
CANADA / JUDGMENT

R. v Hosack

2022 BCCA 226

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 226 R. v. Hosack

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hosack,

2022 BCCA 226

Date: 20220629

Docket: CA45290

Between:

Regina

Respondent

And

Ernest Allan Hosack

Appellant

Before:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Fenlon

The Honourable Justice Dickson

On appeal from: Orders of the Supreme Court of British Columbia, dated

April 22, 2013 and October 27, 2017 (R. v. Hosack, 2013 BCSC 2504 and

2017 BCSC 2644, New Westminster Docket X073841-2).

Counsel for the Appellant:

V. Larochelle

Counsel for the Respondent:

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

December 10, 2021

Place and Date of Judgment:

Vancouver, British Columbia

June 29, 2022

Written Reasons by:

The Honourable Justice Dickson

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Fenlon

Summary:

The appellant challenges his conviction for second-degree murder. He argues the trial judge erred by ruling his statement to police admissible, by finding it included inculpatory admissions to killing the deceased and by inferring that he intentionally caused the death. He also argues the judge erred by failing to find him not criminally responsible on account of mental disorder ("NCRMD") and by failing to stay the proceedings pursuant to s. 11(b) of the Charter based on unreasonable delay. Held: Appeal dismissed. The judge made none of the alleged errors. He interpreted the evidence reasonably and drew available inferences that supported his admissibility ruling and his conclusion that the appellant was guilty of second-degree murder. He also did not err in his NCRMD ruling given the inconclusive nature of the salient evidence. Finally, the s. 11(b) argument is new on appeal, and will not be entertained.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

- [1] Ernest Hosack appeals his conviction for the second-degree murder of Richard Falardeau, his former roommate. The appeal turns largely on the admissibility and import of his statement to police and the inferences that could reasonably be drawn from the evidence. According to Mr. Hosack, the judge erred by ruling his statement admissible, by finding it

included inculpatory admissions and by inferring that he intentionally caused the death of Mr. Falardeau. The judge also erred, he says, by failing to find him not criminally responsible on account of mental disorder and by failing to stay the proceedings pursuant to s. 11(b) of the Charter based on unreasonable delay.

- [2] In my view, the judge made none of the alleged errors. He interpreted the evidence reasonably and drew available inferences that supported his admissibility ruling and his conclusion that Mr. Hosack was guilty of second-degree murder. Nor did the judge err by failing to find Mr. Hosack not criminally responsible given the inconclusive nature of the salient evidence or by failing to stay the proceedings for unreasonable delay, a remedy Mr. Hosack did not seek in the court below.
- [3] For these reasons and those that follow, I would dismiss the appeal.

Background

- [4] Mr. Falardeau died in the summer of 2008. He was living in an attic suite in Surrey, British Columbia at the time. A 54-year-old heavy drinker who suffered from poor health, Mr. Falardeau met Mr. Hosack in May 2008 when Mr. Hosack defended him in an altercation at a Starbucks. Thereafter, Mr. Hosack stayed at Mr. Falardeau's suite until he was arrested on June 18, 2008 on an unrelated matter and held in custody until July 14, 2008, when he was released.
- [5] On July 15, 2008, Mr. Falardeau attended at the office of his family doctor. On July 16, 2008, his landlord purchased a lock for his attic suite after Mr. Falardeau told him that he and Mr. Hosack were not getting along, but he did not install the lock.
- [6] On July 20, 2008, police found Mr. Hosack sleeping in a wooded area of Surrey and had him transported to hospital for treatment of a head laceration. On July 21, 2008, Delta police found him driving erratically in a stolen car and arrested him. In the trunk of the car was a suitcase later found to contain a knife with Mr. Falardeau's DNA on it, together with a drawing on one side of a piece of paper and, among other words, "Ernest Hosack" written on the other side. The drawing was of a figure wielding a double-bladed axe apparently having just decapitated a person on a tree stump.
- [7] Mr. Hosack was initially cooperative when he was arrested on July 21, 2008. However, he began to act in a delusional manner after he was lodged in police cells.
- [8] Throughout the first few weeks of August 2008, flies began to appear in increasing numbers in the house where Mr. Falardeau lived in the attic suite. The landlord and downstairs tenant tried to find the source of the flies and, in doing so, entered the suite, which was messy and smelled bad. They quickly looked around and noticed that there were many flies there, but they found no sign of Mr. Falardeau.

- [9] On August 14, 2008, a police officer attended at Mr. Falardeau's suite in response to a missing person inquiry, but did not enter. On August 20, 2008, police returned and found Mr. Falardeau's badly decomposed body in a suitcase in the bathroom closet of the suite. He had been decapitated. The next day, police found Mr. Falardeau's thumbs, anus and testes in a plastic bag in the freezer. Three months later, his head was found in a Surrey Hydro right-of-way.
- [10] Between July 21, 2008 and May 10, 2009, Mr. Hosack was incarcerated and serving a provincial jail sentence. When he was released he was immediately arrested for Mr. Falardeau's murder, a practice sometimes called "gating". He was transported to a nearby detachment where he was given appropriate Charter and statement cautions and he exercised his right to counsel. Then he was interviewed. The interview lasted for approximately 12 hours, from 2:49 p.m. on May 10 until 2:38 a.m. on May 11. It was video-recorded and conducted primarily by two interrogating officers, occasionally assisted by two more.
- [11] Early in the interview, an officer asked Mr. Hosack if he had killed Mr. Falardeau. He denied it. However, later in the interview he adopted the persona of his deceased grandfather, whom he called "Ernie Gootchie Gootchie Koo". Speaking in the grandfather persona, Mr. Hosack told the officers that spirits had taken Mr. Falardeau and that he (the grandfather persona) had ordered Mr. Falardeau's dismemberment. Among other things, Mr. Hosack also told them that Mr. Falardeau's thumbs and genitals were removed, that he died quickly and that he (Mr. Hosack) saw him (the grandfather persona) "snap his head off like a twig".
- [12] Mr. Hosack was charged with committing the second-degree murder of Mr. Falardeau on a date between July 17 and 20, 2008. Following a preliminary inquiry in 2010 and a fitness assessment in 2011, the trial proceeded in April, May and June 2012 and February 2013, commencing with a seven-day voir dire concerning the admissibility of Mr. Hosack's statement. At trial, the defence was that the Crown had failed to prove beyond a reasonable doubt that Mr. Hosack had caused Mr. Falardeau's death.
- [13] On June 14, 2012, the judge ruled that Mr. Hosack's statement was admissible. On April 22, 2013, he found the Crown had proved the actus reus and mens rea of the offence of second-degree murder beyond a reasonable doubt. However, he deferred entering a formal conviction to give the defence an opportunity to consider whether to raise the issue of criminal responsibility.
- [14] After the judge issued his reasons, Mr. Hosack retained new counsel and brought an application to be found not criminally responsible by reason of mental disorder ("NCRMD"). An NCRMD assessment was ordered and a report and addendum were completed by a psychiatrist, Dr. Widajewicz, who testified at the hearing. The NCRMD application was heard in December 2016 and June 2017 and dismissed on October 27, 2017. On April 17, 2018, the judge sentenced Mr. Hosack to life imprisonment without eligibility for parole for 15 years.

- [15] Mr. Hosack did not apply in the court below for a stay of proceedings based on unreasonable delay under s. 11(b) of the Charter. Nor did he seek the exclusion of his statement on the basis that his ss. 7 and 9 Charter rights were breached.

On Appeal

- [16] Mr. Hosack raises four grounds of appeal in support of his submission that we should quash his conviction. First, he submits the judge erred by failing to conduct a contextual analysis of whether his statement was voluntary rather than engaging in broad lines of inquiry into threats and inducements, oppression, operating mind issues and police trickery and considering all of the relevant factors collectively. Second, he submits the judge erred by inferring that he intentionally killed Mr. Falardeau when this was not the only reasonable conclusion available on the entirely circumstantial evidence presented and thus that the verdict was unreasonable. Third, he submits the judge erred by failing to provide him with needed assistance at the NCRMD hearing and failing to give effect to Dr. Widajewicz's evidence. Fourth, he submits the judge erred by failing to stay the proceedings pursuant to s. 11(b) of the Charter given the long delays that preceded and followed his finding of guilt.
- [17] In support of his position on the second ground of appeal, Mr. Hosack seeks the admission of fresh evidence in the form of a report written by Dr. Orde, a forensic pathologist. In the report, Dr. Orde opines that hyoid bone fractures observed by the pathologist who testified at trial, Dr. Straathof, could be accounted for by post-mortem injury such as dismemberment or post-mortem predation by animals prior to discovery of the remains as opposed to significant traumatic injury to Mr. Falardeau's neck when he was alive. Dr. Orde's opinion in this regard is based in part on a review of police notes indicating that the hyoid bone was found over 20 feet away from Mr. Falardeau's recovered skull, which information was not provided to Dr. Straathof. The Crown resists the fresh evidence application on the basis that it fails to meet the due diligence criterion in *R. v. Palmer*, [1980] 1 S.C.R. 759 and that its admission would not have affected the outcome. However, if Dr. Orde's report is admitted, the Crown seeks the admission of a responsive report from Dr. Straathof.
- [18] The issues that emerge for determination are:
- Did the judge err by ruling Mr. Hosack's statement was voluntary and admissible? If so, how?
 - Did the judge err by inferring that Mr. Hosack intentionally caused the death of Mr. Falardeau and thus reach an unreasonable verdict? Should Dr. Orde's report be admitted as fresh evidence?
 - Did the judge err by failing to assist Mr. Hosack appropriately in the NCRMD hearing and by failing to find him not criminally responsible for the murder of Mr. Falardeau?
 - Did the judge err by failing to stay the proceedings pursuant to s. 11(b) of the Charter on the basis of unreasonable delay?

Discussion

Did the judge err by ruling Mr. Hosack's statement was voluntary and admissible? If so, how?

Legal Framework

- [19] The scope of the common law confessions rule is well-established. The governing authority is *R. v. Oickle*, [2000] 2 S.C.R. 3. In *Oickle*, Justice Iacobucci described voluntariness as "the touchstone of the confessions rule" and a "shorthand for a complex of values": at paras. 69-70. Accordingly, only those confessions proven voluntary beyond a reasonable doubt will be admissible: at para. 68. Justice Iacobucci also affirmed that hard and fast rules cannot account for the wide range of circumstances that may vitiate voluntariness. Therefore, he stated, judges must be "sensitive to the particularities of the individual suspect", conduct a contextual analysis and consider all relevant factors when determining the admissibility of a confession made to police: *Oickle* at paras. 42, 47, 71.
- [20] As Justice Iacobucci explained, in assessing voluntariness a judge must consider whether threats or inducements were used by police in an interrogation, whether conditions were oppressive, whether the accused had an operating mind and whether the police engaged in trickery. The threats or inducements doctrine asks whether the police offered a quid pro quo to obtain a confession and, like the oppression doctrine, is primarily concerned with its reliability. Conditions of an interrogation are oppressive where they are so distasteful that they overbear the suspect's will. The operating mind doctrine requires that the suspect is aware of what is being said and that it is being said to police who can use it to their detriment, and is primarily concerned with fairness and the rights of the accused. These three doctrines are to be considered together. Considerations of police trickery involve a distinct inquiry aimed at maintaining the integrity of the criminal justice system and ask whether the police conduct in question would shock the community, although police deception is also relevant to voluntariness at large: *Oickle* at paras. 57, 58, 63, 65-70.
- [21] In conducting a contextual analysis, the judge should strive to understand the entirety of the surrounding circumstances and ask whether, considered together, they give rise to a reasonable doubt as to voluntariness, taking into account all aspects of the confessions rule: *Oickle* at paras. 71, 91.
- [22] If a judge properly considers all the relevant circumstances, a finding regarding voluntariness is essentially factual in nature. Accordingly, it should only be overturned on appeal based on a palpable and overriding error. A disagreement with the judge concerning the weight to be given to various aspects of the evidence is not a proper basis upon which to reverse a finding on voluntariness: at paras. 22, 71. Trial judges are in the best position to draw conclusions from the evidence based on their fact-finding expertise and their privileged position from which to assess the entirety of the evidence on the voir dire: *R. v. Spencer*, 2007 SCC 11 at para. 17.

Admissibility Ruling: 2012 BCSC 2139

- [23] The judge began by noting that Mr. Hosack was plainly suffering from mental illness when he made the statement. He identified the critical questions as whether the Crown had proven beyond a reasonable doubt that Mr. Hosack had an operating mind and whether the length of the interview and police tactics employed did not create an atmosphere of oppression or demonstrate conduct that would shock the community. After outlining the circumstances of Mr. Hosack's arrest, he identified three distinct stages of the interview, namely, a rapport-building stage, a confrontational stage and the grandfather persona stage. Then he described what took place at every stage.
- [24] The judge observed that during the rapport-building stage Mr. Hosack expounded on his delusional plans for various innovations and expressed concern that others were stealing his ideas and plans. He also described Mr. Hosack's account of meeting Mr. Falardeau and returning to the attic suite after his release from jail, at which point Mr. Hosack said that Mr. Falardeau told him he was no longer welcome. After approximately six hours, the interview shifted into the confrontation stage.
- [25] The judge stated that during the confrontation stage an officer told Mr. Hosack he was certain that he had killed Mr. Falardeau and characterised the offence "as either having been planned and deliberate or spontaneous": at para. 20. The officers also told Mr. Hosack they had an overwhelming amount of evidence, invited him to show that he was not "a cold, calculating killer" and played recordings of Mr. Hosack's family members urging him to confess: at para. 32. Approximately nine hours into the interview, they gave Mr. Hosack his anti-anxiety medication and a female officer interacted with Mr. Hosack in what the judge described as a "mildly flirtatious" manner, leading him jokingly to propose marriage: at para. 38. Following a second cigarette break, the judge stated, the interview moved into the final "critical phase", at which point Mr. Hosack adopted the grandfather persona: at para. 45.
- [26] The judge gave a detailed description of Mr. Hosack's words and behaviour after he adopted the grandfather persona. For example, he noted that Mr. Hosack spoke in a low guttural tone and sometimes growled, informed the officers that he (the grandfather persona) had ordered Mr. Falardeau to be dismembered and that Mr. Falardeau died quickly. He also noted Mr. Hosack stated that he (Mr. Hosack) saw him (the grandfather persona) snap Mr. Falardeau's head off like a twig.
- [27] Next, the judge described the expert evidence of Dr. Lohrasbe, a psychiatrist. Among other things, he noted that Dr. Lohrasbe defined "psychosis" and "delusions", and explained that the relationship between psychosis and the ability to give a voluntary statement is based on the context and intensity of a delusion. He also noted Dr. Lohrasbe testified that a person experiencing psychosis may have robust cognitive and volitional capacity, that the ability of such a person to make a free choice to speak can remain relatively unimpaired by mental illness and that Mr. Hosack, while clearly mentally ill, displayed a good level of

concentration and sustained attention skills.

- [28] The judge went on to note that certain assertions made by police were inaccurate and to comment on counsel's submissions. As to the latter, he stated that defence counsel emphasised the length of the interview and asked him to consider "the corrosive and undermining psychological effect of the police 'gating' Mr. Hosack, by re-arresting him on the very day of his highly-anticipated release from his previous sentence": at para. 75. Then he turned to his analysis of voluntariness.
- [29] The judge began by identifying Oickle as the governing authority. He summarised the relevant legal principles, observed that counsel did not focus on the effect of threats or inducements and stated that "[s]ome of the police tactics could certainly be read as implied threats": at para. 83. However, he found, in the context of the overall statement the implied threats did not have "any particular significance during the dialogue between the officers and Mr. Hosack or any effect whatsoever on his ultimate decision to speak about the offence": at para. 84. He found further that the moral and spiritual appeals by Mr. Hosack's family members did not amount to threats or inducements as those concepts are understood in Canadian law: at para. 85.
- [30] The judge described the role of Mr. Hosack's mental illness in his analysis as "pivotal" and Dr. Lohrasbe's general explanations of psychosis, delusions and other mental states as "relevant and informative": at para. 86. However, he observed that it was for him to ascribe factual and legal meanings to Mr. Hosack's behaviour. He found that Mr. Hosack's descriptions of his works of genius and threats of theft were obvious delusions. However, he stated, Mr. Hosack's conduct revealed a "purposive awareness" of his statements, their effect and their possible use:
- [88] While his descriptions of his works of genius and the persistent theft of them by others are obvious delusions, his interactions with the interviewers reveal throughout the interview, including during his adoption of the persona of his grandfather, a purposive awareness of his statements and their effect, and a keen understanding that they could be used against him. He repeatedly commented on the efforts of the interviewers to impose criminal responsibility on him for acts of which he claimed to be innocent, including his potential role as a fall guy or patsy for the actions of others. He also referred repeatedly to his preference to have matters sorted out during the trial process rather than commenting on the evidence with which he was being confronted. ...
- [89] Further, during a conversation when he was presenting himself as the grandfather, he referred to such relatively sophisticated legal concepts as being acquitted of the killing or the spirits not allowing him to be convicted, as well as to the concept that the acts of the spirits would be characterized in earthly terms as murder.
- [31] After also finding that Mr. Hosack's delusions were walled off from most of his other cognitive abilities, the judge concluded he had an operating mind: at para. 90.

- [32] Turning next to the oppression issue, the judge noted defence counsel's submission that multiple relevant factors interacted, "especially Mr. Hosack's pre-existing mental illness, the control exerted over him in various ways by the investigators, and the sheer length of the interview": at para. 91. However, he found that Mr. Hosack's actual behaviour "does not support a finding that he was worn out or overwhelmed by the tactics that were being employed": at para. 92. In explaining this finding, he noted the interview was punctuated by appropriate breaks, the officers' questioning was not aggressive or bullying, and Mr. Hosack assumed the grandfather persona during a "relatively innocuous interaction with the investigators--a stage that involved no pointed inquiries or increased psychological pressure by them": at paras. 93, 95-96. He noted further that Mr. Hosack's presentation did not change after he took the anti-anxiety medication and he did not reveal signs of mental deterioration due to pressure or exhaustion: at paras. 97-98.
- [33] The judge was unable to make a finding on whether Mr. Hosack was deliberately deceiving the officers by speaking in the grandfather persona or whether the persona was part of his grandiose delusion. However, he was satisfied that in either case "[Mr. Hosack] said what he intended to say". He was also satisfied that "whatever fatigue or sense of pressure may have existed by the time [Mr. Hosack] took on the grandfather role and made the inculpatory admissions, those factors did not deprive him of his essential ability to choose whether to speak": at para. 99.
- [34] Finally, the judge dealt with police trickery. He recognized that the police misrepresented the strength of the investigation, but was not left in doubt that this police conduct could have contributed to an atmosphere of oppression or would shock the community. He found the misstatements played no role in what Mr. Hosack chose to say and commented that, while he could not endorse the police tactics employed, they were unlike some outrageous conduct previously found to be capable of shocking the community: at paras. 100-106.
- [35] In the result, the judge concluded that Mr. Hosack's statement was voluntary and admissible: at para. 107.

Mr. Hosack's Position on Appeal

- [36] Mr. Hosack submits the police treated him abusively by keeping him in custody for over 17 hours and preying on his delusions, paranoia, social isolation and mental illness. However, despite condemning their conduct, the judge concluded that his statement was admissible. Mr. Hosack says that, in doing so, the judge erred by considering some factors in isolation and ignoring others rather than engaging in a broad contextual analysis of his overall experience throughout the interrogation. He also conflated the complex concept of voluntariness with mere volition and causality, contrary to the approach mandated in *Oickle*.

- [37] In support of his submission, Mr. Hosack argues that he was "gated" and kept in custody for over five hours before the interview commenced, which breached his rights under s. 503 of the Criminal Code and ss. 7 and 9 of the Charter. However, the judge failed to consider those breaches in his voluntariness analysis. In advancing this argument, Mr. Hosack acknowledges that he did not ask the judge to exclude his statement based on the Charter breaches he now alleges. However, citing *R. v. Singh*, 2007 SCC 48, he says the confessions rule intersects Charter rights and Charter breaches can impact voluntariness and, therefore, the judge erred in failing to take those breaches into account.
- [38] Mr. Hosack goes on to say that, in addressing the threats and inducements issue, the judge failed to consider the female officer's exploitative flirtation in light of his vulnerability, the veiled threat of a premeditated murder charge in light of his mental illness, and the excessive length of the interrogation. In addition, he says, he failed to recognize the oppressive atmosphere of the interrogation despite his obvious desperation, exhaustion and progressive mental breakdown. Further, he says, the judge failed to consider his fragile mental health and the length of the interrogation on the operating mind issue and he inquired separately into whether the police conduct would shock the community without considering its relevance to the larger voluntariness inquiry.
- [39] According to Mr. Hosack, considered collectively and cumulatively, these factors were plainly fatal to the admissibility of his statement. However, the judge lost sight of the need to adopt a contextual approach and ask whether the police conduct could produce an unreliable or false confession, not simply whether it did produce one. In other words, he says, the judge's analysis was unduly narrow and focused on volition and causality rather than on the complex of values represented by the concept of voluntariness. In doing so, he argues, the judge failed to strike an appropriate balance between, on the one hand, acceptable methods of interrogation and, on the other, the right of all Canadians to a justice system that ensures confessions are not unreliable or untrue and that detainees are treated fairly and decently.
- [40] In Mr. Hosack's submission, the time has clearly come for this Court to restrict the permissible length of interrogations to prevent abusive police conduct that makes a mockery of the principle against self-incrimination. This is particularly so, he says, for interrogations involving highly vulnerable individuals such as himself. Therefore, in addition to recognising the standard voluntariness constraints, Mr. Hosack invites us to impose a bright-line limit of six hours on the power of police to detain individuals for the purpose of interrogation against their expressed will.

Analysis

- [41] In my view, the judge conducted a manifestly broad and contextual analysis of voluntariness, as mandated in *Oickle*. His reasons are detailed, nuanced and responsive to the arguments advanced below. They also reflect a keen sensitivity to Mr. Hosack's unusual "particularities" and vulnerabilities, namely, his mental illness and its impact on his

cognitive and volitional capacity. As the judge stated, when he ascribed factual and legal meanings to Mr. Hosack's words and behaviour, Mr. Hosack's mental illness played a pivotal role.

- [42] The judge's factual findings in this regard were well-grounded in the evidence. As he noted, Dr. Lohrasbe testified that a person experiencing psychosis may have a robust cognitive and volitional capacity and may willingly choose to speak to police despite the existence of mental illness. Bearing in mind that evidence when assessing whether Mr. Hosack had an operating mind, the judge examined his words and behaviour closely and found they revealed a "purposive awareness" of his statements: at para 88. He also found that Mr. Hosack's delusions of worldly importance were walled off from his other cognitive abilities, which were not impaired by his mental illness. In my view, those findings were clearly reasonable, available and strongly supportive of his conclusion on voluntariness.
- [43] The same is true of the judge's findings on the oppression issue. Contrary to Mr. Hosack's submission, he made them with an express awareness of the interaction of multiple factors, including Mr. Hosack's mental illness, the police tactics employed and the length of the interview. As he did on the operating mind issue, the judge examined the salient evidence, such as Mr. Hosack's behaviour, the police conduct and the manner in which the interview unfolded. He went on to reject the submission that Mr. Hosack suffered a progressive mental breakdown and found he was able to choose whether to speak to the police, and did so. Again, these findings were reasonable, available and supportive of the conclusion that his statement was voluntary.
- [44] The judge's conclusions on voluntariness were also well-grounded legally. He committed no legal errors and he correctly applied the law. As the Supreme Court affirmed in *R. v. Nagotcha*, [1980] 1 S.C.R. 714 at 716, there is no invariable rule that inculpatory statements made by a mentally ill person are necessarily involuntary, nor does the test for an operating mind require a high degree of mental ability: see *R. v. Whittle*, [1994] 2 S.C.R. 914 at 939. Further, as affirmed in *Singh*, a suspect has a right to remain silent but does not have a right not to be spoken to by police. Accordingly, when assessing the voluntariness of a confession the appropriate analytical focus "is on the conduct of the police and its effect on the suspect's ability to exercise his or her free will": *Singh* at paras. 28, 36. That was the judge's focus when he analysed the police conduct and its effect on Mr. Hosack.
- [45] As his detailed reasons reveal, the judge considered all the relevant circumstances, including the circumstances surrounding Mr. Hosack's arrest and detention for interview purposes. However, the defence did not ask him to find that Mr. Hosack's rights under s. 503(1) of the Criminal Code and ss. 7 and 9 of the Charter were breached or to impose a new six-hour limit on the power of police to detain individuals for interrogation and, therefore, he made no findings in this regard. I agree with Crown counsel that, for the reasons articulated by Justice Fitch in *R. v. Gill*, 2018 BCCA 144 at paras. 9-10, this Court should not entertain these new arguments for the first time on appeal due to the fact-based nature of the necessary inquiry, the incomplete state of the record and the absence of a decision from

the trial judge.

[46] I also agree with Crown counsel that, at bottom, Mr. Hosack is attempting on appeal to relitigate the voir dire with respect to the admissibility of his statement. In other words, he is asking us to reweigh the evidence and reach a different factual conclusion on voluntariness than the conclusion reached by the judge in the court below. As affirmed in *Oickle*, that is not the role of an appellate court.

[47] It follows that I would not give effect to this ground of appeal.

Did the judge err by inferring that Mr. Hosack intentionally caused the death of Mr. Falardeau and thus reach an unreasonable verdict? Should Dr. Orde's report be admitted as fresh evidence?

Legal Framework

[48] Like the applicable legal principles on the first ground of appeal, the principles that apply on the second ground are also well-established. As Justice Newbury explained in *R. v. Robinson*, 2017 BCCA 6 [Robinson 2017], a verdict will be unreasonable within the meaning of s. 686(1)(a)(i) of the Criminal Code if it is not one that a properly instructed judge or jury could reasonably have reached on the basis of the evidence; if the judge drew an inference or made a factual finding essential to the verdict that is plainly contradicted by evidence relied upon in support; or if the impugned inference or finding is incompatible with otherwise uncontradicted or rejected evidence: at para. 20.

[49] Appellate courts are slow to find that a verdict is unreasonable: *R. v. Caron*, 2014 BCCA 111 at para. 48. This is because trial judges are entitled to consider and weigh the evidence as they see fit and "have considerable leeway in their appreciation of the evidence and the proper inferences to be drawn therefrom": *R. v. Biniaris*, 2000 SCC 15 at para. 24. Accordingly, the fact that an appellate judge would have had a doubt when a trial judge did not does not mean the verdict was unreasonable: *R. v. A.G.*, 2000 SCC 17 at para. 29.

[50] The test for determining an unreasonable verdict requires an appellate court to assess the cumulative effect of all the trial evidence. A piecemeal evaluation is inappropriate: *R. v. Robinson*, 2003 BCCA 353 at para. 40. Nor is a piecemeal evaluation of the evidence appropriate at the trial level. On the contrary, a trial judge must assess the whole body of trial evidence in its totality and should not examine the individual pieces of evidence in segregation or separate silos: *R. v. Morin*, [1988], 2 S.C.R. 345 at 359-362; *R. v. Rodgeron*, 2015 SCC 38 at para. 23.

[51] A misapprehension of evidence can also undermine the validity of a verdict and give rise to a miscarriage of justice under s. 686(1)(a)(iii) of the Criminal Code. However, a disagreement with a trial judge's factual assessment will not meet the stringent test for a misapprehension of evidence. To meet that test an alleged misapprehension must be on a question of substance, be material to the judge's reasoning and play an essential role in the judge's reasoning: *R. v. Lohrer*, 2004 SCC 80 at paras. 2, 9. As Justice Stromberg-Stein explained in *R.*

v. Swales, 2014 BCCA 350:

- [49] It is not enough for the appellant to merely suggest a different interpretation of the evidence, or merely point to some evidence which arguably weighs against the trial judge's finding. Mere differences in interpretation on factual matters are not misapprehensions but simple disagreement with the judge's differing view of the evidence.
- [52] Moreover, as Justice Fish stated in *R. v. Clark*, 2005 SCC 2, appellate courts may not interfere with the findings of fact and factual inferences drawn by a trial judge unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable: at para. 9.
- [53] Where proof of one or more elements of an offence depends exclusively or largely on circumstantial evidence, a judge must be satisfied beyond a reasonable doubt that the "only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty": *R. v. Griffin*, 2009 SCC 28 at para. 33. The critical issue in a circumstantial case is the range of reasonable inferences that may be drawn. If there are reasonable inferences other than guilt, the reasonable doubt standard will not be satisfied. The inferences in question must be reasonable given the evidence or absence of evidence, assessed logically and in light of human experience and common sense: *R. v. Villaroman*, 2016 SCC 33 at paras. 35-36.
- [54] Nevertheless, circumstantial evidence need not totally exclude all conceivable inferences. A verdict will not be unreasonable simply because other conceivable alternatives did not raise a doubt for the trier of fact in the court below: *Villaroman* at para. 56. In circumstantial cases, it is the task of the trier of fact to draw the line that separates reasonable doubt from speculation: *Villaroman* at para. 71. The task of an appellate court, on the other hand, is to decide whether the trier of fact, acting judicially, could reasonably be satisfied that the guilt of the accused was the only conclusion available on the totality of the evidence. While this task does require some limited weighing of the evidence, an appellate court must take care not to retry the case, act as a "thirteenth juror" or otherwise usurp the function of the trial court: *Robinson* 2017 at para. 33.
- [55] After-the-fact conduct evidence is one form of circumstantial evidence. Like other circumstantial evidence, after-the-fact evidence may allow a trier of fact, relying on logic, common sense and human experience, to draw inferences based on a person's words or actions. This includes inferences regarding intent. As Justice Martin explained in *R. v. Calnen*, 2019 SCC 6:
- [112] The inferences that may be drawn "must be reasonable according to the measuring stick of human experience" and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence: *R. v. Smith*, 2016 ONCA 25, 333 C.C.C. (3d) 534, at para. 77. That there may be a range of potential inferences does not render the after-the-fact conduct null: see *R. v. Allen*, 2009 ABCA 341, 324 D.L.R. (4th) 580, at para. 68. In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. "It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact

conduct": Smith, at para. 78.

[119] Contrary to certain suggestions made in the courts below, there is no legal impediment to using after-the-fact conduct evidence in determining the accused's intent. The jurisprudence of this Court is clear: after-the-fact conduct evidence may be relevant to the issue of intent and may be used to distinguish between different levels of culpability

[56] Finally, and importantly, a trial judge's reasons must be read as a whole, in context and in conjunction with the presumption that a judge knows the law. An appellate court should not indulge in a microscopic examination of reasons for judgment and any ambiguity should be resolved in favour of the trial judge: Caron at para. 29.

Trial Reasons: 2013 BCSC 2504

[57] The judge began his trial reasons by describing the nature of the Crown case and the points of controversy. In particular, he stated, the Crown relied on "what are characterised as inculpatory admissions" in Mr. Hosack's statement, "as well as on a supporting body of circumstantial evidence" to prove that Mr. Hosack caused Mr. Falardeau's death "with the required intent for second degree murder, before dismembering and disposing of his remains": at para. 4. He also stated the controversy was "when Mr. Falardeau was last seen alive, the date and manner of his death, Mr. Hosack's presence on the property and his interactions with Mr. Falardeau and the other residents, and what inferences can safely be drawn from his statement to the police": at para. 5.

[58] Then the judge reviewed the trial evidence. In doing so, he noted that Dr. Straathof found two sets of rib fractures on Mr. Falardeau's body which could have occurred before or after death, as well as a fracture on the C-5 vertebrae attached to his recovered skull which may have been caused by the decapitation. In addition, in examining the recovered skull, Dr. Straathof found fractures on both sides of the hyoid bone, a horseshoe-shaped bone located at the front of the neck. The judge summarised Dr. Straathof's evidence on this point in this way:

[69] These kinds of fractures suggest blunt force trauma, he said. They are often seen in cases of strangulation, which he thought was a possible cause of death here. There was also a fracture to the cartilage in the area of the Adam's apple and voice box. This could be consistent with the same type of trauma as to the hyoid, but it was also possible that it resulted from the decomposition process.

[59] The judge went on to summarise Dr. Straathof's evidence as to the cause of Mr. Falardeau's death, noting that he was unable to identify a specific mechanism of death. He also noted that Dr. Straathof would not have expected a large volume of blood to exit from the dismemberment wounds if they were inflicted post-mortem, as the evidence suggested, and observed that Dr. Straathof attributed Mr. Falardeau's death to what he called "homicidal violence":

[70] Overall, Dr. [Straathof] attributed death to what he called "homicidal violence", rather than being able to identify a specific mechanism of death. The combination of injuries indicative of strangulation, as well as of post-mortem dismemberment consistent with an attempt to hide the remains, made this finding appropriate in his view.

[60] The judge described some of the other evidence, then turned to Mr. Hosack's statement. He quoted several passages directly "[s]o the context of what are alleged to be the inculpatory admissions is clear". In doing so, he identified Mr. Hosack with the initials "EH". The passages that he quoted included the following at para. 100:

BS: Did Richard die quick?

EH: Very.

BS: How did Richard die?

EH: Faster than he ever thought possible.

SL: Ernie Goochie Goochie Co, uh, Richard died quick. How did you make sure he died quick? How did you do that? Did he suffer, or he died peacefully?

EH: He couldn't have felt it more than a second.

SL: Okay. So you didn't want him to suffer?

EH: No.

SL: Well, that's important. [T]hank you, Ernie Goochie

SL: So your grandson saw how uh, Richard died?

EH: Yes.

SL: Okay. Tell me what your grandson saw?

EH: Seen me snap his head off like a twig. And I showed him just how far that meddling would take him with what Richard was playing with.

SL: So how did he

EH: Before I snapped his head off like a twig.

SL: So you said you snapped Richard's head like a twig?

EH: That's right.

BS: Right, but I'm asking you what would your grandson call it? I'm not asking him to tell me. What word, what mortal word would your grandson call it?

EH: Because he's seen both sides he'd say it's God's Will or an Act of God.

BS: And what would I call it?

EH: You would call it murder or whatever.

[61] After setting out these and other passages from the statement, the judge said this:

[104] These passages are capable of supporting admissions by Mr. Hosack, ostensibly on behalf of the grandfather or entity, that:

- he had ordered Mr. Falardeau to be dismembered;
- the thumbs and genitals had been removed and that they remained in the freezer at the residence wrapped in a Safeway bag;
- the genitals came off cleanly because he used a razor;
- he also used shears to cut Mr. Falardeau up;
- he put a stick of incense up Mr. Falardeau's anus and lit it;
- he had asked his grandson, Mr. Hosack, to do the cleanup for him;
- Mr. Falardeau died quickly "faster than he ever thought possible", "he couldn't have felt it more than a second", and his grandson saw the grandfather snap the head off like a twig;
- he put the head "back to the time that it was just bone" and his grandson is strong enough to do that he wants him to be.

[62] The judge completed his review by observing that the statement contained actions and comments capable of supporting the inference that Mr. Hosack "was consciously adopting the persona of the grandfather, as opposed to being in any sort of altered state of consciousness": at para. 106.

[63] Under the heading "Discussion", the judge described the critical issue as "the weight that I give to Mr. Hosack's statement to police and the inferences that are capable of being drawn from it about his actual involvement, if any, in the offence": at para. 107. He noted that the Crown did not suggest "the surrounding body of circumstantial evidence could in itself reach the necessary standard of proof": at para. 107. He also remarked on the need for extreme caution in relying on the statement as an admission that Mr. Hosack killed Mr. Falardeau and dismembered his body given Mr. Hosack's mental illness and the bizarre nature of the inculpatory admissions. Nevertheless, he stated:

[109] I agree with the Crown's primary submission that there is no escaping the compelling force of Mr. Hosack's recitation of the holdback information concerning the severing and the location of storage of the anus, testes, and thumbs. While the mere designation of investigative information as holdback does not in itself establish any kind of impermeable barrier to its onwards dissemination, I find it unlikely, to the point of impossibility, that someone in Mr. Hosack's position could have acquired this information other than through personal knowledge and involvement. This evidence satisfies me that he committed those acts himself and lends powerful support to the overall reliability of his inculpatory

admissions.

- [64] The judge further remarked on aspects of Dr. Straathof's evidence and the statement bearing in mind the defence submission that the dismemberment might have occurred after Mr. Falardeau died from other causes. However, he found that Mr. Hosack's statements were "clear expressions of an intention to cause death" and admissions "of some kind of act of manual strangulation or other infliction of serious trauma by him to that area of the neck":
- [110] Dr. [Straathof]'s opinion was that the excision of these body parts was likely done after death. The statements by Mr. Hosack relating to them are not in themselves admissions of having caused the death and it is important to give full potential weight to the defence submission of the possibility of the dismemberment having occurred following the death of Mr. Falardeau from other causes. Despite this, the finding of the broken hyoid, which Dr. [Straathof] testified is consistent with strangulation, tends to confirm the reliability of Mr. Hosack's statements that Mr. Falardeau's head was snapped like a twig, and that he died more quickly than he ever thought possible. These statements can be seen in that context as clear expressions of an intention to cause death. I am satisfied that they were admissions by him of some kind of act of manual strangulation or other infliction of serious trauma by him to that area of the neck.
- [111] Similarly, the rib fractures, which Dr. [Straathof] said are consistent with two applications of trauma to that part of the body and which do not bear any indications of healing before death, lend some circumstantial support to an infliction of violence as the cause of death.
- [112] Mr. Hosack's concession in the persona of the grandfather that worldly people would describe his grandson's acts as murder is significant in this regard.
- [65] The judge went on to say that the extensive post-mortem mutilation was "indicative of participation in a preceding homicide" and that it supported "the strong inference of a homicidal state of mind":
- [113] I also infer that such extensive post-mortem mutilation of the genitals and the decapitation are in themselves indicative of participation in a preceding homicide, as the tail end of a continuing transaction. Even in the delusional universe described by Mr. Hosack, the savage and bizarre indignities inflicted on the body here reflect a degree of hostility that I find is unlikely to have been generated solely by coming upon Mr. Falardeau after he had died of disease or an unrelated accident. Rather, they support the strong inference of a homicidal state of mind, which was not exhausted by causing Mr. Falardeau's death and required additional expression in the form of the post-mortem indignities.
- [66] In conducting his analysis, the judge observed that some elements of the killing and surrounding events could not be confirmed or were inconsistent with Mr. Hosack's descriptions. However, he did not regard the "strong inference of an intentional killing by Mr. Hosack" as being possibly displaced by any potential contradictions or difficulties in the evidence:

- [118] I do not regard any of these difficulties as being capable of displacing the strong inference of an intentional killing by Mr. Hosack.
- [120] If, as I have found, Mr. Falardeau was killed by force applied externally to his neck, there is no reason that a major bloodletting would necessarily have resulted from the subsequent dismemberment, and the location where his head was found leaves open the possibility that the decapitation may not even have been done at the residence.
- [123] Even giving these [previously listed] potential contradictions their full weight, any concerns arising from them are overcome by the strength of Mr. Hosack's knowledge of the holdback evidence of mutilation, by the description of what amounts to an intentional killing by an application of force to the neck, supported by the evidence of corresponding fractures to that part of the body, and by the inferences that I have drawn from the extent of the post-mortem violence.
- [67] The judge characterised the inference that Mr. Falardeau's poor health could have caused his death before Mr. Hosack dismembered him proposed by the defence as speculative. He found that Mr. Hosack spoke truthfully when he told police how Mr. Falardeau was killed and with what intent, and that the actions Mr. Hosack attributed to the "entity" were his own:
- [124] Mr. Falardeau was not in particularly good health, and he may well have had a tendency to fall, particularly if he combined prescription medication with alcohol. However an inference that any of these factors led to his death, following which Mr. Hosack performed the acts that have been physically identified and that he admitted upon the body, would be rather speculative on the evidence, and it does not give rise to a reasonable doubt.
- [125] I am satisfied on the trial itself, for the reasons that I have given, that he spoke truthfully on the issues of how Mr. Falardeau was killed and with what intent, and that the actions that he attributed to the "entity" were his own actions towards Mr. Falardeau.
- [68] Given these findings, the judge described the remaining evidence as "less important": at para. 126. For example, he stated, while Mr. Falardeau's DNA on the knife generally confirmed Mr. Hosack's involvement "in the killing and/or dismemberment" he could not draw more specific inferences: at para. 127. In addition, he said, while the decapitation drawing was "ominous", it was not a reliable basis upon which to draw inferences: at para. 128. The judge also considered evidence from the forensic entomologist too imprecise to be relied upon and found the downstairs tenant saw Mr. Hosack at the house around the likely time of Mr. Falardeau's death, but considered that link "too tenuous to be the subject of a strong inculpatory inference": at paras. 129, 133. Further, he noted the "anomaly" that the landlord and downstairs tenant failed to see Mr. Falardeau's body in the suitcase in the attic suite, but found that did not lead to any doubt as to Mr. Hosack's involvement "based on the possibility that the body was placed there after the inspection of the suite and while he would have been in custody": at para. 134.

[69] In the result, the judge was satisfied beyond a reasonable doubt that Mr. Hosack committed the actus reus and had the necessary mens rea of second-degree murder. However, citing *R. v. Swain*, [1991] 1 S.C.R. 933, he deferred entering a formal conviction to allow the defence an opportunity to consider raising the issue of criminal responsibility:

[135] I am satisfied beyond a reasonable doubt that Mr. Hosack committed the actus reus of second degree murder. In the absence of any additional evidence of his mental state at the time of the offence, the inferences available from the current evidence are amply able to prove beyond a reasonable doubt that he had also had the necessary mens rea for that offence.

[136] However, as the Supreme Court of Canada pointed out in *R. v. Swain*, [1991] 1 S.C.R. 933, it is open to the defence to call evidence showing a lack of criminal responsibility due to mental disorder after the Crown has proven all of the elements of the offence.

Mr. Hosack's Position on Appeal

[70] Mr. Hosack submits the judge erred by inferring that he intentionally killed Mr. Falardeau based on the evidence, which he characterises as entirely circumstantial. He describes the impugned inference of an intentional killing as speculative and says it was not the only reasonable conclusion that could be drawn. In particular, Mr. Hosack says, there were at least two other reasonable alternate inferences available on the evidence or lack thereof, namely, that Mr. Falardeau died of natural causes and his body was mutilated later or that he did not intend to kill Mr. Falardeau even if they had a violent altercation. However, he submits, the judge failed to grapple adequately with the first alternate possibility and failed entirely to grapple with the second. He also reversed the burden of proof and failed to apply the standard of proof beyond a reasonable doubt.

[71] According to Mr. Hosack, the judge outlined the core of his inferential reasoning process in paras. 110-113 of the trial reasons. He submits those paragraphs, together with others that followed, show that he rested the inference of an intentional killing on four foundational findings: that Mr. Falardeau was killed by force applied externally to his neck (para. 120); that the rib fractures supported "an infliction of violence" as the cause of death (para. 111); that the post-mortem mutilation supported an inference of a "homicidal state of mind" (para. 113); and that he admitted to intentionally killing Mr. Falardeau by manual strangulation or infliction of trauma to the neck (paras. 110, 112). However, he says, those four findings did not provide a proper foundation for the inference that he intentionally killed Mr. Falardeau because each of them was either unsupported by the evidence, based on a misapprehension of the evidence or inconsistent with an intentional killing.

[72] In Mr. Hosack's submission, given Mr. Falardeau's poor health and the possibility that he could have died of natural causes, there was simply insufficient evidence to support any conclusion on the cause of his death, which undermined the judge's first foundational finding. In support of this submission, he emphasises that Dr. Straathof conceded he could

not prove Mr. Falardeau did not die of natural causes and that, while he made much of the hyoid bone fractures, he could not say whether they were caused ante-mortem or post-mortem, which made strangulation as a cause of death speculative. On this point, he emphasises Dr. Orde's fresh evidence that post-mortem injury would account for the hyoid bone fractures and that many forms of post-mortem injury were distinct possibilities which Dr. Straathof did not consider. Mr. Hosack characterises this fresh evidence as credible, compelling and capable of affecting the outcome of the trial, and seeks its admission in the interests of justice regardless of whether it meets the due diligence criterion under the Palmer test.

- [73] Nor, Mr. Hosack submits, did the expert evidence regarding the rib fractures support "an infliction of violence" as the cause of Mr. Falardeau's death, as the judge stated at para. 111 of his reasons. On the contrary, both Drs. Straathof and Orde testified that the rib fractures could well have been sustained after Mr. Falardeau died. However, he says, the judge did not engage with the real possibility that the ribs were fractured when Mr. Falardeau's body was stuffed into the suitcase when he conducted his analysis. Rather, he indulged in a priori reasoning in an apparent effort to make the evidence fit with his conclusion of guilt. In doing so, Mr. Hosack argues, the judge departed from the dictates of logic and common sense in response to the repugnant nature of the facts.
- [74] Mr. Hosack goes on to submit that the judge also erroneously treated the post-mortem mutilation as after-the-fact circumstantial evidence of an intention to kill, despite the lack of clarity on how Mr. Falardeau died and the inability of human experience and logic to explain his intentions given his delusions and mental illness. He says Dr. Straathof's evidence that the cause of death was "homicidal violence" was no more than an unqualified suspicion of foul play, not an expert opinion, as Dr. Orde diplomatically explained in his report. In addition, he says, the judge's statement at para. 118 that the contradictory evidence was not "capable of displacing the strong inference of an intentional killing" suggested an erroneous reversal of the burden of proof and a failure to apply the reasonable doubt standard of proof.
- [75] Moreover, Mr. Hosack argues that it is unclear how the judge moved from his finding at para. 113 that the post-mortem mutilation supported a strong inference of "a homicidal state of mind" to a determination of which type of homicide preceded the mutilation, manslaughter or murder. He notes that in his NCRMD ruling issued four years later the judge referred back to para. 113 and "clarified" that he was aware "post-offence conduct is generally unhelpful in demonstrating that a culpable homicide is murder rather than manslaughter, an alternative verdict that was not argued in this case": at para. 25. Mr. Hosack submits this "clarification" confirms that the judge failed to consider manslaughter as a possible verdict, which was an error because a verdict of manslaughter was available given the lack of clear evidence on the mechanism of death and his intent.
- [76] Finally, Mr. Hosack submits that the judge misunderstood his statement to police and failed to read his words in their full context. When those words are read in context, he says it is clear that he was describing post-mortem indignities committed to Mr. Falardeau's body, not

acts that caused his death. In particular, Mr. Hosack says, his statement that Mr. Falardeau's head was "snapped off like a twig" accurately described post-mortem decapitation, not manual strangulation, which would have been a slow and painful process, not quick and painless.

- [77] Mr. Hosack also submits the judge failed to consider both inculpatory and exculpatory portions of his statement, which was too confusing and irrational to have any real evidentiary value. In addition, he erroneously leapt from the admission of post-mortem mutilation to the curious concept of a "homicidal state of mind", which lacks any clear meaning in law. Further, and importantly, he says, his admission to having mutilated Mr. Falardeau's body post-mortem meant that his knowledge of the holdback evidence regarding the severed body parts was not relevant on the issues of either causation or intent.
- [78] In sum, Mr. Hosack submits that the verdict of guilty of second-degree murder was illogical, based on misapprehensions of evidence and manifestly unreasonable in light of the nature and paucity of the evidence. That being so, he says, this Court should set the verdict aside and order a new trial.

Analysis

- [79] I do not accept the central proposition upon which Mr. Hosack bases his submissions, namely, that the Crown's case was entirely circumstantial in nature. Rather, as the judge recognised, the Crown's case relied primarily on Mr. Hosack's statement to the police, "as well as on a supporting body of circumstantial evidence": at para. 4, emphasis added. As the judge also stated, the critical issue at trial from the perspective of both the Crown and the defence was "the weight that I give to Mr. Hosack's statement to police and the inferences that are capable of being drawn from it about his actual involvement, if any, in the offence": at para. 107, emphasis added.
- [80] Mr. Hosack's inculpatory admissions were direct evidence that he killed Mr. Falardeau and then dismembered him. In my view, the judge was entitled to interpret the statement as he did, namely, as an inculpatory admission that he caused Mr. Falardeau's death. Mr. Hosack told the police that Mr. Falardeau died quickly, that he did not want him to suffer when he died and that he could not have felt "it" for more than a second. He also told them that he snapped Mr. Falardeau's head off like a twig. He did not tell them that he came upon Mr. Falardeau's dead body and then dismembered it.
- [81] In other words, contrary to Mr. Hosack's submission, the judge did not infer from the circumstantial body of evidence presented that he caused the death of Mr. Falardeau. Rather, he found that Mr. Hosack caused Mr. Falardeau's death based on the totality of the evidence, which included his direct admissions to the killing and circumstantial evidence that tended to confirm their reliability. As is clear from para. 110, the judge fully appreciated that Mr. Hosack's admission to dismembering the body after death was not an admission to having caused Mr. Falardeau's death, nor did it support an inference that he killed Mr.

Falardeau. However, he also appreciated that, in addition to admitting to the post-mortem dismemberment, Mr. Hosack admitted that he snapped Mr. Falardeau's head off like a twig and said that he died quickly.

- [82] In my view, the judge's interpretation of Mr. Hosack's words as an inculpatory admission that he caused Mr. Falardeau's death by "some kind of act of manual strangulation or other infliction of serious trauma by him to that area of the neck" was reasonable based on their content and context: at para. 110. On appeal, Mr. Hosack has simply proposed a possible alternate interpretation of those words, namely, that he was referring to the post-mortem mutilation when he said that he snapped Mr. Falardeau's head off like a twig. However, as is clear from Swales, the fact that Mr. Hosack's statement might have been interpreted differently does not mean that the judge misinterpreted it. The proper interpretation of the evidence was a matter for the judge, as was the weight to be ascribed to Mr. Hosack's statement to the police.
- [83] In addition to amounting to direct evidence that Mr. Hosack caused Mr. Falardeau's death, his statement provided compelling circumstantial evidence that he killed Mr. Falardeau intentionally. In particular, his statement provided evidence that Mr. Hosack harboured a hostile attitude toward Mr. Falardeau; had a strong, albeit bizarre, motive for killing him; and committed an act that would predictably result in his death, namely, snapping off his head. An available inference that might reasonably be drawn from this evidence was that, when he killed Mr. Falardeau, Mr. Hosack did so intentionally. When considered in combination with the after-the-fact evidence of dismemberment, and in the absence of any other salient evidence on his intent, these inculpatory admissions fully supported the judge's finding that the killing was intentional and thus that the Crown had established both the *actus reus* and *mens rea* of second-degree murder beyond a reasonable doubt.
- [84] Given the nature of the defence presented at trial, in my view it is neither surprising nor concerning that the judge did not expressly address and then reject the possibility of a manslaughter verdict. He is presumed to know the law, including the difference between the required level of intent for both murder and manslaughter. His finding regarding Mr. Hosack's intent when he killed Mr. Falardeau was unambiguous, supported by the evidence and responsive to the live issues identified by counsel and the arguments presented. In my view, it is clear from his reasons that the judge was fully aware of and applied the requisite standard of proof and burden of proof in reaching his conclusions on the essential elements of the offence of second-degree murder.
- [85] That said, I accept that some of the language used by the judge was arguably imprecise--for example, his reference to a "homicidal state of mind" in para. 113 of his reasons. However, read in context, in my view those words do not suggest or reflect any legal error. Rather, they explain why the judge rejected the proposition that Mr. Falardeau may have died from other causes and Mr. Hosack may have come upon his body and dismembered it, as opposed to the proposition that Mr. Hosack personally caused Mr. Falardeau's death by homicide. I also accept that the judge could have explained his reasoning process more fully and separated

his findings on the actus reus and mens rea of the offence more distinctly. However, those imperfections do not undermine the validity of the verdict. On the contrary, when his reasons are read as a whole and in the context of the record, in my view it is clear that the verdict of guilt is reasonable and supported by the evidence and that his analysis is error-free.

[86] Given the foregoing, I would not admit the fresh evidence of Dr. Orde. It would not have affected the outcome. The judge obviously appreciated the limits of Dr. Straathof's evidence, including the fact that he could not and did not reach a conclusion on the mechanism of Mr. Falardeau's death based on the physical evidence. However, the judge was able to reach his own conclusions on the cause of Mr. Falardeau's death based on the whole of the evidence, including Mr. Hosack's inculpatory admissions, which body of evidence he appropriately considered in its totality.

[87] I would not accede to this ground of appeal.

Did the judge err by failing to assist Mr. Hosack appropriately in the NCRMD hearing and by failing to find him not criminally responsible for the murder of Mr. Falardeau?

Legal Framework

[88] Pursuant to s. 16(1) of the Criminal Code, no one is criminally responsible for an act committed while suffering from a mental disorder that rendered them incapable of appreciating the nature and quality of their act or of knowing that it was wrong. Pursuant to ss. 16(2) and (3), the burden of proving on a balance of probabilities that the person suffered from a mental disorder so as to be exempted from criminal responsibility is on the party that raises the issue.

[89] An accused may raise an NCRMD defence at any time during the trial, including after the trier of fact has found them guilty but prior to the entry of a conviction: Swain at 986-987.

NCRMD Ruling: 2017 BCSC 2644

[90] As I have explained, when the judge found Mr. Hosack guilty of second-degree murder he deferred entering a conviction to enable the defence to consider whether to raise the issue of criminal responsibility. Thereafter, Mr. Hosack retained new counsel and brought the NCRMD application. At the hearing, he was represented by his new counsel, who cross-examined Dr. Widajewicz and made closing submissions. The judge also permitted Mr. Hosack to question Dr. Widajewicz and, at one point in the hearing, Mr. Hosack asked that a new psychiatric assessment be ordered. However, this did not occur. At another point in the hearing, in an exchange with the judge, Mr. Hosack's counsel referred to himself as "somewhat [of] an amicus".

- [91] In his NCRMD ruling, the judge summarised the trial evidence and, as noted, sought to clarify para. 113 of his trial reasons. Then he discussed Dr. Widajewicz's NCRMD report and outlined Mr. Hosack's mental health history. He also explained that Mr. Hosack provided Dr. Widajewicz with his version of events, namely, that after his release from jail he returned to the attic suite intoxicated by alcohol and cocaine and found Mr. Falardeau dead in the bathtub, at which point he dismembered him hoping to lead Hells Angels to believe that he (Mr. Hosack) was dead and thus would be safe.
- [92] The judge went on to explain that Dr. Widajewicz concluded Mr. Hosack "did not suffer from any symptoms of a psychotic illness involving the victim which would exempt him from criminal responsibility": at para. 37. He also noted Dr. Widajewicz's testimony that it would be speculative to assume "bizarre circumstances are inevitably an indication of lack of criminal responsibility" and that "one cannot extrapolate from unexplained bizarre behaviour to a conclusion that it was driven by a delusion": at para. 44. He noted further that Dr. Widajewicz testified "it is difficult to assess the mental state of a person with respect to a killing that he denies committing" as this involves an "inherent contradiction" and means "it is impossible to really conclude whether there was the presence of a mental disorder at the time": at para. 49.
- [93] The judge went on to observe that Dr. Widajewicz testified he could not say whether Mr. Hosack could appreciate the legal and moral consequences of the act without Mr. Hosack being consistent about his involvement. He also testified regarding a possible interplay "in terms of Mr. Hosack's mental state at the time of the offence, between the state of intoxication that he had described and his ongoing mental illness" and stated he had no doubt Mr. Hosack was impaired at the time of the offence: at paras. 55, 67.
- [94] The judge characterised the NCRMD application as an essentially factual inquiry "into whether I can be satisfied on a balance of probabilities that the inferences available from the surrounding circumstances indicate that at the time of the offence, Mr. Hosack was suffering from a mental disorder that placed him in one of the states exempting him from criminal responsibility" under s. 16 of the Criminal Code: at para. 92. He observed that he was entitled to make findings contrary to Dr. Widajewicz's opinion "if that is what the evidence dictates when considered as a whole" and found that Mr. Hosack was clearly suffering from mental illness when he killed Mr. Falardeau: at paras. 95-96. Nevertheless, he stated, the key question was "whether the surrounding circumstances support an inference that one of the specific states of mind required to provide an exemption from criminal responsibility pursuant to s. 16 were present": at para. 99.
- [95] Given the inconclusive nature of the evidence, the judge was not satisfied on a balance of probabilities that either mental state prescribed in s. 16 was present when Mr. Hosack killed Mr. Falardeau: at paras. 102-106. Based on his conclusion that there was no way to tell on the evidence if the requirements of s. 16 of the Criminal Code were met, the judge dismissed Mr. Hosack's NCRMD application.

Mr. Hosack's Position on Appeal

- [96] Mr. Hosack describes himself as an unrepresented litigant when the judge permitted him to cross-examine Dr. Widajewicz. At that point, he submits, his previous counsel was "a nebulous form of amicus [curiae]" and, therefore, the judge was obliged to ensure that he understood his procedural rights, including his right to testify, call evidence and obtain another assessment report. In support of this submission, Mr. Hosack relies on *R. v. Cotterell*, 2013 ONCA 446 concerning the duties of a judge presiding over an NCRMD application where the accused is unrepresented and says that a judge's failure to discharge those duties results in a miscarriage of justice and requires a new trial.
- [97] According to Mr. Hosack, the judge failed to ensure that he understood his procedural rights when he was self-represented. He also breached his procedural rights, he says, by interrupting him when he was cross-examining Dr. Widajewicz. Further, he says, the judge failed to consider and give effect to Dr. Widajewicz's evidence that he was clearly mentally impaired by reason of mental disorder at the time of the offence. He submits that, combined with the trial evidence, that evidence was sufficient to tip the scales in favour of a positive finding under s. 16 of the Criminal Code, but the judge erroneously failed to infer that he suffered from an exempting mental disorder when he killed Mr. Falardeau.

Analysis

- [98] In my view, this ground of appeal lacks any merit.
- [99] Mr. Hosack was never self-represented on the NCRMD application. On the contrary, he was represented throughout by experienced senior counsel. That the judge indulged him by permitting him to cross-examine Dr. Widajewicz personally did not change this reality. Nor did his counsel's quip that he was "somewhat [of] an amicus", which plainly he was not. No such appointment was ever sought or granted. Further, to the extent that the judge interrupted Mr. Hosack when he was questioning Dr. Widajewicz, he did so in an entirely appropriate manner in the exercise of his trial management powers. Far from creating any procedural unfairness, his efforts enhanced the fairness of the NCRMD hearing.
- [100] As to Mr. Hosack's submission that the evidence justified a finding that he suffered from an exempting mental disorder, this was a factual question to be determined by the judge on the whole of the evidence. Bearing in mind the nature of Dr. Widajewicz's evidence, as described by the judge in his ruling, he was simply not satisfied on a balance of probabilities that either mental state prescribed in s. 16 was present when Mr. Hosack killed Mr. Falardeau. That factual conclusion is entitled to appellate deference.
- [101] I would not give effect to this ground of appeal

Did the judge err by failing to stay the proceedings pursuant to s. 11(b) of the Charter on the basis of unreasonable delay?

[102] For the same reasons that I would not entertain Mr. Hosack's new arguments regarding alleged breaches of ss. 7 and 9 of the Charter, I would not entertain his new argument on an alleged breach of s. 11(b) of the Charter, namely, the fact-based nature of the necessary inquiry, the incomplete state of the record and the absence of a decision from the trial judge.

Conclusion

[103] For all of the foregoing reasons, I would dismiss the appeal.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Madam Justice Fenlon"

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