
CANADA / JUDGMENT

R. v. Ratte

2012 BCCA 352

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 352 R. v. Ratté

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Ratté,

2012 BCCA 352

Date: 20120824

Docket: CA038726

Between:

Regina

Respondent

And

Denis Florian Ratté

Appellant

By Court order made under section 486.5(2) of the Criminal Code, the identity of the undercover police officers or any information that could disclose their identity shall not be published, broadcast, or transmitted in any manner.

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Garson

The Honourable Mr. Justice Harris

On appeal from: Supreme Court of British Columbia, December 10, 2010

(R. v. Ratté, Prince George Registry 28473)

Counsel for the Appellant:

J.J. Blazina

Counsel for the Respondent:

G.D. McKinnon, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 5, 2012

Place and Date of Judgment:

Vancouver, British Columbia

August 24, 2012

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Garson

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] Mr. Ratté appeals his conviction by a jury of the second degree murder of his wife. He alleges three principal grounds of appeal. First, the trial judge erred in law by allowing the Crown to adduce evidence of his character through his daughter when he had not put his character in issue. Second, the trial judge erred in law in allowing a police officer to state her opinion that Ms. Ratté had never left the Prince George area on the day that she disappeared. Third, the trial judge erred in law by allowing inadmissible and prejudicial hearsay evidence from three witnesses. In each case, the trial judge erred in law by not giving a limiting instruction in respect of the evidence.
- [2] For the reasons that follow, I would dismiss the appeal.

Background

- [3] Ms. Ratté disappeared on August 18, 1997. She was never seen again. A police investigation undertaken at the time found no trace of her.

- [4] At the time of her disappearance, Ms. Ratté lived with her husband and two teen-aged children on a rural property outside Prince George.
- [5] In 2007, the Prince George RCMP sent the file to the Unsolved Homicide Unit who mounted an undercover operation (a so-called Mr. Big operation) targeting Mr. Ratté.
- [6] During the operation, Mr. Ratté was (mis)informed that the police had images of him disposing of his wife's body. He was told that he needed to clean this up and that "Mr. Big" could help him do so if he gave a true account of what happened.
- [7] On September 27, 2008, Mr. Ratté told Mr. Big that he had killed his wife by shooting her in the head with a .22 calibre rifle at their house on the morning of August 18, 1997, and then disposed of her body in a swamp east of Prince George. He gave a detailed description of the events and the reason he had acted as he had. That discussion was video and audio recorded. A transcript became an exhibit at trial.
- [8] That day, on a drive to Prince George, he repeated a version of the same events to two undercover police officers in substantially the same terms. Over the next two days, when visiting the scene where Mr. Ratté claimed to have disposed of his wife's body and the house where they had lived, he again described how he had killed his wife. Certain of these discussions were recorded and played to the jury.
- [9] On October 9, 2008, Mr. Ratté again acknowledged that he had killed his wife and expressed relief that a search of the swamp had not uncovered her body or significant other evidence. The discussion was recorded and portions of it were played in Court.
- [10] Mr. Ratté was arrested on December 5, 2008. During a subsequent five-hour interrogation he admitted shooting his wife. All but 40 minutes of the interrogation were played for the jury.
- [11] Mr. Ratté gave evidence at his trial. He denied killing his wife, although he acknowledged that he told people that he did. He testified that his statements to the undercover police officers were false. He made them because he thought the gang would pay off the police, put an end to their continuing investigation of him, and allow him to become a member of the gang. He explained that the statement made after his arrest was also false, and that he had admitted killing his wife only because he saw some of his discussions with Mr. Big and realized that they were all cops and that he "was done".
- [12] The Crown's theory was that given that Ms. Ratté was the family's breadwinner and a dedicated, serious, loving, mother, it was inconceivable that she would simply walk away from her children, disappear without a trace, and take up a life elsewhere. The inescapable conclusion, on all the evidence, the Crown argued, was that Mr. Ratté was responsible for Ms. Ratté's disappearance. There was no evidence resulting from the missing person investigation to suggest that Ms. Ratté had walked away from her family or left the Prince George area. The confessions both to the undercover police officers and in his interrogation were true.

- [13] Observing that the Crown did not have to prove a motive, the Crown's theory was that in the months before she disappeared there had been a crisis in the Rattés' relationship that had led to Ms. Ratté losing her trust in her husband and their relationship. The catalyst for this loss of trust, the Crown alleged, was Mr. Ratté incurring a large gambling debt at a time of financial stress. Ms. Ratté was vocal in expressing her disapproval of what Mr. Ratté had done. Mr. Ratté was unable to work, and was tormented by the fact. Ms. Ratté was effectively the family breadwinner. The Crown argued that the cumulative effect of financial and other stresses in the relationship had put Mr. Ratté in the domestic equivalent of an indeterminate sentence in the "doghouse" which he could not take anymore. The Crown said this:

What was Mr. Ratté's motive, it was -- it arises out of the cumulative effect on him of all his circumstances. There is always this, he wants you to think that she left, but don't you think maybe that he was worried that she'd make him leave, that she'd kick him out? The relationship wasn't working. She had the job. She paid the mortgage. Mr. Ratté was in the domestic equivalent of a -- an indeterminate sentence in the doghouse and he couldn't take it anymore.

- [14] The defence argued that it was reasonably possible that Ms. Ratté's frustration with her existing life might have led her to desert her family. It was indeed essential to the defence theory that Ms. Ratté was deeply disillusioned by her relationship with her husband. The gambling debt and other financial issues had destroyed her trust in her husband and in their relationship. According to the defence, Ms. Ratté was looking to explore other relationships and in the months before she disappeared was contemplating whether a same sex relationship would be more fulfilling, loving and trusting. Mr. Ratté submitted that the missing person investigation was inadequate and it was reasonably possible that it had simply failed to find Ms. Ratté living a new life in a new place.
- [15] But the defence also acknowledged that the core to the case was the truth of the "confessions". The jury was told that the case was "pretty straightforward" if they believed that Mr. Ratté was actually telling the truth about killing his wife. The defence argued that there was a reasonable doubt about the truth of Mr. Ratté's statements pointing out such matters as the risks that he would have had to take to shoot his wife as he said he had, providing a rationale for lying to Mr. Big and the police subsequent to his arrest, and pointing to the lack of a compelling motive for killing her.
- [16] During the trial, Mr. Ratté's daughter gave evidence. In response to a Crown question about what type of person her father was, she described him as "secretive".
- [17] A police officer who had been involved in the original missing person inquiry, after giving evidence about the facts of the investigation and its results, expressed her opinion that Ms. Ratté had never left the Prince George area. This opinion contradicted the defence theory that, for a number of reasons, Ms. Ratté might have simply left home and was living somewhere else, possibly in the United States.

- [18] During the trial, Mr. Ratté's daughter and police officers gave evidence about the amount of a gambling debt alleged to have been incurred by Mr. Ratté that was said to have been a catalyst in causing Mr. and Ms. Ratté's relationship to deteriorate. Other evidence about what the police officers learned from the missing person inquiry was given at the trial.
- [19] I will return in more detail to the evidence given at trial in the context of discussing whether the trial judge erred in law in admitting it or in failing to give a limiting instruction to the jury.

Analysis

- [20] The focus of the appeal is on the admission of three categories of evidence, without any limiting instruction to the jury, each of which is said to constitute an error in law. Before turning to the specifics of the evidence, it may be helpful to make some general comments about the trial and the evidence.
- [21] The evidence now objected to was not objected to at trial by defence counsel. Indeed, as I will discuss below, in some instances further evidence of the kind now objected to was elicited by the defence in cross-examination. Moreover, defence counsel did not ask the trial judge to provide any limiting instruction with respect to any of the evidence challenged on appeal, even though there were extensive discussions about what the charge should contain.
- [22] While the failure to object or seek limiting instructions is not determinative of an appeal, it can be a relevant consideration in assessing an appeal's merits, especially where, as here, the position on appeal is in tension with the defence theory at trial: *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716 at para. 43.
- [23] On my review of the record, it is clear that the defence was content to have certain evidence admitted in the way it was because doing so assisted the defence theory. In particular, it is clear from the record that the defence tactics involved exploring a number of the difficulties Ms. Ratté was having in her relationship with her husband to support the theory that she had left the family voluntarily. By way of example, this included eliciting hearsay evidence from the daughter about her mother having run away from her family home as an adolescent, and remaining out of communication with the family for some considerable time.
- [24] Similarly, defence counsel appears, at a minimum, to have been content to have hearsay evidence come in about the results of the missing person investigation through the officers involved in it. The record supports the inference that defence sought it to be to its advantage to explore potential weaknesses or inadequacies in the investigation in this way, rather than risk the defence theory that the investigation was inadequate being foreclosed by more formal and complete proof.

Character evidence

[25] Mr. Ratté argues that the following evidence was inadmissible character evidence adduced by the Crown when he had not put his character in issue:

Q And in terms of your impressions growing up, was your father the same type of person as your mother, or a different type of person?

A They were completely different people. Mom was open and honest and - and never wanted to keep anything from anybody, just like I am, and Dad was secretive. He was calm - growing up, he was calm and patient, and didn't say much, he kept things to himself. The rare family story we got from him was a treat. And so Mom did the talking most of the time. Dad didn't - didn't do much talking.

[26] This evidence was led from Mr. and Ms. Ratté's daughter very near the beginning of the trial.

[27] Mr. Ratté acknowledges that evidence of the relationship between the Rattés and evidence relevant to motive is admissible. He argues, however, that this evidence does not go to the alleged motive for the killing. The Crown's theory of motive related to the gambling debt and the financial stresses the family was under leading to a breakdown in the relationship between the couple. Equally, Mr. Ratté argues, the evidence is not a description or observation of the relationship between husband and wife. Rather, the evidence is prejudicial character evidence that would have allowed the jury to reason that since Mr. Ratté was not "open and honest", but "secretive" and "kept things to himself", he was therefore precisely the type of person who could have killed his wife and then successfully kept it a secret for the 10 years.

[28] With respect, I am unable to agree. In my view, the evidence goes to the nature of the relationship between the parents, and within the family, as observed by their daughter. One source of difficulty between her parents, as observed by their daughter, related to a gambling debt incurred by Mr. Ratté which led to Ms. Ratté losing trust in her husband and their relationship. The witness's description of her parents' relationship, informed by the perception of the type of people that they were, was relevant, admissible, contextual evidence and was admissible to give the jury a full understanding of the relationship between husband and wife.

[29] Most importantly, I do not think that the evidence would be taken by a jury to support an inference that Mr. Ratté was the kind of person who would kill his wife. The witness described her father as "secretive" and as keeping things to himself. She also says that he was calm and patient. I do not interpret the contrast between her mother's openness and honesty and her father's secretiveness, as suggesting that she saw her father as being "dishonest". I do not think that someone who is secretive and keeps things to themselves, but is calm and patient, would be taken by any jury to be of a character or disposition to kill their spouse.

- [30] The evidence was admissible without a limiting instruction. Indeed, defence counsel did not ask for a limiting instruction with respect to this evidence. Neither counsel referred to this evidence in their closing submissions. The trial judge did not refer to it in his jury instructions.
- [31] Defence counsel did ask for, and received, a limiting instruction on character evidence with respect to Mr. Ratté's involvement with a criminal organization. The jury would have understood, as a general matter, that they were not to consider whether Mr. Ratté was the kind of person who would have killed his wife, even if they would not necessarily have transposed that instruction to the description of Mr. Ratté as secretive.
- [32] I do not consider that the trial judge made an error in law in admitting this evidence or in failing to give the jury a limiting instruction. I would not accede to this ground of appeal.

Opinion evidence

- [33] During the trial, a police officer testified about the enquiries she made in 1997 to locate Ms. Ratté. She testified extensively about the specific results of her enquiries. After doing so, and in the course of her evidence, the following exchange occurred:

Q Going back to what we discussed this morning, I believe you agreed that you identify late September or early October is the time when you came to some sort of initial judgement on the file.

A That was about the time that the children were back in school, no one has heard from Wendy, school started for her. To me if - if there was any possibility, she should have surfaced by then.

Q And although the matter was not at an end, had you reached a sort of provisional conclusion in your mind about the matter at this point?

A My feeling was and my belief is still to this day that she never left Prince George area.

- [34] A short time later the police officer gave the following evidence:

Q Has the passage of 13 years, since 1997, shaped your conclusions in any way?

A Just reinforced it, it's -- to me, Wendy never left Prince George and did not leave. She's, you know, this is where she was last at.

- [35] No objection was made to this evidence when it was given. Neither counsel referred to it in their closing submission. No request was made for a limiting instruction. The trial judge did not refer to it in his instructions to the jury.
- [36] The Crown accepts that the evidence is non-expert opinion evidence, but says that it is admissible nevertheless. The Crown submits that the evidence falls within the principle that a lay witness is entitled to express an opinion that is "merely incidental" to that person's findings as "a compendious way of ascertaining the result of the witness' observations": R. v. Bell, 2001 BCCA 99, 152 C.C.C. (3d) 534 at para. 10, quoting R. v. Graat, [1982] 2 S.C.R. 819.

The Crown argues Bell permits a witness to express a lay opinion on matters of common experience even where the witness might not have difficulty transmitting to the jury the factors which support the opinion. As a practical matter, the distinction between fact and opinion is not always clear and, accordingly, the exclusionary rule is often not applied.

- [37] The Crown gives five reasons why the police officer's opinion was admissible. First, the police officer had conducted a comprehensive search, talking to many people, and compiling 250 pages of notes. She testified that she never found any information that suggested that Ms. Ratté had left Prince George. Second, her opinion was supported by the evidence of Ms. Ratté's children who testified that they had not seen their mother since the day on which she disappeared. The police officer's assessment was based on her professional experience as an investigator. Third, the police officer's opinion was relevant to the issue of whether Mr. Ratté had murdered his wife. Fourth, defence counsel had full opportunity to cross-examine the police officer on her findings and conclusions. Finally, defence counsel did not object to the opinion and did not ask for a specific instruction with respect to this opinion, although he did ask for an instruction with respect to expert opinion. No specific instruction with respect to this lay opinion was necessary.
- [38] I am unable to agree with the Crown's submissions. The police officer had given detailed evidence of the specific enquiries she made in the course of her investigation and the results of those enquiries. In my view, her statement of opinion went beyond being a compendious way of stating the police officer's findings and was not merely incidental to them. The jury was in a position where it could readily draw the appropriate inferences from the factual evidence about the enquiries and their results.
- [39] The issue whether Ms. Ratté disappeared on August 18, 2007, because she had been killed by her husband, who then hid her body, or whether she voluntarily disappeared to start a new life somewhere else free from her family was a material one in this trial. The defence position was that it was a reasonable possibility that Ms. Ratté was still alive, living elsewhere. The opinion was, therefore, rendered on a material issue.
- [40] At trial, the defence was faced with the challenge of responding to the inference to be drawn from the facts resulting from the missing person enquiry that Ms. Ratté had disappeared but not left the Prince George area. The police officer's opinion may have, to a certain extent, added to that challenge in that, when coupled with her experience in this field, her opinion may have carried some independent weight with the jury.
- [41] In my view, the opinion was inadmissible for the truth of its contents. It appears to have either slipped through without being caught by counsel, or defence counsel made a decision not to object to it. It is unnecessary to decide whether the evidence was inadmissible for all purposes. Even if there was some other basis that would support the admissibility of the statement, given that the evidence was heard by the jury, a limiting instruction should have been given to the jury to disregard the statement for the truth of the opinion and consider it only for a permissible purpose, if there were one. In this context, the jury should have been

told that they were to consider only the evidence of fact in deciding whether Ms. Ratté might have left the Prince George area. The failure to give a limiting instruction in these circumstances is an error of law: see *R. v. Van*, 2009 SCC 22; [2009] 1 S.C.R. 716.

[42] It is necessary therefore to consider whether the curative proviso found in s. 686(1)(b)(iii) of the Criminal Code should be applied, even though there has been an error in law. This Court recently considered the principles involved in applying the curative proviso in *R. v. Feil*, 2012 BCCA 110, 316 B.C.A.C. 277. Writing for the Court, Madam Justice MacKenzie said the following at paras. 68-70:

[68] Section 686(1)(b)(iii) of the Criminal Code provides that a court of appeal may dismiss an appeal against conviction where:

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) [wrong decision on a question of law] the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, ...

[69] The curative proviso, with respect to which the Crown bears a heavy onus of proof, allows an appellate court to uphold a conviction despite an error of law if no substantial wrong or miscarriage of justice occurred as a result of the error. As set out in the Crown's factum:

87. ... The Crown must demonstrate either (1) that the error was so harmless, and so insignificant, that it could not have affected the verdict; or (2) that the error, while serious, did not result in a miscarriage of justice or a substantial wrong because the case against the accused was so overwhelming that a conviction would have been inevitable even if the error had not been made: *R. v. Sarrazin*, 2011 SCC 54 at [24]; *R. v. Jaw* at [42]; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823 at [28-31]; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at [34-36]. [And see *White* (2011) at paras. 91-94.]

a) Harmless error

[70] The first category of error capable of engaging the operation of the curative proviso is described in *White* (2011) at para. 93 as follows:

In determining whether or not an error had only a minor effect, the court may look at the entirety of the case for context, but should not assess the strength of the evidence against the accused (*Van*, at paras. 35 and 37). For example, an error that appears significant in isolation may be minor because, in context, it only related to "a very minor aspect of the case that could not have had any effect on the outcome" or concerned "issues that the jury was otherwise necessarily aware of" (*Khan*, at para. 30).

[43] For the reasons that follow, the admission of the opinion evidence and the failure to give a limiting instruction was, within the context of this case, a harmless error. It is not necessary, therefore, to examine whether the second branch of the curative proviso is also engaged.

- [44] The Supreme Court of Canada's decision in *R. v. Van* is instructive in applying the harmless error branch of the curative proviso. In *Van*, a police officer gave evidence about an investigation into an attempted murder alleged to have been committed by the accused. One issue concerned the reason why the investigation focused on the accused and not other potential suspects. The police officer explained that he focused on the accused "because, in my opinion, Duc Van is the one that is responsible for this act". He was then asked what his opinion was based on and replied: "my investigation ... and information that I received".
- [45] The Supreme Court of Canada accepted that the evidence was admissible for narrative purposes, but that it was an error in law not to give a limiting instruction on the permissible uses to be made of the evidence. The majority observed that the police officer both professed his personal opinion about the accused's guilt and left open the possibility that his opinion was based on information not in evidence at trial. The failure to provide a limiting instruction created a risk that the jury would use the evidence for an impermissible purpose. The majority concluded, however, that in the context of the trial, the error was harmless and the curative proviso applied because it could not have caused any prejudice to the accused nor had any impact on the verdict.
- [46] The majority accepted that the error might not seem trivial when viewed in isolation, but concluded that its effect was sufficiently harmless in context, that it did not prejudice the accused, and the verdict would necessarily have been the same absent the error: see para. 37.
- [47] First, the majority accepted that the statement of opinion about the accused's guilt was "unwarranted and clearly foreclosed by the jurisprudence, due to the danger of the jury uncritically accepting the witness's opinion without drawing their own conclusions about the evidence" (at para. 39). But the majority concluded that the statement of opinion likely had "an insignificant impact on the verdict in the context of [the police officer's] testimony and the trial as a whole" (at para. 39). The majority accepted that the police officer was explaining to the jury the reasons why he focused on the accused rather than other suspects. Moreover, the trial judge had instructed the jury numerous times in his charge that they were the finders of fact and only their opinion of the evidence mattered.
- [48] The majority rejected the minority's view that the effect of the evidence was to pit the opinion of an experienced police officer against the testimony of the accused that he had not stabbed the victim. The Justice LeBel majority reasoned:

I do not believe that one clear statement of the officer's opinion in one ambiguous statement of opinion made in the course of a 17-day trial was sufficient to completely alter the nature of the trial as suggested. While [the police officer] was clearly a credible Crown witness, he was not the only Crown witness, nor was he the only police officer who testified to the steps taken during the investigation. I cannot accept the jury would have attributed such significant weight to [the police officer's] testimony, regardless of his years of experience or his seat at the counsel table in the courtroom. ... I fail to see how this particular statement of the officer's opinion could possibly

have affected the verdict when viewed in context. (at para. 40)

[49] Finally, the majority placed some weight on the fact that defence counsel did not object when the questions were put to the police officer, did not request a limiting instruction and did not seek one. Justice LeBel said at para 43:

It should be noted that defence counsel failed to object to many of the questions put to [the police officer], whose answers are now the subject of appeal, and that counsel registered no complaint following the trial judge's charge to the jury in which a limiting instruction was notably absent. A failure to object to an error may suggest that the error was not serious or that it did not result in an unfair trial [citations omitted]. That said, an error might still be considered serious despite the absence of objection at trial [citations omitted].

[50] Justice LeBel went on to conclude that in the circumstances the failure to object did not arise from a calculated tactical decision but from the fact that the error was insignificant in the context of the case.

[51] In my view, many of the considerations that led the majority in Van to conclude that the error was harmless apply in the circumstances of this case. First, the opinion that Ms. Ratté had not left Prince George was, on its face, less prejudicial than an opinion that Mr. Van was guilty of attempted murder. Second, the opinion was given in the context of extensive evidence about the scope of the investigation and its results. The defence cross-examined the investigating officer at length about the missing person investigation. The facts were extensively explored. Accordingly, the jury had before it detailed factual evidence about what was done or not done in the investigation, and what was known and not known. Third, the evidence was given in two short answers in the context of a lengthy trial. Fourth, no objection was made to the evidence when it was given and no limiting instruction was sought in the charge to the jury. Fifth, neither counsel referred to the opinion evidence in their closing submissions, although they did refer to factual matters connected to the missing person investigation. The trial judge did not refer to the opinion in his jury instruction. The trial judge did make it clear, however, that the jury were the sole judges of the facts and that their view of the evidence was controlling. He also explained the role of opinion evidence, in connection with expert evidence that had been led at trial.

[52] From the perspective of the defence, the core issue in this trial was whether the jury should be satisfied beyond a reasonable doubt that Mr. Ratté was telling the truth when, on multiple occasions, both before and after his arrest, he admitted to shooting and killing his wife. The defence raised a number of grounds in an effort to persuade the jury that they should not be so satisfied that the "confessions" were true. Those grounds included a lack of motive as well as rationalizing why the confessions might be false. The defence also attempted to sow doubt in the mind of the jury by pointing out the extraordinary risks involved in attempting to kill his wife in the way and at the time he did, when his two children were still in the house.

- [53] One element of the defence case, but only one among several, was to provide the jury with some reason to believe that Ms. Ratté did not disappear in August 2007 because she had been killed. The defence laid the foundation for its argument that Ms. Ratté was sufficiently dissatisfied with her life, relationships, and husband that she might have deserted her family and had no further contact with them. The defence attempted to develop a basis to make this theory plausible by referring to her behaviour in earlier years. The defence also attempted to lay a foundation for this theory by demonstrating that there were gaps, holes or deficiencies in the missing person investigation which would open the door to the possibility that Ms. Ratté was still alive.
- [54] When the inadmissible evidence is set in the context of the trial as a whole, I am satisfied that its admission was insignificant and did not prejudice the defence. I do not think there is any real risk that the jury would have attached any weight to the opinion, let alone uncritically accept it and fail to reach their own conclusions based on the admissible evidence. There is no reason to consider that the jury failed to understand that they were the sole fact finders and that it was for them, and only them, to draw conclusions from the facts. The jury was properly instructed about its role in relation to finding facts.
- [55] I am satisfied, moreover, that the absence of an objection to the opinion evidence can, in this case, be taken to indicate that the error was not significant in the context of this case.
- [56] In my opinion, the verdict would necessarily have been the same, even without the error. I would not give effect to this ground of appeal.

Hearsay evidence

- [57] Mr. Ratté alleges that the trial judge erred in admitting hearsay evidence and in failing to give a limiting instruction about the use that could be made of any such evidence. Once again, the evidence was adduced at trial without objection.
- [58] In his factum, Mr. Ratté identified a substantial body of hearsay evidence he contended had been improperly admitted. In oral argument the focus on what evidence had been improperly admitted was narrowed, partially in recognition that some of the originally impugned evidence was admissible as evidence of the deceased's state of mind, was relevant to motive, or was otherwise evidence going to the nature of the relationship between himself and his wife. Accordingly, I will focus my analysis on the evidence that was challenged during argument.
- [59] The evidence in question relates principally to evidence about the existence of a \$10,000 gambling debt alleged to have been put on a family credit card. Evidence of that debt was adduced, initially, from Mr. Ratté's daughter and, later, from investigating police officers who reported on information they had received from certain financial institutions. Mr. Ratté submits that the hearsay evidence of the gambling debt was used for the truth of its contents and not simply as evidence of Ms. Ratté's state of mind based on a belief that the debt was for that amount. The Crown then used the evidence that Mr. Ratté had put a gambling debt

of \$10,000 on a credit card as evidence to support his motive to kill his wife. Mr. Ratté points in particular to the following comments of Crown counsel in closing as illustrating the hearsay use that was made of the evidence about the gambling debt:

Sergeant Thomas also turned up the fact that there had been some real problems in the family during the months preceding Wendy's disappearance. Dennis Ratte had been injured. He wasn't working. He had taken to gambling and there was a big bad surprise about a big gambling debt that led to anger, a lack of trust and -- a real crisis in the relationship. And I pause here to note partially in response to what Mr. Heller said this morning that Sergeant Thomas, from her investigation and both the children, testified in a consistent manner about these events and particularly the gambling debt and its magnitude and the importance to the family. And it's strikingly different from the self-serving testimony of Mr. Ratte about how it really was just a small thing and the big sum was only the size of the pot.

- [60] Mr. Ratté also objects to other hearsay evidence given by the police officers relating to the results of enquiries they made during the missing person investigation. In his view, this evidence should have been formally proved given the importance of the question of whether Ms. Ratté had left the Prince George area.
- [61] Mr. Ratté argues that the failure of his counsel to object to this evidence at trial is not decisive of the issue on the appeal. The trial judge has an independent obligation to ensure that the trial is fair and that the jury receive only admissible evidence. The trial judge in this case, he argues, failed to fulfil his role as a gatekeeper ensuring that the jury received and considered only admissible evidence. Moreover, he contends that his counsel's failure to object to the admissibility of the evidence did not reflect a strategic approach to the defence or agreements that evidence could be received for a hearsay purpose. The evidence, particularly of the gambling debt, was prejudicial to him because it laid the foundation for the Crown's theory of motive.
- [62] The Crown, for its part, argues that whether the gambling debt was for \$10,000 and was put on a family credit card was not the critical point of the evidence. Mr. Ratté acknowledged that he had incurred a gambling debt, although he disputed the amount. Mr. Ratté testified that he only lost \$2,000 to \$3,000. Mr. Ratté's position before this Court was that the hearsay evidence concerning this larger amount of debt supplied evidence of the Crown's theory of motive. However, he also acknowledged that his wife believed that he had lost \$10,000, even though he had tried to explain to her that that was not the case. The critical point, the Crown argues, is that Ms. Ratté's belief that there was a large gambling debt was a critical factor in explaining the crisis that developed in the relationship between the couple. And it was this crisis that contributed to the motive to kill his wife. Accordingly, the evidence was admissible for that purpose without any special instruction.
- [63] The Crown goes on to argue that, even if the evidence was hearsay whose reliability had not properly been scrutinized by the trial judge, the position taken at trial by Mr. Ratté should preclude him from attacking the admissibility of this evidence on appeal. The Crown argues

that defence counsel agreed to the admissibility of this evidence, elicited additional hearsay on the cross-examination of Crown witnesses and the direct examination of his client, and based his overall defence strategy on parts of this evidence. Where defence counsel agreed to the reliability of evidence at trial, appellate counsel cannot argue that the trial judge erred in admitting the evidence: *R. v. Polimac*, 2010 ONCA 346, 254 C.C.C. (3d) 359, at para. 65, leave to appeal ref'd [2010] S.C.C.A. No. 263.

- [64] The Crown also relies on *R. v. Utomi*, 2008 ONCA 83, to the effect that hearsay concerns disappear when counsel, for tactical reasons, decides to admit the evidence for its truth. This they say is what happened here.
- [65] Moreover, the Crown argues, a fair reading of the record reflects a mutual agreement to admit hearsay evidence, particularly in relation to the missing person investigation. That agreement was in the interests of the defence. It was easier to identify inadequacies and weaknesses in the investigation through a cross-examination of only two police officers. Demanding more formal and thorough proof of the facts recorded through the investigation would have risked foreclosing the defence theory. The admission of hearsay should be taken as reflecting a calculated tactical decision by defence counsel. Indeed, the transcript discloses, the Crown argues, that the defence was not objecting to evidence of the results of enquiries made to third party record holders.
- [66] I agree with the substance of the argument advanced by the Crown.
- [67] Two important elements of the defence approach to the case were, first, that Ms. Ratté was so deeply dissatisfied with her family life, including her relationship with her husband, that she chose to leave to seek a better life (or at least that it was possible that she had done so), and, second, that she might be alive living elsewhere and the police investigation had been sufficiently incomplete to rule out that possibility. This was a perfectly reasonable approach in light of the case against Mr. Ratté.
- [68] The defence theory explaining why Ms. Ratté may have chosen to leave her family drew on much the same evidence that the Crown relied on for its theory of motive. The Crown and the defence each had an interest in evidence bearing on the crisis or tension in the relationship. What differed primarily was their interpretation of the significance of that evidence and the inferences they invited the jury to draw from it.
- [69] The evidence was relevant to Ms. Ratté's state of mind and its purpose was not to prove the truth of its contents. Defence invited the jury to draw the inference that Ms. Ratté may have acted on her frustration and disappointment and left a relationship bereft of trust. Crown suggested the crisis in the relationship, manifested in Ms. Ratté's anger and lack of trust, provided a motive for murder. The evidence was not used for a hearsay purpose.

- [70] Indeed, the defence elicited hearsay evidence, in the face of a caution from the trial judge, about whether Ms. Ratté had run away from her family as an adolescent and remained out of communication with them for some time. This evidence was used to support the argument that what she had done once, she might have done again. Also it was the defence who drew out additional evidence about Ms. Ratté's interest in pursuing a same sex relationship and some of the steps she had taken to pursue that interest.
- [71] As for the hearsay complaint in relation to the second element of the defence theory, it is also clear on the record, in my view, that defence pursued a deliberate strategy in not objecting to hearsay reports of the results of third party records or inquiries in connection with the missing person inquiry. There is no reason to doubt that in the circumstances that strategy was soundly based. It is reasonable to suppose it made it more, rather than less, likely that defence counsel could persuade the jury that there were inadequacies in the missing person investigation and that the inquiry had simply failed to find Ms. Ratté where she was now living. Objecting to this hearsay evidence and requiring more formal proof would have likely put that strategy at risk.
- [72] In these circumstances, it was not incumbent on the trial judge to undertake an independent inquiry of the admissibility of this evidence. Perhaps it would have been better if an agreement that the evidence was being admitted without objection had been formally on the record. Nonetheless, it is apparent that there was at least an implicit agreement to that effect. I agree with the approach taken by the Ontario Court of Appeal in *Utomi* that any hearsay concerns disappear when counsel, for "sound tactical reasons", decide to agree that evidence will be admitted for its truth, regardless of the fact that it is hearsay. Further, even if the agreement to admit the hearsay is implicit, i.e., in the case of there being no objection to it because of tactical reasons, the Ontario Court of Appeal has found no error in the admittance of evidence of an obvious hearsay nature on that basis: *R. v. Fournier* (1996), 95 O.A.C. 356 at para. 3. For these reasons, I agree that it is not open to Mr. Ratté now to object to something tacitly accepted at trial and which reflected a sound strategic approach to his defence.
- [73] In the result, I would not give effect to this ground of appeal.

Disposition

- [74] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Garson"

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