File Number: 38129

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

and

DEAN DANIEL KELSIE

Respondent
(Appellant)

and

DIRECTOR OF PUBLIC PROSECUTIONS
ATTORNEY GENERAL OF ONTARIO
CRIMINAL LAWYERS' ASSOCIATION

Interveners

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal is concerned with a consideration of the acts and declarations of co-conspirators in the third step of the *Carter* test: both whose acts and declarations can be considered and when those acts and declarations must have been made.[1] An important question that underpins these issues is the threshold pursuant to which the membership of those individuals in the conspiracy whose words and actions are being relied upon must be proven.

2. In this case, the jury was instructed that, before they could consider the acts and declarations of certain co-conspirators made in furtherance of the agreement to kill the victim, they had to be satisfied **beyond a reasonable doubt** that the declarants were members of the conspiracy. The Nova Scotia Court of Appeal quoted this instruction – without comment or correction – in its review of the trial judge's charge to the jury.

3. The question of the appropriate standard of proof of the membership of non-accused co-actors is not answered in the standard formulation of the *Carter* analysis. The issue has yet to be addressed explicitly by any appellate court, although outside of the Nova Scotia Court of Appeal's decision in the present case, the burden of **probable** membership is both widely assumed and relied upon in the Canadian jurisprudence. It is also the standard adopted in foreign common law jurisdictions.

4. The Director of Public Prosecutions (DPP) intervenes to make a single point: this Court should confirm that the standard of proof for all alleged members of a conspiracy – accused and declarants alike – is on a balance of probabilities. If this Court does not address this question, it should be expressly left for another case.

B. Facts

5. The DPP makes no submission on the facts.

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[1] *R. v. Carter*, [1982] 1 S.C.R. 938.

PART II – POSITION ON THE QUESTIONS IN ISSUE

6. The DPP intervenes in relation to the first two grounds of appeal raised by the appellant, which address the third step of the *Carter* test, to submit that the appropriate threshold on which the membership of the declarant – whose statements and acts are to be considered – must be determined is a balance of probabilities.

7. The DPP takes no position on the third and fourth grounds of appeal, which relate to the respondent's conviction on the murder charge.

PART III – ARGUMENT

A. Co-conspirators exception to the hearsay rule: general principles

8. Out-of-court statements and acts by persons engaged in an unlawful conspiracy or in a common enterprise may be received in evidence as admissions against all members of the conspiracy if those statements were made or acts done while the conspiracy was ongoing and in furtherance of its common object.[2] This exception to the hearsay rule – known variously as the co-conspirators exception, the co-actors exception or the common enterprise test – is a rule of evidence that applies to conspiracy charges and substantive counts alike.[3]

9. The rule applies only to the hearsay acts and statements of those who have commonly agreed to do an unlawful act, not to those who have not agreed or who are merely pretending to agree. For example, undercover police officers and police agents cannot in law be co-conspirators because any professed agreement to achieve a common illegal purpose is necessarily feigned.[4] As such, the hearsay exception does not apply to their evidence; these witnesses must give *viva voce* evidence at trial of their involvement in the investigation. In this respect the DPP supports the appellant's position on the first issue: Derry's in-court testimony about his own acts and declarations is not hearsay and its admissibility does not depend on the application of the co-conspirators exception. [5]

10. Where the accused was present for, or party to, the acts or declarations, evidence of them

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[2] For an overview of the relevant jurisprudence, see *R. v. Kler,* 2017 ONCA 64 at paras. 61-68.
[3] *R. v. Koufis,* [1941] S.C.R. 481 at p. 488.
[4] *United States v. Dynar,* [1997] 2 S.C.R. 462 at para. 88.
[5] See e.g. *Connolly v. The Queen,* 2001 NLCA 31 at para. 22.

may be received as an admission, an adopted admission or admissible to prove the accused's state of mind.[6] In these circumstances, reliance on the rule is unnecessary.

B. *Carter* test: no guidance regarding declarants' membership in the conspiracy

11. In *R. v. Carter*, Justice McIntyre set out the three-part test for the receipt of co-conspirators' hearsay acts and declarations as evidence against a particular accused.[7] Justice McIntyre in *R. v. Barrow* adopted the following summary of the applicable test:

> 1. The trier of fact must first be satisfied beyond reasonable doubt that the alleged conspiracy in fact existed.
>
> 2. If the alleged conspiracy is found to exist then the trier of fact must review all the evidence that is directly admissible against the accused and decide on a balance of probabilities whether or not he is a member of the conspiracy.
>
> 3. If the trier of fact concludes on a balance of probabilities that the accused is a member of the conspiracy then he or they must go on and decide whether the Crown has established such membership beyond reasonable doubt. In this last step, only the trier of fact can apply the hearsay exception and consider evidence of acts and declarations of co-conspirators done in furtherance of the object of the conspiracy as evidence against the accused on the issue of his guilt.[8]

12. The *Carter* test is clear with respect to the standard on which the membership of the accused in the conspiracy must be proved at step 2: it must be established on a balance of probabilities. It is, however, silent with respect to the membership of the declarants whose hearsay acts and declarations the Crown seeks to rely upon at step 3.

13. Indeed, the authors of *The Law of Evidence* state that nothing prevents the Crown from doing anything more than merely alleging the declarant's membership in the conspiracy:

> One issue that has not been considered by the courts is the degree of proof necessary to establish that the co-conspirators whose declarations are being tendered were, in fact, themselves parties to the conspiracy. It appears that, once it is established on the basis of evidence directly admissible against an accused that he or she was a party to the conspiracy charged, the acts and declarations of the "alleged co-conspirators" may be used as

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[6] See notably: *R. v. Smith*, 2007 NSCA 19 at para. 193, affirmed on other grounds, [2009] 1 S.C.R. 146; S. Casey Hill, David M. Tanovich, Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th Edition (Toronto: Canada Law Book, 2017) at §7:160.50 (adopted admissions) and §7:120.40 (state of mind).
[7] *R. v. Carter*, [1982] 1 S.C.R. 938 at p. 947.
[8] *R. v. Barrow*, [1987] 2 S.C.R. 694 at p. 740, per McIntyre J., dissenting on another point.

> evidence against him or her. This would mean that the acts and declarations of persons not proven to be agents of the accused are admissible against him or her. There does not appear to be a restriction that the acts and declarations which become admissible must be those of conspirators shown to be a party to the conspiracy.[9]

14. This Court has not considered the co-conspirators exception to the hearsay rule since 2005 in *R. v. Mapara.* That case held that the *Carter* rule met the necessity and reliability requirements of the principled approach to hearsay. The Court did not address, however, the question of how the membership of co-conspirators must be proven. Rather, both the majority and the dissent referenced only the standard on which membership of the **accused** in the conspiracy must be proved.[10]

C. Jury instructed on a standard of beyond a reasonable doubt

15. In the case at bar, the trial judge repeatedly instructed the jury that they needed to be satisfied beyond a reasonable doubt that the alleged declarants were in fact members of the conspiracy to murder Simmons, which the Court of Appeal recited in full:

> The Crown alleges that Dean Kelsie was involved in the conspiracy together with James, Gareau and Smith. Before you can consider the acts of James, Gareau and Smith for the purpose of assessing guilt against Mr. Kelsie, you must be satisfied **beyond a reasonable doubt that the identity of the particular separately indicted co-conspirator**, or co-conspirators, has been proven to your satisfaction. If the identity of a co-conspirator is not proven beyond a reasonable doubt, then anything that he said or did is irrelevant, and cannot be used to establish the complicity of this accused. […]
>
> Although I have reviewed just part of the evidence applicable to this element, it is for you to consider all of the evidence to determine if the identity of the co-conspirator, or co-conspirators, has been proven beyond a reasonable doubt. <u>As I stated previously, if the identity of a co-conspirator is not proven beyond a reasonable doubt, that anything that that co-conspirator said or did is irrelevant, and cannot be used by you to establish the complicity of Mr. Kelsie.</u>
>
> On the other hand, if you are satisfied beyond a reasonable doubt that proof of the identity of any one or more of the separately indicted co-conspirators has been made, you may then consider the acts and declarations of that or those separately indicted co-conspirators for the purposes of assessing guilty [sic] against the accused.[11] [Underlining in original; our bold]

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[9] Sidney N. Lederman, Alan W. Bryant and Michelle K. Fuerst, *Sopinka, Lederman & Bryant – The Law of Evidence*, 5th ed. (Toronto: LexisNexus Canada, 2018) at §6.498.
[10] *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358 at paras. 23-31.
[11] *R. v. Kelsie*, 2017 NSCA 89 (NSCA Decision) at para. 147.

16. The Nova Scotia Court of Appeal included these instructions for the purposes of illustrating the evidence the trial judge had identified as useful in the *Carter* analysis. Because their focus was the scope of the evidence said to be co-conspirators' evidence, the Court of Appeal was not concerned with the standard that should be applied to determine membership. Instead, the Court of Appeal simply said that the out-of-court statements must be those of persons said to "have been proven to be members of the conspiracy".[12]

17. Although the trial judge's charge referenced the "identity" of the alleged co-conspirators, the facts in this case make it clear that the identity of those individuals was never in issue. For this reason, the reference to identity can only be understood to mean the "membership" of the alleged co-conspirators in the agreement. However, even if the trial judge meant to reference the actual identity of the co-conspirators, this too would be an error. Conspiracy counts regularly include reference to unknown co-conspirators, whose identities cannot and need not be proven.[13]

18. The Court of Appeal's failure to correct the trial judge's erroneous instruction on this point could be perceived as some measure of approval for an improper standard that would make the application of the *Carter* test unworkable, as will be explained in the next section.

D. Probable membership: the appropriate threshold

19. A threshold of probable membership (i.e. on balance of probabilities) for declarants whose words or actions are sought to be tendered as proof of an accused being a party to a conspiracy or common enterprise is essential to the proper application of the *Carter* test. The adoption of the higher threshold of proof beyond a reasonable doubt would make step 3 of *Carter* unnecessary.

20. Consider a case where all three members of a conspiracy stand jointly charged in a single trial. The *Carter* test becomes unworkable if the membership of declarants must be proven beyond a reasonable doubt before their words and actions become available at the third step of the analysis. Each member of the conspiracy could conceivably be both an accused and a

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[12] NSCA Decision at para. 145.

[13] See e.g. *R. v. Douglas*, [1991] 1 S.C.R. 301 at p. 317 quoting with approval from Martin J.A. in *R. v. Paterson, Ackworth and Kovach* (1985), 18 C.C.C. (3d) 137 (Ont. C.A.), aff'd *sub nom. R. v. Ackworth*, [1987] 2 S.C.R. 291.

declarant for the purposes of the application of the test. For the Crown to rely on the hearsay acts and declarations of accused B and C against accused A, the Crown would be required to prove accused A's membership on a balance of probabilities at step 2 of the *Carter* test. For B and C, however, the Crown would have to prove their membership beyond a reasonable doubt on the basis of evidence directly admissible against each of them separately.

21. Conversely, to rely on the acts and declarations of accused A against B and C, the Crown would be required to first prove A's membership in the conspiracy beyond a reasonable doubt at step 2. In such a case, reliance on the test would become unnecessary because the Crown would have adduced sufficient evidence of membership for each accused without resorting to hearsay.

22. While this problem is most acute where all members of the conspiracy stand jointly charged, it is no less present in cases where some of the co-conspirators are tried separately or not charged at all. The Crown would still be forced to prove beyond a reasonable doubt the membership of the declarants without reliance on the hearsay acts and statements of the other members of the conspiracy. However, because there is rarely direct evidence of the existence of a common unlawful object, the Crown often must rely on circumstantial evidence – including the words and acts of the various alleged participants – to prove the membership of any particular member beyond a reasonable doubt.[14] In the end, the Crown faces an insurmountable hurdle.

23. This is the very problem that *Carter* sought to resolve: if reliance on the hearsay rule depended on proof of the accused's membership beyond a reasonable doubt, the exception would be unnecessary. For this reason, this Court concluded that "[i]t is only if the preliminary proof of membership is on a standard less than the ordinary standard in criminal cases that this exception can be made available without, at the same time, disposing of the final issue in the matter."[15] The same rationale must apply to declarants.

24. Furthermore, requiring proof on a balance of probabilities for **all** members of a conspiracy avoids introducing an unnecessary step into an already complex jury instruction that would be created by adopting two different standards for the accused and for the declarants at step 2 of the *Carter* test. Such a threshold is consistent with the general principle that the admissibility of

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[14] *R. v. J.F.*, 2013 SCC 12, [2013] 1 S.C.R. 565 at para. 53.
[15] *R. v. Carter*, [1982] 1 S.C.R. 938 at pp. 943-944.

evidence is determined on a balance of probabilities.[16] It thus comes as no surprise that appellate courts across Canada have applied a "probable membership" threshold.

E. Appellate courts: implicit recognition of probable membership

25. While there appears to be no appellate judgments that have expressly considered the requisite standard of proof applicable to declarants, a number of courts of appeal have assumed and relied on the probable membership threshold.[17]

1. Nova Scotia

26. The Nova Scotia Court of Appeal – the very court whose ruling is at issue in the case at bar – has twice implicitly adopted a standard of probable membership for declarants. In *R. v. Smith*, which concerned the respondent's alleged co-conspirators Smith and James, Cromwell J.A. (as he then was) wrote for the Court of Appeal that the *Carter* test applies to "... out of court statements by persons who are proved **probably** to have been members".[18] The same standard was also acknowledged in *R. v. Johnson*, where the Court stated: "The trial judge reviewed the evidence directly admissible against [the declarant] to establish *probable* participation."[19]

2. British Columbia

27. The British Columbia Court of Appeal, in *R. v. Tran*, assumed a standard of probabilities with respect to the membership of the declarant. In that case, the appellants complained that the trial judge had failed to conduct a step 2 analysis with respect to an unindicted co-conspirator. The Court of Appeal found that, on the basis of the evidence led at trial, "... it ineluctably followed that [the declarant] was also a **probable** member.[20]

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[16] See notably S. Casey Hill, David M. Tanovich, Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th Edition (Toronto: Canada Law Book, 2017) at §4:10.10 (relevance determined on a balance of probabilities); §7:60.10 (threshold reliability assessed on balance of probabilities); §10:10.20 (probative value over prejudicial effect on balance of probabilities).
[17] For an example of a trial judge adopting the reasonable probabilities threshold in this context, see *R. v. Neves*, 2000 MBQB 126 at para. 105.
[18] *R. v. Smith*, 2007 NSCA 19 at paras. 194-195, affirmed on other grounds: *R. v. Smith*, [2009] 1 S.C.R. 146 (our bold).
[19] *R. v. Johnson*, 2017 NSCA 64 at para. 186 (our bold).
[20] *R. v. Tran*, 2014 BCCA 343 at paras. 123; see also *R. v. Wang*, 2013 BCCA 311 at paras. 71-81, leave to appeal refused, [2013] 3 S.C.R. xi.

3. Ontario

28. The Court of Appeal for Ontario has twice dealt with the question of whether a trial judge was required to instruct the jury to conduct a step 2 *Carter* analysis with respect to co-conspirators, commenting in each case on the appropriate standard of proof. In *R. v. White*, the Court dismissed a complaint that the trial judge had failed to instruct the jurors that they must be satisfied of the probable membership in the conspiracy of individuals other than the two appellants. The Court accepted the Crown's argument that, although such a direction was generally appropriate, it was not necessary in the case because the declarants had all been called as witnesses. The standard of probability was assumed and accepted by all parties. [21] Similarly, in *R. v. Farinacci*, the Court of Appeal found it unnecessary for the trial judge to instruct the jury with respect to the **probable** membership of the declarants. Pardu J., writing for the court, held that such an instruction "adds an additional layer of complexity to an already difficult charge."[22]

29. More recently, in *R. v. Kler*, the Court of Appeal extensively reviewed the co-conspirators' exception, and relied repeatedly on a standard of probable (or likely) membership when describing step 2 of the *Carter* test, without distinguishing between accused and declarants:

> The *Carter* regime permits, but limits, access by the trier of fact to the acts and declarations of likely conspirators in furtherance of the offence object of the conspiracy to prove the guilt of other likely conspirators. […] The initial step – step 2 of *Carter* – involves a determination of probable or likely membership on a restricted evidentiary basis – the words and conduct of an individual accused.[23]

4. Quebec

30. In *Langille c. R.*, the Quebec Court of Appeal similarly approved of a jury instruction using language of other probable members of the conspiracy at step 3 of the *Carter* test.[24]

F. Model jury instructions: probable membership recognized as proper threshold

31. The position taken by appellate courts appears to be consistent with the approach taken in

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[21] *R. v. White* (1997), 114 C.C.C. (3d) 225 at p. 273, 1997 CanLII 2426 (ON CA), leave to appeal refused, [1997] 3 S.C.R. xv.
[22] *R. v. Farinacci,* 2015 ONCA 392 at paras. 54 -55.
[23] *R. v. Kler,* 2017 ONCA 64 at paras. 81, 83; see also paras. 65, 72, 96-98; see also *R. v. Gagnon* (2000), 147 C.C.C. (3d) 193, 2000 CanLII 16863 (ON CA) at paras. 50-66.
[24] *Langille c. R.*, 2007 QCCA 74 at paras. 9-19; see also *Stockford v. R.*, 2009 QCCA 1573 at para. 39.

trial courts. Trial judges across the country routinely instruct juries that they must be satisfied of the **probable** membership of all the members of the conspiracy when relying on the co-conspirators' exception to the hearsay rule. In that regard, the National Justice Institute's Model Jury Instructions provide a clear and sensible approach to the determination of membership, both for the declarant and the person against whom the acts and declarations are to be adduced:

> Second, if you find beyond a reasonable doubt that there was a conspiracy to (specify unlawful object), you must decide whether (identify the author of the acts or statements and the person against whom they were tendered) were probably members. Consider each person individually. On this question, you must determine whether it is more likely than not that he or she was a member of the conspiracy. Unless I tell you otherwise, in deciding whether a person was probably a member of the conspiracy, consider only his or her own acts and statements in the context in which they occurred. At this step, evidence of acts or statements of an alleged member of the conspiracy may be considered only in relation to that person's participation, and not that of anyone else.[25]

32. Model jury instructions are simply starting points for trial judges and do not dictate the correctness of the charge to the jury in any particular case. They are nevertheless useful guides that set out the generally appropriate legal standards and are routinely relied upon.[26]

G. Comparative law: lower threshold than beyond reasonable doubt

33. While the three step *Carter* test appears to be uniquely Canadian,[27] a brief comparative law analysis shows that other jurisdictions do not apply a beyond reasonable doubt threshold to determine the admissibility of co-conspirators' deeds and declarations against an accused.

34. In the United States, it is a crime to conspire to commit any offense against the federal government.[28] Under the *Federal Rules of Evidence*, a statement is not hearsay if offered against an opposing party and made by the party's co-conspirator during and in furtherance of the conspiracy.[29] The admissibility of such statement is decided by the trial judge upon being satisfied, **by a preponderance of the evidence**, of three elements: (1) the existence of a conspiracy; (2) the declarant's and the defendant's participation in the conspiracy; (3) the hearsay

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[25] National Judicial Institute, Model Jury Instruction 11.27.
[26] *R. v. Rodgerson,* 2015 SCC 38, [2015] 2 S.C.R. 760 at paras. 51-53.
[27] *R. v. Puddicombe*, 2013 ONCA 506 at para. 86 referring to Keith Spencer, "The Common Enterprise Exception to the Hearsay Rule" (2007), 11 Int'l J. Evidence & Proof 106.
[28] Conspiracy to commit offense or to defraud United States, 18 U.S.C. § 371.
[29] Rule 801(d)(2)(E) *of the Federal Rules of Evidence*.

statement was made during the course of, and in furtherance of, the conspiracy.[30] If admitted, the statement is considered in determining whether the conspiracy is proven beyond a reasonable doubt.[31]

35. In England, Australia and New-Zealand, as in the United States at the federal level, the admissibility of co-conspirators' statements is determined by the trial judge acting as a gate-keeper. The same three elements required under American federal law must be satisfied for the co-conspirator exception to the hearsay rule to become available, but on a "reasonable evidence" threshold, also described as a *prima facie* case, which is perceived as more favourable to accused than the balance of probabilities.[32] Whatever the case may be, the "reasonable evidence" standard remains lower than proof beyond a reasonable referenced used by the courts below.

PART IV – COSTS

36. The DPP does not seek costs, and requests that no order of costs be made against her.

PART V – ORDER SOUGHT

37. Counsel for the DPP wish to present oral argument at the hearing of this appeal as ordered by Brown J. on February 7, 2019.

Dated at the City of Ottawa, this 15th day of March 2019.

_____ _____

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[30] *Bourjaily v. United States*, 483 U.S. 171 (1987) at pp. 175-176; *United States v. Reeves*, 742 F.3d 487 (11th Cir. 2014) at pp. 502-503; see also *R. v. Duff* (1994), 32 C.R. (4th) 153, 1994 CanLII 6408 (Man. C.A.) at para. 31.

[31] Elena De Santis, "Federal Criminal Conspiracy" (2018), 55 Am. Crim. L. Rev. 1193 at pp. 1196, 1209-1210.

[32] *Ahern v. R.*, [1988] HCA 39 at para. 17; *R. v. Qiu*, [2007] NZSC 51 at paras. 24-29; *Kayrouz v. R.* [2014] NZCA 139 at para. 22; *King & Ors v. R.*, [2012] EWCA Crim 805, [2012] All ER (D) 107 at para. 32; Sean Kinsler, "The Co-conspirators Exception to the Hearsay Rule in New Zealand: *R v Qui*" (2007), 13 Auckland U. L. Rev. 200 at pp. 202 *et seq*; see also *R. v. Duff* (1994), 32 C.R. (4th) 153, 1994 CanLII 6408 (Man. C.A.) at paras. 34-43.

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