Citation: R v Moar, 2022 MBCA 36
Date: 20220425
Docket: AR21-30-09581

# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Holly C. Beard
Mr. Justice Marc M. Monnin
Madam Justice Lori T. Spivak

***B E T W E E N :***

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| ***HER MAJESTY THE QUEEN*** | ) | ***E. J. Roitenberg*** *and* |
| | ) | ***L. C. Robinson*** |
| | ) | *for the Appellant* |
| *Respondent* | ) | |
| | ) | ***A. Y. Kotler*** |
| *- and -* | ) | *for the Respondent* |
| | ) | |
| ***KANE ASHLEY ANTONIO MOAR*** | ) | *Appeal heard:* |
| | ) | ***January 24, 2022*** |
| *(Accused) Appellant* | ) | |
| | ) | *Judgment delivered:* |
| | ) | ***April 25, 2022*** |

**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.**

On appeal from 2021 MBQB 28

## BEARD JA

### I. THE ISSUES

[1] The accused was convicted by a jury of second degree murder pursuant to section 229(a) of the *Criminal Code* and sentenced to life in prison (see section 235(1)) with no eligibility for parole for 15 years (see

section 745.4). He is appealing both his conviction and the period of parole ineligibility.

[2] The accused is appealing his conviction on the grounds that the trial judge erred in instructing the jury on intention and intoxication. He has applied for leave to appeal his sentence on the grounds that the trial judge failed to give appropriate weight to his circumstances, to section 718.2(e) of the *Criminal Code* and to the principles in *R v Gladue*, [1999] 1 SCR 688 when determining the period of parole ineligibility.

## II. BACKGROUND

[3] The deceased was a foster parent at a group home for youth in care. One of the youths living at the home was C.H., who was dating the accused's sister, T.M.

[4] On December 17, 2018, the deceased answered a knock on the door of the group home and was confronted by a male. He refused to permit the male to enter the home, whereupon the male stabbed the deceased three times. The entire incident took 12 seconds. One of the stabs entered the deceased's chest, cutting into his heart, two major blood vessels and his lung. Death followed quickly.

[5] At trial, the accused denied that he was the assailant, pointing the finger at C.H. The primary issue for the jury to determine was that of identification. The accused also argued that the Crown had failed to prove the necessary intent for second degree murder, given the evidence of his intoxication on that day.

[6] The jury convicted the accused of second degree murder. He is not challenging the finding that he was the assailant, but he does challenge the finding that he had the necessary intention for murder, arguing on appeal that he should have been convicted of manslaughter due to his level of intoxication. He also argues that his parole ineligibility should be lowered to 10 years.

## III. THE CONVICTION APPEAL

[7] The grounds of appeal regarding the conviction allege errors in the jury instructions regarding intention and intoxication. The principles governing appellate review of jury instructions were explained in detail in *R v Herntier*, 2020 MBCA 95 at paras 278-82.

[8] In summary, trial judges have flexibility in drafting jury instructions, and alleged errors are to be examined in the context of the entire jury charge and the trial as a whole. As a result, appellate review includes a consideration of the evidence, the live issues, the positions of the parties and counsels' submissions, both at trial and in response to the jury instructions. While jury instructions are required to adequately prepare the jury for deliberation, the standard is not one of perfection, because appellate review is meant to ensure that juries are properly, not perfectly, instructed. Jury instructions are not inadequate because more could have been said, or because what was said could have been better phrased.

[9] As noted, the participation of counsel in preparing the instructions and the failure to object are factors for consideration. This was explained by Fish J, for the Court on this issue, in *R v Khela*, 2009 SCC 4 (at para 49):

> While the obligation to ensure that juries are properly instructed clearly falls to the trial judge, counsel should not abdicate their duty of assisting the court. As Bastarache J. recently explained in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523:
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> > . . . it is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. (para. 58)
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> . . .

(See also *R v Stubbs*, 2013 ONCA 514 at para 138; *R v Minor*, 2013 ONCA 557 at paras 89-91; *R v Calnen*, 2019 SCC 6 at paras 38-40; *R v Green*, 2019 MBCA 53 at para 32; *R v Barton*, 2019 SCC 33 at para 49; and *R v Roulette*, 2020 MBCA 125 at para 17.)

[10] The failure to raise an issue regarding a jury instruction can be particularly significant where trial counsel had a full copy of the written jury instructions prior to making its closing, had ample opportunity to vet them and participated in the preparation of the jury charge. (See *R v Polimac*, 2010 ONCA 346 at para 96; and *R v Gardner*, 2021 ONCA 539 at para 48.)

[11] In this case, both counsel had several opportunities to provide input into the preparation of the jury instructions, starting before they made their closing submissions to the jury. The trial transcript shows that defence counsel made a number of very helpful suggestions as to the content of the instructions, most of which were accepted by the trial judge. Further, both counsel were appropriately responsive and helpful in addressing the trial judge's requests for input. After commenting on the second draft of the

instructions, both counsel were asked, "[Are] there any areas that you feel that I should recount more evidence" and both said "no".

*(i) intention*

[12] The accused's position is that, overall, the instruction regarding intention for second degree murder under section 229(a) of the *Criminal Code* was convoluted and difficult to follow, including containing a misstatement of the requirements in section 229(a)(ii), with the result that it failed to provide sufficient clarity so that the jurors would know what the Crown had to prove.

[13] I will first address the misstatement. The trial judge read his instruction to the jury and then provided the jurors with a written copy. The accused acknowledges that the trial judge's initial statement of the law regarding intent under section 229(a)(ii) in the jury instructions was correct, both in the oral and written instructions. That instruction is:

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> . . . Crown counsel must prove beyond a reasonable doubt that [the accused] either meant to kill [the deceased] or meant to cause bodily harm that [the accused] knew was likely to cause death to [the deceased] **and** was reckless whether [the deceased] died or not.
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> . . .
>
> [emphasis added]

[14] However, a short time later, the trial judge misspoke when repeating this instruction while reading it to the jury, stating:

> . . .

> . . . that is [the accused] did not mean to cause the death of [the deceased] or did not mean to cause him bodily harm that he knew was likely to cause his death **or** was reckless whether death followed . . .
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> . . .
>
> [emphasis added]

[15] A review of the jurisprudence shows that errors in jury instructions regarding the element of intention in section 229(a)(ii) are not uncommon (see *R v Moo*, 2009 ONCA 645 at paras 49-56). Watt JA, for the Court, stated that "[o]f importance in considering the effect of the misdirection were prior and subsequent correct recitations of the statutory language and trial counsel's failure to object to the instructions" (at para 53).

[16] The trial judge in *R v Van Every*, 2016 ONCA 87, made the same error of substituting "or" for "and" when explaining the intent for murder, but, in that case, he repeated the error on eight occasions (see para 46). van Rensburg JA, for the Court, quoting from *Moo* at para 66, stated that the effect of the error is determined on the basis that "[t]here is an essential step between legal error and appellate reversal – was there a substantial wrong or miscarriage of justice caused by *this* error, on *this* evidence, in *this* trial?" (at para 51). After considering the error in the context of the case, the Courts in both *Moo* (see para 69) and *Van Every* (see para 71) dismissed this ground of appeal.

[17] In the case at bar, the correct instruction is set out three times in the written jury instructions and the trial judge read it correctly on two of those three occasions. In addition, the Crown correctly referenced the intent under

section 229(a)(ii) on five occasions in its closing submissions. Further, the fact that this slip was not significant is underlined by the fact that, following the reading of the instructions, the trial judge asked counsel if they had any comments. Defence counsel raised two issues, neither of which addressed this misreading.

[18] If the jury had, unlike the four lawyers present at the trial, noticed the error, one would expect that the inconsistency would have resulted in a question for clarification. There was no such question.

[19] Further, the use of "or" in the jury charge creates three different intents, rather than two that appear in section 229(a)(ii). Three intents is not consistent with the wording of the rest of the jury instruction, which uses the words "both", "either" and "neither" when referring to the states of mind for murder—words that refer to two, not three, states of mind. (See *Van Every* at para 53.)

[20] Finally, the trial judge did not charge on recklessness as a third route to intent, and neither of the lawyers, in their closing submissions, argued that the killing in this case could have been the result of recklessness. Thus, recklessness as a third route to intent for murder was not reasonably at play.

[21] This error was clearly a slip of the tongue on the part of the trial judge. As Scott CJM stated in *R v Jack*, 1993 CarswellMan 266 (CA), "slips of the tongue on either a Crown or conviction appeal do not usually form the basis for a successful appeal" (at para 20). Successful appeals in similar cases usually occur either because there are other errors, as well, or the error occurred in an answer to a jury question.

[22] I am of the view that this error was not significant and, when considered in the context of the Crown's submissions and the entire jury charge, would not have confused or misled the jury regarding the correct instruction for intent.

[23] The accused also argues that the instruction was confusing because the trial judge first set out the full instruction for intention and then referred to it in various short terms, often using alternative descriptions like "knew or foresaw" and "meant or intended".

[24] The trial judge followed the model jury instruction for intent under section 229(a) of the *Code* in David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed (Toronto: Carswell, 2015) (Watt's jury instructions). In *R v Banwait*, 2010 ONCA 869, MacPherson JA, in dissent, but not on this point, explained that "[t]hese instructions are the product of the lengthy and focussed collaboration of many of the very best criminal law judges, lawyers and academics in Canada" (at para 173). Watt explained that the model jury instructions have been drafted to explain legal principles in language that the average juror can understand. (See David Watt, *Helping Jurors Understand* (Toronto: Thomson & Carswell, 2007) at section 53.)

[25] That said, it is clear that, while model jury instructions are of great assistance in the preparation of jury instructions, they are to be used as an aid that is modified to fit the case. This means, for example, that those elements of an offence that are set out in a model jury instruction should not be left with a jury if they are not at issue in the trial because that unnecessarily lengthens the instructions. (See, for example, *R v Rowe*, 2011 ONCA 753 at paras 61-62; and *R v Potter*, 2021 NLCA 11 at para 17.)

[26] In my view, when the jury instruction for intent to commit murder that was used in this case is read together with the entire jury charge and in the context of counsels' submissions, the instruction on intent under section 229(a) was neither convoluted nor difficult to follow, and the trial judge's misstatement, when considered in context, was also neither confusing nor significant. Further, I would not accept the accused's argument that the cumulative effect of the misstatement and the confusing wording, taken together, resulted in an inadequate jury instruction that failed to adequately prepare the jury for its deliberations on intent.

*(ii) intoxication*

[27] The accused argued at trial that there was evidence of intoxication that should raise a reasonable doubt that he had the required intent for second degree murder. He argues on appeal that this jury instruction was deficient because (1) it failed to tell the jury that it "**must**" consider the evidence of intoxication; (2) it did not relate the evidence of intoxication to the accused's state of mind; (3) it did not adequately explain intoxication in relation to the common sense inference of a sane and sober person; and (4) it did not adequately set out the details of the evidence of intoxication.

[28] In support of the first argument, the accused relies on the model jury instructions published by the Canadian Judicial Council's (CJC) National Committee on Jury Instructions, which include the following instruction: "You [the jurors] **must** consider this evidence [of alcohol/drug consumption] when you determine whether the [accused] had the intent required for [the offence]" (CJC: National Committee on Jury Instructions, "Model Jury Instructions", online: *National Judicial Institute* <www.nji- inm.ca/index.cf

m/publications/model-jury-instructions> at instruction E.4(2) (date accessed 23 March 2022).

[29] While the trial judge did not say that the jurors "**must**" consider the evidence of intoxication in determining intention, he did say, more than once, that they "**should**" consider that evidence. This alternative wording is found in two other sets of model jury instructions. In my view, these three sets of instructions are of equal authority and, in this context, the same meaning is conveyed by "must" and "should". (See Watt's jury instructions, p 1195 at paras 5-6; and Prof Gerry A Ferguson & The Hon Mr Justice Michael R Dambrot, *Canadian Criminal Jury Instructions*, 4th ed (Vancouver: Continuing Legal Education Society of British Columbia, 2005) vol 2 (loose-leaf updated 2019), section 8.36.11 at para 15.)

[30] The second argument is that the trial judge failed to relate evidence of intoxication to the accused's state of mind. In fact, the trial judge makes that connection several times. His charge includes the following:

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> . . . However, sometimes intoxication may negate the intent to commit murder and the Crown must satisfy you beyond a reasonable doubt that [the accused] had the state of mind the law requires for second-degree murder.
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> . . .
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> . . . To decide whether Crown counsel has proven beyond a reasonable doubt that [the accused] had one of the intents required to make the unlawful killing murder, you should take into account the evidence about his consumption of alcohol and/or drugs, along with the rest of the evidence that throws light on his state of mind at the time the offence was allegedly committed.

> . . .
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> . . . All [of] these things and the circumstances in which they happened, including any evidence about how much alcohol and/or drugs [the accused] consumed when and for how long, as well as its effect on his state of mind, including his knowledge of the consequences of his conduct, may shed light on [the accused's] state of mind at the time he allegedly committed the offence charged. . . .
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> . . .
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> If, after taking into account the evidence of [the accused's] consumption of alcohol and/or drugs, along with the rest of the evidence, you are not satisfied beyond a reasonable doubt that [the accused] had one of the intents required to make the unlawful killing murder, you must find [the accused] not guilty of second degree murder, but guilty of manslaughter.
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> . . .

[31] The trial judge also says, in reference to making a common sense inference about intent, that "[i]t is a conclusion that you may only draw, however, **after considering all the evidence, including evidence about [the accused's] consumption of alcohol and/or drugs**" (emphasis added). In these instructions, as well, he is clearly relating the evidence of intoxication to the accused's state of mind.

[32] In my view, the instructions adequately related the evidence of intoxication to the state of mind required for murder. They conveyed the message that alcohol and/or drug intoxication could lead to a reasonable doubt that the accused had the required state of mind for murder, that the Crown had to prove beyond a reasonable doubt that the accused had the required intent for murder and that that determination was to be made by the jury.

[33] The third argument, which the accused raised at the appeal hearing, is that the trial judge did not correctly explain intoxication in relation to the common sense inference of a sane and sober person. In support of his position, he referenced analysis by Bastarache J, for the majority, in *R v Daley*, 2007 SCC 53.

[34] After reviewing the cases and setting out the principles to which the accused refers, Bastarache J applied those principles to the facts of that case. He stated (at para 63):

> It is clear that [the trial judge] was following the *Canute* model [*R v Canute* (1993), 80 CCC (3d) 403 (BCCA)] charge, with the further addition of the modified instruction on the common sense inference suggested in *Seymour* [*R v Seymour*, [1996] 2 SCR 252]. More specifically, it appears he was closely following the specimen charge on intoxication set out in *Watt's Manual of Criminal Jury Instructions* (see Final 71, at pp. 827-28 [David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Carswell, 2005)]), which incorporates all the recommendations from this Court's recent cases and even provides further direction on relating the evidence of intoxication to the issue. . . .
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> . . .

[35] Bastarache J then set out and analyzed the provisions that were contained in the jury charge. Finally, he concluded that, on a functional assessment, those instructions properly instructed the jury that intoxication might have impaired the accused's foresight of consequences sufficiently to raise a reasonable doubt that he had the required intent and that, intoxication having been raised, the Crown had the onus to prove beyond a reasonable doubt that the accused had the required intent.

[36] The trial judge in this case used the same instructions for intent, the common sense inference and intoxication as was used in *Daley*. In my view, consistent with the finding in *Daley*, he did not err in so doing.

[37] The fourth argument is that the trial judge failed to review the details of the evidence that related to the accused's level of intoxication, being the testimony of C.M., the accused's sister, and the security video. I agree with the accused's counsel that it would have been better if the trial judge had provided more details of the evidence that related to intoxication. That said, as noted earlier, the standard of review is that of adequacy in the context of the case, not perfection.

[38] A leading decision on a trial judge's obligation to relate the evidence in a jury charge is that of Watt JA, for the Court, in *R v PJB*, 2012 ONCA 730. He explained the basic principle as follows (at para 44):

> . . . Except in rare cases, where it would be unnecessary to do so, a trial judge must review the substantial parts of the evidence and give the jury the position of the defence so that the jury appreciates the value and effect of that evidence: *Azoulay v. The Queen*, [1952] 2 S.C.R. 495, at pp. 497-498. Typically, trial judges review the evidence in the context of the various issues and indicate what parts of the evidence support the positions of the respective parties on those issues: *MacKinnon* [*R v MacKinnon* (1999), 132 CCC (3d) 545 (Ont CA)] at para. 29. . . .

[39] He noted, further, that "[t]he obligation to review the substantial parts of the evidence and to relate it to the issues raised by the parties is that of the trial judge, not counsel, whether prosecuting or defending" (at para 47).

[40] Watt JA went on to explain how appellate review would be carried out (at para 49):

> Jury charges do not take place in isolation, but in the context of the trial as a whole. Appellate review of the adequacy of jury charges must acknowledge this reality, especially where the complaint is about the extent to which the trial judge has reviewed the evidence in final instructions. Appellate review on this issue includes consideration of the complexity and volume of the evidence adduced at trial, the extent of its review by counsel in their closing addresses, the length of trial proceedings, the issues to be resolved by the jury, the effect of a more complete and balanced review of the evidence, and whether counsel objected to the charge on the ground advanced on appeal. . . .

[41] Finally, he stated that the test is one of fairness, and that a charge will be adequate if the evidence is put in a way that permits the jurors to fully understand the issues and the defences (see para 49).

[42] In the present case, the trial was not long; it lasted only four and one-half days, ending on a Friday. Counsel made their submissions on the following Tuesday and the trial judge instructed the jury two days later. Thus, the evidence was fresh in the jurors' minds.

[43] The evidence was not complex and there were only two issues—the identity of the perpetrator and intoxication. The evidence of intoxication came from only one witness and the security video of the perpetrator approaching and leaving the scene. That evidence, and, in particular, the details which the accused now argues should have been included in the jury charge, was reviewed in some detail by the Crown in closing submissions and, as well, by his counsel. (See, for example, *Regina v Dwyer* (1977), 35 CCC (2d) 400 at 406-7 (Ont CA); *R v Owen*, 2015 ONCA 462 at paras 35-36; and *R v Taillefer*, 2021 ONCA 172 at para 5.)

[44] At the first case conference to discuss the initial draft of the jury instructions, defence counsel raised the issue of adding a specific reference to C.M.'s evidence regarding the accused's state of sobriety. The trial judge agreed to do so and followed defence counsel's suggestion as to what should be added and where it should go in the instruction.

[45] Those changes were included in the second draft of the jury instructions, which were reviewed with counsel on two further occasions. The trial judge specifically asked both counsel whether more should be said about the evidence, and both said no.

[46] I am of the view that, while the trial judge's review of the details of the evidence of intoxication was not ideal, it was adequate, in the circumstances of this case. The jury would have had no difficulty in determining what evidence it was to consider in deciding the issues related to intoxication and intent.

[47] When the instructions on intoxication and the common sense inference are considered in the context of the entire jury charge, the evidence at trial, the submissions of counsel and their input into the jury charge, the instructions were, in my view, adequate to permit the jurors to understand the issues and defences related to intoxication, and to prepare them for their deliberations.

[48] For these reasons, I would find that there was no error in the jury instructions on either intent to commit murder or intoxication, and I would dismiss the conviction appeal.

## IV. SENTENCE APPEAL

[49] The accused argues that the trial judge erred in his weighing of the factors that were applicable to his sentencing, in particular, his circumstances, the application of section 718.2(e) of the *Criminal Code* regarding Aboriginal offenders, and the principles in *Gladue*.

[50] The Supreme Court of Canada has given clear directions regarding appeals that allege errors in weighing sentencing factors. That Court has adopted the following quote from *R v McKnight* (1999), 135 CCC (3d) 41 (Ont CA) (at para 35):

> . . . To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.
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> [footnote omitted]

(See *R v Lacasse*, 2015 SCC 64 at para 49; and *R v Friesen*, 2020 SCC 9 at para 26.)

[51] The trial judge gave lengthy written reasons for the sentence that he imposed. There were a significant number of documents filed at the sentencing hearing regarding the accused's background, including a number of pre-sentence reports, *Gladue* reports and psychological assessments, all of

which were referred to in the reasons for sentence (see para 6). Those reasons demonstrate that the trial judge was very attuned to the accused's circumstances, to his very dysfunctional upbringing and to the applicable *Gladue* principles.

[52] The trial judge recognized that these circumstances had to be balanced with other circumstances related to the accused. This included his serious criminal record of violent offences with weapons, the finding that he was at a high risk to reoffend violently, the fact that he was unlawfully at large at the time of this offence and, regarding the offence, that this was a brutal attempt to gain access to a group home to get access to another person.

[53] The accused argues that the trial judge relied on a factual error in sentencing him, which had a material effect on the sentence. The trial judge stated that the accused was breaching a court-ordered prohibition when he armed himself with a weapon that he then used to gain entry to the group home. The Crown does not disagree with this. It states, however, that the accused was unlawfully at large and, as a paroled prisoner, the accused was required to abstain from further offences and that possession of a weapon for purposes dangerous to the public peace is an offence that would breach the conditions of his parole. In my view, the factual error was not material in all of the circumstances of this case.

[54] The accused is asking this Court to re-weigh the factors that were considered by the trial judge to come to a different conclusion as to the appropriate sentence. I am of the view that the trial judge did not exercise his discretion unreasonably in his weighing of these factors, and the sentence that he imposed was not unfit.

[55] While I agree that the period of parole ineligibility imposed in this case is on the high side, I am of the view that it was available to the trial judge on the facts of this case.

## V. DECISION

[56] For the reasons set out herein, I would dismiss the accused's appeal from conviction. While I would grant leave to appeal the sentence, I would dismiss that appeal.

Beard JA

I agree: Monnin JA

I agree: Spivak JA