Docket No.: CAC 161864
Date: 20001031

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Riley, 2000 NSCA 123]

Chipman, Freeman and Roscoe, JJ.A.

BETWEEN:

SAMUEL ALBERT RILEY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	The appellant in person Kenneth W.F. Fiske, Q.C., for the respondent
Appeal Heard:	October 16, 2000
Judgment Delivered:	October 31, 2000
THE COURT:	Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Freeman, J.A.; Chipman and Roscoe, J.A. concurring.

Freeman, J.A.:

[1] The appellant was convicted of the indictable offence of break, enter and theft at a tire store contrary to s. 348(1)(b) of the **Criminal Code** following a trial before Chief Justice Kennedy of the Supreme Court of Nova Scotia at Amherst, Nova Scotia and sentenced to 40 months incarceration which he is serving in the federal institution at Springhill, Nova Scotia.

[2] He has appealed the conviction on the ground it is not supported by the evidence and seeks leave to appeal the sentence. He was represented by counsel at his trial but is self-represented on the appeal.

[3] Kennedy, C.J. found as a fact that the appellant had been in possession of goods stolen in the burglary, which he took into account in his decision, but he stayed a separate charge of possession on the **Keinapple** principle. He acquitted the appellant on a second burglary charge in which possession of stolen goods was not proven.

[4] The burglaries took place in the neighbourhood where Mr. Riley and Gerald Hachey, who admitted his involvement in both breaks with an accomplice who had since disappeared, both resided. Both admitted visiting the home of Margaret Winters, a neighbourhood hangout for users of dope and alcohol, immediately before and after both incidents. Mr. Riley testified he had not taken part in the burglaries and had been

angry at his friend Mr. Hachey for tricking him into using his truck to transport the loot. Mr. Hachey, as well as Mr. Riley's common law wife, corroborated his testimony. Mrs. Winters and others in her household gave incriminating evidence of Mr. Riley's words and actions at highly relevant times. Chief Justice Kennedy stated:

> The crown's case against Mr. Riley relative to these two breaks is based entirely on the testimony of certain crown witnesses who have told this court that he was involved. The accused, Samuel Riley, and other defence witnesses have given evidence that if found credible would at least raise a reasonable doubt about his criminal participation in these matters. So then the first step for this court, the first step for me, in deciding this matter is to assess the credibility of those witnesses and in so doing I have considered all of the witnesses although I will only refer to some of the witnesses in this decision and I have considered all of their testimony although I will only refer to some of their testimony.

[5] The trial judge found the Crown witnesses credible but did not believe Mr. Riley or his witnesses. On his appeal Mr. Riley argued that the investigating police officer could have suggested testimony to Mrs. Winters and her 17-year-old son, Matthew Estabrooks, both of whom were vulnerable. Mrs. Winters was serving a conditional sentence and her son was on probation. This argument had been made at the trial by Mr. Riley's counsel and was considered by Chief Justice Kennedy in assessing credibility.

[6] Their evidence was that Mr. Riley had been involved in bringing three large bags of goods stolen from the tire store to Mrs. Winters' house, where he participated in going through the contents. He was identified as the one who offered Mrs. Winters $40. to keep the bags overnight in her basement, and actually paid her $20. at the time. After finding he did not believe Mr. Riley's explanation the trial judge applied the doctrine of recent possession, following **R. v. Kowlyk** (1989), 43 C.C.C. (3d) 1. He also

applied the test set forth by Cory, J. in **R. v. W.(D.)** (1991), 63 C.C.C. (3d) 397 for determining guilt beyond a reasonable doubt when credibility is an issue, and found Mr. Riley ”guilty beyond any reasonable doubt.”

[7] Mr. Riley challenges the credibility findings and the reasonableness of the verdict.

[8] The standard to be followed by an appeal court in appeals on these grounds was set out by Sopinka, J. in **Burke v. R**. (1996), 105 C.C.C. (3d) 205 (S.C.C.):

> In undertaking a review under s. 686(1)(a)(i) of the *Criminal Code*, the appellate court must carefully consider all of the evidence that was before the trier of fact. As I stated for a majority of this court in *R. v. S. (P.L.)* (1991), 64 C.C.C. (3d) 193 at p.197, [1991] 1 S.C.R. 909, 5 C.R. (4th) 351:
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> > In an appeal founded on s. 686(1)(a)(i) the court is engaged in a review of the facts. The role of the Court of Appeal is to determine whether on the facts that were before the trier of fact a jury properly instructed and acting reasonably could convict. The court reviews the evidence that was before the trier of fact and after re-examining and, to some extent, reweighing the evidence, determines whether it meets the test.
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> As a result, it is only where the court has considered all of the evidence before the trier of fact and determined that a conviction cannot be reasonably supported by that evidence that the court can invoke s. 686(1)(a)(i) and overturn the trial court's verdict.
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> According to this court in *R. v. W. (R.)* (1992), 74 C.C.C. (3d) 134, [1992] 2 S.C.R. 122, 13 C.R. (4th) 257, special concerns arise in cases such as this where the alleged ``unreasonableness'' of the trial court's decision rests upon the trial judge's assessment of credibility. In these cases, the court of appeal must bear in mind the advantageous position of a trial judge in assessing the credibility of witnesses and the accused. As McLachlin J. stated in *W. (R.)*, at pp. 141-2:
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> > . . . in applying the test [under s. 686(1)(a)(i)] the Court of Appeal should show great deference to findings of credibility made at trial. This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: *White v. The King* (1947), 89 C.C.C. 148 at p. 151, [1947] S.C.R. 268, 3 C.R. 232; *R. v. M. (S.H.)* (1989), 50 C.C.C. (3d) 503 at pp. 548-9, [1989] 2 S.C.R. 446, 71 C.R. (3d) 257.
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> Despite the "special position" of the trial court in assessing credibility, however, the court of

> appeal retains the power, pursuant to s. 686(1)(a)(i), to reverse the trial court's verdict where the assessment of credibility made at trial is not supported by the evidence. As McLachlin J. stated in *W. (R.)*, at p. 142:
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> > . . . as a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.
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> Thus, although the appellate court must be conscious of the advantages enjoyed by the trier of fact, reversal for unreasonableness remains available under s. 686(1)(a)(i) of the *Criminal Code* where the "unreasonableness" of the verdict rests on a question of credibility.
>
> I acknowledge that this is a power which an appellate court will exercise sparingly. This is not to say that an appellate court should shrink from exercising the power when, after carrying out its statutory duty, it concludes that the conviction rests on shaky ground and that it would be unsafe to maintain it. In conferring this power on appellate courts to be applied only in appeals by the accused, it was intended as an additional and salutary safeguard against the conviction of the innocent.

[9] After reviewing the evidence and the submissions of Mr. Riley and Crown counsel, I am not satisfied that Chief Justice Kennedy erred in an unreasonable way in his assessment of the credibility of the witnesses nor in the verdict he reached. On the facts before him a properly instructed jury acting reasonably could have convicted Mr. Riley. The appeal against conviction is dismissed.

[10] On the sentence appeal Mr. Riley complains that he received a 40 month sentence while Mr. Hachey received only 34 months for the same burglary, plus another. The court was informed during oral argument that Chris Connolly, whom Mr. Hachey had identified as his missing accomplice, had since pleaded guilty and had been sentenced to a total of three years for the two burglaries and other offences. Both Mr. Riley and Mr. Hachey received credit for time on remand. Mr. Hachey pleaded guilty at an early opportunity, a mitigating circumstance, although he too had a lengthy criminal record which included sentences totalling ten years for armed robbery with a

firearm. This was Mr. Riley's ninth conviction for break and enter. He insisted he had not been involved in the burglary for which he was convicted. He said he had been attempting to turn his life around and was in a stable common law relationship with three children. However he had retained friends involved in a criminal life style and still had a problem with drugs. He did not identify an error by Chief Justice Kennedy in applying sentencing principles. The sentence imposed is not unreasonable, unfit, nor manifestly excessive.

[11] Leave to appeal is granted but the appeal is dismissed.

Freeman, J.A.

Concurred in:

Chipman, J.A.

Roscoe, J.A.