unknown to her. She saw them take the money in $50 bills.

14. Curtis Fownes was sitting on the ground, bloody. To protect him she stands over him, his body in a seated position at her feet, his head between her knees. She extends her arms and hands outwards to keep the four assailants at bay, all kicking him, taking turns.

15. She is facing the High School, her back to the Simms residence; Curtis Fownes is facing that residence. Ms. Stanton sees Mr. Clarke to her *"top left"*. She knows him; they live in the same, small community and meet, from time to time, at the same parties.

16. To distract them she exclaims that the cab had arrived; they leave. She is not sure whether Mr. Fownes followed them. Both Fownes and herself end up at the place, in the parking lot, where she had kicked off her shoes. She retrieves them.

17. Three of the assailants, J.S., A.C. and Bryson Clarke, come back looking for a bracelet or a chain. Curtis Fownes refuses to give it to them: indeed they would have to kill him first; it has sentimental value. The assailants leave. She and Mr. Fownes run in the opposite direction, by the High School, to the Dairy Queen, to the hospital. They are scared.

18. Ms. Stanton is not sure of the times. This event occurred quickly and she would guess between three and three thirty a.m.

19. Mr. Fownes, quite inebriated, from a rather foggy recollection, describes his encounter with several men whom he could not identify. He got beat up severely. He feared for his life. He offered them money in fifties and twenties to stop the beating. They took it and he ended up in the hospital.

20. Mr. Clarke denies being there at all and says he was with Linea Robinson the whole time waiting for the cab which eventually drove him home. Indeed he has a clear recollection of the time lines of the events that night - just in case he is falsely accused, as in the past - and was *probably* home by 3:23 or 3:25 a.m. that morning having arrived at the Simms residence *probably about 5 after 3*. He only drank water that night. He was the only witness but for Constable Kelly to give clear evidence of times.

21. Interestingly Mr. Clarke did not make a mental note of the time at Recardo's before going to Simms where, he says, Constable Kelly threatened to arrest him as he witnessed a short confrontation involving one of the accused friends. Indeed he wonders how the Constable could have been near the adult school that night at approximately 3 a.m., as the latter testified at the beginning of the trial.

22. Bryson Clarke said he had nothing to drink or smoke. But Mr. Johnson testified of sharing a joint with him.

23. Defence witnesses say Ms. Stanton remained at the Simms residence once she got there. Matthew Johnson, also named Boo, felt she was there for quite along time. He, Mr. Clarke, Ms. Robinson, Ms. Barnaby describe Ms. Stanton as *drunk and intoxicated, having slurred speech, could not walk straight, loaded, giggling.*

24. Was she? By her own admission, Ms. Stanton had drank the previous evening, before going to Club 98, a quart of rum, less perhaps 10 oz. It is a habit. It is not unusual for her. She alternates her drinks, vodka or rum. She is a self-employed hair dresser. She may have had some two drinks at the Club. She limits her purchases at the Club where drinks are too expensive for her. She is also a part time bouncer there, but was not on duty that night. She, physically, from her physical appearance, obviously, is capable of taking care of herself.

25. The consumption of such quantity certainly gives rise to concerns as to her state of sobriety. It was a proper subject of extensive examination and cross-examination. She describes herself as having a high tolerance to alcohol, given her practice, her age (25) and being, in her words - "*a big girl*". She did not think she was drunk although she was not sober. While under the influence of alcohol she is *funny and friendly*.

26. She knows everybody and appears to have felt to be among friends and acquaintances. Yet at the Simms residence she became aware of a change of attitude once the racist comment was made to her. She decided very quickly to leave, not feeling welcome. Having made the decision, she put it to execution immediately.

27. She did not have to occupy herself with Curtis Fownes. Their acquaintance was only about an hour old; but, given her concerns, she decided not to leave him behind. She suspected something untoward, but nothing as dire as the situation she eventually faced. Not seeing Mr. Fownes at the house, she looked for him, and even though others entreated her not to,

and one actually tried to prevent her, physically; far from cowering, she broke free and ran ahead.

28. Faced now, at the scene, with a violent assault underway before her eyes, she doesn't withdraw, she intervenes, fearlessly, alone against several young men attacking Mr. Fownes. She sees them ask for and then getting money from the victim. And she, fending their blows, protects that victim, as much as she could, from further blows, alone against 4 aggressive young males.

29. One can argue she did so because she was inebriated, as the defense testifies and infers. The evidence shows otherwise: a conscious decision, based on suspicions and apprehension of some difficulty, to intervene and remove herself and Mr. Fownes from an uncomfortable situation; then, when faced with actual harm, devising a plan of action quickly, logically, reasonably, with great courage and presence of mind, even attempting to divert her attackers' attention whenever possible, calling for a cab.

30. These are not the actions of a person whose mental or physical abilities were impaired by alcohol. These acts speak much more loudly than the words used to describe her by the witnesses.

31. I note Ms. Stanton was somewhat a reluctant witness; the Crown was asking her to testify against her own people, some she considered her friends; certainly her acquaintances,

siblings of friends, members of this small, tightly knit community; yet she did so without hesitation and unshaken. She is a highly credible witness, who describes her role in this episode quite humbly. But the events show a remarkable deed by a person acting unselfishly, helping a stranger attacked by her acquaintances, because it was not *"right"*.

32. I conclude, from all the evidence, that the manner she testified on direct and on cross-examination, that her acts that night show great presence of mind, demonstrate physical and moral courage, decisiveness, determination, physical abilities and mental acuity.

33. I reject Ms. Robinson's evidence, that the accused was at all times with her, waiting for a cab; that she wanted to go home, nearly immediately upon getting to the Simms' residence may be understandable - if not explained - in light of the hour. She did not recall, however, that in fact she accompanied Ms. Stanton on her way up the hill. I find that her testimony is contradicted by that of Ms. Stanton, as to the whereabout of Mr. Clarke on the way up.

34. I accept Mr. Clarke's evidence that he *"probably"* went home that night with Ms. Robinson, even though the original arrangements did not include him; but I reject his alibi that he was not at the scene. The evidence shows the time to cover the distance from the scene to the Simms' residence to be short.

35. Whether he had a time piece or not, he kept track of time - he did not indicate if he did so simultaneously with the event or after - because *"I'm like everybody else, I do check the time when I have a chance to in case something like this happens"* when he may have to face false accusations. He thinks the police does not like him. But why keep track of time when there is no evidence that anybody at the Simms party was aware that a police car, driven by Constable Kelly, had been present twice near the scene, quite likely the cause of the break-up of the congregation of people near the Adult School that night, about 3 a.m.; nobody except those who were there.

36. I do not accept his evidence Ms. Stanton was at all time at the Simms' residence, and was there when he left in a cab, *"laughing, joking, drinking"*. Mr. Clarke became an active party to the beating (s. 21 of the **Code**) but his participation was of short duration just before Ms. Stanton's arrival on the scene, where she saw Mr. Fownes being hit.

37. It is argued that the taking of the money did not amount to a robbery, as Mr. Fownes offered to pay them to stop the beating. With respect, I disagree.

Section 344 provides:

> *Every one commits robbery who*
> *(b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person.*

38. In this case, the violence immediately preceded the theft, and followed it. It is immaterial whether the original intent was only the beating. The fact theft occurred during the act is sufficient to bring the whole transaction within the definition of s. 344: **R. v. Dunn** (1978), 40 C.C.C. (2d) 532 (Ont. C.A.).

39. I conclude, beyond a reasonable doubt, that the accused is guilty of robbery. Since theft and assault are included offences I will invoke the **Kienapple** principle and stay those two charges.

CLERK: (Inaudible)

THE COURT: Guilty of 344 and a stay for the 266 and the 334.

Jean-Louis Batiot, J.P.C.

February 27th, 2008

Annapolis Royal, Nova Scotia