SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Lilly, 2021 NSSC 292

Date: 20211101
Docket: CRH 507902
Registry: Halifax

Between:

Her Majesty the Queen

Plaintiff

v.

Jacob Matthew Lilly

Defendant

Decision on Recusal Motion

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	October 6, 2021, in Halifax, Nova Scotia
Counsel:	Rick Woodburn, for the Crown Ian Hutchinson, for the Defence

By the Court:

Introduction

[1] Mr. Lilly was scheduled to begin a three-day trial before me on October 6, 2021, on the charge that he:

> on or about the 31st day of March 2021, at or near Dartmouth Nova Scotia, did without lawful authority engage in conduct with the intent to provoke a state of fear in Corrections Officer Matthew Hicks, a justice system participant, in order to impede him in the performance of his duties, contrary to section 423.1(b) of the *Criminal Code*.

[2] Mr. Lilly has made a motion for me to recuse myself on the basis of an argued a reasonable apprehension of bias.

[3] I conclude there is no merit in the application, and consequently I dismiss it.

Background

[4] Mr. Lilly presently stands charged with others (the so-called Burnside 15) with offences having occurred December 2, 2019, within the Central Nova Scotia Correctional Facility ("Burnside" jail) in Halifax Regional Municipality (HRM), Nova Scotia. Those charges alleged relate to a concerted attack by seven inmates on an inmate (SFA) who was alone in his cell. Various other inmates who were outside the cell are alleged to have prevented correctional officers from coming to

that injured inmate's assistance. Correctional Officer ("C.O.") Matthew Hicks was present to see and hear what went on at the relevant times around the cell of SFA. He was subpoenaed for a May 2021 trial for that reason. The May 2021 trial was adjourned to the Fall of 2021.

[5] The trials of the Burnside 15 were split into groups of seven and eight individuals respectively, both to be heard by Justice Jamie Campbell in September – November 2021. C.O. Matthew Hicks was expected to be a witness at those trials.

[6] In relation to the present intimidation charge alleged against Mr. Lilly, he appeared in Provincial Court on June 1, 2021. On July 26, 2021, he elected Trial in Supreme Court by judge alone, having waived his preliminary inquiry. I first became involved on August 24, 2021.

[7] After receiving Pre-trial Conference Report forms from both the Crown and the Defence, which are designed to assess how much court time is required for pretrial motions and the trial itself, I conducted a pre-trial conference that day, wherein I consulted with counsel regarding those matters. Thereafter, I completed the standard Report to the Trial Judge form which summarizes the content of the pre-trial conference.

[8] Included with those materials was a synopsis of the circumstances surrounding the alleged March 31, 2021, offence. Mr. Hutchison advised that Justice Arnold is in conflict and cannot hear the matter. The Crown advised that the Crown case would be presented through video and *viva voce* evidence from C.O. Matthew Hicks and other correctional/police officers.

[9] On August 26, 2021, the matter returned to Crownside before me, at which time trial dates were set for October 6, 7 and 8 [afternoon] 2021 with Justice Ann Smith presiding.

[10] Counsel also noted that Justice Jamie Campbell was conflicted in relation to the matter.

[11] Thereafter, I was assigned to hear the matter as the trial judge. Mr. Hutchison became aware of my involvement and sent a letter on October 1, 2021, at 2:30 PM, advising that his client instructed him to make an application to the court that I recuse myself from hearing Mr. Lilly's trial.

[12] In relation to Mr. Lilly's trial on the intimidation charge, the court file presently shows that subpoenas have been recently issued to Correctional Officers Matthew Hicks, Tyler Whynot and Detective Constable Brad Murray of Halifax Regional Police.

The application for recusal

[13] Mr. Hutchison stated in his October 1, 2021, letter:

> "On prior occasions, Mr. Lilly's co-accused in this prosecution have made applications before your Lordship for bail reviews and applications for *habeas corpus*. It is understood that in hearing one of these bail review applications your Lordship made findings of the case against Mr. Lilly and his co-accused was strong. Consequently, **your Lordship is in possession of knowledge and has made findings of potential bad character upon Mr. Lilly's behalf in relation to proceedings which albeit are not to be adjudicated upon in the forthcoming trial but form the context of the prosecution being brought against Mr. Lilly.**"
>
> [My bolding added]

[14] In response, I directed Mr. Hutchison to provide a written brief including greater particulars of the basis for Mr. Lilly's concerns (and directed the Crown to file a response brief).

In his October 5, 2021, brief Mr. Hutchison particularized the concerns as follows:[1]

> "**Corrections Officer Matthew Hicks… is also a witness for the Crown in the matter of Queen versus BJ Marriott** at al which is currently being heard before the Hon. Justice Campbell. There are 15 Defendants in Queen versus Marriott at al. **Mr. Lilly is one of these defendants**. The counts on the indictment… include conspiracy to commit murder, attempted murder, unlawful confinement, obstruction of a peace officer and assaulting a peace officer. As to the offences of commit murder, attempted murder, unlawful confinement, obstruction of the peace officer and assaulting a peace officer, **the Crown say that all 15 defendants are liable to conviction as they acted as co-conspirators**. As to the offences of attempted murder, unlawful confinement,

[1] There is presently a continuing publication ban in relation to my decision in *R v KC*, 2020 NSSC 186, as I consider KC's trial as not yet completed.

obstruction of a peace officer **the Crown state all 15 defendants are parties to an defence under section 21 of the Criminal Code of Canada.**… **Your Lordship has heard a bail application made by Mr. KC, Mr. Lilly's co-accused. You have also reviewed the audio recording for the bail application made by another co-accused, Mr. BJM. You have also heard several applications for *habeas corpus* brought by Mr. Lilly's co-accused. Your Lordship has heard the facts as alleged** by the Crown in Queen versus Marriott et al. [**we assume this includes your Lordship being told of Mr. Lilly's alleged actions**] the correctional history of Mr. Lilly's co-accused and the antecedents of Mr. Lilly's co-accused. **In ruling upon these applications, your Lordship has made findings as to the merits of the case against Mr. Lilly and his co-accused**. **In the bail review conducted held in Queen versus KC, 2020 NSSC 186, your Lordship held as follows:**

> **38 – the Crown also points out that the case against KC is strong as it relies primarily on videotape recordings, supplemented by observations of correctional officers who were present at the time of these events, and recorded those observations such as what people said, and who said what, very shortly after the events in question**. Moreover, even if KC is not as easily assigned criminal responsibility for attempted murder and conspiracy to commit murder as some of the other accused are, they say the evidence very strongly suggests he may be convicted of aggravated assault.
>
> …
>
> 44-the videotaped evidence speaks for itself. On December 2, 2019, KC ran towards trouble. **The Crown has a very strong case that he wanted to be in the middle of trouble – in the cell of [SFA, the victim].**
>
> …
>
> 49 I find that **there is a substantial likelihood that he will be found guilty of at least aggravated assault**…
>
> 52 1 will examine briefly the four enumerated factors, and include my conclusions thereafter:
>
> 1. the apparent strength of the Crown's case — **the case against him is strong, in relation to the following offences**: assault with a weapon; aggravated assault; attempted murder; conspiracy to commit murder. The case relies largely on videotaped evidence interspersed with recollections from correctional officers of what individuals were

shouting or saying at the relevant times. **K.C. made a concerted effort to get inside the cell of SFA, running down the stairs in haste, directly to that cell;** was seen speaking to **B.J.M. (who arguably orchestrated this attack- and who was denied bail by Justice Denise Boudreau in an oral decision which I have listened to only in order to ensure we are consistently interpreting the legal principles involved) very shortly before the attack on SFA in his cell; was seen kicking and punching into the cell area before the door was closed by two inmates on the outside; and all the while was one of seven people who were inside the cell for approximately three minutes during which very many injuries were inflicted on SFA**.

2. the gravity of the offences - the nature of the attack and the injuries to SFA are very high on the blameworthiness scale. The maximum penalties are among the highest available in the Criminal Code.

3. The circumstances surrounding the commission of the offences, including whether a firearm was used — no firearms were used, but sharp objects were used in place of knives by one or more of the seven attackers; **seven individuals against one person in a confined locked space; what very much appears to have been a coordinated, and inferentially therefore discussed before-hand, plan of attack, carried out in part in a conspicuously surveilled location inside a prison** - suggests a previously unseen level of audacity and threat to ongoing control of the institution by Correctional Services.

4. that the accused is liable on conviction for potentially lengthy terms of imprisonment — as examples, assault with a weapon carries a maximum of 10 years in custody, whereas aggravated assault has a maximum of 14 years in custody. If convicted, there is a substantial likelihood that the sentence will be in a federal penitentiary.

[53] **After considering the circumstances of this case in the context of the tertiary ground, I conclude that K.C. has not satisfied me that he should be released**. He has no proposed surety, no ties to Canada and a very weak release plan. He has not satisfied me that a dispassionate member of the public, apprised of all the circumstances and aware of the law including the Charter of Rights, would continue to have confidence in the administration of justice if he were released.

Finally, your Lordship is denied all applications for *habeas corpus* and denied the application for bail."

[My bolding added]

[15] Let me briefly make some salient observations at this point:

1. Mr. Lilly is not alleging actual bias on my part – he is alleging that there is a reasonable apprehension of bias in relation to me hearing his trial;
2. I have not presided on any *habeas corpus* application, bail or bail review application, or trial previously involving Mr. Lilly;
3. although no specific *habeas corpus* applications were identified regarding his co-accuseds, in any event it is important to recall that *habeas corpus* applications have nothing to do with the merits of criminal charges against persons, nor their suitability for release on bail. Since I did not deal specifically with Mr. Lilly in a *habeas corpus* application in which a judge might make it credibility findings in relation to that individual, there is no evidence that *habeas corpus* applications that I may have heard regarding other of the Burnside 15 are anything but irrelevant for purposes of this recusal motion;
4. my bail hearing decision regarding KC is not of assistance to Mr. Lilly for the following reasons:
    a. KC was one of the seven people who were *inside the cell* of SFA, which is the period of time in which SFA's injuries were administered – to my recollection there was no reference to Mr. Lilly during this hearing, and other than through the playing of portions of the videotape without audio showing the area of SFA's cell, the hearing proceeded by way of representations by counsel. I certainly was unable to identify Mr. Lilly during the playing of the videotape given that I had no memory of ever seeing him before. I have no recollection of specifically Mr. Lilly's alleged participation having been mentioned during the bail hearing of KC-only 7 of the Burnside 15 are alleged to have been involved directly in the cell assault of SFA – leaving 8 others remained outside the cell door;
    b. concluding that the case against KC was strong or "very strong" is a comment specific to KC and based on the limited

evidence presented at a bail hearing (which included that he was one of the 7 inside the cell), and which process is a focused on evidence relevant to whether the particular accused person seeking bail can safely be released while pending trial given the considerations in section 515 of the Criminal Code;

c. although Mr. Lilly in his brief states: "you have also reviewed the audio recording for the bail application made by another co-accused Mr. BJM… [**You have] heard the facts as alleged by the Crown in *R. versus Marriott at al*, (we assume this includes your Lordship being told of Mr. Lilly's alleged actions)…**" – I did not listen to any of the bail hearing evidence or submissions regarding BJM, and do not recall hearing of "Mr. Lilly's alleged actions" – moreover, as I stated in my decision regarding KC at para. 52 I only listened to the oral decision of Justice Boudreau, and did so for a limited purpose:

> "K.C. made a concerted effort to get inside the cell of SFA, running down the stairs in haste, directly to that cell; was seen speaking to B.J.M. (**who arguably orchestrated this attack – and who was denied bail by Justice Denise Boudreau in an oral decision which I have listened to only in order to ensure we are consistently interpreting the legal principles involved)** very shortly before the attack on SFA in his cell;

5. while each of the 15 defendants may be alleged to have been co-conspirators and parties pursuant to section 21 of the Criminal Code to all the offences committed against SFA, and therefore they each could bear criminal responsibility indirectly for the acts of others, the key point here is that they remain mere allegations – Mr. Lilly starts his trial on the charge that is before me with the benefit of the presumption of innocence which persists until the Crown has proved beyond reasonable doubt that he committed an offence. Moreover, the relevance of the December 2, 2019, circumstances to Mr. Lilly's March 31, 2021, charge is merely contextual.
6. Mr. Lilly also refers to my having agreed to a June 1, 2021, request by Stanley MacDonald QC, counsel for BJM, [Exhibit J-1] that another justice hear his bail review on account of my having heard the bail hearing for Mr. KC. That I deferred for administrative

reasons to another justice hearing the matter in that instance, is of no evidentiary significance to the recusal motion here.

7. the charge against Mr. Lilly is specific to CO Matthew Hicks.[2]

The elements of the section 423.1 *Criminal Code* offence

[16] The elements of the s. 423.1 *Criminal Code* offence were referenced in *R v Armstrong*, 2012 BCCA 248:

> (b)With respect to s. 423.1 of the *Criminal Code*:
>
> ***Armstrong***
>
> [44] Section 423.1 is a specific intent offence. In *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833 at 863, 45 C.C.C. (3d) 1, Justice McIntyre described the difference between a specific and general intent offence. He described specific intent by reference to "the purpose" of the performance of the *actus reus*:
>
> > A distinction has long been recognized in the criminal law between offences which require the proof of a specific intent and those which require only the proof of a general intent. This distinction forms the basis of the defence of drunkenness and it must be understood and kept in mind in approaching this case. In *R. v. George*, 1960 CanLII 45 (SCC), [1960] S.C.R. 871, Fauteux J. said, at p. 877:
> >
> > > In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.
> >
> > This statement makes the distinction clear. The general intent offence is one in which the only intent involved relates solely to the performance of the act in question with no further ulterior intent or purpose. The minimal intent to apply force in the offence of common assault affords an example. A specific intent offence is one which

[2] To be clear, Mr. Hicks has never appeared before me to testify, and I did not purport to make any credibility findings about Mr. Hicks when considering the bail decision of Mr. KC – I say this particularly because I do not recall Mr. Hicks's name even being mentioned at that hearing, and I would be surprised if it were since the circumstances of the offences there were entirely based on representations by counsel, as supplemented by the videotape without audio.

> involves the performance of the *actus reus*, coupled with an intent or purpose going beyond the mere performance of the questioned act. Striking a blow or administering poison with the intent to kill, or assault with intent to maim or wound, are examples of such offences.

[45] There is not, however, a clear equation of "intent" with "purpose"; intention as understood in relation to an offence does not always require that the purpose of the act coincide with "intent" under the *Criminal Code*. In *Chartrand*, for example, Justice L'Heureux-Dubé, discussing the offence of abduction of a child "with intent to deprive a parent ... of the possession of that person" contrary to s. 281 of the *Criminal Code*, said at 889-890:

> General principles of *mens rea* apply to the words "with intent to", and, accordingly, in order to conclude that the *mens rea* of the offence under s. 281 has been made out, it is sufficient that the taker knows or foresees that his or her actions would be certain or substantially certain to result in the parents (guardians, etc.) being deprived of the ability to exercise control over the child.
>
> In *R. v. Buzzanga and Durocher* (1979), 1979 CanLII 1927 (ON CA), 49 C.C.C. (2d) 369 (Ont. C.A.), although in the context of wilful promotion of hatred, Martin J.A. stated at pp. 384-85:
>
> I agree ... that, as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted so as to produce it, then he decided to bring it about (albeit regretfully), in order to achieve his ultimate purpose. His intention encompasses the means as well as to his ultimate objective.
>
> This definition of intent was subsequently approved by this Court in *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, at pp. 774-75. Moreover, in *R. v. Olan*, 1978 CanLII 9 (SCC), [1978] 2 S.C.R. 1175, at p. 1182, this Court examined the possibility that intent under s. 338 (now s. 380) of the *Code* may encompass a contemplated outcome distinct from the purpose of the conduct. It adopted the English Court of Appeal's dictum in *R. v. Allsop* (1976), 64 Cr. App. R. 29:
>
> > Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is "intended" only in the sense that it is a contemplated outcome of the fraud that is perpetrated.

[Emphasis added in original]

. . .

> [47] The offence of which Mr. Armstrong is convicted is expressed in somewhat different language, with "in order to" in place of "with intent to". Yet although the words differ, I do not consider the phrase "in order to" has a more specific meaning than the phrase "with intent to", and it seems to me the approach described in *Chartrand* is the approach that should apply to the *mens rea* component of an offence under s. 423.1. Thus I do not accept the Crown's submission that the *mens rea* test is "relaxed somewhat" from the test expressed in *Chartrand*; nor do I accept that it is more rigorous.[3]

[17] Let me next turn to the law regarding alleged reasonable apprehensions of bias.

What constitutes a reasonable apprehension of bias by a trier of fact?[4]

[18] As Mr. Lilly stated in his brief:

> In *Nova Scotia (Attorney General) v MacLean* 2017 NSCA 24 the [court] reviewed the applicable law in a motion for a Judge to recuse themselves upon the ground's reasonable apprehension of bias. Speaking for a unanimous Court of Appeal, Justice Saunders said:
>
> [38] I will begin this section of my reasons by describing the legal principles engaged in this case.
>
> [39] **First, as a matter of law, there is a strong presumption of judicial impartiality, which is not easily displaced. Second, there is a heavy burden of proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision-maker should be disqualified on account of bias**. Third, whether a reasonable apprehension of bias exists is "highly fact-specific". Such an inquiry is one where the context, and the particular circumstances, are of supreme importance. The allegation can only be addressed carefully in light of the

[3] See also *R v Parsons*, 2017 NSSC 269 per Wood J (as he then was), and *R v Bergeron* 2015 BCCA 177. Regarding a more recent discussion of specific versus general intent offences see Justice Moldaver's reasons in *R v Tatton*, [2015] 2 SCR 574.

[4] Most recently our Court of Appeal has addressed this issue in a very comprehensive fashion in *R v Potter*, 2020 NSCA 9 beginning at paragraphs 741 per Derrick, JA.

entire context. There are no shortcuts. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45.

[40] **The "test" regarding what constitutes a reasonable apprehension of bias** appears in the oft-quoted dissenting judgment of de Grandpré, J. in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 at ¶40:

> …the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information, that test is "**what would an informed person, viewing the matter realistically and practically— …conclude? Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.**

[41] **In relation to what constitutes the "reasonable person",** the qualifications are not limited to just being "reasonable". The law requires fully *informed* "reasonable person". That is:

> …**a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality.**

[***R. v. S.(R.D.)(R.D.S**.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484]

[42] **In that case, the Supreme Court of Canada explained in detail the requirement for neutrality in decision-making, and how the duty to be impartial did not oblige judges to have no sympathies or opinions at all, but rather to ensure that they were receptive to other points of view.**

…

[44] Having an opinion will not disqualify a decision-maker from fairly adjudicating a matter; **it is the ability to approach one's consideration of the issues in dispute with an "open mind" that is required**. See as well *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851 at ¶3.

[My bolding added]

[19] Justice Cory elaborated in *RDS*, [1997] 3 SCR 484:

> **106** A similar statement of these principles is found in R. v. Bertram, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:
>
> > In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. **In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.**
>
> See also R. v. Stark, [1994] O.J. No. 406 (Gen. Div.), at para. 64; Gushman, supra, at para. 29.
>
> **107 Doherty J.A. in R. v. Parks (1993), 15 O.R. (3d) 324 (C.A.), leave to appeal denied, [1994] 1 S.C.R. x, held that partiality and bias are in fact not the same thing**. In addressing the question of potential partiality or bias of jurors, he noted at p. 336 that:
>
> > Partiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases.
>
> **In demonstrating partiality, it is therefore not enough to show that a particular juror has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence**: Parks, supra, at pp. 336-37.
>
> [My bolding added]

[20] It is not at all unusual for judges to hear evidence and representations which place an accused in what a layperson might consider a very unfavourable light (such as what could be considered during the: bail hearings, preliminary inquiry hearings, pretrial motions involving the exclusion of inculpatory evidence-including statements by accused persons or real evidence which implicates them in a crime) and yet they are trusted to go on in even the same proceeding involving

the same individual to render a just verdict on the evidence presented in relation to a trial on the merits.

[21] In *R v Francis*, [2021] NJ. No. 84, His Honour Harold J. Porter summarized it well at paras. 28-30, where he stated:

> "28 In *Yukon Francophone School Board Education Area # 23 v. Yukon (Attorney General)*, 2015 SCC 25, at para 22, Abella J., writing for the majority of the Court, said that
>
> > "**The objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process. The issue of bias is thus inextricably linked to the need for impartiality**."
>
> 29 At para 33, Abella J. said as follows:
>
> > **Judicial impartiality and neutrality** do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they **require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one.**
>
> 30 **The mere fact that a judge may have dealt with the accused on other occasions, for other purposes, including bail, trial and sentencing, does not invite an inference of bias.** Judges are presumed to be impartial, and it takes compelling evidence to dislodge that presumption. No such evidence has been heard in support of this application."

Conclusion

[22] In summary, I ask myself, taking into consideration that:

1. there is a strong presumption of judicial impartiality, which is not easily displaced;

2. and there is a heavy burden of proof upon the person making the allegation to present cogent evidence establishing "serious grounds" sufficient to justify a finding that the decision-maker should be disqualified on account of a reasonable apprehension of bias-

What would an informed person, viewing the matter realistically and practically, conclude?

Would they think that it is more likely than not that I, whether consciously or unconsciously, would not decide fairly regarding Mr. Lilly's trial (that is, to retain the ability to approach my consideration of the issues in dispute with an open mind)?

[23] Mr. Lilly has not rebutted the presumption of judicial impartiality.

[24] I therefore dismiss his application for my recusal.

Rosinski, J.