Citation: R v Kinnavanthong, 2022 MBCA 49
Date: 20220519
Docket: AR21-30-09647

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice William J. Burnett
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***R. I. Histed***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***D. C. Sahulka*** *and*
	)	***A. Y. Kotler***
- and -	)	*for the Respondent*
	)	
CAMERON BOUNTHIENG KINNAVANTHONG	)	*Appeal heard and Decision pronounced:*
	)	***May 4, 2022***
(Accused) Appellant	)	
	)	*Written reasons:*
	)	***May 19, 2022***

NOTICE OF RESTRICTION ON PUBLICATION: An order prohibiting disclosure of a witness's identity has been made in this proceeding pursuant to section 486.31(1) of the *Criminal Code* and shall continue.

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

BURNETT JA (for the Court):

[1] The accused appeals his convictions after trial by jury for the offences of manslaughter, aggravated assault and discharge of a firearm with intent to wound. He also appeals his designation as a dangerous offender and the imposition of an indeterminate sentence.

[2] After hearing the appeal, we dismissed both the conviction appeal and the sentence appeal with reasons to follow. These are those reasons.

Background

[3] The accused was part of a group of males involved in the collection of a drug debt. He, along with four others, attended a residence and beat the deceased and another victim (R.T.). According to R.T., one of the other men sprayed bear mace. In his statement to the police, R.T. said that the same individual yelled, "Shoot them in the leg." The accused was armed with a firearm, and he shot both the deceased and R.T.

[4] When arrested by police, the accused initially denied being at the residence. He subsequently admitted that he was there to collect a debt, and he said that he was just along for the ride and that his intention was to just stand there, but then everybody started panicking, knives were swinging and the gun "just went off". He said that he only started shooting because he panicked after he walked into a cloud of mace. He insisted that his intentions were not to kill the deceased and that he pointed the gun downwards so that he would not kill anyone. When asked if he meant to squeeze the trigger, he responded, "Yeah, I pulled the trigger."

[5] A search warrant executed at the accused's residence resulted in the seizure of the gun used in the shootings.

[6] The accused did not testify at his trial, nor did he call evidence.

[7] The trial judge refused his request to put the defence of self-defence (based on his statement) to the jury, finding that it did not have an air of reality.

[8] In his closing submissions, defence counsel argued that the accused's actions were accidental. That submission was not raised by counsel during the pre-charge conferences, nor was it raised when he put his theory of the defence to the Court. The Crown asked the trial judge to address the issue in his instructions to the jury. The trial judge found that there was no air of reality to the defence of accident and instructed the jury accordingly.

[9] The jury convicted the accused.

[10] Significant evidence was called at the dangerous offender hearing, including two forensic psychologists who diagnosed the accused with various ailments, including anti-social personality disorder. As well, the accused had a lengthy criminal record, including many offences involving violence and weapons.

Issues and Standards of Review

[11] The accused raises four grounds of appeal. In particular, he submits that the trial judge erred:

1) in finding that there was no air of reality to the defence of self-defence;

2) by instructing the jury to disregard his submission that the shooting was unintentional and that the defence of accident was not available to him;

3) by hearing a dangerous offender application without the accused being physically present, against the wishes of the accused; and

4) by imposing an indeterminate sentence which was demonstrably unfit, reflecting a failure to consider that the presumption in section 753(1.1) of the *Criminal Code* (the *Code*) did not apply to the accused, and in finding that there was no reasonable expectation that a sentence other than indeterminate detention would adequately protect the public.

[12] The parties agree, as do we, that the first three grounds involve a question of law and that the standard of review is correctness. The standard of review for the fourth ground was described by this Court in *R v Sanderson*, 2018 MBCA 63 (at para 8):

> The standard of review in an appeal of a dangerous offender designation is more robust than that in ordinary sentence appeals, but nonetheless, the appellate court must give some deference to the findings of the sentencing judge. The question to be asked by the appellate court is whether the decision of the sentencing judge was reasonable (see *R v Osborne (CG)*, 2014 MBCA 73 at para 51, citing *R v Atatise (BF)*, 2012 MBCA 117 at para 8; and more recently, *R v Laporte (PLR)*, 2016 MBCA 36 at para 188).

Analysis

[13] We begin our analysis by addressing the two grounds raised by the accused in relation to the conviction appeal.

[14] With respect to the issue of self-defence, the accused submits that the Crown conceded that the first two elements of that defence (as set out in section 34(1) of the *Code*) had been established and that there was a reasonable basis for the jury to find that his response was reasonable in the circumstances (i.e., the third element of the defence).

[15] According to the accused, "the discharge of the firearm was a panicked reaction to being sprayed in sight of swinging knives . . . in a dangerous, chaotic and unpredictable environment." The circumstances did not afford time for detached reflection. In these circumstances, the accused says that there was ample evidence that could leave a jury in reasonable doubt as to whether he reacted in self-defence.

[16] The accused submits that weighing the circumstances of a fight is a task reserved to the jury (see *R v Mustard (G)*, 2016 MBCA 40 at para 34) and that by substantively weighing the evidence and making findings of fact as to the circumstances of the fight, the trial judge erred in law (see *R v Brar*, 2009 BCCA 585 at para 42). The accused argues that, once it was shown that there was an air of reality to his reasonable belief that force or a threat of force was being used against him or another person (see section 34(1)(a) of the *Code*), and that he held a subjective belief his actions were for the purpose of defending or protecting himself or another person (see section 34(1)(b)), it was for the jury to decide if his response was reasonable (see section 34(1)(c)).

[17] In his reasons, the trial judge referred to the Supreme Court of Canada's decision in *R v Cinous*, 2002 SCC 29, where the Court confirmed that the "long-standing requirement is that the <u>whole defence</u> must have an air of reality, not just bits and pieces of the defence" (at para 97).

[18] The question is thus "not whether there is some evidence, but whether there is <u>some evidence reasonably capable of supporting an acquittal</u>" (at para 74). Here, there was no evidence of any resistance by either R.T. or the deceased, and there was no evidence that the machete was directed anywhere near the accused. Neither R.T. nor the deceased were armed nor

threatening the accused. The accused admitted to police that he did not know who sprayed the bear mace, or why, or whether it was even aimed at him.

[19] In our view, the trial judge correctly concluded that, based on the whole of the evidence, there was no air of reality to the defence of self-defence. There was no likelihood that a jury would reasonably conclude that the presence of bear spray justified the immediate and repeated discharge of a handgun just in case there was a threat.

[20] With respect to the defence of accident, the accused says:

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> . . . [S]queezing or clenching is a natural response to being struck in the face at close range with bear repellant. Not only does this negative the intention to kill, it negatives the voluntary nature of the act of firing the gun and breaks the chain of causation. . . .
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> . . .

[21] In response, the Crown points out that both R.T. and the deceased were being beaten, neither had a weapon, there was no evidence that either posed any threat to the accused, and in his statement to police, the accused admitted that he "pulled the trigger" and that he intentionally pointed the gun downwards so he would not kill anyone. Moreover, a firearms expert testified, without contradiction, that firing the weapon required a series of preliminary steps and that it would have been necessary to release the trigger between shots and then pull it again.

[22] In his reasons for ruling that there was "no air of reality to the defence of accident on the facts of this case" (at para 14), the trial judge said (at paras 5, 11):

> . . . In my view, pulling the trigger of a gun is a voluntary act. This is particularly so here because he said the gun was fired twice. The evidence of [the accused] was that not only did he fire the gun twice, but he aimed downward so as not to kill. In these circumstances, even if [the accused's] statement is believed, there is no air of reality that what transpired here was an unintentional act. Also, the evidence of the other witnesses at trial do not provide any evidence to support that the shooting was an accident.
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> . . . Here, there is nothing in the record supporting any inference that the risk of bodily harm which is neither trivial nor transitory was a chance occurrence. There is no air of reality to the defence of accident on these facts. Shooting a gun twice in close quarters in a room with a number of individuals and at the lower body of an individual is an intended consequence. Non-trivial bodily harm is entirely foreseeable on the facts in the evidence.

[23] Once again, in our view, on the basis of the whole of the evidence, the trial judge correctly concluded that there was no air of reality to the defence of accident.

[24] We now turn to the sentence appeal.

[25] Shortly before the sentencing hearing, counsel for the accused advised the trial judge: "I had originally sought and obtained [the accused's] instructions for him to appear by video, and last night when I was, of course, doing my due diligence to make sure that was even possible, it transpires that it is not" (emphasis added).

[26] The sentencing hearing had been previously adjourned and, as noted by the Crown in its written submission:

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> . . . [In January 2021], the Chief Public Health Officer had moved Winnipeg to the Critical ("Red") level in terms of COVID-19

> response and the province was under severe restrictions. All levels of court had restricted hearings and public access to the courthouse was limited. It was medically unsafe to transport the [accused] and there was no guarantee that things would have improved by a future hearing date. Moreover, the credibility of witnesses was not at issue – indeed, most of their evidence had been provided in advance *via* reports and institutional information. The [accused's] ability to see and hear was regularly confirmed throughout the hearing. . . .
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> . . .

[27] The accused submits that section 650(1) of the *Code* mandated his physical attendance and that none of the exceptions in that section applied to this trial. He argues that, while sections 650(2)(b) and 758(2)(b) give the Court the power to "permit" the accused to be out of court during the whole or any part of the trial, he did not waive his right to be present in court and, in fact, insisted on it. In such circumstances, proceeding without him was not a grant of "permission".

[28] The accused says that the provisions in the *Code* are clear, and regardless of his willingness to appear by video, the sentencing hearing could not proceed without his actual, physical presence at the hearing.

[29] We disagree.

[30] Section 758(2)(b) provides that a court may "permit the offender to be out of court during the whole or any part of the hearing on such conditions as the court considers proper", and section 715.23(1) provides:

> **Appearance by audioconference or videoconference**
> **715.23(1)** Except as otherwise provided in this Act, the court may order an accused to appear by audioconference or

> videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including
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> **(a)** the location and personal circumstances of the accused;
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> **(b)** the costs that would be incurred if the accused were to appear personally;
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> **(c)** the suitability of the location from where the accused will appear;
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> **(d)** the accused's right to a fair and public hearing; and
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> **(e)** the nature and seriousness of the offence.

[31] In our view, given the history of the proceedings and the circumstances that prevailed in January 2021, the trial judge properly exercised his discretion when he ordered that the accused appear by videoconference at the sentencing hearing.

[32] Finally, having carefully considered counsel's submissions and having conducted a robust examination, it is our view that the trial judge's decisions to designate the accused as a dangerous offender and to impose an indefinite term of incarceration are reasonable and amply supported by the record.

[33] Both forensic psychologists agreed that the accused suffered from an anti-social disorder. Moreover, the accused's pattern of behaviour was a significant indicator of future risk. There was a long-standing pattern of aggressive behaviour. The accused's record of over 40 convictions from the ages of 12 to 32 demonstrated a largely unbroken pattern of criminal activity and violence. His corrections file included assaults on other inmates, 21 incidents involved threats or abusive language and over 40 incidents

involved non-compliant behaviour. A number of risk assessment tools were completed; all confirmed that he presented a high risk of violent recidivism.

[34] The trial judge carefully considered each of the requirements in section 753 of the *Code*, and he carefully weighed the evidence and provided adequate reasons to support his conclusions.

[35] For these reasons, the conviction appeal and the sentence appeal were dismissed.

Burnett JA

Steel JA

Simonsen JA