Citation: R v Assi, 2023 MBCA 2
Date: 20230113
Docket: AR21-30-09704

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

B E T W E E N :

	)	***R. J. Wolson, K.C.*** *and*
	)	***L. C. Robinson***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***D. C. Sahulka***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
MAHFUTHMM ASSI	)	*Decision pronounced:*
	)	***January 6, 2023***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***January 13, 2023***

On appeal from 2021 MBQB 36

MAINELLA JA (for the Court):

Introduction

[1] The accused appeals his convictions for second degree murder and attempted murder arising from a tragic stabbing incident that occurred outside a Middle Eastern restaurant in Winnipeg (the restaurant) on April 15, 2019. After hearing the appeal, we dismissed it with reasons to follow. These are those reasons.

Background

[2] The stabbing victims, M.A. and Y.A., and a group of their friends and family (the birthday group) were at the restaurant celebrating M.A.'s birthday. The accused was a server at the restaurant. The birthday group's rowdyism resulted in M.A. getting into a brief but heated argument with the accused which culminated in the exchange of "vulgar insults" (at para 2) and pushing each other. The two men were physically separated but each continued to hurl verbal abuse at the other, which included reference to sexual acts involving female family members, language that is highly inflammatory in Arabic culture. At one point, M.A. picked up a knife and waved it until relinquishing it. Although there was no evidence the accused saw M.A. wave the knife, the trial judge accepted he heard M.A.'s threats to kill him.

[3] The manager of the restaurant ejected the birthday group and asked the accused to end his shift and go home. Over the next several minutes, the accused and M.A. were out of each other's sight but still within earshot of each other's insults. The birthday group exited the restaurant through the front door and congregated outside on the sidewalk although M.A. came back into the restaurant briefly. M.A. was still "visibly agitated" at this time (at para 34). The stabbing incident occurred about two minutes after the birthday group initially left the restaurant in what the trial judge characterized as a "targeted attack" (at para 69).

[4] While the birthday group was leaving, the accused went into the restaurant's kitchen and armed himself with a knife. He was visibly angry but told a co-worker, on two or three occasions, to "[l]eave [him] alone" (at para 33) as he said he was going to leave and go home. The accused walked

towards the rear of the restaurant but turned back to get his car keys. He then exited the building via the rear of the restaurant and walked to his vehicle that was parked in the back lane. He opened the door and turned on the vehicle's lights. He then went around to the front of the restaurant, brandished the knife and proceeded directly to attack M.A. in a crowd of about 10 people. Y.A. interceded and the accused fatally stabbed Y.A. in the chest. He then stabbed M.A. in the chest with the knife going through M.A.'s body and out his back. M.A. fell to the ground. The accused then stabbed M.A. a second time above his hip. Y.A. died soon after being stabbed and M.A. almost perished. The accused testified and said he had no memory of what occurred other than being very angry.

Discussion

[5] The first ground of appeal is that the trial judge failed to consider all of the evidence in determining intent for both offences (see *R v Walle*, 2012 SCC 41 at para 46). The argument is that she focused exclusively on what occurred in the short period after the accused left the restaurant's kitchen with the knife and ignored the prior heated argument and the fact that the accused was very angry. In our respectful view, this submission fails.

[6] The trial judge's reasons reflect a careful and sensitive approach to the evidence as a whole that responded to the live issues at the trial and the parties' key arguments. Because she accepted the accused's evidence that he could not recall what was on his mind at the time of the stabbings, there was no direct evidence of intent. Absent something in her reasons that suggests she "subconsciously subverted what [she] said, [she] is 'entitled to be taken at [her] word'" (*R v McLean*, 2022 MBCA 60 at para 48) that her decision on

intent was based, as she stated, on "the testimony of the witnesses to the stabbing, the surrounding circumstances of the incident, and the autopsy report" (at para 66) in relation to Y.A. There was no obligation on the trial judge to say to what degree particular pieces of evidence led to her decision given that she provided an intelligible pathway to the result she reached (see *R v Ramos*, 2020 MBCA 111 at para 47, aff'd 2021 SCC 15).

[7] The next ground of appeal is that the trial judge erred in rejecting the partial defence of provocation (see section 232 of the *Criminal Code* (the *Code*)). She found that the Crown had proven beyond a reasonable doubt that M.A.'s conduct was not sufficient to deprive an ordinary person of self-control, thereby excluding the partial defence of provocation. Absent an extricable legal error, the trial judge's finding on the ordinary person standard is a question of fact, reviewable on a standard of palpable and overriding error (see section 232(3)(b) of the *Code*; and *R v Cassan (ER)*, 2012 MBCA 46 at para 37).

[8] The principal submission is that the trial judge misapplied the objective element of provocation—that is, the ordinary person standard—by relying on the perceptions of witnesses from the birthday group and restaurant employees as to the nature of the argument between M.A. and the accused and the cultural overtones of the insults exchanged (the witnesses' evidence) (see *R v Tran*, 2010 SCC 58 at paras 30-35) rather than making her own assessment. The accused also says that the trial judge failed to undertake a detailed assessment of the reliability and credibility of the various witnesses in the restaurant before relying on their evidence.

[9] We do not agree that the trial judge abdicated her role as argued by the accused. She stated that, in her analysis of provocation, she "[could] and should consider the entire context of the interaction" between M.A. and the accused (at para 79). After considering the witnesses' evidence, she reviewed other evidence and then stated that she had considered all of the evidence in making her determination (see paras 91-92). Thus, while she took account of the witnesses' evidence, she did her own assessment of all of the evidence and came to her own conclusion on this element.

[10] The trial judge was clearly entitled to take this eyewitness evidence into account in her analysis. Many of the witnesses to the heated argument were of the same gender, approximate age and ethnicity as that of the accused. We are satisfied that the trial judge did not rely on this evidence in any way that is contrary to "contemporary social norms" (*Tran* at para 19). The witnesses' evidence as to the heated argument was clearly relevant to applying the ordinary person standard as that evidence, to the benefit of the accused, established that the insults exchanged were far beyond what a server would experience from typical "rude, unruly customers" (at para 85) and had a cultural significance (see *R v Nahar*, 2004 BCCA 77 at paras 34, 37; and *Tran* at paras 31-35).

[11] We also are not convinced that it was an error for the trial judge to rely on the witnesses' evidence despite the frailties with it alleged by the accused. The fact that there were minor inconsistencies from different eyewitnesses as to the sequence of events is not surprising and, ultimately, is unremarkable. All of the witnesses were examined at length at trial and surveillance video inside the restaurant allowed the trial judge to see for herself the movements and bodily language as the argument began and

evolved. Also, several of the witnesses were fellow employees of the restaurant and, thus, independent of the stabbing victims. Given the deferential standard of review as to the evaluation of witness testimony, we see no basis for this Court to interfere with the trial judge's fact finding (see *R v Jovel*, 2019 MBCA 116 at paras 26-30).

[12] The law is premised on fostering self-control and non-violent behaviour. Accordingly, provocation is a narrow and restrictive partial defence that is limited to situations where an ordinary person would, rather than could, have lost self-control (see Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 445).

[13] Ultimately, we are not persuaded that the trial judge made a palpable and overriding error in concluding that the accused's targeted attack of M.A., after the birthday group had departed, was an unexpected surprise escalation. The fact that the accused, although still angry, told a co-worker, in essence, that everything was okay and that he was going to leave and go home, provides ample basis to support the trial judge's conclusion. We are satisfied that it was reasonably open to her to conclude that the accused's conduct was outside societal standards of reasonableness and responsibility notwithstanding the heated argument inside the restaurant.

[14] In light of our decision, it is unnecessary to address the trial judge's alternative finding that, if she was incorrect on the objective element of provocation, the partial defence would otherwise fail for aspects of the subjective requirements of provocation, other than to say we see no reversible error in her alternative finding.

[15] The last ground of appeal is that, contrary to *R v Villaroman*, 2016 SCC 33 at paras 37-38, the trial judge failed to consider alternative inferences on the circumstantial evidence relating to the *mens rea* for the offence of attempted murder. The accused says that an alternative inference—that he armed himself with a knife with the intention to cause bodily harm only—could not be ruled out despite the fact that he had no recollection of what his intent was when he testified.

[16] Appellate deference plays an important role in reviewing a trier of fact's assessment of circumstantial evidence (see *R v Hall*, 2018 MBCA 122 at paras 164-66). The appellate court must not retry the case by looking at the evidence in an "alternative way" as it is for the trier of fact to decide whether, and to what degree, a given inference is plausible or speculative (at para 200; and *R v Fedyck*, 2018 MBCA 74 at para 25 (see also paras 31-32), aff'd 2019 SCC 3). The limited focus of the appellate court in assessing inferential reasoning is considering whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable inference available on the totality of the evidence (see *Villaroman* at para 55; *R v Robinson*, 2017 BCCA 6 at para 38, aff'd 2017 SCC 52; and *R v Youssef*, 2018 ONCA 16 at para 4, aff'd 2018 SCC 49).

[17] The conviction for the attempted murder of M.A. was well-founded on the totality of the evidence given that the accused pursued and targeted M.A., he fatally stabbed Y.A. and he then committed the *actus reus* of the attempted murder (i.e., some step towards the commission of the murder of M.A. beyond mere acts of preparation), namely, stabbing M.A. twice with great violence in vulnerable parts of his body (see *The Queen v Ancio*, [1984] 1 SCR 225 at 247). The alternative inference proposed by the accused as to

his intent that the savage nature of the stabbing of M.A. may have been only to injure him, as opposed to kill him, after the accused had already fatally stabbed Y.A., strikes us as "'fanciful' . . . speculation" (*Villaroman* at para 37). It does not surprise us that the trial judge rejected this submission.

Disposition

[18] In the result, the appeal was dismissed.

Mainella JA

Beard JA

leMaistre JA