IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. K.W., 2011 NSPC 41

Date: July 11, 2011
Docket: 2057222
Registry: Halifax

Her Majesty the Queen

v.

K.W., a young person

DECISION

Judge:	The Honourable Judge Jamie S. Campbell
Heard:	July 4, 2011
Decision:	July 11, 2011
Charge:	cc 239(1)
Counsel:	John Nisbet - Crown Attorney Luke Craggs - Defence Counsel

By the Court:

[1] K.W. wants to withdraw a plea of guilty to being an accessory after the fact to attempted murder. He wants instead to enter a plea of guilty to accessory after the fact to aggravated assault.

[2] The other person involved, Amanda Currie, was not committed to stand trial with respect to attempted murder. After a preliminary inquiry, she was committed to trial on the charge of aggravated assault.

[3] Section 592 of the Criminal Code makes it clear that a person charged with being an accessory after the fact to an offence may indeed be convicted whether or not the principal or any other party has been convicted of the offence itself. There is no legal inconsistency in K.W. being found guilty of being an accessory after the fact to attempted murder. The defense asserts that there is another problem though.

[4] K.W.'s legal situation is complicated by the fact that he is a young person to whom the Youth Criminal Justice Act, ("YCJA") applies. Section 36 of the YCJA provides that when a young person pleads guilty the court must be satisfied that the facts as admitted support the guilty plea. It is asserted here, that the facts do not support the plea as it was entered and that the section 36 finding was made in error. After a preliminary inquiry it was determined that there was not sufficient evidence to support a charge of attempted murder. How then could there have been enough evidence set out in the section 36 inquiry to support the assertion that a murder had been attempted for which K.W. was an accessory after the fact? The issue isn't the

charge faced by Amanda Currie but the lack of evidence that there was an attempted murder. Mr. Craggs on behalf of K.W. has applied to have me reverse the original finding.

The Section 36 Finding

[5] On July 9, 2009 K.W. entered a guilty plea to the charge of accessory after the fact to attempted murder. He was represented by Joe Cameron, an experienced senior counsel who specialized in Youth Criminal Justice matters. At that appearance, Mr. Cameron confirmed that he had instructions from K.W. to enter the plea. He confirmed that his client was entering the plea of his own free will, knowing that he was giving up the right to a trial, and knowing that the court would not be bound by any joint recommendation regarding sentencing.

[6] Mr. Nisbet, for the Crown, specifically requested that the section 36 finding be completed at that time. Mr. Nisbet wanted to make sure that the facts were, to use his phrase, "nailed down". The section 36 finding must be made before sentencing. It can be made when the plea is entered or, as is often the case, can be deferred to the sentencing hearing.

[7] The facts as presented by Mr. Nisbet were not in dispute then and are not in dispute now. K.W. is not backing away from the agreed upon facts.

[8] Police had been called to the scene of a stabbing on June 17, 2009. There had been a report that a female, later determined to be Samantha MacDonald had been

stabbed. The police received information that the suspected stabber was Amanda Currie. She was said to be with three males, one of whom was K.W.. When the police arrived at the scene they found the victim, Samantha MacDonald, suffering from three stab wounds.

[9] Ms. MacDonald told the police that she had bought a Playstation from K.W. for $50.00 a few weeks before. Perhaps not entirely surprisingly, the Playstation never worked. She and her boyfriend had been trying to get the money back from him. On June 17, 2009 she left it in his driveway.

[10] A short time later, Samantha MacDonald saw K.W. and three others, including Amanda Currie. K.W. asked Samantha MacDonald why she had left the Playstation in his driveway. She said she wanted her money back. At this point it is perhaps best to quote directly from the transcript of the appearance.

"Amanda gets in Samantha's face. Samantha pushes her. When Amanda raises her right hand, she's holding a knife. Amanda tries to stab her, a couple of times in the stomach and misses. Samantha was trying to avoid the knife because she was three months pregnant at the time. Amanda then continued to stab her, hitting her in the back two times and once in the chest. The knife, Your Honour, is described as a fold-up knife, the blade being two to three inches long. Amanda folded the knife up after stabbing Samantha, put it in her pocket, and walks away with K. W. and two other people toward K.W.'s house. The police arrived a few minutes later."

[11] K.W., in his statement to the police said that he had been asked by Amanda Currie to get rid of the knife. He hid it under his garage at home. Though when asked at first he said he didn't know where the knife was, he later on admitted that he had hidden it and then led police to the hole where the knife was found.

[12] Based on that submission, a finding under s. 36 of the YCJA was made. A presentence report and Gladue report had already been ordered. The matter was to be referred to a sentencing circle with a view to returning to court on October 16, 2009 with recommendations for sentencing. K.W. left Nova Scotia and went to British Columbia. He did not return for sentencing until he was apprehended in British Columbia in April 2011, taken into custody and returned.

[13] A preliminary inquiry was held with respect to the charges against Amanda Currie. She was not committed to stand trial on the charge of attempted murder but on the charge of aggravated assault. This was after K.W. had entered the guilty plea and the section 36 finding had been made. So, K.W., at this point, had entered a plea to accessory to attempted murder when Amanda Curie herself was not committed to stand trial on that charge.

[14] K.W. does not deny that Amanda Currie stabbed Samantha MacDonald and that he hid the knife that was used. K.W.'s actions themselves are not in question. He wants now to plead guilty to being an accessory after the fact to the offence with respect to which Amanda Currie was actually committed for trial. On a practical level it is difficult to see what would be wrong with that. His sentencing would be with respect to his actions which are not in dispute and not with respect to Amanda Currie's intent, which he, like others, would have to have inferred from her actions. Whenever the phrase "on a practical level" is used, it could be a clue that things will just not be as straightforward as all that and that there is another level that will generate pages of briefs.

Jurisdiction to Review a Section 36 Finding

[15] Some procedural issues arise from this. The first is whether the making of a section 36 finding of guilt under the YCJA precludes me from taking any action at all. Having made a section 36 finding can I review and potentially reverse my own decision? Counsel have agreed that I do have the jurisdiction to do that. This is beyond a judge reserving the jurisdiction to clarify a previously made ruling. This is a matter of actually reversing a finding that I have already made.

[16] The basis for this conclusion is found in subsection 130(1) of the YCJA. That provision states that when, after a "finding of guilt" has been made, there has been a change of plea, the case should be transferred to another judge for hearing. In order for a change of plea to take place, after a section 36 finding of guilt, that finding would have to have been reversed or rescinded.

[17] Having made a section 36 finding a judge in the Youth Justice Court must be able to reverse that finding.

Test for Withdrawal of a Guilty Plea

[18] There is however no clear legislative guidance as to when and in what circumstances such a reversal should be considered. I have not been directed to any case law on that precise issue.

[19] If a judge agrees to reconsider a section 36 finding, that he or she has

previously made, is this to be done using a test similar to that applicable to the withdrawal of a guilty plea? In the alternative is the test a less stringent one of whether, after reconsideration, the facts do support the guilty plea? Or, is the test somewhere between those two?

[20] When a person pleads guilty with the benefit of counsel the onus is on that person to show that the plea was not valid. A trial judge may exercise his or her discretion to permit the withdrawal of a guilty plea where the accused can show that he was deprived of the ability to freely choose whether he should go to trial. That may involve the person having received legal advice that was wrong. It may involve coercive of oppressive conduct. A change of mind by the accused does not justify the withdrawal of a guilty plea.

[21] The test for the withdrawal of the guilty plea is not whether the plea was correct. It does not provide for an opportunity to try the case to show that the guilty plea was wrong in law or not supported by the evidence. The test is one that goes to the validity of the process by which the plea was entered. Allowing people to withdraw guilty pleas under less stringent conditions would enable accused people to make arrangements with the Crown to enter a plea in return for having other charges withdrawn, then back out of the deal. The withdrawal of the plea does not give the Crown to opportunity to reactivate the withdrawn charges.

The Nature of the Section 36 Inquiry

[22] Asking a judge in Youth Justice Court to reconsider a section 36 finding may

have the same practical implications for the plea bargaining process.

[23] The circumstances are not identical however. While a judge in adult court makes inquiries as to whether the accused person fully appreciates the significance of the plea and is admitting the essential elements of the offence to which the plea has been entered, there is no provision that is analogous to section 36. The section 36 inquiry is not a "drill". It is a substantive protection offered to young people to protect against pleas being entered where the facts do not support the plea. Crown attorneys and defense counsel will each be guarding against such a thing. The section 36 inquiry is an opportunity for a further check to maintain the integrity of the system.

[24] It is not an inquiry into evidence to determine whether the evidence supports the facts as alleged. Information may be put forward to the court in the form of facts without any indication at all as to how those facts were determined to be facts. The facts are admitted by the young person without the judge having any information to determine whether the admission was one that should have been made, based on all of the evidence.

Tests for review of a Section 36 Finding

[25] A judge asked to reconsider a section 36 finding of guilt is put in an unusual position. He or she must undertake that reconsideration attuned to the real potential that he or she was in error in the first instance but not so willing to acknowledge error that integrity of the process is compromised either by a sense of personal humility or the desire to show it. The protection afforded by section 36 requires that a young

person simply cannot be convicted and sentenced with respect to an offence which the agreed upon facts do not support. If the original section 36 finding did that, it must be reversed.

[26] The test to be applied to that reconsideration it would seem would be different in different circumstances. I am not presuming to set out a comprehensive test. That is not my role. I do feel obliged to show that the test that I have proposed to apply in this case was arrived at having regard to the broader context of section 36 findings and my understanding of the implications of such findings.

a) Withdrawal before a section 36 finding: When a young person pleads guilty to an offence, but backs away from the previously agreed upon facts the process appears to come to an abrupt and screeching halt. Without agreement on the facts, the section 36 finding cannot be completed. Where an adult might be held to the plea, the young person simply cannot be sentenced because the section 36 finding cannot be made. The process provides a protection against misunderstandings or misjudgments by young people as to what should be agreed. That is the case even when the young person is represented by counsel.

b) Backing away from the facts after the section 36 finding has been made: Where a young person has changed his or her mind and no longer accepts the facts as set out when the section 36 finding was made, a test closer, but not identical to the one used when adults seek to change a guilty plea would make sense. The section 36 inquiry is an opportunity to formally put the agreement as to the facts before the court. The young person is asked whether he or she agrees.

Backing away from those facts, after that, is a serious matter. If the young person was advised by counsel at the time that the section 36 finding was made that would establish a presumption of correctness. Given that the accused is a young person that presumption could be overcome having regard to the persons age, personal circumstances, level of sophistication in dealing with the legal system, the complexity and seriousness of the charges and facts, and the circumstances surrounding the entry of the plea. The YCJA recognizes that adults and young people make decisions in ways that are very different. The decision to enter a plea may well be different for a young person than for an adult. A threatened 14 year old in difficult circumstances, perhaps should be held to a less onerous standard when it comes to changing his mind than a mature accused.

c) Legal Error in Making a Section 36 Finding: Where the young person asserts that the section 36 finding was made based on a legal error, a judge has an obligation to get the law right. If the section 36 finding of guilt was based on a misunderstanding of the law, or an incomplete consideration of the legal requirements to sustain the charge, it should be reversed. In this case, the finding under section 36 was not based on a legal error nor is it claimed to have been. Section 592 of the Criminal Code makes it clear that a person may be convicted as an accessory after the fact even if the principal has not been convicted of the offence itself. There are reasons for that. The principal may not be convicted for any number of reasons from death of the principal, death or unwillingness of witnesses to testify, or a plea bargain. The fact that Amanda Currie was not committed to stand trial for the attempted murder of Samantha

MacDonald does not in itself make the finding of guilt of K.W. as an accessory after the fact to that offence, legally wrong.

d) Unreasonable Inference in Making a Section 36 Finding: Where a young person asserts that the facts as set out in the section 36 inquiry do not support the inferences required to sustain the charge, as is the case here, I have an obligation to reassess the reasonableness of those inferences. That should be done having regard to the purpose of the section 36 finding, the summary nature of the inquiry, the lack of full evidentiary context for the facts as provided, while showing some limited deference to the admissions made through legal counsel.

Application of the Test

[27] One of the essential elements of the offence of accessory after the fact to attempted murder is that there was indeed an attempted murder. Amanda Currie need not have been convicted of it but the offence of attempted murder must be proven to have taken place. The offence requires that there be evidence of intent to cause the death of the victim. There were no words expressing intent so it had to be inferred from the circumstances. That is a difficult thing to prove.

[28] Mr. Craggs asserts on behalf of K.W. that the actions of Amanda Currie in stabbing Samantha MacDonald did not allow for that inference to have been made. He argues that the facts as agreed and presented to the court could only support the inference of intent to wound so that a plea of accessory after the fact to aggravated

assault would be sustainable.

[29] The issue is not whether the facts themselves support the charge directly but whether the facts support the inference necessary to the charge. Inferences are not facts. Facts are determined from evidence. Inferences are drawn from facts. When a section 36 finding is made a judge must have facts that support the essential elements of the offence. The inquiry is not whether the judge would necessarily make the inferences that counsel assert should be made. The facts support a plea if they support a reasonable inference that must be made to establish the essential elements of the offence.

[30] Inferences are not either correct or incorrect but reasonable or not reasonable. Some inferences are more reasonable than others. Some inferences approach certainty. Others require a pause for thoughtful consideration. Some inferences are only eventually and even grudgingly accepted as reasonable. An inference that is reasonable for one purpose may not be reasonable for another. Counsel can agree as to what inferences they believe are reasonable. In my respectful view, I have a positive obligation to test those inferences where they bear on the essential elements of the offence. Section 36 imposes it.

[31] In assessing the reasonableness of the inference here, I cannot abdicate that determination to counsel, however skilled and experienced. At the same time, I cannot ignore the fact that senior counsel, having a much more detailed and nuanced understanding of the case than I do , have at least tacitly agreed that the inference is a reasonable one. Both counsel have professional obligations to make sure that a guilty

plea is not entered to an offence that they conscientiously believe was not supported by the reasonable inferences from the facts. It would be wrong in my view to ignore the significance of those professional obligations and to fail to show some degree of deference to those assessments. Showing too much deference would defeat the purpose of section 36.

[32] Furthermore, as is the case with a joint sentencing recommendation, counsel are privy to details of evidence that have not been put before the court. Inferences involve a process that is more complex than A therefore B therefore C. In a trial, inferences are not drawn from facts assembled as a linear mathematical equation but facts considered in the full context of the evidence. A section 36 inquiry does not allow a judge to observe how each piece of evidence relates to the whole of the matter. A section 36 inquiry provides the judge with what might be called "bare facts". Inferences can still be made but hardly in the same way that they would be made having had the benefit of hearing all of the evidence.

[33] In this case, no specific reference was made to an agreement that the required inference was reasonable. That leaves open the possibility, perhaps very slight, that counsel failed to turn their minds to the legal requirement for that inference. Were that specific agreement stated a somewhat higher degree of deference might be warranted. Even with the kind of tacit agreement between counsel that an attempted murder had taken place, I should consider to some extent, that legal counsel have had an opportunity to consider the reasonableness of the inference with the benefit of a more contextualized review of the facts.

[34] The assessment of whether an inference is reasonable must be undertaken with a view to the legal context in which that assessment is made. Here, that assessment is made in the course of a section 36 inquiry, not a preliminary inquiry or a trial. While not a drill, it is not a detailed inquiry into the evidence either. The purpose is to insure that the young person is clearly admitting all of the essential elements of the offence before he or she is sentenced. That is particularly important where the young person is not represented by counsel.

[35] I must still review the matter allowing for the possibility that both legal counsel might just have been wrong or have made an oversight as well as the real possibility that I was wrong when the section 36 finding was made. That should be done in my view, considering that what I have are the bare facts provided in a summary form. That review should be done showing some limited deference to the representations and admissions made by counsel at the time of the section 36 inquiry while not abdicating the responsibility to review them. It should be undertaken having regard to the purpose of the section 36 inquiry.

[36] This case involved three stab wounds, two to the back and one to the chest in the course of a disagreement. There was no evidence provided as to the depth of those wounds or as to the full extent of the victim's injuries. No medical evidence was provided to indicate whether the wounds were potentially lethal. In the context of a preliminary inquiry that statement of bare facts may not allow the inference to be made. In the context of this section 36 finding, it is a sufficiently reasonable inference.

[37] K.W. will be sentenced based on his actions. It is doubtful that at the time he

assessed whether what Amanda Currie did was with intent to kill or simply to wound. The assessment of Amanda Currie's intent as inferred from her actions, relates to the nature of the legal charge against him. It does not appreciably change the nature of what he admitted to doing.

[38] The application to have the section 36 finding reversed and a guilty plea entered to the charge of accessory after the fact to aggravated assault is denied.