

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. M.M., 2011 NSPC 27

Date: April 19, 2011

Docket: 2261626, 2261628, 2261630, 2261632, 2261634, 2261636, 2261638,
2261640, 2261642, 2261644, 2261646, 2261648, 2261650, 2261652, 2261654,
2261656, 2261658, 2261660, 2261662

Registry: Halifax

Her Majesty the Queen

v.

M.M., a young person

DECISION

Judge: The Honourable Judge Jamie S. Campbell

Heard: April 5 and 8, 2011

Decision: April 19, 2011

Charges: cc 344, cc 267(a) x 2, cc 264.1(1)(a), cc 279(2), cc 87, cc 88(1), cc 88(1), cc 94(1), cc 94(1), cc 95(2), cc 86(1), cc 86(2), cc 90 x 3, cc 91(2) x 2, cc 92(1), cc 96(1)

Counsel: John Nisbet - Crown Attorney
Eugene Tan - Defence Counsel

By the Court:

[1] On December 13, 2010 the police stopped a car driven by Candace MacDonald. It was suspected of having been involved in a robbery with a firearm at a specific address in Sackville. In the car were the driver, Candace MacDonald, another adult, Cody Muise and two young men, K.M. and M.M. In the car were also found, some drugs, some items reported to have been stolen in the robbery, a set of brass knuckles and a 32 calibre semi-automatic handgun. The gun was found under the back seat of the car, loaded.

[2] M.M. has been charged with a number of offences, including robbery. He provided a statement to the police. That might be an overly generous description. It might be more accurate to say that he just said some random things. He said that he and Candace MacDonald were in the car. They picked up some guys, at some building, somewhere in Fairview. At first he said he didn't know the guys but then agreed that he just didn't want to name them. Given that the two guys were in the car with M.M. when the police stopped it in a high risk take down and that their identities would be pretty quickly determined, that is perhaps technically in strict compliance with the non-ratting provisions of the code of the street. Otherwise, it doesn't seem to make much sense at all.

[3] He said that he had not been in Sackville at all. He had nothing to do with any robbery. It was not at all clear how and when he ended up in the car with Candace MacDonald. While at the police station, M.M. was observed by the police reaching

into the waistband of his pants. He took out a gold and diamond ring that had been reported stolen in the robbery and placed it on his finger. M.M. is found in a car, with the property reported stolen in the robbery, now wearing the ring reported to have been stolen.

[4] It only gets worse. K.M., the other young person in the car, pleaded guilty to the robbery and to the possession of the gun and the brass knuckles. While that may be seen as taking the responsibility it has another affect. It means that M.M. was found, in the car, with the gun and the stolen property, with the stolen ring directly in his possession, in the company of a person who has now admitted to having committed the robbery, having the gun and having the brass knuckles.

[5] K.M. gave evidence. He was not asked about what had taken place during the robbery or who had been there when it happened. In other words, he was not asked to implicate M.M. directly. He just confirmed that he had pleaded guilty to those offences. As he left the courtroom, M.M. said to him, “Thanks buddy”.

[6] The driver of the car, Candace MacDonald gave evidence as well. She too is facing criminal prosecution arising from this incident. She was not asked about the robbery itself. She was asked only about the drive from her home in Sackville and the route she took. She said she drove directly from her home to the point where the vehicle was stopped by the police. She said that she did not stop anywhere else. It was a direct drive.

[7] Her evidence is in direct contradiction to some of what M.M. said to the police.

No one was picked up in Fairview according to Candace MacDonald. Two guys were not picked up. The evidence given by Ms. MacDonald and M.M. is the same in this sense though. Neither of them suggested that M.M. was picked up anywhere along the highway or in Fairview. The circumstantial evidence at this point is piling up.

[8] K.M. admitted to doing the robbery. The car left Sackville, where the robbery is supposed to have taken place and he was in the car when it was stopped. Candace MacDonald said they didn't stop to pick anyone up or drop anyone off. It is entirely logical to infer that the people found in the car when it was stopped by the police were the people who got in the car when it left Sackville.

[9] Candace MacDonald's car was stopped on Northwest Arm Drive. The police observed the car taking the exit from the highway from Sackville. Had it gone to Fairview, using this exit would have required considerable backtracking. From the time when the robbery report was called in, to the take down by the police, would allow for a direct drive from the address in Sackville to the place on Northwest Arm Drive where the car was stopped. It was suggested that the times are not precise. The time when the robbery is said to have taken place could be off by some minutes. The time of the police stop could also be off by some minutes. The time of the drive itself would depend on the traffic patterns at the time.

[10] Considering the time periods involved, it is possible that a stop was made. The time allows for that. The other evidence doesn't. The problem is that Candace MacDonald herself said nothing about stopping anywhere. M.M., in his statement, such as it was, spoke about picking up guys in Fairview and not having been in

Sackville himself. He did not make any reference to Candace MacDonald and the guys stopping to pick him up in the moments before the car was stopped by the police. Having been in a vehicle when the police executed the high risk take down procedure and where robbery and guns were being talked about, if a person had just been picked up, that would be an overpoweringly relevant piece of information for him to have provided. It would have been simple enough to have said. He had only to say that he had not been in Sackville but had been picked up just a few moments before in Fairview or somewhere else for that matter. He has the right to remain silent, but when he made the statements he did to the police, inferences can be drawn from what he said and what was left out.

[11] In summary then, M.M. is found in a car driven by a Candace MacDonald, who says she drove straight from Sackville, with a person, K.M., who has pleaded guilty to the robbery that had taken place a few minutes before in Sackville. Also in the car are a gun and a number of items reported to have been stolen in that robbery. M.M. himself has a ring reported stolen in the robbery. If M.M. was not at the scene of the robbery, why was he in the car that had driven directly from the scene? If he had been picked up on the way, why did he tell the police that he had been in the car with Candace MacDonald when the others were picked up in at some building, somewhere in Fairview? If he had nothing to do with a robbery why was he hiding the stolen ring and why did he later put it on his finger? At this point it is very difficult to conceive of how M.M. was not involved with that robbery.

[12] Nykell Brooks was the victim of the robbery. It is no longer an alleged robbery. K.M. has pleaded guilty to robbing him. Mr. Brooks told of how he had been lured to

Candace MacDonald's house and essentially ambushed by Ms. MacDonald and three males. He said that Ms. MacDonald wrongfully accused him of taking her wallet. Ms. MacDonald says that Mr. Brooks was her drug dealer. She was not asked about the circumstances surrounding the robbery itself.

[13] Nykell Brooks says that he was taken into Candace MacDonald's house. A gun was placed to his head. He was forced to sit down and empty his pockets. His brass knuckles were taken. Money was taken from his wallet. His prescription drugs were taken. His watch, his ring and his earrings were taken. The robbers went to his car and removed his GPS system. Mr. Brooks said that the robbers wrote down his address and warned him of repercussions for himself and his family if he reported the matter to the police. A handwritten note with his address written on it was found in the car.

[14] Mr. Brooks did not get merely a fleeting glimpse of these people. He was with them for some minutes. The situation as he reported it was stressful in the extreme. He was however able to provide detailed descriptions of the individuals. First, they were in the company of Candace MacDonald, whom he certainly knew.

[15] He said that he did not know any of the three young men. They were, in his judgment all young men of about the same age. One of them had red hair. K.M., who has pleaded guilty to the robbery of Mr. Brooks, at least now, has short and distinctively red hair. It is reasonable to conclude that the red haired person identified by Mr. Brooks was K.M.

[16] One of the remaining two was described as having black hair and the other

blond hair with a “buzz cut”. Mr. Brooks said that the blond person with the buzz cut hair also had a tattoo on his forearm. The adult male found in the car, Cody Muise, has short hair and a tattoo on his forearm. While in the photograph put in evidence of Cody Muise his hair appears dark, Mr. Tan pointed out that the police officers described Cody Muise as having short light hair. Mr. Muise would appear at least, to fit the description of the second of the three males.

[17] The third male was described by Mr. Brooks as having black hair and wearing a dark jacket and jeans. M.M. was not found wearing either a dark jacket or jeans. Mr. Brooks was asked to look at M.M. in the dock and say whether he believed him to have black hair. He said no. When asked whether any of the three males was in the court room, he said no. Significantly, he did not say that he didn’t know or wasn’t sure. After looking around the court room he said no.

[18] When shown the gun that was found in the car, Mr. Brooks said that this was not the same gun. He said that the gun that he saw was older with chipped paint. Something doesn’t seem quite right. Given the strength of the circumstantial case, it seems natural to try to reconcile these troubling inconsistencies.

[19] Perhaps Mr. Brooks was just scared to make an identification. He had said that threats were made against his family. But Mr. Brooks is not a witness who was reticent about identification of the people involved. He gave descriptions of the three men. One is clearly consistent with the description of K.M. The other is reasonably consistent with the description of Cody Muise. He was not hesitant about saying that Candace MacDonald was the “mastermind” to use his word. There is nothing here to

allow that inconsistency to be resolved by inferring that Mr. Brooks just didn't want to point the finger at M.M.

[20] Perhaps Mr. Brooks was too agitated, intoxicated or confused to recognize the people involved. The police confirmed that he was not intoxicated, and while agitated he does not appear to have been addled. He gave a description that fit the one person who has pleaded guilty.

[21] It is now trite to say that an in dock identification is not the most compelling of evidence. A person who is asked to identify his assailant and for the first time picks the accused out of the dock, may be acting in good faith. He may also be subconsciously drawn to the one person in the courtroom who is most obviously implicated by virtue of where he is seated.

[22] An identification made in the moments or hours after the event may also be questioned if the witness caught a fleeting glimpse of the suspect as he fled, if the lighting was poor or if the person is being asked to distinguish or identify features of a race other than his own.

[23] Identification in some circumstances can be more compelling. People are able to identify and distinguish one person from another. The proper but sometimes artificial skepticism of the courtroom goes only so far. Each day we do not wander through a world made up entirely of complete strangers. Of course people can recognize other people. It is far from perfect, and perhaps much less reliable than is often thought. But there is a difference between appropriately critical skepticism and

the outright denial of reality.

[24] Here, Mr. Brooks clearly saw the people who robbed him. He described them. None of the people he described fit the description of M.M.. Had he simply not been able to identify M.M. in the courtroom as one of those people, it could be said that with the passing of a few months that could be accounted for by fading memory.

[25] But here, the failure to identify must be considered in light of two other things. The first is the fact of what might be called positive non-identification. This was not to the extent of looking him the eyes and saying..."No, that's not one of the guys". It is very close. Mr. Brooks did not simply say that he couldn't be sure. He positively said that none of the people who robbed him were present in the courtroom. M.M. was no more than a few feet away, sitting on the bench next to the lawyers. The second is the failure of the description to match M.M. Had Mr. Brooks provided no description of the third assailant, or had he given a description that generally fit M.M. his failure to identify him might be capable of being explained away.

[26] This is where the highly probable meets that something else. The circumstances in which M.M. was taken into custody on December 13, 2010 are more than suspicious. I am conscious of being repetitive here. He was found in a car, minutes after a robbery with the person who has pleaded guilty to the robbery, another who was identified as being involved, and a third who fit the general description of one of the robbers. The driver of the car said they left the location of the robbery and didn't stop until they were apprehended by the police. M.M. is found in the car with a hand gun under the seat and with the stolen property. He has in his possession a ring taken

from the victim, Mr. Brooks. His statement given to the police makes no reference to his having been picked up moments before and instead suggests that he and Candace MacDonald had picked up “two guys”, from some building, somewhere in Fairview. That all suggest that it is highly probable that M.M. was one of the people involved in the robbery of Nykell Brooks.

[27] It is natural, it seems, to try to resolve the loose ends of any narrative by making some inferences. The known knowns add together to fill in the gap left by the known unknowns. Given the probability that M.M. left Sackville with the others in Candace MacDonald’s car, after robbing Nykell Brooks, it seems logical to resolve the discrepancy by assuming that Nykell Brooks was either mistaken or not telling the whole truth. In some situations that inference might be entirely reasonable. There are reasons here why it is not.

[28] Nykell Brooks was a critical Crown witness. He is the only person who told of how he was robbed. Neither Candace MacDonald nor K.M. gave any evidence about what happened in the house where the robbery took place. If Nykell Brooks were intentionally refusing to identify M.M. as one of the robbers, it would beg the question as to why he was doing that and what else he might be saying that was not true. That also seems to be unlikely given that he readily identified Candace MacDonald and provided descriptions of the others.

[29] The other inference to resolve the narrative inconsistency is that Mr. Brooks was just mistaken or confused. That is also a difficult inference to draw. He clearly saw his assailants. They were close to him. He saw them for a number of minutes. He

gave detailed descriptions. The descriptions, match K.M. who has pleaded guilty and Cody Muise who was also in the car. The descriptions do not match M.M., either in terms of hair colour or clothing.

[30] In court Mr. Brooks looked directly at M.M. He had already confirmed a red haired man, and a blond man with a tattoo on his arm. That left the black haired man. He said that M.M. did not have black hair. When asked if any of the people who robbed him were in the courtroom he said that they were not. He did not say that he was not sure or that he couldn't tell. People who are most sure are often the least reliable. Of course he could be wrong.

[31] The evidence of M.M.'s involvement would have to be so strong that it would allow the inference to be made that Nykell Brooks was just wrong, having regard to the factors that add to the reliability of his assertion that none of the people who robbed him were in the courtroom. In the face of evidence that is plainly inconsistent with his guilt, and which itself has some indicators of reliability, the evidentiary gap cannot be closed. The circumstantial evidence does not support the inference, in the absence of anything else, that Mr. Brooks was just wrong. It does not provide an answer to what I will now call the critical known unknown. If M.M. robbed Nykell Brooks, why didn't Mr. Brooks describe him or identify him when given the opportunity?

[32] That important question remains unresolved. The narrative is incomplete. There is an inconsistency in the story that is so important that it raises a reasonable doubt. That doubt applies to all of the charges. The Crown has not proven beyond a

reasonable doubt that M.M. was involved in the robbery, assault, confinement or threatening of Nykell Brooks. It has proven that he was in a vehicle, with the stolen property and the gun. It has not proven that he was involved in the robbery and because of that there is no evidence that he knew or should have known that he was in a car with a gun or stolen property.