SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Downey*, 2021 NSSC 74

Date: 20210226
Docket: Hfx No. 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.

***Voir Dire* #5**
Admissibility of Certified Youth Court Records
(by written submissions only)

Judge:	The Honourable Justice D. Timothy Gabriel
Last written submissions:	February 7, 2021
Date of Decision:	February 26, 2021
Counsel:	Scott Morrison and Erica Koresawa, for the Provincial Crown
	Malcolm Jeffcock, Q.C. and Robert Jeffcock, for the Defence

By the Court:

[1] The facts of this case are set forth in my as yet unpublished decisions related to the first three *voir dires* held in this matter. I do not intend to repeat most of them.

[2] This jury trial is presently scheduled to commence on March 31, 2021. It will be Markel Downey's second trial, the first having ended with an acquittal, which was overturned on appeal by decision dated February 14, 2018, and sent back to this Court for a new trial.

Nature of Application

[3] The Crown has made an application for the admission of certified Youth Court Information with respect to R.D., E.S., and D.B. These three individuals are known to have participated in the home invasion on Arklow Drive in Dartmouth, Nova Scotia on November 30, 2014. They subsequently admitted their involvement, entered guilty pleas, and served Youth Court sentences for that participation.

[4] A fourth individual was present. Like the other three, he wore special clothing and his face was masked. The Crown contends that this fourth individual was the accused, Markel Downey. It also contends that Mr. Downey was the person who shot and wounded Logan Starr, Jordan Langworthy, and Ashley MacLean during the course of the home invasion. At Mr. Downey's first trial, Messrs. Starr, Langworthy, and Ms. MacLean all testified. In 2018, Ms. MacLean ultimately died as a result of the injury which she sustained on March 30, 2014. In the first *voir dire*, I ruled that her testimony in the accused's first trial was nonetheless admissible in the second.

[5] In the first trial, Ms. MacLean and Mr. Langworthy identified (correctly, as it turned out) R.D., E.S., and D.B. as the three other participants. Ms. MacLean also identified Mr. Markel Downey as the fourth participant, the one who shot her and the other two victims. She was the only witness to do so.

[6] The Crown argues that the Youth Court Information, confirming the guilty pleas and ultimately the presence of the three others on November 30, 2014, and the fact that they were correctly identified, is relevant both to the reliability of Ms. MacLean’s recognition/identification of Mr. Markel Downey as the fourth, and that both her’s and Mr. Langworthy’s correct identification of the other three also has

relevance in conjunction with additional evidence connecting the accused to R.D., E.S. and D.B., and to the home invasion.

[7] The accused's primary position is that this evidence is irrelevant. Alternatively, he argues that even if the evidence is relevant, it must still be excluded, because its evidentiary worth is exceeded by its prejudice to the accused.

Issues

[8] Simply stated, then, the issues are:

A) Is the fact that Ms. MacLean and Mr. Langworthy correctly identified the other three participants in the home invasion relevant either to the accuracy of Ms. MacLean's identification of the accused as the fourth, or to the other body of evidence linking all four to each other and to the crime scene?

B) If yes, is there any rule of evidence which would exclude it?

C) If no, is the probative value of this evidence exceeded by its prejudice to the accused?

General Concepts (preliminary)

[9] Evidence is relevant to a particular fact if there is a relational correspondence between it and that fact. If the piece of evidence, either on its own, or in conjunction with other evidence, tends to prove, disprove, make more likely, or less likely the existence of that particular fact, it is said to be relevant to it.

[10] Logic, or common sense, is involved in the linkage. Context is also crucial.

[11] Evidence may be legally (as opposed to merely logically) relevant if, in addition, it is (first) material, and (second) there is no rule of evidence which precludes its admission.

[12] Finally, to be admissible, it must also survive a cost-benefit analysis.

[13] As Watt, J.A. concisely stated in *R. v. J.H.*, 2020 ONCA 165:

> 52. To be receivable in a criminal trial, evidence must be relevant, material and admissible. Evidence is relevant if it tends to prove what it is offered to prove.

> Evidence is material if what it is offered and tends to prove is something with which the law is concerned. And evidence is admissible if its reception does not offend any exclusionary rule of evidence and its probative value exceeds its prejudicial effect.
>
> [Emphasis in original]

Analysis

> *A) Is the fact that Ms. MacLean and Mr. Langworthy correctly identified the other three participants in the home invasion relevant either to the reliability of Ms. MacLean's identification of the accused as the fourth, or to the other body of evidence linking all four to each other and to the crime scene?*

[14] Yes, this evidence is relevant. We are in the rare position of having had this issue considered by the Court of Appeal in *R. v. Downey*, 2018 NSCA 33. In the course of overturning the trial decision and ordering a new trial, Saunders, J.A., writing for a unanimous Court, said:

> 83. … I believe the accuracy of her [Ms. MacLean] identification of the other three intruders was very relevant in determining the reliability of her having identified [Markel] Jason Downey as the man who shot her.
>
> [Emphasis added]
>
> 84. Ms. MacLean's statement in the ambulance that it was "Baby Jason" who shot her is an out-of-court statement. Because Ms. MacLean adopted that statement during her testimony in court and further identified Mr. Downey as the person who shot her, her statement to the police officer in the ambulance would be classified as a prior consistent statement. Typically, prior consistent statements are inadmissible because they lack probative value and are seen as self-serving. See for example, *R. v. Stirling*, 2008 SCC 10, and *R. v. Dinardo*, 2008 SCC 24. However, this presumption can be rebutted in certain circumstances. And this case is one of those. That is because here, Ms. MacLean's prior consistent statement relates to her identification of the accused. As noted in *E.G. Ewaschuk, Criminal Pleadings & Practice in Canada*, loose-leaf (consulted on 12 March 2018), (Toronto, Ont.: Thomson Reuters, 2017) Ch. 16, pp. 16-196-197:
>
> > A prior statement identifying or "describing the accused" is admissible as original evidence where the identifying witness identifies the accused at trial as the person in question.
> >
> > [Emphasis in original]

[15] Later, he continued:

89. … The trial judge said:

> [41] ... The Crown has not argued that there is any evidence connecting Mr. Downey to the other three people alleged to be involved on the evening of the shooting. ...

In effect, the judge assumed that there was "no evidence" connecting the respondent to the other three home invaders. A finding of "no evidence" is a question of law alone. See for example, *R. v. Al-Rawi*, 2018 NSCA 10 and *R. v. Feeley*, [1953] 1 S.C.R. 59. He overlooked the considerable body of corroborative evidence linking all four to the crime scene, which was highly probative in assessing the reliability of both Ashley MacLean's and Jordan Langworthy's eyewitness testimony.

90. Whether it is "true" that Z, ES and DB -- the three youths arrested and charged along with the respondent -- later pleaded guilty to their involvement in the incident is not critical to our disposition. In other words, our allowing the Crown's appeal and ordering a new trial does not depend upon their having been convicted. Should the Crown seek to introduce such evidence at the retrial, it will have the opportunity to persuade the judge presiding over the matter that such evidence is relevant, probative and admissible. But for the purposes of this appeal, I agree with Mr. Scott's able submissions that such evidence is not required to support our decision.

[Emphasis added]

[16] Then, at paras. 91and 92:

91. Jordan Langworthy's positive identification of these three youths as being the same three individuals who robbed him two or three weeks earlier, as well as the items found during the course of the investigation which linked those youths to the scene of the crime provided ample evidence of their complicity and further served to enhance the reliability of both Mr. Langworthy's and Ms. MacLean's testimony. Obviously, the importance of this evidence was lost upon the trial judge when he said in para. 41 of his reasons that Ms. MacLean's identification of the three youths was "irrelevant". Furthermore, as noted earlier, he was obviously mistaken when he said in the same paragraph that the:

> ...Crown has not argued that there is any evidence connecting Mr. Downey to the other three alleged to be involved on the evening of the shooting ...

[Emphasis added]

92. The fact that the trial judge missed this "connection" is also revealed in para. 45 of his decision where he said:

> ...Despite a thorough investigation the only evidence the police found, which potentially connected Mr. Downey to the shooting, was the gunshot residue on Mr. Downey's right hand. ...

> Respectfully, as I will now show, the judge appears to have forgotten the other direct and circumstantial evidence led by the Crown which tied the respondent to the other three intruders, and connected them all to the crime scene.
>
> [Emphasis added]

[17] Finally, for our purposes:

> 93. Clearly, the Crown presented and relied upon important evidence tying these three youths to the respondent, including the fact that the respondent: Markel Jason Downey and Z are ____; they were arrested together at their home less than 90 minutes after the shooting, each with gunshot residue on their hands; the DNA of DB and ES were found on some articles recovered during the police K-9 tracking at the scene; and ES's fingerprint was found on the rear inside window of the red Honda Civic driven by the respondent and impounded at his home.

[18] Defence counsel would have the Court essentially relegate these comments in *Downey (supra)* to *obiter*. He argues that the records of conviction for the other three are irrelevant to the evaluation of Ms. MacLean's ability to observe and identify people in that environment, and in any event draws a distinction between that and the jury's proper function, which is to evaluate her ability to observe and correctly identify the shooter, the fourth individual present, which the Crown contends was the accused. (*Defence brief, voir dire 5, paras. 11 to 15*)

[19] With respect, what the Court said in *Downey*, at para. 90 (as excerpted above) was that their decision did not turn upon whether the other three individuals had actually pled guilty to their involvement in the home invasion on November 30, 2014. What was important, as is apparent from the excerpts noted above, was that the other three were actually there, and that Ms. MacLean (as well as Mr. Langworthy) correctly identified them. This is relevant not only to the reliability of her identification of Mr. Downey, but also to the other evidence of linkage between these three individuals and Mr. Markel Downey *inter se*, and to the crime.

[20] Indeed, Justice Saunders said that the evidence, when considered holistically, constituted a "... considerable body of corroborative evidence linking all four to the crime scene, which was highly probative in assessing the reliability of both Ashley MacLean's and Jordan Langworthy's eyewitness testimony." (*Downey, para. 89*)

[21] So the evidence is relevant and material. How, then, does the fact that Ms. MacLean and Mr. Langworthy were correct in their identification of the other three intruders get to the jury in the second trial? One way would be to treat it in the same way it was treated in Mr. Downey's first trial. There, it was admitted on the record

that the three others had pleaded guilty to their role in the home invasion. The second way, failing an agreed admission, would be for the Crown to prove it.

[22] Regardless, the weight to be given to Ms. MacLean's having correctly identified the other three intruders, and how significant it is to the reliability of her identification/recognition of Markel Downey as the fourth (when the evidence at trial is assessed in its totality) is for the jury to decide.

[23] If it is necessary for the Crown to prove the presence of the other three at the scene, the only likely available means by which to do so would be through submission of the records of the Youth Court convictions of the other three. One of the other three intruders is now deceased, another is R.D. Moreover, there has been considerable evidence (in earlier *voir dires* held in this matter) of what is known, in street parlance, as a "rat" culture. Participants in criminal acts, or those having knowledge of them, do not “rat” or provide such knowledge to legal authorities. Violation of such a "code" may lead to ostracism and/or reprisal.

B) If yes, is there any rule of evidence that would exclude it?

i) Brief segue: Does Ms. MacLean's death pose a barrier or complicate the reception of this part of her evidence?

[24] This is not necessarily the same thing as asking if her testimony in the first trial is admissible in the second – that issue was decided in the first *voir dire* in the affirmative. But if a particular question put to her, or a particular piece of her testimony was felt to offend an evidentiary rule, counsel could still object, in the same manner as they could otherwise have done if it were still possible for her to provide her evidence *de novo* in the second trial.

[25] However, having already decided that this evidence (that she and Mr. Langworthy were correct in their identification of the other three intruders) is relevant and material, the analysis boils down to what it would have otherwise: is there an evidentiary rule that would preclude the reception of this evidence? And the answer is “no”.

ii) a) Oath helping

[26] The Defence contends that such evidence is akin to oath helping. In particular:

> The purpose the Information is sought to be placed before the jury is improper. The purpose is "oath building". As it is not information properly before the Court for the proof of an issue the jury must determine, it cannot to be said to be evidence that could also serve to corroborate Ms. MacLean. The sole purpose is to bolster her evidence. As such, it is the position of Mr. Downey that this is "oath building" and it is inadmissible. (*Defence brief, February 8, 2021, p. 7*)
>
> [Emphasis in original]

[27] With respect, the relevance of this evidence has been dealt with above. As to whether it is akin to "oath helping" or "oath building", this concept was addressed in *R. v. Tat*, [1997] 0.J. No. 3579 (C.A.), albeit within the context of an earlier identification of the accused by the witness out-of-court:

> 38. Where a witness identifies the accused at trial, evidence of prior identifications made and prior descriptions given by that witness do not have a hearsay purpose. In his influential article, *Evidence of Past Identification, supra*, Professor Libling explains the admissibility of the out-of-court statements where the witness makes an in-court identification in this way, at pp. 271-72.
>
> > There is no hearsay problem with this kind of evidence. It is not admitted to prove the truth of the earlier identification, but to add cogency to the identification performed in court. As a general rule, a witness is not permitted to testify as to his own previous consistent statements because they add nothing to the in-court testimony. But evidence of previous identification strengthens the value of the identification in court by showing that the witness identified the accused before the sharpness of his recollection was dimmed by time. Furthermore it is important, in assessing the weight of the identification in Court, to know whether the identifying witness was able to identify the accused before he was aware that the accused was the person under suspicion by the police.

[28] Once again, I return to *Downey, supra*:

> 87. I adopt Justice Doherty's analysis [in *Tat*] as a correct statement of the law and one which ought to have been applied by the trial judge in this case. Limiting the impact of Ms. MacLean's testimony in the way he did had the effect of giving no weight whatsoever to the reliability of her identification of Mr. Downey as being the shooter, as well as the accuracy of her identification of the other three young men who participated in the home invasion.
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> 88. Ms. MacLean's statement to the paramedic and the police officer in the ambulance fits squarely within the first situation in which out-of-court identification evidence is admissible as substantive identification evidence described in *Tat, supra*. This evidence should have been considered in assessing

> the reliability of Ms. MacLean's identification of Mr. Downey. It should not have been limited to only "show[ing] that her opinion that Mr. Downey as the gunman did not arise because of hearing about his arrest or reading discussions on social media about the incident", as the trial judge found in para. 33 of his decision.

[29] The situation in *Tat* is analogous to Ms. MacLean's prior statement to the ambulance driver on November 30, 2014, in which she identified the accused as the fourth intruder and the shooter.

[30] However, what we are dealing with at this juncture is evidence that she and Mr. Langworthy correctly identified the other three intruders. This simply provides the trier of fact (in this case the jury) with one possible tool or collateral circumstance (amongst others, in conjunction with the totality of the evidence) with which to determine how much weight, if any, to assign to her purported identification of the accused as the fourth participant. In my view, there is no hearsay or oath helping purpose being served here.

[31] There is no rule which bars the admission of this evidence. In fact, the rules which permit use of exemplification evidence expressly permit it, in these circumstances.

ii) b) Canada Evidence Act

[32] A path leading to the reception of information from one Court by another is provided by the *Canada Evidence Act*, RSC 1985, c. C-5. The relevant section, in this context, follows:

> 23. (1) Evidence of any proceeding or record whatever of, in or before any court in Great Britain, the Supreme Court, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, any court in a province, any court in a British colony or possession or any court of record of the United States, of a state of the United States or of any other foreign country, or before any justice of the peace or coroner in a province, may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record, purporting to be under the seal of the court or under the hand or seal of the justice, coroner or court stenographer, as the case may be, without any proof of the authenticity of the seal or of the signature of the justice, coroner or court stenographer or other proof whatever.
>
> (2) Where any court, justice or coroner or court stenographer referred to in subsection (1) has no seal, or so certifies, the evidence may be given by a copy purporting to be certified under the signature of a judge or presiding provincial court judge or of the justice or coroner or court stenographer, without any proof of the authenticity of the signature or other proof whatever.

[33] Certified copies of an Information may properly be introduced under the common law doctrine of exemplification, or the above-noted statutory codification. It is available in circumstances where the question of whether or not a guilty plea was entered in an earlier proceeding has relevance to the particular case at bar. The facts underlying the plea, however, remain inadmissible hearsay.

[34] The fact of the admission of guilt by the other three, with respect to their roles in the home invasion of November 30, 2014 has significance because (as discussed) both Ms. MacLean and Mr. Langworthy identified them as being there. Ms. MacLean, in addition, identified the accused as the fourth participant. A jury would be entitled to know from their admission of guilt that they were indeed present during the home invasion as indicated by Ms. MacLean and Mr. Langworthy, and then decide whether or not that fact has a bearing on the reliability of Ms. MacLean's further recognition of the accused as the fourth participant.

[35] As was stressed in *Downey (supra)* "... our allowing the Crown's appeal and ordering a new trial does not depend upon their [the three others] having been convicted" (*Downey*, para. 90). What was relevant was not the fact of their guilty pleas *per se*, but rather that they were present on November 30, 2014, and that Ms. MacLean had correctly identified them. To repeat, this is one factor which is relevant to her ability to accurately observe in the circumstances. It is also one factor to consider when other evidence of the accused's connection to the three others, and the crime scene, is weighed.

[36] In Mr. Downey's first trial, the fact that the three others had pled guilty in Youth Court proceedings was admitted on the record (*Downey*, para. 37). Strictly speaking, all that would have been needed, at a minimum, was an admission that R.D., E.S., and D.B. were three of the four participants in the home invasion which ended with the three victims being shot. If there is no similar admission in the accused's second trial, then s. 23 of the *Canada Evidence Act* provides the means through which the Crown may adduce the fact of the guilty pleas in the other proceedings.

iii) Probative Value v. Prejudicial Effect – a cost-benefit analysis

[37] Over the years, the courts have identified several "subspecies" of the potential prejudicial effects of evidence when such a balancing is undertaken. These consist of moral prejudice, reasoning prejudice, unfairness to the witness, unfair surprise, and inability to test.

[38] It should be clear that the latter two have no application in this context. In the first *voir dire*, I ruled (among other things) that the prejudice arising from the accused's inability to test in the second trial what Ms. MacLean had to say in the first was significantly attenuated by the extensive and thorough cross-examination under oath to which she was subjected. The only material fact that is different in the second trial is that Ms. MacLean is now deceased, having ultimately succumbed to the injuries that she sustained on November 30, 2014. What she observed that night, however, and the evidence that she offers as to what happened, remains unimpacted. The jury will be able, on the basis of her direct and cross-examination at first instance, to holistically assess the value of what she has to say. Mr. Langworthy, who also identified the other three, will be available for cross-examination.

[39] As to unfair surprise, the Defence has long known of the Crown's intent to introduce this evidence. Nor is there any indication of unfairness to any witness in the proceeding.

[40] As to moral and reasoning prejudice, the jury will be aware, and this awareness will be reinforced by appropriate instructions from the Bench, of the permissible and impermissible uses of this evidence. Although clearly important, it is not a complicated instruction.

[41] Finally, the actions of the three others do not equate to those of the accused. The fact that they were there, and the fact that Ms. MacLean's and Mr. Langworthy's testimony correctly identified them as the other participants is simply one other relevant circumstance for the jury to consider when they determine how reliable Ms. MacLean was when she identified the fourth intruder (which she says was the accused), and to evaluate the strength of the other evidence linking Markel Downey to the other three and to the scene of the crime. There is little danger of reasoning prejudice as a consequence.

[42] I can do no better than advert to what the Court of Appeal had to say in *Downey (supra)*, about the significance of this evidence, some of which has been noted earlier.

[43] This is not to say that there is no potential for prejudice to the accused at all. Any relevant evidence is potentially prejudicial. However, the risk of prejudice posed by the introduction of this particular evidence is more than adequately outstripped by its significant probative value. Moreover, any prejudice arising from admission of this evidence may be significantly curtailed by proper jury instruction.

Conclusion

[44] No doubt the jury will hear argument based upon alleged differences between Mr. Langworthy, Mr. Starr and Ms. MacLean's evidence *inter se*, and with respect to other witnesses. Among other things, fairness requires that they hear evidence which is consistent with what these witnesses say they observed at the scene as well. Ultimately, the jury will determine the value to be accorded to Ms. MacLean's purported identification/recognition of the accused as the fourth intruder (and shooter) when this and all of the other relevant evidence is considered.

[45] The Crown's application is granted. The parties shall either agree upon an appropriate admission with respect to the identities of the three other participants in the home invasion of November 30, 2014, or the Crown will be permitted to adduce evidence of that fact in the manner that Counsel has proposed.

Gabriel, J.