
CANADA / JUDGMENT

R. v. Reeves

2013 BCCA 250

COURT

British Columbia Court of Appeal

DECIDED

28 May 2013

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2013 BCCA 250 R. v. Reeves

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Reeves,

2013 BCCA 250

Date: 20130528

Docket: CA039127

Between:

Regina

Respondent

And

Robert Reeves

Appellant

Corrected Judgment: The text of the judgment was corrected at paragraphs 22 and 39 where changes were made on May 31, 2013;

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Prowse

The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of British Columbia, April 7, 2011

(R. v. Reeves, Smithers Registry No. 21073-2)

Counsel for the Appellant:

G.P. DelBigio, Q.C.

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Counsel for the Respondent:

B.A. MacLean

Place and Date of Hearing:

Vancouver, British Columbia

January 8, 2013

Place and Date of Judgment:

Vancouver, British Columbia

May 28, 2013

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurring Reasons by:

The Honourable Chief Justice Finch (page 14, paragraph 45)

Concurred in by:

The Honourable Madam Justice Prowse

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] The appellant was convicted of second degree murder following a trial before judge and jury. He contends that the judge misdirected the jury on the issue of intent. He also says that the judge erred in failing to clarify questions posed by the jury and in admitting into evidence a statement that the appellant made to police.

Evidence at Trial

- [2] The victim, Brian Baker, was stabbed to death in his home in Granisle, B.C. on April 26, 2009. The only other persons in the home at the time of the stabbing were Vivian Baker (the victim's wife) and the appellant, her son.
- [3] Ms. Baker testified that on the night of the killing, the appellant was angry with her over the preparation of dinner. He grabbed and shook her. Mr. Baker, who was not in the kitchen, said something in an attempt to calm the situation. At that point, the appellant left the kitchen.

- [4] Ms. Baker was unable to say what happened next, explaining that she either experienced an epileptic fit or went into shock. Her next recollection, which she believed was about 20 minutes later, was of Mr. Baker calling to her for help. She found him lying on the floor, bleeding from wounds to his abdomen, arms and hands. She attempted to stanch the bleeding using a towel and then picked up the telephone to summon help. In the meantime, the appellant entered the room and proceeded to cut the telephone cord. Ms. Baker then went across the street to a neighbour's house, where she used the telephone to summon help.
- [5] Ms. Baker succeeded in contacting the Houston RCMP detachment from her neighbour's house at about 9:00 p.m., and two officers arrived in the vicinity of the Baker residence by about 9:25 p.m. Because the situation was considered dangerous, and because there was a lack of information on Mr. Baker's condition, they did not immediately enter. Sergeant Wadelius made telephone contact with the appellant, who remained in the home. Early in the conversation, the appellant advised Sergeant Wadelius that Mr. Baker was dead.
- [6] As a result of technical difficulties, the recording of the telephone call was imperfect. For the first part of the call, only Sergeant Wadelius's voice was recorded. Sergeant Wadelius attempted to mitigate the problem by repeating many of the appellant's words back to him. For later parts of the call, Sergeant Wadelius placed the recording device close to his ear, so that some of what the appellant said is discernable on the recording, though not all of his words are recorded.
- [7] The appellant gave evidence at the trial. He testified that he had no memory of the events of the night from the time he went into the kitchen to ask his mother about dinner until well after the stabbing. He was unable to say whether or not he had stabbed Mr. Baker.
- [8] There were, effectively, only two issues at trial: whether it was proven that the appellant was the person who stabbed Mr. Baker, and whether, in light of mental infirmities from which the appellant suffered, it was proven that he had the requisite intent to commit murder.
- [9] After approximately one day of deliberations, the jury asked for clarification of certain parts of the judge's instructions. The judge re-charged the jury on the issue of intent. Ultimately, the jury found the appellant guilty of second degree murder.

Issues on Appeal

- [10] The appellant presents three grounds of appeal. He contends that the judge's instructions on the distinction between murder and manslaughter were erroneous, and left the jury without a clear understanding of the intent necessary to found a conviction for second degree murder. He also says that the questions posed by the jury were unclear, and argues that the judge had a duty to clarify them before proceeding with her re-charge. Finally, he says that the judge erred in allowing evidence of his conversation with Sergeant Wadelius to go to the jury.

The Jury Instructions on Intent

[11] The requisite intent for murder is set out in s. 229(a) of the Criminal Code, R.S.C. 1985 c. C-46:

229. Culpable homicide is murder

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

(i) means to cause his death, or

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

[12] In the case before us, the victim bled to death after receiving multiple stab wounds. It is apparent, from an objective standpoint, that the infliction of those wounds would have resulted in bodily harm that was likely to cause death.

[13] A forensic psychiatrist who testified was of the opinion that the appellant suffers from paranoid schizophrenia. The appellant has persistent delusional beliefs and is subject to hallucinations. He believes that chips have been implanted in his body, and that his behaviour is manipulated by the CIA. In light of the appellant's mental infirmities, the jury had to determine whether it was convinced beyond a reasonable doubt that he intended to commit murder. Effectively, the question for the jury was whether it could, in the circumstances, infer that the appellant intended the natural and probable consequences of his acts.

[14] In her charge, the judge initially provided a good summary of the mental elements of murder and of manslaughter. She then turned to the relevance of mental illness to intent, and to the "common sense inference" that a sane and sober person intends the natural and probable consequences of the person's acts.

[15] For the most part, her discussion of the relevance of mental illness was straightforward and unexceptional. She did, however, refer to the definition of "mental disorder" in s. 2 of the Criminal Code, and instructed the jury that it was required to apply that definition. That instruction was erroneous - none of the issues before the jury required it to consider whether the appellant's mental infirmities constituted a "disease of the mind" or "mental disorder" as those terms are used in the Criminal Code. The instruction to use the definition in s. 2 of the Criminal Code was both unnecessary and confusing. I am not satisfied, however, that the instruction could have caused any prejudice to the accused in the context of the evidence in this case.

[16] The judge then turned to applying the law to the evidence in the case. She said:

The criminal fault in manslaughter is the commission of the unlawful act which is objectively dangerous in the sense that a reasonable person in the same circumstances as the accused would recognize that the unlawful act would subject another person to the risk of bodily harm which is neither trivial nor transitory. But in the offence of murder there is, in addition to the unlawful act, the ingredient of either an intention to cause death or this intention to cause bodily harm that the accused knows is likely to cause death and recklessness whether death ensues.

That is the statutory difference between murder and manslaughter, and quite frankly that is why, if you find him not guilty of murder, you will then, because you have determined that the Crown has not satisfied you beyond a reasonable doubt that he had the intention, and it would be on the evidence because of delusional thinking leading him to stab Brian Baker, that is the reason why he stabbed Brian Baker. If you are not satisfied that the Crown has proved this beyond a reasonable doubt, then you will find him guilty of manslaughter, not murder, because all of the evidence is, from Dr. Smith and from Mr. Reeves, that he objectively knew that if he stabbed Mr. Baker in the abdomen, it could cause death, and that if he did not get medical attention, death would surely ensue from bleeding.

- [17] The statement that the appellant "objectively knew that if he stabbed Mr. Baker in the abdomen, it could cause death, and that if he did not get medical attention, death would surely ensue from bleeding" is problematic. Presumably, all the judge meant to do was state that in stabbing Mr. Baker, the appellant had committed an act that was, from an objective viewpoint, likely to cause death or bodily harm of a non-trivial and non-transitory nature. The language used by the judge, however, focussed on the appellant's knowledge at the time of the stabbing. It was likely to cause confusion for the jury, leaving it with no clear indication of the difference between murder and manslaughter. Worse, it might have been taken to be an instruction to the effect that the accused had knowledge that stabbing Mr. Baker was likely to cause death.
- [18] It is quite likely that it was this erroneous instruction that led the jury to request clarification approximately one day into its deliberations. The clarification sought (which I will discuss below) related to the difference between murder and manslaughter and the intent requirement for murder.
- [19] Given that her initial instructions on the issue of intent to commit murder were confusing, it was particularly important that the judge clearly articulate the difference between murder and manslaughter in answering the jury's questions.
- [20] In recharging the jury, the judge gave the following instruction:

If you find that Robert Reeves committed the act of stabbing Brian Baker, you go to Ingredient Number 5. Did he intend to do so within the meaning of culpable homicide? That's the hardest part, I would say, because the concepts are so blurry. However, I am going to suggest to you it's not that hard. I mean, it's hard, but it's not unintelligible.

And so I want to remind you mental illness is not a defence. If you find that Mr. Reeves committed that unlawful act, then the question is, Is it murder, did he intend to do so, or is it manslaughter?

Now, I -- just because you asked this question specifically I am going to take you to what you have in front of you, the distinction between murder and manslaughter. It doesn't get a whole lot clearer than this. The difference between murder and manslaughter is not easy to define. Essentially it is this. An unlawful act is part of the offence of murder just as it is part of the offence of manslaughter. But for murder the Criminal Code requires that an accused must mean to cause death or mean to cause bodily harm that he knows is likely to cause death and to be reckless whether or not death ensues. Those words are not mentioned in the offence of manslaughter.

The criminal fault in manslaughter is the commission of the unlawful act, which is objectively dangerous in the sense that a reasonable person in the same circumstances as the accused would recognize that the unlawful act would subject another person to the risk of bodily harm which is neither trivial nor transitory.

Now, let's just stop there. When you heard the evidence of Dr. Smith and you heard the evidence of Mr. Reeves, Mr. Reeves understood that if you stab somebody in the abdomen several times it may cause death and if you leave them -- leave them to bleed, it will cause death. He understood that. That is the same as objectively dangerous in the sense that a reasonable person in the same circumstances as the accused would recognize that the unlawful act would subject another person to the risk of bodily harm which is neither trivial nor transitory.

[21] In my opinion, the judge's re-charge had potential to confuse the jury. Because it was given in the context of her charge on manslaughter, the judge's statement that "Mr. Reeves understood that if you stab somebody in the abdomen several times it may cause death and if you leave them -- leave them to bleed, it will cause death" must have been intended to describe an objective rather than subjective test. It did not, however, do that. Instead, it focussed on the actual knowledge of the appellant, and suggested that at the time of the stabbing he did appreciate that his actions were likely to cause death.

[22] The instruction may have led the jury to understand that the requisite intent for manslaughter was the same as that for murder. This was particularly likely given the judge's statement that the concepts were "so blurry" and that "the difference between murder and manslaughter is not easy to define." As the judge affirmed that the accused had the necessary intent to commit manslaughter, the jury might well have considered itself bound to find that he also had the requisite intent for murder.

[23] The problem was compounded, in my view, when the judge went on to discuss the mens rea for murder under s. 229(a)(ii) of the Criminal Code:

[I]f you have a reasonable doubt about whether or not Mr. Reeves actually intended or meant to cause the death of Brian Baker, you must consider whether or not the Crown has proved this ingredient the second way. As I said earlier, the second way the Crown can prove this ingredient is by proving that Mr. Reeves meant to cause bodily harm which he knew was likely to cause death and was reckless whether or not death ensued. The second way has three separate parts. I will discuss these three parts separately.

First part of reckless. The first part is that Mr. Reeves intended to cause bodily harm to Brian Baker. When you decide whether or not Mr. Reeves intended to cause bodily harm to Brian Baker, you should use the same procedure I told you about in regard to intent to kill. In other words in deciding whether Mr. Reeves intended to cause bodily harm you may, but you are not required to, rely on the commonsense inference that a sane or sober person intends the natural consequences of this conduct. If bodily harm was a natural consequence of Mr. Reeves' conduct, you are entitled to find that the bodily harm was intended. However, you are not required to come to this conclusion. In the end you should look at all of the surrounding circumstances in order to decide whether Mr. Reeves actually intended to cause bodily harm.

The second part of reckless. The second part is that Mr. Reeves knew that the bodily harm would be likely to cause the death of Brian Baker. You must ask yourselves whether Mr. Reeves intended to cause bodily harm of such a grave and serious nature that he knew that it was likely to result in the death of Brian Baker.

As you probably know, knowledge is like intention, they are both states of mind; therefore, you should decide what Mr. Reeves knew the same way you decide what he intended to do, by looking at all the surrounding circumstances, including the effect that the mental disorder may have on a person's ability to foresee or know that death was a likely consequence of his actions.

Third, the third part. The third part is that Mr. Reeves was reckless about whether or not his conduct caused the death of Brian Baker. Mr. Reeves knew at the time that he committed stabbing numerous times that it would likely cause the death of Brian Baker, but he nevertheless persisted in committing that act despite his knowledge of the risk that Mr. Reeves has been reckless as to whether or not death ensued.

[24] The judge's instructions on "the first part of reckless" and "the second part of reckless" are, in and of themselves, not particularly problematic. When combined with her earlier instructions to the effect that the appellant "objectively knew" or "understood" that his actions were likely to cause death, however, they would have been confusing to the jury. The instructions may well have left the jury with the impression that there was no question but that the appellant knew that his actions were likely to cause Mr. Baker's death.

- [25] The judge's instructions on "the third part" were, in themselves, problematic. The judge had a duty to instruct the jury that it could not convict of second degree murder unless it was satisfied beyond a reasonable doubt that the appellant had persisted in behaviour that he knew risked the death of Mr. Baker. The instruction given by the trial judge does not leave the matter in the hands of the jury. Instead, it simply states that the appellant persisted in behaviour that he knew risked causing the death of Mr. Baker.
- [26] The Crown argues that the words used by the judge simply constituted a shorthand way of instructing the jury, and that the judge's tone of voice and cadence of delivery would have left the jury in no doubt that it was to make the determination. I am not convinced, particularly in light of the judge's earlier instructions, that this argument can be accepted.
- [27] In my view, the judge's instructions, read as a whole, would have been confusing to the jury. They left open a possibility that it may have convicted the accused despite harbouring doubts as to whether he had the specific intent to commit murder. In light of that possibility, the conviction for second degree murder cannot stand.

The Jury's Questions

- [28] My conclusions on the charge to the jury make it unnecessary, strictly speaking, to deal with the appellant's other grounds of appeal. In light of the arguments that have been put forward, however, I do wish to comment on the appellant's contention that the judge erred by failing to ask for clarification of the questions posed by the jury.

- [29] The note sent by the jury to the judge was in the following terms:

Clarification of My Lady's charge to the jury as it pertains to:

- (1) relevance of mental state on culpability.
- (2) the difference between second degree murder and manslaughter.
- (3) reckless (please explain further).
- (4) fifth element of Crown's ingredients.

[Emphasis in original]

- [30] The "fifth element of the Crown's ingredients" is a reference to a part of the judge's charge relating to second degree murder, in which she said "The fifth ingredient the Crown must prove is that Mr. Reeves either meant to cause the death or meant to cause bodily harm which he knew was likely to cause death and was reckless whether death ensued or not."
- [31] The appellant says that the discussion between counsel and the judge following receipt of the jury's questions demonstrated confusion and disagreement over the source of the jury's need for further instructions. He contends that in such a situation, it was incumbent on the judge to seek clarification from the jury as to the nature of its questions.

[32] In support of this contention, the appellant relies on *R. v. Kahnapace*, 2010 BCCA 227 and *R. v. Shannon*, 2011 BCCA 270.

[33] In *Kahnapace*, as in the case before us, the most difficult question for the jury was whether the accused had the requisite intent for murder. On the second day of deliberations, the jury came back with four questions, which were as follows:

1. The definition between and clarify the differences of intent for manslaughter and intent for second degree murder: could you give us a few examples.
2. Clarify or expand on intoxication versus intent or how it relates to intent.
3. Assignment of weight to evidence: could you give us a few clear examples.
4. How does one qualify intent? Is there a time frame?

[34] Neither the trial judge nor counsel understood the source of the jury's confusion. The second and fourth questions caused particular difficulty. Both counsel suggested that it might be helpful for the jury to "narrow down their question", but the suggestion was not taken up.

[35] This Court, in allowing the appeal, found that the trial judge made certain errors in her instructions to the jury. It also noted that trial judges need to be alert to the importance of clarifying the intent of any ambiguous questions put by the jury:

[48] By failing to [clarify the meaning of the jury's questions before answering them], the trial judge was left to speculate on the precise nature of the jury's concerns. Had the questions been clarified, they may have identified, or at the very least pointed to, one or more sources of the jury's confusion and thereby triggered a more careful review of the original charge and its attendant errors, which had to be corrected in the recharge.

[50] Failure to clarify questions that are unclear or ambiguous may amount to reversible error. This was the case in *Mohamed* [*R. v. Mohamed* (1991), 64 C.C.C. (3d) 1 (B.C.C.A.)] where the trial judge failed to clarify the jury's ambiguous questions before responding to the questions by repeating the original charge on self-defence. On two prior occasions, the jury had come forward with questions on the essential elements of the offences of attempted murder and aggravated assault, and on the requirements of self-defence. No objection was taken to the trial judge's recharges on each of those two occasions.

[51] On behalf of the Court, Mr. Justice Wood (as he then was) stated at 11:

When a jury asks a question during deliberations there is a duty on both counsel, and ultimately on the trial judge, to see to it that a responsive answer is provided.

...

Be that as it may, with or without the assistance of counsel, the trial judge has the ultimate responsibility to see to it that the jury receives the assistance it requires. It was impossible to discharge that responsibility in this case without first determining what the problem was. In my respectful view the trial judge ought to have clarified the question with the foreman before embarking on a repetition of an instruction which twice previously had failed to clarify the issues of law for the jury.

Before us it was argued that there is an inherent risk of inappropriate disclosure in any dialogue with the jury, but that risk can be minimized or even eliminated if the judge takes the initiative by asking leading questions and cautioning the foreman not to disclose any views which the members of the jury may have on the evidence while answering those questions. I do not think that the risk of improper disclosure by the foreman was much of a real, as opposed to a theoretical, concern. It certainly was not a proper reason to refrain from any attempt to clarify the question in this case.

I am mindful of the fact that on concluding his comments, the trial judge received an affirmative response when he asked the foreman if he had answered their question. However, in light of the confusing nature of the question, and the fact that it followed on the heels of two previous instructions similar to those which the judge offered in response to it, and after five hours of deliberations, I would have trouble attributing much weight to the foreman's answer.

[52] Similarly, in *R. v. H.(L.I.)*, [2003 MBCA 97], the Manitoba Court of Appeal observed:

[72] In order for a jury's question to give "the clearest possible indication of the particular problem that the jury is confronting," the question itself must be clear. Similarly, in order for the trial judge to "clearly, correctly and comprehensively" answer the jury's question, the judge must be certain what the jury is asking. If the jury's question is unclear, it follows that the trial judge should clarify the question by whatever method is best in the circumstances in order to gain "the clearest possible indication of the particular problem that the jury is confronting," and in order to be able to give a clear, correct and comprehensive answer.

[36] I would fully endorse these statements of the law. They should not, however, be read as compelling a trial judge to enter into a dialogue with the jury every time it delivers a question that is not absolutely precise. The jury may be incapable of pinpointing the precise source of its difficulties. The very fact that it has not fully understood the judge's instructions may get in the way of providing an articulate account of the problem. While a judge must clarify a jury's question where it is so obscure as to prevent a responsive answer from being given, the practice of asking a jury for clarification should be used with caution. Such a practice might lead to considerable frustration for the jury, and might make it reticent to put forward further questions. Where the focus of the jury's inquiries is readily apparent, the judge need not seek clarification.

- [37] In Kahnpace, some of the questions put by the jury reflected fundamental misunderstandings of central concepts in the case. In that context, it was important for the judge to identify the area of the charge that was causing difficulties, and she had to seek clarification of the questions in order to do so.
- [38] In Mohamed, the jury was continuing to experience problems understanding a portion of the charge that had been repeated to it on two separate recharges. In the circumstances, it was unlikely that a further repetition of the charge would dispel the confusion. It was, in the circumstances, incumbent on the judge to root out the source of the difficulty.
- [39] The case before us does not present the sort of difficulties that were present in Kahnpace or Mohamed.
- [40] Just as the charge to the jury has to be looked at as a whole, and in the context of the live issues at trial (see *R. v. Daley*, [2007] SCC 53, [2007] 3 S.C.R. 523), so also do any questions put by the jury. In the case before us, there were two essential questions for the jury - whether the accused was the person who stabbed the victim, and whether the accused did so with the intent to commit murder. The jury's questions all related to the question of whether the accused had the requisite intent for second degree murder. It was apparent that what was troubling it was the question of how the accused's mental illness impinged on the question of intent.
- [41] I do not infer from the transcript of the discussions between counsel and the judge that they were in any serious doubt as to the nature of the jury's confusion. While I acknowledge that defence counsel said, at one point, that he was "nonplussed" over the jury's reference to culpability, I would not read too much into that isolated statement. It is clear that the judge and counsel all recognized that the jury's concerns revolved around the question of how to approach the question of intent in light of the evidence of the accused's mental illness. Indeed, the judge's response to counsel's statement that he was nonplussed expressed the nature of the jury's difficulty perfectly: "They are trying to sort out what to do with the evidence on Mr. Reeves' mental state at the time and whether it is murder or manslaughter."
- [42] While the jury's questions may have reflected some confusion of legal terminology and were not absolutely precise, they served to alert the judge and counsel to the area of difficulty. None of the participants suggested that it would be advisable to ask the jury to clarify its questions. I am not persuaded that it was necessary (or even advisable) for the judge to seek additional clarification from the jury in this case.

Admissibility of the Statement

- [43] In light of my conclusion that the judge's charge to the jury contained serious errors, it is unnecessary to consider the argument directed at the admissibility of the accused's statements to Sergeant Wadelius, and I express no views on the issue.

Disposition

[44] I would allow the appeal and order a new trial.

"The Honourable Mr. Justice Groberman"

Reasons for Judgment of the Honourable Chief Justice Finch:

[45] I have had the advantage of reading in draft form, the reasons for judgment of my colleague, Mr. Justice Groberman. I respectfully agree with his conclusion that the appeal should be allowed, and a new trial ordered. However, I would prefer to base my reasons for doing so solely on the trial judge's instructions concerning the distinction between murder and manslaughter. I agree with my colleague's analysis of that issue.

[46] Since the appeal must be allowed on this ground alone. I do not consider it necessary to address the other grounds of appeal advanced by the appellant.

[47] As indicated, I would allow the appeal and order a new trial.

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Madam Justice Prowse"

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