Court File No. 38129

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

BETWEEN:

HER MAJESTY THE QUEEN

Applicant
(Respondent)

-and-

DEAN DANIEL KELSIE

Respondent
(Appellant)

REPLY TO RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
Pursuant to Rule 28 of the Rules of the Supreme Court of Canada

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(i) Conspiracy: Acts and Declarations of Co-conspirators

1. The Respondent continues to misconstrue the admissibility of the evidence as did the Nova Scotia Court of Appeal.

2. Paul Derry could testify about what he did, observed, and stated. This was not hearsay and did not invoke *Carter*. Derry could also testify about anything Dean Kelsie said or did. Since Kelsie was the accused, anything he said outside of Court is admissible as an admission against interest and is not hearsay. The NSCA error, and that of the Respondent, concerned when Derry testified about the acts and declarations of Wayne James, Neil Smith and Steven Gareau. Once a common design is shown, evidence of what Smith, James, and Gareau said is admissible against Kelsie pursuant to *Carter*. Like an admission against interest for a single accused, the statements of other members of the conspiracy may be used against Kelsie as if they were his own. It is the declarant who must be a co-conspirator for the evidence to be admissible against Kelsie, not the witness.

3. The NSCA wrongly identified Derry's testimony about the acts and declarations of the co-conspirators as Derry's personal acts and declarations This error is displayed in paragraphs 156 – 158 of the NSCA decision.[1]

4. The trial Judge committed no error. The evidence drawn to the jury's attention was of the acts and declarations of James, Smith and Gareau, not Derry. Derry was merely the witness, through which this information was presented to the trier of fact. This evidence was properly admitted under the hearsay exception for co-conspirators. As this Court found in *R. v. Mapara*[2] the rule is broad enough to encompass even double hearsay of co-conspirators (para. 29).

(ii) National Importance

5. The Respondent wrongly attempts to minimize the issue of national importance by suggesting the inconsistency between *Proulx c. R.*[3], on the one hand and *R. v. Loewen*[4] and *R. v.*

[1] Application for Leave to Appeal, Tab E, pp. 53-54
[2] [2005] 1 S.C.R. 358
[3] 2016 QCCA 1425
[4] (1999), 134 Man. R. (2d) 234 (C.A.)

Container Materials Limited[5] is irrelevant. The Respondent's omission of a significant portion of para.163 may be to blame for his confusion.

6. The Respondent highlights the second sentence of para.163 in the NSCA decision and then moves on to discuss paras.164, 165 and 166. When para.163 is read in its entirety, the legal error committed by the NSCA is undeniable:

> [163] On the appellant's second point: the hearsay evidence introduced did not mention Kelsie, did not allude to him being involved in the conspiracy, and did not suggest that he in any way had any involvement in the conspiracy to murder Mr. Simmons. All of the hearsay evidence relates to a period of time when Kelsie could not, on this record, have been part of the conspiracy. Kelsie was not a member of the conspiracy when these acts and declarations occurred; they could not prove his membership in the conspiracy. The hearsay evidence could not possibly assist them to determine his membership beyond a reasonable doubt. He is not implicated in any way by that evidence.

7. Clearly the NSCA thought that the jury could not consider, legally, anything which occurred prior to the Respondent joining the conspiracy: "Kelsie was not a member of the conspiracy when these acts and declarations occurred; they could not prove his membership in the conspiracy."

8. That this evidence could not legally be used against Kelsie is wrong in law. This is where *Loewen* and *Container Materials* come into play, and the rift in Canadian law with *Proulx* and now *Kelsie* is apparent. This is detailed in the Appellant's Leave memorandum.

9. The fundamental flaw in the NSCA's understanding of the significance of evidence from prior to Kelsie's entry into the conspiracy is also apparent in paragraph 163:

> On the appellant's second point: the hearsay evidence introduced did not mention Kelsie, did not allude to him being involved in the conspiracy, and did not suggest that he in any way had any involvement in the conspiracy to murder Mr. Simmons.

10. Of course, the evidence from <u>before</u> Kelsie joined the conspiracy did not "allude to him being involved" – he had not joined yet. The Court was wrong to think the evidence could only be admissible if it directly implicated Kelsie. Rather, the evidence showed the nature, scope and

[5] [1940] 4 D.L.R. 293, affirmed [1941] 3 D.L.R. 145 (C.A.), affirmed [1942] S.C.R. 147.

purpose of the conspiracy; that James, Smith and Gareau were members; and ultimately that Kelsie was a member of the conspiracy beyond a reasonable doubt.

11. Evidence of the meeting between Smith, James and Derry where the "hit" on Simmons was ordered, was evidence of a conspiracy to commit a murder contrary to Kelsie's statement that he had merely entered into an agreement to scare someone.

12. The evidence of Gareau looking for Simmons at the behest of James and Derry and calling them on October 3, 2000 with Simmons' location, was evidence of why the group (including Kelsie) went to Dartmouth. It explained why they met Gareau at a pre-arranged location and why Gareau then accompanied Kelsie to 12 Trinity Avenue.

13. All of this evidence was relevant to prove along with the evidence directly admissible against him, that Kelsie was a member of the conspiracy to kill Simmons beyond a reasonable doubt.

14. The Respondent shares with the NSCA a fundamental misunderstanding of the importance of this evidence and of precedent as established by *Container Materials* and *Loewen*. The rationale behind the reasoning in *Container Materials Limited* and *Loewen* is that an accused joining an ongoing conspiracy is said to ratify or adopt its prior acts and declarations. This is not the same as saying that the person has to be implicated before they join.

(iii) Air of Reality to Manslaughter

15. The argument that Kelsie, as aider, somehow did not know the intent of Gareau or did not have the requisite intent himself is untenable. It completely ignores the evidence at trial and the law of conspiracy as it affects the substantive offence of first degree murder.

16. In paragraph 23 of the Respondent's submission he suggests the necessary fact scenario for manslaughter to possess a sufficient air of reality to be left with the jury. It would require Kelsie to have joined the conspiracy to kill Simmons yet not actually been aware of its purpose, or for that matter, any other relevant aspect of it.

17. The Respondent cannot have it both ways. Kelsie travelled with James, Derry and Potts to Dartmouth after Gareau found Simmons. By his own admission, Kelsie was told he would have to use the antique murder weapon and received instructions in the car on how to shoot it. Kelsie and Gareau left the prearranged meeting location and went together to 12 Trinity Avenue. Kelsie said

he did not believe Gareau would shoot Simmons, yet feared he himself would be shot if he left. Kelsie would have had to purge from his mind his own agreement to kill Simmons, and all he had learned in the car, give Gareau the murder weapon and accompany him to the location of the exact same intended victim, yet have no knowledge of Gareau's intent. Even taking Kelsie's evidence at its highest, it would not give an air of reality to manslaughter.

18. Further, there was no evidence at trial, as the Respondent suggests in his manslaughter scenario in paragraph 23, that Kelsie lied when he claimed credit for the shooting in intercepted communications, because he somehow thought it would work to his advantage with the Hells Angels.

(iv) Planning and Deliberation and Abandonment

19. The Respondent argues that conspiring to murder and planning and deliberation are not the same thing. It is hard to imagine a situation in which conspiring with others to kill someone is not planning and deliberation. Certainly on the facts of this case it was exactly the same thing. Manslaughter, an unintentional killing, cannot, by definition, be the object of a conspiracy.

20. In arguing the manslaughter issue and elsewhere in his factum, the Respondent attempts to introduce the issue of abandonment, which was not argued at trial. There was no air of reality to abandonment on the facts of this case. You cannot abandon an offence you claim never to have agreed to commit. Kelsie stated he did not know Simmons was going to be killed. Kelsie's story was that he thought they were only going to teach someone a lesson (although he contradicts this elsewhere in his statement).

21. Leaving abandonment with the jury would mean that Kelsie agreed to work toward the common purpose of killing Simmons, then abandoned the agreement to murder him, but accompanied Gareau anyway, knowing that there was this pre-existing plan in place in which he had been a part of, to murder Simmons. This theory of abandonment would certainly negate any argument of manslaughter as it gives Kelsie the necessary intent along with knowledge of planning and deliberation of the murder. Kelsie would be a party even if he decided he no longer wanted to actually pull the trigger. He still accompanied Gareau, adding bulk to the guard and assisting Gareau in getting into the building.

(v) *R. v. Jackson*, [1993] 4 S.C.R. 573

22. The Respondent misconstrues the Applicant's argument for why the NSCA was wrong to rely on *Jackson* in refusing to use the proviso, or alternatively, to revisit the proviso in this regard. The Appellant did not ask this Court to reason back from the first degree murder conviction. The Applicant asks this Court to use the conspiracy conviction, which was untainted by legal error, as insight into the jury's obvious thought process. Then the conviction of first degree murder, as opposed to second degree murder, becomes important in regard to the unpalatable acquittal argument. The jury had an option of a lesser offence, if they felt that they simply could not acquit. They did not take it.

(vi) Grounds Not Decided by the Court of Appeal

23. The Respondent argues that it had additional grounds of appeal which were not adjudicated on by the NSCA which should prevent leave from being granted. The Crown is seeking Leave to Appeal from the errors of law, of national importance, committed by the NSCA in the decision it actually rendered. What may have become of the remaining grounds is speculative. The errors that need to be addressed by this Court are the ones the NSCA made.

24. Within the constraints of a Reply, the Applicant cannot address each of these additional grounds in detail. The Applicant relies on the Crown's argument in the Court below on the issues of the direction regarding unanimity; abandonment; and the use of hearsay going to planning and deliberation[6].

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Mark Scott, Q.C.
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Her Majesty the Queen

August 10, 2018
Halifax, Nova Scotia

[6] Response, Tab 4, pages 123-127; and 132-137; on abandonment see also paras.20-21 of this Reply.

TABLE OF AUTHORITIES