C.A.C. No. 02847

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Fleming, 1993 NSCA 208

Jones, Hallett and Matthews, JJ.A.

BETWEEN:

KEVIN JOSEPH FLEMING	)	
	)	the appellant appeared in person
Appellant	)	
- and -	)	
	)	William D. Delaney
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
Respondent	)	Appeal Heard: November 19, 1993
	)	Judgment Delivered: December 2, 1993

THE COURT: Leave to appeal granted from the imposed sentences but the appeal is dismissed per reasons for judgment of Matthews, J.A.; Jones and Hallett, JJ.A. concurring.

MATTHEWS, J.A.:

After a five day trial Associate Chief Justice Palmeter of the Supreme Court, on

December 18, 1992, convicted the appellant of four offences, that:

> "He at or near 733 Herring Cove Road, Halifax, in the County of Halifax, Nova Scotia, on or about the 23rd day of March, 1992 did attempt to murder Sarkis Frangieh by wounding him with a knife, contrary to Section 239 of the **Criminal Code of Canada**;
>
> AND FURTHER at the same time and place aforesaid did rob Sarkis Frangieh, contrary to Section 343 of the **Criminal Code of Canada;**
>
> AND FURTHER at the same time and place aforesaid did have his face masked with intent to commit an indictable offence contrary to Section 351(2) of the **Criminal Code of Canada**;
>
> AND FURTHER at the same time and place aforesaid did assault Charbel Akkari while armed with a weapon, to wit: a tire iron contrary to Section 267(1)(a) of the **Criminal Code of Canada**;"

On February 18, 1993 he was sentenced to imprisonment for twelve years on the attempted murder charge; five years on the robbery charge, to be served concurrently; one year on the charge involving the face mask, to be served concurrently and one year on the assault with a weapon charge also to be served concurrently; that is, a total of twelve years and that to be served consecutively to time already being served.

The appellant appeals from his conviction and seeks leave to appeal and if that is granted, appeals from the sentences imposed. Although he was represented by counsel at trial he appeared before us in person.

THE FACTS:

On March 23, 1992, Sarkis Frangieh was working at the Stop and Shop store, Herring Cove Road in Halifax. He was watching a movie with his friend, Charbel Akkari. Late in the evening, two masked men entered the store; one said "It's a robbery". Then one of the men struck Mr. Akkari with a tire iron which he was carrying when he entered the store. The other, who had a knife, jumped on the counter behind which Mr. Frangieh was located. That man lost his balance and pricked Mr. Frangieh in the throat with the knife. In

the ensuing struggle Mr. Frangieh pulled the mask from the man's face. The man then stabbed Mr. Frangieh numerous times in the neck and face. As Mr. Frangieh lay bleeding profusely that man attempted to open the cash register with his knife. Mr. Frangieh told him to press the "no sale" button. The man was not successful in his attempts to open the register. One of the men then cut the electrical cord attached to the register. The register and a quantity of cigarettes were taken out of the store. The police later found the register, some cigarettes and a knife a short distance from the store.

Bernard Greenwood who lived next door to the store, attracted by a noise, from his bedroom window looked in the store window and saw a man jump over the counter and pound the cash register. He got dressed, went to the shop, looked in the window and saw two men in the store. He returned to his house and called the police. He then saw one of the men leave the store carrying the register. A motor vehicle appeared. An argument ensued between the driver of the car and the man who was carrying the register. The register was thrown to the ground. The man who was carrying the register ran down the street. Mr. Greenwood previously saw another man who had been in the store leave the scene. Mr. Greenwood then entered the store, saw the condition of Mr. Frangieh and applied a cloth to Mr. Frangieh's neck to stop the bleeding. An ambulance soon arrived. Mr. Frangieh was taken to hospital. It was there determined that Mr. Frangieh had lost approximately one-half of his blood. His condition was assessed as life threatening. Two of the lacerations to his neck were found by the attending doctor to have "barely missed by a millimetre or two the great vessels in the neck, the so-called carotid artery and the internal jugular vein which takes blood to and from the brain and injury to those structures would have almost certainly resulted in more or less - in him dying more or less immediately. And those vessels were just missed by very, you know, almost by a hair's breath by these two wounds". The doctor was also of the opinion that had Mr. Frangieh not received immediate assistance from Mr. Greenwood and others, he would have bled to death, probably prior to his arrival at hospital.

On March 25, 1992, Mr. Frangieh, from a number of photographs shown to him by the police, selected one depicting the appellant and identified him as the man who had stabbed him. Mr. Frangieh, in court, also identified the appellant as his assailant. He was adamant in his identification of the appellant.

Mr. Greenwood, who knew the appellant, testified that he did not see the appellant at the scene, however, it appears that when he saw the men each was wearing a mask.

The Crown called several witnesses and the defence none.

The appellant's notice of appeal raises five issues:

> 1. Did the trial judge err in law in admitting evidence of questionable probative value and high prejudicial effect?
>
> 2. Did the trial judge err in law in placing reliance upon the expert opinion evidence of Heather MacDonald?
>
> 3. Did the trial judge err in law in failing to properly apply the principle of reasonable doubt?
>
> 4. Were the verdicts unreasonable and unsupported by the evidence?
>
> 5. Was the sentence imposed on the attempted murder charge manifestly excessive?

It is noteworthy when considering each of the grounds of appeal that the appellant did not testify nor was any evidence called on his behalf.

Ground one: Did the trial judge err in law in "admitting evidence of questionable probative value and high prejudicial effect"?

The trial judge has the discretion to exclude evidence on the basis that its probative value is outweighed by the prejudice which may flow from it. **R. v. Seaboyer** (1991), 2 S.C.R. 577.

The appellant referred to three particular instances respecting which he alleges

that the trial judge should have excluded evidence as it was irrelevant and highly prejudicial to him. All three involve peripheral matters only.

Bernard Greenwood was an eye witness to the robbery. He identified from photos shown to him by the police a Mr. Marcotte as one of the two persons he saw holding up the store. The group of photos he was shown included a photo of the appellant. He testified that he had seen Mr. Marcotte throwing a football near the appellant's home. The Crown, in its factum, comments:

> "...The Respondent acknowledges that this evidence was of very tenuous probative value. It is submitted, however, that this evidence cannot be said to have any significant prejudicial affect against the Appellant. Mr. Marcotte's proximity to the Appellant's home at some time after the preliminary hearing in this matter could not be said to lead to any reasonable inference of association between Marcotte and the Appellant. In any event, there was evidence from which a reasonable inference of association between Marcotte and the Appellant might be made. This appears in the evidence of Rhonda Lee Oakley..."

The Crown led evidence of R.L. Oakley and had this to say in its factum:

> "The witness testified that on the day after the robbery she went to the home of Joyce Coady, a friend of the appellant and was given a white garbage bag by Ms. Coady. She disposed of this garbage bag, apparently at the request of Ms. Coady, and without apparently having any knowledge of its contents. The respondent acknowledges that the probative value of such evidence was not great. The trial judge recognized this when summarizing the evidence... It is submitted that this evidence did not have a highly prejudicial effect in relation to the appellant. It was not evidence which went to the character of the appellant. While adding little to the case against the appellant, it did not significantly prejudice him in the eyes of the trier of fact, it is submitted."

The Crown also led evidence from Gail Schnare and had this comment in its factum:

> "This witness testified that she took three cartons of cigarettes from the home of Joyce Coady a few days

> before March 31st, 1992 (the robbery was carried out on March 23rd) and sold them for her. Ms. Schnare kept some of the money from the sale of cigarettes and gave some of the money to Ms. Coady. Since cigarettes were taken in the robbery, it might be open to the trier of fact to infer from this evidence and from the evidence of Ms. Oakley that Joyce Coady, a friend of the appellant, was involved in disposing of the proceeds of the crime and evidence relating to the crime. Again, the probative force of such evidence was not great, as was recognized by the trial judge. ... It is submitted that in respect of this evidence as well there was not any significant prejudicial effect on the appellant."

The trial judge considered the impugned testimony in this fashion:

> "The evidence before me indicates that there was a relationship between Mr. Marcotte and the accused. They knew each other. They frequented the same place. Another witness identified Mr. Marcotte as taking part in the robbery; made a positive identification of Mr. Marcotte. An association in itself does not mean very much but it is something that the court has to look at. What weight is to be given? The evidence of Rhonda Oakley about Mr. Fleming at Coady's the night in question, I have no problem that she identified the night. Mr. Fleming was in the area. Mr. Fleming was nervous. Mr. Fleming was at Coady's and apparently in good shape at 1:00 the following morning. He was not drunk or passed out as he had told the police. Evidence of what she did next day at Coady's does not prove very much. It is suspicious, something that can be considered, something which can be given no weight, little weight, it certainly cannot be given very much weight. The evidence of Gail Schnare, the same thing, cigarettes at Joyce Coady's, I agree, suspicious. When she got and where? Why in the back yard? Why sell them? Again, not proof in itself. Perhaps adds weight to some degree taking everything into consideration."

It is clear that the learned trial judge attached little weight to the impugned testimony. In my opinion that testimony was admissible considering the association that was clearly established from the evidence between the appellant, Oakley, Schnare and the appellant's friend, Joyce Coady, plus the fact that the appellant was at Joyce Coady's house before the robbery and immediately after the robbery. The testimony of Oakley was also

relevant to the issue of the appellant's alibi that he was passed out at a friend's at the time of the robbery. The prejudicial effect of this evidence did not outweigh its probative value. The learned trial judge did not err in failing to exclude the evidence.

Ground two: Did the trial judge err in law in placing reliance upon the expert opinion evidence of Heather MacDonald?

This witness was qualified as an expert "in the field of hair identification and comparison". She testified that a hair taken from the mask, upon microscopic examination, was consistent with a known sample of hair taken from the appellant and inconsistent with any of the other known samples with which she compared it. In addition she testified:

> "Hair comparison is not a positive means of identification. It is possible for two individuals to have hairs on their scalp that would be consistent with each other and, therefore, not be from the same person but when a hair comparison is conducted and a hair is found to be consistent with a known sample, the most likely explanation is that that hair is, indeed, from the individual that provided that sample."

The trial judge held that the mask found in the convenience store was the mask used by the person who assaulted Mr. Frangieh. He had a duty to weigh the testimony of Ms. MacDonald. In so doing he accepted the fact that "one of the hair samples found in the mask is consistent with the known hair samples of the accused". While placing "weight" upon the testimony of Ms. MacDonald, he agreed with the submission of defence counsel that "the evidence of Ms. MacDonald cannot be conclusive" as to the guilt of the appellant.

The factual basis for this witnesses' opinion evidence was properly before the court. She spoke of her own experience and that of noted experts in the field. She testified as to the reasons for her conclusion respecting the consistency of the accused's hair and that found in the mask and also for excluding the other samples which were from two co-accused.

I would dismiss this ground of appeal.

Ground three: Did the trial judge err in law in failing to properly apply the

principle of reasonable doubt?

The trial judge is experienced. After setting out the charges, he began his oral decision in this fashion:

> "In criminal matters the onus is on the Crown to prove its case against the accused beyond a reasonable doubt. Any reasonable doubt has to be resolved in favour of the accused."

He reiterated those principles later in his decision.

Not only is it clear that the trial judge applied the proper principles respecting reasonable doubt, there is nothing in the transcript or the decision to indicate that at any time he failed to apply them.

I would dismiss this ground of appeal.

Ground four: Were the verdicts unreasonable and unsupported by the evidence?

Section 686(1)(a)(i) of the **Criminal Code** provides that an appeal court may allow an appeal against conviction where the court is of the opinion that "the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence". This requires the court to determine whether a properly instructed trier of fact, acting judicially, could reasonably have convicted. In doing so, the court must examine and to some extent weigh and consider the effect of the evidence. **Yebes v. The Queen**, [1987] 36 C.C.C. (3d) 417 (S.C.C.). In applying this test an appeal court should show great deference to findings of credibility made at trial. **R. v. W. (R)**, [1992] 2 S.C.R. 122.

The attack upon Mr. Frangieh was vicious. He suffered numerous wounds inflicted by a knife wielded by the assailant. There can be no question, two of the wounds in particular were life threatening. If it were not for the action of Mr. Greenwood death would have been the result. The trial judge found:

> "This was a continual attempt to injure, to wound, to end the life of Mr. Frangieh. There is no question in my mind the person who stabbed Sarkis Frangieh

intended when he was stabbing him to end his life."

I see no reason to disturb those findings. All of the requisites for a charge of attempted murder were proven.

That leaves but one question. As the trial judge remarked "It all boils down to identification".

The trial judge reviewed the testimony of the pertinent witnesses. He accepted some and rejected others, in whole or in part and gave reasons for so doing. He recognized the inconsistencies in some of the evidence. In particular he considered, at some length, the testimony of Mr. Frangieh who, in the struggle with his assailant, was successful in removing the face mask. Mr. Frangieh then was able to identify the accused. That testimony led the trial judge to comment:

> "We are now faced with the question of eye witness identification. The direct evidence of eye witnesses to a crime is usually preferable to circumstantial evidence, no question. However, the evidence of eye witnesses has to be considered carefully. Having regard to the frailties which can exist and do exist I agree that the court must be very careful of a sincere and honest mistake made by an eye witness. Evidence based on personal impressions, however **bona fide** sometimes is the least to be relied upon. In considering this evidence I must instruct myself on the frailties involved inherent in such identification, it does not mean that I cannot accept the evidence of an eye witness as being conclusive of identification if I find that that is the evidence presented beyond a reasonable doubt. I must weigh all of the evidence and if I am convinced that the informant has identified his assailant beyond a reasonable doubt I can accept his evidence and convict the accused. In this case, it all boils down to whether or not the victim had a good opportunity to observe his assailant in order to make a positive identification."

The trial judge then analyzed in some detail the many factors which must be considered when dealing with eye witness identification. They include:

1. Intelligence and credibility of the witness.

2. Duration of observation.
3. Distance from the witness to the accused.
4. Light conditions.
5. Eyesight of the victim.
6. Was observation impeded?
7. Colour perception.
8. Emotional or physical impediments in the victim.
9. Description given by the victim.
    (a) distinguishing marks
    (b) type of face
    (c) facial hair
    (d) colour and style of hair.
    (e) height
    (f) weight
    (g) clothing
10. Discrepancies and contradictions.
11. Photo lineup
12. Identification in court.

In particular the trial judge found that Mr. Frangieh was "an intelligent, highly credible witness". He noted that not only was Mr. Frangieh not shaken on cross-examination, but that "he became stronger on cross-examination" and that Mr. Frangieh, although wounded, had a good view of his assailant.

After dealing separately with each of the components respecting eye witness identification the trial judge concluded:

> "Summing up, I accept the evidence of the victim as to the identification of the accused and after considering the evidence as a whole, I am left with no possible doubt about the accused's guilt. The Crown

> has proven its case beyond a reasonable doubt. I find the accused guilty of the four charges."

In my opinion that verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered. I would not disturb it.

Ground five: Was the sentence imposed on the attempted murder charge manifestly excessive?

The powers of an appeal court on an appeal from sentence are set out in s. 687(1) of the **Code**. That section has been interpreted by this court on many occasions. The essential principle in an appeal such as this is to determine on the whole of the evidence if the sentence is manifestly excessive.

The trial judge had to consider four offences, all serious. The attempted murder charge and that of robbery each carry a maximum sentence of life imprisonment. The face mask charge and that of assault with a weapon each have a maximum sentence of ten years.

At sentencing the trial judge said:

> "Suffice to say the offender was engaged in a robbery. He was masked and he had a knife. The robbery was premeditated. He became violent toward the owner of the store and almost killed him. Mr. Sarkis Frangieh would have died if it had not been for the assistance of Mr. Greenwood. It was a senseless and savage attack upon a defenceless person. That is the only description I can give it. He caused concern and fear not only in the neighbourhood where the attack occurred but throughout the entire Metropolitan area with particular concerns to operators of small convenience stores and businesses who stay open late at night or on a twenty-four hour basis. The public was appalled by this brutal attack and robbery. This type of activity cannot be permitted to continue. The public will not allow it. Persons in business have to be protected. The message has to get out loud and clear."

The appellant at time of sentencing was 24 years old, had a grade 9 education and was single. From the time when the appellant was 15 years of age until 1990, he was

convicted of 17 offences, including assaults, possession of a weapon, thefts and breaking and entry. He was on parole at the time he committed the four offences in issue.

The pre-sentence report, understandably from the appellant's dismal criminal record, is not positive. As the author remarked:

> "Mr. Fleming is a 24 year old individual whose crimes are becoming increasingly more serious. The subject, who has been in and out of institutions since the age of 15, has shown absolutely no regard for any type of community supervision and his last prison term did little to improve his attitude. The offender violated his parole only hours after being released from Springhill Institution and he was 'on the run' for eight months when he committed these present offences."

The appellant has an addiction to cocaine and other non-prescription drugs.

These crimes arose from the appellant's decision to rob the store. The trial judge acknowledges that three of the four offences are crimes of violence. This court has emphasized that the overriding consideration in sentencing with respect to crimes of violence must be deterrence, both specific and general. The trial judge took into consideration that, where the crimes all arose from the decision to commit robbery, the sentences should be concurrent but when attempted murder is committed during a robbery "sentences of necessity involve substantial terms of imprisonment". In deciding the term to be imposed he applied the principle of totality and that the appellant was on probation at the time the offences were committed. In addition to the total sentence of twelve years, under the provisions of s. 100 of the **Code**, a prohibition order for ten years after the appellant is released from custody was imposed.

In my opinion the trial judge applied the proper principles and did not err in the terms of the sentences imposed and, in particular, that of attempted murder. The sentences are fit. They are not manifestly excessive.

While I would grant leave to appeal from the imposed sentences, I would dismiss the appeal.

Matthews, J.A.

Concurred in:

Jones, J.A.

Hallett, J.A.

C.A.C. No.02847

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

KEVIN JOSEPH FLEMING

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

MATTHEWS, J.A.