SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Downey*, 2019 NSSC 149

Date: 20190516
Docket: CRH 475442
Registry: Halifax

Between:

Her Majesty the Queen

v.

Markel Jason Downey

Restriction on Publication:

Sections 517 and 539 of the *Criminal Code* which have expired effective June 1, 2021.

Pursuant to subsection 110(1) of the *Youth Criminal Justice Act*, no person shall publish the name of a young person, or any other information related a young person, if it would identify the young person as having been dealt with under this Act. This decision complies with this restriction so that it can be published.

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	March 21, 2019, in Halifax, Nova Scotia
Oral Decision:	March 21, 2019
Counsel:	Scott Morrison and Erica Koresawa, for the Provincial Crown Patrick MacEwen, for the Defence

By the Court (orally):

Introduction

[1] The Crown seeks to have the contents of a letter prepared by Markel Downey and delivered by him to R.D. at the Pictou Correctional Centre (while both were on remand) admitted for the jury's consideration at his trial. The Crown contends that it is relevant post-offence conduct specifically, of an attempt to fabricate an alibi.

Background

[2] R.D. pled guilty in Youth Court to aggravated assault in December 2015. It stemmed from a November 2014 home invasion at 52 Arklow Drive, where four masked people dressed in black entered the home. Three teenagers were inside playing video games at the time. At least two of the intruders were armed. One had bear spray, the other, a handgun.

[3] With the three teenagers in the bedroom of the home, the assailants demanded money and drugs. As one of the intruders searched the room, one teen told the masked individuals to leave.

[4] The man holding the gun said "who's this white girl telling me to leave" and said that no one was going to squeal on them (or words to that effect) because "nobody is going to make it out of here alive". He promptly shot all three of the occupants. In Ms. MacLean's case, he shot her multiple times. She was wounded severely, and was left paralyzed, initially. The others have recovered, to some extent.

[5] Markel Downey was charged with three counts of attempted murder. He elected to have it heard by a Judge without a jury. This was his first trial. Ms. MacLean testified at it. The accused was acquitted on the basis of the trial Judge's conclusion that the identification evidence proffered by the Crown was insufficient to prove beyond a reasonable doubt that he was the shooter. The Crown appealed, the appeal was allowed, and a new trial was ordered.

[6] Tragically, Ashley MacLean has since died of complications arising from the wounds which she sustained on that evening. The Crown has preferred a first degree murder charge against Mr. Downey as a result. A trial on this charge, and also with respect to the two counts of the attempted murder of the other two teenagers, is scheduled to begin on May 27, 2019 ("the second trial").

[7] Because the indictment has been preferred, there was no preliminary inquiry. Because one of the charges is first degree murder, the trial will take place before a judge and jury.

[8] A prior *voir dire* has been held. At that time, I determined that Ms. MacLean's testimony (as provided at Mr. Downey's first trial) was admissible under section 715(1) of the *Criminal Code*, and also pursuant to the principled exception to the hearsay rule in accordance with the principles laid down in *R. v. Khelawon*, 2006 SCC 57 and *R. v. Bradshaw*, 2017 SCC 35.

[9] The *voir dire* ruling referenced above was handed down on January 16, 2019. On January 18, 2019, Markel Downey was observed providing the letter in question to R.D. The latter had pled guilty, in December 2015, to aggravated assault for his admitted role in the incident. In the words of the Crown, he therefore faces no further "legal jeopardy" in this matter (*Crown brief, p. 7*). *Voir dire* Exhibit "1" is the videotape which shows the circumstances in which the letter was provided to R.D. by the accused. *Viva voce* testimony of the corrections officers involved described how the letter was recovered from R.D.

[10] The Crown summarizes this evidence as follows:

> On January 18, 2019 Markel Downey was observed on camera at the Pictou Correctional Centre. He was located in the hallway outside of the Alpha 2 block.
>
> R.D. was housed in Alpha 2.
>
> Video shows Markel banging on the window to Alpha 2 to get R.D.'s attention. R.D. approaches the locked exterior door to the wing, where Markel is located.
>
> Markel slides the letter under the door to R.D. R.D. retrieves the letter.
>
> At a later time, officers entered Alpha 2 and approached R.D. to seize the letter.
>
> While being escorted out of Alpha 2, R.D. tries to tear the letter into pieces.
>
> Officers took R.D. to the ground and seized the letter.
>
> (*Crown brief, pp. 1 – 2*)

[11] The letter itself is attached as Appendix "A' to this decision.

[12] I have been asked to determine whether the Crown will be permitted to adduce the letter, the video surveillance, and the testimony of the Correctional Officers involved in the seizure, at Mr. Downey's upcoming (second) trial.

Issues

1. *Is the letter admissible as after the fact conduct of a fabricated alibi?*
2. *If so, should it be excluded on the basis that its probative value is exceeded by its prejudicial effect.*

Analysis

1. *Is the letter admissible as after the fact conduct of a fabricated alibi?*

a) After the fact conduct – generally

[13] This is sometimes referred to as "post-offence conduct" or "consciousness of guilt". Given that the use of such descriptors may be perceived as equivalent to a presumption that an offence has been committed, more recent authorities often refer to it as "after the fact" conduct instead. The legal meaning is the same, however.

[14] In *R. v. Cromwell,* 2016 NSCA 84, Justice Van den Eynden explained at para. 22:

> Post-offence conduct (previously called evidence of consciousness of guilt) is evidence about what the accused did after an offence has been committed. It is a form of circumstantial evidence which, in appropriate circumstances, may be used to assist the trier of fact (in this case the jury) in drawing inferences. Often, post-offence conduct is admitted to demonstrate that the accused acted in a manner that is consistent with the conduct of a guilty person, not an innocent person. (See *R. v. White*, [1998] 2 S.C.R. 72 and *R. v. Hartling*, 2013 NSCA 51.)

[15] At para. 27, she cautions:

> It is widely acknowledged that post-offence conduct is inherently susceptible to error. Often, post-offence conduct is open to more than one interpretation or conclusion. The dangers lie in a jury failing to consider alternate reasons (innocent explanation) for the conduct and/or wrongly leaping from such evidence to a finding of guilt. A trial judge must be vigilant and properly instruct the jury on the use of this evidence. Otherwise, this evidence is open to misuse by a jury. (See *White* and *Hartling*.)

[16] Justice David Watt of the Ontario Court of Appeal, in his *Manual of Criminal Evidence* (Section 9.05), also added a caveat:

> …where judicial experience teaches that jurors may attach more weight to the evidence of post-offence conduct that it warrants, the trial judge must alert jurors to this danger in final instructions.

b) After the fact conduct within the context of an allegation of fabricated alibi

[17] Both counsel have referred to *R. v. O'Connor*, 2002 CanLII 3450 (ONCA). This case involved a lengthy consideration of fabricated alibi and post-offence conduct, and is often cited in this context. A number of principles may be extracted from it, and they include:

> a. There is a distinction between an alibi that is simply disbelieved, and one that is fabricated.
>
> b. The fact that an accused is merely disbelieved is not proof of the opposite of what is asserted in the alibi.
>
> c. A finding of fabrication must be grounded upon evidence independent from that which contradicts the accused's version of events, and this applies to both trial testimony of an accused and out of court statements.
>
> d. The circumstances in which an accused has made an out of court statement may be considered by a trier of fact as independent evidence to show a fabrication.
>
> e. Where the circumstances support a conclusion that the accused made a false statement because of consciousness that the offence was committed, they may be used as independent evidence of fabrication.
>
> f. Significant caution should be exercised when considering the use that can be made of the disbelieved statements.
>
> g. When an out of court statement is involved, the test is whether there is sufficient evidence of fabrication by the accused tending to show the falsity of the statement(s). If this is not present, the Crown will not be permitted to call this evidence.

[18] In *O'Connor*, the amount of detail, the early timing of the statement, which occurred even before the accused was a suspect, and other contextual circumstances were considered to be capable of providing evidence of fabrication.

[19] As the court elaborated:

> 31. In this case, it is my view that the circumstances in which the appellant made the allegedly false statements to the police and the detailed nature of those statements constitute sufficient evidence upon which a jury could conclude that the

> appellant fabricated the statements in order to mislead the police and divert suspicion from himself. His first statement was made the same day as the shooting and, importantly, was made to the police at a time when the police did not suspect the appellant and the appellant did not have reason to believe that he was a suspect. The police, as a matter of routine, questioned witnesses who might have information about the deceased's whereabouts prior to the shooting. The appellant's initial statement furnished a complete alibi and, if true, would lead the police to conclude that he was not involved in the offence. That statement and the next two statements were very precise, both as to the appellant's whereabouts and the times he was in the various places. If the jury were to disbelieve the appellant's statements, they might fairly ask why would the appellant tell such detailed and specific lies to the investigators. Why not tell the truth? And how was it that the appellant was so well prepared with a detailed and precise statement about his whereabouts when questioned by the police? In my view, it would be open to a jury to use the evidence of the circumstances surrounding the making of those statements and the nature of the statements themselves to conclude that the appellant fabricated the statements to avoid suspicion.
>
> 32. To be clear, it is not the evidence establishing the falsity of the statements which constitutes the evidence of fabrication; rather, it is the evidence of the circumstances in which the disbelieved statements were made and the detailed nature of those statements which, in my view, is capable of furnishing the independent evidence of fabrication.
>
> 33. That being the case, I am satisfied that the appellant's three statements, together with the evidence showing that they were false, was properly admissible. However, once that evidence was admitted, it became important that the trial judge clearly instruct the jury on the manner in which the jury could use this evidence.
>
> [Emphasis added]

[20] In *R. v. Laliberté,* [2016] 1 SCR 270, the court explained the relevant focus which the court must adopt at this *voir dire*, or "gate keeper" stage:

> … there must be other evidence independent of the finding that the alibi is false on the basis of which a reasonable jury could conclude that the alibi was deliberately fabricated and that the accused was involved in that attempt to mislead the jury: *R. v. O'Connor* (2002), 62 O.R. (3d) 263 (C.A.); *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445; *R. v. Tessier* (1997), 113 C.C.C. (3d) 538 (B.C.C.A.) (per Ryan J.A.).
>
> [Emphasis added]

c) **The letter itself**

[21] As noted, the letter authored by the accused and delivered to R.D., will be attached as Appendix "A" to this decision when transcribed. It is just over two pages long. In the letter, it is pointed out that "you [R.D.] might have to take the stand, I

don't know for sure." If so, R.D. is directed to "just tell my lawyer …" a number of things.

[22] For example, the R.D. is directed to tell the lawyer that, among other things:

> a. the accused was home at the relevant time babysitting his niece;
>
> b. he had to babysit because his sister had picked up "Nanny" to get groceries;
>
> c. the accused laid down to sleep. While he slept, he [R.D.] stole his car;
>
> d. he [R.D.] picked up "C." and "T. and his buddy" from his house;
>
> e. that he [R.D.] does not know the identity of T's buddy;
>
> f. that he has only seen T's buddy once or twice at T's house;
>
> g. that all of them were wearing black;
>
> h. that the guy who shot the three teenagers is "still out there running around";
>
> i. that he [R.D.] and the accused don't even hang around together; and
>
> j. that he [R.D.] hardly ever sees the accused, because all he does is "work, boxing and sleep".

[23] R.D. is also told to say to the accused's lawyer that:

> k. "I just feel bad because I no (sic) he [Markel Downey] wasn't there".

[24] At the top of p. 2 we find a direction that:

> l. (if "they" ask where the car and everything was) – "tell them the whole story, just say I wasn't there".

[25] And he is also directed to say that:

> m. if [the accused] knew that R.D. was going to rob people for weed he [the accused] would have probably fought to try to stop him.

[26] The letter continues by saying:

> n. when you returned with my car, [say that] "I [Markel] was still sleeping" … and five minutes later "my nan and sister" came back too; and
>
> o. that [the accused] couldn't leave the house because his parents had told him he had to be there to watch the kids if "nanny" was absent while they were in New York.

[27] R.D. is also directed:

> p. to "make sure and tell them" that Markel had too much on the line to do anything so stupid;
>
> q. that he always had money anyway, and was always going away for training;
>
> r. that he just moved in with his mother when she moved into her present house. Before that, he [Markel] lived with his girlfriend in Lawrencetown since he was 14 – 15 years old; and
>
> s. that he [Markel] didn't live with mom on Arklow Drive, he didn't play basketball over in the other people's yard, and that it was only him (R.D.) and R.D. that did so, "but only if they ask about that".

[28] The letter concludes with "don't let anyone else read this stuff, and flush it down when you [sic] done with it".

d) **The circumstances in which the letter was made**

[29] Obviously, the first circumstance to consider is the timing. The delivery of this letter by the accused to R.D. occurred a little over three years after R.D. had entered a guilty plea to "aggravated assault" as a youth in the subject home invasion. It has been pointed out by the Crown that he faced no further legal jeopardy with respect to these offences on January 18, 2019, when he was provided with the letter by the accused.

[30] Significantly, the incident occurred a scant two days after this court's ruling with respect to the admissibility of (the now deceased) Ms. MacLean's evidence (given in the first trial) at the accused's second trial, which is scheduled to begin in May of this year.

e) The amount of detail in the letter

[31] Then there is the amount of detail in the letter. This doesn't appear to have been a letter merely designed to jog R.D.'s memory. If it was, little to none of the apparent "spoon feeding" in the letter would have been required. At most, "R.D. you know I was home babysitting that night" plus, maybe, "why haven't you told them that yet?" would have sufficed. Instead, the letter goes a great deal further than that, in some places saying, in effect, "if they ask you such and such, tell them this".

[32] The Crown (reasonably, in my view) asks why does the accused not simply ask R.D. to contact his lawyer directly, or vice versa.

[33] One might also ask, why pass a note, a very detailed note, to R.D. who was at the time secured on a separate wing of the Pictou Correctional Centre, telling him what to say about the accused's whereabouts on the night the offence took place? Why is R.D. directed to destroy the note and not let anyone else see it?

[34] The Crown points to several inconsistencies in the body of the letter itself, in any event. For example, how is the accused (if he did not participate in the offence) in a position to tell R.D. what to say about:

a. his car being used;

b. the identities of the other known participants; and

c. who did the shooting, that his identity is unknown (to R.D.) and that he is still at large, particularly if he was home sleeping at the time that everything occurred.

[35] The accused argues that there are several possible explanations of his conduct which are consistent with no attempt to fabricate an alibi. He points to the evidence given in the first trial by his father, which was to the effect that the accused did indeed spend a lot of time with his girlfriend, rather than at home, and that R.D. spent a lot of time in Kentville. So, they actually didn't see each other a lot. He also notes that the accused's father went on to testify that he has never seen the accused play basketball in his life, and indeed, his parents were concerned about him sustaining an injury playing other sports, which might affect his boxing career.

[36] Further, the defence points out that, of course, the accused is privy to some of the details of what happened at 52 Arklow Drive on the night in question, even though he wasn't there. He already sat through the first trial (multi-weeks long), and has had access to Crown disclosure material. R.D., has already pled guilty in Youth

Court to his role in the home invasion. Moreover, why wouldn't he direct R.D. to destroy the letter? After all, who wants somebody other than the intended recipient to read his correspondence?

[37] With respect, the accused is certainly not precluded from making these arguments to the jury. I am not here, however, to determine whether the alibi was in fact fabricated. I certainly disbelieve it, but I require more than that. I must find, in addition, that there is sufficient evidence upon which, if accepted, a reasonable jury could conclude that the alibi was deliberately fabricated, and that an attempt had been made to mislead them.

[38] And there is sufficient evidence of this. The contents of the letter, the amount of detail in it, and the circumstances in which the letter was made and delivered to R.D. (as I have previously explained) together furnish the requisite basis for its reception into evidence.

> *2. If so, should it be excluded on the basis that its probative value is exceeded by its prejudicial effect.*

[39] It is essentially a cost/benefit analysis in which the Court must engage at this juncture.

[40] We know what the charges are. Really, however, the case will turn upon whether the trier of fact is satisfied beyond a reasonable doubt that Mr. Downey was the person who pulled the trigger. Counsel have referred to this as a case of identity. This is true (overall), but an important qualification must be made as to the type of evidence that Ms. MacLean actually provided.

a. Identification and Recognition Evidence

[41] Ms. MacLean proffered what is more accurately referred to as recognition evidence. "Identification evidence" is a term which is broad enough to include recognition evidence, but certainly the latter is a more specific sub-category. This was emphasized by Saunders, J.A., when he spoke for the Court, allowed the Crown's appeal in relation to the first trial, and ordered the (pending) second one.

[42] In *R. v. Downey*, 2018 NSCA 33, he explained:

> 53. … eyewitness identification evidence offered by strangers is to be distinguished from voice or visual identification evidence offered by witnesses who are "familiar" with the accused. Such evidence is properly characterized as "recognition evidence" because the witness is able to verify their identification of the accused from

recognizing the voice and/or appearance of the accused based on their familiarity and interaction one with the other.

54. A helpful explanation of this distinction can be found in the decision of the British Columbia Court of Appeal in *R. v. Bob*, 2008 BCCA 485 where Neilson, J.A., writing for a unanimous court said:

> [13] ... this was a case of recognition, rather than identification. There is a significant difference between cases in which a witness is asked to identify a stranger never seen by him before the offence, and cases in which a witness recognizes a person previously known to her. While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence: *R. v. Aburto*, 2008 BCCA 78; *R. v. Bardales* (1995), 101 C.C.C. (3d) 289 (B.C.C.A.), aff'd [1996] 2 S.C.R 461, 107 C.C.C. (3d) 194.
>
> [Underlining mine]

[43] Saunders, J.A. continued in this vein:

55. Recent observations by the Ontario Court of Appeal, per curiam, in *R. v. Campbell*, 2017 ONCA 65, are equally apt:

> [10] This court has confirmed that "recognition evidence is merely a form of identification evidence" and, as such, "[t]he same concerns apply and the same caution must be taken in considering its reliability as in dealing with any other identification evidence": *R. v. Olliffe*, 2015 ONCA 242, 322 C.C.C. (3d) 501, at para. 39. This court also noted in that paragraph, however, that "[t]he level of familiarity between the accused and the witness may serve to enhance the reliability of the evidence." Unlike cases involving the identification of a stranger, the reliability of recognition evidence depends heavily on the extent of the previous acquaintanceship and the opportunity for observation during the incident: *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.), at p. 424, citing *R. v. Smierciak* (1946), 87 C.C.C. 175, at p. 177. Recently, in *R. v. Charles*, 2016 ONCA 892, at paras. 50-51, this court noted the "critical difference" between recognition cases and cases involving identification by a witness of a complete stranger, and referred to the relevance of the "timeline of the identification narrative". See also *R. v. Peterpaul* (2001), 52 O.R. (3d) 631 (C.A.), at p. 638.
>
> [Emphasis in original]

b. *Potential Prejudice to the Accused*

[44] Generally speaking, there are three types of potential prejudice that are considered under this rubric. They consist of moral prejudice, reasoning prejudice, and unfairness to the accused.

[45] It is obvious that there will be prejudice of all three types sustained by Mr. Downey if the Crown's application is granted. After all, this is significant evidence, particularly when coupled with the very serious inference which the Crown will be asking the jury to draw, namely, that the accused attempted to suborn R.D. to commit perjury by fabricating an alibi for him to recite.

[46] On the other hand, the probative value of the letter, including the timing and circumstances surrounding its delivery by the accused to R.D., and the amount of detail in the letter, is extremely high. Recall that by "probative value", we simply mean relevance.

[47] Mr. Downey, at his upcoming trial, will seek to discredit the recognition evidence proffered by Ms. MacLean in her testimony, which was given in person at the first trial, and which will be admitted in the second one as per the Court's (as yet unpublished) decision rendered on January 16, 2019. The letter outlines a very specific method by which he will attempt to discredit it: by leading evidence that Ms. MacLean could not have been very familiar with him (at least from observing him play basketball on Arklow Drive) and also by virtue of alibi evidence which places him somewhere else when the shooting occurred.

[48] The letter, its detailed contents, as well as the circumstances and timing of its delivery are highly probative, and this probative value, in my view, outweighs its prejudicial effect upon Mr. Downey.

[49] I note parenthetically that the prejudicial effect of this evidence, even if it cannot be eliminated completely, may be significantly attenuated by careful jury instructions as to the use which may be made of it. Ultimately, the value of this evidence will be for the jury to decide.

Conclusion

[50] I conclude, therefore, that the Crown will be permitted to adduce at trial:

1. the letter that the accused wrote to R.D.;
2. the video surveillance showing the letter being passed; and
3. the testimony of the correctional officers involved in the seizure.

Gabriel, J.

EDITORIAL NOTE: APPENDIX "A" HAS BEEN REDACTED PURSUANT TO SECTION 110(1) OF THE *YOUTH CRIMINAL JUSTICE ACT*.