
CANADA / JUDGMENT

R. v. McDonald

2015 BCSC 256

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2015 BCSC 256 R. v. McDonald

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McDonald,

2015 BCSC 256

Date: 20150220

Docket: 30925-2

Registry: Dawson Creek

Regina

v.

Thomas Anthony McDonald

Before: The Honourable Mr. Justice Fitch

Application to Exclude Evidence from Dangerous Offender Hearing

Counsel for the Crown:

Declan T.M. Brennan

Counsel for the Accused:

Janet Winteringham, Q.C.

Tam C. Boyer

Place and Dates of Application:

Vancouver, B.C.

February 12 and 16, 2015

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2015

A. Introduction

- [1] Thomas Anthony McDonald applies, in the context of a dangerous offender proceeding, to exclude evidence obtained from him in the course of a Mr. Big investigation. The dangerous offender hearing has not yet commenced.
- [2] The evidence at issue includes statements made by the offender about past criminal acts for which he was never charged, and statements made by him to undercover police officers that, on their face, suggest he has a propensity to commit violent acts, is comfortable operating in a violent criminal milieu, and was generally unfazed by the simulated violence he was exposed to in the course of the Mr. Big investigation.
- [3] For the reasons that follow, I have determined it to be premature to rule on the issues that arise on this application. They are best determined in an evidentiary context that cannot be known until the end of the hearing. For this reason, the application is dismissed without prejudice to Mr. McDonald to reapply for exclusion of the impugned evidence before the end of the hearing.
- [4] This judgment is only intended to provide the parties with preliminary guidance respecting the analytical framework that will likely guide resolution of this application. In addition, the judgment identifies issues in respect of which the Court seeks clarification from the Crown, at the hearing of the application, as to the use it proposes making of the impugned evidence and the standard of proof governing its admissibility.

B. Overview

- [5] By reasons for judgment rendered April 4, 2014, Mr. McDonald was acquitted of first degree murder but convicted of the included offence manslaughter in connection with the shooting death of Dean Earl Jones: 2014 BCSC 477.
- [6] The offence was committed in Dawson Creek in 1981. The morning after the shooting, Mr. McDonald left Canada. He was, from the outset, regarded as a suspect in the killing of Mr. Jones, but there was insufficient evidence at the time to prosecute him for the offence.
- [7] In 2004, Mr. McDonald was convicted in England of manslaughter for an offence committed in 2003.

- [8] In 2008, the police learned Mr. McDonald was back in Canada. They targeted him with a Mr. Big undercover investigation focussing on the 1981 Dawson Creek shooting. In the course of that investigation, Mr. McDonald repeatedly confessed to the shooting.
- [9] In addition, Mr. McDonald made statements to the undercover police officers about his involvement in past uncharged criminal conduct, and various comments to the police and to third parties that, on their face, would suggest he is comfortable with, if not predisposed to, violent acts. These statements, which are the subject of this application, were not admitted for the truth of their content, but only to contextualize assessment of the reliability of Mr. McDonald's confession to the police that he was the Dawson Creek shooter. For example, in the course of the Mr. Big investigation, it is alleged that Mr. McDonald threatened his employer with a pick axe. The employer was called on the admissibility voir dire to give evidence confirming this incident. Although the alleged altercation was not anticipated or scripted by the police, Mr. McDonald told the primary undercover officer about the incident. He confided in the primary that had his employer made a move against him in the course of the altercation, he would have hit him with the axe. Mr. McDonald's description of this incident to the primary generally matched evidence given by the employer about the circumstances surrounding the event. Again, this evidence was admitted on the voir dire for the following limited purposes: as circumstantial evidence from which an inference might be drawn that, just as Mr. McDonald related to the undercover operator a candid and accurate account about what occurred in the altercation with his employer, he was also relating a reliable account of his involvement in the Dawson Creek shooting; and as evidence relevant to whether the police-created scenarios devised subsequent to this incident, that involved simulated violence, constituted an abuse of process.
- [10] The admissibility of Mr. McDonald's various confessions to the undercover operators was the subject of a lengthy pre-trial application. In a pre-trial ruling that preceded the judgment in *R. v. Hart*, 2014 SCC 52, I admitted Mr. McDonald's confessions of responsibility for the Dawson Creek shooting. From the context in which the confessions were given, and the markers of reliability inherent in the confessions, I found them sufficiently reliable to be admitted at trial. I also dismissed Mr. McDonald's argument that his confessions should be excluded on abuse of process grounds because some of the police-created scenarios that preceded elicitation of the confessions incorporated acts of simulated violence that would offend the community's sense of fair play and decency: 2013 BCSC 2344.
- [11] I have not, post-Hart, been asked to reconsider my ruling admitting Mr. McDonald's confessions to the Dawson Creek killing.
- [12] Following Mr. McDonald's conviction for manslaughter, I made an assessment order pursuant to s. 752.1 of the Criminal Code, R.S.C. 1985, c. C-46. When the order was granted, I invited counsel to collaborate on the information that would be provided to the assigned assessor, including the unique investigative context in which the statements and reactions that are the subject of this application were made. In the event of disagreement, I left with counsel the option of moving for directions respecting the precise information to be

supplied the assessor. I am not, of course, privy to the discussions counsel had following the making of this order, but no application for directions respecting the material to be sent to the forensic psychologist assigned to undertake the assessment was made.

- [13] Mr. McDonald declined to be interviewed for the purposes of the assessment.
- [14] The report, dated November 13, 2014, references, in addition to Mr. McDonald's confessions to the Dawson Creek shooting: his statements respecting prior uncharged criminal conduct; his responses, both verbal and non-verbal, to the simulated violence that formed part of the Mr. Big investigation; remarks made by Mr. McDonald to the undercover operators and to his brother, Jeremiah, during the Mr. Big investigation reflecting what might be regarded as a comfort level with violence; and, the statement Mr. McDonald made to the primary about the level of violence he was prepared to use against his employer.
- [15] The extent to which the assessor relied on this body of evidence in assessing Mr. McDonald's risk of violent re-offending is uncertain. It is an issue that will be explored in cross-examination at the time of the hearing.
- [16] The Crown has applied to have Mr. McDonald designated a dangerous offender and sentenced to an indeterminate sentence.
- [17] By this application, Mr. McDonald seeks an order excluding from the dangerous offender hearing the following "impugned evidence":
- any evidence concerning his involvement in the fictitious criminal organization created by the investigating officers;
 - any evidence concerning his reaction to the acts of simulated violence he witnessed in the undercover operation;
 - any statements he made to the undercover officers concerning his criminal history (including past uncharged criminal acts) and attitude towards violence - other than the statements he made concerning the Dawson Creek shooting;
 - any statements he made to the undercover officers concerning the acts of staged violence he witnessed in the Mr. Big operation;
 - any statements he made to his brother, Jeremiah, concerning the acts of staged violence he witnessed in the Mr. Big operation; and
 - any statements he made to the primary about his preparedness to use the axe in the assault allegedly committed in relation to his employer.

- [18] To be clear, Mr. McDonald's application to exclude evidence does not extend to his confessions of responsibility for the Dawson Creek shooting, or any inferences that might be drawn from those confessions respecting his character, propensity to violence, or attitude towards violence. What this application targets is statements made by Mr. McDonald, and non-verbal reactions attributed to him by the undercover officers, that are unrelated to the offence itself and arose in the context of the Mr. Big investigation.
- [19] As noted by Moldaver J. in *Hart*, at para. 68, suspects targeted with a Mr. Big investigation "come to learn that violence is a necessary part of the organization's business model, and that a past history of violence is a boast-worthy accomplishment". That dynamic was in play in this case.
- [20] Given the unique context in which his statements were made and reactions observed - a context created by the state - Mr. McDonald submits that the introduction of this body of evidence on the dangerous offender application would compromise the fairness of the dangerous offender proceeding and undermine the reputation of the administration of justice.
- [21] Exclusion of the impugned evidence is sought on three alternative grounds:
1. It is presumptively inadmissible and, before being received on the dangerous offender application, must meet the test for admissibility set out in *Hart*;
 2. The prejudicial effect of the evidence outweighs its probative value with respect to the issues arising on the dangerous offender application; and
 3. The Crown's reliance on and use of this body of evidence in the context of the dangerous offender hearing constitutes an abuse of process under s. 7 of the Charter warranting exclusion of the evidence under s. 24(1).

C. Discussion

- (a) Is a *Hart* analysis required?

[22] *Hart* established a new common law rule of evidence for assessing the admissibility of Mr. Big confessions at trial. As the Court explained, at para. 85:

Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility is overcome where the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value turns on an assessment of its reliability. Its prejudicial effect flows from the bad character evidence that must be admitted in order to put the operation and the confession in context. If the Crown is unable to demonstrate that the accused's confession is admissible, the rest of the evidence surrounding the Mr. Big operation becomes irrelevant and thus inadmissible. This rule, like the confessions rule in the case of conventional police interrogations, operates as a specific qualification to the party admissions exception to the hearsay rule [footnote omitted].

- [23] I am not persuaded that it is either necessary or possible to transpose to the sentencing context the precise analysis contemplated by Hart.
- [24] The threshold admissibility test fashioned in Hart was devised in a trial context, and is responsive to the specific dangers that arise in that context: the risk that the inducements inherent in a Mr. Big investigation will give rise to a false confession; and a concern that moral prejudice may result from the introduction of a significant body of bad character evidence that must be admitted (with cautionary instructions as to its use) to enable the trier of fact to understand the context in which the target's confession came about.
- [25] The analysis required in the present case must take account of the very different context in which the issue arises.
- [26] First, it is well-established that the strict rules of evidence governing a trial do not necessarily apply at the sentencing stage: *R. v. Gardiner*, [1982] 2 S.C.R. 368. This is not to say that reliability concerns with respect to statements made by a target that go beyond matters directly related to proof of the offence necessarily evaporate on a sentencing hearing. Plainly, they do not. But the risks are different, as is the context, and the issue must be approached differently.
- [27] Second, concerns about the admission of bad character evidence and moral prejudice do not operate in the same way at the sentencing phase. In a trial context, bad character evidence is presumptively inadmissible. In a sentencing proceeding, including a dangerous offender application, character evidence is admissible. Section 757 of the Criminal Code (an evidentiary provision counsel agree is applicable to this proceeding) provides:
- Without prejudice to the right of the offender to tender evidence as to their character and repute, if the court thinks fit, evidence of character and repute may be admitted
- (a) on the question of whether the offender is or is not a dangerous offender or a long-term offender; and
 - (b) in connection with a sentence to be imposed or an order to be made under this Part.
- [28] Third, the context of a sentencing proceeding gives rise to a rebalancing of individual and societal interests. The presumption of innocence has been displaced. As noted in *R. v. Jones*, [1994] 2 S.C.R. 229 at para. 125, the sentencing stage places a stronger emphasis on societal interests, and more narrowly defines the protections available to an offender. In all sentencing cases, both the public interest in safety and the goal of imposing a proportionate sentence dictate that the greatest possible range of information on which to make an accurate evaluation of the applicable sentencing factors, including any risk the offender poses to the community, be received. As noted in *Jones*, at para. 124:

124. In the case of dangerous offender proceedings, it is all the more important that the court be given access to the widest possible range of information in order to determine whether there is a serious risk to public safety. If there is, the dangerous offender sentencing allows the justice system to more precisely tailor the actual time served by the offender to the threat that he poses to society. The overriding aim is not the punishment of the offender but the prevention of future violence through the imposition of an indeterminate sentence. ...
- [29] Consistent with the principle that sentencing judges require a broad range of information and evidence, including that which touches on the character of an offender, to craft a fit disposition, the law seems settled that an admissibility voir dire is not required to determine the voluntariness of a confession in order to receive evidence of that confession on the sentencing hearing: see *R. v. Campbell*, [2003] O.J. No. 4085 (Ont. S.C.J.) for a discussion of the law in this area. Similarly, with respect to uncharged offences, it was noted in *R. v. Edwards* (2001), 155 C.C.C. (3d) 473 (Ont. C.A.) at para. 63, that "evidence [disclosing] the commission by the offender of other untried offences is admissible for the purpose of showing the offender's background and character as that background and character may be relevant to the objectives of sentencing".
- [30] Finally, some of the evidence the Crown appears to be relying on in connection with the dangerous offender application is said to support inferences as to Mr. McDonald's state of mind. As I understand it, the Crown will seek to argue that certain comments Mr. McDonald made during the investigation, as well as verbal and non-verbal responses he gave to scenarios involving simulated violence, are reflective of Mr. McDonald's state of mind and disposition, and are reliable indicators of his attitude towards violence. As such, I anticipate the Crown will argue that these responses illuminate Mr. McDonald's character, a relevant factor on the hearing. While it may be open to the Court to evaluate the context in which these responses were given, and whether they were made in circumstances of suspicion that cast doubt on whether they are reliable indicators of Mr. McDonald's true state of mind or character, these comments and responses do not lend themselves to precisely the same kind of reliability analysis Hart contemplates. Specifically, they are not statements of past fact capable of independent confirmation.
- [31] It is also unnecessary to attempt to force resolution of this issue through the precise framework contemplated by Hart. The protection Mr. McDonald seeks is already available to him in the rules governing sentencing hearings.
- [32] The first rule is that the Crown must prove facts properly characterized as "aggravating" beyond a reasonable doubt: s. 724(3)(e). The Crown appeared to accept in the course of this hearing that it bears the burden of proving other uncharged criminal acts Mr. McDonald admitted to committing beyond a reasonable doubt. But it was apparent to me on the hearing of this application that the Crown's position on this issue is not yet fully developed. Accordingly, I will seek clarification from the Crown at the time of the hearing about the use it seeks to make of this evidence, and confirmation of its position respecting the standard of proof applicable to this body of evidence.

- [33] The second rule lies in the authority and responsibility of a sentencing judge to exclude relevant evidence if its prejudicial effect outweighs its probative value such that the offender's right to a fair hearing is jeopardized: *R. v. Angelillo*, [2006] 2 S.C.R. 728, per Charron J. at para. 32; *Campbell*, per Hill J. at para. 31. The weighing of prejudicial effect against probative value involves application of the test through which a court will determine, in accordance with s. 757 of the Code, whether it is fit to receive evidence relating to an offender's character and repute.
- [34] In my view, the starting point in the analysis is to identify the use the Crown seeks to make of this evidence and whether the evidence the Crown relies on has been established to the requisite standard of proof. In all events, the Court retains a residual discretion to exclude evidence from the dangerous offender hearing if its prejudicial effect outweighs its probative value.
- [35] For the sake of clarity, I should add that the parties agree that the assessment report is admissible on the dangerous offender hearing. It remains, however, my responsibility to make all requisite findings of fact, including those regarding the conduct upon which the assessor bases his opinion. It is trite that an opinion is not evidence of the facts upon which it is based. If I am not independently satisfied as to the truth of "facts" relied on by the assessor, the weight I am able to assign his opinion is correspondingly diminished: see, for example, *R. v. Pike*, 2010 BCCA 401 at paras. 61-73.
- [36] I emphasize that my rejection of the exact analytical framework developed in *Hart* does not render the fairness and social policy concerns that underlie that judgment irrelevant in this context. To the contrary, those principles will inform determination of whether the prejudicial effect of the impugned evidence outweighs its probative value. Put differently, the essentials of the judgment in *Hart* apply, including the weighing of probative value and prejudicial effect. The very different context presented by this case does, however, require refinement of the analysis.
- (b) Does the prejudicial effect of the impugned evidence outweigh its probative value?
- [37] The probative value of the impugned evidence will likely turn on an assessment of: its reliability; the use the Crown proposes making of it; and any evidence the forensic assessor may provide as to why the evidence reliably illuminates Mr. McDonald's character, or otherwise informs his future risk to the public given his past behaviour and unique personality characteristics. The reliability of the evidence will obviously figure prominently in this analysis. Dickson J. (as he then was) noted in *Gardiner* at 414:

One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.

- [38] The prejudicial effect of the impugned evidence is the risk that reliance will be placed, and determinations about future dangerousness will be based, on evidence that, because of the unusual investigative context in which it was gathered, provides no reliable window on the offender's character or propensity to violence. The extent to which the impugned evidence prejudices the fairness of the hearing will also be a function of the extent to which the assessor relied on it in forming his opinion.
- [39] At this stage in the proceeding, I cannot pre-determine the probative value of this evidence or its prejudicial effect, nor can I meaningfully balance them. In my view, this can only be done at the time of the dangerous offender hearing against an established evidentiary background.
- [40] Counsel for Mr. McDonald candidly acknowledged in oral argument that the application has a speculative quality to it. I agree.
- [41] In these circumstances, I have determined to defer resolution of the admissibility of the impugned evidence and, if admissible, the weight it should be given, until all of the evidence to be called on the dangerous offender application has been heard. Counsel should, at that time, be in a position to make more informed and focused submissions on the points in issue.
- [42] I emphasize that counsel are at liberty on the hearing to propose different approaches to the novel points arising on this application than are addressed herein, and identify factors potentially relevant to the analysis that are not expressly addressed in these reasons.
- [43] As resolution of the issue is deferred, it would be inappropriate for me to say more about this issue.
- (c) Is it an abuse of process for the Crown to use the impugned evidence as proof of the offender's attitude towards violence or as evidence of his future dangerousness?
- [44] In the alternative, Mr. McDonald seeks exclusion of this evidence as a remedy under s. 24(1). He argues that use of the impugned evidence as proof of his attitude towards violence, or as evidence of his future dangerousness, is an abuse of process.
- [45] Put simply, Mr. McDonald's argument is that, having carefully orchestrated scenarios that had as one of their objects the creation of an incentive to the expression of violent sentiments, the state cannot use evidence thereby gained (unconnected to proof of the offence) to establish a likelihood that he will cause future harm.

[46] In my view, it is also premature to rule on this alternative ground for relief. The abuse of process argument is best resolved after the evidentiary phase of the dangerous offender hearing has concluded and the use the forensic assessor and the Crown has made, or seeks to make, of the evidence is known. Further, as noted above, the common law provides Mr. McDonald with the means through which the impugned evidence may be excluded. If he is successful in obtaining that relief, the constitutional argument is rendered moot. For these reasons, I am not inclined to address the constitutional argument at this stage. Mr. McDonald has leave to renew it on the hearing of the application.

"FITCH J."

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