Date: 19971105 Docket: CAC 115871

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Forrayi, 1997 NSCA 166

Freeman, Roscoe and Bateman, JJ.A.

BETWEEN:	)	
BRADLEY RODERICK FORRAYI	)	Appellant appeared in person
Appellant	)	
and -	)	
HER MAJESTY THE QUEEN	)	Dana W. Giovannetti for the Respondent
Respondent	)	
	)	Appeal Heard: September 22, 1997
	)	Judgment Delivered: November 5, 1997

THE COURT: The appeal is dismissed as per reasons for judgment of Roscoe, J.A.; Freeman and Bateman, JJ.A., concurring.

ROSCOE, J.A.:

The appellant was convicted of the first degree murder of Michael Cassidy following a twenty day trial in Supreme Court before Justice Tidman and a jury.

The body of Mr. Cassidy, aged 42, was found in his apartment by fire fighters responding to a fire alarm at approximately 12:30 a.m. on August 18, 1993. After the fire fighters removed the body from the building, it was discovered that Cassidy had been stabbed several times. It was later determined that he died from massive bleeding from eleven knife wounds, the most severe of which was to his neck. Medical evidence offered by the Crown pointed to the conclusion that Mr. Cassidy died before the fire started. Other expert evidence indicated that the fire was intentionally set, possibly with the aid of an accelerant.

The position of the Crown at the trial was that Forrayi acted alone when he broke into Cassidy's apartment late at night, stabbed him to death, then set the fire. The motive alleged was that Forrayi had, during the previous five weeks, stolen more than $12,000.00 from Cassidy's bank accounts by forging and negotiating a series of cheques and that removing Cassidy as a witness would benefit Forrayi.

The defence position presented to the jury acknowledged that Forrayi forged the cheques and stole the funds, but submitted that he was merely an observer when Cassidy was killed by Paul Talbot, an associate of Forrayi's. The suggested motive was

that Talbot was angry that Cassidy had stopped the flow from the source of money which had been used to buy drugs.

REVIEW OF THE EVIDENCE:

A. Crown Evidence

Carol Cassidy, the sister of the deceased Michael Cassidy, testified that she first met the appellant in May 1993 and agreed to rent him a room in her apartment. She offered to lend him a bed which was stored in the basement at her brother's house on Church Street in Halifax. The appellant met her at the house in early July to obtain the bed. Her brother was away at sea at the time. Michael Cassidy lived in a flat on the first floor and rented the upstairs to Paul and Jody Gentile. The appellant arrived at the house before her and was let into Michael Cassidy's apartment by Mr. Gentile.

The Crown led substantial evidence that at some point after being in the apartment to get the bed, the appellant stole a key to Michael Cassidy's apartment from Carol Cassidy and using that key entered the apartment and stole blank cheques. Several witnesses from the Canadian Imperial Bank of Commerce testified that the appellant presented himself to the bank with cheques payable to himself drawn on Michael Cassidy's bank account. Seventeen cheques totalling $12,699. payable to Brad Forrayi were cashed between July 13 and August 9, 1993. Evidence was also presented that the appellant arranged by telephone for a transfer of funds from another of Cassidy's accounts when his

chequing account became overdrawn.

Eventually the bank employees suspected that something was amiss and called Cassidy to discuss his bank account. Cassidy was still away at sea, so a message was left on his answering machine. When he returned from sea on August 13, 1993 Cassidy met with his bank manager. The manager testified that Cassidy confirmed that he had not written any of the cheques to Forrayi. The bank required an affidavit to that effect and the two of them attended at a nearby lawyer's office to have one prepared and sworn.

Elaine MacDonald, an assistant bank manager, testified that she met the appellant when she and her common law husband, Michael Ford attended at an after hours club in the South end of Halifax in July, 1993. Later, in mid-August, after she learned from her supervisor that Brad Forrayi was suspected of having written cheques on Cassidy's account, she gave this information to Michael Ford. Michael Ford testified that about one week before Cassidy's death, he advised the appellant that the police were investigating him for fraud in relation a bank account.

A key witness for the Crown was Paul Talbot, who testified that he was a welder and the owner and operator of an "illegal" after hours club in the South end of Halifax. He was an expert in karate, boxing and kick boxing. He lived in an apartment on Victoria Road, Halifax and since June, 1993 had been a friend of Brad Forrayi who, in August 1993, lived on Queen St., both addresses in the South end of the City.

Talbot testified that he spent a lot of time with the appellant in the summer of 1993, often “smoking dope” and drinking. He testified that he had never met Michael Cassidy, nor had he ever been to Mr. Cassidy’s apartment on Church Street. He indicated that on Monday, August 16 at approximately 8:00 p.m. the appellant visited him at his apartment and explained that a person who lived on Russell Street in the North end of Halifax owed him money, and that he intended to go see the person to collect the money. Talbot said that the appellant wanted to borrow dark clothing for this purpose and, in fact, borrowed a pair of black kick boxing pants and a blue vinyl jacket. Forrayi left Talbot’s apartment around 9:30 or 10:00 p.m. Talbot testified that the next time he saw Forrayi was 5:00 the following morning at which time he said that he had not been able to “get at the guy” on Russell Street because someone had been with him all night. The next time Talbot saw the appellant was at approximately 8:00 p.m. Tuesday, August 17. According to Talbot, Forrayi was quite agitated and annoyed and was ranting and raving about needing to get the money that was owed to him.

Forrayi left his apartment at approximately 8:30 or 9:00 p.m. The appellant returned to Talbot’s apartment at approximately 12:50 a.m., Wednesday, August 18. He had a kit bag with him and went to the bathroom and turned on the water in the bathtub. Forrayi told Talbot that he was rinsing blood off the blue vinyl jacket he had borrowed.

Forrayi explained to Talbot that the blood was from a fight with the man on Russell Street. The kit bag contained a radio and binoculars which Forrayi suggested they sell in order to buy drugs. The two of them borrowed a neighbour’s car and drove to

Spryfield to buy cocaine. They returned to Talbot's apartment. Forrayi left for awhile and returned at approximately 4:00 in the morning.

When they then went to Forrayi's apartment, they were arrested. When released from custody the next day Talbot returned to his apartment and gathered the jacket with the blood on it, plus the kick boxing pants and a pair of gloves, put them in a garbage bag and threw them down the garbage chute of his apartment, explaining that he did not want to get involved or "rat" on Forrayi.

Two Crown witnesses, Eleanor Fitzpatrick and Suzanne MacDonald, each testified that they saw the appellant standing in the driveway of Cassidy's residence at approximately 10:00 to 10:30 p.m. on Monday, August 16. As well, Paul and Jody Gentile, who rented the top flat in Cassidy's house testified that at approximately 10:30 to 11:00 p.m. on that Monday, they heard a commotion in front of their residence. Jody looked out and saw Cassidy speaking with Forrayi. She called the police because she had earlier been told by Cassidy about the problems with the bank account. The police officers who responded at approximately 11:00 p.m. were told by Cassidy that Forrayi had been there and was persistent in wanting to speak to him. By that time, Forrayi had gone and the police were unable to find him.

Jody Gentile also testified that at 5:30 a.m. on Tuesday, August 17, she saw Michael Cassidy changing the locks on the front and back doors of the property. Cassidy advised her that Forrayi had been there during the night and had broken a key in the lock.

Paul Gentile testified that Cassidy advised him that at about 5:00 p.m. Forrayi had again visited the house and was suggesting that they could reach a settlement. Michael Cassidy again called the police. A tape recording of that conversation was played at the trial. Cassidy said that Forrayi was bothering him again. Police officers dispatched to the scene arrived after Forrayi left and they were unable to locate him. Michael Cassidy phoned the police department again at 9:00 p.m. wishing to speak to Constable Robert Oostveen who was investigating the bank account fraud matter.

Leon Morris who was a neighbour of Michael Cassidy testified that he heard an argument between two men at approximately 9:30 p.m. on Tuesday, August 17. One person was quite loud and the other voice was muffled, and the sounds were coming from the general direction of Michael Cassidy's house. Rick Somerville testified that he saw Michael Cassidy and Brad Forrayi arguing in front of Cassidy's house at approximately 9:00 p.m. Forrayi was yelling and uttering threats. He heard Forrayi say "do you want to go"; "you get your lawyer and I'll get mine"; "fuck you"; "I'll kill you"; or "I'm going to kill you"; or words to that effect.

On Wednesday, August 18 at approximately 12:15 a.m. Paul and Jody Gentile woke up upon hearing a loud thud or bang coming from Michael Cassidy's apartment. They called police and then shortly thereafter smelled smoke and heard the fire alarm. They left their apartment and tried to enter Cassidy's apartment but were forced back by the smoke. They could see that there was a fire in Michael Cassidy's apartment.

Fire department personnel arrived on the scene a few minutes after receiving the call from Paul Gentile at 12:29. The fire was confined to the bed. They found Michael Cassidy's body on the floor of the bedroom and removed it. Ambulance paramedics pronounced Cassidy dead at 12:47 a.m. Doctor David Tilley, a medical examiner, who attended at the scene attributed the cause of death to a stab wound in the neck.

Doctor Dickran Malatjalian, who performed an autopsy, testified that Cassidy had sustained 11 wounds; some of them deep stab wounds to the left side of the neck which severed major blood vessels. He also suffered second degree burns on his left side. The wounds preceded the fire. Another expert, Dr. Leslie Russell, testified that the fire was intentionally set at or near the top of the bed and that it was possible that an accelerant was used.

Gail Westenbrink, an expert in DNA typing, tested several exhibits and testified that blood matching a sample from Cassidy was found on a cigarette package seized by the police from Forrayi's residence, and on the jacket and both gloves which had been removed from the garbage bin at Talbot's apartment building. She also reported that Forrayi's blood was not found on any of the exhibits from the scene of the crime. It was an agreed fact that Forrayi's watch strap was stained by Cassidy's blood.

Sergeant James Griffin of the Halifax Police Department testified that during a search of the appellant's apartment, he found a receipt from Woolco department store dated August 16, 1993, 11:24 a.m., and an empty package for a knife. Margaret Fowler,

an employee of Woolco at Scotia Square in downtown Halifax, identified the receipt as having been produced by the cash register that she operated on August 16, 1993. She was able to discern from the U.P.C. code on the receipt that it was a receipt for a utility knife and that the same U.P.C. code appeared on the empty knife package. She also recalled that the person who purchased the knife was a tall, slim, male. None of the knives found in the appellant's apartment by the police matched the empty package.

Constable Edgar Card testified that he arrested the appellant at 7:06 a.m. Wednesday, August 18, 1993 at which time the appellant was carrying a can of lighter fluid and a bag containing a number of items later identified as belonging to Cassidy, such as a lighter, a gold safety razor, and a wallet.

B. Defence Evidence

The only witness called for the defence was the appellant, Brad Forrayi. He admitted that he lied to the police in each of his statements and that he took Carol Cassidy's keys to Michael Cassidy's residence and gained entry into his flat where he stole his bank book, cheques and a receipt with Cassidy's signature. He also admitted to forging Cassidy's signature on cheques payable to himself and estimated that he had cashed about a dozen cheques worth $10,000.

He said that he used the money to buy crack cocaine for himself and Paul Talbot. He also indicated that Talbot was unaware of the thefts and did not know Cassidy.

Forrayi had told Talbot that he had made approximately $15,000 through a wise investment.

In late July he went back to Cassidy's apartment, used the key and stole more cheques and military medals. He also admitted to later arranging a transfer of funds from Cassidy's savings account to his chequing account. He testified that on August 14, while he was at Talbot's apartment, Michael Ford told him about the affidavit which Cassidy had signed upon his return from sea regarding the thefts from his bank account. He admitted that he attended at Cassidy's residence several times on August 16 and 17 and was attempting to settle matters with Cassidy and that they argued several times over those few days. He did, however, deny threatening to kill Cassidy.

Forrayi testified that eventually sometime before 9:30 p.m. on Tuesday, August 17, he returned to Talbot's apartment and told him the truth about the problems he was having with Cassidy. He told him that all the money they had been using for their cocaine over the last few months had come from Cassidy's account and that now he was in trouble because Cassidy had found out about it. He said that Talbot was angry because there was no more money. Forrayi testified that the two of them left Talbot's apartment at approximately 10:30 or 11:00 and went to his room on Queen Street briefly before walking to Cassidy's residence. Forrayi testified that Talbot was wearing the jacket that was later found in the garbage bin and which was stained with Cassidy's blood. He said that when they arrived at Cassidy's, he remained in the driveway and smoked several cigarettes. Talbot knocked on the door and Cassidy opened it. Cassidy admitted Talbot and Forrayi

quickly followed them inside. He told Cassidy he wanted to see the affidavit. He said that while Cassidy was looking through his paper work, and while Forrayi was apologizing to Cassidy, Cassidy replied, “You started this mess”, and then Talbot suddenly and without warning stabbed Cassidy in the neck. Forrayi said that he panicked and ran from the house, all the way back to his house where he sat crying and smoking. Ten minutes later Talbot arrived with a bag containing some of Cassidy’s possessions. The two of them agreed to keep their mouths shut and not to rat on each other. He said that Talbot was soaked with blood.

THE CHARGE TO THE JURY:

The charge to the jury contains all of the standard instructions, including those on presumption of innocence, reasonable doubt, credibility of witnesses, circumstantial evidence, motive, use of the criminal records of the accused and other witnesses, and the use of opinion evidence given by the expert witnesses.

The charge contains a very complete review of all of the evidence presented. The trial judge’s review of the evidence of Paul Talbot and the appellant was extremely detailed. Inconsistencies in the evidence of Paul Talbot and between his evidence and his statements to the police were highlighted. During the review of Paul Talbot’s evidence, the trial judge twice told the jury that his evidence should be scrutinized carefully since it was the position of the defence that he was the murderer.

After the review of the evidence, the trial judge instructed the jury on the relevant **Criminal Code** sections involving murder and first degree murder. The jury was advised again of the Crown's burden to prove each element of the offence. The trial judge related the evidence to each of the essential elements of first degree murder and second degree murder. He concluded his instruction on the law as follows:

> Before I conclude, let me warn you about a reasoning process that you must avoid. In cases of this nature where there is direct conflict in the evidence of two material witnesses, there is a tendency to attempt to resolve the main issue solely by putting the question, who do I believe? In this case, the accused says that Paul Talbot, not he, killed Michael Cassidy. Paul Talbot says, he did not kill Michael Cassidy. Thus, there may be a tendency for you to say to yourself, this case boils down to, who do I believe - the accused or Paul Talbot? You must not do that, because that reasoning process ignores the concept of reasonable doubt, which is so important in our criminal law system and which I explained to you earlier. The ultimate issue is not whether you believe the accused or Paul Talbot. It is whether there is a reasonable doubt as to the guilt of the accused. Let me attempt to illustrate what I mean by breaking down the reasoning process into three separate parts. First, if you believe the accused on the material issues, then, you will find him not guilty. Secondly, if you do not believe the accused, but are left with a reasonable doubt about the truth of what he has said on the material issues, again, you will find the accused not guilty. Thirdly, even if you do not believe the accused and you are not left with a reasonable doubt of the truth of his own testimony on the material issues, you must still go on to consider what the accused has said in light of all the other evidence in this trial and, if, after doing so, a reasonable doubt is raised in your mind about the truth of what the accused has said on those material issues, then, again, you will find the accused not guilty. If, however, after considering all of the evidence as a whole, you are satisfied that the crown has proved each and every one of the essential ingredients of the offence charged or the included offence, then, you will find the accused guilty of the offence charged, that is, first-degree murder or of the included offence, that is,

second-degree murder.

ISSUES:

The appellant, who represented himself, set out the following grounds of appeal in his notice of appeal:

(1) The Learned Trial Judge failed to instruct and leave the included offence of manslaughter with the jury.

(2) The Learned Trial Judge failed to instruct the jury with the permitted use of the criminal record of Bradley Forrayi.

(3) The Learned Trial Judge erred in law by admitting the hearsay statements introduced into evidence under the **Smith** Applications.

(4) The verdict was perverse and unreasonable as against the evidence introduced at trial.

In his factum and at the hearing of the appeal, the appellant argued additional issues, namely:

(5) That the trial judge erred by not instructing the jury on intoxication.

(6) That the trial judge erred in failing to adequately relate the theory of the defence through expert testimony to the jury.

(7) That the trial judge erred in failing to warn the jury of the dangers of accepting the evidence of the Crown witnesses, Paul Talbot and Rick Somerville.

Although the appellant elected not to address the grounds of appeal as set out in his notice of appeal, I have considered them and find that none of them have any merit.

1. There was no reason for the trial judge to instruct the jury on the included offence of manslaughter on the evidence as presented in this case. Neither counsel asked the trial judge to do so, nor did counsel object to the charge. As indicated in **R. v. Aalders**, [1993] 2 S.C.R. 482, unless there was evidence which had an air of reality which indicated that the accused did not intend to kill the victim or did not intend to cause him bodily harm which he knew was likely to cause his death, then manslaughter should not be left to the jury as an alternative verdict. The defence theory that was left with the jury in this case was that the appellant did not do it. There was no evidentiary basis indicating that the crime committed was not intended to be lethal, nor was there any evidence led concerning the appellant's mental state at the time of the murder, that may have given cause to instruct the jury about possible lack of intent to commit murder. There was no error on the part of the trial judge in failing to instruct on the included offence of manslaughter.

2. The appellant submitted in the notice of appeal that the trial judge erred by failing to instruct the jury on the permitted use of the criminal record of the appellant. The appellant's criminal record upon which he was cross-examined consists of six prior offences committed during the years 1991 to 1994, including mischief, refusal of the breathalyzer, assault, forgery, obstruction of justice and possession of property obtained by crime.

In the charge to the jury, the learned trial judge referred to the appellant's criminal behaviour in defrauding Cassidy as evidence relevant to motive and instructed the jury as follows:

> . . . The evidence of fraud was, therefore, permitted to be heard by you but only for that limited purpose, that is, the crown's attempt to show a motive for the killing of Mr. Cassidy. You cannot, and I must emphasize this, that you must not rely upon that evidence as proof that the accused, because he stole from Mr. Cassidy, was more likely to be a murderer. The fact that the accused has admitted to the fraud and the commission of other criminal offences, of which you heard evidence, again cannot be relied upon by you in this way, that is, because the accused has committed other crimes, he is more likely to have committed the crime with which he now stands charged.
>
> Those criminal acts, however, may be considered by you in considering and deciding upon the credibility of the accused as well as in determining the credibility of the other witnesses who admitted their criminal convictions; namely, Paul Talbot, Michael Ford and Rick Somerville. I'll tell you a little later how you may consider or how you may deal with those criminal convictions.

The charge to the jury was lengthy and the trial judge divided it into three

parts with a break after the first two parts. After one part of the charge in the absence of the jury, Crown counsel objected that the trial judge had not reviewed the appellant's criminal record; an objection which was renewed at the end of the charge. The trial judge declined to recharge on that point. The defence certainly did not make any objection based on the failure of the trial judge to review the criminal record or advise the jury with any further particularity on its permitted use by them. In my view, the trial judge's charge with respect to the appellant's criminal record was correct. That is, that the jury was not permitted to rely on the existence of a criminal record as evidence that he was more likely to have committed this offence, but that they may use the existence of a criminal record in assessing his credibility.

3. The third ground of appeal is that the learned trial judge erred in law by admitting the hearsay statements introduced into evidence under the **Smith** applications. The statements referred to are those made by the deceased, Michael Cassidy. The particulars of the statements were offered during a voir dire and the appellant's counsel at trial consented to the admission of the statements. Justice Tidman ruled on the admissibility of the statements as follows:

> Counsel, as I earlier alluded to and as counsel have as well, this matter was canvassed as a pretrial issue and the crown submitted to me an extensive brief on the matter and particularly with respect to **R. v. Smith** and the conditions that the Supreme Court of Canada has set down and recited in that case what the court should consider in admitting evidence that was previously barred from admission, because of an adherence to what has been loosely termed as the "hearsay

> rule". Having considered the matter, I am satisfied that the circumstances here satisfy the test of trustworthiness and reliability and necessity as set out in that case and cases that have followed **Smith** and will grant the motion to the crown that that evidence, which was just alluded to by Mr. Hoskins, will be permitted in evidence . . .

The statements of Michael Cassidy that were admitted by the trial judge on the basis of **R. v. Smith**, [1992] 2 S.C.R. 915 were the affidavit of Michael Cassidy deposing that the cheques payable to the appellant were not authorized by him; a note that was found in Michael Cassidy's apartment in his handwriting saying that at 5:00 p.m. August 17, Forrayi came to his door; the audio tape of Cassidy's telephone call to the police station at 5:00 p.m. August 17; Cassidy's conversation with the bank manager Ripley; three statements to the police officers that took place on the 16th and 17th of August; statements of Cassidy to his sisters in which he explained that the appellant had stolen from his bank accounts and that he was afraid of "Brad"; several statements made to Paul and Jody Gentile between August 16 and 17; and similar statements made to his colleagues at work on August 17.

Recently in **R. v. Hawkins**, [1996] 3 S.C.R. 1043, at paragraphs 67 and 68, Lamer, C.J. and Iacobucci, J. in joint reasons for the plurality of the Court said that **R. v. Khan**, [1990] 2 S.C.R. 531 and **Smith, supra**, signalled the beginning of a "modern principled framework for defining exceptions to the hearsay rule". They continued:

> Under this reformed framework, a hearsay statement

> will be admissible for the truth of its contents if it meets the separate requirements of "necessity" and "reliability". These two requirements serve to minimize the evidentiary dangers normally associated with the evidence of an out-of-court declarant, namely the absence of an oath or affirmation, the inability of the trier of fact to assess the demeanour of the declarant, and the lack of contemporaneous cross-examination.
>
> Consistent with the spirit of this modern approach, the twin requirements of "necessity" and "reliability" must always be applied in a flexible manner . . .

The trial judge, in my view, correctly ruled that the various statements made by Michael Cassidy should be admitted because they met the twin requirements of necessity and reliability. Obviously the evidence met the necessity criterion because the declarant was deceased. With respect to the reliability of the statements, most of the statements were corroborated, in fact, many were corroborated by the evidence of the appellant himself. One of the statements, the affidavit, was made under oath. The statements were all consistent with each other and made relatively contemporaneously with the events being reported.

The trial judge charged the jury regarding the hearsay evidence in the following passage:

> Let me here say something about hearsay evidence which you've, no doubt, heard isn't permitted in court. Hearsay evidence is simply evidence of what somebody else has told a person and, ordinarily, such evidence is not permitted in court for obvious reasons. That is, if the person who originally made the statement is not in court, then that person's veracity can't

> be tested by cross-examination. However, there are exceptions and for certain reasons, hearsay evidence may be admitted in a court. In this case, I admitted the evidence of what was reportedly said by the deceased, Michael Cassidy. I did so because there were circumstances that satisfied me that the evidence could be given and that is, because it was necessary, that is, the evidence wasn't available from Michael Cassidy and that there were circumstances that convinced me that it was evidence that you should hear, that it was trustworthy. I don't mean that it was believable - that is for you to decide but it came from trustworthy sources. So, when you're considering the evidence of what was reportedly said by Michael Cassidy, keep in mind that it's still hearsay evidence and it still hasn't been tested by cross-examination. I decided that, under the circumstances, you should hear that evidence but you should be very, very careful when you're assessing the credibility of hearsay evidence.

This charge is entirely appropriate in the circumstances in my opinion. There was no error of law made by the trial judge respecting the admission of the statements nor in the corresponding charge to the jury.

4. The fourth ground of appeal contained in the notice of appeal is that the verdict was perverse and unreasonable as against the evidence introduced at trial.

The standard of review on appeal from conviction under s. 686(1)(a)(I) is as set out by the Supreme Court of Canada in **R. v. Yebes**, [1987] 2 S.C.R. 168 and in **R. v. Burns**, [1994] 1 S.C.R. 656 where at p. 663 McLachlin, J. said:

> In proceeding under s. 686(1)(a)(i), the court of appeal is entitled to review the evidence, re-examining it and re-

> weighing it, but only for the purpose of determining if it is reasonably capable of supporting the trial judge's conclusion; that is, determining whether the trier of fact could reasonably have reached the conclusion it did on the evidence before it: **R. v. Yebes**, [1987] 2 S.C.R. 168; **R. v. W.(R.)**, [1992] 2 S.C.R. 122. Provided this threshold test is met, the court of appeal is not to substitute its view for that of the trial judge, nor permit doubts it may have to persuade it to order a new trial.

A careful review of the evidence presented to the jury in this case leads one to the inescapable conclusion that the evidence presented by the Crown witnesses certainly established that the appellant had a substantial motive to kill Cassidy, and that he had the means and the opportunity to do so. Much of the appellant's behaviour that is admitted by him is corroborative of the fact that he had the motive and opportunity. The forensic evidence indicating that Michael Cassidy's blood was on the appellant's watch strap and cigarette package is also strong circumstantial evidence against the appellant. As pointed out by Crown counsel in its factum, there was abundant support for a finding by the jury that the appellant was not a credible witness. Included was the evidence of his recent criminal record indicating a propensity to dishonesty and violence, the evidence by many witnesses of his misrepresentation to them of his education and employment and his admitted lies to the police in the various statements.

5. The next ground of appeal which is contained in the factum of the appellant and which he argued at the appeal, is that the trial judge erred by not instructing the jury

on the question of the appellant's possible intoxication at the time of the murder. The appellant submits that there was substantial evidence adduced at the trial which, if believed by the jury, would have negated the specific intent required for conviction of murder. He says that the evidence in support of this is the fact that he spent most of the money stolen from Cassidy's bank account on cocaine. He submitted that it was irrelevant that a defence based on intoxication was inconsistent with the defence that was offered at the trial, that is, that Talbot committed the murder. He suggested that the jury should have been instructed to decide first who did the murder and if it was Forrayi, then to decide whether he had the intent to commit the murder. On this point, the appellant relied on several cases including, **R. v. Squire** (1976), 29 C.C.C. (2d) 497; **R. v. MacKinlay** (1986), 28 C.C.C. (3d) 306; and **Alward and Mooney v. The Queen** (1977), 35 C.C.C. (2d) 392.

In his oral submissions, the appellant indicated that there was evidence that his last consumption of cocaine was 18 hours before the murder.

In **R. v. Lemky**, [1996] 1 S.C.R. 757, McLachlin, J. for the court stated at p. 763:

> It is common ground that the trial judge must instruct the jury on any defence that on the evidence has "an air of reality": **R. v. Osolin**, [1993] 4 S.C.R. 595. The threshold test is met when there is an evidentiary basis for the defence which, if believed, would allow a reasonable jury properly instructed to acquit. See **R. v. Bulmer**, [1987] 1 S.C.R. 782; **R. v. Park**, [1995] 2 S.C.R. 836.

I agree completely with the following submissions from the factum of the respondent:

> As submitted in the Respondent's principal factum (p.36), there is no evidentiary foundation for the defence of intoxication in this case. It is true that the Appellant was abusing cocaine in the summer, 1993, but there was no evidence that he was incapable or did not in fact plan and deliberate and act with the requisite intent or foresight.
>
> There is no evidence from the Appellant or anyone else that he was under the influence of drugs or alcohol at the time of the murder. The fact that the Appellant related a coherent and detailed story of the fatal encounter belies any reliance on the defence of intoxication. There is simply nothing in this case to suggest that the Appellant was under the influence of an intoxicant when he killed the victim.
>
> With respect to planning and deliberation, the Appellant's evidence could only support the view that he was sober in the days immediately preceding the murder. The Appellant testified to consuming "a few beers" and a "little bit of dope" on the Monday evening, more than twenty-four hours before the murder (vol. VIII, p.1984). Other than this rather modest consumption, there is nothing in the Appellant's evidence or anyone else's evidence of the Appellant consuming intoxicants during the planning and deliberation stage.
>
> Defence counsel's address to the jury did not suggest that intoxication played any role in the facts of this case. The trial Judge was not requested to put the defence to the jury. It is submitted that there is no air of reality to the intoxication defence.

There is no merit to this ground of appeal.

6. The second ground of appeal argued by the appellant in his factum and at the hearing was that the trial judge did not adequately relate the theory of the defence through expert testimony to the jury. The appellant submitted that the trial judge should have instructed the jury that some of the expert evidence also supported the theory of the defence, that is, that the appellant's watch strap and cigarette package could have been splattered with a small amount of blood if he were standing several feet away from the deceased at the time that Talbot stabbed him. As well, it is submitted that the trial judge should have emphasized that the appellant had very little blood on his shoes and that if the body had been dragged across the floor as speculated by some of the expert witnesses, he should have had more blood on him. The portions of the charge that demonstrate this alleged error according to the appellant are as follows:

> 1. You heard the evidence of Doctor Dickran Malatjalian, a forensic pathologist, who gave his opinion that the death of Michael Cassidy resulted from stab wounds, which severed the carotid artery and jugular vein in his neck, and also, from the stab wound to his back, which he says, entered his lung. It was the doctor's opinion that the wounds were inflicted by stabbing with a sharp object, consistent with having been caused by the knife described on the knife package, identified as Exhibit 49, an alleged replica of which you will have with you in the juryroom and inconsistent with a stabbing by the brown wooden-handled knife, identified as Exhibit 95, which according to the evidence, came from the residence of the accused.
>
> 2. You heard the evidence of Sergeant Michael Tomash, also employed at the R.C.M.P. Forensic Laboratory in Halifax. You heard me qualify Sergeant Tomash as being able to give opinion evidence in the area of blood-stain pattern analysis. You heard Sergeant Tomash give his opinion, among others, that the projected blood stains at the head of the bed and on the night table in Michael Cassidy's bedroom occurred from a struggle or a blow, an arterial gushing and that the blood stains

> originated on or above the bed, and further, that a blow or blows were struck to the blood source, situated on or near the floor in front of the dresser in Michael Cassidy's bedroom.
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> 3. You heard the evidence of Gail Westenbrink, a forensic biology specialist, employed again at the R.C.M.P. Forensic Laboratory, here in Halifax, and you will recall that Miss Westenbrink gave an interesting presentation on the relatively new science of DNA typing used in attempting to identify the source of human substances. You heard her say that the DNA-typing profiles obtained from Exhibit 23, that is, a vial of blood reportedly taken from Mr. Cassidy, matched the DNA-typing profile on the blood reportedly taken from the wall by the headboard, as well as the blood taken from the bureau in Michael Cassidy's bedroom, the blood stain reportedly taken from a hallway in Mr. Cassidy's home and the blood stains taken from the ski gloves in evidence as Exhibit 44. Miss Westenbrink says that the possibility that the DNA extracted from those exhibits, that is, all the latter exhibits, originated from a source other than the donor, reportedly Mr. Cassidy, is remote and that the estimated frequency of occurrence of a match in the Canadian Caucasian population is less than one chance in sixty-eight billion. It was Gail Westenbrink's opinion that the DNA-typing profiles obtained from the Players Light cigarette package, being Exhibit 41, and the dark nylon jacket, being Exhibit 43, also matched the DNA-typing profile of the blood allegedly taken from Mr. Cassidy. You heard Miss Westenbrink state that there was not sufficient material on the clasp of the accused's watch strap upon which she was able to perform DNA-typing profile tests. You will recall that the substance taken from the watch was forwarded to Doctor D. Bing, scientific director of CBR Laboratories, of Boston, Massachusetts . . .

In respect to these portions of the charge, the appellant says that the trial judge should have related that a severed artery can gush for five, six or seven feet.

With respect to the second part of the charge, the appellant submits that the trial judge failed to relate that the blood on his cigarette package came from blood in flight

and that the cigarette package could have been held in the appellant's hand standing across the room and that there apparently was no void space on the surface of the floor or furniture in the room to account for the cigarette package.

With respect to the third portion of the charge in which the trial judge summarizes the evidence of Gail Westenbrink, the appellant says that the trial judge should have noted that there was only a small amount of blood on the appellant's running shoes which was confirmed only to be male blood and was inconclusive as to whose blood it was. He also argues that the trial judge should have emphasized that the gloves, jacket and pants should have been tested for the presence of hair to see whether the appellant's hair or Talbot's hair was on those items.

It should be noted that the defence counsel did not object to the charge. Many of the points raised by the appellant under this ground of appeal were put to the jury in the closing argument by defence counsel.

The issue of how the blood appeared on the cigarette package and how the accused could have been holding it was the source of great deal of comment by both counsel in their closing addresses. The trial judge presented the theory of the defence to the jury throughout the charge, during the review of the evidence, not in a separate part of the charge at the end. During the last break in the charge, in the absence of the jury, the trial judge asked counsel if they were prepared to agree that he not read the theories that had been given to him by counsel "in view of the fact that you've made your arguments and

I have put your theories to them during the course of my charge". Both counsel agreed.

The trial judge's charge was of necessity, quite lengthy because he reviewed in great detail all of the evidence. That review was fair, accurate and complete in my opinion. His direction on the law was similarly complete and correct.

In **R. v. Jacquard**, [1997] 1 S.C.R. 314, Chief Justice Lamer said at paragraph 62 that appellate courts must adopt a functional approach to reviewing jury charges. "The purpose of such review is to ensure that juries are properly - not perfectly - instructed".

The judge's failure to direct the jury in the manner suggested by the appellant does not, in my opinion, constitute error.

7. The last ground of appeal raised by the appellant is that the trial judge erred in failing to warn the jury of the dangers of accepting the evidence of the Crown witnesses, Paul Talbot and Rick Somerville. Mr. Forrayi submits that a **Vetrovec** warning (see [1982] 1 S.C.R. 811) should have been given to the jury because of Paul Talbot's use of drugs, his operation of an after hours bar, his admission that he threw away key evidence, and the fact that during the investigation he asked police not to prosecute a friend of his for impaired driving. Furthermore, it is submitted by the appellant that the **Vetrovec** warning should have been given in relation to the evidence of Rick Somerville who had a criminal

record and made an inconsistent statement in his cross-examination.

The trial judge did, in fact, warn the jury about accepting the evidence of Paul Talbot.

The trial judge said this about the evidence of Mr. Talbot:

> You heard Mr. Talbot say that he had a record of two criminal convictions - one, for possession of stolen property and, the other, for theft over $50.00 - the last conviction being in September, 1970. As I have said, you may take a witnesses' criminal record into account but only in considering the witnesses' credibility. In examining the witnesses' criminal record, you should keep three things in mind - first, you should consider the nature of the offence, and in particular, you should consider whether the witness has committed an offence that involves dishonesty. A conviction for an offence that involves dishonesty obviously has more bearing on credibility then a conviction for an offence that does not involve dishonesty. Second, you should consider when the witness committed the offences. A recent conviction may be more relevant to credibility than a conviction for an offence that was committed a long time ago. Third, you should consider the number of convictions. A single conviction for a criminal offence is usually less serious than a long list of convictions and, of course, that applies to all of the witnesses who gave evidence that you heard had a record of criminal convictions; namely, the accused, Talbot, Somerville and Ford.
>
> You also heard Mr. Talbot agree that he asked the police not to prosecute his friend, Grant, for impaired driving in return for his further cooperation with the police. You also heard him agree that his friend, Grant, was not so prosecuted. You, of course, will decide what, if any, effect that may have had on the testimony of the witness, Talbot.
>
> It is the position of the crown that you should believe the testimony of the witness, Talbot. The crown submits that Mr.

> Talbot was untruthful to the police in the first two statements he gave to them, because he did not want to get involved in the stabbing that had taken place and the murder with which he thought the accused might have been involved.
>
> It is the position of the defence that the witness, Talbot actually committed the murder of Michael Cassidy and is attempting to place the blame for it on the accused. You, of course, will decide on the credibility of the witness, Talbot.
>
> Because of his involvement, that is, his clothing being associated with the murder scene, if you accept that they were, his admitted attempt to get rid of the clothing, his being found in the car which contained goods formerly owned by the deceased, if you find that they were so formerly owned, and his attempts to sell some of those goods and admitted sale of the binoculars, he says, were given to him by the accused on the night in question, you would be wise to look to other evidence that supports his testimony.

As well, the jury was reminded by the trial judge that the accused denied using the word "kill" during the argument that Somerville reported. Additionally, the criminal records of both Talbot and Somerville were highlighted by defence counsel during their submissions to the jury. Experienced defence counsel did not object to any portion of the trial judge's charge. Again, I am satisfied that the jurors were provided with a fair and complete charge and that the warnings given to the jury respecting the evidence of Talbot and Somerville were adequate. The caution was sufficient to comply with the instruction of the Supreme Court found in **Vetrovec**.

In conclusion, I am satisfied that the jury was properly instructed and that they rendered a verdict for which there was adequate evidence in support. I would dismiss the appeal.

Roscoe, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.