SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Muise, 2013 NSSC 408

Date: 20131213
Docket: CRH 373467
Registry: Halifax

Between:

Her Majesty the Queen

Crown

v.

Cody Alexander Muise

Defendant

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	May 2, 2013, in Halifax, Nova Scotia
Oral Decision:	May 2, 2013
Written Decision:	December 13, 2013
Counsel:	Christine Driscoll and Darrell Martin, for the Crown Peter Planetta, for the Defendant

By the Court:

[1] This is the decision in relation to a *Corbett* Application in *R. v. Cody Muise*, CRH 373467. Mr. Muise is charged with first degree murder in the fatal shooting of Brandon Hatcher on December 3rd, 2010. At present, the evidence in this trial indicates that a jury could reasonably conclude that Mr. Muise's girlfriend, Sarah Oakley, was shot on October 16th, 2010, and that Mr. Muise's good friend, Colin Gillis, was shot in a hangout frequented by Mr. Muise, generally, and even earlier that day, on December 3rd, 2010. Mr. Muise believed that Brandon Hatcher had shot both these individuals.

[2] Evidence of text messages between Mr. Muise, Matt Munroe, Ryan MacDougall and others suggests that Mr. Muise was going to respond with force to these incidents, and that he, Matt Munroe and Ryan MacDougall armed themselves with a 30-calibre rifle, a 22-calibre pistol, and a single-shot shotgun with slug ammunition, and walked at least 15 minutes on a path through woods while it was very dark out, dressed all in black, and did reconnaissance on housing units in the area of 123 Lavender Walk in the Greystone area of Spryfield, where it is believed

Mr. Hatcher was living, although they were unaware of his exact address, which was, in fact, 123 Lavender Walk.

[3] While they were there, Mr. Hatcher called Mr. Muise's phone, and they had a conversation, the result of which is Mr. Hatcher indicated he was coming out. Mr. Muise, Munroe, and MacDougall were in a location shown in the photos, Exhibit 37, Number 33, which allowed them to shelter behind large boulders. They were approximately 180 feet from a fence jutting out from one of the residence, and at an elevation 20 feet higher from that same fence.

[4] Very shortly after the telephone call from Mr. Hatcher, a person showed himself from behind that fence and discharged a firearm. Mr. Muise, Munroe and MacDougall believed the shot was made in their direction, it would appear, and reacted by responding with fire to the vicinity of where the person had been seen by the fence.

[5] Mr. Munroe shot approximately three bullets from his 22-calibre revolver, and Mr. MacDougall shot once from a single-shot shotgun, and Mr. Muise shot a

burst of rounds from an M1 carbine rifle, which likely discharged 12 casing which were found in the area and associated with the kind of rifle he was carrying. The evidence suggests that Mr. Hatcher was fatally struck by a bullet that likely came from Mr. Muise's rifle. Mr. Muise's counsel suggests that Section 34(2) and 35 of the Criminal Code will be relied upon him. I will assume, at this juncture, that there is a live issue in relation to both those self-defence sections of the Criminal Code.

[6] In its case, the Defence has presented evidence of Brandon Hatcher's criminal record. Mr. Hatcher's date of birth is October 25, 1990. His record for violence specifically is as follows: Section 86(1), careless use of a firearm, sentencing May 23, 2008, offence date February 26, 2008. On that same sentencing date, Section 92(1), possession of a firearm, and Section 94(1), occupant of a motor vehicle with a firearm present. Next, Section 90(1), carrying a concealed weapon, February 11th, 2008, January 1, 2008 offence date. Next, Section 264.1(1), uttering threats to cause death or bodily harm, February 11th, 2008 sentencing, June 8th, 2007 offence date. Next, Section 266(b), summary assault, February 8th, 2008, offence date March 21, 2007.

[7] The Defence also introduced, in lieu of two sentencing transcripts, police occurrence reports for the offence of Section 266(b) on March 31st, 2007. This involved a punch in the mouth by Mr. Hatcher on that date, and a follow-up assault the next day, which caused the victim to contact police, and Section 264.1(1), June 8th, 2007, which involved Mr. Hatcher in the company of Kyle Borden and Christine Clyke approaching a young male on a public basketball court and saying to him, "Get off the courts or I'll fucking shoot you." This report also notes that the effect on the victim was that he felt threatened and "knows Hatcher's reputation around the community, and feels that this threat could be carried out."

[8] Ryan MacDougall testified for the Crown, and his criminal record was made Exhibit 35 in trial. It consists of five pages. His date of birth is January 23, 1993. The incidents of violence specifically contained in his record show that he was sentenced as follows: September 2, 2009, three robberies, Section 344 of the Criminal Code, for which he received 120, 243, and 304 days of open custody, all concurrent. December 19th, 2008, Section 266, it says, though, assault causing bodily harm in the report, 18 months' probation and a firearms prohibition order for two years. February 19th, 2008, Section 266(b) assault, 12 months' probation.

February 19th, 2008, Section 175(1), causing a disturbance by fighting, 12 months probation.

[9] Matthew Munroe testified for the Defence. His criminal record was not entered as an exhibit, but the convictions and sentencing dates were read into the record by counsel for Mr. Muise. His record, in whole, as read into the record, included May 18th, 2007 - Section 264.1 and Section 145(3), three counts, and Section 145(5) and 348(1)(a). August 10th, 2007, Section 145(3), three counts, and Section 137 of the Youth Criminal Justice Act, three counts, and Section 334(b). February 6, 2008, Section 334(b), Criminal Code, four counts Section 137 YCJA, two summary assaults, Section 266, and one flight from the police, Section 249.1. August 25th, 2008, Section 348(1)(b), Section 355, and Section 344 of the Criminal Code, as well as Section 88, Section 66 and two breaches of Section 37 of the YCJA. June 29th, 2009, three counts of robbery, Section 344 Criminal Code. January 13th, 2010, three offences under Section 139 of the Youth Criminal Justice Act. March 31st, 2010, robbery, 344(b), and possession under $5,000, Section 355, as well as one flight from police, Section 249.1(1). April 29th, 2010, Section 266(b) Criminal Code. February 22nd, 2011, Section 88 Criminal Code.

[10] This is an application by Mr. Muise seeking to edit entirely from his criminal record, Exhibit VD1C, all offences of violence or involving firearms. Mr. Muise's date of birth is October 12th, 1989. That would leave his record as follows: March 14th, 2011 - Section 4(1) of the Controlled Drugs and Substances Act; September 4th, 2008, breach of probation, Section 137 YCJA; September 4th, 2008, assaulting a police officer, Section 270 of the Criminal Code. May 16th, 2008, fail to comply with conditions of release, Section 145(3) of the Criminal Code, two counts. March 19th, 2008, Section 145(3), fail to comply with conditions of release, two counts. Also on that date, March 19th, 2008, Section 129 of the Criminal Code, resisting or obstructing a police officer. A review of his criminal record reveals the majority of it is violence-related offences, and I won't deal with them here, as they can be seen in the exhibit.

[11] There was also evidence from various witnesses, including Ryan MacDougall, Colin Gillis, Matt Munroe, Jamie Downs, and police witnesses, that there was an animosity between Cody Muise and Brandon Hatcher, and it may have been related to them being split into separate gangs or camps known by some

as the Young MOB and the Greystone Gang respectively. During the trial, evidence was called as to the membership of each of these gangs, or camps, and that their rivalry may have involved drugs and territory in the Spryfield area of Halifax.

[12] I note on the date in question here, December 3rd, 2010, Matthew Munroe testified that he wanted to wear, and did wear, a bullet-proof vest because he didn't want to go and get shot when he went up to Greystone area.

[13] Also in evidence are two binders comprising Exhibit 53. These are the telephone service provider records for a number of persons, particularly: Chris Anderson, an apparent alias, whose number 902-292-1147 is repeatedly suggested to be Cody Muise's telephone number; Amber Thompson, an apparent alias used by Amber MacLeod, Brandon Hatcher's girlfriend, which number 902-292-5008 is repeatedly suggested to be Brandon Hatcher's telephone number; and 902-579-0202, which was registered to and used by Matthew Munroe. I note Ryan MacDougall also had his own phone, and it was registered in his name.

[14] The text messages tend to support the evidence of Ryan MacDougall and Matthew Munroe that after the Colin Gillis shooting in the afternoon of December 3rd, 2010, Munroe and Muise particularly began arming themselves and dressing in dark clothing.

The position of the parties

[15] As indicated, the Defence argues that all records of violence should be edited from Mr. Muise's record, because the prejudicial effect on his fair trial rights grossly outweighs any probative value thereof. The Defence argues that the general rule is the accused's character may not be attacked, and that in this case the Accused has not created a situation where his character or disposition has been put in issue by the Defence. Therefore, the general rule about the accused's criminal record being limited to offences that relate to dishonesty, generally, from The Queen and Corbett should be followed here. Those offences have a direct bearing on credibility, and are appropriate for the jury to hear, the Defence says. Any record for violence would tend to encourage the Jury to think that Mr. Muise has a propensity to violence, and is therefore more likely to have committed this offence.

[16] Although the Defence recognizes that having suggested there is a real issue as to who is the initial aggressor, as this is particular relevant in the context of Section 35 of the Criminal Code self-defence provisions, even though the Jury may be left with a slightly-distorted picture of who was more likely the initial aggressor - Mr. Hatcher or one of the three of Muise, Munroe and MacDougall - the other evidence at trial certainly portrays Mr. Muise as a person who has ready access to firearms and a bullet-proof vest.

[17] Furthermore, the evidence suggests he may be part of a gang that is rival to the Brandon Hatcher Greystone gang, and that drugs and territory may have been in dispute between the two. Certainly Exhibit 54, which is a compilation derived from Exhibit 53, suggests that on November 23rd Mr. Hatcher and Muise may have been "having words" via text messages.

[18] The Defence argues that generally evidence of a violent criminal record should be limited to cases where the violence relates to incidents between the parties involved in the offence before the Court. See, for example, The Queen v. *Robertshaw*, 1990, Ontario Judgments number, I believe it's 5042. The Defence

also points out that Ryan MacDougall and Matt Munroe both testified that Mr. Hatcher fired first, so who is the initial aggressor is proved in other respects.

[19] The Crown takes the position that if Mr. Muise's record contains no violence the Jury may be left with the impression of him that is overly sanitized and may be prone to encouraging the Jury to think that Mr. Hatcher may have deserved what he got, after he likely shot Sarah Oakley and Colin Gillis. The Crown is concerned that the Jury will believe Mr. Hatcher was the significantly more violent individual when, in fact, insofar as criminal records are concerned, Mr. Muise has a more significant record for violence.

[20] The Crown acknowledges that some evidence in the trial may disabuse the jury of this notion, but that effectively Mr. Muise has put his character into issue at present, and the jury should see the numerous convictions that he has, which are also indicators of his credibility, and specifically to know at least some of the violent offences he committed so the Jury can assess whether Mr. Hatcher was more likely the initial aggressor.

[21] My analysis. This *Corbett* Application is made particularly difficult because of the previous Scopelliti Applications which have permitted bad character evidence of the deceased, Brandon Hatcher. The relevant sentiments are well-captured by Justice Major in *R. v. Arcangioli*, 1994, 1 SCR, 129, at paragraphs 26 to 31.

[22] Generally witnesses, including the accused, may be cross-examined on their criminal records. Specifically in relation to an Accused, however, only if the case may be made that the prejudicial effect to the Accused's fair trial rights is outweighed by the probative value thereof, as often Accused's may only be cross-examined on offences particularly relevant to dishonesty, such as frauds, thefts, sometimes arguably robberies, which are seen to bear more relevance to credibility.

[23] Where the Defence has raised the bad character evidence of the deceased, the relevance of the criminal record of the Accused shifts from one of exclusively potentially related to credibility to one potentially related to issues as to who is the initial aggressor.

[24] This is such a case. The question that the Court faces is whether the Jury will be left with a distorted picture of the circumstances if some measure of Mr. Muise's criminal record is not introduced at the trial by cross-examination of Mr. Muise by the Crown on his record, should he testify. I have to carefully assess the prejudicial effect of the Jury's being aware of the criminal record in part or in whole of Mr. Muise, as contrasted with the probative value of that criminal record in part or in whole.

[25] In every case, relevance must be assessed in the context of the entire case, and the respective positions taken by the Crown and the Defence. In this case, the Defence is arguing that, in essence, Mr. Hatcher's conduct in the circumstances of December 3rd, 2010, can be predicted, if you will, by the Jurors, not having been there, because Mr. Hatcher would've repeatedly acted in a certain way, preemptively aggressive, when similar circumstances arose in the past and, consistent with human experience and logic, the fact that he was in the habit of doing things in a certain way, in a certain situation, would suggest that on this specific occasion, on December 3rd, in which similar circumstances arose, he

would've acted in accordance with his established practice.

[26] It may also be the Defence could argue that the Jury should find Mr. Hatcher has a violent disposition or state of mind, and that the evidence of that disposition would be a reliable predictor of the conduct of Mr. Hatcher on December 3rd.

[27] The situation is different, however, as it relates to an Accused person like Mr. Muise. Inherent in evidence of extrinsic misconduct by Mr. Muise are both moral and reasoning prejudice. The danger is that a jury may find a conviction on the basis that Mr. Muise is a bad person and was likely to have committed the offence charged because he has a propensity to commit crime. The jury may also want to punish Mr. Muise for prior misconduct by finding him guilty of the offence charged here.

[28] Moreover, the jury's attention may be disproportionately deflected from the main purpose of their deliberations, which is the offence charged. On the other hand:

> The law does not set its face against all propensity reasoning," *R. v. Handy*, 2002, 2 SCR 9098, at paragraphs 89 to 91; and *R. v. Dooley*, 2009, 249 CCC 3rd, 449,

> Ontario Court of Appeal at paragraph 170: "What is prohibited is general propensity reasoning. What is permitted is situation-specific propensity reasoning per Dooley, at paragraph 170.

That being a quote from Justice Watt in *R. v. Saluciano* (sp?), 2001, ONCA 89, at paragraph 117.

[29] In *Dooley*, the Ontario Court of Appeal commented, at paragraph 170, in part:

> The Trial Judge began with a caution against using evidence of a general propensity to commit criminal acts to infer the commission of a particular criminal act. He went on, however, to tell the Jury that they could infer that an Accused acted in a certain way towards Randall based on evidence that the Accused had acted the same or similar way towards Randall in the same circumstances on prior occasions. The instruction captures the difference highlighted in Handy ... between prohibited general propensity reasoning and situation-specific propensity reasoning, which is justified where the propensity operates in a closely-defined and circumscribed context; for example, physical abuse within a family unit of the same child during the same period of time.

[30] The night of December 3rd, 2010, did not involve a closely-defined and circumscribed context where Mr. Hatcher had acted in a certain way towards Mr. Muise in similar circumstances on prior occasions. Thus, this case does not allow for an argument of situation-specific propensity reasoning by the Crown in order to have the criminal record of Mr. Muise in part or in whole presented to the jury as evidence on the cross-examination of Mr. Muise, should he testify.

Conclusion

[31] The probative value of Mr. Muise's criminal record for non-violent offences is relevant to assessing his credibility, and should be admitted, as its probative value is not overborne by the prejudicial effect on his fair trial rights.

[32] The probative value of Mr. Muise's criminal record for violent offences is said to be generally in relation to whether Mr. Hatcher was the initial aggressor on December 3rd, 2010. Both Mr. Munroe and Mr. MacDougall, who were the only other persons present, testified that Mr. Hatcher fired first. Mr. Hatcher's criminal record was introduced based on its relevance to assist the Jury in determining, the Defence says, that he was the initial aggressor. I note that that decision by me, to permit Mr. Hatcher's record as evidence, was made before Mr. Munroe testified.

[33] There is no suggestion in the evidence anywhere that Mr. Hatcher was not the initial aggressor. The fact that Mr. Muise has a criminal record for violence does not create a basis for an argument of situation-specific propensity reasoning; that is, that he was the initial aggressor rather than Mr. Hatcher. Thus, the

probative value of Mr. Muise's criminal record for violence is minimal in relation to that argument. Certainly, the prejudicial effect upon his fair trial rights of all those convictions for violent offences would be significant.

[34] To what extent, then, should the criminal record be edited such that it would not reflect a gross distortion of the facts regarding Mr. Muise's credibility, should the record be put to him in cross-examination, if he testifies. I find that to edit out all the offences suggested by the Defence goes too far. It is important that the jury appreciate to some measure how many convictions Mr. Muise had. To my mind, convictions for violence closer to December 3rd, 2010, would tend to be more prejudicial than those more remote in time.

[35] Given that the Defence has significantly exposed the character of Mr. Hatcher through the testimony of witnesses, exhibits, and specifically his criminal record and sentencing transcript substitutes, being the occurrence reports, and bearing in mind the ages of Mr. Hatcher, Muise, Munroe and MacDougall, as well as the criminal records of the latter two, I conclude that a fair balancing of prejudice and probative value of Mr. Muise's criminal record is as follows. The references to the robbery and unlawful confinement conviction, sentenced on

October 31st, 2011, having been committed December 3rd, 2010, shall be excluded from his record. The Section 117.01, possession of firearm while prohibited, shall also be excluded from his record, as it is too intertwined with, having occurred the same day as, the robbery and an unlawful confinement offences, which are excluded, and too recent to the offence date here of December 3rd, 2010.

[36] The only other offences which should be excluded from his record are as follows. Those sentenced on November 10th, 2008; specifically, that being Section 88(1), Section 96(1), and Section 90(1). That would leave on that date of November 10th, 2008, the Section 94(1) offence, and 117.01.

[37] If Mr. Muise testifies, he can be asked about the existence of the remaining criminal record; that is, he cannot be asked about the circumstances of these offences without leave of the Court, but may be asked the date of the sentencing, the sentence imposed, the date of the offence, the section of the Criminal Code, and the offence charged thereunder.

[38] And when I said here on the previous page, to what extent should the

criminal record be edited such that it would not reflect a gross distortion of the facts regarding Mr. Muise's credibility, should the record be put to him in cross-examination if he testifies, clearly I'm finding that insofar as credibility is concerned, but also as a result of the exposure of the character of Mr. Hatcher, I am finding that it's appropriate that those, if you will, violent offences that are left in the record are appropriate to be put to him, should he testify.

Rosinski, J