SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Calnen*, 2015 NSSC 331

Date: 2015-11-17
Docket: CRH No. 426776
Registry: Halifax

Between:

Her Majesty the Queen

v.

Paul Trevor Calnen

Judge:	The Honourable Justice James L. Chipman
Heard:	November 17, 2015 in Halifax, Nova Scotia
Counsel:	Eric R. Woodburn and Susan MacKay, for the Crown Peter D. Planetta and Sarah M. White, for Mr. Calnen

Orally by the Court:

Introduction

[1] Not surprisingly, the Defence has made a motion for a directed verdict of acquittal. I say this because Mr. Planetta said during our pre-trial conference of October 28, 2015 that the Defence anticipated making such a motion. On October 30, Mr. Planetta provided the Court with a brief on the admissibility of Mr. Calnen's statement and attached a number of authorities including Judge Derrick's April 17, 2014 committal (on interference with human remains but not on second degree murder) decision, stating:

> It painstakingly reviews the authorities and analyzes the uses than can be made of the admissions in this very statement. It is obviously not binding on the Court but thorough and helpful.

[2] On November 1, the Crown responded with an email stating:

> We appreciate the defence sending Your Lordship a copy of Judge Anne Derrick's decision as it aids this court in placing the statement in the context of the entire trial. Although, Judge Derrick concluded that the evidence could not support a committal on 2nd degree murder, it would be the Crown's respectful submission that she also did not have the advantage of having the latest Supreme Court of Canada decision.

[3] In argument today the Crown candidly acknowledged that the case they refer to, *R. v. Rogerson*, 2015 SCC 38, and which they provided to the Court, really does no change the law of post-offence conduct.

[4] Yesterday afternoon the Defence provided 10 cases to the Court. They followed this submission with their 18 page brief, received electronically last evening. As for the Crown, last evening they submitted electronically 6 cases on motive and a case on post-offence conduct, along with emails setting out their position.

[5] In coming to my decision, I have reviewed the entirety of the submissions along with the oral arguments heard this morning.

[6] At the outset of this trial, Mr. Calnen plead guilty to the count Judge Derrick committed him to stand trial on (and to which the Defence conceded at the preliminary inquiry), the s. 182(b) charge.

[7] As for the remaining count, it is pursuant to s. 235(1) C.C., second-degree murder.

Discussion

[8] It is a question of law whether or not to grant a motion for a directed verdict (*R. v. Rowbotham*, [1994] 2 S.C.R. 463).

[9] The question to be addressed is whether there is sufficient evidence such that a reasonable jury properly instructed could find the accused guilty. Subject to a limited exception in relation to circumstantial evidence, the trial judge is not to weigh or assess the evidence beyond satisfying himself or herself that there is admissible evidence adduced by the Crown in relation to each element of the offence.

[10] This issue has been addressed by the Supreme Court in a series of cases. In *The United States of America v. Raymond George Shephard*, [1977] 2 S.C.R. 1067 Justice Ritchie held that the test for a directed verdict is identical to the test for determining if an accused should be committed for trial. Justice Ritchie described the test as follows at page 1080:

> … [W]hether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The "justice"… is …required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.

[11] He further held at page 1087:

> … I cannot accept the proposition that a trial judge is ever entitled to take a case from the jury and direct an acquittal on the ground that, *in his opinion*, the evidence is "manifestly unreliable". If this were the law it would deprive the members of the jury of their function to act as the sole judges of the truth or falsify of the evidence and would thus, in my opinion, be contrary to the accepted role of the jury in our legal system.

[12] And at page 1088:

> … [T]he weighing of evidence is always a matter for the jury under proper instructions from the judge…

[13] In *Rowbotham*, Chief Justice Lamer formulated the *Shephard* test as requiring "no evidence of an essential element of the offence charged" before a directed verdict can be ordered (p.474). In *R. v. Charemski*, [1998] 1 S.C.R. 679,

157 D.L.R. (4th) 603 Justice Bastarache, writing for the majority, held that when dealing with circumstantial evidence, the question of "whether or not there is a rational explanation for that evidence other than the guilt of the accused, is a question for the jury".

[14] In *Charemski*, Justice McLachlin (as she then was), in dissent, formulated the test as "whether a properly instructed jury could reasonably convict on the evidence" (p.692). At p.699, Justice McLachlin summarized her position as follows:

> In my opinion, the test for a directed verdict in Canada remains the traditional one: whether a properly instructed jury acting reasonably could find guilt beyond a reasonable doubt. Where it is necessary to engage in a limited evaluation of inferences in order to answer this question, as in cases based on circumstantial evidence, trial judges may do so; indeed, they cannot do otherwise in order to discharge their obligation of determining whether the Crown has established a case that calls on the accused to answer or risk being convicted.

[15] Justice McLachlin emphasized that where there is circumstantial evidence a judge must engage in a limited weighing of the evidence in order to determine whether it is "rationally possible" for the jury to draw the inferences the Crown seeks to be drawn. This important caveat is fleshed out in later jurisprudence.

[16] In *R. v. Arcuri*, 2001 SCC 54, Chief Justice McLachlin wrote on behalf of an unanimous court. As noted by Derrick, P.C.J. (in her committal decision), this case dealt with the test for committing an accused for trial after a preliminary inquiry test which is the same test as the one that applies to directed verdicts. With respect to circumstantial evidence, Chief Justice McLachlin noted at para. 23:

> [23]… The question then becomes whether the remaining elements of the offence – that is, those elements as to which the Crown has not advanced direct evidence – may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap <u>beyond</u> the question of whether the evidence should be believed: see *Watt's Manual of Criminal Evidence*, *supra*, at §9.01 (circumstantial evidence is "any item of evidence, testimonial or real, other than the testimony of an eyewitness to a material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue"); *McCormick on Evidence*, *supra*, at pp. 641-42 ("[c]ircumstantial evidence . . . may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion"). The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences

> that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, if believed, could reasonably support an inference of guilt. [Emphasis added]

[17] Therefore, a trial judge is permitted and expected to engage in a limited weighing of circumstantial evidence. The inferences that the Crown seeks to draw from the evidence must be reasonable and rational in order for the Crown to discharge its evidentiary burden.

[18] In an extradition case, the Supreme Court in *United States of America v. Ferras; United States of America v. Latty*, 2006 SCC 33, [2006] 2 S.C.R. 77 reaffirmed *Sheppard*. Chief Justice McLachlin articulated the test as "whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty" (see para.9).

[19] The latest word from the Supreme Court on directed verdicts appears to be the decision of Justice Binnie in *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368. The case dealt primarily with the privileged identity of police informants, but the Crown had also appealed a directed verdict of acquittal on a charge of obstruction of justice. The Crown alleged that the accused had obstructed justice by taking investigative steps to identify a confidential police source for the purpose of interfering with the trial of another individual. Justice Binnie said the following at para.48:

> [48] A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction… Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge. An error of law grounds a Crown appeal under s. 676 of the *Criminal Code*.

[20] In *R. v. Beals*, 2011 NSCA 42, the Nova Scotia Court of Appeal applied *Arcuri* in the context of an entirely circumstantial case. Justice Saunders held the trial judge did not go beyond the "limited weighing" described in *Arcuri* when he described the Crown's evidence as "flimsy". He described the task of an appellate court when faced with an examination of this kind as follows:

> [36] There is no ready instrument one can use to gauge the parameters of "limited weighing" by preliminary inquiry judges when dealing with a committal decision, or by a trial judge on a motion for a directed verdict. No such assessment of the evidence can be plumbed with mathematical precision. Whether

> a motion will succeed or fail must depend upon the judge's evaluation of the evidence in that particular case. It seems to me that the approach we ought to take when such determinations are challenged on appeal, is to ask whether the trial judge stayed within the limited bounds of his or her assignment, or erroneously slid into the jury's exclusive preserve. I see nothing here to suggest that Judge MacDonald strayed beyond what the law required him to do.

Analysis and Disposition

[21] Having regard to the authorities, I am obliged to consider the evidence offered by the Crown and decide whether it is sufficient to reasonably support a conviction. In conducting such an analysis, I must weigh the evidence, albeit to a limited extent.

[22] Here the Crown's case against Mr. Calnen is entirely circumstantial. There is no body of the deceased as it was burned and there are inconsequential remnants which were not specifically identified by the Crown's anthropologist expert, Dr. Peckmann.

[23] Over the course of seven days the Crown has led evidence through numerous lay witnesses, Dr. Peckmann and one other expert, Neil Walker.

[24] This is a significantly larger body of evidence than what was before Judge Derrick. I note the preliminary inquiry took place in less than half the time here as it lasted three days in its entirety with a good part of the time dedicated to arguing the committal issue.

[25] I will not now set forth a review of all of the evidence at this trial. The key to the Crown's case relates to Mr. Calnen's post-offence conduct and whether it supports an inference of his guilt of second-degree murder.

[26] Identity and death are not in issue. Causation and the requisite mental intent for second degree murder are in issue. For the Crown to obtain a conviction on the charge of second degree murder, there has to be some evidence that Mr. Calnen caused Reita Jordan's death and that he did so intentionally or that he intended to cause Ms. Jordan bodily harm that he knew was likely to cause her death, and was reckless (s.229(a)(i) and (ii) C.C.).

[27] In the Crown's submission there is evidence that Mr. Calnen had motive to kill Ms. Jordan. The Crown points to Ms. Jordan's March 17 texts indicating her indifference toward Mr. Calnen and her wish to leave him. Further, on March 18, they had an argument when he returned from work. Mr. Calnen said in his

statement he was "kind of pissed off" when he saw that Ms. Jordan was preparing to leave with his laptop and gold ring. We have Wade Weeks receiving a text from Ms. Jordan on March 10 that Mr. Calnen had put his hands on her and she thought she was not safe. Later that day when Mr. Weeks asks if "he hurt u", Ms. Jordan says "he tried im tough tho".

[28] The Crown submits that it is Mr. Calnen's post-offence conduct that supports the strongest inferences of his guilt for murder. The Crown cites what they refer to as a multitude of evidence. Mr. Woodburn went to some length to explain the Crown's theory of the case and in so doing touched upon significant pieces of evidence, including evidence from Reita Jordan through her texts to Mr. Weeks and Mr. Calnen.

[29] The Defence dismisses animus and motive in their brief at pp.5-9 and includes quotes from the cases of *R. v. Johnson* and *R. v. Griffin*. They go on to discuss after-the-fact conduct at pp.9-16 and close with a section on permissible inferences from the evidence. At p. 15 of their brief the Defence sets forth their argument with respect to how *R. v. Rogerson* should be considered:

> The Crown in the case at bar appears to be submitting that *Rodgerson* stands for a broad proposition that in cases where the accused takes steps to conceal a corpse, this act proves intent at the time of the death, as well as the causation of the death and any other required elements. It is anticipated that Crown's argument will be that because Calnen took steps to conceal and dispose of the body, he must have done so to conceal injuries that would prove causation and intent. A reading of *Rodgerson* and *Hill* makes it clear that this argument must fail. *Rodgerson* relies on an inference drawn from significant proven injuries. This is a nuanced fact pattern, much as in *White* (2011). Both of these cases should be viewed as the exception rather than the rule. The law remains that in the vast majority of cases, after the fact conduct is not probative on the issue of intent. It can only be so when that intent is grounded in the evidence, as it was in *Rodgerson*, but not in *Hill*, and most certainly not in the case at bar. Furthermore, it can only be probative in a supporting role.

[30] In oral argument the Defence says there is really no evidence that can properly be put to the jury; i.e., no evidence on which a jury could reasonably convict.

[31] In their submissions, the Defence cites a number of cases in support of their position that post-offence conduct cannot be used to support or inference that Mr. Calnen intended to kill Ms. Jordan and did so. In this regard, they essentially track Judge Derrick's reasoning and the authorities she discusses at pp.25-29 of her decision, entitled, "After-the-Fact Conduct and a Properly Instructed Jury". They

commend for this Court's consideration a further decision of the Ontario Court of Appeal, *R. v. Hill*, 2015 ONCA 616 (CanLII) wherein the Court ordered a new trial on a second degree murder charge owing to a flawed instruction on post-offence conduct.

[32] The Defence argues *Rodgerson* is distinguishable from the case at Bar. Indeed, the Defence says *Hill* distinguished it as follows at para.57:

> [57] I do not agree that the appellant's conduct in hiding and then burying the body could be seen as an effort to destroy evidence capable of showing the nature and extent of the injuries which in turn were capable of supporting an inference of intent. This was not a situation like *Rodgerson* in which the evidence of the injuries to the body, which the accused attempted to destroy as well as bury, and the blood at the scene, which the accused attempted to clean up, suggested a multi-blow attack consistent only with the intention required for murder under s. 229(a). In this case, the condition of the body indicated that Ms. General had been strangled and little else. The bruising on the neck did allow the pathologist to provide a broad estimate as to the length of time over which the appellant applied force to Ms. General's neck. That opinion was potentially significant on the issue of intent. It is, however, farfetched to suggest that the appellant was aware of and appreciated the significance of the bruising and took steps to hide the body to avoid discovery of the telltale bruising.

[33] The Defence goes on to argue there is similarly no evidence of any injuries in this case, certainly no evidence of injuries which are patently inconsistent with an intended homicide. While I agree we do not have evidence of injuries in this case, I do not find this ends the matter. In this regard I note the Crown's submission of last evening that reads:

> … Regardless of my friends submissions, it is clear from *Rodgerson* (and we would argue with *White* & others) that some forms of post-offence conduct can establish;
>
> 1. That Mr. Calnen's efforts to destroy evidence and burn the body are capable of supporting the inference that a crime was committed.
>
> 2. He was not only hiding that fact but hiding the extent of the crime committed. That is, he burned the body to conceal any injuries that could be linked to her death that he intended to commit.
>
> … However, we can see no language in *Rodgerson* that restricts the use of certain types of post-offence conduct to prove intent in homicides.
>
> In this case, Mr. Calnen claims its an accident & he just panicked.

It is clear that Mr. Calnen admits no unlawful act. (unlike several of the cases). In fact, Mr. Calnen does everything to distance himself from this act and conceal his intent. While its true that lying to the police does not necessarily go to intent to kill, we have plenty of evidence that can lead a jury to the conclusion that he not only committed an unlawful act but he had the requisite intent to kill Ms. Jordan.

[34] Further in *Hill* Justice Doherty followed the above-quoted para.57 with this:

[58] As with any inference-drawing process, the primary facts are crucial. It would be unreasonable to infer from the primary facts in this case that the appellant hid and buried the body to conceal the nature and extent of the bruising on Ms. General's neck.

[59] There is more substance to the Crown's second argument. Evidence of motive is relevant to identity and to intent: see *R. v. Luciano*, 2011 ONCA 89 (CanLII), 267 C.C.C. (3d) 16, at paras. 113-17. Evidence of motive can be particularly significant when deciding whether an admitted unlawful killing amounted to murder or manslaughter.

[60] Evidence that the appellant was the father of Ms. General's unborn child was an important piece of evidence, relied on by the Crown to establish the motive alleged by the Crown for the homicide. The burying of the body by the appellant and his attempt to lead others, including Ms. General's mother, to believe she was still alive might reasonably support the inference that the appellant knew that the discovery of the body would reveal his motive for killing Ms. General and thereby implicate him in the murder.

[61] Although Crown counsel's argument connecting some of the appellant's after-the-fact conduct to intent through proof of motive has merit, it does not assist the Crown on the appeal. The trial judge did not leave the appellant's after-the-fact conduct with the jury on the limited basis now suggested by the Crown. He invited the jury to consider the after-the-fact conduct that he identified (hiding the body, burying the body, lying to various people) as evidence of intent without any explanation or qualification. This non-direction is identical to the error identified in *Rodgerson*, at para. 28. The trial judge's open-ended invitation to the jury to consider the appellant's after-the-fact conduct as evidence from which it could infer the requisite intent for murder constituted an error in law.

[62] The error was potentially significant. Intent was one of two live issues at trial. Given the nature of the after-the-fact conduct, a jury could easily have concluded that the appellant acted in a callous and calculating manner for over three months in an attempt to avoid responsibility for his actions. A jury could further conclude that the callous and calculating nature of the conduct was consistent with the conduct of a murderer as opposed to someone who had not intended to kill Ms. General. Absent a proper instruction, a jury may well have

> improperly inferred from the nature of the accused's conduct after Ms. General's death that he killed her with the intent required for murder.
>
> [Emphasis added]

[35] I do not take the above words of Justice Doherty as an absolute prohibition to putting post-offence conduct to the jury when it comes to the issue of intent. Support for this statement is found in the decision of *R. v. Svekla*, 2011 ABCA 154. The Alberta Court of Appeal (per Côté, Costigan J.J.A. and Graesser, J.) had cause to consider an appeal by an accused convicted a second-degree murder in a judge alone trial. The accused had been found with the body of the victim in a hockey bag which he had been transporting. The accused did not testify, although he had given numerous statements to police, some containing exculpatory explanations for why he had possession of the victim's body.

[36] The accused's position at trial was that there was a reasonable doubt as to whether he had committed culpable homicide in relation to the victim's death. Most of the evidence against him consisted of post-offence conduct, and statements to third persons.

[37] The Alberta Court of Appeal reviewed *White* (2011) and went on to make important determinations relevant to the case at Bar:

> [24] The essence of Rothstein J.'s 2011 majority decision is found in its para. 42:
>
> > Thus, *Arcangioli* and *White (1998)* should be understood as a restatement, tailored to specific circumstances, of the established rule that circumstantial evidence must be relevant to the fact in issue. In any given case, that determination remains a fact-driven exercise. Whether or not a given instance of post-offence conduct has probative value with respect to the accused's level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial. There will undoubtedly be cases where, as a matter of logic and human experience, certain aspects of the accused's post-offence conduct support an inference regarding his level of culpability.
>
> [25] Ultimately, we do not think the 2011 *White* decision changes the law in any way. Counsel for the accused agrees. *White* turned on its facts and on the Supreme Court's interpretation of the specific words used in the charge, as well as characterization of flight evidence as demeanor or not.

> [26] If we apply *White* (2011) to the present case, it shows that the trial judge was entitled to use the post-offence conduct to infer intent or state of mind, if the circumstances of the case permitted him to do so. Counsel for the accused concedes this proposition. The Supreme Court distinguished *Arcangioli* on its facts, not on the law.

[38] The Court went on to note at para.29:

> [29] Though use of decided cases as factual precedent has little weight, it may be worth noting that the Crown's factum cites many cases where the Supreme Court of Canada, the Ontario Court of Appeal, and this Court have upheld convictions for murder based in part on elaborate post-offence actions to conceal the evidence (paras. 32-41). We mention that because the appellant's factum tries to use reported cases for factual propositions, such as suggesting that post-offence conduct never can be of real help on the murder vs. manslaughter issue, being equally consistent with both. In our view, no such blanket rule is possible; it depends upon the circumstances. As Rothstein J. says in *White* (2011), this is a factual topic for a properly-instructed trial judge (or jury), not for a Court of Appeal.
>
> [Emphasis added]

[39] When I conduct my limiting weighing of the evidence, I am particularly mindful of the testimony of Wade Weeks and Donna Jordan, along with Reita Jordan's tests and the statements of Mr. Calnen which have been placed in evidence before the jury. In my view, if the jury choses to accept parts of this evidence, it is more than sufficient in establishing the requisite intent for second-degree murder. Having said this, I am especially mindful of Justice Moldaver's wise words in *Rodgerson* in terms of how this post-offence conduct must be characterized for the jury. With this in mind it seems to me that Mr. Calnen's own statements and the texts reveal the possibility of a fight having occurred between him and Ms. Jordan on the day she died. Furthermore, we knew from his June 18 statement and re-enactment statement that Ms. Jordan was preparing to leave Mr. Calnen and that he spied his laptop in one of her packed bags and found his gold ring in her purse.

[40] From Donna Jordan, we have her evidence that Reita wanted to move back home in the lead up to her death. As for Mr. Weeks' evidence, there are the text messages he spoke of and in particular the ones about Mr. Calnen laying hands on Ms. Jordan and the one where she tells Mr. Weeks not to worry about Mr. Calnen hurting her because she's tough. Furthermore, there are Reita Jordan's texts to both Mr. Weeks and Mr. Calnen which speak to a tumultuous relationship involving herself and Mr. Calnen.

[41] While all of this evidence may be explained away – as it has to a degree, through the cross-examinations and other parts of Mr. Calnen's statements – I find that when properly instructed, the jury may choose to accept some or all of it. If they so choose, this evidence establishes the requisite intent for second-degree murder.

[42] I would add that post-offence conduct has been found in other cases to be probative of intent. Mr. Calnen has admitted to burning and disposing of Ms. Jordan's body. This conduct may or may not be probative on the issue of intent in this case. His denials in the statements are admitted into evidence. Any risk of prejudice can be averted by a proper instruction on the proper use of this evidence.

[43] When I review *Rodgerson* and *Hill*, I do not find they alter what the Alberta Court of Appeal stated in *Svekla*. As noted in *Hill*, with any inference-drawing process the primary facts are crucial. In the case at Bar, when I conduct a limited weighing of the evidence led by the Crown, I arrive at the conclusion that there is some circumstantial evidence on all of the essential elements of the offence of second-degree murder. Accordingly, I dismiss the Defendant's directed verdict motion.

Chipman, J.