PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacPhee, 2014 NSPC 89

Date: 2014-11-5
Docket: 2740333
Registry: Sydney

Between:

The Queen

v.

Nelson MacPhee

Judge:	The Honourable Judge Peter Ross,
Heard:	September 16, 2014, in Sydney, Nova Scotia
Decision	November 5, 2014
Charge:	CC s. 236 (a)
Counsel:	Nash T. Brogan and T.J. McKeough, for the Accused Kathryn E. Pentz, Q.C., for the Public Prosecution Service

Summary

On December 30, 2005 the accused shot two people inside a residence. One died shortly thereafter; the other was badly wounded. On April 10, 2007 the accused pled guilty to manslaughter and aggravated assault and was sentenced to 17.5 years and 7 years' incarceration, respectively, served concurrently. On December 21, 2012 the second victim, Donald Seymour, passed away. The body was autopsied. The medical examiner concluded that his death was directly attributable to the gunshot wound seven years earlier. The accused has now been charged with manslaughter on Donald Seymour.

Issue

Does this second prosecution constitute an abuse of process and if so, does it warrant a stay of proceedings?

Result

The application for a stay of proceedings is granted. The public interest in holding the accused accountable for manslaughter in the second death is overborne by the prejudice which would ensue to the accused and, more significantly, to the justice system. In all the circumstances the continued prosecution of the accused would constitute an abuse of process and no other remedy is available or sufficient to address the negative effect it would have on the administration of criminal justice.

By the Court:

Introduction

[1] On June 14th, 2014, police charged Nelson MacPhee with the following offence:

> (that he did) on the 30th day of December 2005 shoot Donald Seymour with a firearm, to wit a hand gun, and did thereby cause the death of Donald Seymour on December 21st, 2012 thereby committing manslaughter contrary to s.236(a) of the Criminal Code of Canada

[2] A seven year hiatus between the act and the consequence is itself enough to take this case into uncharted territory. Add to it the fact that in 2007 Mr. MacPhee was sentenced for aggravated assault for the very same deed, and one has a truly extraordinary situation.

[3] The accused submits that bringing the current prosecution is an abuse of process and has made application for a stay of proceedings. The Crown recognizes the unusual nature of the case, but submits that it has considered all the relevant public interest factors in deciding to prosecute the offence. It responds to the application by saying that the court should not stymie its attempt to hold Mr. MacPhee accountable for death of Mr. Seymour.

[4] Donald Seymour died at home on December 21, 2012. He was to be cremated, and a Crematorium Order Request went from Curry's Funeral Home in Glace Bay to the office of the Medical Examiner. The Medical Examiner saw that the death certificate indicated the cause of death as "gunshot/natural causes". He ordered police to seize the body and transport it to Halifax for an autopsy. This examination was done on December 22, 2012, by Dr. Erik Mont. His report contains the following summary:

> The decedent was a 44-year old man who sustained a gunshot wound of the torso on December 30, 2005 with injuries of the left lung, the diaphragm, the stomach and duodenum, and the liver. He underwent emergent surgery during which, among other things, severe vascular and biliary injuries of the liver were repaired. He subsequently developed a number of complications, including cholangitis, portal vein thrombosis, portal hypertension, and ultimately liver failure. He was also known to have hepatitis C. His condition continued to deteriorate inexorably over the ensuing years, during which he regularly suffered nausea, vomiting, and diarrhea and progressive weight loss. He became jaundiced and developed severe metabolic abnormalities and hepatic encephalopathy. He died on December 21, 2012.
>
> Autopsy revealed sequelae of the remote gunshot wound and surgery, including adhesions and scarring in the left pleural cavity and the abdomen, hepatic cirrhosis, and additional findings consistent with liver failure. Microscopically, the appearance of the liver was more characteristic of obstructive biliary cirrhosis than other causes of cirrhosis, including hepatitis C infection.
>
> Although the death occurred almost seven years after the initial injury, the gunshot wound set in motion a clear chain of events that lead directly to death, without an acute intervening cause. Therefore, the cause of death is delayed complications of a gunshot wound of the torso.

[5] The accused will contest the issue causation at trial. However, for the purpose of this application I will presume that causation is provable. I should not prejudge or speculate about the outcome of potential trial issues. The question here is whether there should be a trial at all.

The Previous Proceeding

[6] Donald Seymour was one of two people shot by Nelson MacPhee on December 30, 2005. The other, his brother Kenneth, died almost immediately. Mr. MacPhee was charged with first degree murder of Kenneth Seymour and attempted murder on Donald Seymour. These charges were later reduced to manslaughter on Kenneth and aggravated assault on Donald.

[7] What occurred in the earlier legal proceeding informs, in part, the decision I am called upon to make now. My knowledge of that proceeding comes from (a) the submissions made here by counsel in the current prosecution, (b) a review of the Supreme Court file from 2007 which I undertook with the knowledge and consent of the parties, who had previously examined the material, and (c) from the sentence decision of Chief Justice Kennedy: see [2007] N.S.J. No. 601.

[8] At the sentence hearing on April 10, 2007, a letter to the Court from Crown Attorney John MacDonald dated March 30, 2007 was entered as an Agreed

Statement of Facts. From this, and from a transcript of the hearing, it appears that Mr. MacPhee visited the Seymour residence the evening of December 30, 2005. He and the Seymour brothers watched a hockey game and drank beer for about 20 minutes at which time MacPhee decided to leave. Upon reaching the door, MacPhee fired four shots at the Seymours from a handgun. "One struck each of Kenneth Seymour and Donnie Seymour" said Crown Attorney Mr. Darcy MacPherson in his oral submission. "Both men suffered gunshot wounds. . . Kenneth Seymour was pronounced dead December 31, 2005 at 12:45 a.m. Mr. Donald Seymour was operated on at the Regional Hospital and he survives." Mr. MacDonald's letter puts it this way: "Donald Seymour was also wounded *but survives to this date*" (emphasis added).

[9] Mr. Alan Nicholson, for the defence, said, "The nature of the wounds were not an execution style wound, they were basically fired at random and the victims were hit on the lower part of the body." The only other person present, Wayne MacRury, heard but did not see the shootings. By all accounts MacPhee was high on drugs: "on crack", "spaced out". Sources confirmed drug use earlier that day. There was no apparent provocation.

[10] A notation on the Indictment reads "plead guilty to manslaughter s.236 and aggravated assault s.268 on April 10, 2007." Clearly this was anticipated, for he

was sentenced on the same day. The record contains no particularization of the s.268. An aggravated assault may be committed in a number of ways – disfigurement, wounding, endangering life – but this is nowhere specified. On the record, through counsel, Mr. MacPhee pled "guilty to the included offence of aggravated assault." In a strict sense s.268 may not be an included offence of attempted murder, but I make no issue of the authority of the court to accept the plea under s.606.

[11] The father of the victims filed a victim impact statement mourning the loss of this eldest son. Saying he suffered daily and could not forgive MacPhee he continued, "if justice is to be served you should get life without parole."

[12] In his victim impact statement Donald Seymour said, "I have lost part of my lung, liver, spleen, bowel, intestinal track. I have had countless surgeries, with more still to come." He concluded with a string of expletives and a vow never to forgive. There were no medical reports.

[13] Mr. MacPherson noted in his submission that "Donnie Seymour was also shot and he was significantly wounded . . . the injuries that he suffered included significant injuries to multiple organs as well as multiple surgeries and more surgeries scheduled for the future. His health is, I don't think could be described

as good by anybody, and that's a direct result of having been shot. So this is a serious aggravated assault from the Crown's perspective. The victim Donnie Seymour has suffered significant wounding." He referenced cases to support the joint submission for a seven year sentence.

[14] Kennedy, C.J. gave a brief oral judgment explaining the difference between murder and manslaughter and why, given the difficulty the Crown had in proving intent, a plea to manslaughter was appropriate. Less is said about the plea to aggravated assault, though the court noted that "when you consider the damage set out in the victim impact statement, that man is lucky to be alive. So, yes, that is aggravated assault, for certain." He reviewed the current case law on sentencing for manslaughter. He accepted a joint recommendation of a sentence from that date forward of 15 years which, considering a credit of 2.5 years for time served on remand awaiting sentence, amounted to an effective total sentence of 17.5 years. The court then stated "As to the second charge of aggravated assault in relation to Donnie Seymour, the sentence is a period of seven years in a federal institution to be served concurrently."

[15] The sentences of 2007 were concurrent based on the well-established legal precept that where two crimes are, in thought and deed, part of one unbroken, continuous transaction, the sentences should be concurrent to one another rather

than consecutive and cumulative. If Donald Seymour had died at the time of the shooting the principle of concurrency would still have been applied. Whether the total sentence would still have been 17.5 years, had both died, is a matter of some speculation, and I take Crown's caution that I should not speculate about this. I nonetheless accept the submission that this manslaughter sentence of 17.5 years was on the high end of the scale. Indeed, counsel for the accused submits – something which I have not independently confirmed - that it was the longest sentence for manslaughter meted out in Canada to that date.

The Current Proceeding

[16] As noted, Donald Seymour died on December 21, 2012. The Information alleging manslaughter describes the offence as occurring *between* December of 2005 and December of 2012. Be that as it may, the actions of the accused occurred on one date in 2005.

[17] Mr. Seymour's mother was advised of the medical examiner's conclusions. She contacted the police to say that because his death resulted from the gunshot Mr. MacPhee should be charged accordingly. Police consulted with the Crown who conducted a lengthy internal review. In late May of 2014 a decision was

taken to charge Mr. MacPhee with manslaughter, and the victim's family was so advised.

[18] The charge was sworn on June 9, 2014. The matter first appeared in provincial court on June 24, 2014. The accused elected to be tried in provincial court on July 3, 2014 and gave notice of his intention to make application for a stay of proceedings. No plea was entered. Briefs and supporting materials were filed. The parties made oral argument on September 16, 2014 and the matter was adjourned for decision.

The Disclosure Issue

[19] The accused attempts to bolster its application by alleging another failure on the part of the Crown. It says that the failure of the police and medical examiner to preserve the deceased's liver amounts to a breach of the Crown's obligation to preserve relevant evidence, which is an aspect of the duty of Crown disclosure. In R. v. La [1997] 2 S.C.R. 680 at par. 23 the Supreme Court said that a Crown failure to disclose may theoretically amount to an abuse of process, a breach of s.7 of the Charter, and justify granting a stay. The disclosure branch of the application is predicated on the concern that the Crown's expert, Dr. Mont, had the benefit of examining the entire organ in arriving at his conclusions on causation, whereas any

expert which the defense might retain to offer a second, and possibly contradictory opinion will not have this same opportunity.

[20] There is well-established law on the obligation of the Crown (and by implication the police or other state agents involved in a criminal investigation) to preserve relevant evidence and to disclose it before trial. Such matters as improper motive and the degree of negligence come into play. The court considers whether reasonable steps were taken to preserve the evidence for disclosure. However to succeed in making out a Charter breach the accused must establish actual prejudice (see R. v. Carosella [1997] 1 S.C.R. 80). On this basis alone this aspect of the application falters, for it has not adduced evidence to show that it suffers actual prejudice by virtue of not having the deceased's liver available for further examination.

[21] Crown indicates that it has in its possession and available to the defence, in addition to the autopsy report, photographs of the autopsy and tissue slides taken at the time it was conducted. It says it has 11 volumes of medical reports which outline Mr. Seymour's entire medical history from the shooting until his death. Needless to say Dr. Mont would be available at trial for cross-examination. Defence can retain its own expert or experts to review the material, to formulate

their own opinions, and to advise counsel on possible shortcomings in Dr. Mont's report.

[22] The law permits an application to be made later in a trial if prejudice only emerges after evidence has been called (see La, supra, at para 27 and 28). At this point I have no proof of prejudice arising out the decision not to preserve the deceased's liver. I do not know whether preserving such evidence would be usual medical protocol in a forensic examination. No doctor or pathologist has given evidence that a valid and supportable second opinion cannot now be formulated.

[23] Given the preparation of the tissue samples, etc. and in the absence of any medical evidence of actual prejudice, there is no basis on which to find a breach of the right to make full answer and defence, nor any breach of s.7. There is nothing before me on this point to support the accused's application, nothing which supplies any additional basis for a stay of proceeding.

s.610

[24] The stay application was originally coupled with a submission that s.610 of the Criminal Code operated as a bar to the proceeding. That section declares that a subsequent indictment is barred if it charges "substantially the same offence as that charged in a previous indictment on which an accused was previously convicted".

It appears to forbid a second prosecution for the same conduct where what is later alleged is an aggravating circumstance which may tend to increase the punishment. When court convened for oral submission on September 16, 2014, accused's counsel abandoned this argument. It was conceded, correctly I think, that the aggravated assault pled to in 2007 and the manslaughter charge now before the court are not "substantially the same offence." In other words, the subsequent death of Mr. Seymour is not simply an aggravating circumstance. In legal terms it changes the very nature of the offence.

[25] S. 610 was raised in R. v. Hall 134 C.C.C. (3d) 256 (Alta QB) where the accused was first convicted of break and enter and commit aggravated assault and later charged with second degree murder when the victim died. The incident giving rise to the charges occurred on August 11, 1998. The accused appeared in court and pled guilty the next day. On August 26, 1998 he appeared again with counsel, confirmed the plea, and was sentenced to 15 months in jail. Crown launched an appeal of the sentence, and also wrote the accused's counsel to advise that his client would be charged with homicide should the victim die from his injuries. On September 8, 1998 the victim died and on September 16, 1998 Hall was charged with second degree murder. Crown contended that the accused

entered his plea to the assault in haste precisely because he knew the victim might die.

[26] Distinguishing Hall from MacPhee, applicant's counsel says "This is not a case where Mr. MacPhee escaped punishment proportionate to his offence and the Crown actively monitored the victim to ensure that the accused did not receive a windfall."

[27] The issues considered in Hall were primarily *res judicata*, double jeopardy, Kienapple, s.11(h) of the Charter, and as noted above, s.610. The only discussion around prosecutorial conduct / abuse of process concerns the above-noted letter. The victim died within four weeks of the assault. It may safely be said that many homicide charges have been laid where death occurred within weeks of the event. The peculiar factor in Hall was the fast, almost precipitous plea to the original charge. Consequently the judgment is not very instructive for present purposes.

Possible Outcomes of the Trial

[28] The Crown has argued that the court should take no account of what sentence Mr. MacPhee might receive if he is ultimately convicted on the charge of manslaughter. If he were to be convicted now of manslaughter with use of a firearm, this might bring into play a minimum mandatory sentence of four years.

Even aside from a potential mandatory sentence, a court may simply decide that further punishment is required. S.12 of the Charter may come into play.

[29] Defence argues that any further punishment, any further period of incarceration, is highly unlikely in all the circumstances, which include Mr. MacPhee's apparent rehabilitation while in the penitentiary. Hence it suggests that this is a "meaningless prosecution."

[30] While the attempt to convict Mr. MacPhee of manslaughter on Donald Seymour may ultimately result in no greater or additional punishment to that already served, this is something which cannot be known or predicted. I cannot nor should not try to predict what particular sanctions might follow a conviction. Aside from this, there are ramifications which extend beyond Mr. MacPhee's personal fortunes. For present purposes it suffices to say that I do not regard the present prosecution as an academic exercise. While I should not speculate on what particular sentence may ensue from a successful prosecution, the prospect of additional punishment and further incarceration is real.

The Year and a Day Rule

[31] Until 1999 the present prosecution would have been barred by a provision in the Criminal Code which declared that no person could be found guilty of

homicide, or criminal negligence causing death, unless the death occurred within one year and one day from the time of the occurrence. That section, former section 227, was repealed. No other time period was substituted and so there is today no fixed rule to guide or limit such prosecutions.

[32] In the UK a similar provision, known as the "year and a day rule" was repealed in 1996. From material provided by the Applicant it appears to have been a reaction to a particular case in which a person escaped prosecution for a death which occurred 16 months after the assault. The assailant received a 2 year sentence for "grievous bodily harm" and was released from jail two months after the victim died. There was a public uproar over the accused escaping appropriate punishment as a result of a "technicality". Although I do not know what condition the victim was in for that 16 month interval between injury and death, counsel have correctly noted that owing to medical advances people can now be kept alive for long periods of time, and indeed may be in coma for years before succumbing.

[33] In the UK a new provision was enacted at the same time as the old one was abolished. Proceedings against a person for a fatal offence may only be brought with the consent of the Attorney General (a) where the injury alleged to have caused the death was sustained more than three years before the death occurred, or

(b) where the person has already been convicted of a non-fatal offence arising out of the same incident. On both grounds, a prosecution such as the one before me would, if instituted in the UK, be subject to this form of oversight. While three years is not a bar, it sets a threshold beyond which a high level of scrutiny is required.

[34] Crown responds to all this by saying that the law of another country should have no bearing on criminal practice in Canada. Parliament, having decided to simply eliminate the "year and a day rule" has left Crown prosecutors as guardians of the public interest. In Nova Scotia the Public Prosecution Service discharges this function, and undoubtedly has the means to review decisions internally at as high a level as it chooses.

The Exercise of the Crown's Discretion

[35] There is no question that the decision on whether a case goes ahead is a core principle of prosecutorial discretion. In addition to the basic requirement that there be a reasonable prospect of conviction, the PPS manual outlines various factors which are considered in deciding whether a prosecution is in the public interest. Some of these, which I also consider relevant to the decision I must make on the stay application, include:

a) The gravity, or conversely triviality, of the incident

(ii) the staleness of the offence – the length of time since commission and whether there is a subsisting interest in seeing a criminal proceeding brought to fruition
(iii) whether the prosecution would be counter-productive and bring the law into disrepute
(iv) the attitude of the victim
(v) the length and expense of a trial
(vi) the necessity to maintain public confidence in the administration of justice

I have paraphrased or added to these; they are not set out *verbatim*. I should also add that while I consider these factors important, they are not, from my perspective, of equal importance. Nor are the foregoing factors exhaustive. The Crown also considers potential prejudice to the accused (prejudice here meaning unfair prejudice, not simply appropriate punishment for wrongdoing). Crown considers as well the interests of the victim and the interests of witnesses who would necessarily be re-involved in the matter. It also acknowledges the use and strain on limited resources which would result from the trial. Crown recognizes that others may hold a different view of whether Mr. MacPhee should once again face trial, but asserts that it is not exercising its prosecutorial discretion rashly, and that it is not the court's function to supervise the province's Public Prosecution Service.

[36] I do accept that the decision to prosecute Mr. MacPhee has been undertaken in good faith, after appropriate deliberation, and with public interest factors in mind.

The Law

[37] There is a long line of Supreme Court authority on prosecutorial responsibility, abuse of process and the appropriateness of a stay of proceedings as a Charter remedy (see R. v. Jewitt [1985] 2 S.C.R. 128; R. v. Power [1994] 1 S.C.R. 601; R. v. O'Connor [1995] 4 S.C.R. 411; R. v. Carosella [1997] 1 S.C.R. 80; R. v. Tobiass [1997] 3 S.C.R. 391; R. v. Regan [2002] 1 S.C.R. 297; R. v. Nixon [2011] 2 S.C.R. 566; R. v. Anderson [2014] S.C.J. No. 41; R. v. Babos [2014 S.C.J. No.16). Counsel have filed cases in addition to these.

[38] In Anderson the Supreme Court considered the use of prosecutorial discretion in a situation where an aboriginal person was facing a fifth impaired driving offence and the Crown opted to proceed in such a way as to invoke a mandatory minimum sentence upon conviction. Factually it is far removed from the present case, but it nevertheless underlines the principle that in our criminal justice system the Crown prosecutor performs a special role and that prosecutorial discretion is entitled to considerable deference. At par. 37, quoting from earlier

judgments, it states that prosecutorial discretion "advances the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference, thus fulfilling their quasi-judicial role as 'ministers of justice'", and further, "not only does prosecutorial discretion accord with the principles of fundamental justice, it constitutes an indispensable device for the effective enforcement of the criminal law".

[39] The doctrine of abuse of process is now considered an aspect of s.7 of the Charter. At par. 50 of Anderson we read "abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system", and at par. 52 "the burden of proof for establishing abuse of process lies on the claimant, who must prove it on a balance of probabilities".

[40] The remedy of a stay of proceedings emerges from s.24(1) of the Charter. Consistently, and again in Babos, the Court has said that a stay will only be warranted "in the clearest of cases". I may say, at least in terms of the present application, that "clearest of cases" does not equate to "obvious". More readily understood is the admonition that a stay of proceedings is the most drastic of judicial remedies and should therefore be used rarely and with great caution. In

par. 30 of Babos, referring to Regan, the Court states: "a stay of proceedings . . . permanently halts the prosecution of an accused. In doing so, the truth-seeking function of the trial is frustrated and the public is deprived of the opportunity to see justice done on the merits. In many cases, alleged victims of crime are deprived of their day in court."

[41] Moldaver, J. opens his judgment in Babos as follows:

> This appeal provides the Court with an opportunity to revisit the law of abuse of process as it related to state conduct that impinges on the integrity of the justice system but does not affect trial fairness – sometimes referred to as the "residual category" of cases for which a judicial stay of proceedings may be ordered. In particular, we are tasked with clarifying the approach to be followed when determining whether a stay of proceedings should be ordered where such conduct is uncovered.

[42] In Babos there was conduct by the Crown or its agents *occurring or emerging during the course of the proceedings* which prompted Defence to allege abuse of process and apply for a stay. This conduct included intimidation by threatening additional charges should the accused plead not guilty, collusion by two police officers to mislead the court about the seizure of a firearm, and improper means used to obtain an accused's medical records. With respect to the latter, the Court found that the trial judge had made a mistake in finding prejudice. With respect to the firearm, the Court found that the trial judge should have considered the less drastic remedy of excluding it from the evidence. With respect

to the threats made by the Crown, the trial judge failed to consider that the particular prosecutor had been removed from the case and had failed to give sufficient weight to society's interests in having a trial on the merits. The exceptional remedy of a stay was not warranted.

[43] Babos says that we may divide the cases where a stay of proceedings is warranted into two categories – where trial fairness is compromised (the "main" category) and where there is no risk to trial fairness but the integrity of the judicial process is called into question (the "residual" category). As noted, the case before me falls into the residual category. A test is then prescribed, which consists of three requirements:

> 1) the prejudice must be manifested, perpetuated or aggravated through the conduct of the trial, or its outcome
>
> 2) there must be no alternative remedy capable of redressing the prejudice
>
> 3) where there is uncertainty after steps 1 and 2 are completed, the court must balance the interests in favour of a stay, such as denouncing misconduct and preserving the integrity of the justice system, against the interest that society has in having a final decision on the merits.

[44] In Babos the accused appellants accepted that they could receive a fair trial, but submitted a stay of proceedings was none the less necessary to preserve and protect the integrity of the justice system. As my remarks on disclosure suggest, this is also the ground upon which Mr. MacPhee's application stands. I have no

basis to conclude that he would not receive a fair trial, either because the autopsied liver was not preserved, or for any other reason.

Applying the Law

[45] Certain aspects of the Babos analysis deserve comment.

[46] Firstly, this is *not* a case where some form of prosecutorial misconduct (which includes conduct of state agents visited upon the Crown) has occurred during the course of investigation, during any interaction between the parties, or during the course of the trial itself. As stated in Babos at par. 37 " . . . while it will generally be true that the residual category will be invoked as a result of state misconduct, this will not always be so. Circumstances may arise where the integrity of the justice system is implicated in the absence of misconduct." In my view this is just such a case.

[47] Secondly, there is no alternative remedy to consider. Adjournments, exclusion of evidence, awards of costs and other measures which might apply in other circumstances simply make no sense here. The objection is so fundamental, being to the very existence of the prosecution, that it must either be stayed or proceed as a normal trial. For instance it is simply not possible to go ahead with some sort of predetermined limit on the form or scope of punishment.

[48] Thirdly, the balancing requirement, step 3, may not readily fit the features of this case. This is not a situation where something extraneous to the trial gives rise to the prejudice, to the potential harm to the justice system. It is not the actions of a prison guard, as in R. v. Bellusci [2012] 2 S.C.R. 509 (see Babos para 42) nor the intimidating actions of a prosecutor as in the Babos case itself, which gives rise to the prejudice. I suppose one could focus on the action of the Crown in bringing forward the charge for arraignment as the 'impugned conduct', but in another sense it is the proposed trial itself, with all its ramifications and potential consequences, which would create the alleged harm. In this sense the trial cannot go ahead *despite* the impugned conduct; it *is* the impugned conduct.

[49] Be that as it may, there are competing societal interests to be considered. I remain cognizant of the observation at para. 44: ". . . in the residual category, cases warranting a stay of proceedings will be 'exceptional' and 'very rare' . . . this is as it should be."

[50] Lastly, even Babos, latest word that it is, does not easily encompass the unusual features of the case before me. In regard to the observation that a stay halts the prosecution of an accused, one must be mindful of the fact that Mr. MacPhee has already been prosecuted, albeit for a lesser offence. As to a stay denying a victim (here the family of Donald Seymour) its day in court, one might

say that the victims have already had ‘a day in court’ so to speak, but are now seeking a second. And as to a stay frustrating the truth-seeking function, the facts of that fatal day in December 2005 have been fully aired in court already - the only live issue is whether the gunshot wound was the direct cause of death seven years later. At least some measure of justice has been served. Is another measure now to be meted out?

Discussion

[51] When, on April 10, 2007, Mr. MacPhee received a 7 year sentence for aggravated assault on Donald Seymour, what did that mean?

[52] First we must presume that the fitness of the sentence was considered on its own terms. The actions of the accused and the impact on Donald Seymour informed the length of the sentence. While this was the less serious of the two counts, and while it understandably received less comment and attention than the charge of manslaughter on Kenneth Seymour, the facts were squarely before the court. Victim and accused were both before the court as well. Other sentencing decisions for aggravated assault were submitted for comparison and precedential value. Nothing was forgotten or overlooked. No appeal was taken. The

sentencing was meant to be a pronouncement on Mr. MacPhee's culpability in light of his actions and the resultant harm.

[53] Accused's counsel here suggests that had Donald Seymore died along with his brother Kenneth the total sentence would not have been any longer than it was, i.e. that there would have been two concurrent 17.5 year sentences. Kennedy, C.J. mentions" totality" in his sentence decision. This suggests that what he considered reasonable individual sentences took some account of the overall impact of both. He was accepting a joint recommendation. He gave the usual credit, according to the law at the time, for time served on remand. Whether the recommendation or the court's sentence would have been longer had there been two manslaughter charges at the same time is simply unknowable. That said, the total sentence was certainly on the higher end, relative to others in Canada at the time.

[54] Second we must presume that the conduct was deemed an aggravated assault (and the plea to this charge therefore appropriate) because of the wounding and the endangerment to life that resulted from the shooting. Normally, when a person is charged with an offence, the manner in which it was allegedly committed is particularized. As Mr. MacPhee pled to a lesser offence - the original indictment charging attempt murder on Donald Seymour - the manner in which the offence was constituted was not explicitly set out in a charging document.

[55] Thirdly, the fact that the sentence was concurrent does not diminish its legal significance (see "the previous proceeding", above).

[56] An aggravated assault does not necessarily endanger life. It was and is still defined as follows:

> "Everyone commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant".

[57] The section encompasses a range of harms. A person might suffer extremely serious injury and yet completely recover. A person might be left badly scarred and disfigured yet with no risk of further complications nor any diminishment of life expectancy. A person might be infected with HIV, feel no effects at the time of the assault, yet have their life endangered. And, a person might suffer serious wounds which permanently compromise his or her health. The court record from 2007 reveals that wounding and endangerment to life were the essential features of the aggravated assault on Donald Seymour.

[58] Before carrying the analysis further, I wish put the following cases forward. I hope the relevance later becomes clear.

[59] In R. v. Mabior [2012] 2 S.C.R. 584 the accused was charged with aggravated sexual assault. The Court said, at para. 17,

> Debate has also surrounded the requirement that the risk be one of "serious bodily harm". Some sexually transmitted diseases involve little beyond treatable temporary discomfort. Yet even that discomfort, while it persists, may be serious from the perspective of the victim. Other STDs, like HIV, are extremely serious, involving permanent and life-altering symptoms, and in some cases death.

And further at para. 92

> . . . HIV is indisputably serious and life-endangering. Although it can be controlled by medication, HIV remains an incurable chronic infection that, if untreated, can result in death . . .

Aggravated sexual assault has been charged in other such cases.

[60] In R. v. Kaotalok [2013] N.W.T.J. No.54 the court, referring to R. v. Cuerrier [1998] 2 S.C.R. 371 says "The risk of infection and death of partners of HIV-positive individuals is a cruel and ever present reality. Indeed the potentially fatal consequences are far more invidious and graver than many other actions prohibited by the Criminal Code." Speaking of the victims, it continues at para 79: ". . . neither victim, as of today, has been diagnosed as having been infected with HIV. However, as some of the excerpts I have quoted from the case law suggest, they still have to live with the possibility, the anguish, the medical tests, and those consequences are not to be dismissed as insignificant."

[61] In R. v. Walkem [2007] O.J. No. 186 the Ontario Superior Court considered the possible range of sentence for transmission of HIV through unprotected sexual

intercourse. In that case one of two victims had tested positive for HIV as of the date of sentence. The sentencing judge says "I have agonized over this matter for the past several weeks, which I dare say is but small consolation to Ms. S who has had to live with her condition for just over four years and will continue to suffer unimaginable and incalculable pain if not suffering, for the rest of her life."

[62] From R. v. Nduwayo [2006] B.C.J. No. 3418 the following extracts are taken (para 13, 14, 26, 27, 34):

> Dr. Patrick said at trial that the HIV virus endangers the recipient's life and creates a risk of early death. The virus can be transmitted after only one incident of unprotected sexual intercourse or never transmitted. Once it is transmitted, it multiplies very quickly until the recipient's immune system fights back in a few weeks. The virus remains in the body, however, and gradually, over time, the HIV virus overwhelms the body's immune system. This gradually leads to the condition of AIDS.
>
> The condition of AIDS may result in one or two years after infection, or up to ten years, but ultimately, the natural progression is to AIDS and AIDS is deadly. Dr. Patrick also said that current drug therapy does support the immune system and delays the onset of AIDS, but his opinion is that the transmission of the HIV virus still endangers a person's life through AIDS.
>
> Her victim impact statement indicates that the infection of her with the HIV virus has changed her life drastically. The last five years have been a terrible five years emotionally with depression, anxiety, lack of self-confidence. She never enjoyed her pregnancy as she was stressed out and not sure if her baby was going to test positive. She was not able to breast-feed her baby because of the risk of transmission to him. She had thoughts of suicide so her family would not have to worry about her, and she would not have to worry about her baby or herself.

> When her baby was born, she had to watch her son being tested for the virus and her depression became worse. The depression caused her to lose her self-esteem and gain weight and her personality changed. She became angry quite easily. She had wanted to go through schooling to be a nurse, but found out she could not because of her HIV-positive status, and so she began studies to become a legal secretary. However, she fell into another depression and left school before she graduated, putting herself into debt.
>
> She says that, overnight, her life went from one of perfect health to one filled with blood tests and medications just to survive. Her energy level has been severely affected, both mentally and physically. Every day is a battle, sapping away her energy and leaving her depressed and hopeless. Her medications and side effects are a daily reminder that she is living with a life-threatening illness that also exposes her to a myriad of illnesses that she would not have to worry about if she did not have a compromised immune system.

[63] In R. v. Nyoni [2014] B.C.J. No. 1276 two of three victims contracted HIV through unprotected sex with the accused. Beginning at para 11 the court discusses the impact on the victims. We read there "From the expert testimony at trial, it is known that contracting HIV means that your life expectancy is shortened by between 5 to 10 years." One victim is described as being in constant pain, suffering from complications and reaction to her medications, and suffering from depression. Another is said to be depressed and anxious, and hospitalized twice for being suicidal.

[64] In R. v. Smith [2012] N.S.J. No.188 (NSCA) the accused shot the victim in the chest. A 14 year sentence for attempted murder, and other lesser offences, was

upheld. The victim's injuries confined him to a wheelchair and reduced his life expectancy by 20 to 30 years.

[65] In R. v. M.G.J. [2012] B.C.J. No.1920 the accused pled guilty to an aggravated assault for violently shaking a young child. She suffered severe brain hemorrhaging which left her quadriplegic and blind. She was expected to have a maximum lifespan of 10 to 15 years. There were a number of mitigating factors. The court accepted a joint submission for two years' incarceration.

[66] In R. v. MacPhee [2007] N.S.J. No. 601 one of two victims, shot in the abdomen, described losing part of his lung, liver, spleen, bowel and intestine. The court was told that he could no longer work, had been through a number of surgeries, and would require more surgery in future. The prosecutor submitted "Kenneth Seymour later died in hospital as a result of the gunshot wound to the abdomen. Donald Seymour was also wounded but survives to this date." Accepting the sentence recommendation, the judge stated at par. 5 "that shooting did a great did a great deal of damage to him. It's fair to say that when you consider the damage set out in the victim impact statement, that the man is lucky to be alive. So, yes, that is aggravated assault, for certain."

[67] Decisions made by courts must have lasting value. This is not to say that the justice system is perfect, or ever will be. Debate over outcomes is healthy and necessary. Appeal courts can review, correct mistakes, and consolidate the legal precepts. Future events may cast court decisions in a different light. Sometimes the law itself will change and evolve. But revisiting sentence decisions based on subsequent events is fraught with problems. For the public to have confidence in such decisions they must have finality.

[68] There may be instances, such as in Hall, above, where because the original proceeding was itself flawed and unjust the case must be revisited and further charges brought. Such instances, one hopes, will be rarer than stays of proceedings. In my view, the further prosecution of Mr. MacPhee risks sending the message that the system need not bring final and lasting justice to bear. If it becomes a feature of our law that additional charges may be brought years later to somehow account for subsequent events it will mean that the system need not get it right in the first place. Many sentences will remain, in effect, contingent sentences, governed as much by the winds of fate as by the clear application of principles to known events.

[69] To counter this one might say that Donald Seymour's death did not result from sheer happenstance, the winds of fate did not simply blow in a bad direction;

rather, it is directly connected to the shooting. This may indeed be so, but it is a self-defeating argument. The fact that Donald Seymour's death was a foreseeable consequence renders the present prosecution unfair and prejudicial to Mr. MacPhee, and even more significantly, prejudicial to the criminal justice system itself. The court, in 2007, sentenced him for an aggravated assault with a clear understanding of how that was, in law, committed – wounding and endangerment of life. It was no secret that Donald Seymour's health had been permanently compromised. One may debate whether the sentence was sufficient (here I do not mean to suggest that it was insufficient). As I have said, that sort of discussion is a necessary part of our democracy. But if a sentence, after a full hearing, with knowledge of the possible consequences of the harm done, can be revisited years in the future, there will, in my view, be great harm to the very stability of the justice system and a consequent loss of confidence in its processes. This negative impact outweighs whatever positive value there may be in putting Mr. MacPhee on trial.

[70] Likely the strongest argument for putting Mr. MacPhee on trial for manslaughter is to make him explicitly accountable for Donald Seymore's death in the eyes of the law. If one looks at the opinion of the medical examiner, sees there that proof of causation is a reasonable prospect, and then adds the expectation that

people should be held publicly accountable for their crimes, it may seem appropriate to bring the charge. Given the clear opinion of Dr. Mont, the urge to seek accountability for the death and an additional measure of justice for the victim's family is understandable. It is not enough, to enter a stay of proceedings, that I think the Crown's decision is unwise. It is not enough, to halt this prosecution, that others may disagree with the Crown's decision. However the concerns go beyond this. The eyes of justice must take a broader view.

[71] If this matter proceeds, it will set a precedent. It seems inevitable that pressure will mount in other such cases to seek redress yet again when the natural consequences of the original offences become manifest. One may well ask, if this prosecution is allowed to proceed, whether accused in such cases as Kaotalok, Walkem, Nduwayo, Smith, M.G.J., Nyoni, etc. will be charged again with culpable homicide when their victims die.

[72] Sadly we see victims of horrible crimes in our courts, people who have suffered serious mental and physical abuse. Psychological harm can be as real and palpable as tissue injuries. Children who are sexually exploited may suffer psychological consequences extending well into adulthood. Should one of these people commit suicide, or die of a drug overdose, will prosecutors consider whether to charge the already-convicted accused with culpable homicide? What if

a person who has been badly disfigured and who is thus unable to find a partner or spouse later in life commits suicide as a result? How will accused persons know that they have "paid their price" if the price keeps changing? One might even wonder about the implications for non-violent offences.

[73] It is vitally important to frame the wrongdoing of a criminal accused within a reasonable time, to the best of our ability, and to deal with it once and for all. If this prosecution is allowed to proceed, the precedent it sets may have the unintended effect of producing inadequate sentences. In cases where the victim's health or fate is precarious, will prosecutors seek and courts impose adequate sentences knowing that the Crown can come back later and ask for more? The possibility of a subsequent prosecution may be held out to victims to justify sentences which are not as strict as they need to be at the time.

[74] If victim impacts matter, then they should matter whether the impact proves better or worse over time. Suppose an accused is sentenced for aggravated assault for infecting an unknowing sexual partner with AIDS. A sentence of 10 years is imposed. One year later a cure for AIDS is discovered. The victim is restored to normal health and normal life expectancy. Should the sentence be commuted? Where a victim of a serious assault years later receives an organ transplant and makes a miraculous recovery, or where a victim of abuse proves to be unusually

resilient and highly successful later in life, would these justify a subsequent reduction of the original sentence?

[75] Trying Mr. MacPhee for manslaughter will reveal no new evidence of his actions. No one else will be implicated in the death. We will know nothing more about his intent. His case was heard in 2007, his actions judged, and sentence imposed. To seek now to 'perfect' that sentence, even in a well-meaning attempt to hold an accused accountable to the victim or his/her family, presents a risk to the integrity of the justice system. Unquestionably the effects of Mr. MacPhee's horrendous actions will linger in the Seymour family, just as they did in Donald Seymour himself. Victims of serious crime often suffer life-long effects, and sometimes even life-shortening effects. These effects may resonate in society at large. They may continue to shape public attitudes. But they should not be permitted to loosen the underpinnings of criminal justice.

Prejudice to the Rehabilitation Principle

[76] There is another consideration. I regard it as subsidiary and so will not elaborate, but it deserves brief mention and some weight. Mr. MacPhee has apparently been rehabilitating himself in the penitentiary. I am told that he has been on escorted outings from prison during which he has spoken in schools about

the dangers of drug use. He has been of good behavior inside the institution and during absences. A long trial, resultant uncertainty for his parole status, possible re-incarceration – these may well set back steps which have been achieved to date. Should Mr. MacPhee be convicted of manslaughter on Donald Seymour, and proceed to sentence, rehabilitation will be a live principle and one which the court is required to consider, even for an offence as serious as manslaughter. And yet the very prosecution which brings him to that future sentencing may well, in and of itself, thwart any meaningful consideration of this principle.

Conclusion

[77] For these reasons I order legal proceedings against Nelson MacPhee on the charge of manslaughter stayed.

Dated at Sydney, Nova Scotia, this 5th day of November, 2014.

_____

Judge A. Peter Ross