

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak

Docket: AR21-30-09688)
BETWEEN:)
)
HIS MAJESTY THE KING) *S. A. Inness and*
) *H. S. K. Allardyce*
Respondent) *for the Appellant*
) *W. D. Bradburn*
- and -)
) *M. A. Ferens*
WARREN DENNIS BRADBURN) *for the Appellant*
) *R. W. Hastings*
(Accused) Appellant)
) *Z. M. Jones*
- and -) *for the Appellant*
) *G. V. Hart*
Docket: AR21-30-09689)
BETWEEN:) *D. Sahulka*
) *for the Respondent*
HIS MAJESTY THE KING)
) *Appeals heard and*
Respondent) *Decision pronounced:*
) *November 25, 2022*
- and -)
) *Written reasons:*
RANDALL WARREN HASTINGS) *December 8, 2022*
)
(Accused) Appellant)
)
- and -)

Docket: AR21-30-09692)
BETWEEN:)
)
HIS MAJESTY THE KING)
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Respondent)
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 - and -)
)
GREGORY VINCENT HART)
)
(Accused) Appellant)

PFUETZNER JA (for the Court):

Introduction

[1] Four co-accused were tried for second degree murder by the trial judge sitting without a jury in connection with the beating and stabbing death of an intoxicated victim in the parking lot of the Burntwood Hotel in Thompson.

[2] Warren Dennis Bradburn (Bradburn) and Randall Warren Hastings (Hastings) were convicted of second degree murder while Gregory Vincent Hart (Hart) and Carla Zurina Agatha Wass (Wass) were convicted of manslaughter. Bradburn and Hastings appeal their convictions. Hart appeals his conviction and also seeks leave to appeal and, if granted, appeals his nine-year sentence. Wass has abandoned her appeal.

[3] After hearing argument, we dismissed the conviction appeals of Bradburn, Hastings and Hart and granted Hart leave to appeal his sentence but dismissed his sentence appeal, all with reasons to follow. These are our reasons.

Background

[4] Based on the evidence accepted by the trial judge, the circumstances of the homicide are as follows. In the early morning of April 21, 2018, police were called to assist an injured male found outside the Burntwood Hotel. The victim had numerous injuries to his neck and chest and he later died. Police followed a blood trail around the side of the building to a large pool of blood from which they recovered glass beer bottle fragments.

[5] The autopsy revealed that the victim suffered, among other injuries, 11 slash-type wounds and three stab wounds. A three-centimeter-deep stab wound to the victim's neck penetrated his jugular vein. The most serious was a 10 to 11-centimeter-deep stab wound to the victim's chest which perforated his left lung and pericardium. The victim bled to death.

[6] Earlier that evening, Bradburn, Hastings, Wass and others were socializing in the bar at the Burntwood Hotel. The victim was also in the bar. A disagreement of some kind occurred. When the victim left the bar to go outside, the three co-accused followed him and a physical fight ensued. The victim was quickly overpowered and was punched and kicked. Hastings pulled a beer bottle out of his pocket, smashed it on the victim's head, and proceeded to stab him in the neck and chest with the broken bottle. Hart was walking by the hotel with two companions when he heard his friend Hastings yelling and told his companions that he was going to help him. Despite his companions' attempts to stop him, Hart ran to the scene and joined Hastings and Bradburn in hitting the victim until Hart "did the last hit"; the victim fell down and "got knocked out"; Hastings "kept stomping on him about 4 times"; and Bradburn "did the last kick" to the victim's head.

[7] Video evidence from after the assault showed Hart washing his hands in a snowbank and Bradburn wiping himself with a shirt, turning it inside out and putting it back on. Hastings is seen cleaning his shoes in the snow and wiping his hands and arms with a shirt. He then walks to a dumpster, lights the shirt on fire and places it in the dumpster.

[8] Bradburn, Hastings and Hart then followed some of the civilian witnesses to the YWCA where Hastings was heard to confess to stabbing the victim in the neck and stating that he knew he had killed him.

[9] At trial, the accused did not testify or call evidence.

[10] The trial judge carefully reviewed the evidence, noting that none of the numerous civilian witnesses “were desirous of testifying”, but they did so in high-stress, unfamiliar circumstances. He considered the relative frailties and inconsistencies in the evidence, as well as the corroborative video and physical evidence.

[11] He rejected each of the accused’s exculpatory police statements, describing much of the statements as “utter nonsense” and not raising “any doubt in [his] mind.”

[12] The trial judge found that the victim “was killed unlawfully as a result of the collective acts of all of the accused.” In convicting Bradburn and Hastings of second degree murder, he found that they “were directly involved from the beginning to the end. They engaged in protracted conduct in relation to [the victim] that was clearly such that serious bodily harm would result. The so-called fight went on for some 10 to 15 minutes and caused massive, horrific injuries.”

[13] He found that Hart “aided, abetted and encouraged Bradburn and Hastings.” However, Hart was found to have lesser involvement as “he came in later” and he was convicted of manslaughter.

Discussion

Bradburn’s Appeal

[14] Bradburn raises two grounds of appeal. First, he argues that the trial judge gave inadequate reasons for his conviction. He says that the trial judge did not address contradictory evidence or make the factual findings necessary to support him having the *mens rea* for murder.

[15] In our view, the trial judge comprehensively reviewed the evidence of each witness and it is apparent from his reasons that the evidence he outlined was the evidence that he was prepared to accept. He adequately addressed inconsistencies in the evidence and explained why he accepted the evidence that he did. The trial judge made the necessary findings in respect of Bradburn’s *mens rea* as he found him guilty as a party with Hastings to murder and found that Bradburn continued with the beating, along with Hastings, even after the victim had been stabbed. The trial judge’s “reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why [he] decided that way in a manner that permits effective appellate review” (*R v GF*, 2021 SCC 20 at para 69).

[16] Bradburn’s second and related ground of appeal is that the trial judge wrongly stated and applied the *mens rea* requirement for murder. This is based on the trial judge’s statement that Bradburn “intended to cause injury directly or as a party to [the victim] that would likely cause his death.”

Bradburn argues that this is an objective standard and does not address the requirement that he subjectively knew his actions would likely cause death.

[17] We are not persuaded by Bradburn’s argument that the trial judge erred in law by applying an objective test in determining that he had the intent for murder. In his factum, Bradburn accurately concedes it is arguable that this was “merely an abbreviated self-instruction and that the . . . [t]rial [j]udge is presumed to know the law”. In our view, it was reasonably open to the trial judge on the whole of the evidence to find that the only reasonable inference arising from punching and kicking an overpowered person, who was also being stabbed during a lengthy group attack, was that Bradburn meant to cause the victim bodily harm that he knew was likely to cause the victim’s death and was reckless whether death ensued or not (see *R v Villaroman*, 2016 SCC 33 at para 55; and section 229(a)(ii) of the *Criminal Code*).

Hastings’s Appeal

[18] Hastings argues that the trial judge erred in finding that he had the requisite intent for murder as he failed to self-instruct on the “rolled-up charge” and failed to consider the evidence of intoxication, anger and potentially provocative behaviour. In our view, the trial judge did not err as alleged. There was no evidence of an act capable of supporting a defence of provocation and the trial judge was entitled to accept evidence indicating that Hastings was not intoxicated. In the circumstances, there was no obligation for the trial judge to explicitly refer to the “rolled-up charge” instruction and he considered all of the evidence relevant to Hastings’s state of mind.

[19] Next, Hastings asserts that the trial judge came to an unreasonable verdict, maintaining that the eyewitness evidence that he was the stabber was

too unreliable. Moreover, he maintains that, due to the evidence of intoxication, anger and potentially provocative behaviour, murder was an unreasonable verdict and the evidence could only have supported a manslaughter verdict. He also submits that there was no evidentiary foundation for the trial judge's speculative inference that he was in possession of the beer bottle when he left the bar. Finally, he contends that the trial judge erred by finding that his after-the-fact conduct showed that he was not intoxicated.

[20] We reject these arguments. There was ample evidence supporting the factual findings and inferences drawn by the trial judge regarding Hastings's actions, role in the offence and his level of intoxication. The trial judge made no palpable and overriding errors (see *R v Clark*, 2005 SCC 2 at para 9). Moreover, "the verdict [was] one that a properly instructed jury or a judge could reasonably have rendered" (*R v RP*, 2012 SCC 22 at para 9).

Hart's Conviction Appeal

[21] Hart argues that the trial judge reached an unreasonable verdict because the only evidence implicating him in the assault was the video-recorded statement of a minor witness who acknowledged in cross-examination at trial that it was possible that he could have been mistaken when he told police that he saw Hart hitting the victim. In support of this position, Hart asserts that the trial judge did not reject the evidence of other witnesses, who said they did not see him assault the victim, and that the trial judge engaged in uneven scrutiny of the evidence by preferring the minor witness's video-recorded statement over his trial testimony and by rejecting Hart's police statement.

[22] We agree with the Crown that the trial judge was entitled to accept the minor witness's video-recorded statement and that he adequately dealt with the inconsistencies in the overall evidence and reconciled them logically. Furthermore, different corroborative evidence supported aspects of the minor witness's testimony. The trial judge made no error in weighing the evidence and the verdict was one that a properly instructed jury or a judge could reasonably have rendered.

Hart's Sentence Appeal

[23] As to his sentence appeal, Hart maintains that the trial judge did not give effect to parity as his co-accused, Wass, was also convicted of manslaughter and she was only sentenced to six years compared to his sentence of nine years. He also argues that the sentence was unfit and crushing as a result of the trial judge discounting his *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688) by overemphasizing the principle from *R v Wells*, 2000 SCC 10.

[24] Parity is only one consideration in sentencing and is secondary to the overriding principle of proportionality. The two offenders here have different personal circumstances, criminal records and levels of involvement in the offence. The trial judge took into account Hart's "extreme" *Gladue* factors but balanced those against his recent and lengthy criminal record for violent offences, his assessment as a high risk to reoffend, and the need to impose a sentence reflecting deterrence and denunciation for a violent crime involving high moral culpability. Hart's moral culpability is illustrated by the fact that he joined the attack at a point where the victim was very obviously helpless and there was no need for Hart to "help his bro". We note that, at the

sentencing, the Crown sought a sentence of 15 years and Hart suggested a sentence of seven years would be appropriate—only two less than the sentence imposed.

[25] While we granted leave to appeal, we were not persuaded that the trial judge made an error in principle that had an impact on the sentence or that the sentence was demonstrably unfit. As a result, we dismissed the sentence appeal.

Disposition

[26] In the result, the conviction appeals of Bradburn, Hastings and Hart were dismissed. Hart was granted leave to appeal his sentence but the sentence appeal was dismissed.

Pfuetzner JA

Cameron JA

Spivak JA
