

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. Bou-Daher, 2013 NSPC 108

Date: November 15, 2013

Docket: 1982660-1982661

Registry: Halifax

Between:

Her Majesty the Queen

v.

John Bou-Daher and Taleb Badour

**DECISION – MOTION BY TALEB BADOUR FOR A DIRECTED
VERDICT**

Judge: The Honourable Judge Anne S. Derrick

Heard: November 15, 2013

Decision: November 15, 2013

Charge: section 435(1), of the *Criminal Code*

Counsel: Alicia Kennedy and Terri Lipton, counsel for the Crown
Elizabeth Buckle, for John Bou-Daher
Luke Merrimen, for Taleb Badour

By the Court:*The Charge against Taleb Badour*

[1] On July 7, 2008, Key Largos, a bar in Lower Sackville, was the scene of a deliberately set fire.

[2] John Bou-Daher and Taleb Badour were eventually charged with arson for fraudulent purposes, the charge against them reading as follows:

That on or about July 7, 2008, with intent to defraud Canadian World Wide Underwriting Agencies Ltd., c/o Maxwell Claims Services, Lloyds of London and Temple Insurance Company, they caused damage by fire to Key Largos, property of Starfish Properties, situate at 70 First Lake Drive, Lower Sackville, Nova Scotia, contrary to section 435(1) of the Criminal Code of Canada.

[3] At the end of the Crown's case, Mr. Badour made a motion for a directed verdict, submitting that there was no evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty.

[4] The issue for me to determine therefore is whether the trial against Mr. Badour should continue or whether his motion should succeed and I should direct that he be acquitted.

The Agreed Facts Relevant to the Motion for a Directed Verdict

[5] A number of facts have been the subject of an agreed statement of facts entered as Exhibit 10. These facts include that on the offence date, Key Largos was co-owned by Johnny Namnoun and Joseph Bou-Daher through the numbered company 3218074 Nova Scotia Limited. There is no evidence of any connection between Mr. Namnoun, Joseph Bou-Daher, and Mr. Badour.

[6] It has also been agreed that the fire was deliberately set. The report of Philip Juby dated May 5, 2010 (Exhibit 20), entered into evidence by consent, contains the following opinion: there were "...two distinct areas of deliberately set fires with the use of a liquid accelerant. The fires could not occur without human actions. The fires were set intentionally to cause damage to the contents and structure of the business." (Exhibit 20, page 3)

The Evidence Relating to Taleb Badour

[7] The evidence about Mr. Badour came from several sources: a statement given to police by Mr. Badour on July 8, 2008, the testimony of the maintenance person for Starfish Properties, Gary Wambolt, and the testimony of Asal Vakili who had worked as a waitress at the bar in July 2008. The statement of Ms. Vakili's boyfriend, Kaihosrov Nademi-Nassari, also provides some evidence about Mr. Badour as I will discuss shortly. That statement, made to police on October 18, 2008, was entered into evidence by consent as Exhibit 21.

[8] What the evidence indicates is that Mr. Badour knew Mr. Bou-Daher. Mr. Wambolt testified that he had seen them together at Key Largos, as he recalled it, 5 to 6 or 4 to 5 times over the last month prior to the fire on July 7. Mr. Wambolt had no dealings with Mr. Badour. He agreed with the proposition put to him on cross-examination that he would not have approached Mr. Badour in relation to any problems with the business.

[9] Indeed there is no evidence Mr. Badour had any interest whatsoever in the bar or the premises. There is no evidence he had any involvement in the management of the bar, or its insurance coverage, or the rental of the premises.

[10] The police took a statement from Mr. Badour on July 8, 2008. (Exhibit 6) He was asked to describe what had happened in the time period leading up to the fire. Mr. Badour told them that he had fixed a sink at Key Largos on Saturday, July 5. He didn't get paid before he left. On the Sunday, July 6 he decided to drop by the bar and get the money he was owed for the work he had done. He said he went to

Key Largos “probably after 12:00”, referring to midnight, (Exhibit 6, page 3) and the door was locked. He got the number to call Mr. Bou-Daher from a man in a truck who was waiting for his girlfriend to get off work. He called Mr. Bou-Daher to say he was outside. Just then Ms. Vakili came out and Mr. Badour went in and waited for Mr. Bou-Daher. He described waiting “maybe half an hour” (Exhibit 6, page 3), although he said he was not sure exactly how long he waited. He saw that Mr. Bou-Daher was counting money “from the machine” (Exhibit 6, page 3) and “...so I just walked out, I don’t want to see what he’s doing in there and waited for him...” (Exhibit 6, page 3) Mr. Badour said he “went down to the door, I took the money from him” and then he went out with Mr. Bou-Daher and “we left.” (Exhibit 6, pages 3 – 4) He thought they left between 12:30 and 1 a.m. (Exhibit 6, page 4)

[11] The evidence of Ms. Vakili and the statement of her then boyfriend, Mr. Nademi-Nassari, deals with the time period when Mr. Badour went to Key Largos around midnight on July 6.

[12] Ms. Vakili testified that July 6 was not a very busy day at the bar and she ended up leaving earlier than normal. The bar’s customers had all left by around midnight. She closed out her shift, handing in her money and receipts to Mr. Bou-Daher who was in the upstairs office. It was Ms. Vakili’s evidence that when she left through the doors leading out from the VLT lounge, Mr. Badour was there, trying to get in. He told her he was “John’s friend” and that he was going to see John. He took the opportunity of Ms. Vakili leaving the bar to get inside.

[13] Ms. Vakili testified that she does not think Mr. Badour had anything with him when he went into Key Largos as she was leaving on July 7.

[14] Mr. Nademi-Nassari described going to Key Largos to pick Ms. Vakili up at the end of her Sunday shift. She was still inside when he arrived. As he waited a car pulled up and a man got out and knocked on his window asking for the number to the bar. Mr. Nademi-Nassari had the number in his phone and gave it to the

man. The man then called the bar and according to Mr. Nademi-Nassari, someone came and opened the door for him. Shortly afterwards, Ms. Vakili came out and she and Mr. Nademi-Nassari drove away.

[15] Mr. Nademi-Nassari was asked by police if the man had anything in his hands. He told them just his cell phone was all he recalled.

The Crown's Arguments on the Motion for a Directed Verdict - Evidence of Opportunity and Motive

[16] The Crown submits that it was Mr. Badour who went into Key Largos to see John Bou-Daher as Ms. Vakili was leaving. It is a reasonable inference from the evidence that Mr. Badour and Mr. Bou-Daher were then in the Key Largos premises together for awhile until they left together.

[17] The Crown submits that it is reasonable to infer that while Mr. Badour was with Mr. Bou-Daher at Key Largos he had the opportunity to set or assist in setting the fires or at least one of them. The Crown points to there being two areas where, according to the expert evidence, separate fires were set. It is reasonable to infer the Crown says that the fires were the work of two persons, and on the evidence, Mr. Badour being one of those persons. It is the Crown's submission that Mr. Badour had the opportunity to set a fire in Key Largos while he was in there with Mr. Bou-Daher.

[18] The Crown also submits that there is some evidence that Mr. Badour could have had a motive to set fire to or assist in setting fire to, Key Largos. The Crown points to evidence that Key Largos was struggling financially. There is evidence that Mr. Badour did some work for Key Largos. The Crown argues that it is a reasonable inference that Mr. Badour could have been motivated to participate in arson for fraudulent purposes in order to achieve a benefit in circumstances where the bar might not be able to continue to employ his services or pay him.

[19] In the motive column, the Crown also points to Mr. Badour having a relationship with Mr. Bou-Daher supporting a reasonable inference that they could have engaged in a joint enterprise to commit an arson for fraudulent purposes. The Crown says it is peculiar that Mr. Badour would go by Key Largos around midnight to get paid for the plumbing work he had done a couple of days before.

The Law on Motions for a Directed Verdict

[20] A directed verdict is “not a creature of statute but rather of the common law.” (*R. v. Rowbotham*, [1994] S.C.J. No. 61 (Q.L.), page 467) The issue to be determined is whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. A motion for a directed verdict will fail where there is admissible evidence, which could, if it were believed, result in a conviction. (*R. v. Acuri*, [2001] S.C.J. No. 52, paragraph 21)

[21] With reference to *Acuri*, the Nova Scotia Court of Appeal in *R. v. Beals*, [2011] N.S.J. No. 231, had the following to say about a motion for a directed verdict that had failed in the court below:

22 Faced with such a motion, Judge MacDonald was obliged to consider the evidence offered by the Crown and decide whether it was sufficient to reasonably support a conviction. In conducting such an analysis he was required to weigh the evidence, to a limited extent. That task was described by Chief Justice McLachlin in *Arcuri*. While her comments were made in the context of a preliminary inquiry, we know that they are of similar binding authority when considering a motion for a directed verdict. The Chief Justice began her reasons:

1 ... For the following reasons, I reaffirm the well-settled rule that a preliminary inquiry judge must determine whether there is sufficient evidence to permit a properly instructed jury, acting reasonably, to convict, and the corollary that the judge must weigh the evidence in the limited sense of assessing whether it is capable of supporting the inferences the Crown asks the jury to draw. As this Court has consistently held, this task does not require the preliminary

judge to draw inferences from the facts or to assess credibility. Rather, the preliminary inquiry judge must, while giving full recognition to the right of the jury to draw justifiable inferences of fact and assess credibility, consider whether the evidence taken as a whole could reasonably support a verdict of guilty.

[22] The case being advanced against Mr. Badour is entirely circumstantial. There is no direct evidence on any of the essential elements of the offence. As it has been agreed that the fire that damaged Key Largos was deliberately set, my task on the directed verdict motion is to determine whether the evidence led by the Crown is capable of supporting the inferences that Mr. Badour set or assisted in setting the fire; and, if so, whether when he did so he intended to defraud the insurance company. My assessment of the evidence does not involve my making factual inferences or assessing credibility. I must engage in only a limited weighing of the evidence, and ask myself whether the evidence, if believed, could reasonably support an inference of guilt. (*Acuri, paragraph 23*)

[23] In *Beals*, the Court of Appeal noted that there is no scientific formula for the assessing what constitutes a “limited weighing” of the evidence:

36 There is no ready instrument one can use to gauge the parameters of "limited weighing" by preliminary inquiry judges when dealing with a committal decision, or by a trial judge on a motion for a directed verdict. No such assessment of the evidence can be plumbed with mathematical precision. Whether a motion will succeed or fail must depend upon the judge's evaluation of the evidence in that particular case...

Analysis

[24] I earlier reviewed the evidence led by the Crown that relates to Mr. Badour. It shows that he was at Key Largos with John Bou-Daher either shortly before or at the time the fire broke out. There is evidence that the security alarm at Key Largos was armed at 1:10 a.m. (Exhibit 11 – System Event Report) The Agreed Statement of Facts (Exhibit 10) indicates that the fire alarm monitor received the fire alarm at

1:09 a.m. The expert report of Philip Juby (Exhibit 20) entered by consent indicates Mr. Juby's opinion that the amount of open flame time in the fire scene at Key Largos was more than 3 minutes and less than 5 minutes. I find it could be reasonably inferred from the times in evidence that Mr. Badour was present at Key Largos when the fire started.

[25] An inference that Mr. Badour was inside Key Largos when the fire started is the high water mark for the Crown's case. On this evidence could a reasonable jury, properly instructed, return a verdict of guilt against Mr. Badour on the charge of arson for fraudulent purposes?

[26] Mr. Badour was seen entering Key Largos but there is no evidence he was carrying anything. There is no evidence therefore that he brought an accelerant into the bar that was used to start the fire. There is no evidence that he started the fire. There is no evidence of Mr. Badour even being with Mr. Bou-Daher in the time before they left the building together. Mr. Badour says he was waiting while Mr. Bou-Daher finished up the night's tally and was not watching him while he did so.

[27] There is also no evidence that Mr. Badour had any motive to start the fire. Indeed, it would not be a reasonable inference that he had any motive for doing so. It would not be reasonable to infer that he would participate in burning Key Largos. There is no evidence he knew the bar was having financial problems. There is no evidence he was reliant on income from working for Key Largos. I think it can be said that it would be unreasonable to infer that Mr. Badour would burn a business that was providing him with some work.

[28] It also cannot be reasonably inferred from the mere fact of a friendly relationship with Mr. Bou-Daher that Mr. Badour would participate in an arson, especially where there is no evidence that Mr. Badour would benefit from doing so.

[29] As I have noted, there is no evidence that Mr. Badour had any interest in Key Largos. The evidence of James Matheson, the insurance adjuster, establishes that he was not a beneficiary on the insurance policy for the business. While motive is not an element of the offence, its absence is “a significant fact.” (*R. v. Jonkman*, [2012] S.J. No. 783 (Q.B.), paragraphs 112-113) (see also, *R. v. Monteleone*, [1987] S.C.J. No. 52, paragraph 14)

[30] There are strong echoes in this case of *R. v. Coutts*, [1998] O.J. No. 2555, where the Ontario Court of Appeal had the following to say about Ms. Coutts, who was present with her boyfriend, Middleton, and a friend of Middleton’s, Scott, when a fire engulfed their apartment:

22 It was open to the jury to find that the fire was deliberately set and that it started inside the apartment. Those findings would lead to the further conclusion that the fire was set by either of the appellants, or Scott or by some combination of the three people.

23 There was evidence that Middleton had a motive to set the fire. He had a long standing heated and ongoing dispute with the landlord and had been ordered to vacate the apartment as of January 31st (the day of the fire). As Crown counsel put it in her oral submissions, it was reasonably open to the jury to find that Middleton had decided to leave the apartment with “a bang.” There is no evidence that Scott had developed any animosity towards the landlord or had any motive to set the fire. Nor do I think the evidence supports the conclusion that Coutts had a motive to set the fire. According to the landlord, his previous dealings with Coutts had been amicable and during her one direct involvement in the ongoing dispute with Middleton, the landlord said that Coutts had tried to control Middleton who was angry and demanding the return of his deposit.

24 Stripped to its essentials, and putting the case at its highest for the Crown, the jury could view this as a case in which three people in all the world had the opportunity to set the fire and only one of those three had a motive for doing so. I think a reasonable jury, properly instructed, could on this evidence return a finding of guilt against Middleton. I do not think, however, that a reasonable jury could convict Coutts of setting the fire solely on the basis of her presence in the apartment when the fire was started...

[31] Likewise, I do not think a reasonable jury, properly instructed, could convict Mr. Badour of arson for fraudulent purposes where the evidence does no more than put him in Mr. Bou-Daher's presence as they leave Key Largos at or near the time the fires on the second level of the bar set off the alarm. At its best, the Crown's evidence establishes Mr. Badour's presence at the scene with no evidence that could support reasonable inferences for proving the elements of this offence. What the Crown suggests as inferences that could be drawn from the evidence are nothing more than speculation and conjecture.

[32] Consequently, having reviewed all the evidence, I direct that Mr. Badour be acquitted of the charge under section 435(1) of the *Criminal Code*.