

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. M.R.M., 2011 NSPC 83

Date: November 21, 2011
Docket: 2292280 and 2292281
Registry: Halifax

Her Majesty the Queen

v.

M.R.M.

Judge: The Honourable Judge Jamie S. Campbell

Heard: September 26, 27, 28, 29, 30, 2011
October 3, 4, 6, 7, 11, and 14, 2011

Oral decision: November 21, 2011

Charges: Criminal Code - section 235(1) and 351(2)

Counsel: Darrell Martin and Christine Driscoll - Crown Attorneys
Eugene Tan - Defence Attorney

Note: There was a ban on the publication of any evidence in this matter pending the completion of the trial in R. v. Muise.

By the Court:

1) Brandon Hatcher was shot and killed on December 3, 2010. Another young man, Colin Gillis, was wounded in a shooting earlier that day. The two events are related. They took place in a subculture that glorifies violence, guns and drugs among what might be described as aspiring gangsters. In the code that passes for some kind of alternative morality in that world, violence begets violence.

2) The young men involved were not members of rival groups of friends whose only difference was that one group lived in Spryfield and other in Greystone. There is more to this than mere “rivalry” despite the seemingly studied use of that term by those close to it. There is more to these groups than merely social, family and perhaps geographic bonds. These groups, by violence and threats of violence, control the kind of street level crime that brings with it financial gain. They are not so much rival groups as “farm teams”, each associated with one of two well known families.

3) M.R.M. is subject to the provisions of the Youth Criminal Justice Act. He has been charged with the murder of Brandon Hatcher. It is alleged that the murder took place when M.R.M. was still a young person under the age of 18.

4) The Crown asserts that he did not act alone but with two others, R.M. and Cody Muise. Cody Muise, an adult, has been charged with that murder.

R.M.'s evidence:

5) R.M. has, for a young man, a long criminal history. He has been in trouble of various kinds for some time. He has spent time in jail.

6) He associated himself with a criminal lifestyle and was brought into the ongoing violent dispute over criminal turf. He was readily implicated in the shooting of Brandon Hatcher. He agreed to provide his testimony in exchange for immunity from prosecution. He is now in the witness protection program. He has both the motive to lie and the history of a pattern of behavior consistent with someone whose values are not in accord with those the justice system seeks to uphold. He says that he now has a child and wants to turn his life around.

7) It would be a high risk proposition to accept R.M.'s evidence on its own, at face value. Pointing the finger at someone else and going into witness protection, while not an

ideal choice, is a better one than facing years in jail.

8) It would be wrong however to cavalierly dismiss everything he says. His testimony may be considered more reliable when it is supported by other independent evidence. That evidence does not have to be of the kind that directly implicates M.R.M.. It must be evidence that helps to restore faith in the reliability of his testimony. That has to be carefully considered. A witness with R.M.'s background and motive to lie, cannot build up his credibility by telling the truth about surrounding circumstances. The risk remains that the lie has been kept in reserve for what really matters. Mere detail can be intended to give an air of verisimilitude to an otherwise unconvincing narrative. R.M.'s evidence can't stand on its own for very much.

Colin Gillis shooting:

9) Colin Gillis is 22 years old. He was an associate of the Spryfield group, to which Muise, R.M. and M.R.M. belonged as well. The real nature of the web of relationships and the extent to which they might have been friends is not entirely clear. Colin Gillis was shot through the basement window of Kyle Cater's apartment. The assailant used a shotgun and deployed it at close range. Gillis was wounded. The shooter escaped without

being identified.

10) Gillis was taken to hospital. He did not call the police. When asked why, he said that he just didn't want to. That's strange. He wasn't pressed further on the issue. That gives some sense of the environment within which these young men operated.

11) That shooting happened at around 5pm on December 3, 2010. The fact that Colin Gillis was shot is clear. It is not clear who shot him or why.

Preparations:

12) During the afternoon of December 3, 2010 R.M. was with M.R.M., Cody Muise and Colin Gillis at the house of another friend, Kyle Cater, playing PlayStation 3. R.M. said he finished playing, and went home, which was a short walk away.

13) He later heard from M.R.M. that Colin Gillis had been shot. That was followed by a call from Cody Muise. He said that Muise told him to bring a rifle and a bullet proof vest.

14) Between 6:00 p.m. and 7:00 p.m. on December 3rd there were 14 calls and messages between the phone used by Muise and the one registered to R.M.. At 6:26 p.m., R.M. texted Cody Muise the following: “You only wanted that sweater and poop hockey stick?” Muise responded, “Yea and the good one both.”

15) R.M. said that the “poop hockey stick” was the term used for a 20 gauge sawed off shotgun. He had got it some months before and kept it hidden at his house. The “sweater”, he said, was the word for the bullet proof vest. The “good one” referred to a rifle. He said that the rifle was about 2 feet long, made of metal and black plastic, with a pistol grip and a clip. He was keeping it at his house as a favour to Muise.

16) He put the items in a guitar case. He couldn't remember much about that guitar case. He couldn't say whether it was hard sided or soft sided. He didn't know whether the guitar itself was an electric guitar or an acoustic guitar. He doesn't even play the guitar. Nonetheless, he said he put the two guns and the bullet proof vest in a guitar case.

17) He got a drive to Jamie Downs' house with a friend to whom he paid \$10.00. He didn't take a taxi because he said he didn't want to be in a taxi with guns. Why it would be better to be in a friend's car with guns is anyone's guess. If someone is taking illegal

firearms and a bullet proof vest to someone else's house, with a view to using them, it would seem that serious fundamental flaws in judgment are already an integral part of the package.

18) R.M. said that he got to Jamie Downs' place and was met there by M.R.M. and Muise. Jamie Downs confirmed that Muise and M.R.M. were already there and were met by R.M.. R.M. said that they were going to go to Greystone to look for "Brandon Hatcher or one of them". He said that they "figured" that those were the people responsible for the shooting of Colin Gillis. When asked whether anyone had specifically said who they believed was involved in that shooting, R.M. responded, "No, I just kind of knew." Jamie Downs reported that M.R.M. said, "We're going to get them mutts". In the context that could be inferred to mean one of the people responsible for the Gillis shooting.

19) Jamie Downs said that he gave R.M. a darker sweater because the one that R.M. was wearing was too "colourful". R.M. got a black sweater with silver print on it from Jamie Downs. That was also confirmed by Jamie Downs.

20) R.M. also got a ski mask from M.R.M.. He said that M.R.M. gave it to him at

Downs' place and said words to the effect of "you can use mine."

21) There is also evidence of text messages sent from M.R.M. and Cody Muise to Stacy Blom at 6:00 p.m. on December 3rd. Stacy Blom was a friend of Cody Muise. M.R.M. told her that "Codi said he want(sic) his mask". She responded at 6:16 p.m. with "kk". At 6:19 p.m. Stacy Blom asked where she should drop off the mask. At 7:13 p.m. M.R.M. tells Stacy Blom to drop the ski mask off in R.M.'s mailbox. Stacy Blom said in her evidence that she never did drop the ski mask off. R.M. said that he never picked up a mask in his mailbox but got it directly from M.R.M. at Jamie Downs' house.

22) The three began loading up the guns according to R.M.. He took the shotgun and put one shell in it, a 20 gauge slug. He also had a box of shotgun shells with him, in his pocket.

23) He said that Cody Muise had a silver coloured revolver. R.M. said that M.R.M. didn't want to carry around a rifle so they switched. According to R.M., Muise then had the rifle and M.R.M. had the revolver.

24) They walked to Greystone through the path behind Elizabeth Sutherland School.

They had to walk up one street but the guns were not visible. The shotgun was tucked under R.M.'s arm, the rifle was in Muise's coat and the revolver was in M.R.M.'s pocket. They got to the edge of the woods and were looking for someone. R.M. said it was "Hatcher, Clyke or one of them." Clyke refers to Christian Clyke who was a member of the group from Greystone, which police witnesses said was called the Young Mob. It was a phrase that the other witnesses apparently neither cared nor dared to speak.

Shooting of Brandon Hatcher:

25) R.M. said that his phone rang. That caused Cody Muise to check his phone. Then Muise's phone rang. Cody Muise said, "We're out back." The cell phone records for the phone associated with Cody Muise show three phone calls from Brandon Hatcher around the time of the shooting. Hatcher called Muise at 7:21 p.m. and 7:22 p.m. The last call was made at 8:34 p.m. moments before Hatcher was shot. That call is consistent with R.M.'s evidence of a call being received by Muise. The call was made from the phone owned by Brandon Hatcher's girlfriend, Amber MacLeod, and that she confirmed was being used by Brandon Hatcher.

26) According to R.M., the three took cover behind some rocks on the far side of Regan Drive from the Greystone housing development. R.M. identified the area in which spent .30 caliber cartridge cases were later found by the police.

27) R.M. said that a person appeared from behind a fence on Lavender Walk and fired a shot. They started shooting back. R.M. said that he crouched behind a rock and fired one shot. He said that he believed he may have hit the side of a house. That slug was never recovered. He said that M.R.M. was 6 feet away from him, firing shots. Between them was Cody Muise. He said that he believed that Muise emptied a clip of 15 cartridges.

28) R.M. said that as the shooting was taking place a dark coloured SUV drove up, stopped on Regan Drive then sped away. That vehicle was never identified.

29) At 8:37 p.m., the phone that was being used by Brandon Hatcher placed a call to 911. The evidence of Amber MacLeod was that she placed the call when Brandon Hatcher returned to the house, bleeding after being shot.

30) Brandon Hatcher's phone was used to call Cody Muise's phone at 8:34 p.m. The person who placed that call was not Amber MacLeod but was Brandon Hatcher. Less than three minutes later, Brandon Hatcher was fatally wounded.

Return to Jamie Downs' house:

31) When the shooting ended, R.M. said that the three ran back to Jamie Downs' house, using a route somewhat different from the one they used to get to Greystone. He threw his shotgun into the woods along with the shells. He said it was too heavy to carry.

32) He also got rid of his sweater and ski mask in the woods along the path they travelled.

33) They got back to Downs' residence and had Jamie Downs let them in. Jamie Downs, his mother Patricia Downs and his girlfriend Ashley Boudreau confirmed the return of all three young men, R.M., Muise and M.R.M..

34) Jamie Downs himself said that after they had left his place earlier that night he heard guns firing about an hour or an hour and a half later. He said, "It was crazy". Jamie

Downs said that he got a call from Cody Muise before they arrived at his house. The phone records show that a call was placed from the phone associated with Cody Muise to Jamie Downs at 8:47 p.m. This was ten minutes after the 911 call was made by Amber MacLeod.

35) At about the same time, 8:48 p.m., the phone identified as being that of Stacy Blom, texted Cody Muise the message, “cops are at the bottom of gs be safe codi”. A minute later the text is, “Gs is blocked off”. Stacy Blom confirmed that she had sent those messages. They are consistent with Stacy Blom advising Cody Muise, in the moments after the shooting, that the police had blocked the street access to Greystone. It is in fact very difficult to interpret them as meaning anything else.

36) When they got to Jamie Downs’ house, he let them in. In his words he was, “stressed out bad”. They ran through his house with their muddy shoes, which he thought was “disrespectful”, as if showing up at his house with guns and a bullet proof vest somehow hadn’t already taken respect out of the equation entirely. They went straight up into his bedroom. They dropped two guns on his bed. He and his girlfriend washed the shoes and clothes. He washed the guns with a wet cloth.

37) He reported Cody Muise as having asked the other two, R.M. and M.R.M., whether they had seen the fence splinter like in a movie. The police found the fence on 125 Lavender Walk splintered after the shooting. That fence is clearly visible in a line of sight from the area where the shots were said by R.M. to have been fired. Mr. Tan noted that from the photographs the holes left in the fence are rather small. Photograph 40, in Exhibit 6, shows what might best be described as a gouge out of the fence. It is not unreasonable to infer from the photographic evidence that a piece of wood that large taken out of the fence might well have been observed.

38) Jamie Downs said that R.M. talked about going back to pick up the gun he had dropped. He testified that M.R.M. said that no one was leaving the house that night.

39) They turned on the television in Jamie Down's room to watch the news. The news reported that someone had been shot and killed. Jamie Downs said that Muise had tears in his eyes. R.M. kept talking about his gun. M.R.M., according to Jamie Downs, said words to the effect of, "I hope I killed him." He was in Downs' opinion acting like "Mr. Toughguy". Then people started calling.

40) That evening at 9:53 p.m., M.R.M. received a text message from Britney Field

asking who he was with. He responded to the message at 9:55 p.m. saying, “me R.M. cody”.

41) All three left Downs’ house the next day. Jamie Downs made no effort to contact the police either during the incident or after. He commented that he feared for his life. He said that he was related to people who are well known for their prominent involvement in violent crime and in his view they would not hesitate to kill him. He said that he felt sympathy for Brandon Hatcher who he described as a guy who “had a heart”. At any rate, Downs appears to be in this thing up to his eyeballs. His evidence has not been considered in light of that.

The Following Day:

42) The next day, December 4, 2010, Mary Elizabeth Wickwire went for a “drive” with her friend Stacy Blom. She said that they drove for an hour or an hour and a half. She didn’t know where they were. The purpose was to meet Cody Muise and M.R.M.. They met at a Sobey’s and talked for about 5 or 10 minutes. She said that Stacy got a call from her mother and was “freaked out”, because there were police around the house. The police knew that she was associated with Cody Muise and were checking out her

mother's vehicle. They headed back to Halifax with M.R.M. and Cody Muise in the car with them. She said that there was no discussion about Brandon Hatcher. They dropped Muise and M.R.M. off at the bottom of Dunbrack Street.

43) Stacy Blom testified that she and Mary Elizabeth Wickwire had indeed gone for a drive December 4th. She had texted Cody Muise and got no response. She texted M.R.M. and he said that they were on their way to Digby. No reason was given for going to Digby. She and Mary Elizabeth Wickwire drove there and met M.R.M. and Muise at a motel across from a Sobeys. She said that M.R.M. told her to take the battery out of her phone. There was no discussion about the events in Spryfield the day before. She said that M.R.M. told her she hadn't done anything wrong. She assumed that he was reassuring her that she had nothing to worry about just because the police were at her house.

44) M.R.M. and Muise returned to Halifax with them, after checking out of the motel in Digby. She said that she dropped them off at the Quality Inn in Bayers Lake.

45) On December 8th, M.R.M. and Cody Muise were apprehended by the police at a motel in Fairview.

Evidentiary Support for the R.M. narrative:

46) R.M.'s evidence itself cannot be relied upon to place M.R.M. at the scene of the shooting. At the same time, a reliable narrative can emerge when that evidence is supported by other evidence.

47) R.M., M.R.M. and Muise were together that day. They were at Colin Gillis' house earlier in the day. Colin Gillis confirmed that. They heard about the Gillis shooting. M.R.M.'s telephone records serve to confirm that. M.R.M.'s text message to Stacy Blom at 6:00 p.m. indicates that he was aware of the need for a ski mask. His phone sent it and she confirmed receiving it. He later confirmed in a text message at 9:55 p.m. that he was with Muise and R.M.. That all serves to confirm what R.M. said. There is simply no inference that is reasonable to suggest that M.R.M. was entirely uninvolved with what transpired that evening. He was not a stranger to what was happening. What is important however is the nature and extent of that involvement. He was involved. The question is how involved.

48) The evidence of Jamie Downs, Patricia Downs and Ashley Boudreau place R.M.,

Cody Muise and M.R.M. at Downs' home, with guns. Their evidence confirms that the three young men were heading to the Greystone area.

49) There is a phone call moments before the shooting recorded between the phone associated with Brandon Hatcher and the phone associated with Cody Muise. Cody Muise was talking by phone with Brandon Hatcher, then less than three minutes later, Hatcher had been shot and a call made to 911.

50) R.M. said that Hatcher fired a shot at them. A shotgun was recovered in the area where R.M. said that Brandon Hatcher was standing.

51) Police forensic examination of the sight confirmed that shots were fired from the direction of Regan Drive toward Lavender Walk, where Brandon Hatcher was shot. That is consistent with where the spent cartridge casings were recovered. That is also consistent with where R.M. said that he, Muise and M.R.M. had taken cover.

52) R.M.'s general narrative is further confirmed by the recovery of the 12 gauge shotgun and ammunition where he said he had thrown it. R.M. said that he threw his gun and shells away. Months later, in May 2011 he was able to lead the police to where the

gun and shells were thrown.

53) Jamie Downs said that he gave R.M. a dark sweater to wear. R.M. said that he threw away that sweater and a black ski mask. The sweater and ski mask were found by the K-9 unit during the investigation immediately following the shooting. On the ski mask was a hair which was tested for DNA. It was that of M.R.M.. The sweater had gunshot residue on it. That is also consistent with R.M.'s evidence.

54) The cell phone records indicate that Muise received messages from Stacy Blom just after the shooting saying that the police were around Greystone and had the street blocked off.

55) Jamie Downs, his mother and Ashley Boudreau all confirmed that the three young men returned together to the house. They had muddy clothes and shoes. Jamie Downs' description of the night was consistent with what R.M. said. He added that comments were made that suggested that Muise, R.M. and M.R.M. had gone together to Greystone and had fired shots.

56) The next day, M.R.M. and Muise were in Digby, where they were met by Stacy

Blom and Mary Elizabeth Wickwire. They gave no reason for being in Digby. There has been no reason suggested by anyone as to why they would be at a motel in Digby on December 4th. They returned to Halifax and were apprehended at a motel in Fairview on December 8th. Once again, there is no apparent reason for M.R.M. to be at a motel in Fairview.

57) The physical evidence, text messages, telephone records and the testimony of Jamie Downs, Patricia Downs and Ashley Boudreau support the narrative provided by R.M.. There is some issue with how reliable each of those pieces of evidence is.

Issues with the corroborating evidence:

58) R.M.'s reliability is not such that his evidence could form the basis for a conviction without substantial corroboration. If the evidence put forward as corroboration is itself unreliable, it doesn't really provide much support.

Cell phone records:

59) Cell phone records formed an important part of the Crown's evidence.

60) As Mr. Tan correctly pointed out, the text messages are reliable only insofar as they reflect what was sent from a particular device. As business records, they are reliable in that sense only. There is no requirement for each text message to be proven as containing the words or portions of words that were sent from each device to another. Those messages were recorded by the service provider in the course of its business. As business records, they accurately reflect the records maintained by the telephone service provider. The content of the text messages is highly reliable as evidence of what actually entered. There is no reliance placed on a person's memory to recall what actually was "said" in a text message. In that sense it is highly reliable.

61) As to the issue of who typed the message or was using the phone, inferences can be made. When a phone is used consistently over a period of days or weeks by a person who identifies himself as Cody and who is referred by others as Cody, and from whom messages are sent to known associates of Cody Muise, making comments of the activities of Cody Muise in the first person, it is reasonable to infer that the phone is being used by Cody Muise. It is not conclusive proof but a highly reliable inference especially when confirmed by other information.

62) In the days around the time of the shootings there are numerous instances of people texting the phone registered to the name of Chris Anderson making reference to Cody Muise as the person apparently using the phone. The outgoing messages also confirm that the phone was indeed being used by Cody Muise.

63) The text messages from the various devices are admissible as evidence that the person to whom that device is associated sent that message. The message would be admissible to prove that a text message was sent, by whom and to whom it was sent, when it was sent, and the words of the message, provided those words are not put forward for the proof of the contents of the message. If the words are put forward for the truth of their contents those words would have to be considered in light of both traditional hearsay exceptions and the principled approach to hearsay.

64) A comment made in the form of a text message should not, by virtue of having been preserved in that form, gain some kind of immunity from principled hearsay consideration. If the text message conveys the words of another person, the text itself, by virtue of having been preserved in that form, does not avoid the designation as hearsay. If the statement is hearsay if made in court, it is equally hearsay if made in a text message.

Hearsay:

65) Statements made by the three young men said to have been involved were argued by the Crown to be admissible because they are co-conspirators. Their statements would then be admissible under the co-conspirators exception to the hearsay rule. Mr. Tan argued that such statements should not be admitted. That argument of course, applies only to statements that qualify as hearsay.

66) R.M. gave evidence and was cross examined. His reported statements were not put forward as evidence, with one exception. Jamie Downs reported that upon returning to his house, R.M. had talked about going back to get the gun that he had dropped. While he did not quote R.M. he did say generally what R.M. had said. That statement was not put forward to prove that R.M. had dropped a gun or where he had dropped a gun. It was put forward to show that Jamie Downs was aware, based on the conversation, that the gun had indeed been dropped. It serves to confirm that Jamie Downs was overhearing conversations among the three young men he said were at his house.

67) The issue of hearsay does not apply with respect R.M.'s statements.

68) Text messages purported to have been sent by Cody Muise and received by Cody Muise were used to confirm that he was using the phone registered to the name Chris Anderson. The content of the message, or what was said in the message, was not the issue. The issue is the name to which it was addressed, the name by which it was signed or the context that associated it to Cody Muise. It is not a reported conversation in the sense that the content of the conversation was being relied upon to prove that content.

69) The evidence that messages were sent back and forth between Muise and M.R.M. from 6:00 p.m. to 7:00 p.m. on December 3rd is not hearsay.

70) Muise's response to the question from R.M. about the "sweater and poop hockey stick, was "Yea and the good one both". It provides only the narrative context for R.M.'s evidence that he brought the rifle as well as the shotgun and bullet proof vest. There is no reason to rely on the words contained in the text message for anything other than that.

71) The next words of Cody Muise reported are from the 6:00 p.m. text message of M.R.M. to Stacy Blom in which he says "Codi said he wantts (sic) his mask". Once again, that statement was not put forward and is not admitted to establish what if anything Cody Muise wanted. Its purpose is to establish that M.R.M. was involved to the extent

of asking Stacy Blom to deliver a mask, about two and a half hours before Brandon Hatcher was shot.

72) While in the place where the shooting is alleged to have taken place, R.M. said that Cody Muise told him that when his phone rang it was Brandon Hatcher calling. That statement is not accepted or needed as helping to establish that it was Brandon Hatcher calling. The identity of the caller is found on the telephone records of the two phones involved. That statement is excluded in any event.

73) Cody Muise's reported statement that they were "out back" was certainly not tendered for proof of the fact that anyone was out back. It was tendered and admitted as evidence to show that Cody Muise was speaking to someone directing that person to where he and the others were. The records of the cell phones confirm that inference that the person was indeed Brandon Hatcher.

74) Jamie Downs reported that Cody Muise called him to tell him that they were running through the woods, sometime after he had heard shots being fired. That statement is intended to prove that at that time Cody Muise was running through the woods as he reported. It is significant because it coincides with the approximate time

when a call was made from the phone used by Muise to Jamie Downs. The reported conversation is not admitted as evidence. The telephone records however, confirm that a call was made from Muise to Downs at that time. The content of the call is excluded. The fact of the call is not.

75) When the three returned to the Downs' residence, Jamie Downs reported that Cody Muise asked the other two if they had seen the fence splinter like in a movie. This is a reported statement of Cody Muise. It is not admitted as proof of the fact that the fence was splintered. There is photographic evidence of the fence having been damaged. The statement is admitted as evidence of the knowledge of Cody Muise that the fence had splintered and of the context that suggest that all three were present when that happened.

76) The reported words of Cody Muise are for the most part not hearsay. To the extent that they are, as I have noted, they are not admitted.

77) The statements reported to have been made by M.R.M. are subject to significant scrutiny, especially when reported by another witness and not recorded in some form. As the accused, he was present in court and able to refute such a statement but only if he

gave up his right to silence. Because those reported statements are in some cases significant, in this context they should be considered individually, rather than being admitted on the basis of their being the reported remarks of the accused person.

78) As with Cody Muise, M.R.M.'s cell phone records tendered to establish that he was using the cell phone are not hearsay. They were not tendered as proof of the contents of the messages themselves.

79) Jamie Downs reported that M.R.M. said, "We're going to get them mutts." That is not a statement that could be put forward for the truth of its contents. It sets out an intention or a state of mind. It does not say that something has been done. It was not offered as evidence, at that point, that something had been done but only as evidence of M.R.M.'s present intention to do something.

80) M.R.M.'s reported statement to R.M., with respect to the mask, "you can use mine", is once again, not hearsay. It is not put forward for the truth of the contents of the statement. It does not relate a fact. If anything, it purports to convey, by inference, the state of mind of M.R.M., or his participation in the planning of the eventual shooting of Brandon Hatcher.

81) M.R.M.'s text to Stacy Blom was, "Codi said he wantns his mask". Once again, that does not purport to prove that Cody Muise wanted anything. It is put forward to establish that M.R.M. was involved in the planning of the attack on Brandon Hatcher.

82) Jamie Downs reported that upon returning to his house, M.R.M. said, "I hope I killed him". It was not put forward for the proof of the contents of the statement. It expresses at most a wish or a hope. It conveys no factual assertion to be relied upon. It could be argued that this does come close to an admission, of sorts. That admission or inference would be that M.R.M. was involved with shooting to the extent that he could at least hope that it was his bullet that killed Brandon Hatcher. To the extent that the comment conveys that kind of inferential or indirect admission, it would also be admissible.

83) Jamie Downs also reported that M.R.M. said that no one was to leave the house that night. Once again that does not convey any fact to be relied upon. It was not tendered to prove that no one was to leave the house, but to prove M.R.M.'s intent and state of mind at the time the statement was made.

84) M.R.M. replied to a text from Stacy Blom, in which she asked whom he was with. The reply was, “me madougall codi”. That is a statement intended to prove the contents of the statement. It was put forth to show that he, M.R.M., was indeed with R.M. and Cody Muise. That statement should be considered to determine whether on a principled basis it should be admitted.

85) Using the principled approach, it’s use is necessary because the accused is not a compellable witness. As to the issue of threshold reliability the text itself appears in a business record as having been sent from an identified device. The evidence establishes on the balance of probabilities that the device was being used that day by M.R.M.. It has been established that the text itself was, on the balance of probabilities, sent by M.R.M..

86) The statement was made in the context of the ongoing event. It was not something constructed afterward. There would be no motive for M.R.M. to lie to Stacy Blom about who he was with at the time. In this case, the statement was incriminating in itself. It placed him with two people who had been involved with the shooting of Brandon Hatcher. There was no leading or prompting and the brief response is to a brief question. It is difficult to see how it could be misunderstood. The statement generally confirms and is consistent with the evidence of R.M., Jamie Downs, Patricia Downs and Ashley

Boudreau. There are circumstantial guarantees of reliability that M.R.M., when sending the message, was telling the truth. On that basis, the text message would be admitted for the purpose of establishing that M.R.M. was with R.M. and Muise when that text was sent.

87) Stacy Blom said that M.R.M. had told her to take the battery out of her phone when they were in Digby. He also told her, on the drive back, that she had nothing to worry about. Neither of those statements would be used for proof of the contents of the statement. They are not hearsay.

88) Counsel argued the issue of the co-conspirators exception to the hearsay rule. It is sometimes referred to as a “declaration in furtherance of a common design”. The Crown argued that the three individuals were involved in a conspiracy, that M.R.M. was a part of that conspiracy and that the actions and statements of the other two, Muise and R.M., are admissible against him.

89) The Crown argued that the law with respect to the co-conspirators exception to hearsay is set out in *R. v. Carter* [1982] 1 S.C.R. 938 and that this has remained essentially unchanged. The court has to be satisfied beyond a reasonable doubt that the conspiracy or common unlawful design existed. There does not have to be a formal

charge of conspiracy. That common unlawful design has to be found to exist without making use of the evidence that is otherwise hearsay and claimed to be subject to the exception. If the court is satisfied that such a common unlawful design existed, the court has to conclude on the balance of probabilities that the accused was part of that conspiracy. That also must be done using evidence directly admissible against the defendant. Once that finding has been made, the acts and statements of one may be used against the others.

90) The rationale said to underlie the exception is that each member of the conspiracy has implied authority to speak or act in furtherance of the common enterprise. The person who makes the statement is considered to be the agent of the accused.

91) The impact of the necessity and reliability based principled approach to hearsay on the exception has been addressed by the Ontario Court of Appeal in *R. v. Chang* [2003] OJ No. 1076, 170 O.A.C.37, 173 C.C.C. (3d) 397, 9 C.R. (6th) 304, 57 W.C.B.(2d) 19. In considering the dangers attached to the use of hearsay in the context of co-conspirators, the court acknowledged that the concerns regarding hearsay are all present. The statement is not under oath, it is not subject to cross-examination and the trier of fact does not have the opportunity to observe the person making the declaration when it is

made.

92) The court noted the caution that the complete abolition of the traditional exceptions was not called for. As Iacobucci J. stated in *R. v. Khan* [1990] 2 S.C.R. 531, the traditional exceptions are, when properly modified, “practical manifestations” of the principled approach. The Supreme Court of Canada in *R. v. Starr*, [2000] 2 S.C.R. 144, held that it will only be “in some rare cases” that hearsay coming within an accepted exception will not meet the requirements of the principled approach. The traditional exception, as set out in *R. v. Carter* is applied and its application to the individual case should be checked against the principles of necessity and reliability.

93) The Ontario Court of Appeal noted in *R. v. Chang*, at para. 102, that the co-conspirators rule meets the requirement of necessity in cases where the declarant is not available to testify. That was confirmed by the Supreme Court of Canada in *R. v. Mapara* [2005] 1 S.C. R. 358, [2005] S.C.J. No. 23, 2005 SCC 23. It may be that the person who made the statement simply can’t be located. He or she may be dead. Often the person will be a co-accused and cannot be compelled to testify in the trial.

94) In this case, the person who made the statements in issue, Cody Muise, is not a co-

accused. He is not unavailable. He is, in fact, awaiting a separate trial. He is a compellable witness.

95) The court in *R. v. Chang* went a bit farther though. The more difficult issue to which they alluded, was when the person is available. On one side, it can be argued that the evidentiary value of the declaration by the co-conspirator made in furtherance of the conspiracy cannot be duplicated by the in person evidence of the declarant. The declaration itself is “superior evidence” and should meet the necessity requirement. In other words, the reported statement is likely to be more accurate than what Cody Muise might say under oath, at trial.

96) On the other side, it can be argued that the Crown should be required to call as a witness the person who made the statement. If the person gives evidence that is not consistent, the person can be confronted with the earlier statement. He can be cross examined and asked whether indeed he said what was reported to have been said.

97) That issue was not fully argued before the Ontario Court of Appeal and the court took no position on it.

98) In the circumstances of this case, it is difficult to accept that the statements made by Cody Muise meet the necessity requirement. He is available. He is compellable. The concern that he may deny having made the statements should hardly support the necessity of their admission in his absence. His denial may or may not be reliable but that is an issue best determined with the benefit of having heard him and having seen him.

99) On the reliability issue, no argument was put forward. In *R. v. Mapara*, at para. 24 the court noted that proof of a conspiracy beyond a reasonable doubt enhances the reliability of what was said in the course of furthering that enterprise. In this case, if a conspiracy were found, that would in itself provide the circumstantial guarantees of reliability required.

100) On balance however, this is one of those rare cases in which the principled approach to hearsay does modify the application of the traditional hearsay exception. The absence of Cody Muise is an issue when his words are used to prove the truth of what he is said to have said. The necessity requirement of the principled approach to hearsay is there for cases like this one.

101) Other than the statements to which I have made direct reference, I have not relied

on any reported out of court statement. The statements of R.M. are not hearsay. The reported statements of M.R.M. that I have identified are not hearsay, except for the last text message to Stacy Blom. That statement has been admitted.

102) The statements of Cody Muise that I have identified as hearsay have been excluded from consideration. I have placed no reliance whatsoever on those statements. None. They form no basis for any inferences that I have made and no basis for any finding that any inference is unreasonable. I have referenced them only for the purpose of identifying them as hearsay.

Evidence of Jamie Downs, Patricia Downs and Ashley Boudreau:

103) Jamie Downs, Patricia Downs and Ashley Boudreau each confirmed the general narrative of R.M.. There were inconsistencies. Care has to be taken in accepting their evidence as it relates to anything. Mr. Tan correctly pointed out that each of them has been implicated in this matter in some way. They have something at stake. That in itself presents an interesting issue. Their version, which sets out a reasonably consistent chain

of events, implicates themselves and each other. That would make it a rather unusual story to have concocted from whole cloth. It begs the question why anyone would create a story that would have them so closely involved with a shooting.

104) It was generally acknowledged that these were not among the most sophisticated of witnesses. Mr. Downs himself said that he was just not that smart. That may show a degree of either self deprecation or self awareness that would suggest that he is at least wiser than he thinks. He changed his statement with respect to some of the details, from the time he gave a cautioned police statement. He said that he had been preoccupied with anger for the past few months and that this had made his memory better. That is hard to accept. It is also hardly the statement or tactic of a cunning manipulator of evidence.

105) Mr. Downs, his mother and girlfriend gave different evidence respecting where R.M. went when he first arrived at the home, whether money was offered to Patricia Downs to let R.M. in the house, the kind of case in which the guns were being carried by R.M., the description of the guns, and what item or items were given by Jamie Downs to R.M..

106) Had their evidence been exactly the same in every respect, it might well be cause

for grave concern. It would suggest that the situation had been observed from one perspective rather than three. The nature of the differences here does not go to the heart of the narrative or to the chain of events in any significant way. Each can be accounted for by less than acute observation in circumstances that for each of the three were stressful, and by frailties of recollection. Missing details and inconsistencies can give clues that evidence is not reliable either because it has been just plain fabricated or because the person's memory is not one that can be relied upon. If memory is the issue, they did recall the same narrative. They were not confused about who came to the house or what happened when they got there. They were not befuddled.

107) Their memories may be fine but the concern about fabrication needs to be addressed. Maybe they made up the story either in whole or in part. As noted, these are not sophisticated witnesses. They did not cleverly evade questions and take refuge in vagueness when they seemed caught. None of the three seemed to be thinking ahead to the next question. Were they to have fabricated their evidence it would be reasonable to assume that inconsistencies would have been more than abundant. They would have to have got their own stories together and have coordinated them with the version given by R.M. and with the other evidence. That would be a complicated and sophisticated undertaking.

108) As with R.M., it would be a risky proposition to accept the evidence of any one of them alone. Any one of them might be capable of weaving a story to implicate M.R.M.. Together with R.M. though, a reliable and consistent version of events begins to emerge. If it were a fabrication it would require that four people conspire to construct a detailed and generally quite consistent version of what happened that also had to take into account the physical evidence and the time line established by the cell phone records.

Ballistics:

109) Mr. Tan argued that the ballistics and medical evidence together operate to raise a reasonable doubt as to who shot Brandon Hatcher. He used what he described as basic high school trigonometry to calculate the angle at which the bullet passed through Brandon Hatcher's body and from that made inferences as to the angle at which the shot had to have been fired. There was however no evidence as to exactly where or even whether Brandon Hatcher was standing when he was shot, no evidence as to the stance of the shooter who may have been lying prone, sitting, standing or in some other position and no evidence as to the difference in elevation from the general area where Brandon Hatcher is supposed to have been and the area across Regan Drive from which the shots

were supposed to have been fired. The calculations do not take into account factors that would affect the result.

110) Brandon Hatcher was shot in the back. That much is known. That is consistent with a person who has, as the evidence suggested, come out to a fight, only to face three armed people and quickly decided to retreat. There are no reasonable inferences that can be made from the angle of trajectory of the bullet in his body about where the person who shot him was located. Brandon Hatcher was shot. Shots were fired from the direction of Regan Drive. The evidence does establish that.

111) The toxicological report of Stephen LaDelpha noted that drugs were found to have been in Mr. Hatcher's system at the time of his death. The drugs would cause drowsiness, weakened strength and decreased coordination. When Brandon Hatcher was shot the bullet transected the posterior cord of the brachial plexus. He would have immediately lost strength in his deltoid muscle and the muscles of the forearm controlling rotation. Dr. Wood suggested that he would likely have dropped anything heavy.

112) The shotgun found in the area is likely that of Brandon Hatcher. Mr. Tan asserts that the gun would have been dropped immediately and therefore it shows where

Brandon Hatcher was when he was shot. The gun did not make impressions in the ground around it, suggesting that it was dropped straight down and not thrown. Mr. Hatcher was under the influence of drugs that limited his strength and coordination. The gun was found behind the fence separating Mr. Hatcher from the area from which the shots are said to have been fired.

113) The inference suggested by Mr. Tan is that Brandon Hatcher dropped the gun when he was shot because of the injury he sustained and his generally weakened state. On this argument, the gun shows where Brandon Hatcher was standing. On the contrary though, while he could have dropped what he was holding in his injured hand, there is nothing to suggest that he would not have carried the gun a few more feet in his other hand and dropped it there. The position of the gun does not establish exactly where Brandon Hatcher was located when he was shot.

114) Constable David Emberlin was involved with taking photos of the scene. He is not an expert in ballistics. He assumed that shots found in the fence that separated the gun from the area across Regan Drive, the area from which R.M. said the shots were fired, were old damage. Mr. Terry Pipes, who was qualified as an expert said that he could not offer any opinion on the age of the damage. There is no reliable evidence to suggest that

the holes in the fence were or were not a result of this incident.

115) The defence carefully deconstructed the evidence with respect to the damage to various areas as identified. The ballistics expert, Terry Pipes, however, did not purport to provide any opinion with respect to the exact location from which shots were fired. As he noted, there are just too many variables to be able to do that. The best that can be done is to give an indication of the direction from which shots were fired.

116) The expert can say with some certainty where a piece of wood, for example, was pierced from one side or from the other. The damage at the entry and exit points is different. Using rods and lasers the expert can trace back to a point where the laser strikes the ground or a solid object. That gives a general indication of the direction.

117) When a bullet passes through a solid material it leaves a hole. The hole may expand or contract depending on the material and conditions in the area. That hole does not amount to some kind of theoretically exact geometric point. When trajectory is traced back the laser cannot account for variances in the size of the bullet hole, changes of direction caused by the material through which the bullet passed or the randomness of ricochets.

118) Mr. Pipes was not put forward as an expert to show the exact point from which the bullets were shot. His report uses lasers and straight lines but does not purport to show the exact location of the shooter. He can say the general direction from which a shot or shots came.

119) Here, Mr. Pipes' report shows that bullets were shot from the general direction of Regan Drive toward the area where Brandon Hatcher was shot. It also happens that expended .30 caliber cartridge casings were found in the area across Regan Drive. When the gun is fired the casings are expelled from the gun but are not thrown far from the gun itself.

Third party suspects:

120) The police who first arrived at the scene were advised on the likely involvement of a dark SUV. It appears as though a dark SUV or minivan left the area very shortly after shots were heard. Charles MacLaughlin saw a Ford SUV driving quickly in the Greystone area, and saw a flash of light consistent with gunfire originate from the driver's side of the vehicle.

121) Ashley Boudreau heard a vehicle travelling at high speed.

122) Elizabeth Tibbo saw a dark red or burgundy minivan leaving the area, although it was not travelling quickly. She also saw three people leave 123 Lavender Walk after the gunshots were fired, travel in the vicinity of 128 Lavender Walk and then enter and leave 140 Lavender Walk. One person was wearing clothes similar to the clothing reported to have been worn by Brandon Hatcher.

123) A Jessy's Pizza delivery vehicle was seen leaving the area at a high rate of speed. It was driven by Ed Battiste, who is the father of Morgan Hatcher, the half brother of Brandon Hatcher.

124) That information is like an unfinished sentence. Something is missing. That something is the connection to the shooting of Brandon Hatcher. Vehicles coming and going and people coming and going do not provide enough information to be able to make any kind of inference. They may invite speculation but that with respect, is as far as they go. Even the comment from Mr. MacLaughlin that he saw an SUV travelling along Greystone and saw what he thought was a gunshot from the driver's side of the vehicle,

does not associate itself with the death of Brandon Hatcher. The location is not close to where Hatcher was when he was shot and there is no indication as to whether this happened at a time consistent with the time of the shooting.

125) The argument with regard to this evidence is not really argument about third party suspects. There is no third party who has been identified as a potential suspect. There are just people in the area, who may or may not have been behaving suspiciously.

126) In *R. v. Grandinetti* [2005] S.C.J. No. 3, [2005] 1 S.C.R. 27, Justice Abella made reference to an argument that purported to implicate a third party by saying that it amounted to “a chain of speculation joined by gossamer links”. In this case even the gossamer links are absent. There is no evidence at all to suggest or to indicate that anyone in a van, an SUV or any other vehicle was involved.

Dying Declaration of Brandon Hatcher:

127) Each piece of evidence is perhaps capable of another explanation. How they fit together however constructs a narrative of the entire event that is remarkably sturdy. That has to be considered in light of another piece of evidence which not only doesn't fit within

the narrative but that seems, on its face at least, to contradict it.

128) Brandon Hatcher was struck by a bullet in the back. The bullet went through his chest and exited from the front. After being struck, he made his way back to his own home on Lavender Walk. His girlfriend, Amber Macleod, was there. She called an ambulance. Both police and EHS arrived. Brandon Hatcher was bleeding profusely. Ms. Macleod was trying to stanch the bleeding using towels.

129) Constable Brad Murray was dispatched to the scene and arrived at the home before the ambulance. He entered the home and saw a blood trail leading upstairs. He saw Brandon Hatcher lying on the floor with Ms. MacLeod applying towels to the bleeding area. Mr. Hatcher was coherent and able to speak. He was clearly aware that he was bleeding and that he had been shot. Constable Murray said that he was saying, "I'm going to die, I'm going to die, I can't breathe."

130) Constable Murray asked him whether he knew who had shot him. He said that he didn't know. Amber MacLeod could not recall that being said.

131) The defence sought to have that statement entered into evidence, as a dying

declaration. It's relevance is clear. If Brandon Hatcher said that he did not know who shot him, and in fact did not know who shot him, that otherwise apparently consistent narrative of events might indeed be wrong. Brandon Hatcher knew M.R.M., as well as R.M. and Cody Muise. If this was a show down, as the other evidence would suggest, why would Brandon Hatcher not know who was involved?

132) It is important to the defence but it is hearsay. It is a reported conversation which is sought to be entered for the truth of its contents. The traditional exception to the hearsay rule for a dying declaration is based on the higher degree of reliability of the statement of someone who has the settled expectation of death. In other words, people who know they are about to die, have less reason to lie and more reason to tell the truth. Traditionally it was said that people did not want to die "with a lie on their lips". It was, in a sense, the moral equivalent of being under oath.

133) The conditions for admission of such a statement under the traditional approach to hearsay have been met. The statement was made by a person with a settled expectation of death who did in fact die soon after the statement was made. It was about the cause of his death or at least his knowledge or lack of knowledge as to who caused his death. The charge involved in this case is murder. Had the statement been made when he was alive it

would have been admissible. The Crown challenged that last point, and asserted the statement was so unreliable as to be inadmissible. With respect, that argument is a tautological one. The conditions of the exception were set out to determine whether the statement was made with sufficient circumstantial guarantees of reliability to be admitted. With respect to that last condition, there is no requirement that the statement itself be reliable but only that it be formally admissible.

134) More convincingly, the Crown asserted that the principled approach to hearsay requires a consideration of whether indeed, in these circumstances, those circumstantial guarantees of reliability are present regardless of whether the conditions under the older approach have been met. The Crown argued that Mr. Hatcher's statement was not reliable at all and did not reach the point of threshold reliability. He was a person with an extensive involvement in criminal activity and would be inclined at every point to thwart the efforts of the police, even when it came to identifying his own killer. While other people might be more inclined to be truthful in these circumstances, Brandon Hatcher, according to the Crown's argument, would not be.

135) There was evidence with respect to the attitude in that community generally that "snitches get stitches". In other words, it is dangerous to cooperate with the police. There

will be retribution. Mr. Hatcher's mother gave evidence about what she saw as his uncooperative attitude toward the police. She also said that he was not a religious or spiritual person.

136) That last comment was used to support the view that he would be unlikely to fear some kind of divine judgment if he were to "die with a lie on his lips". Because he would have been unlikely to have cooperated with the police in any event and unlikely to feel more bound to truthfulness in the face of death, in the Crown's view his statement was entirely unreliable.

137) At the conclusion of a voir dire the statement was ruled admissible. The principled approach to the hearsay rule does not mean that rules of evidence established over years of experience are to be overthrown holus bolus. They still provide guidance in the application of the more modern approach. The balance to be considered here is, on the one side, the prejudice that arises from the lack of cross examination on the statement and on the other, the greater reliability or probative value that arises from the statement made on the brink of death.

138) The statement was made about Brandon Hatcher's knowledge of the cause of his

death. That is one thing that might well trump the code of non-cooperation with the police. The nature of that code is an important consideration. The code, such as it is, is less a moral code or a code of honour than it is a practical code of fear. It is more about self preservation than loyalty. “Snitches get stitches” is not an expression of a moral view, but an expression of a consequence. It is a consequence that would not apply to one who is facing death. Brandon Hatcher would be very worried about what would happen if he were to cooperate with the police. That worry would be all but gone if he firmly believed that he was about to die.

139) Refusing to help the police on a routine investigation is one thing. Protecting the people who killed you would require a level of selfless devotion to an alternative moral code. That would portray a kind of heroism that would elevate that code beyond the level of sordid threats of violence and retribution that it really is. Retribution against family members is a part of that code. Those who enforce it would not assume that it would have any effect on the already dead informant.

140) If Brandon Hatcher had indeed wanted to die what might have amounted in his view to a hero's death, he would likely not have simply denied knowledge of who had shot him, leaving it open to interpretation. He would have defiantly refused to give up his

killer.

141) There are of course serious issues with regard to the truth of the statement. Its admission depends on its meeting the standard of threshold reliability through the presence of circumstantial guarantees of truthfulness. Brandon Hatcher, like very many people, religious or not, probably did not go to his death in fear of standing before the seat of divine judgment. That may not be very much of a guarantee of reliability. He would not be someone who would be worried about dying with a lie on his lips. More importantly, his adherence to the code of noncooperation may have been weakened. He may have understood that he was about to be beyond the reach of retribution. On that basis, the statement was ruled admissible.

142) Once admitted, the statement has to be considered in light of Mr. Hatcher's background, the circumstances of the shooting itself and the other evidence. When admitted, the statement exists somewhat in isolation from the other evidence. At that point it is premature to assess how it relates to everything else. That process has to be undertaken now.

143) Amber Macleod said that she did not recall him making such a statement. If he did

make such a statement to Constable Murray it could mean one of four things.

144) It could mean that he knew who shot him but was refusing to say. That would mean that the code of the street was so important to him that he would want to be remembered as one who had upheld it. It would be a last act of defiance against the police who he might have seen as greater enemies than those who had shot him. It might perhaps have been a result of the fear of retribution against his family. It might also have just been the force of habit in a moment when he did not have the luxury of reflection.

145) It could mean that he saw the person who shot him but that the person was a stranger, someone entirely unknown to him.

146) It could mean that he simply didn't know who of the people firing actually shot him. If things happened as R.M. described them, three people were firing at him. He would not have known which of the three had fired the shot that struck him. In that circumstance it would seem that he would have at least offered up some suspects.

147) It could mean that he had no idea who was even involved. That would mean that he would have to have gone out of the house at that time, and gone toward Regan Drive

where the shooters were waiting, for no apparent reason, then to be shot by a stranger. Somehow, in less than three minutes from his telephone call with Cody Muise, someone else who happened to be in the same area, at the same time as the others with guns, shot him.

148) There is a strong inference that Brandon Hatcher went outside to face someone whom he knew in some kind of showdown. The shotgun on the ground near where the shooting took place, though not specifically tied to Mr. Hatcher, builds on that inference. His phone call to Cody Muise builds on it further.

149) In order to accept that Brandon Hatcher saw who killed him and that the person was someone unknown to him, it would mean first that he had decided to be truthful with the police. It would also mean that the overwhelming evidence that R.M., Muise and M.R.M. had shot at him, would simply be wrong. The dying declaration must be considered in light of all of the other evidence to determine if it raises a reasonable doubt. If in this case, Brandon Hatcher did decide to cooperate and tell the truth to the police, his testament would stand in stark contrast to the other evidence. There is simply no evidence at all to allow for the inference that he was shot by a stranger.

Summary:

150) The evidence that R.M. was present at the shooting of Brandon Hatcher is overwhelming. He did not fabricate a story about his own involvement. He knew where the shotgun had been thrown, where the spent cartridges would be found, and the direction of fire. To have constructed a false story that involved two other people would have taken an extraordinary feat of coordination. With respect to Cody Muise, that story would have to involve weaving in the contact with Brandon Hatcher just moments before he was shot. It would have to take into account and be consistent with the messages from Stacy Blom to Cody Muise moments after the shooting. It would mean coordinating the whole fabrication with Jamie Downs, Patricia Downs and Ashley Boudreau.

151) To have thrown M.R.M. into the mix, he would have to have taken into account the contact between Stacy Blom and M.R.M. about the delivery of the mask. He would have to have made sure that the discarded mask had M.R.M.'s DNA on it. He would have had to have woven into the story M.R.M.'s presence with the group in the time after the shooting to conform with his text to Stacy Blom. In short, it would have taken the work of, if not a mastermind, at least a highly sophisticated, highly intelligent and remarkably composed person. It would have taken the cooperation of Jamie Downs,

Patricia Downs and Ashley Boudreau and relied on their abilities to have kept the story more or less straight.

152) R.M.'s narrative is a reliable one. His having fabricated M.R.M.'s involvement is simply beyond implausible.

153) The three young men were there at the shooting of Brandon Hatcher. The rogue shooter theory would require an even more bizarre confluence of events.

154) An unknown person in a van or SUV or perhaps on foot, would have to have shown up at just the same time and shot Brandon Hatcher. In the very moments after Muise was in telephone contact with Hatcher, that person would have to have appeared and would have to have shot Brandon Hatcher. It would have to have been a coincidence that this person showed up just when the people who left armed and ready for a shooting arrived at the scene.

155) While Brandon Hatcher's statement as a dying declaration has sufficient guarantees of reliability to be admitted, it does not serve to raise a reasonable doubt as to M.R.M.'s direct involvement in the shooting by suggesting that some unknown third party was

involved. The statement must be considered in light of the other evidence and placed within its context. That evidence is so overwhelming that it points only to the conclusion that Brandon Hatcher was indeed not cooperating with the police. That conclusion is consistent with his well known attitude toward the police and consistent with the rest of the evidence. While there are reasons for him to have been willing to tell the truth at that time, they are not sufficient to allow for the conclusion that the statement was true in the face of the overwhelming evidence that it was not.

156) It has been proven beyond a reasonable doubt that Brandon Hatcher was shot and killed by gunfire from the group of three young men who left Jamie Downs' house. That group was made up of Muise, R.M. and M.R.M..

M.R.M. as a party:

157) The time period during which the actual shooting took place requires closer scrutiny. The evidence provides proof beyond a reasonable doubt that M.R.M. was at the scene of the shooting and was armed. The evidence also proves that Brandon Hatcher was killed by a shot fired by one of the three young men who came there and confronted him that evening. The only direct evidence that M.R.M. fired a shot at all was from

R.M.. It is possible that M.R.M. went with R.M. and Cody Muise but took no part in the shooting itself. The evidence of his firing a gun comes from R.M. alone. There has been no gun recovered with M.R.M.'s DNA on it.

158) The trip to Digby with Cody Muise could also be actions of a person who knows that he is in trouble because he was at the scene of the shooting even if he took no part at all in it. M.R.M. knew that Brandon Hatcher had been shot and killed and that because he was there he would be implicated. His flight could be explained whether or not he took part in the shooting.

159) R.M.'s evidence was that M.R.M. was an active participant. He did not simply go along while Cody Muise did the shooting. The issue is the extent to which reliance can be placed on R.M.'s evidence as it relates to this critical period of time.

160) R.M.'s evidence is consistent with the other evidence in every other relevant respect. There still exists the possibility that R.M. would tell the truth regarding all of the surrounding circumstances then tailor the evidence at the pivotal moment to implicate M.R.M. while minimizing his own involvement. He could simply be lying.

161) It is possible that M.R.M. left Downs' residence, armed, with R.M. and Muise, as R.M. and Downs described, but slipped away and went somewhere else while they did the shooting. It is also possible that he went along with Muise and R.M. but did nothing at all himself.

162) The test however is not whether a scenario consistent with the accused person being not guilty can be imagined. Imagination knows no bounds. Reason does. It has been said that imagination cannot be allowed to kick common sense out the door. Nor can it be allowed to kick the concept of reasonable doubt out the door.

163) There is nothing to suggest that he wandered away and separated himself from the others during the shooting. He was there in the planning and there in the aftermath, looking and acting in a way entirely consistent with active involvement throughout.

164) M.R.M.'s passive presence at the scene as a mere observer would be a farfetched and unreasonable inference. His active participation leading up to the shooting, including his text regarding the ski mask, loading up the guns at Jamie Downs' house and his later actions and comments as reported by Jamie Downs, lead only to the inference that he was both there when the shooting happened and an active participant in it.

165) Criminal responsibility attaches to a person as a party to an offence if he or she is the principal, aids the principal or abets the principal by actively encouraging, assisting or supporting the principal in his purpose. Section 21(1) of the Criminal Code puts the aider or abettor on the “same footing” as the principal. The difference between aiding and abetting and personally committing the offence is irrelevant. Either manner of committing the offence is equally culpable. *R. v. Thatcher* [1987] 1 S.C.R. 652, [1987] S.C.J. No. 22, pp.689-90.

166) There can be more than one person who actually commits the crime. When more than one person is present during the commission of the crime and does an act toward the achievement of the crime, they are joint principal offenders. They have to each have the required criminal intent or mens rea. When people act together in this way toward a common criminal objective, and any one of them achieves the common objective, all who are present at the commission of the crime are joint principal offenders. “This principal has been pithily stated in concrete terms that “the blow of one is, in law, the blow of all of them”. E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, Vol .1, 2d ed. 15:1010 and 15:1015 cited in *R. v. H. (L.I.)* [2003] M.J. No. 232.

167) There is no way to know whose bullet killed Brandon Hatcher. Three people were shooting at him. Only one bullet struck and killed him. The law recognizes the absurdity of a situation in which people acting together could avoid criminal liability by making it impossible to determine which one had killed the victim. It has been well established that when people act “in concert” there is no requirement to determine who struck the fatal blow. *R. v. Isaac*, [1984] 1 S.C.R. 74, *R. v. Thatcher supra.*, *R. v. MacMaster* [1996] 1 S.C.R. 740, *R. v. Forknall* [2003] B.C.J. No. 108.

168) In a situation such as this, where people together are firing at another, it does not matter which bullet killed Brandon Hatcher.

169) It is possible, though entirely unlikely, that M.R.M. went to the scene yet took no active part. In light of the evidence, that is a speculative assumption. There is no evidence to support the inference that despite his active involvement up to that point, he changed his mind at the last moment.

170) Even if that were the case however, criminal responsibility would be found under section 21(1) (b) and (c). Those sections deal with aiding and abetting. While the terms are often used together, they are separate concepts. Aiding means assisting the principal in

some way. Abetting means encouraging, instigating, promoting or procuring the crime to be committed. To be guilty of aiding or abetting something more than mere presence at the scene as a passer-by is required. R.v. Dunlop [1979] 2 S.C.R. 881. That can include an act that facilitates the offence such as keeping watch, or enticing the victim away, or an act that tends to prevent or hinder interference with the accomplishment of the crime. That may include preventing the victim from escaping.

171) Presence at the commission of an offence must be accompanied by other factors to attract criminal responsibility.

Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal's intention to commit the offence or attendance for the purpose of encouragement. There was no evidence that while the crime was being committed either of the accused rendered aid, assistance or encouragement to the rape of Brenda Ross. There was no evidence of any positive act or omission to facilitate the unlawful purpose. One can infer that the two accused knew that a party was to be held, and that their presence at the dump was no accidental or in the nature of casual passers-by, but that is not sufficient.... One must be able to infer that the accused had prior knowledge that an offence of the type committed was planned, i.e. that their presence was with the knowledge of intended rape. R. v. Dunlop pp.891-896

172) The evidence here does not support any inference that M.R.M. was merely a passive observer either at the scene or in the hours leading up to the shooting. He was involved at least in the attempt to procure a ski mask from Stacy Blom. He was then part

of the planning. He went to Jamie Downs' home, which was the jumping off point. He didn't go there to watch. He was then part of the scheme. While there he made comments encouraging the furtherance of the plan. With the others, he loaded up the guns and set off for Greystone.

173) It is not rational to conclude either that he was passive when he arrived or that he was not an active participant in the planning and the execution of the plan up to that point. He was present and even if he did not fire a shot, he was not merely present as an observer but as one who directly assisted in the furtherance of the joint enterprise to that point.

174) M.R.M. was either a principal or a party to the killing of Brandon Hatcher. He was a party to that killing whether or not he fired the shot that killed Brandon Hatcher and whether or not he fired a shot at all.

Intent to Kill:

175) There is no evidence that any of the three young men involved specifically stated that they were going to Greystone with the intention of killing Brandon Hatcher, Christian

Clyke or anyone for that matter. Colin Gillis had been wounded and the intent was to exact some revenge. There is no evidence of any one of them at any time saying that the revenge would take the form of killing.

176) Proof of intent does not require a formal statement to that effect by the parties involved. Intent must often be inferred from the surrounding circumstances. Whenever inferences are made it is important to understand that more than one reasonable inference can be drawn from a set of facts. It is not enough to conclude that intent to kill can be inferred from the evidence. It must be the only reasonable inference.

177) The intent of these young men must be inferred from the surrounding circumstances. They arrived armed, not with baseball bats, knives or even small caliber firearms. They came with a 12 gauge shot gun loaded with a slug and additional ammunition for the shotgun. They had two other guns. They fired numerous .30 caliber rounds. The person at whom they shot was not one who was to be surprised in an ambush with the intent that he be startled, threatened or frightened. A bullet proof vest is used when there is an expectation or threat of return fire.

178) Brandon Hatcher came out armed himself. This was essentially a showdown. They

did not discharge one round over his head to scare him. The shots were fired at him. There were a number of .30 caliber bullets fired. One of them hit him and killed him. It is not at all reasonable to infer from these circumstances that the intent was simply to wound or scare Brandon Hatcher.

179) Section 21(1) (a) of the Criminal Code provides that culpable homicide is murder where a person means to cause bodily harm that he knows is likely to cause death and is reckless as to whether death ensues or not. Shooting at another person with the intent to hit him, means that there is an intention to cause bodily harm. The bodily harm inflicted by a firearm of that kind is likely to cause death. It is conceivable that a person may be a skilled marksman and intends only to inflict some kind of nonlethal wound. That is not the case here. Shots were fired at Brandon Hatcher knowing that if he were struck he would be wounded and the wound would be likely to result in his death.

180) The Crown has proven beyond a reasonable doubt that M.R.M. was a principal or a party to the intentional killing of Brandon Hatcher. That killing was murder.

Planning and deliberation:

181) This was furthermore not a situation in which that intent was formed quickly or on the spot. M.R.M. himself was involved in attempting to procure a mask which was to be used as a disguise. That contact took place about two and a half hours before the shooting of Brandon Hatcher took place.

182) The group got together at Jamie Downs' house which was used both as an assembly point and as a safe house of sorts. The three young men were dressed for the event in black clothes. They had a bullet proof vest. The weapons were brought to Jamie Downs' house for use that night. The three young men discussed who would use each one. The weapons were loaded at Downs' house. M.R.M. said words to the effect of, "We're going to get them mutts."

183) They walked to Greystone. It was not a matter of simply crossing a street. They took a route that was not the most direct. They did not rush over in a rage. They took their time.

184) They were in telephone contact with Brandon Hatcher before he came out to confront them. Muise and Hatcher spoke by telephone. They were not getting ready to confront an anonymous person.

185) The three, Muise, M.R.M. and R.M. took up a position where they would have an advantage in any exchange of gunfire with Hatcher. They did not simply drive or walk to his home and demand satisfaction. That might have been the course of action of people intending to scare Brandon Hatcher or intent on just physically attacking him. Their actions, in using firearms, wearing a bullet proof vest and taking cover, lead to the inference that they each knew that it was reasonably likely that Brandon Hatcher would also be armed. They were right. They planned for an exchange of gunfire and that is what they got.

186) There was, of course, an element of rashness to it all. These young men acting in response to an attack on an associate were not making judgments that were the result of a careful weighing of the options. Planning and deliberation does not mean that the plan is a good one, one that is well thought out or one that makes even a modicum of sense. Planning and deliberation is not inconsistent with a decision making process that is triggered by an irrational response, propelled into action by bravado and sustained by profoundly poor judgment.

187) Once the decision was made to shoot Brandon Hatcher the group had to plan and

deliberate. Bringing together the three people and the weapons at a specific house was part of that. Selecting and loading the weapons was another part of the plan. Taking the route to Greystone was also a part of the plan. Taking cover when Brandon Hatcher appeared was yet another part of the planning.

188) The evidence is of, if not careful planning, at least deliberation and planning. There is no other reasonable inference that can be made.

189) The Crown has proven beyond a reasonable doubt that M.R.M. was a party to the planned and deliberate murder of Brandon Hatcher. He is then guilty of first degree murder.

Jamie S. Campbell
Judge of the Provincial Court of Nova Scotia