SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Muise, 2013 NSSC 406

Date: 20131213
Docket: CRH 373467
Registry: Halifax

Between:

Her Majesty the Queen

Crown

v.

Cody Alexander Muise

Defendant

VOIR DIRE

Scopelitti **Application: Evidence of Deceased's Propensity for Violence**

Judge: The Honourable Justice Peter P. Rosinski

Heard: April 10, 2013, in Halifax, Nova Scotia

Oral Decision: April 10, 2013

Written Decision: December 13, 2013

Counsel: Christine Driscoll and Darrell Martin, for the Crown

Peter Planetta, for the Defendant

By the Court:

[1] This then is the decision regarding the S*copelliti* application by the Defence in respect to questioning of Ryan MacDougall. I will say generally Mr. Muise seeks to cross-examine Crown witnesses regarding the reputation in the community for disposition toward violence of Brandon Hatcher who Mr. Muise is accused of having murdered. Mr. Muise relies on a number of cases including the *R. v. Ward*, 2009, NSSC 406 per Cacchione, J. His application for leave is also based on the Ontario Court of Appeal decision, *R. v. Scopelliti,* (1981), 63 C.C.C. (2d) 481 and its progeny.

[2] The Defence herein suggests that it will rely on the self-defence provisions of the *Criminal Code*, likely Section 34(2) or 35 and that the character of Mr. Hatcher is only relevant to that issue. I have thus far heard the evidence of Ryan MacDougall in the *voir dire*, and I do have a sense of the context of the case based on his direct examination to date in the main trial.

[3] The evidence suggests to date, and is anticipated to continue to suggest, that Mr. Muise and Mr. Hatcher were members of rival groups between whom much

animosity existed. Some time in the fall of 2012, Mr. Muise's girlfriend may have been shot but more importantly, on December 3, 2010, a Mr. Colin Gillis, an acquaintance of Mr. Muise, was wounded in a shooting. Mr. Muise would appear to have been of the view that Mr. Hatcher was responsible in some fashion for the shootings and determined that he and friends, Mr. Munroe and MacDougall, would seek revenge, if you will, by shooting Mr. Hatcher. This is essentially a summary perhaps of what Mr. MacDougall said at the main trial, but it sets the stage as to the relevance and context of the proposed questioning of Mr. Ryan MacDougall as to Mr. Hatcher's disposition.

[4] Mr. MacDougall did testify that he, Mr. Munroe and Mr. Muise armed themselves and went to the area where they expected to find Mr. Hatcher, and did. A telephone call ensued between Mr. Muise and Mr. Hatcher resulting in Mr. Hatcher exiting a residence with a shotgun, it appears. When he fired in the direction of the area of Muise, MacDougall and Munroe, they returned fire and Mr. Hatcher was struck once with a bullet which took his life.

[5] The Crown also anticipates calling evidence, it appears, from Jamie and Patricia Downs and Ashley Boudreau. All these persons may be subject to some similar *voir dires*, but they were also associated with the residence on Tartan Avenue at which the three men, Muise, Munroe and MacDougall, congregated prior to the shooting and fled to after the shooting. Mr. Planetta has indicated that it may be his intention to cross-examine those witnesses similarly on their knowledge of the reputation of Mr. Hatcher in the community for disposition towards violence.

[6] Now, the Defence says the evidence is necessary, whether it is reputation evidence or specific incident evidence, including the criminal record of Mr. Hatcher potentially, that the evidence is necessary to support its position that it is more likely that Mr. Hatcher was the initial aggressor in the confrontation between Muise, MacDougall and Munroe and himself, and to support Mr. Muise's position that self-defence has an air of reality in the circumstances.

[7] I recognize that there is no strict requirement that Mr. Muise testify in order to support self-defence arguments (see: *R. v. Chan*, 2005 NSCA 61). On the other

hand, the test for self-defence in Section 34(2), for example, is simultaneously subjective and objective. The defence turns in part on the accused's apprehension of death or grievous bodily harm and the accused's belief that he cannot otherwise preserve himself. Both elements of the defence look to the accused's state of mind, a necessarily subjective inquiry. Section 34(2) provides that however, both the apprehension and belief must also be reasonable. The jury must ultimately consider the relevant circumstances if it is found to have an air of reality as the accused perceived those circumstances, and test that perception against the community standard of reasonableness (see, for example, the *R. v. Pilon*, 2009, ONCA 248 at paragraph 72 to 74). Thus, even if the accused does not testify, the evidence to support the existence of the required state of mind in self-defence must come from somewhere in the trial record.

[8] The difficulty that I face is I must make a decision about the cross-examination of Crown witnesses at this time before I have any concrete notion of the level to which the self-defence arguments of Mr. Muise will rise ultimately, and noting again that that is the only basis upon which this evidence would be considered relevant according to the Defence. The Crown questioned, in its

submissions earlier, how could there be an air of reality to the defences here if it is undisputed that Mr. Hatcher fired first? How can his disposition for violence add anything meaningful, particularly given the surrounding circumstances which suggest that Mr. Muise, MacDougall and Munroe may have gone there preemptively to shoot Mr. Hatcher?

[9] I recognize that the Crown is entitled to a fair trial as well. It argues that evidence, of Mr. Hatcher's disposition for violence, whether through evidence of specific acts which Defence suggested it would place into evidence such as criminal record and sentencing transcripts for Mr. Hatcher, or otherwise, or general reputation in the community for disposition towards violence, may unfairly portray Mr. Hatcher in a negative light in the eyes of the jury. In other cases, see the comments of Justice Osborne in *R. v. Yaeck*, (1991), 68 C.C.C. (3d) 545 at paragraph 74 to 76 and Doherty, J.A. of the Ontario Court of Appeal in the *R. v. Watson*, (1996), 108 C.C.C. (3d) 310 paras. 47 and 51. In the case, *Yaeck*, Justice Osborne reiterated that the test for admissibility of such evidence was whether the evidence had "sufficient probative value for the purpose for which it is tendered to justify its admission."

[10] In my view, I must accept the representation of Defence counsel that "there is a likelihood that at the conclusion of the trial there will be air of reality to a defence under Section 34(2) and 35" which is taken from Mr. Planetta's March 28, 2013 letter to the Court. To a similar effect, see Justice Doherty's comments in *Watson*, above cited, at paragraph 30 regarding which was, in that case, a specific incident of character evidence.

[11] I bear in mind that the Court should be very reluctant to preclude the Defence from presenting its case in the most full manner possible in order to ensure against any miscarriage of justice. My sense is that if the questions on cross-examination regarding the specific incident are not allowed, the Defence may be unnecessarily hobbled. That evidence does, in my view, have sufficient probative value for the purpose for which it is tendered to justify its admission. As I understand it, the Crown acknowledges that that evidence may also be relevant to motive as it would explain why Mr. MacDougall, after being bear sprayed or pepper sprayed by Mr. Hatcher and robbed, according to him, he would have an *animus* as against Mr. Hatcher.

[12] As to the prejudice to the fair trial rights of the Crown, I note that the jury has heard directly from Mr. MacDougall thus far, who was present, that Mr. Hatcher fired first, and that Mr. Muise, MacDougall and Munroe went there to preemptively shoot [at] Mr. Hatcher in any event. In my view, in all the circumstances, the Crown case will not be unreasonably or unfairly undermined by allowing the proposed cross-examination of the Crown witness, Ryan MacDougall, on the specific incident of the bear spray.

[13] However, as to the reputation evidence, I have a different opinion. As noted in *The Law of Evidence in Canada*, third edition, Sopinka, Letterman and Bryant, 2009, at page 652:

> The accused can prove such disposition by:
>
> (1) evidence of reputation;
>
> (2) proof of specific acts;
>
> (3) evidence of the deceased's criminal record; and
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> (4) expert opinion evidence of disposition.

[14] With respect to evidence of specific acts, this evidence does not have to meet the test of similar act evidence proffered by the Crown. Where the reputation or acts are known to the accused at the time of the incident, such evidence is admissible to show the accused's reasonable apprehension of violence from the deceased when that state of mind is a relevant issue. But the previous reputation or acts of violence need not have been known to the accused at the time of the incident to be admissible, so long as there's some other evidence of aggression on the part of the deceased during the incident; then the evidence is relevant to show the probability of the deceased having been the aggressor or having provoked the accused and to support the accused's evidence that the deceased was the aggressor.

[15] I note two caveats, if you will, in this particular case. Firstly, the evidence would have to be at law sufficiently probative. The proffered evidence regarding Mr. Hatcher's disposition for violence in the context of this case must address the inference the Defence ultimately wishes the jury to draw. That is, that the admission of such evidence is premised on the belief that a person's disposition is a reliable predictor of conduct in any given situation and more precisely here, that Mr. Hatcher was the initial aggressor and/or that Mr. Muise had reason to believe,

subjectively and objectively, that his actions were necessary to preserve himself from death or grievous bodily harm.

[16] Secondly, the evidence of general reputation in the community should conform to the following statements in Sopinka *Law of Evidence in Canada* at page 624 and without reciting them, paragraphs 10.24 to 10.26; which, although in fairness, they are referred to there as relating to an accused's reputation, as a matter of procedure and such the comments are still appropriate.

[17] In this case, the difficulty I have with the reputation evidence is that I find the evidence is, as a matter of fact if you will or proof, insufficient to establish the pre-requisites of reputation evidence. Firstly, it is not entirely clear to me that Mr. MacDougall understands what a "reputation in the community" means. I say that because he said in his testimony, "I don't know a lot of people", although he has lived in Spryfield for, I think, the entire portion of his life. He says I don't know a lot of people. He and Mr. Hatcher, as far as I recall from the evidence, have not really crossed paths at any other point other than maybe into 2008 to 2010. So there's no, if you will, pool of people who would know Mr. Hatcher perhaps;

obviously on the evidence, that he would have also traveled in those circles that would be traveled in by Mr. MacDougall. There is nothing like a church community, a school community, a work community, a sports community. Now, “the community”, for the record, whether it is appropriate or not and I think it is, is referred to “Spryfield”, and “Spryfield” has uncertain boundaries, but I will say, based on the 2011 census of population in HRM, the District of HRM Spryfield/Sambro/Prospect Road had a population of 23,500 people in 2011. And if that is any measure at all of the size of the Spryfield area proper, even if it is only half that of 10,000 people, that is a pretty significant community, and although it was characterized by Mr. MacDougall as a small community, the difficulty I have is that Mr. MacDougall really never clarified what reputation in Spryfield, he has a reputation of being bad and what was that, he was not terribly forthcoming about what he meant by that. Then he said well, “sometimes violent”. I do note that that was after being led by Mr. Planetta and asked would he have a reputation effectively for violence, and he said sometimes he can be a “little violent.”

[18] In cross-examination, he said, well, he basically based that on his own personal contacts with Mr. Hatcher, and in large measure at least is the sense I got. He had, for example as well, no idea how old Mr. Hatcher was in December, 2010 although they had been acquaintances, so I appreciate they had had some contact, but it appears that it was relatively late in life, perhaps between the ages of 15 and 17 years of age, before the night of the shooting. And I don't think when we talk of "reputation in the community," I think there's a real danger that not now are we just saying that Mr. MacDougall has a particular opinion of Mr. Hatcher, but worse than that, we are now putting the weight of an entire community behind this predisposition for violence. And I just do not see that the evidence is there to show that there is actually established here a reputation in the community that Mr. Hatcher was violent. Specifically on whether the community was really even captured, I don't get the sense Mr. MacDougall actually knows what the community reputation is. He knows the reputation perhaps among his circle of friends, but that is not a community.

[19] And then there is the question of well, he can be a "little bit violent." Again, that is, I think, insufficient to meet the standard for general reputation in the

community evidence, and ultimately it's a matter of insufficient evidence, and it would, I think, skew the jury's view inappropriately or disproportionately to present that evidence to them. I am satisfied though he had the personal experience with Mr. Hatcher. It is relevant in any event to motive and ultimately it may be at the end of the trial that it will come more precisely to a determination of whether that should be, not just evidence of motive, but also evidence perhaps of the disposition of Mr. Hatcher, but I don't see any particular danger in waiting towards the end of the trial to make the decision more so about whether I will reiterate to the jury the purpose for which they can use the specific incident, includes, you know, Mr. Hatcher's if you will, predisposition to violence as a matter of the basis for which they could use the evidence in addition to the fact that it may explain the motive.

[20] So I will allow, in summary then, the evidence of the specific incident, but not in the case of this witness at least, the reputation evidence that is suggested should be put to him in cross-examination.

Rosinski, J