PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R. v. MacDonald***, 2012 NSPC 99

Date: 20121022
Docket: 2323463, 2323464
Registry: Pictou

Between:

Her Majesty the Queen

v.

Stephen Brett MacDonald

VERDICT

Judge:	The Honourable Judge Del Atwood
Heard:	January 17, May 31, July 19, September 12, 2012
Decision:	October 22, 2012
Written decision:	November 16, 2012
Charge:	Paras. 348(1) (a) and 266(a) of the *Criminal Code*
Counsel:	Mr. William Gorman for the Nova Scotia Public Prosecution Service Ms. Jennifer Cox, Nova Scotia Legal Aid, for Stephen Brett MacDonald

BY THE COURT:

Synopsis

[1] Home invasion break and enter is an extremely serious offence. Sentences start typically in the vicinity of six years in penitentiary and range upward, depending upon the level of violence and injury inflicted upon victims. Sometime during the late evening of 25 May 2011, or the early morning of 26 May 2011, a group of angry young men invaded the home of Christopher Samborski in Barney's River, Pictou County, and assaulted him viciously. The issue in this trial is whether Stephen Brett MacDonald was part of that group and liable criminally under the provisions of paragraphs 348(1) (a) and 266(a) of the *Criminal Code*. In my view, Mr. MacDonald was not and I will explain why I am acquitting him.

Witnesses

[2] The Court heard evidence over the course of several days from a number of witnesses. The most pertinent were:

- the victim, Mr. Samborski;
- Mr. Samborski's main assailant, Joshua Francis Connors;
- Mr. Samborski's secondary assailant, Dylan Earl Ronald Bertram MacDonald;
- a backup muscleman, Chad Unreiner;

- Alfreda Lynn Prosper, the owner of the car Connors and company had taken to get to Mr. Samborski's home, and an authentic honest broker in this mêlée.

All were called by the Crown.

[3] On the last day of trial, the Court heard from the accused, Stephen Brett MacDonald. Accordingly, the Court applies the principles set out by the Supreme Court of Canada in *R. v. W.(D.)*: If I believe the evidence of the accused, I must acquit him. If I do not believe the evidence of the accused, but it nevertheless should leave me in a state of reasonable doubt, then I must acquit him. If I do not know whom to believe, then, as a matter of law, I am in a state of reasonable doubt and I must acquit Mr. MacDonald. Even if I were not to believe Mr. MacDonald and even if his evidence should not leave me in a state of reasonable doubt, I must ask myself whether, based on the evidence that I do accept, I find the prosecution to have proven all of the elements of each offence beyond a reasonable doubt; if I should be left in a state of reasonable doubt on that point, I must acquit Mr. MacDonald.[1]

[1] [1991] 1 S.C.R. 742; see also *R. v. Lifchus*, [1997] 3 S.C.R. 320 at 336-7, and *R. v. H.(C.W.)* , (1991), 68 C.C.C. (3d) 146 at p. 155 (B.C.C.A.).

[4] In this case, I believe the evidence of Mr. MacDonald because it is supported materially by the evidence of both Ms. Prosper and Mr. Samborski, both of whom the Court found to be credible and wholly trustworthy witnesses.

Findings of fact

[5] Going on the evidence that I found to be credible, I am able to make the following findings of fact. At some point during the afternoon of 25 May 2011, Stephen Brett MacDonald and Joshua Francis Connors met up with Chad David Unreiner, Alfreda (also known as "Freda") Lynn Prosper, and Dylan Bertram MacDonald at a service station in Blue Acres. All five crowded into Ms. Prosper's sports car with Dylan MacDonald at the wheel. They stopped at the liquor store at the Aberdeen Business Centre, got themselves supplied, and then drove out to the county. All except the accused had something to drink--some more than others, particularly Dylan MacDonald.

[6] For reasons that were not explained satisfactorily, the name of the eventual victim, Christopher Samborski, was mentioned during the drive. It is clear that Dylan MacDonald and Joshua Connors built up a full head of steam over something they had heard Mr. Samborski had done. I am not persuaded entirely that the reasons given by Dylan MacDonald and Chad Unreiner for the decision to gang up on Mr. Samborski were entirely accurate. Whether motivated by vigilante

justice or something basically feral--how else is the Court to describe three-on-one brutality--the fact is that the group wound up at Mr. Samborski's home in the late evening. While there might have been a group discussion leading up to this, it is not clear to me how much, if at all, the accused participated in it.

[7] I find that, upon arriving at Mr. Samborski's home, Josh Connors, Dylan MacDonald and Chad Unreiner marched up to the front door. Ms. Prosper and the accused hung back; they might have had an inkling of some bad event looming. It is clear to me that they wanted no part of it, voted with their feet and stayed put while the other three pushed on into the big muddy, so to speak.

[8] Quite frankly, I am not sure that the accused and Ms. Prosper could have done anything other than that. This is because it is evident to me that Mr. Connors and Dylan MacDonald would not have been deterred from their course very easily. Mr. Connors, in particular, steamed into this courtroom with the buoyancy of a little pocket battleship, and I am sure that he is capable of projecting an intimidating presence when he so decides. Emboldened as he was by alcohol on the night in question, he would have been an irresistible force. This would likely have been known to the accused (given his acquaintanceship with Mr. Connors), and his decision not to accompany the three antagonists to Mr. Samborski's front

door was the most effective and eloquent statement that he might have made, considering the fact that he demonstrates a very passive and submissive affective display, as I observed in Court.

[9] Had Mr. Unreiner followed the accused and Ms. Prosper's example, then perhaps Dylan MacDonald and Connors might have reconsidered the wisdom of their plan, and such a domino effect might have forestalled the attack on Mr. Samborski. The what-ifs do not affect the history of what transpired, and do not alter my belief that the accused, in acting on his limited options, did all that he could have been expected reasonably to have done.

[10] After Connors broke into Christopher Samborski's home, leading the way for Dylan MacDonald and Chad Unreiner, the full attack on Mr. Samborski ensued. Upon hearing the crescendo, the accused and Ms. Prosper entered the home, not with criminal or malicious intent, but simply to find out what was happening. When Ms. Prosper saw Mr. Samborski being attacked, she screamed at Connors, Dylan MacDonald and Unreiner to stop. That the accused said nothing was not an endorsement of the trio's crime, but essentially a manifestation of his reticent personality and a matter-of-fact recognition that Ms. Prosper had taken charge.

[11] The Crown's theory, articulated in closing argument, is that the accused entered the home at the same time as Connors and company and acted as a backup, blocking the retreat of Mr. Samborski. Not even Mr. Samborski suggests this. Indeed, his recollection of events supports Ms. Prosper and the accused's accounts that the accused accompanied Ms. Prosper into the house after the worst had taken place. Mr. Samborski's evidence on this particular point, which is at page 144 of the transcript of proceedings from 31 May 2012, was very clear:

> Q. Was there anyone else present that you saw?
>
> A. When she had entered, I had seen someone standing in the doorway of my den.

This "someone", the one person whose identity Mr. Samborski did not know, was undoubtedly the accused. I draw that inference by a simple process of elimination.

[12] Thanks to Ms. Prosper's intervention, the three attackers stopped their rampage and drove off, but not before Unreiner delivered a *coup de grâce* ; Connors and Dylan MacDonald closed out the evening by stealing Mr. Samborski's case of beer.

Analysis

[13] I had expected to render a verdict in this case on the 12 September 2012, but reserved my decision to today to allow me to review the parties-focused judgment of the Nova Scotia Court of Appeal in *R. v. Murphy*[2] which was published on 6 September 2012, and I have reviewed as well the extremely helpful memoranda submitted by both Crown and Defence on this point.

[14] In *Murphy*, the Court of Appeal split two to one in dismissing an appeal from conviction from an offender who was found at trial to have been a party to an attempted hit arising from a gang war in Halifax. The dissenting opinion of Beveridge J.A. was based on the reasonableness of inferences made by the trial judge.[3] While this was a dissenting opinion, there is no doubt that Beveridge J.A. states the law on the issue of subsidiary or secondary liability of aiders and abettors completely correctly. In canvassing extensively the governing law, Beveridge J.A. refers to the highly germane decision of the Supreme Court of Canada in *R. v. Briscoe*.[4] In the opinion of Charron J. in that case, rendering the decision of the Court, it is noted that:

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[2] 2012 NSCA 92.
[3] *Ibid*., at paras. 87, 89, 91-92, 97.
[4] 2010 SCC 13.

[13] Canadian criminal law does not distinguish between the principal offender and parties to an offence in determining criminal liability. Section 21(1) of the *Criminal Code* makes perpetrators, aiders, and abettors equally liable:

21. (1) Every one is a party to an offence who:
(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

The person who provides the gun, therefore, may be found guilty of the same offence as the one who pulls the trigger. The *actus reus* and *mens rea* for aiding or abetting, however, are distinct from those of the principal offence.

[14] *The actus reus of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence.* While it is common to speak of aiding and abetting together, the two concepts are distinct, and liability can flow from either one. Broadly speaking, "[t]o aid under s. 21(1)(b) means to assist or help the actor. . . . To abet within the meaning of s. 21(1)(c) includes encouraging, instigating, promoting or procuring the crime to be committed": *R. v. Greyeyes*, 1997 CanLII 313 (SCC), [1997] 2 S.C.R. 825, at para. 26. The *actus reus* is not at issue in this appeal.

. . . .

[15] Of course, doing or omitting to do something that resulted in assisting another in committing a crime is not sufficient to attract criminal liability. As the Court of Appeal for Ontario wrote in *R. v. F. W. Woolworth Co.* (1974), 3 O.R. (2d) 629, "one does not render himself liable by renting or loaning a car for some legitimate business or recreational activity merely because the person to whom it is loaned or rented chooses in the course of his use to transport some stolen goods, or by renting a house for residential purposes to a tenant who surreptitiously uses it to store drugs" (p. 640). The aider or abettor must also have the requisite mental state or *mens rea*. *Specifically, in the words of s. 21(1)(b), the person must have rendered the assistance for the purpose of aiding the principal offender to commit the crime.*

[16] The *mens rea* requirement reflected in the word "purpose" under s. 21(1)(b) has two components: intent and knowledge. For the intent component, it was settled in *R. v. Hibbert*, 1995 CanLII 110 (SCC), [1995] 2 S.C.R. 973, that "purpose" in s. 21(1)(b) should be understood as essentially synonymous with "intention". The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability. It is therefore not required that the accused desired that the offence be successfully committed (*Hibbert*, at para. 35). The Court held, at para. 32, that the perverse consequences that would flow from a "purpose equals desire" interpretation of s. 21(1)(b) were clearly illustrated by the following hypothetical situation described by Mewett and Manning:

> If a man is approached by a friend who tells him that he is going to rob a bank and would like to use his car as the getaway vehicle for

> which he will pay him $100, when that person is . . . charged under s. 21 for doing something for the purpose of aiding his friend to commit the offence, can he say "My purpose was not to aid the robbery but to make $100"? His argument would be that while he knew that he was helping the robbery, his desire was to obtain $100 and he did not care one way or the other whether the robbery was successful or not.
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> (A. W. Mewett and M. Manning, *Criminal Law* (2nd ed. 1985), at p. 112)

The same rationale applies regardless of the principal offence in question. Even in respect of murder, there is no "additional requirement that an aider or abettor subjectively approve of or desire the victim's death" (*Hibbert*, at para. 37 (emphasis deleted)).

[17] *As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed.* That sufficient knowledge is a prerequisite for intention is simply a matter of common sense. Doherty J.A. in *R. v. Maciel*, 2007 ONCA 196 (CanLII), 2007 ONCA 196, 219 C.C.C. (3d) 516, provides the following useful explanation of the knowledge requirement which is entirely apposite to this case (at paras. 88-89):

> . . . a person who is alleged to have aided in a murder must be shown to have known that the perpetrator had the intent required for murder under s. 229(a): *R. v. Kirkness* 1990 CanLII 57 (SCC), (1990), 60 C.C.C. (3d) 97 (S.C.C.) at 127.
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> The same analysis applies where it is alleged that the accused aided a perpetrator in the commission of a first degree murder that was planned and deliberate. The accused is liable as an aider only if the accused did something to assist the perpetrator in the planned and deliberate murder and if, when the aider rendered the assistance, he did so for the purpose of aiding the perpetrator in the commission of a planned and deliberate murder. Before the aider could be said to have the requisite purpose, the Crown must prove that the aider knew the murder was planned and deliberate. Whether the aider acquired that knowledge through actual involvement in the planning and deliberation or through some other means, is irrelevant to his or her culpability under s. 21(1).

[18] It is important to note that Doherty J.A., in referring to this Court's decision in *R. v. Kirkness*, 1990 CanLII 57 (SCC), [1990] 3 S.C.R. 74, rightly states that the aider to a murder must "have known that the perpetrator had the intent required for murder". While some of the language in *Kirkness* may be read as requiring that the aider share the murderer's intention to kill the victim, the case must now be read in the light of the above-noted analysis in *Hibbert*. The perpetrator's intention to kill the victim must be known to the aider or abettor; it need not be shared. *Kirkness* should not be interpreted as requiring that the aider and abettor of a murder have the same *mens rea* as the actual killer. It is sufficient that he or she, armed with knowledge of the perpetrator's intention to commit the crime, acts with the intention of assisting the perpetrator in its commission. It is only in this sense that it can be said that the aider and abettor must intend that the principal offence be committed.

[Emphasis added in paras. 14, 15, 17and 18.]

[15] I shall now apply this statement of the law to Stephen Brett MacDonald. First of all, I find that the Mr. MacDonald did not do anything or omit to do anything that assisted or encouraged Dylan MacDonald, Joshua Connors or Chad Unreiner in breaking into Mr. Samborski's home and assaulting him; his sober and rational decision to remain outside with Ms. Prosper was a clear vote against whatever nondescript mischief Connors and cohort had planned. On that point, I find that the accused did not know what his friends intended to do; confront Mr. Samborski, yes-- I believe the accused knew that there would be a confrontation, but a crime, no. In any event, had the accused intervened more aggressively, I fear that his safety would have in jeopardy, given the alcohol-fueled rage of Connors and Dylan MacDonald, which,sadly, was vented on Mr. Samborski.

[16] With respect to the para. 348(1)(a) charge, in particular, the accused certainly entered Mr. Samborski's home without permission, which would constitute a "break" within the definition of section 321 of the *Code* and an "entering" within the definition of section 350 of the *Code*. However, Mr. MacDonald did so without any criminal intent. Although he conceded, on cross-

examination, that he was wrong to have done so, I take that as being essentially a self-concept of regret, not an admission of legal wrong doing.

[17] I find that the accused's intent in entering Mr. Samborski's home was to accompany Ms. Prosper to find out what had happened. Accordingly, I find that the presumption of criminal intent, set out in paragraph 348(2)(a) of the *Code* has been rebutted by the evidence of Ms. Prosper and the evidence of the accused, which I find wholly credible. I apply the principles set out in *R. v. Hachey*, in which it was noted that the presumption in 348(2)(a) may be rebutted by Crown evidence, defence evidence or both.[5] In the absence of this presumption, the totality of the evidence satisfies me that the accused entered Mr. Samborski's home with no intent to commit any offence. Further, I find that the accused did not assault Mr. Samborski, nor did he aid or abet any of the attackers. Accordingly, I find the accused not guilty of the offences of assault and break and enter with intent.

Included offence

[18] With regard to the included offence of section 430(1)(c) of the *Code*--and this is, indeed, an offence included in a charge of 348(1)(a), in virtue of the

[5] [1971] 1 C.C.C. (2d), 242 at 244 (N.B.S.C.A.D.).

decision of *R. v. Tonsett*[6] -- I find that the accused's entry into Mr. Samborski's home was for the entirely legitimate purpose of finding out what had happened, and did not interfere with Mr. Samborski's use or enjoyment of his home in any way. Accordingly, I find Mr. MacDonald not guilty of the included offence of para. 430(1)(c).

Evidentiary concerns

[19] I would conclude by commenting on two material evidentiary issues. First, the Court was largely unassisted by an audio and video recording of an interview conducted with the accused, made by the lead investigator. Stated simply, the audio channel of this recording was unintelligible, and there were no backup notes made by the officer; nor was a written statement taken. I declined to review a transcript of the interview prepared by the Crown. In accordance with the principles set out in *R. v. Nikolovski*,[7] I find it is the recording, itself, that is the evidence of the statement, and I did not feel it was appropriate for the Court to rely on someone else's interpretation of the great inaudible mass, although I certainly appreciate the effort that was made by the Crown in having the transcript prepared.

[6] (1998) 165 N.S.R. (2d) 228 at para. 32 (S.C.).
[7] [1996] 3 S.C.R. 1197 at paras. 15-16.

[20] When the audio and video recording of statements was first rolled out as a routine investigative practice by policing services in Canada around two decades ago, it was done as a means of authenticating written statement taking. Today, the writing-down part has been abandoned in favour of the complete reliance on technology. On-camera interviewing has expanded into hours-long Dr. Phil sessions, with expansive discussions about feelings, family, sports and other superficialities, but also inadmissible excursions into uncharged offences, statements made by other witnesses or accomplices, character evidence and the like. On top of this are low-budget production values that result in expanses of barely audible utterances which might be misheard or misunderstood by triers of fact. This gives rise to serious forensic challenges, as it is difficult to determine how improper content might be redacted effectively when the forum is, for example, a jury trial, when avoidance of the inadmissible will be crucial, yet continuity of playback , important, so as to keep the evidence intelligible. The risk is that the loss and degradation of electronically-recorded evidence-- which may be exculpatory as much as inculpatory--due to defective recording equipment or procedures will impair the full-answer-and-defence rights of accused persons.

[21] Secondly, in assessing the credibility of Mr. Connors, Mr. Unreiner and Dylan MacDonald, I did not consider the extent of their jeopardy in concurrent proceedings, mainly because none of them was asked anything about it. These three men were alleged accomplices of the accused. When accomplice evidence is called, it is generally the case that the Court will find out, through direct and sometimes cross-examination, the trial status of those accomplices. I am sure that there were very good reasons for counsel not leading evidence on that point at this trial. I bring it up principally because this is a situation that the Court finds itself encountering frequently: trials involving the testimony of accomplices.

[22] But the bottom line, Mr. MacDonald, is that the Court has found you not guilty of both charges and also of the included offences. That also brings to an end the undertaking that you signed on May 29, 2011 and you're free to go.

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J.P.C.