COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Middleton, 2012 ONCA 523
DATE: 20120802
DOCKET: C51767 & C51808

Doherty, Feldman and LaForme JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

Applicant/Appellant

and

Trevor Middleton

Appellant/Respondent

Lance C. Beechener and Mark Halfyard, for Trevor Middleton

Alexander Alvaro, for the Crown

Heard: June 7, 2012

On appeal from the convictions entered by Justice Alfred J. Stong of the Superior Court of Justice, sitting with a jury, on December 15, 2009, and by the Crown for leave to appeal the sentence imposed by Stong J. on February 12, 2010 and if leave is granted to appeal the sentence.

Feldman J.A.:

[1] On September 16, 2007, at around 2:00 in the morning at the Blue Bridge on the southern shore of Lake Simcoe, the appellant and some friends were out partying and driving in their trucks, while the victims and their friends were fishing. Following an incident where some people from the appellant's group

pushed a couple of people from the victims' group into the water, one of the appellant's friends was hurt in a fight with members of the victims' group. The appellant had already left the bridge in his truck by the time the fight broke out, but when he realized his friend was missing he returned. When the appellant saw that his friend was hurt, he chased the victims who were now in a car, ramming their vehicle with his truck and causing them injury, one extremely serious injury. The appellant was convicted of six offences arising from his actions in the truck, two counts of criminal negligence causing bodily harm and four counts of aggravated assault. He received a sentence of two years less a day plus three years probation, and a ten-year driving prohibition.

[2] The appellant appeals his conviction on three grounds. First he says that the trial judge erred in admitting into evidence two hearsay statements that were made by unidentified members of the appellant's group as they went down to the water. The unknown declarants said that they were going "nip-tipping" and that that meant they were "going to push them in the river." The word "nip" was described in the evidence as a derogatory reference to Asian people. Some of the victims' group were of Asian descent. The appellant submits as a second ground of appeal that, even if the statements were admissible, the trial judge failed to properly instruct the jury on the use they could make of those statements. As a third ground of appeal, the appellant submits that Crown

counsel's cross-examination of the appellant at trial was improper and affected the fairness of the trial.

[3] The Crown appeals the sentence. It says the sentence is manifestly unfit, and seeks a significant penitentiary term.

[4] For the following reasons, I would dismiss both the appeal and the cross-appeal.

A. FACTS

[5] For the purpose of the first and second grounds of appeal, which are the main grounds of appeal, the important background facts can be briefly stated. In the early morning of Sunday, September 16, 2007, between midnight and 1:30 a.m., seven friends drove to the bridge at the mouth of a river that flows into Lake Simcoe in the township of Georgina to go fishing. Three of the seven were of Asian descent.

[6] At the same time, the appellant and a group of about 15 to 20 young adults met up in three trucks. Some of the people had been at parties. The appellant and others had been at a bar called the Mansion House. The appellant was a designated driver and said that he was not drinking that night. The three trucks eventually converged at De La Salle Park. The appellant asked one of his friends if he wanted to "party" or "come party" with him. The appellant started driving and the others followed. According to the friends, none of them knew where they

were going. Eventually they ended up at the Blue Bridge where the anglers were fishing.

[7] A number of the partyers got out of their trucks and went down towards the water. Although most assumed the appellant left his truck, no one could say for sure. He denied it. One member of the group, Peter Way, asked another member, Ryan Hall-Leah, what was going on. He said he didn't know but asked the group, whereupon an unknown male said that they were going "nip-tipping". Peter Way knew that "nip" was a derogatory reference to Asians, but asked the group anyway what "nip-tipping" was. Another unknown person answered: "we're going to push them in the river." It was not the appellant who made either of these statements.

[8] A number of the partyers, including Steven French, who was extremely drunk, and Nick Perry, went onto the dock where the anglers were fishing. Mr. French asked them about their fishing licenses.

[9] Ruo Hang Liu, one of the fishermen, said that someone approached him, said he was Canadian and that he was doing his Canadian duty by asking to see his fishing licence. When he went to get it someone pushed him into the water. Similarly, Charles Hogan, another fisherman, said that someone who smelled of alcohol asked him about his fishing licence and when he went to get it he was pushed into the water. Mr. Way said that he heard an argument where someone

said that this was their fishing turf or their fishing area, and then two of the partyers pushed two of the fishermen into the water. No one admitted to the pushing.

[10] There was conflicting evidence as to whether the appellant went down to the dock, whether he was part of any argument, and whether he was one of the people who pushed either of the fishermen into the water. He denied that he went down to the water at all. Mr. French and Mr. Way, who both said they saw the appellant at the dock, agreed that they could have been mistaken. Mr. French specifically testified that he thought he saw the appellant pushing someone in the water to his right out of the corner of his eye. Mr. French later conceded that he was guessing about this, and agreed that he was drunk and “next to blind” in his right eye.

[11] Following the pushing, everyone but Mr. Perry ran up and got into the trucks which pulled away with the appellant in the lead. When the appellant realized that Mr. Perry was not with them, he returned to the bridge where the people in the appellant’s truck saw Mr. Perry lying on the ground. The appellant got out to attend to him. He looked beaten up and badly hurt. Some of the fishermen were observed running from the scene and getting into a white Honda Civic, while a second white car was also driving away.

[12] The appellant was angry. He followed the Honda and ended up smashing it several times, ultimately hitting the car so hard that it left the road, hit a tree, and came to rest back on the road. The appellant said he was attempting to stop the occupants from getting away. After the Honda was stopped, he got out of his truck, saw that people were injured and asking for help, but he drove away to see how Mr. Perry was and did not call 911. Two of the occupants of the Honda were badly injured, one severely.

B. THE TRIAL JUDGE'S RULING

[13] At the opening of the trial the Crown sought two rulings from the trial judge with respect to the admissibility of certain evidence. First, the Crown wanted to admit the evidence of the entire incident by the water, culminating in the pushing of two of the fishermen into the water, as "prior discreditable conduct" of the appellant. Second, as part of that evidence, the Crown sought to admit the two hearsay statements[1] made to Mr. Way by two unidentified members of their group that they were going "nip-tipping", and that that meant they were going to push the people who were fishing into the water. Both motions were granted. It is only the admission of the two hearsay statements that is raised as a ground of appeal.

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[1] All counsel and the trial judge treated the two statements as hearsay and addressed their admissibility and use as such. The jury charge was based on that ruling. On appeal for the first time, Crown counsel sought to argue that the statements were not hearsay. As I have found that the statements were properly admitted, I have not addressed that issue in these reasons.

[14] With respect to evidence of the pushing incident, referred to as the prior discreditable conduct, the trial judge ruled that it was admissible because, if accepted by the jury, it was relevant and probative of the appellant's motive and intent in respect of the driving charges against him. Specifically, it would reveal pre-existing animus against the complainant group that could help explain the extent of his anger at seeing his friend Mr. Perry apparently seriously hurt. The decision was premised on the understanding, based on evidence tendered by the Crown at the preliminary inquiry, that the appellant was the leader of the group and that he may have pushed one of the fishermen into the water.

[15] The trial judge acknowledged that the evidence was prejudicial in that it could lead the jury to engage in propensity reasoning, that is, because the appellant may have pushed or led others to push the victims into the water, it was more likely that he intended to injure the victims with his car. However, he noted that the jury would receive "a falsely sanitized and inaccurate narrative of events" if they did not hear what led up to the driving.

[16] Dealing specifically with the two hearsay statements, the trial judge ruled that they were admissible under the principled exception to the hearsay rule, most recently discussed by the Supreme Court of Canada in *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787.

[17] The trial judge concluded that the hearsay statements were relevant and necessary because, if accepted by the jury, they would establish a common intention by the group, including the appellant, to push the fishermen into the water with racial animus. This, in turn, was relevant to the appellant's intent in driving his truck into the Honda with four of the fishermen in it.

[18] The trial judge next turned to the threshold reliability criterion. He found that evidence of the actions of the group that immediately followed the hearsay declarations where two fishermen, one of whom was Asian, were pushed into the water provided sufficient corroborative evidence to establish the requisite threshold reliability. In reaching this conclusion, the trial judge was leaving open the possibility that the jury could find that the appellant had been one of the pushers on Mr. French's and Mr. Way's evidence.

[19] The trial judge acknowledged that the statements were prejudicial. He concluded, however, that their probative value outweighed their prejudicial effect and that the prejudicial effect could be minimized by an instruction limiting the use of the statements to the issue of whether or not there was a common intention that was shared by the appellant. The jury would also be told that if they decided that this common intention did exist, it would be for them to decide what link, if any, could be made from the common intention to the appellant's driving.

C. CHARGE TO THE JURY

[20] In his ruling, the trial judge based his decision on the evidence from the preliminary inquiry, and in reciting that evidence, he stated that that was the evidence that would be expected to be heard at trial. He stated, referring in particular to Mr. French's contested evidence as to whether the appellant pushed someone into the water, that it would be up to the jury to determine the weight to be attached to evidence that was undermined in cross-examination.

[21] At trial, the evidence regarding what role the appellant played in instigating or leading the group that pushed the fishermen or whether he even went down to the water was equivocal and disputed. The trial judge reviewed the evidence on a witness by witness basis in his charge under the heading "Overview of the Case".

[22] For example, one young woman, Erin Woods, testified in examination in chief that after visiting friends in the area she and another woman, Amanda Blanchard, ended up driving with Steve Samis in his truck. They were heading to Mr. Samis' house to spend the night there when the appellant pulled them over and asked them to hang out. She said that they followed his and another truck to the Blue Bridge where everyone got out. She said that everyone except the two women went down to the water. She heard splashes, following which everyone came running back up to the road, got back into the trucks and left, following the

appellant. In cross-examination, Ms. Woods admitted that someone other than the appellant could have suggested that they party at the bridge, and that it could have been Mr. Samis who stopped the appellant initially (rather than the other way around). She also agreed that she did not see the appellant go down to the water and that he might have stayed in his truck. Amanda Blanchard gave similar evidence, both in examination in chief and when she was cross-examined.

[23] Another witness, Andrew Kozmik, went in his truck to the Mansion House at 2:00 a.m. with his friend Ryan Heyde. While they were in the parking lot, he thought that Ryan was talking to the appellant. They then left and followed the appellant but he did not know where they were going. Three trucks, including Mr. Kozmik's, ended up at the Blue Bridge where they stopped. He said the people from the other two trucks were walking down to the beach, but he and Mr. Heyde stopped half-way down. It was dark, he heard splashing and laughing, then saw people whom he did not recognize running back up. He and Mr. Heyde ran too. They all got into their trucks and he followed the other two trucks driving away. In cross-examination, he said there had been no discussion about partying at the Blue Bridge, and that he did not see the appellant leave his truck, at the beach or running back up to the road.

[24] Peter Way first met the appellant when his friend, Ryan Hall-Leah, asked the appellant for a ride home from the Mansion House at 2:00 a.m. In examination in chief, he testified that when they got out of the trucks at the bridge

he asked “what’s going on?” The answers he received were the two hearsay statements at issue on the appeal. He also testified that a couple of people from their group approached the fishermen and said that it was their fishing area, that an argument then broke out, and that two fishermen were pushed into the water. He said that the appellant was involved in the argument. However, in cross-examination, he agreed that it was possible that the appellant stayed in the truck. He also said that he was the first to run back to the truck and that when he got there, the appellant was already inside.

[25] Steven French was the witness who most positively identified the appellant as being at the dock and pushing one of the fishermen into the water. That evening he was in the process of purchasing the appellant’s truck, and was in the truck with the appellant after a party. He testified that they all got out of the truck at the Blue Bridge and walked down to the dock. He thought he saw the appellant push someone into the water, then he saw people running back up to the road, so he ran as well. He also acknowledged that he was drunk and asked the fishermen for their fishing licenses because he had heard of people fishing in the dark to escape detection.

[26] In cross-examination he said he had had more than 20 beers and a couple of rye and ginger-ales over the course of that evening. He also said when he thought he saw the appellant push one of the fishermen, it was out of his right eye in which he is almost blind, and that he could not be 100% sure that it was

the appellant. He also agreed that the appellant could have stayed in the truck and that the appellant was in it when he ran back. He also testified that it was his idea to ask for fishing licenses, and that there had been no plan to do it.

[27] The appellant testified at the trial and described the events of the evening. He agreed to be the designated driver for his friends who wanted to party. They went first to the Mansion House, then to a house party, then back to the Mansion House. He drove the group to De La Salle Park to drink, but there was security there and the group suggested Sibbald Point Provincial Park. By that time the two other trucks were also following. As they approached the Blue Bridge, someone suggested drinking at the pier. He got out of the truck, relieved himself, and was looking for his cellphone charger when everyone came running back up. He said he panicked, jumped in the truck, and drove away. He specifically denied going down to the dock, pushing anyone, or having anything against Asian people.

[28] The appellant's testimony was the last to be reviewed for the jury by the trial judge. The trial judge followed that review with three specific legal instructions: (1) a *W.D.* instruction; (2) an instruction regarding motive; and (3) a limiting instruction regarding the evidence of prejudice against Asian people.

[29] In the instruction headed “Motive”, after first explaining that motive is not an essential element of the offence but just part of the evidence, the trial judge gave the following instruction:

> In this case, Crown counsel submits that Mr. Middleton had a motive for driving the way the occupants in the Honda Civic describe. That motive incorporates a negative attitude toward Asian fisherm[e]n. That was expressed when [t]he fishermen were pushed into the water, turned into anger when he found his friend, Nick Perry, lying beaten on the road, and culminated in acts of rage in retaliation by attempting to force the car the fishermen were riding in off the road.
>
> The Crown relied on the following evidence to establish a motive for Trevor Middleton to commit the offense with which he is charged:
>
> - an apparent organized [group] of vehicles and occupants, led by Middleton to the area of the Blue Bridge to ostensibly party;
>
> - the immediate convergence of the group to the dock, except for Steve Samis, Erin Woods and Amanda Blanchard, who held back closer to the road, the latter testifying that she had figured things out by the time she was descending from the road;
>
> - the conversation that Peter Way had with another member of the group as they descended to the pier about Nip tipping, a derogatory reference to fishermen of Asian descent[,] and pushing them into the water;
>
> - the then approach of Nick Perry and another member of the group demanding fishing licences of the fishermen on the pier;
>
> - the sequential pushing of two fishermen, Ruo [Hang] Liu and Charles Hogan into the river from the pier;

> - the immediate reactionary running by the group at large after the fisherm[e]n had been pushed into the water;
>
> - vacating the scene in the trucks, once again, led by Mr. Middleton;
>
> - the return to the scene by Mr. Middleton to find Nick Perry lying injured on the road;
>
> - the angry reaction to the discovery by Mr. Middleton;
>
> - the subsequent chase after and ramming of the Honda Civic in retaliation for the beating of Nick Perry.
>
> It is for you to decide whether Trevor Middleton had such a motive, or any motive at all, and how much or little you will rely on it to help you decide this case.

[30] I will also quote the instruction headed "Limiting Instruction" in full. This is the instruction the trial judge gave the jury in accordance with his ruling on the admissibility of the two hearsay statements:

> There is however, a limiting instruction I must give you with respect [to] the evidence of motive, and the effect of the testimony of prejudice or hate shown toward the fishermen of Asian descent.
>
> That limiting instruction is this. Evidence has been led by the Crown which, if you find it to be credible and reliable, is capable of supporting the theory that Trevor Middleton led a group, primarily composed of young adults, to the docks in Georgina near Jackson's Point with the explicit aim of pushing fishermen of Asian descent into the water; an act dubbed 'Nip tipping'. The evidence, if you accept it, would have Mr. Middleton leading and co-ordinating the group's attendance at the docks.

Further evidence led by the Crown, to which I have already referred, is that of Mr. Peter Way. He testified that when everyone was rushing to get to the docks, he either asked himself or his friend Ryan, who was with him [and who] asked [an] unidentified member of the group for him, why everyone was in a rush, to which he received a reply from that unidentified male, "We are Nip tipping", which was a derogatory phrase, understood by Mr. Way to mean that they were going to harass fishermen of Asian descent in some fashion, because when he sought clarification from the same individual, the person responded, "We're going to push them in the water."

The evidence led by the Crown is that two fishermen were pushed into the water moments later by members of this group; one of them, Ruo [Hang] Liu, being of Asian descent. This evidence cannot be used by you to find that Mr. Middleton displayed a propensity for criminal misbehaviour and is therefore more likely to have committed the offence before the Court. *The utterances led in evidence by the Crown, if you find them to be credible and reliable, are to be used only in considering whether or not there was a common group intention in going to the docks that included Mr. Middleton. If you decide that such a common intention did include Mr. Middleton, then you must consider what, if any, connection this had to Middleton's alleged driving some minutes after discovering his friend, Nick Perry was injured.*

It is evidence for you to consider in determining any animus toward the group of fisherm[e]n, such as would speak to the essential element of intent on the aggravated assault charge. It is open to you to consider whether Mr. Middleton's existing animus, if you so find, turn[s] to anger when he allegedly pursues Mr. Liu's vehicle for being involved in the alleged retaliation beating of his friend, Nick Perry, and acting in retaliation for this Civic Honda and its occupants out of that anger. [Emphasis added.]

D. ISSUES

[31] There are three issues raised by the appellant, and one issue raised by the Crown:

(1) Were the hearsay statements admissible under the common law "present intentions" exception to the hearsay rule and/or the principled exception to the hearsay rule?

(2) If the statements were admissible, were the instructions to the jury adequate as to how they could use them?

(3) Was Crown counsel's cross-examination of the appellant improper giving rise to an unfair trial?

(4) Was the sentence manifestly unfit? (raised by the Crown)

E. DISCUSSION

Issue 1: Were the hearsay statements admissible under the common law "present intentions" exception to the hearsay rule and/or the principled exception to the hearsay rule?

(1) Introduction

[32] Hearsay statements are presumptively inadmissible in evidence because the person who is reported to have made the statement cannot be cross-

examined. This means that the veracity and reliability of the contents of the statement cannot be tested. However, a hearsay statement can be admitted into evidence if it fits within an existing common law exception to the exclusionary rule, or if it meets the requirements of necessity and reliability as mandated under the principled exception: see *Khelawon*, at para. 2.

[33] The two hearsay statements were admitted for the purpose of showing a common intention by the group to push Asian fishermen into the water. That common intention and the racial animus inherent to it, when applied to the appellant, could be used as evidence of his motive to hurt the passengers of the Honda Civic after he found his friend Nick Perry badly beaten by some of the fishermen.

[34] The statements could only have any relevance if they could be brought home to the appellant, that is, if there was evidence, which, if accepted by the jury, showed that the appellant shared that common intention through his involvement with the group. Here, the statements were reported to have been made by two unidentified people using the term “we” to include others. There was no way of testing the makers of the statements through cross-examination to determine who was included in the “we” and how any such person was so included. Therefore, the question is whether, as a matter of law, a statement made by one person about the common intention of a group can be admissible against anyone in the group other than the maker of the statement.

(2) Are hearsay statements of common intention admissible for proving the intentions of a third party under the "present intentions" exception to the hearsay rule?

[35] The Supreme Court of Canada confirmed in *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, that, absent suspicious circumstances, the "present intentions" or state of mind exception to the hearsay rule can be used to admit statements that reveal the intention of the out of court declarant. Importantly for our purposes here, the court also analysed whether a hearsay statement of the intention of one person that is reported to another can be evidence of the intention of a third person.

[36] In *Starr*, the victim told his former girlfriend that he was going off with the accused to "do an Autopac scam", in which a car is deliberately wrecked for insurance purposes. The victim was later found dead. The statement was admitted both to show the victim's present intention or state of mind, and to show that he followed through with that statement of intention by actually meeting up with the accused. It was also admitted, according to the majority, as relevant to the accused's intentions on the night in question, as it was the Crown's theory that the accused suggested the idea of the Autopac scam in order to isolate the victim and kill him.

[37] The majority of the Supreme Court held that the hearsay exception that allows a party to tender a statement revealing a declarant's present intention or

state of mind could not be extended to be used as evidence of a third person's intentions. If the declarant's statement of intention demonstrated a common intention, an additional exception would be necessary in order to render that statement admissible against the third party, the most likely one being the co-conspirator exception. Otherwise, it was just double hearsay or possibly triple hearsay, depending on the basis for the declarant purporting to know another person's intentions: see *Starr*, at paras. 164-74. The court, at para. 174, summed up its conclusion on this point of law:

> In conclusion then, a statement of intention cannot be admitted to prove the intentions of someone other than the declarant, unless a hearsay exception can be established for each level of hearsay. One way to establish this would obviously be the co-conspirator exception: see *R. v. Carter*, [1982] 1 S.C.R. 938; Sopinka, Lederman and Bryant, *supra*, at pp. 303-7. This is no doubt what Doherty J. was referring to in *P. (R.), supra,* when he spoke of "cases where the act was a joint one involving the deceased and another person" (p. 344). Barring the applicability of this or some other exception to each level of hearsay involved, statements of joint intention are only admissible to prove the declarant's intentions.

The majority concluded, therefore, that, as a matter of law, the victim's statement of intention could not be used as evidence that the accused in that case shared that intention: see *Starr*, at para. 180.[2]

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[2] In *Starr*, there is a disagreement between the majority and McLachlin C.J. in dissent over the application of the present intentions exception to the hearsay rule to non-declarant third parties, not respecting their intentions but whether they carried out the common intention. The dispute concerns the use of the

[38] In Starr, the majority also concluded that the particular statement could not be used even as evidence of the victim's own intention, because it was made under suspicious circumstances. The victim arguably had a motive for lying to his ex-girlfriend about meeting up with the accused: see *Starr*, at paras. 177-79.

(3) Were the statements at issue here admissible under the present intentions exception?

[39] At trial, the Crown did not seek to admit this evidence against the appellant under the present intentions exception to the hearsay rule, nor could it have. The statements related to the common intention of a group of people and they were tendered to prove the intention of one member of the group, the appellant, who was not the declarant. The Crown would have to have relied on the co-conspirator exception but it did not try to do that, nor in my view would it have been appropriate to do so. This was not a trial for the assault of the two fishermen who were pushed into the water and there was no charge of conspiracy to commit that offence. It would have been very distracting to ask the jury to apply the three part test of the co-conspirator exception in order to find a conspiracy to commit the uncharged discreditable conduct, and to decide

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victim's statement of common intention, and the inference that the victim would have acted on that intention, as a way of demonstrating that the third party, i.e. the accused, participated with the victim in the intended behaviour. See *R. v. Maciel*, 2007 ONCA 196, 219 C.C.C. (3d) 516, at paras. 73-77 for a discussion of this point. In this case, however, the issue was not about whether the intended actions were carried out.

whether the appellant was a member of that conspiracy, in order to attribute to him the intention of the declarant regarding the “nip-tipping”.

(4) Are hearsay statements of common intention admissible for proving intentions of a third party under the principled exception to the hearsay rule?

[40] It was also in *Starr* that the Supreme Court explained that if a statement does not fit within one of the exceptions, it may still be admissible under the principled approach, and that the traditional exceptions and the principled approach are both based on necessity and reliability. In that case, however, the majority concluded that the statement of the victim was also inadmissible under the principled approach because it was not sufficiently reliable to be admissible.

[41] In reaching this conclusion, the majority held, at para. 209, that it was the same circumstances of suspicion that rendered the statement unreliable. The majority added, also at para. 209, that there were no “other circumstantial guarantees of trustworthiness that could render the statement reliable.” The majority in *Starr* did not elaborate on what would have made the statement sufficiently reliable.

[42] The Supreme Court decision in *Khelawon* does, however, provide some helpful guidance on this point with respect to the statements at issue here. In that case, the court held that corroborating evidence can be considered as a circumstantial guarantee of trustworthiness for the purpose of threshold reliability:

see *Khelawon*, at paras. 62, 67, 93-100. In doing so, Charron J., writing for the court, moved away from the position expressed in *Starr* that such evidence could only go to ultimate reliability.

(5) Were the statements at issue here admissible under the principled exception?

[43] As the evidence could not go in under the present intentions exception, it could only be admitted using the necessity and reliability criteria of the principled approach, based on the available evidence at the time the ruling was made, which was the transcript of the preliminary inquiry.

[44] With respect to necessity, because the identity of the declarant was not known, the declarant was not available to testify. There was no other means of getting evidence of similar value before the court. See *R. v. Hawkins*, [1986] 3 S.C.R. 1043, paras. 71-73.

[45] With respect to reliability, the trial judge found that the pushing incident corroborated and therefore rendered sufficiently reliable the statements as evidence of the common intention. He further found that the statements were reliable in terms of their applicability to the appellant specifically based on the anticipated corroborating evidence of the appellant's leadership in the incident and his direct involvement as one of the pushers. Therefore, I do not find that the trial judge erred in his application of the principled exception.

(6) Even if the statements are *prima facie* admissible under the principled exception, did their prejudicial nature outweigh their probative value?

[46] The appellant also submits that the evidence should nevertheless have been excluded because its probative value was minimal as compared with its prejudicial effect. Because he did not dispute that he was angry and upset at the people he thought had hurt his friend, that motive was established. The role of any alleged pre-existing racial animus could add little, if anything. On the other side, the evidence had the potential for both moral and reasoning prejudice; it would be a distraction to the jury and could lead to propensity reasoning on their part.

[47] I agree with the appellant that raising the spectre of racial animosity on the part of an accused is clearly a serious matter and will be prejudicial to the view the jury takes of such an accused. I also agree that on the evidence, the Crown may not have needed to show an extra motive to prove the driving offences beyond the appellant's rage after his friend Mr. Perry was beaten up. However, it was for the trial judge to weigh the probative value of the evidence against its prejudicial effect: see for example *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at paras. 50-53. The trial judge was satisfied on the record he had that it would leave the jury with a skewed understanding of the context for the appellant's driving if they did not hear the whole evidence of the prior incident including the hearsay statements. The trial judge concluded that a limiting

instruction against propensity reasoning would be sufficient to guard against this prejudice.

(7) Conclusion

[48] I am satisfied that the hearsay statements were properly admitted. I would therefore not give effect to this ground of appeal.

Issue 2: Were the instructions to the jury adequate as to how they could use the hearsay statements?

[49] Once the trial judge decided to admit the evidence, it was incumbent on him to make the jury understand that in order to use the hearsay statements, they had to be satisfied that they were sufficiently reliable to establish that the appellant shared the racist intention expressed in those statements. To do this, the jury had to accept the evidence tendered by the Crown to corroborate that the appellant shared this intention. The only evidence they could use to do that was the evidence of his prior and subsequent conduct.

[50] The issue for the jury, therefore, was whether they were satisfied from the evidence heard at trial that the appellant acted as a leader instigating the group to go to the bridge in order to push fishermen of Asian descent into the water, or that he was one of the people who pushed the fishermen in. Although the evidence that the appellant had actually pushed someone into the water was severely undermined on cross-examination, there was still evidence that

indicated that the appellant suggested the partying at the bridge, that he had private communications with a couple of the other partyers before they took off, and that his truck was in the lead on the way there and in taking off afterward.

[51] The jury members were given the judge's charge in writing as well as hearing it from the judge. The charge contained a full and fair review of the evidence on the issue of whether the appellant was involved in the pushing incident and, if so, to what extent. The evidence on this point went both ways, including the appellant's full denial of any knowledge or involvement.

[52] However, when the trial judge came to discuss the issue of the appellant's motive to commit aggravated assault while driving, the list of factors he set out included only the positive evidence that could amount to motive, including racial animus. This was not balanced. He should have listed here the evidence that the appellant was not involved in the pushing incident, that he was not the leader of the group, and that he denied any racial animus. However, given the trial judge's full review of the evidence earlier in the charge, I am satisfied that there was no error on this issue.

[53] Furthermore, the use that the jury could make of the statements was clarified in the subsequent section of the charge labelled "Limiting Instruction", quoted above. In that section, the trial judge told the jury that the only use they could make of the hearsay statements, if they found them credible and reliable,

was to decide whether there was "a common group intention in going to the docks that included Mr. Middleton." This statement made it clear to the jury that they could not use the statements as evidence against the appellant if they did not find them credible and reliable, and even if they did, they had to decide whether Mr. Middleton shared the racial animus expressed by the derogatory reference to Asian people. In my view, this instruction was sufficient to bring home to the jury the need to attribute to the appellant the intent expressed in the statements.

[54] To conclude, I am satisfied that the jury was adequately instructed on the use they could make of the hearsay statements against the appellant and not to use them as propensity evidence. To the extent that the statements were prejudicial because they suggested the appellant had racial animus against the victims, that consequence properly flows if the jury accepted that the appellant shared the common intention to push the Asian fishermen into the water: see *R. v. Merz* (1999), 46 O.R. (3d) 161, at para. 59.

[55] I would therefore not give effect to this ground of appeal.

Issue 3: Was Crown counsel's cross-examination of the appellant improper giving rise to an unfair trial?

[56] In his cross-examination of the appellant, Crown counsel asked a number of questions which invited the appellant to comment on whether Crown witnesses were lying. He also disparaged the appellant by telling him in questioning to "stop

all this nonsense", referring to the appellant's position that he believed his friend Nick Perry had been beaten to death. The appellant submits that this conduct by Crown counsel was improper, causing an unfair trial. The Crown on appeal acknowledges that this questioning should not have occurred, but submits that the impugned questioning was not so serious as to prejudice the appellant or cause unfairness.

[57] In *R. v. Rose* (2001), 53 O.R. (3d) 417 (C.A.), Crown counsel engaged in a list of improper trial tactics including: asking leading questions; improper cross-examination of his own witness; eliciting prior discreditable conduct from the accused as well as improper cross-examination of the accused by irrelevant questions about lifestyle; and finally improperly calling on the accused to comment on the credibility of Crown witnesses, especially police officers. The cumulative effect of these transgressions was to cause an unfair trial and a new trial was ordered.

[58] I agree with the Crown that in this case the cross-examination, standing alone, did not cause the trial to be unfair. Unlike in *Rose*, there was no objection by defence counsel. Although this is not fatal, it speaks to the perception of the fairness of the questioning at the time it was going on. Also unlike in *Rose*, the challenge to the appellant here was on his differences with other members of his group as opposed to police officers who have a position of authority in society. Calling police liars may be perceived by the jury differently than calling another

regular witness a liar. Finally, Crown counsel's transgression was limited to a few questions. It was not prolonged and was not part of a series of other improper tactics.

[59] I would not give effect to this ground of appeal.

Issue 4: Was the sentence manifestly unfit?

[60] The Crown seeks leave to appeal the sentence imposed by the trial judge of two years less a day in reformatory followed by three years probation, together with a ten-year driving prohibition.

[61] The Crown submits that the trial judge erred by failing to give the factors of general deterrence and denunciation sufficient weight, by failing to increase the sentence based on the aggravating factor of racial animus, by considering an improper mitigating factor, and by imposing a sentence that was so lenient as to be manifestly unfit.

[62] For the purpose of considering the sentence, it is necessary to describe what occurred after the two fishermen were pushed into the water. At that point, all of the appellant's group ran back to the three trucks, got in and drove away. The appellant then realized that his friend, Nick Perry, was not with them and turned around and went back to the docks. There he saw his friend lying injured on the road. He became angry and drove towards four of the fishermen who were getting into a Honda parked nearby.

[63] He rammed the Honda, forcing it to reverse off the Blue Bridge, then chased it down the road at high speed, ramming it about 20 times until the Honda lost control and crashed into a tree, ejecting the two back-seat passengers, Shayne Berwick and Charles Hogan. Mr. Hogan was thrown into Lake Simcoe and suffered a concussion, hypothermia, and a gash to his hand requiring stitches. Mr. Berwick was in a coma for several months, eventually emerging with irreparable brain damage and permanent disabilities. In the agreed facts his situation was described as follows: “He will require constant and daily medical attention for the rest of his life and the existence he and his family once knew is irretrievably lost as a result of Mr. Middleton’s conduct.”

[64] The appellant exacerbated his conduct by stopping his car briefly, ignoring the victims’ cries for help, and leaving without offering any assistance or calling the police or an ambulance.

[65] At trial, the Crown asked for a sentence of 8 to 10 years in the penitentiary, while the appellant submitted that two years less a day plus a four-year driving prohibition would be appropriate. The appellant also spent a lengthy period on bail under restrictive terms including no driving.

[66] The trial judge gave thoughtful and detailed reasons for his decision on sentence. He noted that the jury’s verdict meant that they must have rejected the appellant’s version of the events, in particular that he never made contact

intentionally with the Honda and that the Honda crashed into the tree because it lost control on its own.

[67] He recognized that in order to determine whether some of the aggravating factors asserted by the Crown should be applied, he had to make a number of findings of fact beyond a reasonable doubt where one could not discern from the jury's verdict the findings as to certain factual questions that were put to them. He found that the appellant led the group in the three trucks to the Blue Bridge, and that, although it was not proved that he was one of the people who pushed the fishermen into the water, his driving actions were motivated by both anger as well as racial animus against Asians and against the victims in particular.

[68] He also found that the appellant's moral culpability was "extremely high" based on his deliberate, prolonged, high-speed, high-risk driving and ramming of the Honda.

[69] In discussing the appropriate sentence, the trial judge acknowledged that, had the appellant been an adult with life experience, given all of the circumstances and aggravating factors, the sentence proposed by the Crown of 8 to 10 years would have been appropriate on the basis of the factors of general deterrence and denunciation of the appellant's conduct, including the animus of bias and prejudice. That bias could not then be attributed to "abysmal [youthful] ignorance".

[70] However, the trial judge believed that because the appellant was a youthful first offender with a solid background whose actions that night were completely out of character, a sentence of 8 to 10 years would be too harsh. He referred to the jurisprudence of this court on the issue of sentencing youthful first offenders, which has held that a "first penitentiary sentence for a youthful offender should rarely be determined solely by the objectives of denunciation and general deterrence": *R. v. Q.B.* (2003), 63 O.R. (3d) 417, at para. 36. The trial judge mentioned the appellant's work history as a motor-cross racer from the age of 15 as well as a number of letters of support from employers and others. He was also impressed by the appellant's role as care-giver to his brother who, since the date of the offences, had suffered brain-damage with life-long injuries.

[71] Recognizing the seriousness of the offences and their consequences, the trial judge explicitly imposed the maximum reformatory sentence of two years less a day, plus the maximum probation of three years, plus the maximum driving prohibition of 10 years. He referred to the combined term as essentially a five-year sentence of supervision. During the first 18 months of probation, the appellant is obliged to perform 240 hours of community service assisting seniors and the handicapped as well as attending courses on the ethnic mosaic of our country. For the first year of his probation he would be under a curfew in his residence from 9 p.m. to 6 a.m. unless accompanied by two designated people.

[72] Contrary to the submission of the Crown, the trial judge was acutely alive to the gravity of the offence and the need to determine and impose a sentence that adequately addressed the need to deter and to denounce the appellant's conduct, but at the same time recognize his youth, his unblemished past, and his potential for the future. Again contrary to the submission of the Crown, it is clear that the sentence imposed by the trial judge was intended to reflect the aggravating factor of racial prejudice that he found had animated the appellant's actions. The trial judge spent a good portion of his reasons discussing this issue and making his factual finding based on the evidence.

[73] The Crown also suggests that the trial judge made an error of law when he stated that the higher sentence would have been appropriate if the appellant had been convicted of attempted murder, implying that an absence of intent to kill was treated as a mitigating factor. I do not read the judge's reasons in that way, nor do I see any error. This statement formed part of his analysis as to the circumstances that would have justified the higher sentence, including an older, more worldly offender who had the intent to kill, factors not present in this case.

[74] This case represents an example of a situation where the sentence chosen by the trial judge within the appropriate range is to be accorded the deference of this court. As the Supreme Court recently stated in *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 43:

> No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case.

[75] In *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, Doherty J.A. explained the three reasons why appellate deference to a trial judge's sentencing decision makes sense: 1) because judges have varying views on the appropriateness of any particular sentence, it is not often an effective use of judicial resources for an appellate court to substitute its view for that of the trial judge; 2) the trial judge who heard the evidence and saw the accused and victims is in the best position to balance the factors and competing interests; and 3) the trial judge reflects the views and needs of the community in which the offence occurred and the affected people often reside.

[76] While the sentence imposed here can certainly be viewed as one at the lower end of the scale, the trial judge was clearly attempting to impose the maximum he could without sending the appellant, as a youthful first offender, to the penitentiary. This did not constitute an error of law. It reflects the very serious conduct and consequences for the victims, while giving effect to the principles of individual deterrence, denunciation and prospects for rehabilitation. The sentence is not manifestly unfit.

[77] The trial judge's reasons were thorough and nuanced in their analysis of the delicate array of issues that impacted on the determination of the appropriate sentence in this case. I would defer to his decision.

[78] I would grant leave to appeal sentence but dismiss the appeal.

"K. Feldman J.A."
"I agree Doherty J.A."
"I agree H.S. LaForme J.A."

Released: "D.D." August 2, 2012