Case Name:
R. v. Tingle

Between
Her Majesty the Queen, and
Sheldon Tingle and Jermaine Dunkley

[2018] O.J. No. 6300

2018 ONSC 7109

Court File No.: CR-18-5-192

Ontario Superior Court of Justice

K.L. Campbell J.

Heard: October 3-4, 2018.
Judgment: November 28, 2018.

(29 paras.)

Counsel:

Elizabeth Nadeau and *Marco Cuda*, for the Crown.

Scott Reid and *Marianne Salih*, for the accused, Sheldon Tingle.

Jeff Hershberg and *Brian Ross*, for the accused, Jermaine Dunkley.

MID-TRIAL RULING
ADMISSIBILITY OF JURY VERDICT
FOR PRINCIPAL OFFENDER

K.L. CAMPBELL J.:--

A. THE ISSUE

1 If the principal offender in a killing is acquitted of first-degree murder but convicted of second-degree murder, can evidence of that jury verdict be subsequently admitted into evidence at the later trial of two alleged parties to this killing, also facing charges of first-degree murder? That is the issue to be addressed in this mid-trial ruling.

2 After hearing the submissions of counsel on this issue, I advised the parties that I had concluded that this evidence was not admissible. I also indicated that I would provide reasons explaining this conclusion. These are those reasons.

B. OVERVIEW

3 The two accused, Sheldon Tingle and Jermaine Dunkley, are charged with first-degree murder in connection with the November 24, 2013 killing of Neeko Mitchell, which took place just outside the front entrance of the North Kipling Community Centre in the city of Toronto.

4 That night, there were a series of men's recreational basketball games scheduled to be played in the gymnasium of the Community Centre. Mr. Mitchell attended the Community Centre to watch one of the games. The Crown alleges, essentially, that at the request of Jermaine Dunkley, Mr. Mitchell was lured from the gymnasium and outside the Community Centre by Sheldon Tingle, where he was then promptly shot to death by Reshane Hayles-Wilson.

5 The killing itself was captured, quite clearly, in a video recording taken from a security surveillance camera located near the entrance of the Community Centre. That recording leaves no doubt that it was Mr. Hayles-Wilson who killed the deceased. The video recording shows Mr. Hayles-Wilson approach Mr. Mitchell just after he exited the Community Centre, draw a semi-automatic handgun from the waistband of his pants, and quickly shoot Mr. Mitchell repeatedly from very close range. Mr. Mitchell died a short time later, having suffered some eight gunshot wounds.

6 The Crown alleges that the two accused are parties to the murder of the deceased by Mr. Hayles-Wilson, and are guilty of first-degree murder on the basis that it was a "planned and deliberate" murder on the part of the two accused, Mr. Tingle and Mr. Dunkley.

C. THE DEVELOPMENT OF THE ISSUE AT TRIAL

7 Mr. Reid, defence counsel for Mr. Tingle, has already adduced, in the presence of the jury, the fact that Mr. Hayles-Wilson, the person who actually shot Mr. Mitchell to death, was acquitted by a jury on the charge of first-degree murder, but convicted of the included offence of second-degree murder in relation to this killing. This verdict was reached in a separate, earlier trial that took place in this court before Mr. Justice M. Code and a jury.

8 After the jury had heard this evidence about this earlier jury verdict, which was elicited during defence counsel's cross-examination of Det. Steven Kerr, the Crown objected to its admissibility.

The Crown also complained that this controversial piece of evidence was adduced before the jury by defence counsel without first having its admissibility determined in the absence of the jury.

D. THE POSITIONS OF THE PARTIES

9 The Crown argued, essentially, that the verdict reached by the jury in the separate, earlier proceedings against Mr. Hayles-Wilson, based upon different evidence, is simply not relevant in the present proceedings against Mr. Tingle and Mr. Dunkley. The jury is not bound by that verdict and is obliged to reach its own determination as to the potential liability of the two accused, unencumbered by the jury verdict reached in the earlier trial proceedings.

10 Defence counsel for Mr. Tingle contends, however, that this verdict is relevant and admissible in evidence, and should be taken into account by this jury. Indeed, defence counsel suggested, as I understood the argument, that the jury in this case is effectively bound by the jury verdict reached earlier in the proceedings involving Mr. Hayles-Wilson. Otherwise, the defence counsel contends, there would be a risk of inconsistent verdicts.

E. ANALYSIS

11 In my view, a verdict reached by a jury, in earlier, separate criminal trial proceedings against the alleged principal offender is *not* admissible in evidence in subsequent criminal trial proceedings against other alleged parties to the crime.

12 This legal issue was conclusively resolved by the Supreme Court of Canada nearly a century ago. In *Remillard v. The King* (1921), 62 S.C.R. 21, the accused, Joseph Remillard, was tried for murder in relation to the killing of a man named Lucien Morissette. Mr. Morissette was actually killed by the accused's son, Roméo Remillard, who shot and killed Mr. Morissette with a rifle. The accused was alleged by the Crown to be a party to the murder committed by his son. The accused's son was tried first, and convicted not of murder, but of the included offence of manslaughter. The accused argued that since his son, the principal offender in this killing, had only been found guilty of manslaughter, he could not lawfully be convicted, even in a separate trial, of the greater offence of murder. The Supreme Court of Canada disagreed, and affirmed his conviction for murder.

13 In rejecting the defence argument, Idington J., at p. 23, in delivering one of the four separate majority judgments, called this contention a "most remarkable one." Duff J., as he then was, in a brief judgment, at p. 23, stated that he was "unable to perceive any force in the argument founded upon the verdict and judgment against the younger Remillard." Anglin J. provided a more elaborate explanation for rejecting this argument, stating, at pp. 23-24:

> The fact that in another trial another jury passing upon evidence which may have been somewhat different decided that the offence committed by Roméo Rémillard in killing Lucien Morissette amounted only to manslaughter is *wholly irrelevant* to the question whether Joseph Rémillard could rightly be put on trial

> for, and could upon proof that he had aided, abetted or instigated, the homicide, be convicted of murder. As between Romeo Rémillard and the Crown the verdict of the jury who tried him is no doubt *conclusive* as to the nature of his crime. *As between Joseph Rémillard and the Crown it determines nothing*. The character of the offence actually committed by each must be decided by the jury charged with the disposition of the indictment gainst him. [Emphasis added]

14 A similar analytical approach was adopted by Mignault J., who rejected the defence argument in the following terms, at pp. 34-35:

> This reasoning [in the defence argument] necessarily implies that the verdict found in another trial against Roméo Rémillard is conclusive evidence in the trial of Joseph Rémillard of the nature of the offence committed by the former, of which offence question one assumes that the latter could be found to have been an aider and abettor. I think that this shews the *fallacy of the appellant's contention*, for what was decided in Roméo Rémillard's case was *entirely irrelevant* in the trial of his father, and the learned *trial judge would have erred* had he told the jury that because the son in another case had been found guilty of manslaughter, the father, when separately tried, *could not be convicted of the greater offence of murder*, for that would have been giving to the verdict in the Roméo Rémillard case a *conclusive effect* in the Joseph Rémillard trial; in other words, treating it as *res judicata*, which it *certainly is not*.
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> . . .
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> ... it is conceivable that one [accused] may be shewn to be guilty of *murder* and the other of *manslaughter*. And on the trial of the appellant, the jury could certainly determine what was the crime committed and, if the evidence justified the verdict, find the appellant guilty of *murder*, notwithstanding the fact that Roméo Rémillard in another trial was, for the same culpable homicide, convicted of *manslaughter*. [Emphasis added]

15 This authoritative decision of the Supreme Court of Canada has been consistently followed in the subsequent appellate court jurisprudence in Canada, with the result that courts have consistently excluded evidence of such previous verdicts. See, for example, *R. v. Martin* (1980), 53 C.C.C. (2d) 425 (Ont.C.A.), at pp. 432-433; *R. v. Speid* (1985), 20 C.C.C. (3d) 534 (Ont.C.A.), at pp. 556-557; *R. v. Hick*, [1991] 3 S.C.R. 383, at p. 386; *R. v. Camacho* (1998), 129 C.C.C. (3d) 94 (Ont.C.A.), at para. 3; *R. v. Duong* (2001), 160 C.C.C. (3d) 467 (Ont.C.A.), at para. 19; *R. v. Amador*, [2001] O.J. No. 4672 (S.C.J.), at paras. 46-48; *R. v. Fisher*, 2003 SKCA 90, at paras. 61-69, leave denied, [2004] 3 S.C.R. viii; *R. v. Chow*, 2011 BCCA 338, at paras. 44, 51; *R. v. Smith*, 2016 ONCA 25, at para. 48; *R. v. Johnson*, 2017 NSCA 64, at para. 78.

16 I note in passing that *Remilliard* and its progeny are entirely consistent with s. 23.1 of the

Criminal Code, R.S.C. 1985, chap. C-46. This section provides that ss. 21 to 23 of the *Code* apply with respect to an accused, notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence. See also *R. v. S.(F.J.)*, [1998] 1 S.C.R. 88, affirming, 1997 NSCA 87; *Standefer v. United States*, 100 S.Ct. 1999 (1980), at p. 2003.

17 Further, the principle articulated by the Supreme Court of Canada in *Remilliard* has been held to withstand constitutional scrutiny when measured against the principles of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms*. See *R. v. Huard*, 2013 ONCA 650, at paras. 85-105, leave denied, [2014] 1 S.C.R. ix.

18 In the text by David Ormerod Q.C. and Karl Laird, *Smith, Hogan and Omerod's Criminal Law* (2018, 15th ed.), the authors articulate this same principle in the following terms, at p. 219:

> Even if the alleged principal offender has been acquitted, a conviction of another person as an accessory may be logical. This is so even if it is assumed that an accessory may be convicted only when the principal offender himself is guilty. *The acquittal of the alleged principal offender, far from being conclusive that no crime was committed, is not generally admissible in evidence at a subsequent trial of the secondary parties*. A second jury may be satisfied beyond a reasonable doubt that the crime was committed upon evidence which the first jury found unconvincing; evidence may be admissible against D [the accessory] which was not admissible against P [the principal offender], or fresh evidence may have come to light or P may have been acquitted because the prosecution offered no evidence against him.
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> The position would seem to be the same where D is tried first and convicted and P is subsequently acquitted and when the parties are jointly indicted.
>
> [emphasis added]

19 Similarly, E.G. Ewaschuk, in his authoritative text, *Criminal Pleadings and Practice in Canada*, (2nd ed., Loose-Leaf, 2017), vol. 1, at s. 15:2140, and vol. 2, at s. 16:5045, articulates this principle in the following terms:

> An accused cannot be a secondary party to an offence unless the offence has actually been committed. A *secondary party*, e.g., an aider or abettor, may nevertheless *be convicted of the offence charged even where the principal is acquitted, or convicted of a lesser offence*, as long as the principal has committed the proscribed harm, and the secondary party has the requisite *mens rea* and has aided or abetted the principal.

. . .

> *A verdict at one trial is irrelevant* to *and, therefore, inadmissible at a subsequent trial* whether of the same or different accused *even if the charges arise out of the same transaction*. The earlier verdict is merely the "opinion" of another judge or jury and is therefore of *no assistance* on the issue of whether the Crown has proven the accused's guilt at the subsequent trial. [Emphasis added]

20 The main judicial authority cited by the authors D. Ormerod and K. Laird in support of this analysis is the decision of the Judicial Committee of the Privy Council in *R. v. Hui Chi-Ming* (1991), 94 Cr. App. R. 236. Earlier editions of this text, published prior to the decision in *Hui Chi-Ming*, cited the Supreme Court of Canada decision in *R. v. Remilliard* (and, in particular, the above-quoted comments by Anglin J.), in support of this analysis. See, for example, J.C. Smith and B. Hogan, *Criminal Law* (1983, 5th ed.), at p. 137.

21 In the *Hui Chi-Ming* case, the principal offender, who beat the deceased to death with a length of metal pipe, was acquitted on a charge of murder, but convicted of the included offence of manslaughter. A number of years later, the accused was tried separately, also on a charge of murder. The Crown alleged that the accused had sent the principal offender, together with some other men, to a particular area look for someone to hit. The trial judge excluded the evidence of the acquittal of the principal offender on the charge of murder, and the accused was convicted of murder. On appeal, the accused argued that the trial judge had erred in excluding the evidence of the acquittal of the principal. The Privy Council rejected this argument.

22 Lord Lowry, delivering the judgment of the Board, concluded, at pp. 239-240, that there was "no doubt" that the trial judge was "right" to exclude the evidence of the acquittal of the principal on the charge of murder. The "conclusion reached by the jury" at the trial of the principal offender was "irrelevant" and "amounted to no more than evidence of the opinion of that jury" and was, therefore, "inadmissible at the separate trial" of the accused. Lord Lowry also noted, at p. 241, that the logic of the defence submission may be tested by asking what ruling the trial judge should properly make if the accused had been tried first and convicted of murder, and subsequently, on the separate trial of the principal offender, the Crown had tendered evidence of the earlier conviction of the accomplice for murder. In so doing, Lord Lowry impliedly concluded that, in those opposite circumstances, the evidence of the earlier conviction would be clearly inadmissible.

23 This principle continues to be cited with approval in the United Kingdom, with limited exceptions. See, for example, *R. v. Dang*, [2014] EWCA Crim 348, at para. 21; *R. v. Bala*, [2016] EWCA Crim 560, at paras. 86-93; J.F. Archbold, *Archbold: Criminal Pleading, Evidence and Practice*, (2018, Loose-Leaf ed.), at s. 4-400. See also D. Watt, *Watt's Manual of Criminal Evidence* (2018), at s. 3.0, at p. 30; G. Williams, *Criminal Law - The General Part* (1961, 2nd ed.) at s. 130, at pp. 390-391.

24 This logic also finds expression in the Canadian judicial authorities following the Supreme

Court of Canada decision in *R. v. Remilliard*. For example, in *R. v. Martin*, the Court of Appeal for Ontario considered the admissibility of the acquittal of a Crown witness who had earlier been charged and tried for the same murder now alleged against the accused. The evidence of the earlier acquittal had been admitted into evidence by the trial judge. In setting aside the conviction of the accused, and ordering a new trial, Lacourciere J.A., delivering the judgment of the court, drew the following conclusions regarding the admissibility of the earlier verdict, at pp. 432-433:

> On the question of admissibility of this evidence it is clear and, indeed, fairly conceded by [the Crown], that the evidence of Comeau's acquittal was *not conclusive or even probative* of his innocence or guilt and, at the appellant's trial, was *inadmissible* to prove this issue, and *irrelevant* thereto *because it merely represented the opinion of another criminal court*. [Emphasis added]

25 Further, at pp. 432-433, Lacourciere J.A. reviewed the important American judicial authorities on this subject, effectively concluding that the general well-established rule in the United States, is that "upon the trial of one charged with crime it is not permissible to show that another jointly or separately indicted for the same offence has been convicted or acquitted." This principle continues to be applied in more recent American jurisprudence. See, for example, *United States v. Woods*, 764 F.3d 1242 (2014, 10th Cir.C.A.), at p. 1246; *United States v. Cannon*, 475 F.3d 1013 (2007, 8th Cir.C.A.), at pp. 1023-1024.

26 In seeking to support the admissibility of the evidence of the jury verdict reached in the earlier trial proceedings against Mr. Hayles-Wilson, defence counsel relied heavily upon the decision of the Court of Appeal of Ontario in *R. v. Caesar*, 2016 ONCA 599. The issue in that case, however, was quite different. The Court of Appeal in *Caesar* was not concerned about the admissibility of a *jury verdict* reached in an earlier, separate criminal trial, but rather with the admissibility of a *plea of guilty* by another accused, in a case where both accused were originally jointly charged with the same offence of importing cocaine. The Court accepted that the plea of guilty by the co-accused was admissible in order to show that the co-accused had taken responsibility for importing some of the cocaine, and that it was not the accused who was wholly responsible for the commission of the entire alleged offence. See also *R. v. Berry*, 2017 ONCA 17, at para. 35, leave denied, 2017 CarswellOnt 13984 (S.C.C.); *R. v. Tsekouras*, 2017 ONCA 290, at paras. 176-179, leave denied, [2017] S.C.C.A. No. 225; E.G. Ewaschuk, *Criminal Pleadings & Practice in Canada*, vol. 1, at s. 14:2182. The decision in *Caesar* does not, however, provide any support for the admissibility of the *jury verdict* reached in relation to the earlier, separate trial of Mr. Hayles-Wilson.

F. CONCLUSION

27 In the result, as I have already advised the parties, the evidence of the jury verdict in the case involving Mr. Hayles-Wilson, the principal offender in the killing of Neeko Mitchell, is *not* admissible.

28 The members of the jury will have to be clearly and carefully instructed that this evidence

ought not to have been placed before them; that it must be wholly ignored by them; and that it can have no place in their deliberations or their verdict regarding the potential liability of the two accused.

29 Finally, I agree with the Crown that this was clearly an issue that should have been raised, argued and determined *before* the contentious evidence was put before the jury. Had that course of conduct been followed, no remedial, corrective jury instructions would be necessary -- the jury would simply not have heard the inadmissible evidence.

K.L. CAMPBELL J.