

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. MacGillivray*, 2020 NSPC 22

Date: 20200526

Docket: 8221431

Registry: Sydney

Between:

HER MAJESTY THE QUEEN

v.

VALERIE M. MACGILLIVARY

Judge:	The Honourable Judge Diane L. McGrath, JPC
Heard:	February 18 / 19 / 20, 2020, in Sydney, Nova Scotia
Charge:	Section 368(1)(A), Criminal Code of Canada
Counsel:	Mark Gouthro and Rochelle Palmer, for the Crown Tony Mozvik, for the Defendant

By the Court:

Introduction

[1] In the early morning hours of February 23, 2018, Colin Francis McDonald, an inpatient at the Cape Breton Regional Hospital Unit 4C left the unit unbeknownst to employees through a fire door. Mr. McDonald was elderly and confused. The fire door he left through was alarmed however the alarm failed for some reason that has never been explained. As a result of the failure of the alarm to sound, Mr. McDonald was able to leave the building and was found three hours later unconscious in a nearby parking lot. He was later pronounced dead from hypothermia.

[2] As a result of these tragic events, Valerie Marie MacGillivray, an LPN at the hospital, who was assigned responsibility for the care of Mr. McDonald on the night in question comes before this court charged that she:

Between February 21, 2018 and February 23, 2018 at, or near Sydney, Nova Scotia, did knowingly use a forged document to wit: check sheets\nursing flow sheets belonging to Nova Scotia District Health Authority; as if it were genuine, contrary to section 368 (1)(a) of the *Criminal Code of Canada*.

Agreed Statement of Facts

[3] The parties in this matter entered into evidence as Exhibit #1 an Agreed Statement of Facts which is attached to this decision as Appendix 1.

[4] The relevant facts as agreed to are that Mr. McDonald left the hospital through an emergency exit door at 12:35 am on February 23, 2018. He was found unresponsive by hospital security at 4 am and was pronounced dead shortly after 4 am in the emergency department. His cause of death was hypothermia from environmental exposure.

[5] On the night in question Valerie Marie MacGillivray, an LPN, was responsible for the primary care of Mr. McDonald. In the course of executing her duties that evening Ms. MacGillivray completed certain nursing notes pertaining to the care she provided to Mr. McDonald. Copies of those notes were entered by consent and marked as Exhibit #3.

[6] A check sheet completed by Ms. MacGillivray indicating she checked on Mr. MacDonald at 1:00 am, 2:00 am and 3:00 am and observed him in his bed as well as expanded notes pertaining to observations made of Mr. MacDonald at 12:45 am and 1:15 am, form the basis of the charge before this Court.

The Position of the Parties

[7] The position of the Crown is that the check sheet entries and notes made by Ms. MacGillivray pertaining to Mr. McDonald between the hours of 1 am and 3 am inclusive, are false. It is the Crown's theory that Ms. MacGillivray did not make any checks on Mr. McDonald during this timeframe nor did she make any of the observations as indicated. The Crown argues that Ms. MacGillivray could not possibly have observed Mr. McDonald during this timeframe as he was not in the building as confirmed by security video. The Crown further argues that Mr. McDonald's bed was in fact empty during this timeframe and that Ms. MacGillivray created a false record to cover the fact she did not perform any checks on Mr. McDonald as she should have.

[8] Ms. MacGillivray maintains she did not knowingly create any false documentation in relation to this matter. It is her contention that at the times in question she did in fact perform checks in relation to the bed assigned to Mr. McDonald and observed an individual under the blankets resting comfortably. She acknowledges that in light of the events that occurred this could not have been Mr. McDonald but is adamant she did perform the checks and did observe an individual she believed to be Mr. McDonald in the bed at the relevant times.

The Evidence

[9] The Court heard a lot of evidence about the proper way to fill out the forms that are in issue, what each section means and the types of checks that are to be performed. That evidence however is irrelevant to the matter before this Court. Ms. MacGillivray is not charged with any type of negligence-based offence. The charges before this Court do not pertain to any failure to perform her duties as required or any failure to follow any policies or best practices that may exist. Ms. MacGillivray is charged with using a forged document. It is curious she was not charged with forgery as that is essentially what the Crown is alleging however the charge as laid is one pursuant to s. 368(1)(a) using a forged document as if were genuine, a specific intent offence.

[10] During the course of the trial the Crown called several witnesses from the hospital administration team who performed a workplace investigation into the incident. That investigation resulted in Ms. MacGillivray's termination of employment. To say that this investigation, as relayed to the Court, was less than thorough is an understatement. Suffice it to say that throughout this meeting Ms. MacGillivray maintained she performed the checks as required and completed the paperwork based on what she observed and believed to be the case at the time.

[11] The court heard that Unit 4C, can be accessed by anyone in the building but that once on the unit an individual cannot exit without entering a code into a pin

pad or having someone at the nursing station release the door to allow you to exit. The fire exits are locked and alarmed. As stated earlier, for some reason that has never been explained, the alarm on the fire exit through which Mr. MacDonald exited that evening was not working.

[12] Mr. MacDonald was in Rm 47, a two bedroom, which is not clearly visible from the nursing station. There was another individual on the unit at the time that was known to wander and had been previously found in another patient's bed. That individual was in Rm 50 which was estimated to be 20-25 ft from Rm 47 and as well, not visible from the nursing station.

[13] Through the course of the trial the Court heard from all the RNs and LPNs that had been working during the shift in question including Tammy Carrigan-Warner, who was also charged in relation to this event as she too made entries on Mr. MacDonald's chart subsequent to him being found outside. In relation to Ms. Carrigan-Warner I note the entries she made were subsequent to the ones made by Ms. MacGillivray and there has been nothing led to credibly suggest collusion between the two nor was that argued by the Crown.

[14] All other staff on shift that evening testified to performing the required bed checks throughout the evening and to their respective patients all being where they were required to be. There was no specific evidence led as to the times these

checks were made or to the degree of involvement each had with their patients throughout the evening.

[15] It is notable that Unit 4C is considered to be a dementia unit meaning that many of the patients on that unit suffer from cognitive impairment which seems to be primarily age related. Mr. MacDonald was among those individuals. He was described by several staff as being confused, wandering, continually attempting to go home or to work. He was not the only patient like this, there were others. One other notable individual was a patient in Rm 50 who often wandered and was described by Ms. Carrigan-Warner, a crown witness in these proceedings, as not being oriented to time and place and unable to answer questions. Ms. Carrigan-Warner testified on cross examination that on the night in question the patient in Rm 50 was her patient. He was wandering in his room and other patients' rooms. He had to be redirected numerous times. At 12:30 am Ms. Carrigan-Warner observed this individual in his own room, Rm 50, sitting up and resting comfortably. Ms. Carrigan-Warner indicated on his chart that at 1:00 am he was checked as per the check sheet. At this juncture I would note that the evidence was consistent that all times indicated on the charts are approximations and that charts are not completed or filled out simultaneously with the checks but rather later when time permits. No one who testified was able to provide a consistent estimate

as to how long after checks were performed the information was entered on the documents. There does not appear to be any consistent or uniform practice.

[16] Ms. Carrigan-Warner testified that at approximately 3:15 am she took a glass of water to the other individual in the same room as Mr. MacDonald, Rm 47. She testified that while there she did a courtesy check on Mr. MacDonald. She went to the foot of his bed, flipped on the bathroom light to provide some low lighting and observed an individual in the bed, on his right side curled up. His eyes were closed and the blanket was pulled up to his nose. She noted the rise and fall of his chest and also that he had a personal blanket over him, not just hospital issue blankets. Ms. Carrigan-Warner went onto testify that later when it was discovered that an individual was outside in the parking lot and the rooms were being checked, the personal blanket she observed earlier in Rm 47 on Mr. MacDonald's bed was observed on the floor by the end of Mr. MacDonald's bed.

[17] Another individual working that day, Rachael Buick, a nursing student at the time, testified to entering Rm. 47 sometime between 3:00 am and 3:30 am as well to tend to the other individual in the room. Ms. Buick indicated she did not check Mr. MacDonald's bed at that time but did say she did not see any blanket on the floor in the room. It is notable that the blanket as depicted in the photographs

tendered by the Crown show a very colorful blanket that would be very visible and would stand out.

[18] Ms. Buick went on to testify on cross-examination that at one point earlier that evening she located a wandering patient in the shower area of the unit attempting to place bags on his feet. She did not know who that patient was but reported the incident to a staff member at the nursing station. She herself, as a student on a work placement, did not take any action in relation to that patient.

[19] All the Crown witnesses testified and agree that following the discovery that Mr. MacDonald was missing things became chaotic. Ms. MacGillivray was visibly shaken and was described by many as being very upset, others offered the opinion she was in shock. However, all agree she was visibly shaken and appeared to not know what she should do. This is when Ms. Carrigan-Warner stepped in and assumed control. Ms. Carrigan-Warner took Mr. MacDonald's chart to the ER in case it was required and upon her return ensured the necessary paperwork was completed. The Crown made much out of the fact that Ms. MacGillivray's entry from 01:15 was repeated on a new sheet started by Ms. Carrigan-Warner and that it was not identical to the original. The Crown offered this as evidence of an intention to falsify the documentation, a proposition that the Court finds is

farfetched and not supported by any reading or reasonable interpretation of the entries in question.

[20] In response to the charge before this Court Valerie MacGillivray chose to testify. Ms. MacGillivray testified to making the checks as she recorded them on the night in question. She gave a detailed account of what she did that night and indicated the paperwork was completed shortly after she performed her checks. Ms. MacGillivray indicated her initial notes were made prior to it being discovered that Mr. MacDonald was missing and that the second entry for 01:15 was made after the discovery was made. The duplicate note was made at the request of Ms. Carrigan-Warner who was taking over or continuing the notes. She testified she simply copied her previous note and could not say why the notes were slightly different but indicated both were truthful as to what she believed she observed at the time.

[21] In her testimony Ms. MacGillivray indicated that when she checked on Mr. MacDonald that night she went to the foot of his bed and opened the bathroom door to throw a little light, enough for her to see he was in the bed and his chest was rising and falling. She testified he was in the bed on his right side with the blankets pulled up to his nose. He was covered with a colorful blanket that was his own and not hospital issue. Ms. MacGillivray indicated she had looked for a

flashlight to use that evening but as she couldn't find one she used the bathroom light in the room when doing her bed checks.

[22] Ms. MacGillivray indicated it wasn't until 4:00 am that she became aware Mr. MacDonald was missing, the same time as everyone else. She indicated she was very upset, shocked, and really didn't know what to do as she had never encountered anything like that before. Ms. MacGillivray testified she just sat at a desk and that Ms. Carrigan-Warner took over. She was adamant she saw someone in Mr. MacDonald's bed when she did her checks and that she believed that person to be Mr. MacDonald. Ms. MacGillivray categorically denied making any false notes at any time to avoid responsibility for anything.

[23] On cross examination Ms. MacGillivray explained that she completes the check sheets at the end of her shift but that the running notes she completes as close to the events as possible. In this case that would mean the 1:00 am, 2:00 am and 3:00 am checks indicated on the check sheet were done at the end of the shift, or in this instance when it was discovered Mr. MacDonald was deceased, while the 01:15 notation was made shortly after that time frame. Throughout cross-examination she maintained that she saw someone in that bed when she conducted her checks and that at the time, she believed it was Mr. MacDonald, these assertions never waived.

The Law

[24] Section 368(1)(a) of the Criminal Code of Canada states:

368. (1) Everyone commits an offence who, knowing or believing that a document is forged,

(a) uses, deals or acts on it as if it were genuine.

[25] The offence as charged requires that the accused knowingly used a false document with the intent that it be acted upon as genuine to the prejudice of someone else. The alleged false document in this case, the nursing notes were passed along for use in the administrative investigation that was carried out by the hospital. At the time the check sheets were completed, everyone was aware that Mr. MacDonald had passed and knew that inquiries would be made surrounding the events that occurred that evening. In this sense those notes were made to be used in those inquiries. The issue then becomes one of Ms. MacGillivray's knowledge or intent in creating the documents.

[26] The position of defence is that in creating the documents, or more aptly, in filling out the check sheets Ms. MacGillivray was mistaken as to the identity of the individual in the bed. In other words, she saw someone in the bed and honestly believed that individual to be Mr. McDonald. In *R v. Pappajohn* (1980) 14 C.R. (3rd) 243 (S.C.C.) and more recently in *R v. Morrison* [2019] S.C.J. No. 15 the

court notes at paragraph 209 that the defence of mistake of fact is not a true defence in the conventional sense of the word but rather an acknowledgement that a reasonable doubt exists with respect to the existence of the *mens rea* of the offence. It is thus as stated by Prof. Stuart in *Canadian Criminal Law, A Treatise*, at 119, an excuse available to an individual who acted innocently based on a flawed perception of the facts.¹

[27] The offence as charged is a specific intent offence meaning that in order for a conviction to flow the Crown must prove Ms. MacGillivray created the document in question knowing it to be false. An honest but mistaken belief in the truth of the contents of the document, even if such belief arises due to negligence or carelessness offers a defence and a conviction cannot follow.

Burden and Standard of Proof

[28] The burden of proof in any criminal prosecution rests and remains with the Crown throughout, never shifting to the accused. That burden is proof of the allegation beyond a reasonable doubt. A reasonable doubt is one that is not imaginary or frivolous. It must not be based on sympathy or prejudice but must be

¹ See *R.v Tammy Carrigan-Warner*, 2020 NSPC 21

based on reason and common sense. It must flow logically from the evidence or the absence of evidence.

R. v. W.D.

[29] As Ms. MacGillivray chose to testify in these proceedings, I must consider the instruction provided by the Supreme Court of Canada in the case of *R v W.D.* [1991] 1SCR 742. That case tells me how I should apply the burden of proof in a criminal case where the accused has elected to testify. I must remember that it is not about whether I believe Ms. MacGillivray but rather whether the evidence as a whole convinces me of her guilt beyond a reasonable doubt. If I believe her I must acquit her; if I do not believe her I must ask myself if her evidence nonetheless raises a reasonable doubt, and finally if I do not believe Ms. MacGillivray and am not left in doubt based on her evidence does the evidence as a whole convince me of her guilt beyond a reasonable doubt.

[30] I am mindful of the cautious approach to be taken with respect to assessing the demeanor of a witness while testifying. As well I am aware that I may accept parts of a witness's testimony and reject other parts.

Analysis

[31] The evidence in this matter is not straightforward. It is clear from the many witnesses that testified that a lot was going on during the time in question. It was a busy night on a usually busy unit, an atmosphere many indicated could be chaotic at times. The evidence at first glance appears to be conflicting as to whether or not an individual or individuals were wandering about the unit that evening. Upon closer examination what may appear to be an inconsistency is not necessarily so. It becomes apparent when one looks closely at the testimony and evidence of the various staff that were working that evening that not every person was aware of everything that was happening at every moment. For the most part people were concerned with their own patients. Likewise, individuals went on breaks at various times and at other times assisted others. The unit was dedicated to the care of individuals suffering from cognitive issues, many of the patients on that unit suffered from dementia.

[32] It is equally clear from the evidence that not everyone performed their duties in the same manner nor did everyone complete or even interpret the paperwork in the same manner. That however is not the issue. The issue is whether or not the Crown has proven beyond a reasonable doubt that Valerie MacGillivray did not conduct the bed checks on Mr. McDonald as she documented she did or in the

alternative that she did but lied in the documentation about the fact that an individual was in the bed and she believed that individual to be Mr. McDonald.

[33] In looking at the evidence that was presented in this matter it does become difficult to understand how someone, not Mr. McDonald, in other words an extra body, was seen in Mr. McDonald's bed on not one but multiple occasions. All the staff who testified indicated their patients were always accounted for and none were missing at any point during the evening. The exact times they observed their patients however was not detailed nor were the circumstances of those observations. Based on the documentation that is before the court someone else would have had to have been in Mr. McDonald's bed at approximately 1:00 am, 2:00 am and 3:00 am. Apparently no one else was missing during this time frame. At first glance this becomes very difficult to accept. My inability to accept this at face value does call into question Ms. MacGillivray's testimony that on those three occasions she observed an individual she believed to be Mr. McDonald lying in his bed sleeping. I must therefore approach her testimony in this regard with some scepticism. My consideration of her testimony however does not stop there. I must look at these assertions in connection with the remainder of the evidence as necessitated by the second step in *R v. W.D.* to determine whether her testimony nonetheless leaves me with a reasonable doubt.

[34] As noted earlier, Ms. MacGillivray in her testimony was adamant and unshakable in her assertion that she did perform the bed checks as documented and she did observe an individual in the bed, whom she believed to be Mr. MacDonald. She was very detailed in the steps she took in performing her checks on the night in question. The Crown points to the impossibility of those assertions being true as proof of Ms. MacGillivray's knowledge that they were in fact not true. However, when I look at the other evidence in this matter together with Ms. MacGillivray's testimony, I cannot reach the conclusion the Crown advocates.

[35] The evidence of Ms. Carrigan -Warner pertaining to a patient from Rm 50 who was wandering on the night in question and who in the past had climbed into the bed of other patients together with the evidence of Rachel Buick who observed a patient in the shower attempting to put bags on his feet leads the Court to conclude that **at least** one other person was wandering the halls during the relevant time frame.

[36] The Crown called Ms. Carrigan-Warner to give evidence in this matter. As set out above she testified that at approximately 3:15 am she observed an individual in Mr. McDonald's bed lying on his side covered with the colourful blanket and she believed that person to be Mr. McDonald. This evidence was led by the Crown and was not challenged. The Crown then in final argument asked the

court to treat this evidence as suspect because Ms. Carrigan-Warner was also charged in relation to events from that evening. There is nothing in the evidence that was led before me nor in the manner in which Ms. Carrigan-Warner testified that causes me to question her credibility in these proceedings. This is particularly so in light of the evidence from Rachel Buick that she did not see a blanket on the floor in Rm 47 when she entered that room between 3:00 am and 3:30 am. From the pictures entered into evidence by the Crown it is clear that the blanket, which Ms. Carrigan-Warner testified was on the floor after it was discovered Mr. MacDonald was missing, at around 4:00 am, would have been visible to anyone entering the room. This lends support to the assertion that someone was in Mr. MacDonald's bed prior to 4:00 am and that they likely were there, **at the very least**, between 3:00 am and 3:30 am.

[37] Given the existence of a wandering patient or patients together with the questions raised by the issue surrounding the blanket from Mr. McDonald's bed I must conclude that when coupled with the testimony of Ms. MacGillivray that she saw an individual who she believed to be Mr. McDonald in his bed when she performed her nightly bed checks, I am left with a reasonable doubt as to her guilt.

[38] I am not satisfied beyond a reasonable doubt that Ms. MacGillivray did not perform her bed checks as she indicated in her check sheets nor am I satisfied

beyond a reasonable doubt that Mr. MacDonald's bed was empty during the relevant time.

[39] While a consideration of Ms. MacGillivray's evidence when taken together with the remaining evidence in this matter leaves me with a reasonable doubt, I can also say that if I were to go further and embark upon the step 3 analysis as set out in *R. v. W.D.* I would reach the same conclusion. On the whole of the Crown's evidence, I am left with a reasonable doubt as to the guilt of the accused.

Conclusion

[40] Based on the totality of the evidence before this Court I am unable to conclude that Valerie Marie MacGillivray either failed to perform the bed checks as documented or falsely documented that Mr. MacDonald was in his bed when she knew he was not. I am thus not satisfied beyond a reasonable doubt that Valerie Marie MacGillivray knowingly used a forged document as alleged.

[41] The Crown has failed to satisfy this Court of Ms. MacGillivray's guilt beyond a reasonable doubt and an acquittal will be entered.

Diane L. McGrath, JPC

Appendix 1

NOVA SCOTIA EXHIBIT

Exhibit No.: 1

Date: 18 Feb 2020

Case No.: 8221431

Name of Case: R. v. Valerie MacGillivray

Entered by: C

Court: ☐ Supreme ☒ Provincial

☐ Family ☐ Other

Clerk: dmo


**R. v. Valerie Marie MacGillivray
Section 368(1)(a) of the Criminal Code**

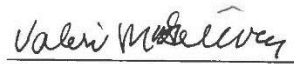
AGREED STATEMENT OF FACTS

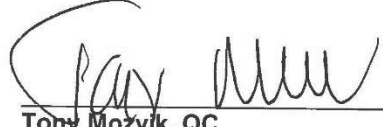
1. Valerie Marie MacGillivray, DOB – February 14, 1971 is the accused in this matter.
2. Valerie Marie MacGillivray is maintaining her innocence and has pled not guilty to the offence outlined on the Information.
3. Valerie Marie MacGillivray was a Licensed Practical Nurse (LPN) employed with the Nova Scotia Health Authority. She was employed at the Cape Breton Regional Hospital and was working in unit 4C on night shift on February 22-23, 2018.
4. This incident is alleged to have occurred at the Cape Breton Regional Hospital, Sydney, NS, during night shift on February 22-23, 2019. Night shift runs between 7:00 pm and 7:00 am the following morning.
5. The medical records of Colin Francis MacDonald - DOB June 24, 1938 are true copies of the originals and are authentic. These records can be tendered as an exhibit at the trial by consent for the truth of their contents.
6. Hospital surveillance video depicts Mr. MacDonald leaving the hospital through an emergency exit door, walking through the rear parking lot and coming to rest on the rear parking lot bridge. Furthermore, this video depicts hospital security finding Mr. MacDonald and tending to him. Lastly, the video shows paramedics arriving on scene to treat Mr. MacDonald and then leaving with him in an ambulance.
7. This surveillance video is authentic and can be tendered as an exhibit at the trial by consent for the truth of its contents.
8. Mr. MacDonald left the Cape Breton Regional Hospital building at 12:35 am on February 23, 2018. He was found unresponsive by hospital security at 4:00 am. Paramedics arrived on the scene shortly thereafter. Mr. MacDonald was immediately taken to the Emergency Department of the Cape Breton Regional Hospital by responding paramedics, where he was pronounced deceased shortly after 4:00 am.

9. Mr. MacDonald's cause of death was Hypothermia from environmental exposure.
10. Mr. MacDonald left the Cape Breton Regional Hospital building at 12:35 am on February 23, 2018. Mr. MacDonald never returned inside the Cape Breton Regional Hospital building until taken into the Emergency Department by paramedics after 4:00 am on February 23, 2018.
11. The handwriting on the Nursing Notes from the Medical/Surgical 12 Hour Flow Chart and the Medical/Surgical Physical Assessment of Colin MacDonald dated February 22-23, 2018 is that of Valerie Marie MacGillivray. Ms. MacGillivray wrote these notes proximate to the times that they describe.
12. Valerie Marie MacGillivray provided a statement to the police on April 27, 2018 that was digitally recorded. This statement was voluntarily provided to the police during their investigation.

DATED at Sydney, Nova Scotia this 18th day of February 2020.



Mark Gouthro
Crown Attorney

Valerie Marie MacGillivray
Accused

Tony Mozvik, QC
Defence Counsel