
CANADA / JUDGMENT

R. v. Walsh

2014 BCCA 326

COURT

British Columbia Court of Appeal

DECIDED

19 August 2014

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2014 BCCA 326 R. v. Walsh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Walsh,

2014 BCCA 326

Date: 20140819

Docket: CA039644

Between:

Regina

Respondent

And

Ryan Joseph Walsh

Appellant

Before:

The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia,
dated March 26, 2009 (R. v. Walsh, Chilliwack Docket 55701-3).

Counsel for the Appellant:

J.J. Blazina

Counsel for the Respondent:

G.D. McKinnon, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

May 5, 2014

Place and Date of Judgment:

August 19, 2014

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Mr. Justice Chiasson

The Honourable Mr. Justice Willcock

Summary:

Appeal from conviction on charges of aggravated assault and assault with a weapon. Y was stabbed during an altercation involving W, P, and a third man. W and P were charged and were represented by the same counsel. W testified he did not stab Y and did not know who did. P did not testify. The trial judge disbelieved W. She convicted W and acquitted P.

W. alleged ineffective assistance of counsel. He contended his counsel was in a conflict of interest and should have taken steps to allow him to call P to testify that shortly after the altercation the third man, M, confessed to stabbing Y. W submitted P's evidence was admissible under the res gestae exception to the hearsay rule. He also contended that because of the conflict, his counsel did not point the finger at P, nor did she argue P's failure to testify was indicative of P's guilt. W applied to have his affidavit and that of his trial counsel admitted as fresh evidence.

Held: Application to adduce fresh evidence and appeal dismissed.

The only evidence that M confessed to the stabbing was in W's affidavit. That evidence was not reasonably capable of belief. Accordingly, there was no credible evidence that P could have testified about that confession (assuming such evidence would be admissible).

Based on the trial record, there was no air of reality to a submission that P was the person who stabbed Y.

Even if W had been separately represented, his counsel could not have asked the judge to consider P's failure to testify.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

INTRODUCTION

- [1] Ryan Joseph Walsh was convicted by Madam Justice Arnold-Bailey of the Supreme Court of British Columbia, on charges of aggravated assault and assault with a weapon. Those charges arose out of an altercation in which Bradley Gordon Gilbert Yarrow was stabbed with a knife. Mr. Walsh testified and denied stabbing Mr. Yarrow. The trial judge rejected his evidence. The judge acquitted the co-accused, Jordan Alan Plante, who did not testify.
- [2] Both Mr. Walsh and Mr. Plante were represented at trial by D. Suzanne Paterson. Mr. Walsh's grounds of appeal relate solely to that joint representation. He asserts he was denied the effective assistance of counsel because Ms. Paterson: (a) did not call Mr. Plante to testify that shortly after the altercation a third person, Lincoln Milne, confessed to stabbing Mr. Yarrow; and (b) failed to argue that Mr. Plante likely stabbed Mr. Yarrow and that Mr. Plante's failure to testify was probative of his guilt.
- [3] In support of his appeal, Mr. Walsh seeks to have admitted as "fresh evidence" his own affidavit and that of Ms. Paterson. In opposing the admission of that evidence the Crown asks this Court to consider two further affidavits. Those affidavits concern interviews of Mr. Milne and his mother conducted by a police officer after Mr. Walsh filed his fresh evidence application.
- [4] For the reasons that follow, I would dismiss both the fresh evidence application and the appeal.

FACTUAL BACKGROUND

- [5] On November 21, 2008, Mr. Yarrow and three others, Alexander Joel Kampen, Sean Radford, and Michael William Schellenberg, worked together on a construction site in Richmond, British Columbia. On their way back to Chilliwack after work, they drank some beer and decided to buy some marijuana. They purchased marijuana from Mr. Plante in the parking lot of the Rhombus Hotel in Chilliwack. After they drove away, Mr. Plante discovered he had been underpaid. He called Mr. Schellenberg on his cellular telephone and the four men drove back to the parking lot. Mr. Walsh (who was then 22 years old) was with Mr. Plante in the parking lot. He accused Mr. Kampen of having wrongly implicated him in stealing drugs some years before. A fight ensued during which Mr. Walsh's head was pushed through the window of a truck. Mr. Yarrow and the others then drove away.
- [6] Mr. Walsh and Mr. Plante decided to go after Mr. Yarrow and the others. They picked up a third person, who Mr. Walsh says was Mr. Milne. After stopping to buy a can of bear spray, Mr. Walsh and the others located Mr. Yarrow and his companions outside Mr. Radford's residence. Another fight ensued during which Mr. Yarrow was stabbed once in the back which resulted in one of his lungs collapsing.

[7] Mr. Walsh and Mr. Plante were charged in an indictment with the following offences:

Count 1: Aggravated assault of Mr. Yarrow (jointly);

Count 2: Assault of Mr. Yarrow with a weapon (a knife) (Mr. Walsh);

Count 3: Possession of a weapon for a purpose dangerous to the public peace (a knife) (Mr. Walsh);

Count 4: Assault of Mr. Schellenberg with a noxious substance (Mr. Plante);

Count 5: Possession of a weapon for a purpose dangerous to the public peace (noxious spray) (Mr. Plante); and

Count 6: Assault of Mr. Kampen (Mr. Walsh).

[8] The Crown's witnesses included Mr. Yarrow, Mr. Kampen, Mr. Radford, and Mr. Schellenberg. None of those persons directly identified Mr. Walsh as the person who stabbed Mr. Yarrow. In her reasons for judgment, the trial judge make the following findings with respect to the credibility and reliability of those witnesses:

Mr. Yarrow: "a credible and reliable witness";

Mr. Schellenberg: "a thoughtful, careful and generally very reliable witness, particularly in relation to what he observed occur between Yarrow and Walsh";

Mr. Radford: "a [not] particularly reliable witness;

Mr. Kampen: "[not] a reliable or credible witness".

[9] The following is a brief summary of the evidence given by Mr. Yarrow and Mr. Schellenberg with respect to the altercation during which Mr. Yarrow was stabbed:

Mr. Yarrow: Mr. Walsh, Mr. Plante, and a third man arrived at Mr. Radford's residence in a truck. As Mr. Walsh and Mr. Plante started to walk towards me, I picked up a beer bottle. The third man ran after Mr. Kampen.

Mr. Walsh told me to put the beer bottle down and fight. At this time, Mr. Plante was standing behind Mr. Walsh. As I turned to put the bottle down I felt something hit my mid-back; I felt like I had been punched. Mr. Walsh knocked me to the ground. While I was on my hands and knees, Mr. Walsh punched me and kicked me once in the head. I looked up and saw Mr. Plante "standing back". Mr. Walsh was the only one near me. Mr. Schellenberg came and got Mr. Walsh off me. I picked up the beer bottle as I wanted to help Mr. Kampen who was being chased by the third man. I saw Mr. Walsh, Mr. Plante, and the third man get back in the truck and drive away. Later, I learned I had been stabbed in the back. I had only been struck once in that area.

Mr. Schellenberg: As soon as Mr. Walsh, Mr. Plante and a third man arrived in a truck, Mr. Walsh attacked Mr. Yarrow. Mr. Walsh was on top of Mr. Yarrow's back. I ran over and struck Mr. Walsh in the face. Shortly after this I was hit from behind and pepper-sprayed. I did not see anyone with a knife.

[10] Immediately after the Crown closed its case, Ms. Paterson advised the trial judge that she was ready to proceed with the defence. She said she would be reading in statements given by two waitresses from the Rhombus Hotel and that there was a witness "who's waiting outside who will testify, and he is in fact the third man that was mentioned", who would tell the court "what happened from his point of view". She indicated once this person had testified she would like a short break to discuss with her clients whether either one of them wished to testify.

[11] After reading in the waitresses' statements, Ms. Paterson called Mr. Milne to testify:

Ms. Paterson: Now I have a witness I wish to call, but that witness relates only to the events, the third stage, which occurred [outside Mr. Radford's residence].

So I would like to have Mr. Milne called, please.

Mr. Lester: Lincoln.

Ms. Paterson: Lincoln.

[12] Mr. Milne was paged but did not respond. The trial judge stood the case down so that the sheriff could look for him. When court resumed a few minutes later, Ms. Paterson stated:

Yes, I apologize, My Lady, but sometimes these things happen. The next witness is going to be delayed until I find him with a subpoena. Therefore I'm asking that it be - - this trial or case be adjourned until tomorrow and I should have him in hand.

The trial judge granted that adjournment.

[13] When the trial resumed, Ms. Paterson advised the trial judge that she was ready to proceed:

And I wish to apologize. I had a little witness problem, but it's all right. We're going to proceed without the witness.

[14] Ms. Paterson called Mr. Walsh as a witness. The following is a brief summary of his evidence with respect to what occurred after the altercation in the Rhombus Hotel parking lot:

Mr. Plante and I drove to a gas station and purchased some pepper spray. Mr. Plante telephoned a person named "Lincoln". We picked-up Lincoln and I drove to Mr. Radford's house, where we found Mr. Yarrow and the others.

Mr. Yarrow approached me with a beer bottle, threatening to use it. I slapped the bottle out of Mr. Yarrow's hand and hit him once in the head. Mr. Yarrow stumbled towards the passenger side of a vehicle and I continued to punch him. When Mr. Schellenberg approached me from behind I tried to turn around and tripped over Mr. Yarrow. I then chased Mr. Kampen down the street. I did not have a knife and did not strike Mr. Yarrow in the back.

Mr. Plante, Lincoln, and I jumped into my truck and drove away. I parked at a friend's house and Lincoln left in a cab.

[15] The following took place during Mr. Walsh's examination in-chief:

Q All right. Now did you stab Mr. Yarrow?

A No.

Q Do you know who did?

A Not [sic] whatsoever.

[16] During Mr. Walsh's cross-examination Mr. Walsh was asked about the name of the third man:

Q And where is it you say Mr. Plante - - and Mr. Lincoln's [sic] last name is Milne; is that correct?

A I have no idea.

Q Okay. Well, we'll refer to - - you knew him as Lincoln then, did you?

A That's all I was put towards, yes.

Q Okay.

The Court: I'm sorry, sir? I didn't hear you.

A That's all I was put towards as the name.

Q Okay, so - -

The Court: It's all what?

Q I was put toward as his name. It could have been something else.

The Court: You were put towards his name?

A It could have - - I - - I was on the standing [sic] that it was his. Could have been - -

Q Okay.

A - - something else, but

Q So his name was Lincoln anyways, correct?

A Mm-hmm.

Q That's a "yes"?

A That's correct.

[17] Mr. Walsh was also cross-examined as to his knowledge of Mr. Yarrow's injury:

Q And you have heard about this injury to his back, you've heard a description of it, correct?

A I heard about it, yes.

Q And you have no idea how that - - how that was - -

A No idea at all.

Q I'm going to put it to you sir, in fact, you do know and that's the first blow that you struck on Mr. Yarrow was to his lower back area.

A That's incorrect.

Q And you had a weapon of some kind, probably a knife, in your hand as you struck him in the lower back.

A I had no knife at all, no weapon whatsoever that day.

Q So his injury to his lower back which you heard collapsed his lung, is a complete mystery to you?

A I have no idea of it, actually.

[18] After Mr. Walsh completed his testimony, the trial judge mentioned that Ms. Paterson might be in a conflict of interest in acting for both Mr. Walsh and Mr. Plante. As it was then after 12:00 p.m., Ms. Paterson asked the judge to take the noon recess so that she could discuss the matter with her clients. When court resumed, Ms. Paterson stated "that ends the defence and we're not calling Mr. Plante."

[19] In her closing submissions, Ms. Paterson conceded that, in light of Mr. Yarrow's injury, someone must have had a knife. However, there was no evidence Mr. Walsh was in possession of, or used, a knife that night. She further submitted that while Mr. Plante had been there to "back up" Mr. Walsh, he could not have had a common intention with Mr. Walsh to stab Mr. Yarrow as Mr. Walsh did not have a knife. Rather, "[Lincoln] definitely could have been the one with a knife." With respect to the charges against Mr. Plante alone, Ms. Paterson submitted, among other things, that Mr. Schellenberg did not see whoever sprayed him.

- [20] Crown counsel submitted that Mr. Walsh was the person who stabbed Mr. Yarrow. He noted that the only time Mr. Yarrow felt a blow to his back was while he was being attacked by Mr. Walsh. No one else was near Mr. Yarrow while Mr. Walsh was striking him. Crown counsel stated that the charge of possession of a knife for a purpose dangerous to the public peace against Mr. Walsh (Count 3) related to Mr. Walsh having been seen with a knife in the parking lot of the Rhombus Hotel.
- [21] With respect to Mr. Plante, Crown counsel submitted that he was a party to the stabbing of Mr. Yarrow by Mr. Walsh. Crown counsel also submitted that Mr. Plante was guilty of the charges relating to Mr. Schellenberg on the basis he was either the person who used the spray or was a party to that action.
- [22] Ms. Paterson's reply was limited to a submission in response to Crown counsel's reliance on Mr. Radford's evidence that Mr. Plante had used the words "getting poked" during the altercation in the hotel parking lot and, if so, what those words could mean.
- [23] The trial judge acquitted Mr. Plante on all the charges against him (Counts 1, 4, and 5). She found Mr. Walsh guilty of aggravated assault of Mr. Yarrow (Count 1) and assaulting Mr. Yarrow with a knife (Count 2). She acquitted Mr. Walsh on the charge of possession of a weapon for a purpose dangerous to the public peace (Count 3), and the charge of assaulting Mr. Kampen (Count 6).
- [24] In convicting Mr. Walsh in relation to the attack on Mr. Yarrow, the trial judge said this:
- [90] For the reasons that I have articulated, in relation to the evidence of Walsh, I find that I do not believe it, and I also find that it does not raise a reasonable doubt. It is simply not credible, and it offends common sense in light of all the evidence, including the surrounding circumstances and the nature of Yarrow's injuries, particularly the stab wound.
- [91] Therefore, based on the third step of the analysis, I must then ask myself whether on the basis of evidence that I do accept, namely, the evidence of Yarrow, Schellenberg and the medical evidence of Mr. Swanson, the ambulance attendant, and Dr. Olson, am I convinced beyond a reasonable doubt of the guilt of Walsh?
- [92] On the totality of the evidence, I find that Walsh did stab Yarrow when they fought. If it did not occur when Walsh struck Yarrow as Yarrow turned to put the bottle down, then Walsh stabbed him when he repeatedly struck Yarrow when Yarrow was on the ground and curled up in a fetal position as observed by Schellenberg. This is the only rational conclusion available on the evidence. Yarrow went into that altercation with Walsh uninjured. He experienced it as he described and then he got up and ran to see what was happening to the others. There is no suggestion that Yarrow was in another subsequent altercation in which he could have been stabbed by anyone else.

MR. WALSH'S FRESH EVIDENCE

- [25] The following are the salient aspects of Mr. Walsh's affidavit. It should be noted that, having been denied bail, he was in custody prior to the trial:
5. In preparing for the trial, I had a number of conversations with Ms. Paterson. Mr. Plante and Mr. Milne were also involved in a number of these discussions.
 6. I repeatedly advised Ms. Paterson that I did not have any knives with me or on me at any time during the confrontation with Yarrow and Kampen. I told her that I never stabbed Mr. Yarrow, and I testified to this at my trial. Mr. Yarrow himself was not sure who stabbed him.
 7. I also repeatedly told Ms. Paterson that Mr. Milne had confessed to myself and Mr. Plante that it was he, Mr. Milne, who had stabbed Mr. Yarrow. I told Ms. Paterson that right as we were driving away from the confrontation with Mr. Yarrow and the others, Mr. Milne told me and Mr. Plante that he had stabbed one of the men. I believe his words were "I got one of 'em." I asked him what he meant, and he told Mr. Plante and me that he had stabbed one of the three men. I made sure my lawyer, Ms. Paterson, knew this.
 8. Ms. Paterson set up some conference calls that Mr. Plante, Mr. Milne and I were involved in. Mr. Milne told Ms. Paterson that he was the person who had stabbed Mr. Yarrow, and he described the knives that he had with him that day. Mr. Milne said that he was willing to testify to this at the upcoming trial.
 9. The trial started on February 9th, 2009 and witnesses for the Crown were called on the next several days. The Crown closed its case on the morning of February 12th. Ms. Paterson advised the Court that the first witness for the defence, the "the third man" who was with Mr. Plante and I at the time, was waiting outside. This was Mr. Milne.
 10. Mr. Lincoln Milne was called as a witness, but did not come into the courtroom. Ms. Paterson told the court that the witness was "going to be delayed until I find him with a subpoena", and Mr. Lester, Crown counsel, told the Court that "It's obviously [sic] he's an important witness to the defence." Court was adjourned until the next morning.
 11. After court, Ms. Paterson told me that Mr. Milne and his mother had spoken to the Crown prosecutor at the courthouse in private that morning, and that afterwards he had told her there was "no way" he was going to testify, and that if she did call him to the stand he would say that he saw me stab Mr. Yarrow.
 12. I know there were other people in the courthouse on February 12th that also saw Mr. Milne and his mother arrive outside the courtroom, and then meet with the Crown prosecutor in private. My mother, Theresa May Walsh, was there for sure.
 13. I was shocked by what had happened. I was expecting Mr. Milne to testify as to the truth of what had happened, that he had stabbed Mr. Yarrow.

14. Ms. Paterson never discussed the possibility that I could testify that Mr. Milne had confessed to me and Mr. Plante that he had stabbed Mr. Yarrow. Ms. Paterson also never discussed with me the fact that Mr. Plante might also be able to testify as to what Mr. Milne had told him. Ms. Paterson never brought up the possibility of asking for a mistrial, or of withdrawing as my lawyer, or withdrawing as Mr. Plante's lawyer, or of bringing an application for severance so that Mr. Plante and I would have separate trials.
 15. When I did take the stand, I told the truth. I said that I had not stabbed Mr. Yarrow, and that I never had any knife whatsoever that day. When the prosecutor asked me if I had any idea how Yarrow received the injury to his back, I said I had no idea at all. I didn't tell him how Mr. Milne had confessed to me and Mr. Plante, or how he had described the knives he had to Ms. Paterson and told her how he had stabbed Mr. Yarrow either.
- [26] The following are the salient aspects of Ms. Paterson's affidavit:
5. In preparing for the trial, I had a number of conversations with the appellant, with Mr. Plante, and with Mr. Milne. The appellant repeatedly advised me that he did not have possession of any knives during the confrontation with Mr. Yarrow and that he never stabbed Mr. Yarrow. The appellant also told me that Mr. Milne had confessed to him and to Mr. Plante that it was he, Mr. Milne, who had stabbed Mr. Yarrow.
 6. The appellant told me that as the three of them were driving away from where they had been involved in the confrontation with Mr. Yarrow and the others, Mr. Milne had told him and Mr. Plante that he had stabbed one of the men. I believe he told me Mr. Milne said that he "got" one of them, they asked him what he meant, and he told them he had stabbed one of the other men.
 7. After hearing this, I contacted Mr. Milne and had several discussions with him. He told me that he really was the person who had stabbed Mr. Yarrow, and he described the knives that he had with him that day. Mr. Milne said that he was willing to testify to this at the upcoming trial.
 8. The trial started on February 9th, 2009 and witnesses for the Crown were called on the next several days. The Crown closed its case on the morning of February 12th. That morning, Mr. Milne and his mother attended at the courthouse, as I had subpoenaed him as a witness for the Defence.
 9. I spoke with Mr. Milne briefly outside the courtroom, and he told me that he was concerned about testifying that he had stabbed Mr. Yarrow, despite the fact that I had already discussed with him the fact that his testimony could not be used to prosecute him for this offence.
 10. I suggested that Mr. Milne speak with Crown counsel at the trial, Mr. Lester, who was also standing outside the courtroom. Mr. Milne and his mother then went with Mr. Lester into an interview room that was beside the courtroom.

11. I spoke with Mr. Milne again after he talked to Mr. Lester, and he told me that he was not going to take the stand and testify that he had stabbed Mr. Yarrow. He said that if I called him to the stand, he would say that it was the appellant who stabbed him. I believe there were other people in the courthouse on February 12th that also saw Mr. Milne and his mother arrive outside the courtroom, and then meet with the Crown prosecutor in private.
12. Court resumed, and Lincoln Milne was called as a witness for the defence. There was no response to this summons, and he did not come into the courtroom. Although the sheriff made attempts to find him, he could not be located and court was adjourned until the next morning. Until that morning, I was fully expecting Mr. Milne to testify as a witness for the defence, and to testify that he had stabbed Mr. Yarrow.
13. I spoke with the appellant and advised him as to what had happened. We did not discuss the possibility that Mr. Plante might be able to testify as to what Mr. Milne had told them about stabbing Mr. Yarrow. Nor did we discuss the possibility of an application for a mistrial, an application for severance, or my withdrawing as counsel.

CROWN'S EVIDENCE IN RESPONSE

- [27] After receiving the affidavits of Mr. Walsh and Ms. Paterson, Crown counsel asked the police to contact Mr. Milne. This resulted in the Crown obtaining two affidavits which it filed in support of its opposition to the fresh evidence application.
- [28] The first affidavit was sworn by Corporal Brett Lounsbury of the Royal Canadian Mounted Police and concerns an interview he conducted with Mr. Milne on August 14, 2013. Attached as exhibits to that affidavit are an audio/video disk and transcript of that interview. Corporal Lounsbury deposes that following that interview he was unable to obtain an affidavit from Mr. Milne.
- [29] The second affidavit was sworn by Mr. Milne's mother, Debbie Milne. Attached as an exhibit to that affidavit is a transcript of Corporal Lounsbury's interview of Ms. Milne on October 17, 2013. She deposes that what she said during the interview is true.
- [30] As I do not find it necessary to consider the Crown's affidavits in dealing with Mr. Walsh's fresh evidence application, I will only refer briefly to their contents.
- [31] During his interview, Mr. Milne stated that:
- (a) he was 19 years old when Mr. Yarrow was stabbed;
 - (b) he was not with Mr. Walsh and Mr. Plante on the night of the incident;
 - (c) Mr. Plante approached him and offered him \$50,000.00 to testify that he was the third person involved in the incident and that he, not Mr. Walsh, stabbed Mr. Yarrow;
 - (d) he was asked to testify and take the blame because his criminal record was less extensive than that of Mr. Walsh;

- (e) Mr. Plante took him to Ms. Paterson's office to discuss his giving evidence;
- (f) he never told Mr. Walsh he stabbed Mr. Yarrow;
- (g) he went to the courthouse and told Ms. Paterson he would not testify (his mother may have been with him); and
- (h) after speaking with Crown counsel he again told Ms. Paterson he would not testify and left the courthouse.

[32] During her interview, Ms. Milne stated that:

- (a) her son told her there was a case coming to trial about someone who had been stabbed and that because he was a "juvenile at the time" he had been asked "to take the fall for it";
- (b) he said he had not been involved in the incident; and
- (c) she went with him to the courthouse where she confronted Ms. Paterson in the hallway.

ANALYSIS

Failure to Call Mr. Plante

[33] Mr. Walsh contends he was denied the effective assistance of counsel because Ms. Paterson did not take the steps necessary to enable him to place in evidence through Mr. Plante the fact that Mr. Milne confessed to having stabbed Mr. Yarrow shortly after that stabbing occurred. He says because Ms. Paterson also represented Mr. Plante, whose best interests lay in not testifying, she was in a conflict of interest. According to Mr. Walsh, once Mr. Milne refused to testify in a manner favourable to the defence, Ms. Paterson should have withdrawn from the case. This would have permitted him to retain new counsel who could have applied for a mistrial and then brought an application for severance. The granting of those applications would have resulted in Mr. Walsh and Mr. Plante being tried separately, thus allowing Mr. Walsh to call Mr. Plante as a witness. Mr. Walsh says that he would then have been able to tender Mr. Milne's confession through Mr. Plante under the res gestae exception to the hearsay rule.

[34] The Crown submits that neither the res gestae exception nor any other exception to the hearsay rule would permit Mr. Plante to testify with respect to Mr. Milne's alleged confession. It further says that as the fresh evidence proffered by Mr. Walsh is neither reliable nor credible, it should not be admitted. As I agree with the Crown on this latter point, I do not find it necessary to discuss the hearsay point.

Test for the Admissibility of Fresh Evidence

[35] By virtue of s. 683(1) of the Criminal Code, R.S.C. 1985, c. C-46, an appellate court has the ability to admit fresh evidence. *Palmer v. The Queen*, [1980] 1 S.C.R. 759, is the leading authority on the application of that provision. In that case, Mr. Justice McIntyre set out the criteria to be considered (at 775):

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: [citation omitted].
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[Emphasis added.]

See also: *R. v. Hay*, 2013 SCC 61 at para. 63, [2013] 3 S.C.R. 694.

[36] However, when fresh evidence is sought to be admitted not for the purpose of challenging an issue decided at trial, but to challenge the integrity of the trial process, the *Palmer* criteria, particularly, the due diligence criteria, are modified to some extent. In *R. v. Aulakh*, 2012 BCCA 340, 295 C.C.C. (3d) 315, Madam Justice Smith, after a review of recent authorities in this and other appellate courts that have considered the admissibility of fresh evidence in support of an ineffective assistance of counsel claim, stated:

[64] Thus, fresh evidence directed to a new issue on appeal relating to the integrity of the trial process (rather than a substantive issue adjudicated at trial) will be admissible for the limited purpose of assessing the allegation of ineffective representation of counsel if it: (i) complies with the rules of evidence; (ii) is relevant to the new issue; and (iii) is credible. If the fresh evidence also relates to a substantive factual or legal issue adjudicated at trial, the *Palmer* due diligence criteria may be relevant. It goes without saying that the fourth *Palmer* criterion, the expectation that the fresh evidence would affect the result, is addressed by the parallel prejudice component of the test for ineffective assistance of counsel.

[Emphasis added.]

Is There Credible Evidence Mr. Plante Could Have Testified as to Mr. Milne's "Confession"?

- [37] It must be kept in mind that Mr. Walsh's claim of ineffective assistance rests solely on the assertion that the actions of his counsel denied him the ability to call Mr. Plante to testify that shortly after Mr. Yarrow was stabbed, Mr. Milne confessed to being the one who stabbed him. It is, accordingly, necessary to consider whether there is any credible evidence that Mr. Plante could testify that Mr. Milne made that admission.
- [38] Nothing in the fresh evidence directly attests to Mr. Plante's ability to give the evidence Mr. Walsh says he was precluded from calling. There is no affidavit from Mr. Plante and Ms. Paterson does not say that in her pre-trial meetings with Mr. Milne he acknowledged having confessed the night of the stabbing. She deposes only that Mr. Walsh told her what he alleges Mr. Milne said that night. That aspect of her affidavit is double-hearsay.
- [39] Mr. Walsh says Mr. Plante was present when Mr. Milne confessed to stabbing Mr. Yarrow. He asks this Court to infer that since he heard that confession, Mr. Plante must also have heard it and, therefore, could testify as to what Mr. Milne said. As the only evidence Mr. Milne confessed the night of the stabbing is found in Mr. Walsh's affidavit, the first issue that must be decided is whether Mr. Walsh's evidence with respect to that confession is reasonably capable of belief. In my view, it is not.
- [40] I begin by noting that, even assuming Mr. Milne was the third man, there is no evidence in the trial record that anyone other than Mr. Walsh had an opportunity to stab Mr. Yarrow. Indeed, Mr. Walsh agreed in cross-examination that he did not see anyone else physically involved with Mr. Yarrow. More importantly, as I will now discuss, Mr. Walsh's testimony at the trial reflects adversely on the credibility assessment of his affidavit.
- [41] Mr. Walsh deposes he expected Mr. Milne to testify at the trial and exonerate him. He further deposes, as does Ms. Paterson, that in preparation for trial he participated in conference calls with Mr. Milne in which Mr. Milne's proposed evidence was discussed. However, during cross-examination, Mr. Walsh stated he did not know Mr. Milne's last name. That evidence strains credulity. While Mr. Walsh may not have known Mr. Milne other than as "Lincoln" at the time of the altercation, I cannot accept that by the time of trial he did not know the name of the key defence witness with whom he had spoken several times. Added to this is the fact that Ms. Paterson referred to "Mr. Milne" in open court as the person she wished to call as the first defence witness and Mr. Milne was paged.
- [42] Next is the fact that during both direct and cross-examination Mr. Walsh denied any knowledge of who stabbed Mr. Yarrow. Indeed, he emphatically stated he had "no idea" how Mr. Yarrow came to be injured. Those answers are inconsistent with the position he now advances in his affidavit. They also defy common sense. It is difficult to accept that had Mr. Milne made the admission Mr. Walsh now attributes to him, Mr. Walsh's would have responded to the question from his counsel, "[d]o you know who [stabbed Mr. Yarrow]?", with the answer, "[n]ot [sic] whatsoever."

- [43] In light of the foregoing, I am of the view Mr. Walsh is a person to whom the truth is a stranger; his evidence that Mr. Milne confessed to stabbing Mr. Yarrow is not reasonably capable of belief. I would, accordingly, dismiss his application to adduce fresh evidence. In the result, his ground of appeal relating to his inability to call Mr. Plante as a witness fails.

Failure to Argue that Mr. Plante Stabbed Mr. Yarrow

- [44] Mr. Walsh also contends he was denied effective representation by reason of the fact that Ms. Paterson was precluded from arguing that: (a) Mr. Plante stabbed Mr. Yarrow; and (b) Mr. Plante's failure to testify was probative of his guilt in that regard. He relies on *R. v. Kim*, 2007 BCCA 25 at para. 28, 235 B.C.A.C. 191, where Mr. Justice Low succinctly stated that, "[i]t is fundamental to our criminal court system that counsel representing an accused person must be free from any conflict between his duty to that accused and his duty to another accused person." In effect, Mr. Walsh says Ms. Paterson was in a conflict of interest because she could not advance his interests by pointing the finger at Mr. Plante.
- [45] There is no absolute bar to jointly representing more than one accused, although doing so places a heavy burden on defence counsel: *Kim* at para. 25, citing with approval from *R. v. W. (W.)* (1995), 100 C.C.C. (3d) 225 at 235-236 (Ont. C.A.); see also: *R. v. Le*, 2013 BCCA 455 at para. 36, 344 B.C.A.C. 225. An appearance of conflict is not sufficient to establish the joint representation has resulted in a miscarriage of justice. An appellant who alleges ineffective representation must show that, in the particular circumstances of the case, joint representation gave rise to an actual conflict of interest: *Kim* at para. 29; *Le* at para. 36; *W. (W.)* at 240; *R. v. Barbeau* (1996), 110 C.C.C. (3d) 69 at 81 (Que. C.A.).
- [46] There is no air of reality to Mr. Walsh's argument that it would have been in his interest for Ms. Paterson to have urged the trial judge to find that Mr. Plante was the person who stabbed Mr. Yarrow. There is nothing in the trial record to suggest Mr. Plante was that person and a closing submission to that effect would have been pointless. As the judge stated in para. 108 of her reasons, there was "no evidence that Plante 'entered the fray' to assist Walsh in the fight with Yarrow". It is unrealistic to think that a submission pointing the finger at Mr. Plante would have led the judge to have a reasonable doubt with respect to Mr. Walsh's involvement in the stabbing.
- [47] Further, there is no merit to Mr. Walsh's argument that had he been separately represented his counsel could have urged the trial judge to consider Mr. Plante's failure to testify as probative of Mr. Plante having stabbed Mr. Yarrow. As Mr. Justice Moldaver stated in *R. v. Prokofiew*, 2012 SCC 49 at para. 6, [2012] 2 S.C.R. 639, counsel for an accused cannot ask a trier of fact to use the silence of a co-accused "as evidence, much less evidence of guilt".
- [48] I would not accede to this ground of appeal.

DISPOSITION

[49] I would dismiss the application to adduce fresh evidence and the appeal.

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Willcock"

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