PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v.Osborne*, 2014 NSPC 9

Date: 2014-03-17
Docket: 2569825
Registry: Pictou

Between:

Her Majesty the Queen

v.

Micah Scott Jacob Osborne

VERDICT

Judge:	The Honourable Judge Del W. Atwood
Heard:	22 July, 10 September, 4 December 2013; 24 February 2014, in Pictou, Nova Scotia
Decision:	17 March 2014
Charge:	Para. 348(1)(b) of the *Criminal Code of Canada*
Counsel:	William Gorman, for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Micah Scott Jacob Osborne

By the Court:

[1] Micah Scott Jacob Osborne is charged in a single-count information with breaking into a residence at 124 Grandview Avenue, Trenton, Nova Scotia and committing the indictable offense of mischief contrary to paragraph 348 (1) (b) *Criminal Code of Canada*. As this allegation involves a dwelling, the charge is indictable. Mr. Osborne elected to have his trial heard in this court, pleaded not guilty, and an English-language trial was conducted before me on 22 July 2013, 10 September 2013, 4 December 2013 and 24 February 2014. The defense did not call evidence. I reserved my decision until today, 17 March 2014.

[2] The theory of the prosecution is that Mr. Osborne was the wheelman who drove Robert Douglas MacInnis, Cory Michael Caverly, and Franklin David Ward Crook to the home of Brent Falconer at 124 Grandview Avenue, Trenton, Nova Scotia. Mr. Osborne waited behind while Mr. MacInnis, in the company of Mr. Crook and Mr. Caverly, went to confront Mr. Falconer about having an affair with Mr. MacInnis' wife. The prosecution alleges that Mr. MacInnis and his party broke into the Falconer home and did substantial damage. The prosecution theorizes that

Mr. Osborne is criminally liable as a party under section 21 of the *Code*, as he aided the three others by providing them with transportation, and by handing Cory Caverly a tire iron*;* it is asserted by the prosecution that the circumstances of the of events of 4 March 2013 ought to satisfy the court beyond a reasonable doubt that Mr. Osborne was aware that Mr. MacInnis intended to break into the Falconer home, or was sufficiently blind as to substitute for *mens rea*.

[3] Although Mr. Osborne did not testify, he did provide two recorded statements to police, which were admitted by consent with confessional *voir dires* having been waived in accordance with *R. v. Park*, [1981] 2 S.C.R. 64.

[4] The first statement, given during a skillful interrogation conducted by Detective Constable Jason MacKinnon, is the one that focuses on the charge before the court. In it, Mr. Osborne admitted to driving Mr. MacInnis and the others to the home of a Michael McKenzie; Mr. MacInnis believed that his wife had had intimate contact with Mr. McKenzie, as well as with Mr. Falconer. Mr. Osborne acknowledged that Mr. MacInnis, Mr. Caverly and Mr. Crook broke out the windows of Mr. McKenzie's van and that Mr. MacInnis lighted a Molotov cocktail which he wound up dropping to the ground.

[5] Mr. Osborne admitted to detective Constable MacKinnon that he then drove the three to the Falconer home and that he expected them to “go in"; however, he claimed not to know that they intended to commit a break-in.

[6] As my colleague Derrick J.P.C. noted in *R. v. Ogden* 2014 NSPC 7 at paragraph 10, I must consider statements made by an accused to police in accordance with the principles set out in *R. v. W.D.*, [1991] S.C.J. 26, just as I would had defence called evidence. I must assess whether I believe Mr. Osborne's version of events as he described them to Det. Cst. MacKinnon; even if I do not, I must ask whether his version can be said to leave me in a state of reasonable doubt with respect to the elements of the offense with which he has been charged. Furthermore, as agreed upon by counsel, I must consider also the included offense of mischief under para. 430(4)(a) of the *Criminal Code*, given subsection 662(1) *Code.*

[7] In the circumstances of this case, I find it unnecessary to decide whether Mr. MacInnis, Mr. Caverly and Mr. Crook actually broke into Mr. Falconer's home. Assuming, *arguendo*, that they did, I find that I accept Mr. Osborne's evidence that he did not know it was going to happen. I find as a fact that he would not have known it, based upon what happened only a few minutes earlier at Mr. McKenzie's

residence, where, yes, property was vandalized, but no break-in took place. Having said that, I am able to conclude that Mr. Osborne knew of or was wilfully blind to Mr. MacInnis is purpose to commit another act of vandalism at the Falconer residence.

[8] Accordingly, I find Mr. Osborne not guilty of the offense of break and enter, but guilty of the included offense of mischief not exceeding five thousand dollars. These are my reasons.

[9] I listened attentively to the evidence of Mr. MacInnis, Mr. Crook and Mr. Caverly. I am mindful that their evidence of their conversations leading up to arriving at Mr. Falconer's home is based entirely on their unaided memories. Mr. Osborne’s car was not the Oval Office, and there was no Alexander Butterfield keeping a taped record of everything that was said. Further, Mr. MacInnis, Mr. Crook and Mr. Caverly had been drinking – " copious amounts" as characterized accurately at paragraph 7 of the prosecution's brief. The court is reminded frequently—often, indeed, by the prosecution—of the impairing effects alcohol consumption might have on human memory, and I am conscious of that concern in this case. In contrast, Mr. Osborne was sober.

[10] Although Mr. MacInnis, Mr. Crook and Mr. Caverly claimed the protection of subsection 5(2) of the *Canada Evidence Act* – a protection constitutionalized in section 13 of the *Charter* – the fact is that they are not impartial witnesses in this proceeding, but indicted accomplices whose charges are pending before the court. While I do not feel it necessary to instruct myself with an unsavory-witness caution pursuant to *R. v. Vetrovec*, [1982] 1 S.C.R. 811 at p. 831, I do find it prudent to remain mindful of the their partisanship in considering whether they might have a motive to amplify Mr. Osborne's level of involvement. This, in my view, is a common-sense self-direction that accords with *R. v. Laboucan*, 2012 SCC 12 at para. 22, *rev'g.* 2009 ABCA 7, but which does not involve pigeon-holing as inherently unreliable the evidence of an accomplice, something which ought to be avoided, as noted in *R. v. Winmill*, [1999] O.J. No. 213 at para. 113 (C.A.).

[11] On the issue of subsidiary liability, I find it most helpful to refer to the opinion of Beveridge J.A. in *R. v. Murphy*, 2012 NSCA 92 at paras. 87, 89, 91-92, 97; although dissenting in the result, there is no doubt that it summarizes accurately the law in relation to parties. In canvassing extensively the governing law, Beveridge J.A. refers to the highly germane decision of the Supreme Court of Canada in *R. v. Briscoe*, 2010 SCC 13. In the opinion of Charron J. in that case, rendering the decision of the Court, it is noted that:

[13] Canadian criminal law does not distinguish between the principal offender and parties to an offence in determining criminal liability. Section 21(1) of the *Criminal Code* makes perpetrators, aiders, and abettors equally liable:

21. (1) Every one is a party to an offence who:
(a)
actually commits it;
(b)
does or omits to do anything for the purpose of aiding any person to commit it; or
(c)
abets any person in committing it.

The person who provides the gun, therefore, may be found guilty of the same offence as the one who pulls the trigger. The *actus reus* and *mens rea* for aiding or abetting, however, are distinct from those of the principal offence.

[14] The *actus reus* of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator *to commit the offence*. While it is common to speak of aiding and abetting together, the two concepts are distinct, and liability can flow from either one. Broadly speaking, "[t]o aid under s. 21(1)(b) means to assist or help the actor ... To abet within the meaning of s. 21(1)(c) includes encouraging, instigating, promoting or procuring the crime to be committed": *R. v. Greyeyes*, 1997 CanLII 313 (S.C.C.), [1997] 2 S.C.R. 825, at para. 26. The *actus reus* is not at issue in this appeal.
...
[15] Of course, doing or omitting to do something that resulted in assisting another in committing a crime is not sufficient to attract criminal liability. As the Court of Appeal for Ontario wrote in *R. v. F. W. Woolworth Co.* (1974), 3 O.R. (2d) 629, "one does not render himself liable by renting or loaning a car for some legitimate business or recreational activity merely because the person to whom it is loaned or rented chooses in the course of his use to transport

some stolen goods, or by renting a house for residential purposes to a tenant who surreptitiously uses it to store drugs" (p. 640). The aider or abettor must also have the requisite mental state or *mens rea*. Specifically, in the words of s. 21(1)(b), the person *must have rendered the assistance for the purpose of aiding the principal offender to commit the crime.*

[16] The mens rea requirement reflected in the word "purpose" under s. 21(1)(b) has two components: intent and knowledge. For the intent component, it was settled in *R. v. Hibbert*, 1995 CanLII 110 (S.C.C.), [1995] 2 S.C.R. 973, that "purpose" in s. 21(1)(b) should be understood as essentially synonymous with "intention". The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability. It is therefore not required that the accused desired that the offence be successfully committed (*Hibbert*, at para. 35). The Court held, at para. 32, that the perverse consequences that would flow from a "purpose equals desire" interpretation of s. 21(1)(b) were clearly illustrated by the following hypothetical situation described by Mewett and Manning:

> If a man is approached by a friend who tells him that he is going to rob a bank and would like to use his car as the getaway vehicle for which he will pay him $100, when that person is ... charged under s. 21 for doing something for the purpose of aiding his friend to commit the offence, can he say "My purpose was not to aid the robbery but to make $100"? His argument would be that while he knew that he was helping the robbery, his desire was to obtain $100 and he did not care one way or the other whether the robbery was successful or not.
>
> (W. Mewett and M. Manning, *Criminal Law* (2nd ed. 1985), at p. 112)

The same rationale applies regardless of the principal offence in question. Even in respect of murder, there is no "additional

requirement that an aider or abettor subjectively approve of or desire the victim's death" (*Hibbert*, at para. 37 (emphasis deleted)).

[17] As for knowledge, in order to have the intention to assist in the commission of an offence, *the aider must know that the perpetrator intends to commit the crime*, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense. Doherty J.A. in *R. v. Maciel*, 2007 ONCA 196 (CanLII), 2007 ONCA 196, 219 C.C.C. (3d) 516, provides the following useful explanation of the knowledge requirement which is entirely apposite to this case (at paras. 88-89):

... a person who is alleged to have aided in a murder must be shown to have known that the perpetrator had the intent required for murder under s. 229(a): *R. v. Kirkness* 1990 CanLII 57 (SCC), (1990), 60 C.C.C. (3d) 97 (S.C.C.) at 127.

The same analysis applies where it is alleged that the accused aided a perpetrator in the commission of a first degree murder that was planned and deliberate. The accused is liable as an aider only if the accused did something to assist the perpetrator in the planned and deliberate murder and if, when the aider rendered the assistance, he did so for the purpose of aiding the perpetrator in the commission of a planned and deliberate murder. Before the aider could be said to have the requisite purpose, the Crown must prove that the aider knew the murder was planned and deliberate. Whether the aider acquired that knowledge through actual involvement in the planning and deliberation or through some other means, is irrelevant to his or her culpability under s. 21(1).

[18] It is important to note that Doherty J.A., in referring to this Court's decision in *R. v. Kirkness*, 1990 CanLII 57 (S.C.C.), [1990] 3 S.C.R. 74, rightly states that the aider to a murder must "have known that the perpetrator had the intent required for murder". While some of the language in Kirkness may be read as requiring that the aider share the murderer's intention to kill the victim, the case must now be read in the light of the above-noted analysis in *Hibbert*. The perpetrator's intention to kill the victim must be known to the aider or abettor; it need not be shared. *Kirkness* should

> not be interpreted as requiring that the aider and abettor of a murder have the same mens rea as the actual killer. It is sufficient that *he or she, armed with knowledge of the perpetrator's intention to commit the crime, acts with the intention of assisting the perpetrator in its commission. It is only in this sense that it can be said that the aider and abettor must intend that the principal offence be committed*.

[Emphasis added in paras. 14, 15, 17 and 18.]

[12] Assuming, for the sake of argument, that Mr. MacInnis and company broke into the Falconer home, it is clear that Mr. Osborne aided them by providing transportation. However, that would be proof of the *actus reus* only. What of the mental element? This is where *Briscoe, supra*, comes into play. With respect to Mr. Osborne's knowledge of Mr. MacInnis' intent, I find that I may rely safely on the statement Mr. Osborne made to Detective Constable MacKinnon. This statement emanated from a highly skilled interrogation conducted by the investigator, one which balanced appropriately the need for inquiry and confrontation. The video recording of Mr. Osborne's statement was of good quality, and I was able to hear clearly what was said by the officer and the accused. It is clear to me that the investigator was well prepared for his task of questioning Mr. Osborne, as he had a thorough understanding of the evidence. Preparation is the key to the taking of admissible and reliable statements, and this officer's work exemplified that. While Mr. Osborne denied initially any involvement with Mr.

MacInnis, his denial withered away at once in the face of the investigator's informed skepticism. It was clear to me that Mr. Osborne was no master of the art of obfuscation or deception. Mr. Osborne proceeded to admit what had happened at the MacKenzie and Falconer residences, including his involvement in the crime. But what remained constant throughout was his denial knowing anything about a plan to enter the Falconer dwelling by force or without permission. I do not believe that this was an exercise by Mr. Osborne in admitting selectively only those misdeeds of lesser criminality, as he readily owned up to the Molotov cocktail incident. No; Mr. Osborne denied knowing about a break and enter because he had no knowledge of it—I accept that as a fact. However, the court's inquiry is not over. This is because—as was argued ably in the brief submitted by the prosecution—the court must consider whether Mr. Osborne was wilfully blind to the prospect of a break-in being done at the Falconer home. Wilful blindness is to be equated with a fraudulent self-denial of the truth: *R. v. Sansregret*, [1985] S.C.J. No. 23 at para. 22. It requires a finding that the defendant intended to cheat the administration of justice: G. Williams, *Criminal Law (The General Part)*, 2d ed. (London: Steven & Sons, Ltd., 1961) at p. 159. I can make no such finding here. The fact that Mr. MacInnis and his friends had vandalized the MacKenzie van, but did not try to enter the home, forcibly or otherwise, assures me that Mr.

Osborne was not wilfully blind about what was to unfold when the group arrived a few minutes later at Grandview Avenue. Yes, Mr. Osborne told Cst. MacKinnon that he knew MacInnis was "going in"; however, the context of this admission satisfies me that what Mr. Osborne meant was that he knew MacInnis would go up to the Falconer house, much as one might speak colloquially about "going in to town" or "going in to see a friend" or some such.

[13] Having said all this, I am satisfied beyond a reasonable doubt that Mr. Osborne knew, in driving to Falconer's, that there was more vandalism to come. Accordingly, although I find Mr. Osborne not guilty of break and enter, I find him guilty of the included offence of mischief not exceeing five thousand dollars, contrary to para. 430(4)(a) of the *Code*.

J.P.C.