SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Muise, 2013 NSSC 407

Date: 20131213
Docket: CRH 373467
Registry: Halifax

Between:

Her Majesty the Queen

Crown

v.

Cody Alexander Muise

Defendant

VOIR DIRE
Character Evidence of the Deceased

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	May 1, 2013, in Halifax, Nova Scotia
Oral Decision:	May 1, 2013
Written Decision:	December 13, 2013
Counsel:	Darrell Martin and Christine Driscoll, for the Crown Peter Planetta, for the Defendant

By the Court:

[1] This, then, is a decision regarding the voir dire set in motion by the Defence regarding the character evidence of the deceased in this case, Brandon Hatcher.

Introduction

[2] The Crown has closed its case and tendered its exhibits. In addition to the admissions made under Section 655 of the *Criminal Code*, that is the case that Mr. Muise faces at this stage of the trial.

[3] In summary, the evidence and Crown allegations therein suggest that Sarah Oakley was shot on October 16th, 2010, and at all the relevant times was the girlfriend of Mr. Muise. On December 3rd, 2010 in the afternoon, Colin Gillis, a friend of Mr. Muise was also shot while at Kyle Cater's house, which was a hang-out for Mr. Muise and his friends.

As to the Factual Context at Trial:

[4] On December 3rd, 2010, Mr. Muise, Matthew Munroe armed themselves with a pistol and a .30-calibre carbine rifle, probably semi-automatic, and along

with Ryan MacDougall who had a single-shot shotgun and shells with him, they went looking for Brandon Hatcher at or about 7:30 to 8:00 p.m. Mr. Hatcher lived in the Greystone area of the Spryfield area of Halifax, Nova Scotia. At about 8:15 p.m. that day, he was at 123 Lavender Walk in the Greystone area when he received a call from Mr. Muise that he and the others were "out back". Mr. Hatcher with a pump-action shotgun exited his residence, took refuge behind a fence in between 128 and 132 Lavender Walk. Upon discharging his shotgun, Munroe, MacDougall, and Mr. Muise responded by firing in the direction of Mr. Hatcher. Mr. Munroe was firing a revolver, Mr. MacDougall fired once a shot with a shotgun, and Mr. Muise fired repeatedly with his .30-calibre carbine rifle.

[5] The evidence at trial thus far, the above-noted of which largely is the evidence of Ryan MacDougall, includes that there were 12 spent casings consistent with a .30-calibre carbine weapon found at a location as described by Ryan MacDougall who gave evidence for the Crown. The police also found a pump-action shotgun behind the fence where it is believed Mr. Hatcher took refuge.

[6] Shortly after the shots were heard by Amber MacLeod, his girlfriend who was present with him at 123 Lavender Walk, Mr. Hatcher returned into the house

badly wounded by one gunshot which passed through his back and out near the midline of his chest rupturing a key artery causing him to ultimately bleed to death shortly thereafter.

The Position of the Defence in Relation to the *Voir Dire*

[7] Mr. Muise intends to rely on Sections 34(2) and 35 of the *Criminal Code* of Canada as the sections [in relation to] which, on December 3rd, 2010, he has asked the Court to consider whether the following evidence should be admissible as evidence of the disposition of the deceased, Brandon Hatcher, towards violence.

> (1) Evidence of two specific convictions and their circumstances occurring March 31st, 2007, Section 266(b); and June 8th, 2007, Section 264.1 of the Criminal Code.
>
> (2) The entire criminal record for Mr. Hatcher as at December 3rd, 2010;
>
> (3) His general reputation in the community for disposition towards violence which would be testified to by Constable Darcy Houston; and
>
> (4) The evidence of Sarah Oakley anticipated to outline that on October 16th, 2010 she was seated in a residence and Cody Muise, just as he sat down beside her, she was shot in the abdomen area through an open window at 48 Spencer Avenue, a basement apartment in Halifax, Nova Scotia.

[8] The Defence will argue that Exhibit 54, and the underlying evidence therefore in the main trial which purports to be a text-message conversation

between Mr. Hatcher and Mr. Muise, is in reference to that shooting of Ms. Oakley. The evidence is not conclusive that Mr. Hatcher was in fact using telephone number 292-5008 nor that Mr. Muise was using 902-292-1147.

[9] Presuming, however, that they were, as there is some evidence that suggests at this trial the exchanges between them on November 23rd, 2010 were in relation to the shooting of Ms. Oakley, then it would be evidence of Mr. Hatcher having been identified as the person who shot Ms. Oakley referring to himself as, "the man in the window," and "I seen the bitch in your eyes 'cause you left your woman to die."

The Evidence at the *Voir Dire*:

[10] In support of its application, the Defence presented evidence as follows:

> (1) The police synopsis which was agreed to as a substitute for sentencing transcript; factual admissions by Mr. Hatcher were entered as voir dire number 2 and 3 for the March 31st and June 8th, 2007 offences respectively.
>
> (2) The criminal record of Mr. Hatcher was agreed to as evidence by consent as *voir dire* number 4.
>
> (3) The evidence of Constable Darcy Houston as to his knowledge of the general reputation for violence in the community of Brandon Hatcher.
>
> (4) The evidence of Sarah Oakley as to the shooting of her on October 16th, 2010 in reference to the existing trial exhibit 54, text messages between Mr. Muise and Hatcher purportedly on November 23rd, 2010 based on Exhibit 53.

The Defence Postion

[11] The Defence argues that Exhibit VD-2, 3 and 4 are probative in relation to Mr. Muise's self-defence position. That is, that Mr. Muise says these examples of violent offences which don't appear to have been known to Mr. Muise specifically should be heard by the jury so that they can make an informed decision about whether Mr. Hatcher was the initial aggressor.

[12] The Defence argues that Constable Houston's evidence of Mr. Hatcher's reputation in the community for violence is relevant to whether Mr. Hatcher was the initial aggressor or not. And that is, if there were evidence that Mr. Muise was aware of Mr. Hatcher's reputation for violence. Sorry, I think I would better read this as follows:

[13] [Firstly,] the Defence argues that Constable Houston's evidence of Mr. Hatcher's reputation in the community for violence is relevant as to whether Mr. Hatcher was the initial aggressor or not.

[14] [Secondly,] the Defence argues that this evidence may also be relevant to whether Mr. Muise had a subjectively and objectively reasonable apprehension of death or grievous bodily harm, and that he believed he could not otherwise preserve himself from death or grievous bodily harm if there were evidence that Mr. Muise was aware of Mr. Hatcher's reputation for violence.

[15] [Thirdly,] the Defence argues that the evidence of Sarah Oakley in combination with Exhibit 54 and 53, although a specific incidence of violence, because it was known to Mr. Muise as likely having been Mr. Hatcher, it is therefore relevant to not only assisting the jury to make an informed decision about whether Mr. Hatcher was the initial aggressor, but also as to whether Mr. Muise had a subjectively and objectively reasonable apprehension of death or grievous bodily harm, and that he believed he could not preserve himself otherwise from death or grievous bodily harm except by firing at Mr. Hatcher with his firearm.

[16] Although the Defence conceded that such disposition evidence may reflect badly on Mr. Hatcher, admitting the evidence will be a lot less prejudicial to the Crown case than disallowing the evidence will be to Mr. Muise, they stated. In

effect, the playing field may be slightly uneven for the Crown, but not disproportionately so, the Defence argued.

The Crown Position

[17] The Crown takes the view that only evidence that assists the jury in determining who is more likely the initial aggressor should be considered for admissibility. It notes that Mr. Muise's self-defence argument is already arguable without this evidence since Ryan MacDougall testified that Mr. Hatcher fired first, since the three - Muise, Munroe, and MacDougall - went there with guns assuming Mr. Hatcher would be armed, and they all three went there believing that only hours earlier Mr. Hatcher was the one who had shot Colin Gillis.

[18] The Crown says that the probative value of this evidence to be tendered or in dispute in the *voir dire* is very little, and substantially outweighed by the prejudice to the jury's task - that is, that it would not reasonably assist the jury to reach a just verdict.

[19] The Crown argues that the specific incidents of violence unknown to Mr. Muise should not be considered for admissibility, even as to who was the initial aggressor, which they might otherwise be, because since he may not testify and

under those circumstances, in the case here there is no air of reality to his self-defence argument.

[20] The Crown argues in relation to Sarah Oakley's evidence that she does not know who shot her or whether that person intended to shoot Mr. Muise. Exhibit 54 is not sufficiently connected or clear to create a sufficient link, the Crown says, between the shooting on October 16th and the text messages as in the demonstrative aid, Exhibit 54, and the underlying Exhibit 63 conversations which purportedly occurred on November 23rd, 2010, and purportedly were between Mr. Muise and Mr. Hatcher.

[21] The Crown also questions the credibility of Ms. Oakley and her reliability in recounting the circumstances of how she got shot on October 16th, 2010. It also refers the Court to the *R. v. Varga* case, 159 C.C.C. (3d) 502, the Ontario Court of Appeal where the Court observed that the dangers of over-exposing the bad character of a deceased may invite jurors to conclude that essentially the person got what they deserved.

[22] In a nutshell, the Crown argues that there will be no air of reality to self-defence in this case, and to allow disposition evidence of the deceased towards violence in such circumstances will distort the jury's rendering of a just verdict; unless either the proffered *voir dire* evidence is ruled inadmissible, or if admitted, that the Crown have the opportunity to level the playing field - that is, [regarding both] the character evidence of the deceased's and accused's disposition for violence.

Analysis

Brandon Hatcher's Reputation Towards Violence Evidence

[23] As to the applicable law [regarding "reputation" evidence], I have twice earlier touched on the principles applicable in my earlier *Scopelliti* decisions herein. The difference in this application is the evidence available to me.

[24] I heard evidence in the *voir dire* from Constable Darcy Houston. I find him to be a credible witness. He has extensive experience in policing in the Spryfield area, and specifically the Greystone area thereof. In fact, the police have an office at 146 Greystone Road.

[25] In September 2007, a position was created to allow Halifax police to have a presence there in order to promote a more productive community experience for the residents and to combat crime. He noted that he has been with Halifax police for eight years, the first three of which he was on patrol specifically in the Spryfield area.

[26] He noted that his partner and he have their cell phones available to be called by anyone in the Greystone area, as they see their job as being in constant communication and always available to residents there in order to break the cycle of crime present. He has cultivated also many human sources of information within the community. He outlined that in December 2010, there was an active gang known as the Greystone Gang who intended to control the drug trade in the area, and that people in the community were fearful of them and they were known to be violent.

[27] At that time, Brandon Hatcher was a member of the gang. They were associated with the Melvin family. Their rivals, if you will, were known as the Young Mob with whom Cody Muise, Kyle Cater, and Matt Munroe among others were associated, and they were associated with the Marriott family.

[28] He had known Mr. Hatcher since 2005, dealing with him about criminal matters, but got more and more interactions with him in that regard in his later years. He arrested Mr. Hatcher ten times, and noted he was violent on two occasions within the period of 2007 and 2008.

[29] Asked specifically about Mr. Hatcher's reputation in Greystone, he indicated that the general population of the Greystone area was fearful of him and the Greystone Gang. And they had a general reputation for violence which was known in that community.

[30] He indicated the Greystone area is a tight-knit community and people know what is going on there. Greystone is a public-housing community which in 2008 had 232 units with about 540 residents, 340 of which were less than 18 years of age. Constable Houston was not able to say what Mr. Hatcher's reputation for violence in the greater Spryfield community was.

[31] In my view, it is not necessary to do a canvass of a community to establish the reputation for violence of a member of that community. Courts must be

flexible in receiving the evidence of reputation in the community for disposition towards violence. However, reputation evidence is in some respects "hearsay writ large" in the community. For that reason, some might suggest that Courts consider if there is a circumstantial guarantee of trustworthiness as to the reliability of the evidence in question.

[32] I do not intend to go that far in using that approach which arises from the principled approach to the hearsay exception. That, of course, is because the purpose in introducing hearsay evidence is for the truth of its contents. And the purpose here as to reputation evidence is a different one.

[33] I notice Justice Osborne said in the *Yaeck* case, [1991], OJ 2062, (Ontario Court of Appeal):

> The threshold standard for admission of such evidence is 'whether it has sufficient probative value to assist the jury in arriving at a just verdict.'

[34] Or it may be said in relation to this case, that there has to be some level of threshold reliability established to the proffered evidence, and it must be in relation to a live issue at trial. That is, in this case the Defence has argued the self-defence issue.

[35] I've heard that Mr. Hatcher was known in at least the Greystone area as being a person to be fearful of, which clearly suggests a violent disposition. I am satisfied that Constable Houston's evidence establishes the threshold reliability of the evidence that he gave. I note, however, that the evidence of Mr. Hatcher's reputation for violence intersects with, and is largely enhanced by, his membership in the Greystone Gang which had a reputation that they were violent, controlled the drug trade in the Greystone area, and people were fearful of them.

[36] Thus, I am concerned that Mr. Hatcher's reputation is really part and parcel of the Greystone Gang's reputation. And in that situation, it is difficult to articulate what is actually his personal reputation for violence in the community, as opposed to his reputation in the community as a member of the Greystone Gang, whose members have a reputation and disposition for violence.

[37] That being the case, it would be unfair in the circumstances of this case to permit the Defence to call this reputation evidence without setting the context of the gang association of Mr. Hatcher. And that would tend to make relevant the circumstances of the gang rivalry here, since Mr. Muise would also be similarly

situated generally speaking, it appears from the evidence.

[38] That is to say, although the evidence has threshold reliability, I am concerned that its probative value is undermined here because Mr. Hatcher is a member of a gang, and it is their reputation that is projected in Constable Houston's evidence, not precisely Mr. Hatcher's reputation per se, and because the use to which this evidence would be put would be to establish that Mr. Hatcher was the initial aggressor. Moreover that evidence has already been established by Ryan MacDougall's testimony that Mr. Hatcher fired first. And even if the jury were not to accept that specific testimony, there isn't much doubt according to Ryan MacDougall's evidence or testimony that he, Matt Munroe, and Mr. Muise all expected Mr. Hatcher to come outside with a weapon. And because the jury will also have before it Mr. Hatcher's criminal record, which is more specific evidence as to the nature of his violence and the dates thereof as well as conclusive findings of guilt, that evidence will allow the Defence to argue that Mr. Hatcher was likely the initial aggressor. It will be up to the jury to decide in all the circumstances if they accept that suggestion by the Defence.

The Criminal Record and Two Incidents of Violent Behaviour by Brandon Hatcher

[39] I am aware that by allowing the criminal record in two specific incidents of sentencing noted to be Exhibits VD-2, 3 and 4, I am exposing Mr. Hatcher's character significantly - that is, allowing an argument that he has a predisposition towards violence.

[40] To have allowed the reputation evidence of Mr. Hatcher into evidence, it being intertwined with the Greystone Gang, would have meant that his gang membership would have been front-and-center. In my view, that would have been unduly prejudicial to his character. And if one were to argue that the Crown ought to be allowed to call evidence of Mr. Muise's gang membership to counterbalance that, a prejudice to the fair-trial rights of Mr. Muise would have been prejudiced to an extent that would be unacceptable to the Court and require the evidence to be excluded.

[41] I observe that although the criminal record exposes Mr. Hatcher's character, it would not be much different if he was a living witness that testified, although

such witnesses could attempt to personally rehabilitate their character while testifying.

[42] I recognize that the danger exists, particularly that evidence of previous acts of violence by Mr. Hatcher, are likely to arouse feelings of hostility against him by jurors. Better, however, to caution the jury against improperly using the character evidence of Mr. Hatcher than depriving Mr. Muise of evidence that could support his claim of self-defence.

[43] I bear in mind at this point in time, I should be reluctant to deprive Mr. Muise of the ability to present a self-defence argument unless the prejudicial effect thereof **substantially** outweighs the probative value of the proffered evidence. Nevertheless, I note that an issue may still arise if Mr. Muise does intend to present evidence as to whether he has put his own character into issue.

[44] In summary, then, I will not permit Constable Houston to give evidence regarding Mr. Hatcher's reputation for violence in the community. However, I will allow the Defence to put into evidence his criminal record and the two instances of sentencings as evidence of his propensity towards violence.

The Evidence of the Sarah Oakley Shooting

[45] I also heard the evidence of Sarah Oakley who testified that she was the girlfriend of Mr. Muise from early 2009 until October 16th, 2010, and on and off thereafter until it finally ended in March 2012. I had some reservations about her evidence which appeared to be given selectively in a manner intended to reveal nothing of significance about Mr. Muise. I noted, for example, she stated in direct evidence she did not speak to the police on October 16th or afterwards because "I didn't know anything."

[46] She agreed she may have said to the police officers present that she wanted an ambulance and not to have police involved, and that she didn't respond to police because: "I was confused. I just wanted to go to the hospital."

[47] When Constable Peter Adamski (or some other officer) later attempted to contact her through her mother, which she acknowledged since she had given no police statement and did not appear to want the police involved, her response was; "If the police wanted to talk to me, they would have come and talked to me."

[48] When asked further in cross-examination, she reiterated: "I don't have details," and that she was "scared and confused." She acknowledged she did discuss it with Mr. Muise, but their discussions had no effect on her decision not to cooperate with the police. Notably, she conceded in cross-examination that she had tattooed around the bullet hole in her abdomen from the shooting of October 16th the following words; "What goes around comes around." She dismissed it as, "just a saying," but then suggested she had no idea when she had the tattoo done, which I found extremely difficult to accept.

[49] I note that between October and December 2010, she was living with Mr. Muise at the corner of Greystone Avenue and the Herring Cove Road and the relationship, of course, continued from that point on until March of 2012.

[50] She testified that on October 16th, she was at Spencer Avenue in a basement apartment when she was shot through an open window while seated on a couch, and Mr. Muise was in the process of sitting down to her left at the time. The shot came from left of her. It hit her spine and the bullet remains there to this day. The police arrived, and she did not wish them to become involved at that occasion, nor

did she at any time in the future make any effort to provide information to the police when asked or of her own initiative.

[51] She indicated in testimony that she had no enemies that she knew of. She claimed that she did not know anything other than Brandon Hatcher's name in October 2010. She saw the news of his murder on the news on December 3rd and 4th, 2010.

[52] The Defence will suggest that her shooting was an attempt to wound Mr. Muise, and that the text-message conversation between telephones purportedly used by Mr. Muise and Hatcher as captured on Exhibit 54, underlying which is Exhibit 53, are specifically a reference to that occasion, and that Mr. Hatcher effectively thereby names himself as the person who shot her.

[53] The Defence recognizes that it will also thereby be giving credence to the Crown's argument that Mr. Muise had the shooting of Ms. Oakley and Mr. Gillis both as a motive for killing Mr. Hatcher, and that this was the actual motive when he and others went looking for Mr. Hatcher at about 8 p.m. on December 3rd, 2010. Mr. Muise purportedly also references in the Exhibit 54 and 53, an "AR-

15", which I would note could be seen to be a reference to a model of military assault rifle therein, which would put him in a very unfavourable light with the jury, given the evidence that he shot Mr. Hatcher purportedly with a .30-calibre carbine semi-automatic rifle.

[54] While the connection between Ms. Oakley's shooting on October 16th and the purported conversations by text messages between Mr. Muise and Hatcher on November 23rd is tenuous, Ms. Oakley's evidence is relevant not only to Exhibit 54 and the underlying text-message conversations, but also to establish a motive for Mr. Muise to want to have Mr. Hatcher killed.

[55] Thus, the probative value of that evidence is significant, whereas the prejudicial effect thereof is minimal. In summary, I find the evidence of Sarah Oakley is admissible, should the Defence wish to call the evidence.

Rosinski, J