Docket: CAC 154191
CAC 154251
Date: 20000608

NOVA SCOTIA COURT OF APPEAL

[Cite as: R. v. Campbell, 2000 NSCA 76]

Bateman, Hallett and Flinn, JJ.A.

BETWEEN:

LOWELL ARNOLD CAMPBELL and
THOMAS BARRETT

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

Counsel:	Allan F. Nicholson for the appellant Campbell Anne Derrick for the appellant Barrett Dana W. Giovannetti, Q.C. for the respondent
Appeal Heard:	May 26, 2000
Judgment Delivered:	June 8, 2000
THE COURT:	Leave to appeal sentence granted but appeals on both conviction and sentence are dismissed per reasons for judgment of Bateman, J.A.; Hallett and Flinn, JJ.A. concurring.

BATEMAN, J.A.:

[1] These are appeals by Lowell Arnold Campbell and Thomas Barrett from robbery related convictions.

BACKGROUND:

[2] On the evening of May 5, 1996, a man robbed Ester Hogan, a clerk at Rita's Quick Way convenience store in Lingan, Cape Breton County, taking at gunpoint money from the cash register. Ms. Hogan was shot and sustained permanent injury. The key issue at trial was identification. Ms. Hogan could not identify the gunman, as he was masked. Her limited description of his features did not match either Mr. Barrett or Mr. Campbell. It was the Crown's theory that the robber was Mr. Barrett and that Mr. Campbell was a party to the offence. There was evidence that Mr. Campbell had obtained the same gun that was used in the robbery and accompanied Mr. Barrett to the store, waiting for him in a getaway vehicle driven by a third person. This theory turned on the credibility of two Crown witnesses: Mark Drake, who testified that he loaned Campbell the handgun, and Charles Ogley, who testified that he drove Barrett and Campbell to and from the robbery. The defence's position was that neither witness was credible and that Ogley and Drake were shifting blame from themselves. This, they said, was sufficient to raise a reasonable doubt.

[3] The appellants were charged with robbery contrary to s. 344 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, and with using a firearm while committing the

robbery contrary to s. 85(2) of the **Code**. This firearm count was not left with the jury because it did not disclose an offence under the law. Mr. Barrett was also charged with wearing a mask contrary to s. 351(2) of the **Code**. Mr. Campbell was further charged with possession of the handgun contrary to s. 91(1) of the **Code**.

[4] Justice Felix Cacchione presiding with a jury identified the issues, *inter alia*, as follows:

> The main issues before you are whether the crown has proven beyond a reasonable doubt the identity of both these accused as being the perpetrators of this offence and another issue, a great issue for you to determine, is the credibility of Ogley and Drake.

[5] On December 11, 1998, having deliberated for an afternoon and morning, the jury returned verdicts of guilty in relation to each appellant on the robbery charge (s. 344); a guilty verdict in relation to Mr. Campbell on the handgun charge (s. 91(1)) and an acquittal of Mr. Barrett on the masking charge (s. 351(2)).

[6] Justice Cacchione sentenced each appellant to 10 years imprisonment for the robbery. The appellant Campbell was sentenced to a 2 year term of imprisonment, to be served concurrently, on the s. 91(1) count. Both offenders received firearms' prohibitions.

GROUNDS OF APPEAL:

[7] The appellants allege that the verdicts are unreasonable and cannot be

supported by the evidence (s. 686(1)(a)(i) of the **Criminal Code**). Each seeks leave to appeal sentence citing error in principle on the part of the sentencing judge or, alternatively, they say that the sentences are excessive.

FRESH EVIDENCE APPLICATION:

[8] The appellants have made application to adduce fresh evidence. As is the usual procedure, we heard the application and reserved our decision on the admission of the evidence. (**R. v. Stolar** (1988), 40 C.C.C. (3d) 1 (S.C.C.))

[9] This Court's power to admit fresh evidence derives from s.683 of the **Criminal Code** which provides:

> 683. (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
>
> . . .
>
> (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;

[10] In **R. v. Palmer** (1979), 50 C.C.C. (2d) 193 (S.C.C.), McIntyre J. listed the principles guiding the admission of fresh evidence at p.205:

> (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*, [1965] 1 C.C.C. 142, 46 D.L.R. (2d) 372, [1964] S.C.R. 484;
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> (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
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> (3) the evidence must be credible in the sense that it is reasonably capable of belief, and
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> (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.

[11] The **Palmer** principles must be applied in the context of the evidence sought to be introduced and against the whole background of the case including all of the other evidence. (**R. v. Stolar, supra**) The Supreme Court of Canada in **R. v. G.D.B.** [2000] S.C.J. No. 22 (Q.L.) acknowledged, however, that ". . . jurisprudence pre-dating *Palmer* has repeatedly recognized that due diligence is not an essential requirement of the fresh evidence test, particularly in criminal cases. That criterion must yield where its rigid application might lead to a miscarriage of justice." (per Major J. at § 19) This would most commonly occur where the evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury. (**McMartin v. The Queen** [1964] S.C.R. 484 per Ritchie J. at p. 491)

[12] The Crown concedes that the evidence proffered here is both relevant and reasonably capable of belief. The Crown says, however, that the defence failed to act with due diligence and, more importantly, that the fresh evidence, even if believed, could not reasonably be expected to have affected the result.

[13] The defence seeks to introduce two statements from John Robert Steele of Glace Bay, Nova Scotia. The Crown has submitted a third statement from Mr. Steele provided to the R.C.M.P. in response to the fresh evidence application. Taking all of this material together, Mr. Steele says that on the evening of May 5, 1996, while at his

home, he was listening to a radio scanner. He went upstairs to take a shower before leaving to go to the local Tim Horton's for a coffee. On his way out the door of his house he heard talk of a robbery at a store on Roaches Road, that a lady clerk had been injured and something about an ambulance being either requested or on the way. Mr. Steele had not heard any broadcast about the robbery before going upstairs for his shower. He cannot say whether the report that he heard was the first report of the robbery, or whether he missed one report or more while he was showering. An unidentified friend drove Mr. Steele directly to the Tim Horton's on Commercial Street in Glace Bay which took approximately five minutes. When he arrived the two appellants were in front of Tim Horton's along with two other men. After getting his coffee and exiting the shop, Mr. Steele saw the appellants get into a burgundy or red two door Buick Regal, which could have been an Oldsmobile Cutlass or a Monte Carlo, and drive away.

[14] In addition to the Steele statements, the defence tenders an affidavit from Dennis Miller, an investigator hired by the appellants. He states therein that he was advised by the R.C.M.P. that the call from Ester Hogan reporting the robbery was received at 10:53 p.m. He further deposed that he timed the drive from the crime scene to the Tim Horton's on Commercial Street, using two different routes. It would take between fifteen minutes and six seconds and sixteen minutes and thirty-eight seconds to make the trip, presumably at legal speed.

[15] As to the requirement of due diligence, Mr. Barrett's sister, Cindy Barrett, has since disclosed to appellate defence counsel that Mr. Steele told her before trial that "... he knew Mr. Barrett had not done the robbery because Mr. Steele had seen him at Tim Horton's right after the robbery was reported over the scanner." Ms. Barrett says that she told her brother about this conversation. It is accepted that Mr. Barrett did not raise it with his trial counsel. Mr. Barrett says that he did not pursue it because he had heard that Mr. Steele did not want anything to do with the case. The Crown says that Mr. Barrett's prior knowledge of Mr. Steele's potential as a witness precludes him now tendering that information as fresh evidence.

[16] While lack of due diligence alone should not prevent the admission of compelling fresh evidence, the fact that Mr. Barrett knew of this evidence in advance of trial and determined not to pursue it remains a factor to be considered on the application. It bears noting that this was not a situation where post-trial investigation has turned up evidence the import of which was unknown to the accused at the relevant time. Mr. Barrett knew before trial that it was Mr. Steele's belief that he could not have committed the offence because he was seen at Tim Horton's that evening. That he chose not to pursue it is almost inexplicable. Mr. Campbell cannot, however, be imputed with Mr. Barrett's knowledge and, accordingly, there is no argument that there was a lack of due diligence on his part.

[17] In any event, I agree with the Crown's submission that the evidence sought to be

introduced does not meet the fourth **Palmer** criteria. It could not, in the context of all of the evidence, even if believed, be reasonably expected to have affected the result at trial.

[18] As the Crown points out, Mr. Steele's evidence is offered as alibi to establish that the appellants would not have had time to commit the offence and appear in front of Tim Horton's at the time they were seen there by Mr. Steele. No alibi evidence was offered at trial. Neither appellant testified. Mr. Barrett's mother testified that he was at her home until about 10 p.m. that evening. That evidence is inconsistent with that offered by Charles Ogley who testified that he was with Messrs. Barrett and Campbell the evening of the robbery from about 7:20 p.m. onward. Mr. Barrett's mother's testimony is not, however, alibi evidence in the sense that it eliminates Mr. Barrett's opportunity to commit the crime.

[19] Nor am I persuaded that Mr. Steele's evidence precludes the appellants' participation in the robbery. It is agreed that the first call to the police about the robbery came from Ester Hogan at 10:53 p.m. Ms. Hogan testified that after the gunman fled she locked the door then made her way behind the store counter where she put a tourniquet on her leg to stanch the bleeding from the gunshot wound. She pressed the alarm and tried to use the telephone but could not get a dial tone. She continued to try and eventually was able to contact her boss Rita MacDonald. One would assume, then, that the assailant fled the store some minutes prior to 10:53 p.m.

[20] It was Mr. Ogley's estimate that Mr. Barrett left his vehicle to commit the robbery at about 10:45 p.m. Mr. Barrett must have returned to the vehicle before the first report was received at 10:53 p.m. A fifteen to seventeen minute drive back to town would have them arriving around 11:08 p.m. to 11:10 p.m. assuming legal speed. It is reasonable to assume, however, that the Ogley vehicle was actually en route to town before 10:53 p.m., allowing time for Ester Hogan to apply a tourniquet to her wound and make telephone connection to report the robbery. This would put the appellants back in town even earlier than the above estimated time. Ogley thought that it would have been shortly after 11 p.m.

[21] Mr. Ogley testified that he dropped the appellants off on Minto Street in Glace Bay after the robbery and proceeded a short distance to his ex-wife's house about two minutes away. He thinks that he arrived there "probably shortly after eleven, about ten after eleven." He stayed there "about twenty minutes, a half hour, at the most" and went back to town to gas up the car. He saw the appellants walking down Main Street. They hailed him, got into his car and all three went to Tim Horton's to have a coffee. While at Tim Horton's a truck pulled up and Mr. Ogley heard over that vehicle's scanner a report of the robbery and shooting.

[22] Allowing time for him to drive to his ex-wife's house, stay for twenty minutes to one half hour and return to town, he could well have reconnected with the appellants around 11:30 p.m. or even earlier. John Steele's evidence is not inconsistent with

these time estimates and does not provide an alibi for the appellants.

[23] In his statement to the R.C.M.P., Mr. Steele surmises that he left his house for Tim Horton's sometime after 11 p.m. He stated that this was just an approximation as he does not pay attention to what time it is. He cannot be sure that it was prior to midnight because he does not know how long he was in the shower. His best approximation is that he would have started his shower sometime between 10:30 p.m. and 11:30 p.m. Mr. Steele does not know who was speaking on the scanner when he heard the report - whether the police, an ambulance attendant, a dispatcher or some other person. His scanner received conversations from many sources. He is unable to say when he arrived at the Tim Horton's, whether before or after midnight. He does not know if the radio communication that he heard after his shower was a first report or a relay of the information.

[24] The appellants say that Mr. Steele must have heard the initial report of the incident at or around the time that the ambulance was on its way to the scene. The ambulance was dispatched at 10:54 p.m. This, they say, puts Mr. Steele at the Tim Horton's around 11 p.m. The appellants could not then have participated in the robbery and also been at the Tim Horton's by that time. It is certainly, they submit, incompatible with Mr. Ogley's evidence that after returning from the robbery he dropped the appellants off on Commercial Street then reconnected with them again twenty or thirty minutes later when the three went to Tim Horton's. The appellants say that a jury

hearing Mr. Steele's testimony might well have had a reasonable doubt about the reliability of Mr. Ogley's evidence and, therefore, whether the appellants could have participated in the robbery. The difficulty with this argument is the imprecision in Mr. Steele's evidence. It is not clear that the scanner report heard by Mr. Steele was at or about 10:53 p.m. rather than a later relay, nor was Mr. Ogley definite in his evidence of the time that they returned to town and later attended at Tim Horton's. The only conclusive evidence about the timing of events is that the first report of the incident was received by the police at 10:53 p.m., with the ambulance dispatched at 10:54 p.m. Ogley, Barrett and Campbell might well have left the scene minutes before then. Another witness, Shannon Clyburn, who testified that he drove by the Quick Way that night, said that the robbery was in progress at about 10:40 p.m. or 10:45 p.m. The return trip to town could have been faster than the 15 to 16 minutes estimated by the investigator. Taking the earliest estimates of time, they could have conceivably been back in town even before 11 p.m. and at the Tim Horton's well before 11:30 p.m.

[25] The jury must have accepted Mr. Ogley's evidence, in substantial part, as credible. Mr. Steele's evidence, lacking as it does even general estimates of time, does not contradict that of Mr. Ogley or adversely reflect upon his credibility.

[26] I would not admit the fresh evidence. I am not satisfied that Mr. Steele's evidence, if believed, when taken with the other evidence adduced at trial, could

reasonably be expected to have affected the result.

ANALYSIS:

(i) Unreasonable Verdict:

The Supreme Court of Canada in **R. v. Biniaris**, [2000] S.C.J. No. 16 (Q.L.) has recently reiterated the test to be applied on an appeal alleging an unreasonable verdict (s. 686(1)(a)(i) **Criminal Code**). The Court confirmed the continuing validity of the long accepted test in **R. v. Yebes** (1987), 36 C.C.C. (3d) 417 (S.C.C.): the Court of Appeal is entitled to review the evidence, re-examining it and re-weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it. Arbour, J. cautions in **Biniaris**:

> [para24] Triers of fact, whether juries or judges, have considerable leeway in their appreciation of the evidence and the proper inferences to be drawn therefrom, in their assessment of the credibility of witnesses, and in their ultimate assessment of whether the Crown's case is made out, overall, beyond a reasonable doubt. Any judicial system must tolerate reasonable differences of opinion on factual issues. Consequently, all factual findings are open to the trier of fact, except unreasonable ones embodied in a legally binding conviction. . .

[27] The appellants say that the acquittal of Mr. Barrett on the masking charge, yet the conviction of Messrs. Barrett and Campbell on the robbery, reflect inconsistent and therefore unreasonable verdicts. The appellant who complains of an unreasonable conviction by virtue of inconsistent verdicts bears a heavy onus. In **R. v. McLaughlin** (1974), 15 C.C.C. (2d) 562 (C.A.), Evans, J.A. framed the test in this way (at p. 567):

> The fact that verdicts may be inconsistent does not mean that in all cases the Court of Appeal *ex necessitate* must quash the conviction or grant a new trial. If the verdicts are violently at odds and the same basic ingredients are common to both charges then

> the conviction will be quashed but the onus is on the appellant to show that no reasonable jury who had applied their minds to the evidence could have arrived at that conclusion. (Emphasis added)

[28] The only direct evidence that the gunman was masked came from Ester Hogan. Mr. Ogley's evidence provided circumstantial corroboration. He testified that after driving Mr. Campbell and Mr. Barrett to the convenience store, Mr. Barrett exited the car. He was not then wearing a mask. Mr. Ogley saw him enter the store, rushing out a few minutes later tearing off a mask. The appellants submit that the only reasonable inference from the jury's acquittal of Mr. Barrett on the masking charge is that they must have rejected Mr. Ogley's evidence about the events of that night. The Crown, however, offers an explanation for the apparent inconsistency. As the Crown says, ". . . Ogley's evidence that Barrett wore a mask was not evidence that he wore a mask concurrent with the 'intent to commit and indictable offence' as is required by s.351(2) of the **Code**". The Crown submits that the trial judge, in charging the jury on this count, mistakenly removed Ms. Hogan's evidence from consideration. In his instruction on the handgun charge (s. 91(1)) and the masking charge (s. 351(2)) the judge said:

> All right. Members of the jury I am going to address the last two counts on the Indictment.
>
> The first one relates to Mr. Barrett solely, he is charged with having his face masked with intent to commit an indictable offence. In order for the Crown to succeed on this charge, it must prove the following essential elements beyond a reasonable doubt. One, the identity of Mr. Barrett as the offender. Two, the time and place as set out in the Indictment. Three, that he had his face masked. And four, that his intent was to commit an indictable offence. On this charge, as with the charge of robbery, the element of identity if [sic, is] contested. The evidence which the Crown relies on to prove this element is that of Charles Ogley. You will recall that Mr. Ogley testified that he dropped the accused off at Rita's Quick Way and when he returned a short time later Mr. Barrett was coming out of the store and pulling off a ski mask. He described it as a regular dark ski mask and when shown exhibit number 9, he said that it was a dark ski mask. He told you about various items being disposed of soon after.
>
> The defence position is that Mr. Ogley is not a credible witness and his evidence is unreliable. The defence argues that Mr. Ogley gave the police a statement implicating the

> accused in order to point responsibility away from himself and that he should not be believed. The issue of credibility of witnesses is a matter which is in your exclusive jurisdiction. You may accept all, part or none of what a witness says. If you accept Mr. Ogley's evidence on this point as being truthful and credible, then this element of the offence will have been proven beyond a reasonable doubt. However, if you disbelieve Mr. Ogley's evidence on this point or if his evidence leaves you in a state of reasonable doubt, then the Crown will not have discharged its burden and you must acquit the accused. My comments about Mr. Ogley's evidence apply equally to the essential elements of having his face masked and to the element of intent to commit an indictable offence. Section 351(2) of the *Criminal Code* makes it an offence to have one's face masked with the intent of committing an indictable offence. The word "masked" in this section should be given its ordinary everyday meaning. The shorter Oxford dictionary defines masked as having or wearing a mask, having the real features or character disguised, concealed from view. On the issue of intent I refer to what I said about this when I instructed you about aiding and abetting. That is, that intention is a state of mind and is difficult to see inside another person's mind. However, you may draw an inference that a sane and sober person intends the natural and probable consequences of his or her voluntary actions. It is not necessary that you make this conclusion. The state of an accused's mind is a question of fact for you to determine upon a consideration of the whole of the evidence bearing on that issue including the accused's words, conduct and demeanor at the material time. If you accept Mr. Ogley's evidence as truthful and credible, then the elements one, two, three and four, which I have outlined for you, will have been proven beyond a reasonable doubt. If you do not accept his evidence or if it leaves you in a state of reasonable doubt, then these elements will not have been proven and you must acquit.
>
> In summary then all the elements of this offence are in issue and the proof of all of these elements beyond a reasonable doubt rests on your view and evaluation of the testimony of Mr. Ogley as it relates to the accused, Mr. Barrett pulling off a ski mask when he was leaving the store. Let me just say that it is not an offence to wear a mask. Lots of people do it at Halloween. Its an offence to wear a mask with the intention of committing an indictable offence.
> (Emphasis added)

[29] I would agree with the Crown that this direction might well have left the jury with the understanding that they were not to consider Ester Hogan's evidence on the masking charge, but only that of Charles Ogley. The trial judge said: "The evidence which the Crown relies on to prove this element is that of Charles Ogley." And as he was summing up he told the jury that the proof of the four elements of the masking offence (which included the wearing of the mask with the intent to commit an indictable offence) must be proven beyond a reasonable doubt and "rests on the jury's view and evaluation of the testimony of Mr. Ogley." The judge did comment within that

instruction: “The state of an accused’s mind is a question of fact for you to determine upon a consideration of the whole of the evidence bearing on that issue including the accused’s words, conduct and demeanor at the material time.” That language would not, in my view, have been enough to overcome the overall focus in relation to the masking charge upon Mr. Ogley’s evidence alone.

[30] In the face of this direction from the trial judge, it is conceivable that the jury acting reasonably but following the instructions literally, could acquit on the masking charge yet convict on the robbery count. Ogley did not testify that Barrett was wearing the mask when he exited the car to go into the Quick Mart. The jury if believing that they could not consider Ms. Hogan’s evidence on the masking charge but only that of Ogley, may have reasoned that, on the Ogley evidence alone, Mr. Barrett’s face was not masked when he formed the intent to rob. The jury could thus have concluded that this necessary element of the masking offence was not proven beyond a reasonable doubt. This would explain how they could acquit on the masking charge yet convict on the robbery count.

[31] The appellants say that another pivotal issue in the jury’s analysis was Ester Hogan’s evidence that the man who robbed and shot her was 5 feet 6 or 7 inches tall, white and that she could see blue eyes and freckles through the eye slit in the fact mask. As neither appellant matched this description they say that the verdict is unreasonable.

[32] By the time of trial Ester Hogan had little recollection of the assailant's features. She confirmed that in her statements to police immediately after the robbery she thought that the gunman had blue eyes and freckles. At the time of giving her statement she was sure that the gunman was white. Mr. Campbell is black. She testified at trial, however, that she had no current recollection of his features, that she was not good at estimating height and was not confident in her observations because at the time making them she was "staring down the barrel of a gun". The case law is replete with cautions on the frailty of eyewitness testimony (see for example, **R. v. Nikolovski** (1996), 111 C.C.C. (3d) 403 (S.C.C.)). Ms. Hogan's observations of the gunman were made under most stressful circumstances. The full face mask revealed little of his features. He wore gloves. It is impossible to say what effect fear may have had on her ability to accurately observe the gunman and to later report those observations with clarity. Ms. Hogan, herself, was not confident in her description. In his charge to the jury the judge specifically referred to the identification evidence offered by Ester Hogan. He reviewed for the jury the position of the defence that the description matched neither of the appellants. I am not persuaded that by virtue of the variance between the appellants' features and the description of the gunman the verdict is unreasonable.

[33] Having reviewed and re-weighed the evidence, I am satisfied that the appellant has not met the burden of proving that the conviction for robbery was unreasonable. I am not persuaded that a reasonable jury, applying their minds to the evidence, and

considering the trial judge's instructions on the masking charge, could not have convicted both appellants of the robbery charge yet acquitted Mr. Barrett of the masking charge.

[34] In summary, the jury could reasonably have reached the conclusion it did on the evidence before it. I would dismiss both appeals of conviction.

(ii) Unfit Sentence:

Justice Cacchione, finding that both general and specific deterrence were required, sentenced each appellant to a term of imprisonment of ten years, imposed a lifetime firearm prohibition on Mr. Campbell and a ten year ban on Mr. Barrett. He declined the Crown's request that the appellants be required to serve at least half of the sentence before eligibility for parole.

I am not persuaded that either sentence is demonstrably unfit or that the judge erred in principle. I would grant leave but dismiss the sentence appeals.

DISPOSITION:

I would dismiss the appeal.

Bateman, J.A.

Concurred in:

Hallett, J.A.

Flinn, J.A.