Citation: R v Van Wissen, 2018 MBCA 110 Date: 20181024
Docket: AR16-30-08579

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel
Madam Justice Janice L. leMaistre

B E T W E E N:

HER MAJESTY THE QUEEN	)	***M. D. Glazer***
	)	*for the Appellant*
	)	
Respondent	)	***J. M. Mann***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
SCHUYLER FRANCIS VAN WISSEN	)	***March 14, 2018***
	)	
	)	*Judgment delivered:*
(Accused) Appellant	)	***October 24, 2018***

LEMAISTRE JA

Introduction

[1] The accused appeals his conviction by a jury for first degree murder contrary to section 231(5)(b) of the *Criminal Code* (the *Code*).

[2] The deceased was a single mother who lived alone with her daughter. She was brutally murdered in her home. The accused was convicted of first degree murder for sexually assaulting and stabbing her to death. The case against the accused was circumstantial. The accused's DNA was found in several places on the body of the deceased and bindings used to tie her wrists behind her back, leading to his arrest.

[3] The accused initially alleged 24 grounds of appeal in his notice of appeal. Counsel for the accused argued 19 grounds in his factum and at the appeal hearing. Some of the grounds overlap. Others lacked sufficient merit after reviewing the record, the written submissions of the parties and hearing from counsel for the accused to make it necessary to call on the Crown in response. In my view, the issues on this appeal are:

- whether the DNA evidence was properly admitted;
- whether the trial judge erred when instructing the jury;
- whether the verdict was unreasonable; and
- whether the trial judge's behaviour rendered the trial unfair.

[4] The accused seeks to have the verdict quashed and an acquittal entered, a new trial or in the alternative, a conviction for second degree murder rather than first degree murder.

[5] For the reasons that follow, I would dismiss the appeal.

Background

[6] When the deceased failed to show up for work on May 14, 2011, her father went to her home and, tragically, found her dead in her living room. The police investigation determined that the day prior to her death, a Friday, the deceased worked her regular job during the day. She also worked that night at a social. She left the social alone at 1:13 a.m. Saturday morning. Her house alarm was armed at 1:27 a.m. and then disarmed at 6:03 a.m. Her bank and Visa cards were used three times between 7:00 and 7:01 a.m. Only one

of the attempts to withdraw $300 was successful suggesting someone other than the deceased used the cards. Her father received a telephone call from her employer on Saturday at 11:15 a.m. when she failed to show up for work. Shortly thereafter, upon driving to her home and entering her locked residence, he found her body.

[7] The deceased was found lying on her back on the floor. She had a child's pajama top bound tightly around her neck and a plastic shopping bag in her mouth. A second plastic bag was draped over her face. Her wrists were bound behind her back with female panties (the wrist bindings). She was wearing a long-sleeved shirt, but was naked from the waist down, except for socks, and had a knife sticking out of her chest.

[8] An autopsy determined that the deceased had semen in her vagina, anus and gluteal cleft (the area between the buttocks). Male DNA was identified on swabs taken from the deceased's vagina and gluteal cleft. She also had contusions on her head, buttocks, thighs and neck. Finally, she had five stab wounds, three of which were fatal.

[9] In addition to the DNA on the deceased's body, the wrist bindings had DNA in three locations: 1) the shorter end of the knot on the left side; 2) the longer end of the knot on the left side; and 3) the loose end in between the two knots.

[10] Having no suspects for the murder and anticipating that the DNA might identify the killer, the police canvassed men who knew or lived near the deceased for information and DNA samples. The police received information that the accused's father lived near the deceased's home and that he had lived with him "off and on". The police spoke with the accused and

requested a sample of his DNA, which he provided. The accused's DNA matched the DNA found on the body of the deceased that was tested, as well as the wrist bindings.

[11] A DNA expert testified at the trial that the accused's DNA profile matched the DNA found on the swabs taken from the interior of the deceased's vagina and her gluteal cleft and from the three locations on the wrist bindings. He also testified that "the estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile" was as follows:

- interior vaginal swab and gluteal cleft swab—1 in 510 billion;
- wrist bindings, shorter end of the knot on the left side—1 in 47 billion;
- wrist bindings, longer end of the knot on the left side—1 in 450 million; and
- wrist bindings, loose ends between the knots—1 in 1.6 billion.

Admissibility of the DNA Evidence

[12] At the trial, the accused contested the admissibility of the DNA evidence. He asserted that the police breached his sections 8, 9 and 10(*b*) *Charter* rights and that the DNA evidence ought to have been excluded pursuant to section 24(2). A *voir dire* was held to determine whether the DNA evidence was admissible.

The Voir Dire

[13] Two police officers testified on the *voir dire*. They had no suspects for the murder and were conducting a broad canvas of males associated with or living near the deceased. They decided to interview the accused whose father lived near the deceased. They approached the accused who was at a park with his girlfriend at the time, Meagan Taylor (Taylor), and her young child. They asked the accused if he would go with them to the police station to be interviewed about the death of the deceased. He agreed and went with the officers in their police car to the Public Safety Building (PSB). He was briefly left alone in an interview room which locked automatically from the outside. When the officers returned, they spoke with the accused for approximately 46 minutes. They asked him a range of questions including whether he would provide a DNA sample. He did not appear to be intoxicated.

[14] The accused agreed to provide a DNA sample. Before doing so, the officers reviewed and completed the Winnipeg Police Service Consent to DNA Forensic Analysis (Adult) Form (the DNA consent form) with the accused by reading the form to him and writing in his responses. While reviewing the DNA consent form with the accused, he expressly declined to contact counsel. The officers subsequently obtained a DNA sample which ultimately led to the accused's arrest.

[15] The accused testified that the officers intimidated him and told him he had to accompany them to the police station. They led him to the police car with one officer on each side and to the interview room at the PSB with one officer in front and one behind him. He felt that he could not leave the interview room. He said that the DNA consent form was not provided to him

until after the police took the DNA sample and that he did not believe the officers ever read the DNA consent form to him. He testified that he was intoxicated by drugs and alcohol throughout his dealings with the officers and that, based on what the officers said to him, he did not understand that the DNA sample may be used in the murder investigation involving the deceased.

[16] Taylor testified on the *voir dire* that the accused was not intoxicated, there was no physical contact between the police and the accused and, while she believed there was one officer on each side of the accused as they walked to the police car, he did not appear to be under arrest.

[17] Based on the evidence, the trial judge made the following findings:

- The accused's testimony was inconsistent with the other evidence and was not credible.
- The accused was not physically or psychologically detained and therefore there was no section 9 *Charter* breach.
- Even though the accused was not detained, he was provided with his section 10(*b*) right to counsel and therefore there was no section 10(*b*) *Charter* breach.
- The accused provided his voluntary, informed consent to give a sample of his DNA and therefore there was no section 8 *Charter* breach.
- Even if there were breaches of the accused's *Charter* rights, the admission of the DNA evidence would not bring the administration of justice into disrepute pursuant to section 24(2).

Positions of the Parties

[18] The accused asserts that the trial judge erred in his findings of fact and credibility, in applying the law to the facts as found and in determining that the *Charter* breaches, as alleged by the accused, were trivial and would not have warranted exclusion of the DNA evidence under section 24(2). He says that the trial judge wrongly concluded that the accused's sections 8, 9 and 10(*b*) *Charter* rights were not infringed. He argues that the standard of review is correctness.

[19] The Crown points out that the trial judge's determinations regarding the facts and the admissibility of evidence under section 24(2) of the *Charter* are subject to deference. It submits that the trial judge made no palpable and overriding errors regarding his credibility and factual findings and applied the correct legal principles when he found that there were no sections 8 or 9 *Charter* breaches and conducted the section 24(2) analysis.

Standard of Review

[20] The standard of review applicable when considering a trial judge's determination of *Charter* issues in an appeal by an accused was considered by this Court in *R v Farrah (D)*, 2011 MBCA 49. Justice Chartier (as he then was) explained (at para 7):

> a) When examining a judge's decision on whether a *Charter* breach occurred, the appellate court will review the decision to ensure that the correct legal principles were stated and that there was no misdirection in their application. This raises questions of law and the standard of review is correctness.
>
> b) The appellate court will then review the evidentiary foundation which forms the basis for the judge's decision to see whether

there was an error. On this part of the review, the judge's decision is entitled to more deference and, absent palpable and overriding error, the facts as found by the judge should not be disturbed (see *Grant* [*R v Grant*, 2009 SCC 32] at para. 129).

c) The appellate court will also examine the application of the legal principles to the facts of the case to see if the facts, as found by the judge, satisfy the correct legal test. In the criminal law context, this is a question of law and the standard of review is correctness (see *R. v. Shepherd*, 2009 SCC 35 at para. 20, [2009] 2 S.C.R. 527).

d) The decision on whether to exclude under s. 24(2) of the *Charter* is an admissibility of evidence issue which is a question of law. However, because this determination requires the judge to exercise some discretion, "considerable deference" is owed to the judge's s. 24(2) assessment when the appropriate factors have been considered (see *Grant* at para. 86, and *R. v. Beaulieu*, 2010 SCC 7 at para. 5, [2010] 1 S.C.R. 248).

Analysis

Section 9 of the *Charter*—Arbitrary Detention

[21] The accused argues that when the trial judge determined that there was no psychological detention in this case, he applied an objective test when he should have applied a subjective test.

[22] In finding that the accused had not been psychologically detained, the trial judge stated, "In the circumstances presented here, I am not satisfied that any reasonable person in the accused's position would have felt obligated to go with the police" (2016 MBQB 174 at para 70).

[23] The law regarding detention under section 9 of the *Charter* is well settled. In *R v Grant*, 2009 SCC 32, McLachlin CJC articulated the oft-cited

definition of a detention (at para 44):

> In summary, we conclude as follows:
>
> 1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> 2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:
>
>   (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
>   (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
>   (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.
>
> [emphasis added]

[24] The Court makes it clear that the inquiry is an objective one in which "the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance

between the individual and the police" (*Grant* at para 32). Therefore, in my view, the trial judge correctly articulated the legal principles regarding the test for psychological detention and did not misdirect himself in their application.

Did the Trial Judge Err in his Factual and Credibility Findings?

[25] The accused asserts that the trial judge made errors in his findings of fact and credibility when considering whether the accused's *Charter* rights were breached. Specifically, the accused argues that the trial judge erred:

- when he concluded that the accused made an informed choice to accompany the police to the PSB and the accused was not unsophisticated;
- by accepting the testimony of the officers in light of their failure to take detailed notes;
- by rejecting the testimony of Taylor without providing reasons; and
- by finding that none of the interviews conducted as part of their canvas for suspects were videotaped when in fact 3 out of 38 were videotaped.

[26] The Crown argues that the trial judge gave reasons for his findings of fact and credibility and made no palpable and overriding error when doing so. I agree.

[27] The trial judge gave reasons for rejecting much of the testimony of the accused and concluding the accused made an informed choice. The trial judge commented on the accused's contradictory claims that he was

intoxicated when he met with the police, but had a clear recollection of the conversations he had with the police.

[28] The trial judge's observations of the accused when testifying led him to conclude that the accused was "a well spoken intelligent man" (at para 70). This conclusion is consistent with his finding that the accused was not unsophisticated.

[29] The trial judge also commented on the accused's testimony that he was told the DNA sample was being sought in relation to an unrelated investigation; that he signed the DNA consent form after he provided a DNA sample; and that when the police reviewed the DNA consent form, the word murder was never used. The trial judge found this testimony to be "incredible" (at para 66) as it contradicts the DNA consent form. This finding is consistent with the evidence contained in the DNA consent form. The DNA consent form states that the DNA sample was sought in relation to the offence of murder occurring on May 14, 2011 at the residence of the deceased. The DNA consent form is also clear that it is intended to be completed prior to the taking of the DNA sample.

[30] The trial judge accepted the evidence of the police officers. Their testimony, along with the testimony of the accused and Taylor that the police officers did not physically touch him or yell at him, led the trial judge to conclude that the accused made an informed choice to accompany the police to the PSB. These conclusions were, in my view, reasonably supported by the evidence.

[31] Regarding the accused's assertion that the lack of detail in the police officers' notes warranted an adverse credibility finding, the trial judge

concluded that the notes were detailed and that the accused was treated "in a manner consistent with their dealings with all of the other individuals that were part of their canvas, which was conducted primarily for elimination purposes" (at para 62). In light of the circumstances, the trial judge did not find it surprising that the notes were not more detailed than they were.

[32] Contrary to the accused's assertion, the trial judge's reasons demonstrate that he clearly explained why he rejected parts of Taylor's evidence. The trial judge stated (at para 65):

> As to the accused's contention that the police waited for him at the park when he spoke to [Taylor] and then walked him to and then placed him in the police car, [counsel for the accused] argues that this is corroborated by [Taylor]. In fact, [Taylor] could only say that she "believed" that there was one officer on each side of the accused when he approached the police car. The detectives, whose evidence I accept, denied that this occurred.

[33] Moreover, the trial judge did accept Taylor's evidence that the accused was sober.

[34] In his reasons, the trial judge stated that he was not surprised that none of the interviews conducted as part of the police canvas were videotaped. The accused points out that the evidence establishes that three of the interviews were videotaped and asserts that the trial judge erred in finding otherwise.

[35] I am not convinced that this minor misstatement by the trial judge impacted on his findings of fact or credibility. The evidence demonstrates that two of the interviews that were videotaped were conducted after the accused's interview. The third interview that was videotaped was the

interview of the deceased's father conducted on the day of the murder and for purposes other than the collection of a DNA sample.

[36] In my view, the findings of fact and credibility made by the trial judge were reasonable and supported by the evidence, and were not the result of palpable and overriding error.

Did the Trial Judge Err in Applying the Legal Principles to the Facts?

[37] The accused argues that he was placed in the back seat of a locked police car when he was taken to the PSB and then he was left alone in a locked interview room. He says this is evidence of a physical detention contrary to section 9 of the *Charter*.

[38] The Crown argues that the facts do not support a finding that the accused was physically detained.

[39] In *R v CRH*, 2003 MBCA 38, Steel JA held, "The use of the word 'detention' necessarily connotes some form of compulsory restraint. It involves the act of holding or keeping someone against his will for a period of indeterminate length" (at para 18).

[40] In this case, the trial judge found that the accused willingly attended the PSB. I am not persuaded that he erred in applying the legal principles to the facts when he made this finding. Even though the police car was locked, there was evidence that the accused was neither a suspect nor obligated to attend. Additionally, there was no evidence that the accused, at any time, indicated to the police that he wished to leave even though he was in a locked

interview room.

[41] These circumstances do not, in my view, constitute a physical detention.

[42] The accused further asserts that the trial judge erred when he found that the accused was not psychologically detained based on the nature of the contact with the police which involved pointed questions and was accusatory and confrontational. The Crown points out that a finding of psychological detention involves a demanding standard and argues that the standard is not met on the facts of this case.

[43] The police are permitted to ask questions during an investigation even if it turns out that they are making inquiries with someone involved in a crime and at risk of self-incrimination (see *Grant* at para 38). In *R v Suberu*, 2009 SCC 33, McLachlin CJC and Charron J held, "not every interaction between the police and members of the public, even for investigative purposes, constitutes a detention within the meaning of the *Charter*" (at para 3).

[44] In *R v Peterson (DC)*, 2013 MBCA 104, Beard JA explained that there are two requirements for an interaction to constitute a psychological detention (at para 38):

> - the first requirement is that there must be a restrictive request or demand by the police to the member of the public; and
>
> - the second requirement, where there is no legal obligation to comply with that request or demand, focusses on the state conduct in the context of the surrounding legal and factual situation and how that conduct would be perceived by a reasonable person in the situation as it developed.

[45] In *Peterson*, the police viewed the accused as a person of interest, but not a suspect. During their interview with him, the accused spontaneously confessed to the murder they were investigating. Justice Beard found that the accused was not detained at any time prior to his incriminating statement and stated, "The fact that the police ask pointed questions about the crime does not necessarily turn a person of interest into a suspect" (at para 52).

[46] In this case, the trial judge rejected the accused's assertion that he felt obligated to accompany the police to the PSB. He found there was no dispute that "the police did not have physical contact with the accused, were polite to him, did not raise their voices to him or threaten him subtly or otherwise" (at para 69). He also concluded that the police questioning of the accused was not coercive; the accused was sober throughout his dealings with the police officers; and he was well spoken and intelligent.

[47] The evidence established the following facts. The police officers were in the midst of a broad canvas of males associated with or living near the deceased. The accused was not a suspect, rather he was 1 of 38 individuals whom the police sought to interview and obtain a DNA sample from. Although the accused was left alone in a locked interview room, he was told he could knock if he needed anything. During the ensuing police interview, the questions were initially generic and then became more pointed and specific.

[48] In light of the trial judge's conclusion that the accused was willing to attend the PSB, the interaction between the accused and the police officers was polite and friendly and there was no restrictive request or demand during the course of the interview, in my view, an overall view of the situation does

not demonstrate that a reasonable person would have concluded that he or she was being deprived of his or her liberty by the state (see *R v DEM*, 2001 MBCA 110 at para 19).

[49] Moreover, while the questioning became more pointed and culminated with a direct inquiry as to whether the accused was responsible for the murder and whether he would consent to providing samples of his DNA, focussed suspicion, in and of itself, does not turn the encounter into a detention. What is important is the nature of the police interaction with the accused based on the suspicion (see *Grant* at para 41).

[50] In my view, there is nothing unique about the accused's personal characteristics that would lead a reasonable person to conclude that, in the circumstances, he had no choice about whether to comply with the police officers.

[51] The trial judge's conclusions that there was no restrictive request or demand made by the police requiring the accused to accompany them and that a reasonable person in the accused's circumstances would not conclude that he had been deprived of the liberty of choice were, in my view, correct based on the facts as found.

Section 10(*b*) of the *Charter*—Right to Counsel

[52] The accused does not suggest that the trial judge erred in his statement of the correct legal principles as to whether the accused's section 10(*b*) *Charter* rights were breached. I have already addressed his arguments regarding the evidentiary foundation which forms the basis for the trial judge's decisions on the *voir dire* and determined that the trial judge's

findings of fact and credibility were not the result of palpable and overriding error.

Did the Trial Judge Err in Applying the Legal Principles to the Facts?

[53] The accused argues that the trial judge erred when he found that the accused was not entitled to rights pursuant to section 10(*b*) of the *Charter* and that the right to counsel was not given promptly or properly.

[54] Section 10(*b*) imposes a duty on a police officer when detaining or arresting an accused to inform him or her that he or she has the right to counsel. Where there is no detention, the accused is not entitled to section 10(*b*) rights (see *Suberu* at para 2; see also *R v Vandenbosch (KA)*, 2007 MBCA 113 at para 24).

[55] In this case, the trial judge found that the accused was not detained and therefore the right to counsel was not triggered. He also found that the accused was informed of the right to counsel a short time after arriving at the PSB.

[56] Due to my conclusion that the trial judge was correct when he found that the accused was not detained, I need not consider this argument—the accused was not entitled to section 10(*b*) *Charter* rights.

Section 8 of the *Charter*—Unreasonable Search or Seizure

[57] The accused argues that the trial judge erred by finding that the accused waived his section 8 *Charter* rights because he was tricked and misled by the police.

[58] The Crown submits that the accused gave his express, voluntary and informed consent to the taking of his blood sample by the police. In doing so, he waived his reasonable expectation of privacy and therefore section 8 of the *Charter* was not engaged.

[59] Section 8 of the *Charter* protects against unreasonable search or seizure. The act of taking a DNA sample from the accused without a warrant in this case would be an unauthorized search or seizure absent the accused's consent. The accused's consent to provide a DNA sample, if valid, constitutes a waiver of his section 8 rights.

[60] In order to be valid, a waiver of section 8 rights must be both informed and voluntary. In *R v Wills* (1992), 70 CCC (3d) 529 (Ont CA), Doherty JA set out a number of factors to consider when determining whether a waiver is valid (at p 546):

> In my opinion, the application of the waiver doctrine to situations where it is said that a person has consented to what would otherwise be an unauthorized search or seizure requires that the Crown establish on the balance of probabilities that:
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> (i) there was a consent, express or implied;
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> (ii) the giver of the consent had the authority to give the consent in question;
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> (iii) the consent was voluntary in the sense that that word is used in *Goldman*, supra [*Goldman v R*, [1980] 1 SCR 976], and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;
>
> (iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

> (v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested, and
>
> (vi) the giver of the consent was aware of the potential consequences of giving the consent.

[61] In *R v Borden*, [1994] 3 SCR 145, Iacobucci J explained that an effective waiver requires an informational foundation which makes the right to choose meaningful (see p 162). This means that there is "a link between the scope of a valid consent and the scope of the accused's knowledge in relation to the consequences of that consent" (at p 163). The extent of the accused's awareness of the consequences of the section 8 waiver is dependent on the particular facts of the case (see *Borden* at pp 164-65; see also *R v Arp*, [1998] 3 SCR 339 at para 87).

[62] The accused relies on four factors which he says establish he was tricked and misled by the police and therefore could not provide informed consent to provide a DNA sample:

1. When the police asked if the accused was willing to provide a DNA sample for elimination purposes, they failed to explain what that meant.

2. During their interview of the accused, the police officers brought up an unrelated incident in which the accused was stabbed.

3. The accused refused a ride home from the police officers.

4. One of the police officers read the DNA consent form to the accused; he did not read it for himself.

[63] These facts were uncontested.

[64] The accused challenges the trial judge's application of the legal principles to the facts. He does not suggest that the trial judge made any error regarding the applicable legal principles and I am satisfied the trial judge correctly outlined the relevant factors to consider when examining whether or not the accused's waiver was valid and did not misdirect himself in their application.

[65] The trial judge considered the evidence and determined:

- the accused willingly went with the police officers to the PSB;
- the police officers did not use threats, violence or coercion during their dealings with the accused;
- the police officers told the accused they were investigating the murder of the deceased and they intended to use his DNA to compare it to the DNA found on and around the deceased or in her house;
- the DNA consent form made it clear that the accused did not have to provide a DNA sample;
- one of the police officers read the DNA consent form to the accused;
- the accused indicated he understood the process; and
- the accused agreed to voluntarily provide a blood sample.

[66] As already stated, the trial judge's factual findings were reasonable

and supported by the evidence.

Did the Trial Judge Err in Applying the Legal Principles to the Facts?

[67] Based on his factual conclusions, the trial judge found that the accused's freedom to choose whether to provide a DNA sample had not been negated (see para 77). He further stated, "At the very least, the accused had the required general understanding of his jeopardy and an appreciation of the consequences of deciding for or against exercising his s. 8 *Charter* rights" (at para 78).

[68] In my view, the evidence supports the conclusion that the accused possessed the requisite informational foundation to relinquish his right to be free from an unreasonable seizure under section 8 of the *Charter*. He was told the DNA being collected would be compared against other DNA found at the crime scene. He was also told the DNA was being collected regarding the murder of the deceased and could be used as evidence in court. The date and location of the murder was on the DNA consent form. The accused was found to be intelligent and sober.

[69] One of the police officers explained that he raised the unrelated stabbing incident because it was part of the accused's history. The stabbing incident occurred shortly after the murder and the accused was carrying a knife. The officer denied he tried to trick the accused into giving a DNA sample by making him believe that it was for the stabbing incident.

[70] In light of the circumstances, I am not persuaded that the accused was incapable of understanding the information provided in order to

appreciate the gravity of providing a DNA sample or that he could have been confused by any mention of an unrelated stabbing incident.

[71] In my view, the trial judge correctly found that the accused's section 8 *Charter* rights were not violated as the accused provided his informed and voluntary consent to provide a sample of his DNA thereby waiving his section 8 rights.

Section 24(2) of the *Charter*—Admissibility of the DNA Evidence

[72] Even though the trial judge found that there were no *Charter* breaches, he considered whether any of the breaches alleged by the accused would require exclusion of the DNA evidence pursuant to an analysis under section 24(2) of the *Charter*. Ultimately, he was not persuaded that the admission of the evidence would bring the administration of justice into disrepute (see para 92).

[73] There is no suggestion that the trial judge failed to consider the appropriate factors in his decision about whether to exclude the DNA evidence under section 24(2). The accused submits that the trial judge wrongly found that any breaches of the accused's *Charter* rights were trivial. He says this is particularly so because the taking of the blood sample was highly intrusive.

[74] The Crown submits that even if there had been a breach of section 9 and 10(*b*) of the *Charter*, any alleged breach "was not sufficiently connected to the taking of the blood sample in light of the [accused's] express, voluntary and informed consent."

Did the Trial Judge Err in Finding that the Breaches Alleged Would not Warrant Exclusion of the DNA Evidence?

[75] Because the trial judge articulated the correct legal test and assessed the relevant factors, his decision must be given considerable deference.

[76] In *Grant* at para 71, McLachlin CJC revised the test for exclusion of evidence under section 24(2) of the *Charter* and established three lines of inquiry:

1. the seriousness of the *Charter*-infringing state conduct;

2. the impact on the *Charter*-protected interests of the accused; and

3. society's interest in an adjudication on the merits.

[77] In this case, the trial judge found that the police officers believed subjectively that they were legally entitled to canvas for suspects, they acted in good faith, they treated the accused with respect and they advised him of his right to counsel. On the facts, the trial judge found that there was "no breach or combination of breaches that were so egregious that the court would need to distance itself from the type of conduct complained of" (at para 88).

[78] Regarding the impact on the *Charter*-protected interests of the accused, the trial judge considered the nature of the intrusion when the blood was taken—"a simple 'pin prick'" (at para 89). He concluded that while the intrusion was not minimal, nor was it "profoundly intrusive or demeaning" (*ibid*).

[79] Finally, the trial judge held and the accused conceded that the DNA

evidence was "highly reliable and important evidence" (at para 90).

[80] In my view, the trial judge's conclusions were amply supported by the evidence. I am not persuaded that he erred in finding that the admission of the DNA evidence would not bring the administration of justice into disrepute. I would dismiss this ground of appeal.

Jury Instructions

Standard of Review

[81] The standard when reviewing alleged errors in jury instructions requires a functional approach. An appellate court is to consider the entire charge and the trial as a whole (see *R v Daley*, 2007 SCC 53 at para 53; and *R v Hay*, 2013 SCC 61 at para 47). As explained in *Hay* by Rothstein J (*ibid*):

> Where an impugned reference in a jury charge in isolation could be understood to be an incorrect statement of the law, an appeal court will not interfere if it is evident that, considering the charge as a whole, the jury would have been properly instructed.

[82] It is the general sense that the words must have conveyed that is important, not the particular words used (see *Daley* at para 30). As stated by Bastarache J in *Daley*, "The accused is entitled to a properly instructed jury, not a perfectly instructed jury: see *Jacquard* [*R v Jacquard*, [1997] 1 SCR 314], at para 2. It is the overall effect of the charge that matters" (at para 31). See also *R v Araya*, 2015 SCC 11 at para 39.

Positions of the Parties

[83] The accused raises a number of issues regarding the jury instructions

including the following:

- the charge on reasonable doubt was inadequate and the trial judge should have avoided using the word "sure" (see *R v Starr*, 2000 SCC 40 at para 232);

- the trial judge failed to instruct the jury that in order to convict the accused of first degree murder, they had to find that the deceased had been sexually assaulted by the accused and the trial judge did not tell the jury they could find that there was no sexual assault committed at the time of the killing;

- the trial judge failed to instruct the jury on alibi and *R v W(D)*, [1991] 1 SCR 742;

- the jury should have been instructed that the accused could have been excluded if a different DNA test had been used (the 15 loci test);

- the trial judge failed to instruct the jury that the absence of injury to the deceased's vagina and anus did not support the conclusion that the sex was non-consensual;

- the charge regarding the DNA evidence was inadequate; and

- the charge favoured the Crown and undermined the position of the defence.

[84] The Crown argues that the jury instructions were accurate, balanced and adequate from a functional perspective.

Analysis

Was the Instruction on Reasonable Doubt Inadequate and Should the Trial Judge Have Avoided Using the Word "Sure"?

[85] When instructing the jury on reasonable doubt, the trial judge followed the direction from the Supreme Court of Canada in *Starr* (see *Starr* at paras 232, 242). He stated:

> The phrase reasonable doubt is a very important part of our criminal justice system. A reasonable doubt is not a farfetched or a frivolous doubt. It's not a doubt based on sympathy or prejudice. It's a doubt based on reason and common sense, not on speculation. It's a doubt that logically arises from the evidence or lack of the evidence. On the other hand it's not enough for you to believe that the, that [the accused] is probably or likely guilty. In those circumstances, you must find him not guilty because Crown counsel would have failed to satisfy you of his guilt beyond a reasonable doubt. Proof of probable or likely guilty is not proof beyond a reasonable doubt.
>
> You should also remember, you should also remember, however, that it is nearly impossible to prove anything with absolute certainty. Crown counsel is not required to do so. Absolute certainty is a standard of proof that is impossibly high.
>
> I put it to you this way, if, at the end of the case, after considering all the evidence, you're sure that [the accused] committed the offence, you should find him guilty of it since you would have been satisfied of his guilt of that offence beyond a reasonable doubt.
>
> [emphasis added]

[86] The trial judge provided the jury "with a proper definition as to the meaning of the words 'beyond a reasonable doubt'" (*Starr* at para 232) and did not use the word sure until he had done so. In my view, this definition

would not have misled the jury as to the correct standard of proof.

[87] Moreover, in his opening remarks to the jury, the trial judge explained reasonable doubt the same way that he did when instructing the jury, including his use of the word sure. During cross-examination of an expert witness and his closing address to the jury, counsel for the accused used the word sure in a different context. As a result, the trial judge needed to clarify that the word sure may mean something different in a different context.

Did the Trial Judge Fail to Instruct Regarding the Need for the Jury to Conclude There Was a Sexual Assault at the Time of the Murder?

[88] The trial judge clearly instructed the jury that in order to convict the accused of first degree murder, they had to find that the accused sexually assaulted the deceased and that they could find that there was no sexual assault committed at the time of the killing. He stated:

> If you're not satisfied beyond a reasonable doubt that [the accused] committed sexual assault on the person of [the deceased], you must find the accused not guilty of first degree murder but guilty of second degree murder. Your deliberations would be over.
>
> If you are satisfied beyond a reasonable doubt that [the accused] committed a sexual assault on the person of [the deceased], you must go onto the next and last question.
>
> Were the sexual assault and murder of [the deceased] part of the same series of events?
>
> In order for [the accused] to be guilty of first degree murder, Crown counsel must also prove beyond a reasonable doubt that the accused murdered [the deceased] while he was committing the offence of sexual assault. This does not mean that the murder and the sexual assault have to happen at exactly the same moment, but it does mean that the murder and the sexual assault must be closely

> connected with one another in the sense that they must be part of the same series of events. They must both be part of a single ongoing transaction.
>
> [emphasis added]

[89] The trial judge went on to explain that the sequence of events surrounding the death is uncertain. He told the jury that they "may wish to consider . . . that there was no sexual assault at the time of the killing."

Did the Trial Judge Fail to Instruct on Alibi and *W(D)*?

[90] Taylor testified that she told the police she thought the accused took a bus when he left their home on the morning of the killing. Relying on this testimony, the defence called evidence in an attempt to establish that the accused could not have gotten to the deceased's residence by bus within the timeframe of the murder. Because there was no evidence that the accused actually took a bus, the trial judge declined to instruct the jury on the defence of alibi or in accordance with *W(D)* as to whether the defence evidence raised a reasonable doubt.

[91] At the appeal hearing, counsel for the accused argued that Taylor's evidence was a statement of intention by the accused to take a bus and was therefore an exception to the hearsay rule and evidence which could establish that the accused took a bus. The accused asserts that, in light of this evidence, the trial judge erred in failing to include instructions on the defence of alibi and in accordance with *W(D)*.

[92] I am not persuaded that there is an air of reality to the alibi asserted by the accused or that the trial judge erred in failing to instruct the jury on

alibi and in accordance with *W(D)*. During cross-examination, counsel for the accused asked Taylor the following question: "And when he left you were pretty sure he took a bus, that's what you told the police?" She responded, "Yes." This was the only evidence that could arguably support the defence contention that the accused took a bus. This evidence does not, in my view, constitute a statement of intention by the accused, nor does it establish that the accused took a bus. The evidence does not indicate that the accused told Taylor he was going to take a bus, nor that she saw him get on a bus.

Should the Trial Judge Have Instructed the Jury that the Accused Could Have Been Excluded if the 15 Loci Test was Used?

[93] Two DNA experts testified in this case, Bruce Fenske (Fenske) and Thomas Suzanski (Suzanski). They explained that the DNA in this case was tested using a system that examines nine genetic regions (the nine loci test). In 2014, after the accused's DNA was tested in this case, the RCMP replaced the nine loci test with the 15 loci test. Fenske agreed with a suggestion that the accused could be excluded as the source of the DNA in this case if the results from one of the six additional loci in the 15 loci test did not match the accused's DNA. He also said he would be surprised if the application of the 15 loci test excluded the accused based on his experience with the nine loci test and a 13 loci test. Suzanski agreed that if the nine loci test produced a DNA match, the results would probably be the same with the 15 loci test.

[94] In his draft jury instructions, the trial judge included the comment that the accused could possibly have been excluded if the 15 loci test had been used. However, when he charged the jury, he removed this comment along with a statement the accused objected to that Fenske would have been

surprised if the result would have been any different with the 15 loci test.

[95] The accused argues that the jury should have been instructed that the accused could have been excluded if the 15 loci test had been used, but should not have been told Fenske would have been surprised if the result would have been any different.

[96] The Crown argues that the trial judge properly instructed the jury about the existence of the 15 loci test and that this is a more discerning test because of the increased number of genetic regions involved. It says that it would have been improper for the trial judge to tell the jury that the accused could have been excluded with the 15 loci test without also telling them that the experts would have been surprised if the results were different because this would have been misleading. It submits that whether the accused would have been excluded with the 15 loci test is speculation. I agree.

Should the Trial Judge Have Instructed the Jury that the Absence of Injury to the Deceased's Vagina and Anus Did Not Support a Conclusion that the Sex was Non-Consensual?

[97] In response to questions on cross-examination, the forensic pathologist testified that the absence of genital injuries on the deceased does not prove or disprove that a sexual assault took place. He also said that he has seen many cases of sexual assault without genital injuries particularly in adult women after childbirth.

[98] The trial judge instructed the jury that the absence of injury to the deceased's vagina and anus was a neutral fact that did not prove or disprove non-consensual sex.

[99] The accused asserts that this evidence was speculative and inadmissible. He argues that the trial judge ought to have instructed the jury that the absence of injury did not support a conclusion that the sex was non-consensual.

[100] The instruction sought by the accused does not accord with the pathologist's evidence. The pathologist agreed with the suggestion on cross-examination that "there was no genital injury in this case to support a finding of sexual assault". He did not agree that the absence of injury did not support that the sex was non-consensual. Moreover, the testimony of the pathologist was based on his own experience and was therefore not speculative.

Was the Trial Judge's Instruction Regarding the DNA Evidence Inadequate?

[101] The accused submits that the charge regarding the DNA evidence was inadequate and did not contain the elements set out in *R v Terceira* (1998), 123 CCC (3d) 1 (Ont CA), aff'd [1999] 3 SCR 866. He argues the trial judge failed to explain:

- the limitations of DNA science and its ability to determine when and how the DNA found at the scene had been deposited;
- the DNA was challenged in this case as unreliable and inconclusive;
- the limits of expert evidence;
- DNA has led to false matches;
- the reliability of the DNA database used in this case was not

established by a population geneticist;

- there was no corroboration of the DNA evidence which identified the accused as the killer; and

- the DNA did not prove the deceased was sexually assaulted.

[102] In my view, a review of the trial judge's jury instructions as a whole, in the context of the trial, do not bear out the accused's assertions for the following reasons:

- the DNA experts were extensively cross-examined about the limitations of DNA science;

- the trial judge instructed the jury about how to approach expert opinion evidence and specifically told them they did not have to accept the evidence of the DNA experts;

- the trial judge instructed the jury to consider "the education, training, and experience of the expert, the reasons given for the opinion, the suitability of the methods used, and the rest of the evidence in the case when [deciding] how much or how little to rely upon [expert] opinion";

- the trial judge instructed the jury regarding the position of the defence, including the lack of DNA linking the accused to objects in the deceased's home and the inability of the DNA evidence to prove "anything more than [the accused] had consensual sex with [the deceased] at some point in time";

- the trial judge instructed the jury that the "sequence of events is not for certain";

- the trial judge explained to the jury that random match probability is a statistical estimate of the frequency of occurrence of a matching DNA profile and, if DNA samples match, either the samples came from the same person or the match is a coincidence;

- Fenske testified that he was not familiar with the term "false match", but rather described a coincidental match as occurring when DNA samples from two different people match;

- the trial judge instructed the jury regarding the possibility of a coincidental match;

- the trial judge instructed the jury to disregard Suzanski's opinion that the DNA could hardly belong to someone else after providing a mid-trial instruction on this point;

- Fenske was qualified to give opinion evidence regarding techniques to identify and analyse Short Tandem Repeat DNA and the statistical interpretation and comparison of STR DNA profiles, the RCMP lab where the DNA was analysed in this case was accredited, the database used by the RCMP in this case was validated by a population geneticist, the reliability of the DNA database was not challenged and there was no evidence to suggest that it was unreliable;

- the trial judge properly instructed the jury that they could not find

the accused "guilty based on circumstantial evidence alone unless [they were] satisfied beyond a reasonable doubt that the accused's guilt [was] the only rational conclusion to be drawn from the whole of the evidence"; and

- the trial judge properly instructed the jury on the elements of the offence of sexual assault.

[103] In the circumstances, I am satisfied that the trial judge met the requirements set out in *Terceira*.

Did the Jury Instructions Favour the Crown and Undermine the Position of the Defence?

[104] The accused argues that the jury instructions were unbalanced and that the trial judge failed to include points which assisted the defence.

[105] Prior to instructing the jury, the trial judge provided a copy of his draft jury instructions to both counsel for the Crown and the accused. Thereafter, counsel appeared before the trial judge (the pre-charge meeting) and made submissions regarding the contents of the instructions. This was a lengthy appearance which covers 185 pages of transcript and which resulted in amendments to the jury instructions. In addition, counsel provided the trial judge with written communications regarding their positions.

[106] Many of the concerns raised by the accused on the appeal regarding the jury instructions were raised with the trial judge at the pre-charge meeting or in the written communications and were addressed by the trial judge.

[107] While the trial judge did not include everything sought by the

defence to be included in the jury instructions, they were nonetheless balanced and accorded with the evidence and the issues raised.

[108] Having considered the entire charge and the trial as a whole, I am of the view that the jury was properly instructed. I would dismiss this ground of appeal.

Unreasonable Verdict

[109] The accused was convicted of first degree murder on the basis that he intentionally killed the deceased while committing the offence of sexual assault pursuant to section 231(5)(b) of the *Code*. In order to convict the accused of first degree murder, the jury had to be satisfied that the sexual assault and the murder were part of a continuous sequence of events forming a single transaction (see *R v Muchikekwanape*, 2002 MBCA 78 at paras 76-78).

Positions of the Parties

[110] The accused argues that the jury's verdict is unreasonable. In particular, he says:

- the alibi evidence establishes a lack of opportunity for the accused to have committed the murder;
- the jury was not instructed that the alibi evidence established a lack of opportunity for the accused to commit the murder and that they must not engage in speculation;
- there is no evidence establishing that the sexual assault and the

murder were part of the same single transaction;

- the forensic evidence does not connect the accused to the deceased's home, the knife used to kill her or the bank cards that were used the morning of the murder because his fingerprints were not found in her home, on the knife or on the bank cards; and

- the DNA evidence does not prove the accused committed the murder.

[111] The Crown submits that the accused's argument considers the evidence in a "piecemeal fashion." It says that the jury was required to look at the evidence as a whole and consider its cumulative effect. The Crown points to the evidence that supports the conviction for first degree murder and says the DNA evidence cries out for an explanation. Notwithstanding the presence of the accused's DNA on the body of the deceased and the wrist bindings, the accused failed to provide an explanation for the presence of his DNA that would allow the jury to conclude the sexual intercourse occurred at another time or place or that it was not part of a continuous series of events surrounding the murder. Lastly, the Crown argues the trial judge made it clear to the jury that they could find there was no sexual assault at the time of the killing, and that they could not convict the accused of first degree murder unless they were satisfied he had committed both sexual assault and murder.

Standard of Review

[112] The parties agree, as do I, that the standard of review of the reasonableness of the verdict in a jury trial is whether the verdict is one that a properly instructed jury, acting judicially, could have reasonably rendered

(see *R v Villaroman*, 2016 SCC 33 at paras 55-56; and *R v Schenkels*, 2017 MBCA 62). The role of the appellate court is to examine and, to some extent, reweigh and consider the effect of the evidence (see *R v Yebes*, [1987] 2 SCR 168 at 186; *R v Biniaris*, 2000 SCC 15 at paras 36-40; and *R v WH*, 2013 SCC 22 at paras 26-29).

[113] In *Villaroman*, Cromwell J explained how to assess whether the inferences drawn by the jury were reasonable in a circumstantial case (at paras 55-56):

> Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence [citations omitted].
>
> The governing principle was nicely summarized by the Alberta Court of Appeal in *Dipnarine* [*R v Dipnarine*, 2014 ABCA 328], at para. 22. The court noted that "(c)ircumstantial evidence does not have to totally exclude other conceivable inferences" and that a verdict is not unreasonable simply because "the alternatives do not raise a doubt" in the jury's mind. Most importantly, "(i)t is still fundamentally for the trier (of) fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt."

[114] It is for the jury to determine whether inferences are speculative or give rise to reasonable doubt. An appellate court must give deference to inferences drawn by the jury that are reasonable in light of the evidence and the standard of proof (see *Villaroman* at paras 67, 71).

Analysis

[115] The accused asserts that the evidence establishes that he had a lack

of opportunity to commit the murder. I disagree.

[116] Taylor testified that it was 5:30 or 6:00 a.m. and possibly as late as 7:00 a.m. when the accused left their home on the morning of the murder. She told the police that she was pretty sure he took a bus, but she did not see where he went. She said that he returned "[a]round noon" with about $200 in cash consisting of 20 and 50 dollar bills.

[117] The Crown's theory was that the murder occurred sometime between 6:03 and 11:15 a.m. The evidence established that the deceased armed her home alarm at 1:27 a.m., disarmed it at 6:03 a.m. and her bank and Visa cards were used between 7:00 and 7:01 a.m. to withdraw $300. Two of the three attempts to use the cards were unsuccessful, suggesting someone other than the deceased used the cards. Her father found her body inside her locked home shortly after 11:15 a.m.

[118] As explained by Mainella JA in *R v Allen*, 2017 MBCA 88 (at para 8):

> To constitute an alibi, the evidence must be determinative of the final issue of the guilt or innocence of an accused by excluding any "window of opportunity" for an accused to possibly have committed the offence (*R v C(TW)*, 2006 CarswellOnt 2284 (CA) at para 2; see also *R v Sgambelluri*, 1978 CarswellOnt 1223 (CA) at para 9, leave to appeal to SCC refused, [1978] 2 SCR x (note)). The requirements of an alibi are strict; evidence that an accused had only a limited opportunity to commit a crime is not an alibi (see *Tomlinson* [*R v Tomlinson*, 2014 ONCA 158] at para 55).

[119] Despite the alibi asserted by the accused, there is no evidence that the accused took a bus when he left home and the evidence demonstrates that he in fact did have the opportunity to commit the murder in accordance with

the Crown's theory because his whereabouts are unaccounted for between the time he left home and noon when he returned. There was accordingly no air of reality to the alibi and no need for the trial judge to instruct the jury that the alibi evidence established a lack of opportunity for the accused to commit the murder.

[120] The Crown's theory in this case was that the deceased was sexually assaulted and murdered at the same time and therefore, the accused was guilty of first degree murder.

[121] The defence asserted firstly that it was open to the jury to find that the accused had consensual sexual contact with the deceased such that the sexual act was not part of a continuous sequence of events forming a single transaction with the murder. He also argued that the jury could have concluded that even if there was a sexual assault, it was not part of the same series of events as the murder. This, he says, makes the verdict of first degree murder unreasonable and warrants either an acquittal, a new trial or in the alternative, a conviction for second degree murder rather than first degree murder.

[122] In *Muchikekwanape*, Steel JA explained that in order for a jury to convict of first degree murder, it must determine whether the sexual assault and the killing were all part of one continuous sequence of events forming a single transaction. She stated (at para 77):

> The underlying offences listed in s. 231(5) of the *Code* all involve the unlawful domination of victims. The Legislature intended that where an accused exploits this position of power and commits murder in the process of such exploitation, the crime warrants the increased stigma and sentence attached to first degree

> murder. See *R. v. Nette* (2001), 205 D.L.R. (4th) 613, 2001 SCC 78, at para. 62, *per* Arbour J. I agree that the Legislature envisioned the murder taking place either after or during the commission of the underlying offence. In terms of sexual assault, if the only sexual indignity were completely separate and occurred after the death of the victim, then the charge would be sexual interference with a dead body and not sexual assault. However, the section also uses the phrase "while committing." Therefore, where the underlying offence and the murder are so inextricably intertwined that they form a single, continuous transaction, the requirements of s. 231(5) will be satisfied. To say otherwise would involve courts in the macabre exercise of attempting to determine by minutes and seconds when life flowed out of the victim.

[123] In my view, the defence theory that the accused and the deceased could have had consensual sex at some time unrelated to the murder, is speculative and is not reasonable, given the evidence. The following facts are relevant to this discussion:

- the deceased had the care of her daughter until Friday when the child's father picked her up at the home of the deceased's parents;
- she worked during the day on Friday at her regular job and then she worked at a social on Friday from 7:30 p.m. until Saturday at 1:13 a.m.;
- she armed her home alarm at 1:27 a.m.;
- she disarmed the alarm at 6:03 a.m.;
- the deceased's body was found on Saturday shortly after 11:15 a.m.;
- the accused was drinking at a hotel bar with Taylor from Friday until

about 2:00 a.m. on Saturday morning and then he went home with her;

- he left home while it was still dark on Saturday morning and did not return until noon;
- the deceased's father was not aware of her being involved in a relationship with anyone at the time of her death;
- one of the deceased's best friends who spoke with her daily, had never heard of the accused and said the deceased was not seeing anyone;
- the accused's semen was found in the deceased's vagina;
- the semen contained sperm;
- the presence of sperm in the semen indicated the accused penetrated the deceased and ejaculated within a few hours or up to two to three days prior to death;
- the deceased also had the accused's semen on her gluteal cleft which was described by a police officer as a white, crusty substance visible to the naked eye; and
- the accused's DNA was on wrist bindings.

[124] In order to conclude that the accused and the deceased had consensual sex at some time unrelated to the murder, the jury would have had to accept that the deceased, a single mother who had her daughter until Friday

and died on Saturday, had sex with the accused in between jobs on Friday, which is inconsistent with Taylor's testimony that she and the accused were out drinking, or sometime prior to Friday when she had her daughter with her.

[125] The accused also argued that his DNA on the wrist bindings and the deceased's gluteal cleft could have been the result of transfer DNA. In other words, after having sex with the accused, his DNA could have been transferred to the deceased's clothing and gluteal cleft after coming into contact with a DNA source; the deceased could have gone to work wearing the panties with his DNA on them; and then gone home where ultimately the panties were used to bind her wrists. This argument is problematic for two reasons:

1. The evidence did not reasonably support the inference that the panties used to bind the deceased's wrists belonged to her, that she wore the panties, or that they were adult panties. In fact, the panties had "Snoopy symbols" on the back and the front, which is more consistent with the panties belonging to the deceased's daughter than to the deceased.

2. There was no evidence that the deceased knew the accused or was engaged in a relationship with him.

[126] Therefore, the defence theory requires inferences to be drawn that the deceased either knew the accused but never mentioned this fact to her father or one of her best friends or did not know the accused but was willing to have unprotected sex with him; she wore the same panties after sex; and she went to work while she had dried semen on her gluteal cleft.

[127] In light of the evidence, in my view, it would be speculative to conclude that the deceased had sex with the accused at some point prior to the murder.

[128] Moreover, the evidence pointed to a sexually motivated killing:

- when she was found, she was wearing only a long-sleeved shirt and socks and was otherwise naked from the waist down;
- an injury to her head indicated she was struck with enough force to knock her unconscious either by a blunt object or by falling to the floor;
- her hands were bound behind her back with panties containing the accused's DNA in three places; and
- she was strangled, but that was not the cause of death.

[129] The accused also says the killer could have sexually assaulted the deceased, left her bound while he left to try to get money from the deceased's bank accounts and then gone back and killed her. In this scenario, he argues, the sexual assault and the murder are not part of the same single transaction. In my view, this scenario is not only speculative, but leaving the deceased bound makes it a continuing series of events.

[130] The role of an appellate court is not to determine whether the evidence can be viewed in a different way, but only to decide if the jury could have reasonably viewed the theories advanced as speculative (see *Villaroman* at paras 55-56).

[131] The accused's failure to testify is a factor that may be considered in assessing whether the verdict was reasonable (see *R v Klyne*, 2007 MBCA 100 at para 30; *R v Oddleifson (JN)*, 2010 MBCA 44 at paras 25-27, leave to appeal to SCC refused, 33756 (28 October 2010); and *R v Moose*, 2017 MBCA 112 at para 5).

[132] The accused's failure to testify in this case "[signified] the unavailability of an evidentiary foundation to ground alternative explanations or 'reasonable' doubts" (*Klyne* at para 30). In other words, the absence of an innocent explanation for the presence of the accused's DNA in light of the significant body of evidence that supported a sexually motivated killing "'fail(ed) to provide any basis to conclude' that the sexual intercourse occurred at a time or place other than as part of a continuous series of events surrounding the murder" (*R v Kociuk (RJ)*, 2011 MBCA 85 at para 56; see also *R v Banayos and Banayos*, 2018 MBCA 86 at para 24).

[133] In my view, the lack of forensic evidence in the deceased's home, on the knife or on the bank cards does not assist the accused, bearing in mind the totality of the evidence.

[134] Having reviewed the record, I find that a properly instructed jury, acting judicially, could reasonably have been satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence (see *Villaroman* at para 55). Accordingly, I would dismiss this ground of appeal.

Conduct of the Trial Judge and Trial Fairness

Introduction

[135] The accused argues that the trial judge undermined the defence by "[i]mproper judicial intervention and improper treatment" and provides examples of this conduct from the trial transcripts. While he is unclear as to exactly how the trial judge's interventions created unfairness, the transcript references indicate that his concerns relate to interference by the trial judge during his lawyer's cross-examinations and to criticisms of his lawyer by the trial judge during the trial. The accused has not asked this Court to review each of the trial judge's interventions for error, rather he alleges that it is the cumulative effect of the trial judge's interventions and criticisms that rendered the trial unfair.

[136] In these circumstances, the conduct of the trial judge is a matter of first instance for this Court and, therefore, no standard of review applies. Therefore, when considering this issue, I will apply the established legal test relating to judicial interventions and determine whether the interventions affected the fairness of the trial (see *R v Lynxleg*, 2002 MBCA 101; and *R v Monias*, 2016 MBCA 111).

The Law

[137] A criminal trial is an adversarial process and a trial judge's role is a very demanding one. A trial judge must ensure that the trial "is conducted in a seemly and orderly manner according to the rules of procedure governing the conduct of criminal trials and that only admissible evidence is introduced" (*Regina v Valley* (1986), 26 CCC (3d) 207 at 230 (Ont CA), leave to appeal

to SCC refused, 1986 CarswellOnt 6137). Consequently, some judicial interventions are permissible.

[138] As explained by Lamer J, for the Court, in *Brouillard Also Known As Chatel v The Queen*, [1985] 1 SCR 39 (at p 44):

> First of all, it is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.

[139] However, because "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*The King v Sussex Justices; Ex parte McCarthy* (1923), [1924] 1 KB 256 (BAILII) at 259), there are limits on the right and duty of a judge to intervene during a trial. In *Lynxleg*, Steel JA stated (at para 19):

> Judges must not descend into the arena and interfere with the adversarial process to the extent that they lose their neutrality. A judge must be especially careful in a jury trial to avoid influencing the jury or indicating to the jury his or her opinion as to credibility or predisposition one way or the other. Even when sitting alone, a judge should not intervene so as to inhibit counsel from adequately examining witnesses. See *R. v. Denis* [*Regina v Denis* (1966), [1967] 1 CCC 197 (Qc CA)]. When a trial judge goes beyond these limits and usurps the function of counsel, that may affect the appearance of the fairness of the trial. The accused must not only actually receive a fair trial, he must receive the appearance of a fair trial.

[140] When determining whether a trial judge's interventions compromised the appearance of a fair trial, an appellate court must consider

"whether [the accused] might *reasonably* consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial" (*Valley* at p 232; see also *R v W (A)*, [1995] 4 SCR 51). The analysis is fact specific and contextual (see *Lynxleg* at para 23; and *R v Murray*, 2017 ONCA 393 at paras 96-97). A trial judge's interventions must be considered cumulatively in the context of the entire trial record (see *Chippewas of Mnjikaning First Nation v Chiefs of Ontario*, 2010 ONCA 47 at para 230, leave to appeal to SCC refused, 33613 (8 July 2010)).

[141] In *Valley*, Martin JA concluded that appellate courts have tended to condemn four principal types of judicial interventions:

- conveying the impression the judge is siding with the prosecution and disbelieves the accused or the defence witnesses through questioning;
- intervening in a manner that makes it impossible for counsel to present the defence and properly test the evidence;
- intervening in a manner that prevents the accused from telling his or her story in his or her own way; and
- actively obstructing counsel in his or her work.

[142] Justice Martin explained (at p 232):

> The courts have drawn a distinction between conduct on the part of the presiding judge, which is discourteous to counsel and indicates impatience but which does not invite the jury to disbelieve defence witnesses, and conduct which actively

> obstructs counsel in his work: *R. v. Hircock*, [1970] 1 Q.B. 67 (C.A.); *R. v. Ptohopoulos* (1967), 52 Cr. App. R. 47. The authorities have consistently held that mere discourtesy, even gross discourtesy, to counsel cannot by itself be a ground for quashing a conviction. Where, however, the trial judge's comments suggest that counsel is acting in a professionally unethical manner for the purpose of misleading the jury, the integrity and good faith of the defence may be denigrated and the appearance of an unfair trial created: *R. v. Turkiewicz, Barrow and MacNamara* (1979), 50 C.C.C. (2d) 406, 103 D.L.R. (3d) 332, 26 O.R. (2d) 570 (Ont. C.A.); *R. v. Hulusi* [*R v Hulusi* (1973), [1974] 58 Cr App R 378 (CA (Crim Div))], *supra*.

[143] While trial judges must conduct themselves in a judicious manner when intervening to avoid concerns about unfairness, debates between counsel and a trial judge over relevant factual and legal issues, and expressions of impatience, do not on their own amount to an apprehension of bias or unfairness. Similarly, interventions during submissions will generally be given more latitude than interventions during testimony (see *Chippewas* at paras 240, 243, 260, 262).

[144] The effect of a trial judge's interventions on the jury must also be considered, particularly when the interventions occur in the presence of the jury (see *Monias* at para 7; see also *Tymkin v Ewatski et al*, 2014 MBCA 4 at para 44, leave to appeal to SCC refused, 35749 (26 June 2014); and *R v Hungwe*, 2018 ONCA 456 at para 40). Events that take place in the absence of the jury usually will not affect them or their decision (see *Murray* at para 97).

[145] A trial judge must be careful not to usurp the function of the jury and must ensure the general atmosphere of a jury trial is as neutral as possible (see *R v Sicotte*, 1991 CarswellQue 269 at para 61 (CA), leave to appeal to

SCC refused, 1992WL1330222).

[146] In summary, trial judges should be judicious in their actions and comments, but signs of impatience or even rudeness will not necessarily result in an unfair trial. Trial judges may properly interfere in proceedings to focus or clarify evidence, to prevent repetitive, irrelevant or inadmissible evidence from being presented, to prevent harassment of witnesses and to ensure the proper progress of the trial. However, there are limits to this. Generally, a trial judge's interventions or comments must not:

- usurp the role of counsel;
- reveal a loss of neutrality;
- reveal that the judge's opinion has been formed about the credibility of a witness or the guilt of an accused;
- obstruct counsel from presenting its case or obstruct counsel from properly testing the evidence of a witness;
- prevent the accused from telling his or her account in his or her own way; or
- suggest that defence counsel is acting unethically, lacks integrity or is purposefully misleading the jury.

Positions of the Parties

[147] In this case, the accused asserts that the trial judge "minimized and undermined the Defence by intervening during [cross-examination], criticizing Defence counsel and in effect nullifying the evidence of [Taylor]".

The accused says the conduct of the trial judge during the trial rendered the trial unfair and he identifies transcript excerpts which, he argues, support his assertion, although he does not specify how the trial judge's interventions created unfairness.

[148] The Crown argues that the trial judge gave considerable latitude to defence counsel during cross-examination of witnesses and that defence counsel elicited inadmissible evidence and occasionally misstated the evidence to witnesses, requiring the trial judge, in his gatekeeper role, to intervene.

Analysis

[149] I have reviewed each of the impugned interventions in the overall context of the trial and considered their cumulative effect. In my view, while a few of the trial judge's comments might have seemed curt if viewed in isolation, a reasonable person present throughout the trial would not conclude that the trial was unfair or that the trial judge's interventions compromised the appearance of a fair trial.

[150] While the accused refers to a number of points in the transcripts where he says the trial judge treated his lawyer improperly, many reference exchanges between his lawyer and the trial judge in the absence of the jury. These exchanges do not indicate that the trial judge is biased or has lost his neutrality. The trial judge does not suggest that counsel lacks integrity or ethics and, any impatience shown by him does not reflect negatively on counsel. Rather, the trial judge appears to be trying to prevent improper questioning or move the proceedings along and does not hinder the defence in the process.

[151] Regarding the accused's complaint that the trial judge improperly interfered with his lawyer's cross-examination of Taylor, he argues that the trial judge intervened "in a manner suggestive of counsel misleading the witness even though she had already agreed with counsel's suggestion". A review of the record demonstrates that the trial judge only intervened when counsel for the accused misstated Taylor's testimony.

[152] Taylor testified that she awoke when the accused got out of bed and left home on the morning of the murder. She said she was sure it was around 5:30 or 6:00 a.m., but she did not look at the clock.

[153] During cross-examination, defence counsel misstated her testimony about the time when he said, "You said at around 6:30 in the morning; correct, that's what you told us today?" He was immediately corrected by the trial judge.

[154] Counsel for the accused resumed his questioning of Taylor and the following exchange took place:

> [Accused's counsel]: And I take it because you didn't look at the clock it could've been later, it could've been 6:30 a.m.?
>
> [Witness]: Could've been.
>
> [Accused's counsel]: Yeah. Or could even have been at 7:00 a.m.; right?
>
> [Witness]: I'm not sure.
>
> [Accused's counsel]: Yeah. So because you didn't (inaudible) at the clock all you know is -- was it daylight already --
>
> [Witness]: No.

> [Accused's counsel]: -- when he left? It wasn't daylight?
>
> [Witness]: No.
>
> [Accused's counsel]: Are you certain, in May 2011 with the clocks springing forward that it wasn't daylight in the morning at 6:30 or, in the morning?

[155] At this point, the trial judge intervened to point out the witness did not say it was 6:30 a.m. when the accused left. Defence counsel responded that he was cross-examining the witness and wanted to continue. The trial judge allowed him to continue. Eventually Taylor agreed that it could have been daylight before 6:00 a.m. and it was possible that the accused could have left as late as 7:00 a.m. on the day of the murder.

[156] In my view, the trial judge intervened in the cross-examination of the witness on an important point in order to ensure the question was being put fairly to the witness. When asked to be allowed to proceed, the trial judge permitted defence counsel to continue, and he was not impeded from presenting evidence favourable to the accused's case about when the accused may have left home.

[157] At one point during the trial, counsel for the accused complained to the trial judge that the jury was "getting the wrong impression that somehow [he was] doing something underhanded". He claimed that following an exchange he had with the trial judge after the Crown objected to a question he posed on cross-examination, the jury was "shaking their heads, wondering why the judge [was] chastising [him]". Having reviewed the record, in my opinion, counsel could not know what the jury was thinking and his complaints about what the jury thought of him were unfounded.

[158] I would dismiss this ground of appeal.

Conclusion

[159] In the result, I would dismiss the appeal.

leMaistre JA

I agree: Monnin JA

I agree: Steel JA