

Proving Parties to an Offence Beyond a Reasonable Doubt: A Clear Application of Sections 21(1) and 21(2) of the *Criminal Code*

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Case Commented On: *R v Hardy*, [2017 ABQB 588 \(CanLII\)](#)

The Alberta Court of Queen’s Bench released a decision on 2 October 2017 which directly applied the law on parties to an offence to the evidence heard at trial. In *R v Hardy*, Tamra Hardy and her brother Cody Hardy were co-charged with manslaughter contrary to s 236(b) of the *Criminal Code*, [RSC 1985, c C-46](#), break and enter with intent to commit an indictable offence contrary to s 348(1)(a) of the *Criminal Code* and robbery contrary to 344(1)(b) of the *Criminal Code*. Cody Hardy pled guilty to manslaughter prior to Tamra Hardy’s trial. Furthermore, while Tamra pled not guilty to the charge of break and enter with intent to commit theft, at the end of her trial she “invited a conviction on” s 348(1) (a) of the *Criminal Code* (at para 113) and a conviction was entered on that count She did dispute her criminal liability for the robbery and manslaughter, however, which turned on whether she was a party to these offences.

At the trial, Justice Feehan heard the testimony of five individuals: Tamra Hardy, Michelle Patenaude and her partner Adam Sheppard, and two RCMP officers. Tamra Hardy and Michelle Patenaude were the critical witnesses in the case and while their evidence contradicted each other, Justice Feehan held portions of each of their testimonies to be reliable and credible. After hearing all of the evidence, Justice Feehan held that the following events occurred on April 24th 2015.

Facts as Found

Siblings Tamra Hardy and Cody Hardy approached the home of Adam Sheppard and Michelle Patenaude hoping to get a ride into town to purchase beer. At that time, Adam Sheppard’s brother, Michael Sheppard, was at the residence, drinking beer with Michelle Patenaude waiting for his brother Adam to come home from work. Tamra and Cody Hardy were heavily intoxicated when they approached the residence. Michelle Patenaude answered the door and Tamra Hardy asked to use her phone. In plain view of Tamra and Cody Hardy were three cases of beer, recently purchased by Michael Sheppard. Tamra asked Michelle for a beer after unsuccessfully attempting to use Michelle’s phone.

Tamra and Cody Hardy were standing outside the residence with the screen door open when Tamra nudged her brother and said “Cody” (emphasis added). Cody entered the house to grab the beer and then Michael and Cody went at each other and started wrestling. Tamra followed her brother into the house telling Michelle Patenaude that they were “just there for the keys and the beer” (at para 129). Before fleeing the residence, Tamra saw Michael’s body on the ground.

Tamra and Cody fled the residence both carrying the beer with them. Michael Sheppard had suffered a fatal stab to the head.

Justice Feehan concluded that “Cody Hardy was the principal offender” (at para 83) leaving the case to turn on whether the Crown could prove that Tamra Hardy was a party to the offences under section 21(1) and 21(2) of the *Criminal Code* and therefore equally culpable for the death and robbery of Michael Sheppard.

Parties to an Offence

In order for the Crown to prove that Tamra was a party to manslaughter and/or robbery they had to establish as per s 21 of the *Criminal Code* that she:

- (a) actually committed the offence; or
- (b) did or omitted to do anything for the purpose of aiding Cody Hardy to commit an offence; or
- (c) abetted Cody Hardy in committing the offence.

In order for the Crown to prove that Tamra Hardy was a party to manslaughter and/or robbery pursuant to s 21(2), Justice Feehan relied on the test outlined in *R v Cadeddu*, [2013 ONCA 729 \(CanLII\)](#), which held that three elements had to be established (at para 53, relying on *R. v. Simon*, [2010 ONCA 754 \(CanLII\)](#)):

- (1) there was an agreement (that Tamra and Cody agreed to commit break and enter with intent to commit robbery and/or manslaughter);
- (2) there was an offence (the death and/or robbery of Michael occurred as an incidental crime to the offence of break and enter with intent to commit theft);
- (3) there was knowledge (that Tamra could reasonably foresee that manslaughter and/or robbery could have occurred as a result of the break and enter with intent to commit theft).

Analysis

The case turned on two pivotal questions: (1) what could be inferred from Tamra’s nudge of her brother and utterance of his name? (2) Could Tamra Hardy, in all the circumstances, appreciate that bodily harm was a foreseeable consequence of the break and enter? Justice Feehan decided as follows with respect to these questions.

(1) Before entering the Sheppard residence, Tamra Hardy nudged her brother Cody while saying his name. The Crown sought “an inference that the purpose of the nudge and speaking of his name was to get him to enter the premise to commit an unlawful act” (at para 110). Defence said that Tamra’s actions were an attempt to get Cody to leave the residence. Justice Feehan held this was an “equivocal act” and could not be used as evidence to establish that Tamra attempted to encourage or facilitate her brother Cody Hardy in committing a further offence of manslaughter or robbery (at para 110). As a result, the Crown failed to prove beyond a reasonable doubt that Tamra did “something more” than merely be present at the scene of the crime. Her actions did

“not support an inference that [she] aided or abetted Cody in committing robbery, for the same reasons that it does not go so far as to support that same inference with respect to manslaughter” (at para 136). Tamra Hardy did not intend to “assist, facilitate, encourage, or make it easier for Cody” to commission an offence and therefore could not be held culpable as a party to the offence of manslaughter or robbery by virtue of s 21(1) of the *Criminal Code* (at para 133).

(2) In order to convict Tamra Hardy as a party to the offence under s 21(2) of the *Criminal Code*, the Crown needed to prove that Tamra knew or ought to have known that violence would result from the common intention to enter the Sheppard residence and steal Michael Sheppard’s beer. The analysis of s 21(2) for determining whether Tamra was a party to the offence of robbery or a party to the offence of manslaughter, through common intention, was the same, due to the fact that the “violence necessary in the proof of robbery is the manslaughter” (at para 138). The analysis turned on the question of whether Tamra could have reasonably foreseen that violence would ensue. Justice Feehan held that there was no evidence that Tamra knew her brother had a weapon or that stealing the beer would result in a violent altercation between Cody and Michael. He further concluded that the “violence erupted, apparently suddenly, [and] there is no evidence that Tamra anticipated this” (at para 129). Because of the lack of sufficient evidence before the Court, the Crown failed to prove “beyond a reasonable doubt that Tamra reasonably ought to have appreciated in all the circumstances that bodily harm was a probable consequence of carrying out the unlawful purpose” (at para 126). As a result it was not established that Tamra Hardy was a party to the offence of manslaughter or robbery by virtue of s 21(2) of the *Criminal Code*. However, Tamra was convicted of break and enter with intent to commit theft pursuant to s 348(1)(a) of the *Criminal Code*.

Conclusion

Tamra Hardy was acquitted of robbery and manslaughter as all that could be concluded is that her actions were “consistent with intent to commit break and enter with intention to commit theft but no more than that” (at para 122, emphasis added). Justice Feehan’s decision reflects a clear application of the law on parties to the facts of the case, while reminding us of the strict requirements of beyond a reasonable doubt.

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