Citation: R v Cleveland, 2022 MBCA 54
Date: 20220610
Docket: AR19-30-09295

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N:

	)	***P. A. Cleveland***
	)	*on his own behalf*
HER MAJESTY THE QUEEN	)	
	)	***C. A. Vanderhooft*** *and*
Respondent	)	***R. D. Lagimodiere***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
PEREZ ADARYLL CLEVELAND	)	*Decision pronounced:*
	)	***May 30, 2022***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***June 10, 2022***

MAINELLA JA (for the Court):

[1] At the conclusion of the hearing, we indicated that the accused's appeal of his conviction on a charge of first degree murder was dismissed with reasons to follow. These are those reasons.

Denial of Adjournment Request

[2] The accused requested that his appeal be adjourned; we were satisfied that the interests of justice did not favour granting the requested adjournment.

[3] The accused was convicted and sentenced on May 29, 2019. He

filed his notice of appeal on June 14, 2019. Thereafter, the appeal has proceeded at a snail's pace.

[4] During the appeal process, the accused hired and fired three different lawyers from the counsel who represented him at trial.

[5] On May 22, 2020, a case management judge was appointed to attempt to provide a path towards an orderly hearing of the appeal. The appeal was set for hearing on October 28, 2020, but was later adjourned at the accused's request. The case management judge held many meetings throughout 2020/2021 to resolve the accused's complaints regarding disclosure, as well as to set deadlines to perfect the appeal. Correspondence from Correctional Service Canada indicates that the accused was being reasonably accommodated in custody to prepare for his appeal as a self-represented litigant.

[6] While the accused has inundated the Court's registry with correspondence complaining about a sundry of things (most of which were irrelevant to his appeal), he has not filed a factum.

[7] According to the court file, during the multiple appearances that occurred before the case management judge, several themes emerged. These themes ultimately manifested themselves before us. The accused took no responsibility for his appeal languishing; he liberally blamed others. The accused also constantly denied receiving materials from the Crown despite the fact that it is undisputed he did receive the materials (sometimes on multiple occasions). Little in what he said has occurred could be accepted, absent independent corroboration.

[8] The appeal was set again for hearing on March 8, 2022. Although the accused had well over two years to prepare a factum, he did not do so. No counsel who had gone on record for the accused could ever get him to approve a factum to be filed on his behalf. The accused asked for one last adjournment of his appeal hearing. We agreed. However, we advised the accused in clear language that this was the final adjournment. We are satisfied that the accused understood and that he should prepare himself to argue his appeal in person. Deadlines were set and agreed to in the event that the accused chose to file a factum. The matter was put over to an agreed hearing date of May 30, 2022.

[9] At the hearing, the accused advised that, in late April of 2022, he contacted a lawyer in Ottawa, Ontario to represent him. He said he paid the lawyer a retainer for an opinion but the lawyer was not prepared to represent him yet. Crown counsel confirmed aspects of the accused's narrative. The Ottawa lawyer told the Crown he had received a retainer and some of the trial transcripts in early May of 2022. He said he was not prepared to go on record for the accused.

[10] The accused is no stranger to the criminal justice system and is very familiar with the procedures of this Court (see 2019 MBCA 49). He is articulate and able to discuss legal concepts. For example, during the course of his ultimate submissions on the appeal, he took issue with whether the forensic anthropologist who testified at his trial, Dr. Holland, met the criteria of an expert set out in *R v Mohan*, [1994] 2 SCR 9, and, even if she was a properly qualified expert, he said the trial judge should have instructed the jury that her evidence really was of no value to establish the cause of death in light of the expert evidence from the forensic pathologist, Dr. Rivera, who conducted an autopsy on the victim.

[11] The interests of justice concern not just an accused's right to have a fair appeal based on the dispassionate application of the rule of law to their case, but also society's interest in seeing that justice is done in a timely and reasonable fashion. While the accused has been convicted of the most serious crime in our criminal law, that does not grant him special privileges to proceed by different fundamental rules (see *R v Fabrikant* (1995), 97 CCC (3d) 544 at 574 (Qc CA)). The comments of Proulx JA apply equally here (at pp 574-75):

> . . .
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> When I think of how scrupulous courts are in their efforts to maintain the integrity of the process and to assure fairness at trial, it is difficult to understand why one would deprive himself of the fundamental guarantees which are protected by our Constitution, and choose instead to seek to disrupt, abuse and discredit the very process that is there to protect his rights. . . .
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> . . .

[12] In our view, the accused's deliberate stratagem of stonewalling judgment day on his case must come to an end. He has been accommodated throughout the proceedings to the point that public confidence in the administration of justice would be eroded if his appeal was not determined on its merits. Resolution of this matter cannot be further delayed.

Background to the Appeal

[13] The accused's conviction for first degree murder was based on section 231(5) of the *Criminal Code*: committing the offence of forcible confinement when death was caused.

[14] The trial judge aptly described the accused as the "curator of a house

of horrors." The accused was a drug dealer living in a polygamous relationship with five women, including the victim, at a residence in Winnipeg. The accused exerted control over his "family" by violence, psychological manipulation and a regular supply of drugs, such as methamphetamine.

[15] In August of 2016, the victim died. At the trial, it was agreed that the victim's death was by an unlawful act. Her body was temporarily stored in a Rubbermaid container and then eventually placed in a barrel. A liquid cremation ensued; chemicals were added to the barrel to dissolve her body. On December 1, 2016, the barrel with its grisly contents was discovered by police in the yard of the accused's residence. The advanced state of decomposition ruled out a precise cause of the victim's death. According to the autopsy, the victim had a broken wrist, fractured ribs and a head injury; when these injuries occurred could not be determined due to decomposition.

[16] The case for the Crown centered on the evidence of the four other women who lived with the accused. They provided direct evidence against the accused that, in August of 2016, in the basement of the residence, he had engaged in a prolonged and sadistic assault of the victim over several days using weapons such as a machete heated by a blow torch, a hammer, a taser and electrical cords.

[17] According to the women's evidence, the motive for the assault of the victim was her perceived infidelity. During the assault, the accused attempted to mask the victim's screams with loud music. One of the women testified that, prior to her death, the victim managed to get out of the residence temporarily. The victim told that witness that she didn't "want to go back in"

to the residence because the accused was "going to kill [her]." The four women also testified to the accused orchestrating the cover up of the victim's death by the destruction of her body and a fake story that she had gone to Jamaica. Ultimately, one of the women came up with the idea of the liquid cremation. The accused instructed that the plan be carried out. Two of the four women were charged as accessories after the fact.

[18] During the course of each of the four women's evidence, they detailed the domestic violence the accused had inflicted on each of them, which included bondage, whipping, beating, burning and constant rape. These witnesses all spoke to the environment in the residence where their movements were controlled by the accused with the assistance of a video surveillance system which he operated. The Crown alleged and proved to the jury's satisfaction that the victim and the other women were confined to a psychological prison.

[19] The accused advanced a third-party-suspect defence. Counsel for the accused suggested to one of the women in the residence during her evidence that she had killed the victim during an assault due to jealousy. The witness denied the allegation. His counsel also challenged the evidence of the four women on the basis of various frailties, including collusion.

[20] The accused did not testify.

Discussion

[21] The first ground of appeal is the trial judge's decision to admit similar fact evidence as to the appellant's control over the women living in the residence, as well as other acts of domestic violence, to establish *modus*

operandi, *animus*, motive, intent and narrative, as well as to rebut the third-party-suspect defence.

[22] Absent an error in principle, a trial judge's decision to admit similar fact evidence is owed substantial deference (see *R v Handy*, 2002 SCC 56 at para 153; and *R v Shearing*, 2002 SCC 58 at para 73). The history and unique nature of the polygamous relationship of the accused and the five women was peculiar and important contextual evidence for the jury. We see no basis to interfere with the trial judge's decision. In accordance with *Handy*, he provided the jury with appropriate limiting instructions as to what use they could make of the similar fact evidence.

[23] The accused also challenged the trial judge's decision to admit DNA evidence of the victim found on the basement wall. While the accused conceded the evidence was relevant, he said the probative value of the evidence was outweighed by the prejudicial effect of admitting it.

[24] The trial judge found the DNA evidence "very probative" to triable issues, such as the victim being beaten in the basement. The trial judge was well aware of the "cost benefit analysis" to be conducted in weighing the probative value of the evidence against the prejudicial effect of admitting it (*R v Hall*, 2018 MBCA 122 at para 125). There is no basis for us to interfere with his exercise of discretion.

[25] Next, the accused challenged the adequacy of the charge to the jury as to how the trial judge instructed it on the facts and on the issues of unlawful confinement and the after-the-fact conduct, as well as the overall fairness and balance of the charge.

[26] Taking a functional approach to the jury charge as a whole, we are satisfied that the trial judge fairly and properly instructed the jury on the facts, the law, and the competing theories of the Crown and the defence. The jury charge as to unlawful confinement and after-the-fact conduct was in accordance with the directions of the Supreme Court of Canada (see *R v Magoon*, 2018 SCC 14 at para 64; and *R v Calnen*, 2019 SCC 6 at paras 106, 115, 117).

[27] It is important to remember that unlawful confinement can be established by "fear, intimidation and psychological and other means" (*R v Kematch (SD) et al*, 2010 MBCA 18 at para 89). The evidence before the jury supported the inference of the accused creating a coercive environment where he confined the five women by a combination of violence, intimidation and drug use.

[28] Given the lengthy and horrific nature of the accused's assault of the victim, and that he did not testify as to his state of mind, we think it was more than fair for the trial judge to leave with the jury the possible verdict of manslaughter as an alternative to the third-party-suspect defence. Another trial judge may not have done so in these circumstances. The accused's complaint about the trial judge not going further in his charge to support a defence of manslaughter is not persuasive.

[29] Finally, the accused said he received ineffective assistance of counsel at trial. He made this submission solely on the basis of an autopsy of the trial transcript, arguing his trial counsel, a well-known criminal lawyer with significant experience, should have pursued a different strategy on various parts of the case. He raised concerns as to how his trial counsel cross-

examined Drs. Holland and Rivera on the cause of death of the victim and the four women he lived with in relation to the third-party-suspect defence. He critiqued his trial counsel for suggesting to the jury that the accused may have killed the victim due to an accident but conceding there was insufficient evidence of intoxication. He also said his trial counsel did not forcefully enough advance the alternative defence of manslaughter despite him not testifying. Lastly, he said that, once the trial judge admitted the similar fact evidence, his trial counsel should have used it to discredit the female witnesses based on myths and stereotypes. He said that his trial counsel should have argued that the sexual promiscuity of the four women and their propensity to engage in a litany of immoral activity made them unbelievable on the murder charge against him. There is no merit to any of these submissions.

[30] We have no evidence of trial counsel's rationale for conducting the defence as he did. The accused chose not to answer the allegations by not giving evidence. The transcript makes clear that he made the decision to not testify after being given advice and ample time to weigh his options.

[31] The accused received a robust defence as his trial counsel made every effort to challenge the Crown's case as far as ethically possible and, in particular, the credibility of the four women who lived in the residence. This is not one of those rare cases where ineffective assistance of counsel is apparent from the trial transcript alone (see *R v Ramos*, 2020 MBCA 111 at paras 126, 134, aff'd 2021 SCC 15). A conviction for first degree murder was inevitable here if the jury accepted the evidence of the four women, which they were entitled to do.

Disposition

[32] In the result, the appeal is dismissed.

Mainella JA

Steel JA

Pfuetzner JA