

SUPREME COURT OF NOVA SCOTIA

Citation: *R v. Currie*, 2023 NSSC 396

Date: 20231206

Docket: 514343

Registry: Sydney

Between:

His Majesty the King

and

Jarrot Currie

Judge: The Honourable Justice Patrick J. Murray

Heard: August 14, 15 and 17, 2023 in Sydney, Nova Scotia

Written Decision: December 6, 2023

Counsel: Lisa MacPhee for the Crown
Alan Stanwick for Mr. Currie

By the Court:

Introduction

[1] Just after midnight on the 21st day of April 2021 someone broke and entered Cletus' Corner Convenience on West Avenue, Glace Bay. Several hours later a cab driver for Bud's Taxi reported he had been robbed at knife point, at or near the same area on West Street.

[2] The Defendant, Jarrot Currie, has been charged with break and enter with intent pursuant to s. 348(1)(a) of the *Criminal Code* and mischief by willingly damaging property, the door and cigarette shelf, in the store at 114 West Avenue, contrary to s. 430(a) of the *Criminal Code*.

[3] The Defendant is further charged with four (4) offences in relation to the robbing of the cab driver, Terry Hiscock, at approximately 4:00 a.m. on the date in question. The charges in the Indictment are theft with the use of violence, pursuant to s. 344(1)(b); possession of a weapon in committing an assault, pursuant to s. 267(a); possessing a knife for a purpose dangerous to the public peace, contrary to s. 88(1); and mischief by wilfully damaging without legal justification the property of Bud's Taxi, contrary to s. 430(4) of the *Criminal Code*.

[4] The trial was held over three (3) days in August 2023. A total of 20 Exhibits were entered by the Crown and a total of 13 witnesses were called, including 10 police witnesses. In addition, the Crown called Cletus O'Neil, the owner of the convenience store, Terry Hiscock, the taxi driver, and Whitney MacNeil, a dispatcher employed at Bud's Taxi.

[5] Identification Officer with the Cape Breton Regional Police Service, Sgt. Geoff MacLeod introduced a booklet of photos from the scene of the break and enter (Exhibit #1), as well as photos of the Accused's clothing seized at lock up upon the arrest of Mr. Currie (Exhibit #2), on the date of the alleged offence. In addition, a booklet of photos (Exhibit #14) was introduced through Cst. Kyle Dicks pertaining to the items seized during the execution of a search warrant at 31 7th Street, Glace Bay, Nova Scotia.

[6] A number of items seized were physically entered as exhibits, items of clothing, hiking boots, a knife, track pants, rolling papers, a package of cigars, skull mask, sneakers, money, and a black hoodie.

[7] In particular, there is a CD containing video clips taken from security cameras at Cletus' Convenience on the night in question. These were introduced through Cst. James Reynolds who transferred the clips from the camera to a USB jump drive and give it to Sgt. Jack Burke of the Cape Breton Regional Police Services.

[8] Several of these videos, clips #2, #4 and #7 show a person entering the front of Cletus' Convenience, breaking open the steel gate, and smashing the glass entrance door. The individual is then shown entering the store near the front counter, climbing over the counter and behind it where the person is swinging an object, attempting to break through a foldable steel door which is locked.

[9] The person rummages around looking for more things, including looking in drawers and stuffing things into a bag, before climbing back over the counter and then leaving the store.

[10] Cst. Gillard gave evidence that he arrived at the scene following a report by a Cape Breton Post driver. The K9 identification unit was deployed, and no one was found in the store. The metal gate was open, the lock being cut off, and the glass door was smashed in. He remained outside and turned the scene over to Sgt. Martell.

[11] Cst. Kyra Clarke attended at the scene of the store, having arrived after taking the report of Terry Hiscock, at Bud's Taxi on Brookside Street, Glace Bay, in relation to the robbery, she remained in her vehicle at the convenience store.

[12] A hatchet with a yellow handle was found on the floor behind the counter just below the cash register and near the folding door.

Cletus O'Neil

[13] The Crown called the store owner, Cletus O'Neil, to give evidence. He has six (6) employees at the store and testified that he had been working at the store the previous evening. He testified the store closes at 10:00 p.m. and with the work needed to finish up, he closed up and locked the doors at 11:00 p.m.

[14] Mr. O'Neil was awoken around 6:00 a.m. the next morning by police, informing him of the break in. He attended the store shortly after that and awaited the identification team. He saw the door smashed and the pieces of glass. It was

obvious to him the store had been broken into. He confirmed the condition of the store was not how it was left when he closed, stating that no one was present when he left the night before, the doors were closed, the cigarette counter was secured and the metal outside door was fastened with a lock. The alarm was set, just like any other night.

[15] The alarm did not go off, he said.

[16] Upon arrival at the scene, he saw that the outside metal door had been broken open from its U-shaped lock. Upon entering the store Mr. O'Neil testified he saw things on the floor that had been pushed away and fallen. A bic lighter display, a display with cords, cell phone chargers, chips and lighters were on the floor. The hatchet found behind the counter was not his, nor was it previously in the store.

[17] Mr. O'Neil testified that nothing else in the store was touched, just the area around the counter. The cigarette counter was double locked, he said. In terms of missing items, Mr. O'Neil said there were three drawers below the counter containing cigars, cigarette papers, various brand names, such as Sail Classics. When shown the video clip, Mr. O'Neil testified the intruder can be seen going through those drawers after being unable to open the cigarette cabinet.

[18] The place was a "mess", he said. He was shown a number of photos of the scene stating the exterior doors and the counter area were not in the condition he had left them. For example, the Zigzag rolling papers, and Players Export Cigars, shown in photograph 96 were in the drawers the night before, and the hatchet was not there. Behind the metal wall, Mr. O'Neil mostly keeps cigarettes, lottery and scratch tickets, and money.

[19] He was shown a number of photographs including 70, 74, 80, 83, 86, 93, 96, 105 and 121 of Exhibit #1.

Mr. O'Neil was asked by police about the hatchet, what items were missing, together they watched the video from the store cameras.

Video Clips of Cletus' Convenience

[20] Testifying in Court, Mr. O'Neil described what he saw on the video. A person entered the store and climbed over the counter and attempted to break into

the cigarette counter, located behind the counter, but he could not get into these, he said. The person then turned to the drawers where he mostly keeps cigars, cigarette paper, and vapes.

[21] When asked if he recognized the person in the video, Mr. O’Neil testified it was Jarrot Currie. When asked what made him think it was Mr. Currie, the store owner said he is familiar with the Accused, who had been in his store “hundreds of times”. He testified he knew Mr. Currie from his mannerisms and previous interactions with him. He had seen him about a week earlier and remembered having a previous conversation with Mr. Currie about his girlfriend stealing bars at his store. They got along, Mr. O’Neil said, and he felt they had a good relationship.

[22] Mr. O’Neil was also shown the video of the intruder in the porch area entering the store (Clip 4-21) pausing while a police vehicle passed, and the video from the back of the store (7-21) of the person trying to get into the cigarette counter by swinging at it, with what was most likely the hatchet. Mr. O’Neil described these videos as an accurate depiction of the video he watched with police, noting the time difference on the camera and the actual time.

[23] Cst. Reynolds earlier testified that the time on the video camera was an hour and 40 minutes ahead, which meant the camera time was 1:48 a.m., but the actual time was 12:08 a.m., when the video commenced.

[24] Mr. O’Neil identified Mr. Currie as the person sitting in the courtroom. Significantly, Mr. O’Neil testified that after he viewed the video with police, he identified Mr. Currie as the individual in it, stating, “Soon as I saw it, I said that’s Jarrot Currie”. It was immediate for him, he said. He cleaned up his store and later gave a statement to the police that day.

[25] In cross-examination Mr. O’Neil agreed the cameras are infrared and in dark light they show only greys and blacks but no color.

[26] Mr. O’Neil acknowledged informing the police in his statement that the intruder “looks like a person that comes into my store, Jarrot Currie”. “I’d have to say yes to that”, he answered.

[27] Further, he acknowledged that Mr. Currie had paid for the stolen bars, stating he, Mr. O’Neil talked to him and brought it to Mr. Currie’s attention.

[28] Mr. O’Neil admitted in cross-examination that when one looks at the video, the person’s face can not be seen. He agreed he was making the ID of Mr. Currie in Court as the person who had been in his store, even though there was no facial recognition on the video.

[29] In particular, Mr. O’Neil was challenged on his identification of Mr. Currie by his mannerisms. Defence Counsel suggested Mr. O’Neil had never seen him jumping over the counter or swinging a hatchet in his store. Mr. O’Neil agreed he had not.

[30] Mr. O’Neil did state he had seen Mr. Currie wave his arms and was familiar with how he moved around and saw him “jumping” in his store.

[31] He agreed there could be other people in the Cape Breton Regional Municipality that are ambidextrous and able to use both arms as Mr. O’Neil suggested Mr. Currie’s was.

[32] It was suggested that other people in the CBRM could certainly have similar mannerisms to what’s shown on the video, he replied, “it must be possible, I guess”.

[33] Mr. O’Neil also agreed that the items taken are commonly sold in convenience stores. He agreed stating that stores sell different brands, but said some stores may carry the “same ones”.

[34] In cross-examination, Mr. O’Neil agreed that he told police that Mr. Currie robs and steals sometimes from other people, but that he was never charged with theft from his store.

Robbery, Bud’s Taxi

[35] Terry Hiscock testified that he was dispatched in his cab to the corner of West Avenue and 6th around 4:00 a.m. on April 21, 2021. It was dark and quiet, and he was near the end of his shift, which would be 5:00 a.m.

[36] Mr. Hiscock has been driving a cab for 38 years. He drove for Bud’s Taxi, which his father owned, and for Sonny’ Taxi in Glace Bay for about 7 years, from 2007 to 2013.

[37] He was expecting a regular call that evening and when he went to the pickup there was no one there. The building was empty in front. He circled around back and there was a man in behind the building, he said. When the man got in the cab, he immediately brandished a knife, holding it to Mr. Hiscock's side, and demanded money.

[38] He did not have a lot on him, about \$80.00 as most people paid with debit. He gave him \$5.00 bills, some change, toonies and loonies, and a \$20.00 bill. The person asked where the big bills were, and the driver said it had been a really quiet night. The man got out and left on a little bike, which the driver said was too small for him.

[39] Mr. Hiscock said he followed the man in the cab from West Street to 7th Street where he turned into 31 7th Street and drove through the yard. The cab driver then headed back to the stand.

[40] Mr. Hiscock described the knife as a "filet" style knife, with a brown handle about 10 inches in length, the type used at a fish plant. The robber had cut the cable cord on the dispatch phone used for radio communication. Mr. Hiscock had his own cellphone and reported the robbery using it.

[41] Mr. Hiscock described the person as male, and younger than him (he is 57). He said the person had reddish brown hair and hazel eyes. He was wearing a baseball hat and a light blue hoodie, "powder blue", he said. He was not sure but thought the man had on white sneakers. He wore a bandana type mask, not a medical mask, that the driver assumed was tied in the back.

[42] He described the hat as dark coloured. His hoodie was up, and he was wearing the mask from the bottom of his eyes down.

[43] Mr. Hiscock described the area he was in as No. 2, New Aberdeen. He described the vehicle he was driving, and said traffic was quiet. He said when the man looked at him, Mr. Hiscock knew he had seen him before. The man had a "shocked look" on his face when he looked back at Mr. Hiscock, who said he knew who it was, when the man drove the bike into 317th Street, the residence of Mr. Currie.

[44] Mr. Hiscock testified he remembered Mr. Currie when he used to drive for Sonny's Cab. He would pick him up, drive him to the methadone clinic at Black

Diamond Pharmacy, and drive him back. He estimated this was eight or nine years earlier.

[45] Mr. Hiscock said it was the eyes and hair colour that stood out to him in being able to identify Mr. Currie and also “where he went”. I will note here that Defence Counsel has pointed out that in his evidence, Mr. Hiscock said that the man on the bike drove “through” the yard, and he lost sight of him after that. There is also the evidence of the dog handler, Cst. Dale MacLean, who observed a bicycle with wet tires in the rear of the house where Jarrot Currie lived.

[46] In cross-examination Mr. Hiscock acknowledged that when he first spoke with Cst. Clarke, he did not identify a suspect, but described the person as a stocky male with reddish hair. He also said it was possible he may have told police the knife was the first thing he saw, instead of the blue hoodie. He was asked further if he had described the knife to the police as six inches long. At trial, Mr. Hiscock maintained the knife was longer than that, stating that it was closer to ten inches but added that he obviously did not measure it.

[47] Mr. Hiscock admitted he could not tell the man’s age, except that he was younger. He testified the man said, “This is a robbery, I want your money”.

[48] Further, Defence suggested given that it was eight or nine years since Mr. Hiscock last seen Jarrot Currie, that it is possible that he cannot remember. He acknowledged that it was possible and that it was “a while ago”.

[49] In terms of other clothing, he testified that the individual was wearing gym pants. It could have been jeans, he said, but they looked like gym pants.

[50] Mr. Hiscock was questioned at length about eye colour and hair colour. It was suggested he told police the man’s hair was “ginger” and also said it was strawberry blonde. He answered tht the person’s hair was more brown than red. He agreed with the suggestion there could be any number of people in the CBRM with those features.

[51] Defence Counsel further suggested he may have been tired, and that fatigue could have affected his recollections. Once again, it’s possible, he said.

[52] The Defence challenged Mr. Hiscock on whether his description of the man came from his own memory or from social media and his discussions with his

girlfriend. He maintained in direct evidence and in cross-examination that he was the first to tell his girlfriend who it was, and testified he recognized the person's eyes, hair, and forehead.

[53] Admitted into evidence as Exhibit #2 is a booklet of photographs of the clothing seized from the Accused upon his arrest. These items include a pair of white Puma sneakers, a pair of Old Navy Jeans, and a blue sweatshirt with the insignia "Hurley".

[54] Admitted into evidence (through the identification officer, Cst. Kyle Dicks) as Exhibit #14 is a booklet of photographs of items seized during the execution of a search warrant at Mr. Currie's residence at 31 7th Street, Glace Bay, Nova Scotia.

[55] Among the items seized and entered as exhibits are a pair of "camo" hiking boots, a skull face mask, black sweatpants, a black Raptors baseball hat, a blue hooded sweater, a steak knife with wooden handle, a pair of blue grey sweat pants, a package of Export A rolling papers and a package of eight cigars, with the brand name "Sail".

[56] I will touch upon these further in my decision.

[57] As it turned out, a curfew check had been performed at Mr. Currie's residence at 8:28 p.m. on the evening of April 20, 2021, by Cst. Turner and Cst. Hu. Both officers gave evidence that Mr. Currie was not at home. They returned after 5:00 a.m. At that time, Jarrot Currie was home and gave them permission to enter. He was advised of a curfew breach, and upon being arrested, was permitted to return to get a hoodie. Seized from that time were the \$20.00, several five dollar bills, and change, consisting of toonies, loonies, quarters, and a bic lighter.

Decision

[58] In a criminal case such as this the burden is on the Crown and it alone to prove the elements of each offence charged beyond a reasonable doubt. The Accused, Jarrot Currie, has no burden at all, and he may choose not to call evidence.

[59] In this case, I find the Crown has met its burden to establish that there was a break and enter at Cletus' Convenience and that damage was caused willfully. The

evidence of Sgt. MacLeod and Cst. Dicks including the photographs and the surveillance video, shows this clearly.

[60] In particular, there is the evidence of the owner Cletus O'Neil, including his description of the store, the condition it was in the night before, being locked up as compared to the description the next day, with the lock broken, steel door open, things in disarray, dents or hatchet marks on the steel folding door behind the counter, the black door handle that was broken, and the till boxes shown in photograph 122 of Exhibit #1.

[61] In this case, I find the Crown has also met its burden of proving there was a robbery of Bud's Taxi and its driver, Terry Hiscock, on the morning in question.

[62] Having established the date, time, and place of the offences, the Crown must also prove beyond a reasonable doubt that it was Mr. Currie who committed them.

[63] The main issue is, has the Crown proven beyond a reasonable doubt the identity of the offender as being the Defendant, Jarrot Currie?

[64] The law is clear that identification evidence must be approached with extreme caution due to the inherent frailties associated with such evidence. Proof beyond a reasonable doubt is a significant burden. While the Crown need not prove the offence to an absolute certainty, it is closer to a certainty than to other standards of proof.

[65] Moreover, this is a case of circumstantial evidence. While a conviction may be sustained on it as well as on direct evidence, it is evidence from which a fact or issue maybe inferred. It allows and often requires a judge to make inferences. Inferences are not precise, and even reasonable inferences may simply be wrong.

[66] In short, it is only when all of the circumstantial evidence is considered that inferences may be made. A judge must be satisfied beyond a reasonable doubt that the guilt of the Accused is the only rational inference. The judge must first consider whether the evidence is reliable and second whether the inference sought to be made is sound. (See *R v. M.C.S.*, 2010 NSPC 26)

[67] In terms of the break and enter, Mr. O'Neil stated that the Accused was well known to him, that he had many interactions with him, and he knew his mannerisms. Although he admitted to not seeing his face, there was no hesitation

by Mr. O'Neil, once he viewed the video, in identifying Mr. Currie as the person in his store. The Crown submits the evidence of Mr. O'Neil is reliable and credible. He testified in a straightforward manner and should be believed.

[68] The Defence says Mr. O'Neil is credible and reliable with respect to the items in his store, but his evidence is not reliable when it comes to his assertion that it was Mr. Currie in the store video.

[69] The Defence argues the video is of poor quality, infrared, and showed monotone colors. It is not even clear whether the intruder was male or female, Mr. Currie submits. Mr. O'Neil agreed in cross-examination that he never witnessed Mr. Currie swing an axe or jump over a counter. The whole notion of reliance upon "mannerisms" is fraught with danger and frailty, the Defence submits.

[70] Further, the Defence argues, there is nothing unusual or unique about cigars, cigarette papers, or a bic lighter being in someone's possession. Counsel points out that Mr. O'Neil admitted that other stores sold similar brands.

[71] There is nothing to link Mr. Currie to these items, and that other persons in the Cape Breton Regional Municipality of similar body type and mannerisms could have committed these offences, says the Defence.

[72] I would note that in giving his evidence, Mr. O'Neil testified that he often had conversations with his customers, including with Mr. Currie. He testified that during these, Mr. Currie would "jump around". He was familiar with his movements, he said, and had seen him about one (1) week before the incident.

[73] In terms of the items seized, the video does show the person wearing camouflage boots, similar to those seized, in evidence as Exhibit #5. I think there is a difference between a pair of those boots and a pair of those boots with a particle of glass inside, seized on the day of the robbery. In this regard, I would refer to the smashed door and glass shown in photographs 74-76 of Exhibit #1.

[74] The Defence submitted that there is no forensic evidence linking the Accused to these crimes, stating the "Hema strip" on the axe handle is not blood, and there are no fingerprints. The K-9 unit located no evidence or suspect related to these crimes.

[75] Although there was no forensic evidence linking the piece of glass found in the boot to the store, this evidence, small as it may be, is a piece of circumstantial evidence to be considered with all of the other evidence.

[76] With respect to the robbery, Terry Hiscock had no relationship with Mr. Currie other than as driver/passenger. The Crown submits he was forthright in his evidence, and it is plausible that after he thought about it, after the initial shock, he came to realize who it was that robbed him.

[77] He did observe the person's face from above the nose. Despite repeated questioning he maintained that his identification was based on his hair colour and his eyes. It had been some time, years before, that he drove Jarrot Currie to the methadone clinic, but he did so regularly and was familiar with him. He further identified the man's clothing, the black hat, blue sweatshirt, the knife and the face mask.

[78] With respect to the items seized, the Defence argues that there were three bedrooms and other persons residing at the residence. The evidence was that Mr. Currie resided with his grandmother. The Defence argues that no police officer confirmed ownership of these items and no items could be linked to Jarrot Currie through forensic analysis.

[79] The Defence submits that all ten of the items seized in the home were items that could have been purchased through retail by anybody in the municipality. A knife of the kind seized could be found in any residential property, counsel submits. I note here Mr. Hiscock described the knife as a "filet knife", which may not be the same as a steak knife.

[80] Similarly, the Defence argues that the items of clothing seized, the Puma sneakers, the Old Navy jeans, the Hurley hoodie, could be purchased retail as well.

[81] The Defence said Terry Hiscock did not identify any insignia on the sweatshirt, stating only that the hoodie was "powder blue". Further, the Defence says, there are no distinguishing features about the money and the denominations could have been different, suggesting maybe Terry Hiscock gave him \$20.00, and maybe not.

[82] The Defence correctly points out that Mr. Hiscock testified that the person on the bike did not go into the residence at 31 7th Street and continued on (through the yard).

[83] The Defence submits that there is no timeline linking the Accused to these offences. Mr. Currie could have been home after the second curfew check at 10 p.m. (the earlier one being at 8:48 p.m.) It is conceivable Mr. Currie was at home between 10:00 p.m. and 5:15 a.m. when Mr. Currie was at home says the Defence.

[84] In terms of the evidence, the Defence submits that the Crown has failed to prove beyond a reasonable doubt that the only rational inference is the guilt of the Accused, Mr. Currie.

[85] They say Mr. O'Neil's evidence based on the video is not reliable. Further, Mr. Hiscock last saw Mr. Currie eight or nine years ago. For this reason, the Defence says, they would be unable to identify Mr. Currie on the night of the crime.

Conclusion

[86] Mr. Currie was identified by the store owner, Mr. O'Neil, as the person who committed the break and enter. Mr. Currie was identified by Mr. Hiscock as the person who committed the robbery. Each said that Mr. Currie was familiar to them.

[87] Mr. O'Neil testified in a forthright and credible manner. While facial recognition was not possible on the video, I accept his evidence that Mr. Currie had been in his store hundreds of times. I find he would have been familiar with Mr. Currie based on the interactions he had with him.

[88] There is also the piece of glass found in the hiking boot, which is similar to those worn by the person in the video, based on my observation. It is true the piece of glass was not forensically matched but given the timing and proximity to the crime, it is a telling piece of circumstantial evidence.

[89] There is, then, the items found in the apartment, numerous items which match very closely, the items taken from the store. Once again, the timing and proximity of the evidence is a strong factor when combined with the other evidence.

[90] Mr. O’Neil was an honest witness, and while there are reservations about the video, Mr. Currie was no stranger to him, quite the opposite.

[91] It is true other brands are available in other stores, but it is not all of Cape Breton Regional Municipality where this occurred, but rather at or near West Street, known in Glace Bay as No. 2, a relatively small area with the events unfolding in a single day within a short period of time.

[92] Mr. Hiscock testified in a straightforward manner. He was an excellent witness in that he spoke plainly and to the point.

[93] He described the blue hoodie and the knife, as well as seeing the individual’s eyes, hair and forehead. He did not waver in his evidence. He did allow for certain possibilities, but that only added to his credibility, showing an open mindedness and an awareness of his and others’ fallibility.

[94] That said, Mr. Hiscock was unmoved in his testimony and unshaken in cross-examination. The sheer number of items seized from Mr. Currie’s residence, from the hoodie to the brown handled knife, from the gym pants to the black hat, the skull mask and the money, are, in my respectful view, beyond mere coincidence when it comes to determining inferences and matters of fact.

[95] The evidence of denomination of bills is clear, one - \$20.00; nine – toonies; two loonies.

[96] The items seized also include a white pair of sneakers, which Mr. Hiscock believed the person who robbed him was wearing. I will add that the bike with the wet tires seems to fit with all of the other circumstantial evidence.

[97] I concur with the Crown that while each piece of evidence, may not of it own support a finding of guilt, when considered all together, I am satisfied the only rational conclusion is that Mr. Currie committed these crimes, being the break and enter at Cletus convenience and the robbery of Bud’s taxi and related offences.

[98] I therefore find him guilty of counts 1, 2, 5, 6, 7 and 8 of the Indictment.