Citation: R v Okemow, 2024 MBCA 25
Date: 20240318
Docket: AR20-30-09517

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner
Madam Justice Anne M. E. Turner

B E T W E E N:

	)	***Z. M. Jones***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Respondent	)	***M. E. Carlson***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
MICHAEL WILLIAM OKEMOW	)	***January 23, 2024***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***March 18, 2024***

On appeal from: *R v Okemow*, 2020 MBQB 32 [conviction decision];
R v Okemow, 2020 MBQB 128 [sentencing decision]

TURNER JA

[1] The accused was convicted of second degree murder, under s 235(1) of the *Criminal Code*, RSC 1985, c C-46 [*the Code*], after a trial by a judge sitting without a jury. He was sentenced to life in prison without the possibility of parole for fifteen years and ten months.

[2] The accused appeals his conviction, asserting that the verdict, which was based entirely on circumstantial evidence and evidence of after-the-fact conduct, was unreasonable because the trial judge failed to consider reasonable, alternate explanations to the circumstantial evidence. He also

seeks leave to appeal his sentence, and, if granted, appeals the period of parole ineligibility. He argues that the sentence imposed was crushing and unfit, and that the trial judge did not adequately consider the accused's extensive *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*]), his untreated schizophrenia, and the harsh conditions in which he was held prior to his trial.

Facts

[3] The deceased was last seen alive at approximately 6:30 a.m. on the morning of November 8, 2015. Her body was found the morning of November 9. At the trial, many witnesses testified to the deceased's whereabouts during the evening of November 7 and the morning of November 8.

[4] During the evening of November 7, the deceased attended a social at the God's Lake Narrows Community Hall, after which she went to Beverly's[1] residence. Sometime after 3:30 a.m., the deceased and her friend Tessa, with several other people, went to another friend's residence.

[5] On November 8, at 5:55 a.m., the deceased called her husband to tell him that she was going to start making her way home. At 6:00 a.m., the deceased, Tessa and three other friends walked to Wallace's house to ask him to give them a ride. He agreed. While he was getting ready to drive them, the deceased and Tessa got into an argument, and the deceased stormed off, walking down the main road.

[6] When Wallace drove past the deceased, the people in the car tried to convince her to get in. She refused.

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[1] For clarity, I will refer to the witnesses by their first names, as the trial judge did in his decision. No disrespect is intended.

[7] After Wallace dropped off his passengers at Tessa's residence around 6:15 a.m., he drove to pick up Mitchell Okemow. Mitchell wanted to go to Tessa's to pick up a bottle of alcohol. On the way back to Tessa's, Wallace saw the deceased while she was still walking down the road, close to Tessa's house. Wallace again offered the deceased a ride, but she refused.

[8] When Wallace and Mitchell arrived at Tessa's, Wallace went inside and Mitchell stayed in the vehicle. Wallace heard a truck driving down the road, heard it stop for a few seconds, reverse, and then screech away. Mitchell saw a grey-green SUV at a stop sign, which he initially described as belonging to the accused's father, but later said he was not sure. He saw the grey-green SUV backup and then drive away.

[9] Meanwhile, at approximately 6:00 a.m., Tina Trout and her husband awoke to sounds of screaming and crying outside their residence, in the Nazzie's Point area of God's Lake Narrows. When Tina looked out the window, she saw the accused and Candice Trout fighting outside of the house across the street. She saw the accused get into his father's grey-green SUV (the SUV) and drive towards a group of people who had gone outside to help Candice. He hit one person, backed up, then drove forward again, hitting two people. He continued driving and stopped near the steps of Tina's house. Tina testified that she went outside and was five feet away from the accused when she saw him near her steps. She did not see anyone else in the vehicle with him. He drove off through some neighbouring yards, over a bridge and headed towards the Island area of God's Lake Narrows.

[10] Tina sent her brother a Facebook message at 6:40 a.m. asking him to call the RCMP. He did so.

[11] After speaking to Tina, RCMP officers went to the accused's mother's house, looking for the accused regarding the incident that Tina had witnessed. The accused's mother said that the accused was not there. She said that when she had gone to bed at 11:00 p.m. on November 7, the accused was still home. When she woke up at around 1:00 a.m. on November 8, she saw that the SUV was gone and that the accused was no longer at the home.

[12] The RCMP found the SUV stuck in the muskeg on the winter road at 8:49 a.m. on November 8. There were no keys in the vehicle and the engine was cool to the touch. Officers observed footprints leaving the driver's side of the vehicle.

[13] The accused arrived at his mother's residence at around 4:00 p.m. on November 8. His clothes were wet from the waist down. After his mother told him that the police were looking for him, the accused showered, changed, and washed the clothes he had arrived in. His mother testified that she found that strange because the accused did not generally do laundry at her house. The accused put the washed clothes, that were still damp, in a box in a downstairs bedroom.

[14] At 6:00 p.m., RCMP officers returned to the accused's mother's residence and arrested the accused for hitting the individuals with the SUV near Tina's house. Some time later, his mother gave the officers the washed clothes. She tried to find the shoes the accused had been wearing when he arrived at her house, but she could not find them.

[15] The morning of November 9, the deceased's body was found by two boys who were checking traplines. Her body was found approximately ten feet from an ATV path near the winter road. She was covered with spruce

branches and moss. The boys also said that they had seen the SUV in the muskeg the previous day.

[16] The deceased was not wearing the hooded sweatshirt or shoes she had been wearing the previous evening and early morning. One shoe was found between her body and the SUV. The other shoe was found not far from where Wallace and Mitchell had last seen the deceased walking on the road and where Mitchell had seen the SUV stop on the road. Her sweatshirt was found on May 24, 2016, during a community-led search. It was found folded under the muskeg between where her body was found and where the SUV had been stuck.

[17] The RCMP searched the accused's mother's residence and located the shoes that he was wearing when he arrived at her home. They were in a box that appeared to have been hidden in the crawl space behind the water tank.

[18] The autopsy confirmed that the deceased died of blunt force trauma to the head, caused by a weapon of some kind. Among many other injuries, footwear impressions were found on both sides of her face. An expert provided the opinion that footwear with the same characteristics as the accused's shoes could have made the impressions on the deceased's face.

[19] Two vaginal swabs were also taken during the autopsy. One swab confirmed the presence of the accused's DNA inside the deceased's vagina.

[20] RCMP officers interviewed the accused on November 9 and 12, 2015. The accused denied knowing the deceased. He said that the incident that Tina had seen the morning of November 8 was actually the accused being carjacked. Two men hid in the back of the SUV, put a pillowcase over his

head, put a broken hockey stick to his neck, causing him to drive erratically, and shortly after knocked him unconscious. He woke up in a ditch and went home to wash his clothes. He confirmed that he did not report the carjacking to the police.

[21] The trial proceeded as a judge-alone trial in Thompson. The trial judge provided written reasons for convicting the accused of second degree murder, and he also travelled to God's Lake Narrows to read a portion of his judgment in the community which, he noted, had been significantly impacted by the deceased's murder (see conviction decision at paras 6-9).

[22] The trial judge did not believe the accused's story of being carjacked. He concluded that, on the totality of the evidence, the only reasonable inference was that the accused killed the deceased.

[23] Similarly, the trial judge provided written reasons for his sentencing decision, and he also attended the community for the sentencing hearing and to read aloud a portion of the sentencing decision (see sentencing decision at paras 2-5). He concluded that, based on all the aggravating and mitigating factors, a period of parole ineligibility of fifteen years and ten months was appropriate.

Analysis

The Conviction

[24] The accused argues that the guilty verdict was unreasonable. The test for an unreasonable verdict is whether it "is one that a properly instructed jury acting judicially, could reasonably have rendered" (*R v Biniaris*, 2000 SCC 15 at para 36).

[25] When a verdict is based on circumstantial evidence, "the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence" (*R v Villaroman*, 2016 SCC 33 at para 55 [*Villaroman*]).

[26] The trial judge clearly understood and considered that the Crown's case was circumstantial, and that, in order to secure a conviction, the Crown had to prove beyond a reasonable doubt that the only reasonable inference from the totality of the evidence was that the accused killed the deceased.

[27] The trial judge thoroughly reviewed the evidence. In both the content that he read to the community and his written decision, he provided clear reasons as to why he did not believe the accused's version of events as described in his statements to the RCMP. The trial judge also reminded himself: "Just because I do not believe [his] story to police, I cannot use that against him; unless I believe he made up a lie to police, so he would not be linked to [the deceased's] killing" (conviction decision at para 71). In his reasons, the trial judge reviewed the evidence that contradicted the accused's statement in more detail, as well as the independent evidence that he found demonstrated that the accused fabricated the version he told the RCMP in his statement (see conviction decision at paras 11-28).

[28] The trial judge articulated his conclusions. As read to the community and reflected in the conviction decision at para 72, the trial judge stated:

> As I consider what everyone told me at the trial, I am looking at everything all together. The time and places, the places people were last seen, [the accused] driving the SUV, and where it was

> found, where [the deceased] and her sweater and shoes were found and what the experts told me all fit only one answer. When I think about everything, I believe [the accused] killed [the deceased]. . . .

[29] Further, in the conviction decision, he wrote at para 28:

> I recognize counsel's argument about the inherent weaknesses in some points of evidence, and possible alternative inferences. However, as I will explain, here, the totality of the evidence and the individual components are too great, in number and significance, to allow for any other possibility or coincidence as reasonable rather than speculative. Clearly, there are gaps; however, there is nothing but speculation to suggest any alternate inference.

[30] The trial judge did not end there. He continued, in both his oral remarks and written reasons, to explain all of the factors that he considered from the evidence. He considered the frailties of any evidence as pointed out by the accused. He concluded that there was no other reasonable explanation for the circumstances set out in the evidence, other than the accused's guilt.

[31] The accused submits that the trial judge did not consider two reasonable alternate explanations: that the deceased accepted a ride with the accused in the SUV but got out at some point and was killed by an unknown person; or that the accused had sex with the deceased and assaulted her in the area of the winter road, but an unknown person delivered the blunt force trauma that killed her.

[32] The Crown argues that these alternate explanations are new issues being raised on appeal that were not explored in examinations at the trial and were not suggested to the trial judge in argument. The accused asserts that this is not a new issue being raised for the first time on appeal, as the trial

judge was required to consider any reasonable alternative explanations presented by the evidence or gaps in the evidence.

[33] Regardless of whether these are new issues being raised on appeal for the first time, when the trial judge's reasons are read as a whole, it is clear that he considered other reasonable alternative inferences inconsistent with guilt, including that someone other than the accused killed the deceased, and he dismissed them as pure speculation.

[34] On appeal, I must consider whether the inferences drawn were reasonably open to the trial judge. I am not persuaded that the trial judge erred. He understood the applicable legal test for determining guilt based on circumstantial evidence. He understood that he had to consider other available inferences inconsistent with guilt. When read as a whole, the trial judge's reasons demonstrate that he considered the defence theory and the frailties in the Crown's case. His reasons outline that, based on the evidence that he accepted, he concluded the only reasonable inference was that the accused killed the deceased. In my view, he made no reviewable error in coming to that conclusion and his conclusion, having regard to the standard of proof, is entitled to deference (see *Villaroman* at paras 67, 71).

[35] I would dismiss the conviction appeal.

The Sentence

[36] The accused submits that the period of parole ineligibility was demonstrably unfit.

[37] The standard of review for a sentence appeal is highly deferential (*R v Lacasse*, 2015 SCC 64 at para 41):

> . . .
> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*. . . .
> . . .
>
> [emphasis in original]

[38] In the sentencing decision, the trial judge considered all of the aggravating and mitigating factors. He considered the extensive *Gladue* factors throughout the accused's life, as well as his schizophrenia diagnosis and the extent of his treatment. In particular, he considered that the accused's schizophrenia diagnosis remained undiagnosed for many years because the accused also experienced chronic alcoholism and persistent substance abuse that destructively impacted every aspect of his personal and social life. The trial judge recognized that when the accused resided in God's Lake Narrows, he had difficulty accessing the necessary medication and counselling.

[39] The trial judge considered the accused's previous violent criminal record, which was relatively unbroken and included several convictions for assault.

[40] As required by s 718.04 of the *Code*, the trial judge appropriately considered that the deceased was a young, Indigenous woman who was in a vulnerable state at the time of her murder.

[41] He concluded that a parole ineligibility period of sixteen years was fit.

[42] Notably, it was the trial judge who invited counsel to address whether the "harsh jail setting" in which the accused was held during his trial should be a factor in sentencing (sentencing decision at para 54). The trial judge was very alive to the fact that the accused spent five to six nights in RCMP cells during his trial, because there was no remand facility in Thompson. He noted that the cells are not designed as remand cells. They are small, with a mattress on a concrete bench, no access to fresh air, no reading material, all meals eaten in the cell, and no privacy for using the toilet. He stated: "The cell is like solitary confinement. It is, as a local judge described, inhumane" (sentencing decision at para 53).

[43] In conclusion, the trial judge stated (sentencing decision at paras 55, 57):

> Here, given the severe nature of the remand facility in Thompson, and the time [the accused] spent in it, notably while suffering a major mental disorder, this is one of those rare cases where his sentence, reflected in parole ineligibility, should be reduced to signal the Court's repugnance for how he was held. . . .
>
> . . . Because of the awful way he was held in jail during the trial, I am reducing [parole ineligibility] by two months. . . .

[44] The trial judge turned his mind to all of the appropriate principles. I am of the view that there was no material error in his analysis, and I am not persuaded that the parole ineligibility period is demonstrably unfit. Therefore, while I would grant leave to appeal sentence, I would find that appellate intervention regarding the sentence would not be appropriate.

Conclusion

[45] In the result, I would dismiss the conviction appeal, grant leave to appeal sentence, and dismiss the sentence appeal.

Turner JA

I agree: Beard JA

I agree: Pfuetzner JA