

PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. MacLeod, 2011 NSPC 105

Date: 2011/11/30

Docket: 2265084, 2265085,
2265086, 2265087,
2265088

Registry: Sydney

Between:

Her Majesty the Queen

v.

Andrew Sterling MacLeod

DECISION

Judge: The Honourable Judge Jean Whalen, JPC

Heard: November 8th, Sydney, Nova Scotia

Decision: November 29, 2011

Charges: Sections 264.1(1), 88(2)(b) x 2, 86(1), 90 of the Criminal Code of Canada;

Counsel: Glenn Gouthro, Counsel for the Crown
Cheryl Morrison, Counsel for the Defence

By the Court:**I. Introduction**

[1] Mr. MacLeod and Ms. Hart had dated for about three months. They broke up approximately one week before this alleged incident. On the date in question the parties had communicated via Facebook. They subsequently went for a drive to discuss their relationship. During this time Mr. MacLeod is alleged to have pulled out a gun, a knife and uttered threats to Ms. Hart=s new boyfriend.

[2] After Ms. Hart arrived home she called the police, and as a result of the police investigation the defendant was charged with numerous offences.

II. Review of the Evidence

[3] The complainant, Ms. Hart, testified she had dated the defendant, Mr. MacLeod, for three months. They broke up approximately one week before these alleged offences. On December 22, 2010 the parties sent messages to one another via Facebook. Mr. MacLeod wanted to meet her and talk. She said he wanted to work things out but she only wanted to be friends. Mr. MacLeod picked up Ms. Hart at her house in his truck. She got in and sat in the front passenger seat.

[4] They were talking about how everything was and how they were. She did not really know where they were going, Mr. MacLeod was just driving; she testified that they subsequently ended up in Port Morien.

[5] When they were in downtown Glace Bay Mr. MacLeod said he had a gun. She said: AHe took it out and showed it to me.@ Ms. Hart said it was on the defendant=s left, on the side of the truck underneath his seat. She does not recall what she said but she testified she did not want to see it. Mr. MacLeod put it away. She said it was only out for a few seconds.

[6] Ms. Hart described it as a greyish handgun. She could not tell the material it was made of but it looked metallic. Ms. Hart said she heard about it but did not believe he had it. This incident made her feel a little nervous, but she testified that she felt at that time he Ajust wanted to show it to me.@

[7] When they got to Port Morien Mr. MacLeod parked by the water (where the boats are located). The defendant said that he missed Ms. Hart. They continued to talk about their relationship. The complainant described Mr. MacLeod=s demeanor at

this time as calm but she said there was still tension because Ms. Hart had just indicated she just wanted to be friends.

[8] Ms. Hart stated they were parked for about an hour. About half an hour into the conversation she told Mr. MacLeod she wanted to be friends. She testified Mr. MacLeod got aggressive, angry and upset with her.

[9] Ms. Hart testified Mr. MacLeod pulled out the gun again and began to wave it around. He put it up to his head for a second. She does not remember if he said anything but she yelled at him to put it away. Mr. MacLeod began to cry and got out of the truck and then he got back in and then he put the gun away. Before that, Mr. MacLeod put the gun to his head and told Ms. Hart that he had two bullets in it. This made Ms. Hart feel nervous and she wanted to leave and go home.

[10] Ms. Hart also testified when she first got in the truck she saw a machete in a case attached to Mr. MacLeod=s right leg . She thinks the pouch as she described it, was leather. It was connected to his pants.

[11] She described the machete as a little bigger than any butcher knife. It had a small handle and looked like it had a steel blade.

[12] It was about fifteen minutes after the gun incident she said that Mr. MacLeod brought the machete out on the way home from Port Morien. He was distraught. She said he started twirling the machete around with his right hand and driving with his left. The blade was resting on his leg. Ms. Hart testified that she was scared. The defendant's demeanor, she described at that time, as upset and angry.

[13] Ms. Hart does not remember what Mr. MacLeod said, but she remembers taking the machete from Mr. MacLeod at that time. She said he did not put up a struggle, but he did ask for it back. She refused saying she did not trust the defendant with the weapon. Ms. Hart put the knife down by her right side.

[14] Mr. MacLeod drove Ms. Hart directly home after this alleged incident. She testified the defendant knew she had a new boyfriend, Mike Dunn. When they were on her street, she testified Mr. MacLeod said "If he ever sees Mike he'd kill him." Ms. Hart stated she replied, "She'd get in the way." And she testified Mr. MacLeod responded, "He would push her out of the way."

[15] When they got to her house, she said goodbye, got out of the truck and went in the house. Mr. MacLeod drove away. She subsequently called the police.

[16] On cross examination Ms. Hart testified she was at Mr. MacLeod=s residence during their relationship, but not a lot. She said she did not stay over. She said she was aware that Mr. MacLeod collected knives and weapons. She stated she had seen rifles in Mr. MacLeod=s room but not handguns or pellet guns.

[17] A police officer came to her house and she gave a statement the same day. Ms. Hart had heard about a gun but did not believe the defendant had a gun until that day.

[18] Ms. Hart said she did not get out of the truck because it was moving. Also, she was not nervous enough at that point to get out.

[19] Mr. MacLeod testified he picked Ms. Hart up at her house. He denies pulling out a gun in Glace Bay. Mr. MacLeod said his intension was, ATo clear the air because they had mutual friends and so it wouldn=t be awkward.@

[20] Mr. MacLeod denies pulling out a knife or putting a gun to his head. He denies being aggressive. He stated his mood was not hostile; but admits that both were upset at some point. He denies making any threats. His discussion was merely to try and avoid an awkward moment.

[21] Mr. MacLeod testified that Ms. Hart slept at his house when he had gone to Fort McMurray for work for four or five days.

[22] The defendant says he collects swords as a hobby and he had two imitation swords on his wall and he owns one C05 pellet gun that looks a lot like a revolver. It is usually on his dresser or in the draw. However, when seized by police he said it was under his mattress because he had two little cousins at his house.

[23] The police had asked him if he had weapons and he subsequently voluntarily gave these items to a police officer.

[24] On cross examination Mr. MacLeod stated the parties were acquainted prior to dating. On December 22nd, the date of these alleged offences, he agreed the breakup

was still pretty fresh. He stated both wanted to talk. He felt it was more appropriate to talk face to face. The defendant said he was in a different relationship on this date.

[25] Mr. MacLeod acknowledged that he knew before their drive that Ms. Hart was dating someone named Michael. He said he knew him from different occurrences not from dating Candice. Yet on direct he said he had never seen him personally and did not know what he looked like. Mr. MacLeod did not want to end up in the same place as the complainant and her boyfriend. Although he had “no beef”, he said: Ait didn=t seem like an ideal circumstance.@

III. Issues

[26] 1. Count number 2: the *Criminal Code* does not define handgun. There is no evidence it is a firearm. The Crown did not amend the information to conform with the evidence to read Aor an imitation thereof.@ Can the court, on its own motion, amend the Information pursuant to s.601(4).

2. Did Mr. MacLeod utter threats to cause death or bodily harm to Mr. Dunn via the complainant as set out in Count One.

3. Did the defendant possess for the purpose dangerous to the public peace (Counts Two and Three).

4. Is there evidence of a Afirearm@ as set out in Count Four.

5. And did Mr. MacLeod carry a concealed weapon as set out in Count Five.

IV. The Law

[27] With respect to the credibility of witnesses, *R. v Jaura*, [2006] O.J. No. 4157 at p. 4, paras. 12 and 13 states:

The assessment of credibility is not a science. However proper credibility assessment is closely related to the burden of proof. For this reason an accused is to be given the benefit of reasonable doubt in credibility assessment. Credibility assessment must not be assessed in a way that has the effect of ignoring, diluting or worse reversing the burden of proof. What must be avoided is an either or approach where the trier of fact chooses between competing versions, particularly on the basis of mere preference of one over the other. In assessing credibility of any witness including the accused, the existence of evidence that contradicts the witness is obviously relevant but other factors such as demeanor, contradictions within the witnesses evidence itself, potential bias and criminal record.

No witness is entitled to an assessment of his or her credibility in isolation from the rest of the evidence. Rather, his or her evidence must be considered in the context of the evidence as a whole.

[28] Also, since Mr. MacLeod has testified, I must consider *R. v. W.D.*, [2008] O.J. No. 4463 which states at para. 27:

Aln the case where credibility is important, the trial judge must instruct the jury or him or herself that the rule of reasonable doubt applies to the issue. The trial judge should instruct the jury where him or herself that they need not firmly believe or disbelieve any witness or set of witnesses specifically. The trial judge is required to instruct the jury, (1) if you believe the evidence of the accused you must acquit; (2) if you don=t believe the evidence of the accused but have been left in a reasonable doubt by it you must acquit; and (3) lastly if you are not left in doubt by the evidence of the accused you must still ask whether on the whole of the evidence you accept that you are satisfied beyond a reasonable doubt of the guilt of the accused.@

[29] Mr. MacLeod testified, he appeared to be a calm and reserved individual, however, the court could tell that he was somewhat nervous, but that is not unusual for civilian witnesses. The courtroom is rarely second nature to them as it would be for counsel. The defendant is currently employed at Walmart. He denied the incidents described by the complainant and that a gun or machete was in his possession that day while they were in the truck. He offered no explanation as to why Ms. Hart would accuse him. (I would note the court is mindful that Mr. MacLeod is presumed innocent until proven guilty and that the crown has the burden to prove his guilt beyond a reasonable doubt.)

[30] Mr. MacLeod=s evidence is one of denial. It is difficult to elaborate on a denial. There is nothing inherently untruthful or contradictory in his denial. His evidence on its own, suggest nothing inherently believable or unbelievable. The defendant=s evidence must be contrasted with the evidence of the complainant, Ms. Hart, to be given its context. It is impossible to give full consideration to the denial without considering it and testing it in light of the details of the allegation.

[31] Ms. Hart when testifying appeared to be calm. Her narrative was straightforward and I find she did not embellish her testimony, even at times in her evidence when she could have. She gave details where she could, and if she could not remember she said so.

[32] This matter, like so many domestic violence incidents, comes down to a he said/she said scenario. As a result of her complaint that same day to the police and their investigation, Mr. MacLeod was charged. There are:

- 1) no other witnesses including the investigating officer;
- 2) no photographs;
- 3) no exhibits despite Mr. MacLeod giving his pellet gun or imitation swords to police as he testified;
- 4) no forensic reports (e.g. fingerprints);
- 5) no expert witnesses regarding firearms;

6) no audio/video statement of the defendant (although I would note the defendant has the right to remain silent.)

[33] Section 2 of the *Criminal Code* defines a firearm:

A...means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm@.

[34] Section 2 of the *Criminal Code* defines a weapon:

A...means anything used, designed to be used or intended for use

- (a) in causing death or injury to any person or
- (b) for the purpose of threatening or intimidating any person and without restricting the generality of the foregoing includes a firearm.@

[35] *R. v. Belair*, 61 C.C.C. (2d) 461 (Ont. C.A.) states:

AThe Criminal Code provisions dealing with the use of firearms during the commission of an offence are aimed at the prevention not only of injury, but also the causing of alarm in the commission of an offence.@

[36] *R. v. MacDonald* (2002), 170 C.C.C. (3d) 46 (Ont. C.A.) states:

AWhen a knife is used to intimidate another, it is or can become a weapon.@

[37] *R. v. Roberts* (1990), 60 C.C.C. (3d) 509 (N.S.C.A.) states:

The definition of weapon in s.2 involves a subjective test. The defendant must intend to use the object as a weapon. Proof that an object was being used as a weapon will depend on all of the circumstances.@

[38] In Section 88(2) the critical element is the purpose@ for which the weapon is carried or possessed. The external circumstances of the offence must show that the defendant must carry or possess a weapon, imitation weapon, actual use is not required. The mental element involves either (a) a purpose dangerous to the public peace or (b) the purpose of committing an offence. Proof of either ulterior state of mind, together with the basic mental element involved in possession or carriage is sufficient.

[39] *R. v. Califoux*, 14 C.C.C. (2d) 526 (B.C.C.A.) states:

A...a weapon as contemplated by the section maybe (a) anything designed to be used as a weapon; (b) anything that a person uses as a weapon, whether that thing is designed as a weapon or not; and (c) anything that one intends to use as a weapon regardless of its design.@

[40] *R. v. Boutilier* [1977] 4 W.W.R. 443 (B.C.C.A.) states:

A...a starting pistol is an imitation of a weapon.@

[41] *R. v. Allan*, 4 C.C.C. (2d) 521 (N.B.C.A.) states:

A...a broken piece of glass maybe a weapon.@

[42] Concealed weapon as defined makes the essence of this offence one of concealment. The external circumstances consist of (1) carriage; (2) concealment of a weapon or other regulated item and (3) the absence of a F.A. authorization to carry the weapon.

[43] The mental element requires proof the defendant intended to conceal what the law regards as a weapon or other regulated item. The prosecution must prove beyond a reasonable doubt that the defendant took steps to hide the weapon so that it would not be observed or come to the notice of others.

VI Analysis (Conclusion)

[44] With respect, the parties I find dated for three months. There is absolutely no evidence of any history of domestic violence, yet on the date in question that is what is alleged.

[45] There were no questions asked or evidence tendered to show the complainant would be motivated to lie about this event. The two inconsistencies pointed out by defence counsel are not significant enough to alter a material particular.

[46] Mr. MacLeod wanted to talk to Ms. Hart to clear the air because they had mutual friends and it would be awkward. But if he was fine with the breakup as he said, why would it be necessary? As well he never testified at all to this type of discussion during their drive.

[47] As well there was no testimony as to when the complainant might have seen the gun at Mr. MacLeod's house, or under what circumstances, (as he alluded to).

[48] Mr. MacLeod in cross examination denied knowing Mr. Dunn, but in direct he said he knew him from different occurrences not from dating Ms. Hart.

[49] In conclusion, I find with respect to Count Two and Count Three, Ms. Hart describes a greyish handgun that looked metallic. Mr. MacLeod said he had a CO5 pellet gun that looked like a revolver. I find that is what Ms. Hart saw on the date in

question. The court will amend the count to read Aa handgun or imitation thereof, A pursuant to s.601(4) of the *Criminal Code*. I do not find that Mr. MacLeod has been misled or prejudiced in his defence by this amendment. It does not change the substance of the allegation and therefore I find him guilty.

[50] Count Three, although the defendant denied having any gun or machete with him that day I find on the evidence that he did. He said the items were in his room the gun usually in his drawer/dresser and the swords on the wall. But to end up in his truck Mr. MacLeod had to make a conscious effort to remove them and take both with him. He placed the gun under the seat and the machete in a pouch strapped to his leg. When the gun, for the second time and the machete came out, Mr. MacLeod was described as upset, angry, aggressive or distraught. He mentioned having bullets and put the gun to his head on the second occurrence. He twirled the machete on his right leg.

[51] Each time these things occurred the complainant said she wanted to be friends, Mr. MacLeod brought out these items. I can only conclude it was meant to intimidate her in hopes she would change her mind. He certainly succeeded in making her feel nervous and upset.

[52] Given all of the above I can only conclude he possessed them for a purpose dangerous to the public peace and find him guilty.

[53] With respect to Count One, Mr. MacLeod was upset by the breakup and when he realized Ms. Hart wasn't going to change her mind, he threatened her new boyfriend. Their meeting was not to avoid ending up in the same place and trying to avoid an awkward situation, nor to learn for future relationships. It was and I find, as Ms. Hart said, he wanted to get back together and when she refused he got angry and upset. I therefore find him guilty with respect to Count Number One.

[54] With respect to Count Four, the court cannot take judicial notice of a firearm as defined in s.2 of the *Code*. The court must hear either *viva voce* evidence from a firearms expert or, at the very least, receive a copy of his/her report as an exhibit stating a weapon was examined and the conclusion reached as a result of that examination. The court has neither and therefore I find Mr. MacLeod not guilty.

[55] With respect to Count Number Five, from the moment Ms. Hart entered Mr. MacLeod=s vehicle she said she saw a knife in a leather pouch strapped to Mr. MacLeod=s right leg of his pants.

[56] She described it as a little bigger than a butcher knife with a small handle and a steel blade. It was not covered by anything, or out of the complainant=s sight as the handgun had been.

[57] Based on all of the evidence before me, I am not convinced beyond a reasonable doubt that Mr. MacLeod concealed the machete and therefore I find Mr. MacLeod not guilty.

J.