SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Muise*, 2013 NSSC 146

Date: 20130515
Docket: CRH 373467
Registry: Halifax

Between:

Her Majesty the Queen in and for the Province of Nova Scotia

Crown

v.

Cody Alexander Muise

Defendant

Restriction on publication: Until the end of trial.

Judge: The Honourable Justice Peter P. Rosinski

Heard: May 6, 2013, in Halifax, Nova Scotia

Counsel: Christine Driscoll and Darrell Martin, for the Crown
Peter Planetta, for the Defendant

By the Court:

[1] Mr. Muise is charged with the first-degree murder of Brandon Hatcher on the basis that it was planned and deliberate. His counsel argues, that manslaughter as well as second-degree murder should be put to the jury as potential included lesser offenses in the circumstances here. The Crown argues that manslaughter should not be put to the jury.

[2] In summary, the factual context is that Mr. Muise and Mr. Hatcher were from rival groups involved in criminal activity in the Spryfield area of Halifax, Nova Scotia. Both have significant criminal records, and arguably Mr. Muise's record for violence is greater than that of Mr. Hatcher's. Their split as friends happened in 2007 – 2008. On October 16, 2010 Mr. Muise and his girlfriend Sarah Oakley were in the downstairs apartment on Spencer Avenue when a firearm blast narrowly missed Mr. Muise and struck his girlfriend wounding her. Events and communications between Mr. Hatcher and Mr. Muise between that date and December 3, 2010 gave rise to a reasonable belief by Mr. Muise that Mr. Hatcher had been responsible. On December 3, 2010 in the afternoon Mr. Muise and his friends were at Kyle Cater's basement apartment at 205 Abrams Way in

Halifax. Mr. Muise left and within a short time thereafter several shotgun blasts were fired into the downstairs basement injuring Colin Gillis. Mr. Muise believed that Mr. Hatcher had fired into the apartment hoping to hit Mr. Muise.

[3] That evening, Mr. Muise, Matthew Monroe and Ryan McDougall, both youths under the *Youth Criminal Justice Act*, congregated at the home of a friend armed with a .22 caliber pistol, a sawed-off single shot shotgun with slug ammunition and an M1 .30 caliber automatic rifle. In the dark they ventured through backwood paths for approximately 15 minutes to the outskirts of the neighbourhood where Mr. Hatcher lived. At some point Mr. Hatcher called Mr. Muise's cell phone. As a result of the conversation Mr. Hatcher told Mr. Muise he was coming outside. Mr. Hatcher came outside with a pump action shotgun and concealed himself behind a wooden fence near to his residence. It was dark out, and likely raining at the time off and on. Mr. Muise along with Munroe and MacDougall had concealed themselves behind large boulders at a location 180 feet from Mr. Hatcher's and at an elevation approximately 20 feet higher. From their vista they had a very favourable view of the narrow area from which Mr. Hatcher would likely emerge. Upon seeing a person with what looked to be a firearm, the three ducked down during which time Mr. Hatcher discharged his shotgun. In part

because of the darkness it is unclear whether he fired a warning shot into the air or specifically targeted the three – it is more likely that he shot without knowing the exact location of the three given the darkness and their dark clothing, and concealment behind the boulders.

[4] In response the three fired at Mr. Hatcher. The evidence suggests that one of the bullets fired by Mr. Muise struck him and caused a fatal loss of blood. All three testified at the trial, and they were generally consistent in their evidence that they did not know whether Mr. Hatcher had been struck or not. There is some contrary evidence to suggest that Mr. Muise may have known that he struck Mr. Hatcher.

[5] The Crown and Defence herein both agree that first and second-degree murder should be put to the jury. The Defence argues that the Crown has not made out its case against Mr. Muise beyond a reasonable doubt as to first or second-degree murder. It argues this primarily based on their position that there was no specific intention by Mr. Muise to kill Mr. Hatcher, and/or Mr. Muise was defending himself pursuant to section 34 (2) of the *Criminal Code.*

[6] The Defence further suggests that manslaughter should be left with the jury as a lesser included offence under s. 662(3) of the *Criminal Code*.

[7] This decision addresses whether; (i) manslaughter should be left with the jury; and more specifically whether the jury should be directed to consider first whether the Crown has proved the "intention" to commit the murders, and then whether self-defence has been disproved by the Crown beyond a reasonable doubt, such that if self-defence is rejected then manslaughter could be left to be considered by the jury.

[8] I have found particularly helpful the following decisions: *R. v. Laverty* [1996] 3 SCR 412; *R. v. Baker* (1988) 45 CCC (3d) 368; and *R. v. Kuzmack* [1955] SCR 292.

[9] The upshot of those decisions in my view is that in such cases the jury should consider in the following order whether the crown has proved beyond a reasonable doubt:

1. Did Mr. Muise cause the death of Mr. Hatcher?

2. Did Mr. Muise cause the death of Mr. Hatcher unlawfully? [In addition to assessing whether the Crown has proved the essential elements of the underlying "unlawful act", it is at this juncture where self-defence should be considered – if it is accepted as a justification for his having shot Mr. Hatcher then Mr. Muise is acquitted; if rejected the jury goes on to question 3].

3. Pursuant to section 229(a), did Mr. Muise intend to cause the death of Mr. Hatcher ; or did he intend to cause Mr. Hatcher bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not? [If the jury concludes that neither of these thresholds of intention are met, then the Crown will have proved a culpable homicide which according to a reading of section 222(4) and 234 must therefore be manslaughter.]

4. If the jury concludes that one of these states of mind have been proven then it must go on to consider whether the murder was "planned and deliberate" pursuant to section 231(2). If they decide that it is so they must find Mr. Muise guilty of first-degree murder. If they find it is not so they must find Mr. Muise guilty of second-degree murder.

[10] I note here parenthetically that provocation under section 232 is not applicable in the circumstances of this case as I view the legal principles contained in the Supreme Court of Canada's recent decision *R. v. Mayuran* 2012 SCC 31. Moreover the lowest threshold intention in section 229(a) is that Mr. Muise intended to cause bodily harm to Mr. Hatcher that he knows is likely to cause his death and is reckless whether death ensues or not, which is distinct from the

underlying state of mind required for "unlawful act manslaughter" pursuant to section 222(5) which is an objective foreseeability of the risk of bodily harm that is neither transient nor trivial – *R. v. Creighton* [1993] 3 SCR 3. Moreover the unlawful act must also be objectively dangerous – that is likely to give rise to a risk of harm to another person.

[11] Having resolved the issue of sequence of consideration by the jury of self-defence and lack of intent respectively, I next turn to why manslaughter has an air of reality in this case.

[12] Mr. Muise himself testified that, he had no intention to harm Mr. Hatcher physically- much less an intention to kill him. On the other hand, there is also compelling evidence that suggests Mr. Muise had great motive to want to harm Mr. Hatcher physically, even to the extent of killing him.

[13] Nevertheless, while an inference of murderous intention could be drawn, it is not the only inference that could be drawn.

Conclusion

[14] There is evidence upon which the jury could conclude that Mr. Muise did not intend to cause the death of Mr. Hatcher, nor to cause bodily harm to him such that he knew it was likely that it would cause the death of Mr. Hatcher, and was reckless as to whether death ensued or not; but they could also conclude on the other hand that Mr. Muise committed an objectively dangerous act for which there was objective foreseeability of the risk of bodily harm of a neither transient nor trivial degree to Mr. Hatcher.

[15] Therefore the jury must be permitted to consider manslaughter as a verdict in this case.

Rosinski, J.