NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Mantley***, 2013 NSCA 16

Date: 20130207
Docket: CAC 390999
Registry: Halifax

Between:

Ellwood Michael Mantley

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Farrar, JJ.A.
Appeal Heard:	November 28, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring.
Counsel:	Luke A. Craggs, for the appellant William D. Delaney, Q.C., for the respondent

Reasons for Judgment:

Overview

[1] The appellant, Elwood Mantley, attempted to enter the Dartmouth General Hospital at 4:00 a.m. on July 1st, 2011, with a number of weapons and voicing his intention to kill his wife who was a patient at the hospital. Fortunately for Ms. Mantley, he was prevented from getting access to her room by security personnel and his weapons were confiscated. Mr. Mantley was charged with, and convicted of , attempted murder pursuant to s. 239 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 by Provincial Court Judge Frank P. Hoskins. He was also convicted of possession of weapons for the purpose of committing an offence under s. 88(1) of the **Criminal Code**. Those convictions were stayed by the trial judge under the **Kienapple** principle (**Kienapple v. R.**, [1975] 1 S.C.R. 729).

[2] Mr. Mantley appeals alleging the trial judge erred by admitting utterances made by him while he was alone in the police interrogation room. Mr. Mantley also argues that the trial judge erred in his interpretation of the *actus reus* of attempted murder.

[3] For the reasons that follow I would dismiss the appeal.

Facts

[4] Elwood and Ramona Mantley had been married for approximately 15 years when in May, 2011, Ms. Mantley moved out of the family home with the intent of ending the relationship.

[5] On June 14, 2011, Ms. Mantley was admitted to the Dartmouth General Hospital where she remained a patient until her discharge on July 7th, 2011. Some time prior to July 1st, 2011, Mr. Mantley visited Ms. Mantley in the hospital. On that occasion, Ms. Mantley asked Mr. Mantley to leave and not to return. She also advised the nursing staff that she did not wish to see him nor did she want him to contact her by telephone. She went so far as to change her telephone number so that he could not contact her.

[6] On July 1st, 2011, at approximately 3:55 a.m. John Zinck and Christopher Roy, two commissionaires providing security services at the Dartmouth General Hospital, saw Mr. Mantley enter the Emergency Department and walk towards the doors leading into the main part of the hospital. He attempted to enter through the doors but they were locked. Mr. Mantley started banging on the doors at which point Mr. Zinck shouted to him that he needed to sign in before he could go any further into the hospital. Mr. Roy approached Mr. Mantley and attempted to explain to him the procedures and requirements for entering the hospital. Mr. Mantley seemed quite upset and appeared to be anxious to see his wife.

[7] The appellant agreed to accompany Mr. Roy to the security office for the purpose of signing in and they walked from the area of the doors to the main part of the hospital to the security office. Around this time Mr. Roy noticed a long handle projecting from Mr. Mantley's coveralls and informed Mr. Mantley that he could not go into the hospital carrying what appeared to be a mallet with him. The appellant said that he had just gotten off work and the object that the commissionaire had seen was a mallet. Mr. Mantley went outside with the mallet and returned approximately 10 seconds later. He was directed to the security office to sign in. At this point, Mr. Roy noticed the handle of a knife sticking out of the appellant's coveralls. Mr. Roy asked the appellant for the knife and Mr. Mantley handed it to him. Mr. Zinck, having witnessed what was going on, became concerned and called 911. While Mr. Zinck was on the telephone with 911 he continued to watch the appellant and Mr. Roy on security monitors.

[8] Mr. Roy testified that the appellant was very upset with his wife and that he said that he wanted to do harmful things to her. Although the commissionaire had difficulty recalling the verbatim statements of Mr. Mantley, he recalled that he said that his wife cheated on him and that when he got up there she was going to get it. Mr. Mantley said: "F.... it, I'll find a way up." He then tried to get through the doors that led back through the Emergency Department. He could not get in. He then turned and went through the triage area that leads directly through to the Emergency Department. At that time, Mr. Roy felt that he had to stop him. He told Mr. Mantley that he could not come back into that area and that he had to leave. Mr. Mantley lunged at him. There was a struggle. Eventually, Mr. Mantley was persuaded to return out through the triage area.

[9] Mr. Roy then found the mallet just outside the doors to the Emergency Department and beside it was an aluminum baseball bat. He picked up both objects. Mr. Mantley demanded that the mallet and bat be returned to him and Mr. Roy refused telling him to leave the hospital. There was another brief struggle with Mr. Roy after which Mr. Mantley left walking towards his vehicle.

[10] Mr. Roy testified that during his encounter with the appellant he heard him say "a lot of harmful things about what he wanted to do to his wife". For example, she's a "church-going woman" and "she cheats on me ... I'm going to kill her".

[11] Had the appellant succeeded in getting through the doors from the Emergency Department into the main part of the hospital, he would have been able to have access to the third floor of the hospital where Ms. Mantley was located.

[12] Constable Leigh Pike, a member of the Halifax Regional Police Department, arrived at the Dartmouth General Hospital just after 4:00 a.m. on July 1st, 2011. When he arrived, he saw a commissionaire outside the hospital standing behind a car pointing at Mr. Mantley. Mr. Mantley was standing up outside his car with the driver's door open. Constable Pike arrested Mr. Mantley and transported him to the Halifax Regional Police Headquarters on Gottingen Street in Halifax. During the 8-10 minute ride from the Dartmouth General Hospital, Constable Pike observed that the appellant was very emotionally upset and was cursing under his breath and rambling. He said that he was "pissed off"; that his wife was cheating on him and that it had been going on for months.

[13] After arriving at the police station, Constable Pike placed him in an interview room.

[14] Constable Michael Marchand, also a member of the Halifax Regional Police Department, also attended at the Dartmouth General Hospital and arrived there at almost the same time as Constable Pike. After Mr. Mantley was placed under arrest he searched him and found a can of Raid in his left front pocket and a pair of gloves in his right pocket.

[15] At the police station, Constable Marchand advised the appellant that the room he was in was going to be monitored and recorded for audio and video.

[16] While the appellant was in the interview room at the police station he made three utterances to himself, in the absence of the police, which were audio and video-recorded and tendered by the Crown at trial. A transcript of these utterances was read into the record by the trial judge. Mr. Mantley's utterances to himself were rambling and repetitive. The theme emerging from the utterances was the appellant's very clear intention to kill his wife.

Issues

[17] The appellant raises the following grounds of appeal:

1. Did the Learned Provincial Court Judge err by admitting the utterances the appellant made while he was alone in the police interrogation room; and

2. Did the Learned Provincial Court Judge err in his interpretation of the *actus reus* of attempted murder?

Standard of Review

[18] The parties agree, and I concur, that the issues raised by the appellant allege errors of law. Accordingly, the standard of review with respect to both issues is correctness.

Issue #1 - Did the Learned Provincial Court Judge err by admitting the utterances the appellant made while he was alone in the police interrogation room?

[19] The appellant argues that the appellant's statements to himself while alone in the interview room were subject to proof of voluntariness and ought to have been subject to a *voir dire*.

[20] To understand this argument some additional factual background relating to the utterances is necessary.

[21] At trial, the appellant challenged the admissibility of the statement he made to Constable Pike during the drive from the Dartmouth General Hospital to the

police station on Gottingen Street. He also challenged the admissibility of the utterances he made to himself at the police station on the basis that they were unlawfully intercepted private communications under s. 183 of the **Criminal Code** and, as well, that they had been obtained in breach of the appellant's rights pursuant to s. 8 of the **Charter**.

[22] Finally, the appellant argued that, in essence, the statements to himself while alone in the interview room were statements made to a person in authority and, therefore, were subject to proof of voluntariness in the same manner as any other statement given to a person in authority.

[23] On this appeal the appellant raises only the last argument – that is – the appellant's utterances to himself in the interview room were statements made to a person in authority and, therefore, presumptively inadmissible.

[24] There were three separate instances where the appellant, while alone in an interview room at the Gottingen Street station made utterances to himself which were audio and video recorded.

[25] The first one occurred shortly after Mr. Mantley arrived at the police station. He was placed in the interview room and advised that he was going to be monitored and recorded for audio and visual. Constable Marchand then left the appellant in the interview room and went to the monitoring room approximately 10 feet away to log on to the computer and turn on the recording equipment.

[26] This is when Mr. Mantley made the first utterance to himself commencing at approximately 4:41 a.m. This utterance occurred before any interview by the police commenced.

[27] The second utterance commenced at 5:32 a.m., after Constable Marchand had been interviewing Mr. Mantley and left the interview room for a short period of time. Like the first utterance, it is rambling and repetitive.

[28] The third utterance occurred at 6:01 a.m., when again Constable Marchand left the room, and again, Mr. Mantley made similar comments to himself as he did on the previous two occasions.

[29] All of the utterances, in a profanity-laced rant to himself, make reference to Mr. Mantley's intention to kill Ms. Mantley.

[30] The Crown did not seek to introduce Constable Marchand's interview of Mr. Mantley into evidence at the trial.

[31] The appellant says that the difficulty with the three monologues is that they cannot be severed from the unproven and untendered interview of Constable Marchand.

[32] The trial judge relied on the authority of **R. v. Evans**, [1993] 3 S.C.R. 653 in which the appellant's statements were treated as falling under the admissions exception to the hearsay rule. However, as the Crown appropriately concedes, **Evans** is hardly on all fours with this case. **Evans** involved statements by an accused person to civilian witnesses who were not involved in the investigation of the crime with which he was charged. That is not this situation. The appellant's utterances, in this case, were made while he was detained in a police station and after (on two occasions) he was being interrogated by Constable Marchand. The reasoning in **Evans** provides little support for the admission of the utterances of Mr. Mantley.

[33] In **R. v. Horvath**, [1979] 2 S.C.R. 376, a 17 year old youth was arrested on a charge of murder and interrogated for nearly three hours by two RCMP officers. The following day the youth was introduced to a polygraph operator and subjected to a very skilful interrogation which lasted for hours. There was expert evidence at trial that the polygraph operator had inadvertently caused the accused to enter a state of light hypnosis. It was also the expert's opinion that the interrogation had reduced the accused to a state of "complete emotional disintegration". On several occasions, the polygraph operator left the accused alone in the interview room and the accused embarked upon a number of utterances to himself which the trial judge referred to as soliloquies.

[34] The Crown sought to introduce two statements of the accused made after he was in the hypnotic state. However, the Crown never sought to introduce the evidence of the statement made by the accused while he was in what was described by the expert witnesses as a "light hypnotic state". This included the three

soliloquies by the accused person in the absence of the polygraph operator. Ultimately the statements were ruled inadmissible because, after consideration of all of the circumstances, their voluntariness was tainted or contaminated by the accused's hypnotic state which preceded them (**Horvath**, pp. 428-29).

[35] **Horvath** is not particularly helpful in determining whether utterances made by a person to himself, in circumstances such as this, are statements to a person in authority and must be voluntary to be admitted. It does, however, point to the necessity of reviewing all of the circumstances of an interrogation to determine whether statements by the accused are voluntary. There is a danger introducing monologues or soliloquies, such as those made by Mr. Mantley without first looking at the circumstances under which the utterances are made including the circumstances of the interrogation to determine whether they were voluntary.

[36] In my view, the trial judge erred in failing to hold a *voir dire* to determine the voluntariness of the statements. The trial judge ought to have reviewed all of the circumstances surrounding the utterances including the interrogation being undertaken by Constable Marchand to determine whether the statements were voluntary. In failing to do so, he erred.

[37] However, in these very unique circumstances, I would find that no substantial wrong or miscarriage of justice occurred.

[38] Section 686(1)(b)(iii) of the **Criminal Code** provides:

> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
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> ...
>
> (b) may dismiss the appeal where
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> ...
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of

> the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

[39] In my view, this is a proper case for the invocation of s. 686(1)(b)(iii). The evidence establishes that the first utterance commenced at 4:41 a.m. immediately after the appellant was brought into the interview room and before Constable Marchand commenced his interrogation. There was a full examination of the very brief contact between Constable Marchand and the appellant as the appellant was taken into the interview room and there was nothing to suggest a voluntariness or **Charter** issue might arise. The record also contains a complete examination of the circumstances of the arrest and the circumstances of the appellant's conversation with Constable Pike en route to the station. Again, there is nothing in that evidence to suggest a voluntariness or **Charter** issue. Therefore, even if the trial judge had conducted a voluntariness examination with respect to the first utterance, the record indicates that the result of such inquiry would inevitably have been to admit the utterance. All three utterances are essentially the same in terms of their content and probative value. In each one, the appellant emphatically declares his intention to kill his wife. The second and third utterances add nothing to the first. If the first utterance had been subjected to a voluntariness inquiry it would have been admitted into evidence. The second and third utterances, on the evidence before the trial judge, would have had to have been ruled inadmissible as the evidence was insufficient to establish voluntariness. However, the second and third utterances add nothing material to the contents of the first.

[40] Further, in my view, the evidence was so overwhelming (I will discuss this in more detail under the second issue) that the exclusion of the utterances would not have impacted the result.

[41] Particularly significant is the evidence of Mr. Roy, the commissionaire who the trial judge found to be credible. He testified that during his struggle with the appellant, Mr. Mantley said "I'm going to kill her". At trial, counsel conceded that Mr. Mantley's utterances to security personnel at the hospital were not made to persons in authority. The evidence, viewed in its totality, even in the absence of the utterances made by Mr. Mantley to himself at the police station, would have resulted in a conviction. As a result, there was no substantial wrong or miscarriage of justice resulting from the trial judge's error.

[42] I would dismiss this ground of appeal.

Issue #2 - Did the Learned Provincial Court Judge err in his interpretation of the *actus reus* of attempted murder?

[43] The appellant's argument on this issue is that the actions of Mr. Mantley in trying to gain access to the main part of the Dartmouth General Hospital at 4:00 a.m., armed with a number of weapons while uttering threats to kill his wife, were mere preparation to commit the offence of attempted murder and too remote to constitute an attempt to commit the offence. As appellant's counsel put it in argument, Mr. Mantley would have had to have been in a position to actually kill Ms. Mantley to be charged with attempted murder.

[44] With respect, this is not nor has it ever been the law in Canada.

[45] Justice Le Dain in **Deutsch v. The Queen**, [1986] 2 S.C.R. 2 at p. 25 had this to say about this issue:

> Among the cases referred to by Estey J. in support of this statement were *R. v. Cheeseman* (1862), Le. & Ca. 140, 169 E.R. 1337, where Blackburn J. said at p. 1339, "But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime", and *R. v. White*, [1910] 2 K.B. 124, where Bray J. said at p. 130: "...the completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by other acts, result in killing. It might be the beginning of the attempt, but would none the less be an attempt." Taschereau J., dissenting, in *Henderson*, although he differed in the result, would not appear to have applied a different concept of proximity.... (Emphasis added)

[46] It is clear from this passage that it is not necessary to be in a position to commit the murder to be convicted of attempted murder.

[47] The trial judge carefully considered the leading authorities on the issue of the distinction between preparation and attempt and referred to **R. v. Boudreau**, 2005 NSCA 40, at ¶30 where MacDonald, C.J.N.S. referred to the reasons for judgment of Le Dain, J. in **Deutsch, supra** as follows at p. 23-24:

> McIntyre J. referred with approval to the judgment of Laidlaw J.A. in *R. v. Cline, supra*, particularly for what it said concerning the relative importance of *mens rea* in attempt, but that judgment has also been treated as helpful for what it said concerning the application of the distinction between preparation and attempt. With reference to this question Laidlaw J.A. said at p. 28:
>
> > The consummation of a crime usually comprises a series of acts which have their genesis in an idea to do a criminal act; the idea develops to a decision to do that act; a plan may be made for putting that decision into effect; the next step may be preparation only for carrying out the intention and plan; but when that preparation is in fact fully completed, the next step in the series of acts done by the accused for the purpose and with the intention of committing the crime as planned cannot, in my opinion, be regarded as remote in its connection with that crime. The connection is in fact proximate. (Emphasis added)

[48] The trial judge also instructed himself in terms of the following passage adopted by the Nova Scotia Court of Appeal in **Boudreau, supra**, from the judgment of the Supreme Court of Canada in **Deutsch, supra** at p. 26:

> In my opinion, relative proximity may give an act which might otherwise appear to be mere preparation the quality of attempt. That is reflected, I think, in the conclusion of the majority in *Henderson* and in the conclusion of the Ontario Court of Appeal with respect to *actus reus* in *R. v. Sorrell and Bondett* (1978), 41 C.C.C. (2d) 9. But an act which on its face is an act of commission does not lose its quality as the *actus reus* of attempt because further acts were required or because a significant period of time may have elapsed before the completion of the offence. (Emphasis added)

[49] Mr. Mantley's actions went far beyond mere preparation.

[50] The evidence established that when the appellant arrived at the hospital at approximately 4:00 a.m. on July 1, 2011, his intention was to kill his wife. Preparations had been completed. The appellant had armed himself with a number of weapons capable of causing death. While attempting to enter the hospital, the appellant expressed his intention of killing his wife.

[51] Mr. Mantley made it into the Emergency Department of the hospital. All that remained for him to do was to get through the doors to the lobby, take the

elevator two floors up or climb two flights of stairs and make his way to his wife's room. He entered the hospital with three concealed weapons. He was frantic to see his wife. His only physical obstacle arose when he was blocked by the locked doors. Frustrated, he began banging on the locked doors. He then decided to find another way up to her room. He tried to enter the main building through the triage area. During this time he mentioned "a couple of times" that he was going to kill his wife. His intention to do violence was obvious.

[52] These acts which on their face, are acts of commission, do not lose their quality as the *actus reus* of attempt because Mr. Mantley had not yet reached the proper hospital floor or because he was not in the same room as his wife or within seconds of completing the crime of murder. Applying the proximity test accepted by Le Dain, J. in **Deutsch, supra**, the appellant's actions clearly amounted to an attempt and not mere preparation.

[53] There was very little left for Mr. Mantley to do to complete the murder except go to his wife's room, pull out a weapon and attack her with it. He had selected three weapons. He had dressed himself in clothes that effectively concealed the weapons to the passing eye. He was on location at the hospital and striding purposely toward the main part of the hospital as Mr. Roy put it "like a man on a mission" when he was stopped by the locked doors.

[54] Mr. Mantley's actions were sufficient for the trial judge to conclude, as he did, that Mr. Mantley entered the hospital that evening with the intent to kill his wife and that his actions went beyond mere preparation. As the trial judge concluded:

> ... The overt act of entering the Hospital was clearly an act in the execution of his plan to kill his wife. He entered the Hospital with the specific intent to kill his wife and equipped himself with weapons accordingly for that specific purpose.

[55] The trial judge went on to conclude that the Crown had proven beyond a reasonable doubt that Mr. Mantley committed the offence of attempted murder. In reaching this conclusion he committed no error.

[56] I would dismiss this ground of appeal.

Conclusion

[57] I would dismiss the appeal.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Saunders, J.A.