
CANADA / JUDGMENT

R. v. Kahnapace

2013 BCCA 45

COURT

British Columbia Court of Appeal

DECIDED

22 January 2013

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2013 BCCA 45 R. v. Kahnapace

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Kahnapace,

2013 BCCA 45

Date: 20130122

Docket: CA039658

Between:

Regina

Respondent

And

Martha May Kahnapace

Appellant

Before:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice Neilson

The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, June 17, 2011

(R. v. Kahnapace, Vancouver Registry 23674)

Oral Reasons for Judgment

Counsel for the Appellant:

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Counsel for the Respondent:

M.T. Ainslie

Place and Date of Hearing:

Vancouver, British Columbia

January 22, 2013

Place and Date of Judgment:

Vancouver, British Columbia

January 22, 2013

- [1] NEILSON J.A.: On June 17, 2011, following a trial before a judge and jury, Ms. Kahnapace was convicted of the second degree murder of Donald Wall, her former common law husband. She appeals that conviction arguing, among other things, that the trial judge erred in his instructions to the jury on the mental element of the crime and on the impact of intoxication on her mental state.
- [2] The Crown agrees the trial judge erred in charging the jury in these areas, and that these errors are cumulatively of such significance that they cannot be remedied by the curative proviso in s. 686(1)(b)(iii) of the Criminal Code. It therefore concedes the appeal must be allowed and a new trial ordered.
- [3] For the following reasons, I am satisfied the Crown's concession is appropriate.

Background

- [4] As there is to be a new trial I will not deal with the facts in detail. Briefly, on November 29, 2005, following a day of drinking alcohol, taking cocaine, and arguing in the apartment they had shared, Ms. Kahnapace stabbed Mr. Wall in the chest with a knife. The knife punctured his heart. Assistance was summoned promptly, but he died of his wound several days later.
- [5] Ms. Kahnapace was initially tried before a judge and jury in June 2007. The sole issue was whether the Crown had established she had the requisite intent for second degree murder, or whether she was guilty of the lesser offence of manslaughter. The jury convicted her of second degree murder. Ms. Kahnapace successfully appealed that conviction to this Court, and a new trial was ordered: 2010 BCCA 227, 255 C.C.C. (3d) 342 [Kahnapace #1].

- [6] At that trial, which is the basis for this appeal, Ms. Kahnpace admitted stabbing Mr. Wall and conceded she was guilty of manslaughter. She again maintained, however, that the Crown had not established the requisite intent for second degree murder, either because of her alcohol and drug consumption, or because Mr. Wall had provoked her within the meaning of s. 232 of the Criminal Code and she was acting in the heat of the moment. She was again convicted of second degree murder.

Discussion

- [7] In conducting review of a trial judge's charge an appellate court must not examine whether the judge recited a particular formula, but instead should consider the general sense that the judge's words conveyed to the jury. It must look to the charge as a whole in the context of the entire trial and consider its overall effect: *R. v. Daley*, 2007 SCC 53 at paras. 30-31, 58, [2007] 3 S.C.R. 523.

- [8] The Crown's case against Ms. Kahnpace focussed on the secondary definition of murder in s. 229(a)(ii) of the Criminal Code:

229. Culpable homicide is murder

- (a) where the person who causes the death of a human being

...

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not ...

- [9] Thus, the Crown had to prove not only that Ms. Kahnpace intended to cause Mr. Wall bodily harm, but also that she knew that stabbing him was likely to cause his death, and she was reckless as to whether death would result from her actions. This is a subjective intent, and the Crown was obliged to prove that Ms. Kahnpace actually intended to cause bodily harm that she knew or actually foresaw was likely to cause death: *Kahnpace #1* at paras. 25-26.

- [10] As well, it was undisputed that there was evidence of intoxication which, if accepted, could have impaired Ms. Kahnpace's ability to foresee the consequences of her actions, and thus preclude a conviction for second degree murder.

- [11] The Crown concedes that, in instructing the jury, the trial judge erred in three respects. Ironically, these errors mirror some of those that led to an order for a new trial in *Kahnpace #1*.

- [12] First, the Crown concedes the trial judge, in his charge and in his other communications to the jury, erred in law by repeatedly using an abbreviated description of the intent for second degree murder required under s. 229(a)(ii). Instead of setting it out fully, he used the phrase "intent to wound" to describe this intent. At no time did he define this term for the jury, or explain that it was a convenient abbreviation for the more extensive intent that the Crown must establish. Of particular significance, this error was evident in both his instructions on

intent, and on the impact of intoxication on Ms. Kahnpace's state of mind.

- [13] In *R. v. Dove* (#1), 2004 BCCA 338, 187 C.C.C. (3d) 506, this Court commented adversely on the practice of using abbreviations for a critical element in s. 229(a):
- [23] I am also sympathetic to the trial judge's desire to condense his charge following such a lengthy trial. In my view, however, the use of abbreviations for the critical element the jury had to decide was a form of false economy which had the potential to jeopardize the entire process. While stating and restating the full intent under s. 229(a) of the Code is somewhat cumbersome, I think the repetition of the elements of the second intent, in particular, is important in bringing home to the jury the essential elements of the second intent. Abbreviating this aspect of the charge, where intent is the most critical issue in the trial, poses a potential danger which can, and should, be avoided.
- [14] The impact of such unwarranted abbreviation was also dealt with in *Kahnpace* #1, where a similar error was made:
- [34] The next issue arises in the trial judge's recharge to the jury on the link between the evidence of intoxication and the intent for murder (see para. 11 above). There, the trial judge erroneously described the secondary intent for murder under s. 229(a)(ii) in an abbreviated form by stating that "murder is not committed if Martha Kahnpace lacked the required intent, that is that she intended to kill Donald Wall or that she intended to cause him bodily harm that was likely to cause death." This instruction erroneously makes no reference to an essential element of s. 229(a)(ii) being that of the accused's knowledge or subjective foreseeability of the likely consequence of death or risk of death. In the next passage (in para. 11 above) the trial judge then instructed the jury to consider "this" intent (referring to the abbreviated version of s. 229(a)(ii)) in deciding what effect, if any, the evidence of intoxication may have had "on [Ms. Kahnpace's] state of mind ... at the time that the unlawful act occurred, that is the stabbing". This instruction repeats the error by instructing the jury to consider the evidence of intoxication in reference to the abbreviated instruction on the secondary intent for murder and failing to link the evidence of intoxication to the element of knowledge or subjective foreseeability in s. 229(a)(ii).
- [15] I appreciate the trial judge did give the jury a copy of s. 229(a)(ii), and occasionally described the required intent in full in his instructions. I am nevertheless satisfied that, when the charge is considered as a whole, his pervasive use of the abbreviated description of intent presents a significant danger that the jury may have collapsed the issue of intent to the sole question of whether Ms. Kahnpace intended to wound Mr. Wall, and may not have appreciated that the Crown also had to prove that she subjectively knew or foresaw that his death was a likely consequence of her action, and she was reckless as to whether death occurred.

- [16] The second error arises from the trial judge's repeated reference to the common sense inference that a person usually intends the natural consequences of their acts as a "presumption" in his charge to the jury, and his failure to properly instruct them on how to apply that inference, in light of the evidence concerning Ms. Kahnpace's consumption of alcohol and cocaine.
- [17] While the term "presumption" was used in this context historically, the Supreme Court of Canada in *R. v. Robinson*, [1996] 1 S.C.R. 683 at para. 62, 105 C.C.C. (3d) 97, and *R. v. Seymour*, [1996] 2 S.C.R. 252 at para. 20, 106 C.C.C. (3d) 520, rejected this term, and found it preferable to refer to a common sense inference that juries may, but not must, draw. That Court recently affirmed this view in *R. v. Walle*, 2012 SCC 41, 284 C.C.C. (3d) 153:
- [63] In my view, instructing a jury on the common sense inference serves a useful purpose. It provides the jury with a marker against which to measure the rather amorphous concept of intent. A proper instruction also sounds a cautionary note. The jurors are admonished that the inference is permissive, not presumptive, and that before acting on it, they must carefully consider the evidence that points away from it. That is important. Left to its own devices, a jury might too readily turn to common sense for an answer, especially in cases like the present one, where common sense might suggest that anyone who fires a gun into a person's chest at close range would surely be aware of the consequences.
- [18] Furthermore, where there is evidence of intoxication, *Seymour* and *Robinson* hold that the trial judge must provide instructions that draw a direct link between the effect of intoxication and the common sense inference. In *Kahnpace #1*, this Court referred to the relevant parts of these decisions:
- [39] The trial judge further erred in law in instructing the jury on the link between the evidence of intoxication and the use of the common sense inference. Where the defence of intoxication is put to the jury, *Seymour* has stated that two further instructions are required: (i) that the evidence of intoxication may rebut the common sense inference, and (ii) if the jury has a reasonable doubt about the accused's intention it must not apply the common sense inference. At para. 23 of *Seymour* the Court described the requirements as follows:

It is common knowledge that a significant degree of intoxication may affect a person's state of mind and thus the ability to foresee the consequences of actions. It is, therefore, essential for a trial judge to link the instructions given pertaining to intoxication to those relating to the common sense inference so that the jury is specifically instructed that evidence of intoxication may rebut that inference. See *Robinson*, at para. 65. A trial judge is obliged to ensure that the jury understands two important conditions: (1) the reasonable common sense inference may be drawn only after an assessment of all of the evidence, including the evidence of intoxication; and (2) the inference cannot be applied if the jury is left with a reasonable doubt about the accused's intention. [Emphasis added.]

...

- [41] Here, the trial judge did not provide the specific instructions on the direct link between the effect of intoxication and the common sense inference as outlined in Seymour and reiterated in Daley. The failure to do so was said in *R. v. Robinson*, [1996] 1 S.C.R. 683 to amount to reversible error:
- [65] The respondent correctly argues, in my view, that where there is some evidence of intoxication, a trial judge must link his or her instructions on intoxication with the instruction on the common sense inference so that the jury is specifically instructed that evidence of intoxication can rebut the inference. In both the model charges set out in *MacKinley* and *Canute*, this approach is taken. This instruction is critical since in most cases jurors are likely to rely on the inference to find intent. Moreover, if no instruction is given, then a confused jury may see a conflict between the inference and the defence and resolve that conflict in favour of their own evaluation of common sense (see *Korzepa* at p. 505). Therefore, an instruction which does not link the common sense inference with the evidence of intoxication constitutes reversible error. In this case, the trial judge's failure to make this linkage constitutes reversible error. [Emphasis added.]
- [19] In *Kahnapace #1*, the Court concluded the trial judge's use of the word "presumption", and her failure to draw the necessary link, constituted two of the cumulative errors that led to the order for a new trial.
- [20] The trial judge's charge in this case contained similar errors. While he occasionally referred to the "common sense inference", he more frequently used the terms "common sense presumption", or "provisional presumption". This leads to a concern that the jury may have erroneously presumed what Ms. Kahnpace intended when she stabbed Mr. Wall, instead of properly assessing her actual intent, and then deciding whether they could draw the common sense inference, a matter that lay in their discretion only after they had assessed all of the evidence.
- [21] As well, the trial judge failed to instruct the jury at all on the second element required by Seymour, that they could not rely on the inference if they had a reasonable doubt about Ms. Kahnpace's intention.
- [22] The third error on which there is consensus is the trial judge's failure to properly instruct the jury on how Ms. Kahnpace's consumption of alcohol could have affected her ability to subjectively appreciate and foresee the consequences of her actions.
- [23] This was a case in which the evidence established advanced intoxication. The law is clear that in such circumstances the jury must be told about the potential effect of intoxication on the accused's ability to foresee the natural consequences of her actions, in particular that the bodily harm inflicted was likely to cause death. The Supreme Court gave guidance on the appropriate charge to be given in such circumstances in Daley at paras. 51-53. As well, in *Kahnapace #1* this Court affirmed the importance of instructing the jury on the link between intoxication and each element of intent under s. 229(a)(ii):

- [37] Although the trial judge summarized for the jury the Crown's address that did include a link between the evidence of intoxication and Ms. Kahnpace's ability to foresee the natural and probable consequences of her actions, this was not sufficient, in my view, to overcome the trial judge's omission in her instructions to make the link between the evidence of intoxication and Ms. Kahnpace's knowledge or subjective foreseeability of the likely consequences of her conduct. I am also not persuaded that this omission is rectified by the "functional" approach to jury instructions as suggested by the Crown. While the language employed to instruct a jury need not follow the exact words of the relevant case authorities, it must still convey the meaning of the required directions. That did not occur with this instruction as it did not make the required link between the evidence of intoxication and each of the elements of the intent under s. 229(a)(ii), namely that the accused meant to cause bodily harm, that she knew was likely to cause death, and was reckless whether death ensued or not.
- [24] Here, the trial judge's use of the abbreviated phrase "intent to wound" precluded an instruction that complied with that principle. This segment of his charge exemplifies the difficulty this presented in describing the interrelationship between the required intent and intoxication:

In other words, members of the jury, you must not convict unless you are sure that the defendant, when she did the act, intended specifically to wound. In deciding whether she intended, you must take into account the evidence that she may have been drunk and/or affected by drugs. If you think that because she was so intoxicated by drink and drugs that she did not intend or may not have intended then you must find her not guilty of that specific offence. But if you are sure that despite her drunkenness and the effect of the drugs she did intend to specifically wound then this part of the offence is proved against her. As I said earlier, a drunk or drugged intent is still an intent.

So I think - this is the reason why I think you should deal with the defence of intoxication first, because if you accept Ms. Kahnpace's evidence that she did not intend specifically to wound then that ends the matter.

[Emphasis added.]

Conclusion

- [25] I am satisfied the errors of law identified by the parties are significant and cannot be saved by the curative proviso in s. 686(1)(b)(iii) of the Code: *R. v. Khan*, 2001 SCC 86 at paras. 29-31, [2001] 3 S.C.R. 823. I would therefore set aside Ms. Kahnpace's conviction and order a new trial. That result renders it unnecessary to deal with the balance of her grounds of appeal.
- [26] It is most unfortunate that Ms. Kahnpace must face a third trial due to errors in the charge to the jury that so closely resemble the errors that led to an order for a new trial in *Kahnpace #1*. This pattern raises the question of whether trial judges may be relying too heavily on outdated precedents in preparing their charges, instead of taking advantage of

the contemporary model jury charges available in both CRIMJI: Canadian Criminal Jury Instructions (4th ed. 2005) and Canadian Judicial Council, Model Jury Instructions (2012) (online). Reference to the suggested instructions in either of those sources may well have avoided these errors.

[27] I would allow the appeal from conviction and order a new trial.

[28] TYSOE J.A.: I agree.

[29] BENNETT J.A.: I agree.

[30] TYSOE J.A.: The appeal is allowed and a new trial is ordered.

"The Honourable Madam Justice Neilson"

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