
CANADA / JUDGMENT

R. v. Roe

2009 BCCA 193

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 193 R. v. Roe

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Roe,

2009 BCCA 193

Date: 20090501

Docket: CA035758

Between:

Regina

Respondent

And

Steven Patrick Roe

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice D. Smith

C.J. Nowlin

Counsel for the Appellant

W.J.S. Bell

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

April 1, 2009

Place and Date of Judgment:

Vancouver, British Columbia

May 1, 2009

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] Mr. Roe appeals his conviction of the second degree murder of Mr. David Stanley, also known as David Holditch. Mr. Holditch died as the result of a struggle with Mr. Roe which took place at a gas station in Kamloops, British Columbia on February 21, 2006. Mr. Roe, then 19 years of age, had become angry after reading some Internet chat files between his girlfriend Ms. Regnier, and Mr. Holditch. Mr. Roe confronted Ms. Regnier about having lied to him regarding the nature of her relationship with Mr. Holditch. The two argued, and eventually Mr. Roe told Ms. Regnier that he 'hated her right now', that he hoped she died slowly, and that he was going to go and 'kick [Mr. Holditch's] ass'. He left her residence at about 4:00 p.m.
- [2] Mr. Roe travelled by bus to his own home and arrived there at about 4:24 p.m. He asked his roommates for Mr. Holditch's last name, place of employment or telephone number. One of the roommates, Ms. Little, told him that Mr. Holditch worked at an Esso service station. Mr. Roe testified that he asked for Mr. Holditch's number so he could "call him and yell at him." He changed his clothes and put on his "Outback" trench coat. He testified that he put his "dagger" on his belt and that his "throwing knives" were already in his coat pocket, although he said he was not aware of that fact. He called a cab to go to the Esso station where, he testified, he intended to "maybe threaten him with [the dagger] or maybe hurt him." He arrived at the Sahali Esso gas station but was told Mr. Holditch worked at a different location. The cab took him there. Mr. Roe testified that his intention as he headed towards the second gas station was again to "confront [Mr. Holditch], maybe fight him, yell at him, threaten him, maybe cut him a bit with the knife."

- [3] At the gas station, he asked for Mr. Holditch, who came out of the back of the store and walked past Mr. Roe to the front area, with Mr. Roe following him. Mr. Roe took his knife out. At the counter, he testified, Mr. Holditch turned around, told Mr. Roe to get out, and a scuffle ensued. Mr. Roe testified that he wanted to scare him and "hurt him" by "cutting him" and to "hurt him a little bit, and that's it." Customers in the store testified that Mr. Holditch was defending himself and that they saw Mr. Roe punch him several times. They saw something in Mr. Roe's hand and one customer identified it as a knife.
- [4] Mr. Roe testified that he held the knife with the sharp part of the blade pointing to the right, that he made three or four motions with the knife, that Mr. Holditch grabbed hold of him and pulled him closer to him and that "he sort of pushed me away, and I fell backwards and I left." He denied any intention to stab Mr. Roe in the chest and said that as he ran away, he was not sure what had happened in the struggle. He threw the knife into a dryer of some kind and ran home. Witnesses said that the struggle lasted between one and two minutes.
- [5] Back at the gas station, Ms. Cullen, an employee, called 911 at 4:57 p.m. Mr. Roe also called 911, at 4:59 p.m., and reported that he had "just stabbed someone". When the police arrived, he told them where he had put the knife and said he thought he had stabbed Mr. Holditch "but I don't know how much" and that "it's over a girlfriend." He was apparently co-operative with police, and gave a statement, although at trial he admitted it was not entirely truthful.
- [6] There was medical evidence to the effect that Mr. Holditch had suffered six stab wounds, the fatal one having penetrated his heart by three to four inches near the breastbone. Most of the other wounds were much less invasive. A videotape of the incident was put in evidence but it was of poor quality, and still photos taken from it were also in evidence.

Jury Instructions

- [7] At the start of the trial, counsel for Mr. Roe (not counsel on appeal) told the trial judge in a voir dire that there was "no issue that Mr. Roe caused the death of Mr. Holditch. There is no issue that he is guilty of at least manslaughter in causing that death." The defence entered a series of admissions. For purposes of this appeal, the only material one was that on February 21, 2006 Mr. Roe had killed Mr. Holditch by "stabbing him using the knife which was seized and marked by the police as police exhibit number 9 (the "Knife")." Near the end of the voir dire, again in the absence of the jury, the trial judge said this:

I just wanted to clarify something with respect to my opening comments to the -- the jury and what I am intending to say to the jury regarding just a brief overview of the elements of the offence of second-degree murder and the fact that the first four elements, as I understand it, are not in issue and I -- what I am going to say is that I anticipate that the first four elements are not in issue and that it is really the fifth element, that is the intent element, and really what the jury - the issue for the jury will be determining whether it is second-degree murder or the included offence of manslaughter. Is that -- ?

Defence counsel at trial answered "yes" and added that he had "no problem" with the trial judge's advising the jury that she anticipated Mr. Roe would admit "the first four elements, that the only element in issue is the fifth element", or with her describing briefly the difference between murder and manslaughter, based on the description of the distinction given in G. Ferguson, CRIMJI: Canadian Criminal Jury Instructions (4th ed., 2008) vol. 2, ("CRIMJI").

[8] In her opening address, the trial judge told the jury that the Crown was required to prove each of the five elements of second degree murder - that Mr. Roe was the offender; the time and place of the offence; that he "committed an unlawful activity"; that it caused Mr. Holditch's death; and last, that Mr. Roe either meant to cause the death, or meant to cause bodily harm that he knew was likely to cause death and was reckless as to whether it caused the death of Mr. Holditch. She continued:

In this case, I anticipated [sic] that Mr. Roe will admit the first four elements of the offence. The only element in issue is the fifth element. The issue before you will be whether Mr. Roe is not guilty of the murder, but guilty of the included offence of manslaughter. 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 the death, or mean to cause bodily harm that he knows is likely to cause death, and to be reckless whether or not death ensues.

These 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, but in the offence of murder there is in addition to the unlawful act the ingredient of either an intention to cause death or an intention to cause bodily harm that the accused knows is likely to cause death, and recklessness whether death ensues.

These are the statutory differences between the two offences. It may turn out that there are defences available to Mr. Roe on the offence as charged. We will know this after we -- we will not know this until we hear all of the evidence. Again, I will tell you about any defences when I give my final instructions.

[9] At the beginning of the defence case, counsel for Mr. Roe told the jury that his client was "not going to try and defend himself here for what he did. What he did is inexcusable and any way you look at it, it's a very serious criminal offence." Further, counsel said:

on Monday, he will get up on the witness stand and will tell you what was in his mind, and it will be for you to decide whether he is guilty of murder or whether he is guilty of manslaughter. There will be no other alternative. We're not in any way suggesting here that he is not guilty of a very serious offence; the issue is whether he is guilty of murder or whether he is guilty of manslaughter.

- [10] Following the Crown's case, Mr. Roe took the stand and described his relationship with Ms. Regnier and the events of February 21, 2006. When asked about the wound to Mr. Holditch's heart, he said it must have happened when they were struggling or when Mr. Holditch had pushed him away, and that he was not entirely sure how it had happened. He testified that he had never intended to stab Mr. Holditch in the chest and had not thought about the "possibility that he might die". In cross-examination, he denied having "lost control" when he inflicted the stab wounds on Mr. Holditch, and denied stabbing him "with a side arm type gesture" or "an underhand punching type gesture".
- [11] Near the end of the trial, the trial judge asked for counsel's submissions concerning the jury charge. Mr. Roe's lawyer said he would not be advancing the "defence of accident", because it could "lead to an acquittal." (Evidently, he had determined as a tactical matter that it would prejudice Mr. Roe's chance for a manslaughter verdict if the jury thought he was trying for an acquittal.) In fact, counsel observed, Mr. Roe's "defence" was not a defence at all - his position was simply that the Crown had not proven the intent required for murder. Counsel's understanding - although he said he "could be wrong on this" - was that Mr. Roe was not saying he had not intended the blows to Mr. Holditch, but that he had "not intend[ed] for a blow to strike where it did". Counsel said he would leave with the trial judge whether it would be better simply to say nothing about a defence of accident. The trial judge responded that she would deal with the intents required for manslaughter and murder and that "Accident has never been raised during the course of this trial as a defence. it's really state of mind, not whether or not the killing blow was an accident."
- [12] In her charge to the jury, the trial judge said that she would be explaining "the law arising from the offence charged in the indictment and the included offence of manslaughter." She explained proof beyond a reasonable doubt and that it applied to each element of "the offence". The only element to be decided by the jury, she stated, was whether the Crown had proven that Mr. Roe "had the state of mind required for murder. The other elements of the offence have been admitted by Mr. Roe." Later in the charge, she instructed that the Crown must prove three essential elements for murder - that Mr. Roe had committed an unlawful act; that it had caused Mr. Holditch's death; and that he had had the intent required for murder. The first two elements having been admitted, the jury was required to decide whether the Crown had proven beyond a reasonable doubt "either that Mr. Roe meant to kill Mr. Holditch, or that Mr. Roe meant to cause Mr. Holditch bodily harm that he knew was so dangerous and serious that he knew it was likely to kill Mr. Holditch and proceeded despite his knowledge of that risk."
- [13] The trial judge then reviewed the evidence and summarized counsel's positions. There was no discussion of accident as such, or of the elements of manslaughter or of the 'objectively dangerous' criterion. The jury was told there were two possible verdicts - guilty as charged or guilty of the included offence of manslaughter. The questions as framed by the trial judge for the jury were the following:

1. Do you find Mr. Roe guilty of the offence of manslaughter and not guilty of the offence?

If the answer to this questions [sic] is yes then you will not be asked the second question. If the answer is no then you will be asked a second question.

2. Do you find Mr. Roe guilty of the offence of second degree?

The jury retired at 11:21 a.m. on October 24, 2007. Later that day, they asked for clarification concerning "what questions we have to answer with guilty or not guilty and in which order" and asked for the "written wording" of second degree murder and manslaughter and "written wording of the 2 intents."

[14] Although the trial judge commented to counsel that "what they want to know is what makes up the elements of manslaughter," her instructions on the point related only to what Mr. Nowlin in this court referred to as the actus reus of manslaughter. In her words:

I believe what you are asking is what are the elements of second-degree murder and what are the elements of manslaughter. The elements of manslaughter are that Mr. Roe committed an unlawful act, that the unlawful act was dangerous, and that the unlawful act caused Mr. Holditch's death. Mr. Roe has admitted to the fact that - to all of those elements.

The jury was also given a typewritten page that stated:

ELEMENTS OF MANSLAUGHTER

The Crown must prove beyond a reasonable doubt that the accused is the person who committed the offence on the date and in the place described in the indictment. Specifically, the Crown must prove each of the following essential elements beyond a reasonable doubt:

1. that Mr. Roe committed an unlawful act;
2. that Mr. Roe's unlawful act was dangerous; and
3. that Mr. Roe's unlawful act caused Mr. Holditch's death.

Mr. Roe has admitted that he committed an unlawful act, that the unlawful act was dangerous and caused Mr. Holditch's death.

Mr. Nowlin emphasizes that again, nothing was said about the requirement that the unlawful act be one that is objectively dangerous in the sense that a reasonable person in the same circumstances as the accused would recognize that the act would subject another to the risk of bodily harm which is not trivial or transitory.

[15] The trial judge explained the "two intents" relating to second degree murder as described earlier. She then excused the jury and told counsel she had realized that in preparing the questions for the jury, she should have asked, "Do you find Mr. Roe guilty of the offence of manslaughter, and not guilty of the offence of second-degree murder?" Counsel for the Crown approved the addition of the underlined words and defence counsel responded was that he was "wondering whether we should discuss the dates of sentencing and so on".

[16] After some further questions that need not be recounted here, the jury returned at 2:34 p.m. on October 26 with its verdict.

On Appeal

[17] In his factum, Mr. Roe advanced four grounds of appeal:

A. Did the learned trial judge err by failing to instruct the jury about the mens rea for manslaughter?

B. Did the learned trial judge err by failing to relate the evidence to the issue of the mens rea for manslaughter?

C. Did the learned trial judge err by failing to leave the defence of accident with the jury?

D. Did the learned trial judge err by failing to leave the defence of provocation with the jury?

The first two are founded at least in part on the assumption that notwithstanding defence counsel's concession that the only issue to be decided by the jury was whether Mr. Roe was guilty of murder or only of manslaughter, Mr. Roe had not admitted, or intended to admit, that he was guilty of at least manslaughter. Mr. Nowlin relies on the fact that the formal admissions made at the start of the trial stated only that Mr. Roe had killed Mr. Holditch by stabbing him with the knife, and said nothing as to the requirement that the unlawful act (the assault with a knife) must have been objectively dangerous. In response, the Crown observes that defence counsel's oral submissions at trial left only one inference - that the existence of all the elements of manslaughter were conceded and there was only one issue to be decided by the jury, i.e., whether the Crown had proven the mens rea for murder. This led the trial judge, quite understandably, to focus almost exclusively on the offence of second degree murder in her charge and in her response to the jury's questions.

[18] I agree with counsel for Mr. Roe that it would have been better if the trial judge had clarified at the start of the trial what exactly was being admitted. However, it cannot be seriously argued that in trying to "cut" Mr. Holditch with his knife, Mr. Roe was not engaging in an unlawful act that was objectively dangerous in the sense required by the Code. If this is correct, then there was in fact only one live issue for the jury to decide, and that was whether the Crown had proven that Mr. Roe intended to cause Mr. Holditch's death or bodily harm that was likely to cause death and was reckless as to whether death ensued.

- [19] In the circumstances of this case, this single issue turned on what one would normally call "accident" - whether one of the "two intents" required for murder had been proven, or whether Mr. Roe had intended only to "cut" Mr. Holditch and had stabbed him accidentally in or near the heart, with fatal and unintended consequences. (Mr. Nowlin described this "defence" as one of "partial accident".) The authors of CRIMJI, to which he referred, write in their notes to Part 8 ("Accident or Lack of Intent") that there is "unclear authority as to whether or not 'pure' accident exists as a defence or if it is just another way of saying that the accused lacked criminal intent." The cases cited by the authors relate to situations in which self-defence is also in play such that if accident is proven, an acquittal is possible on the evidence: see *R. v. Alkadri* (1986) 29 C.C.C. (3d) 467 (Alta. C.A.) and *R. v. Gunning* 2005 SCC 27, [2005] 1 S.C.R. 627; see also *R. v. Nelson* (1992) 71 C.C.C. (3d) 449 (Ont. C.A.), at 464.
- [20] But as my colleague Mr. Justice Tysoe observed during the hearing of this appeal, accident is in fact the "flip side" of mens rea. If an act is done accidentally, it is unintentional and the intent for murder - either the intent to kill or the intent to cause serious bodily harm - may be negated. The case-law makes it clear that the concept of accident should be "linked" to mens rea for the jury where accident is advanced by an accused. In *R. v. Stevenson* (1990) 58 C.C.C. 464, for example, the Ontario Court of Appeal allowed a conviction appeal on the basis that the jury charge had not related the question of accident to the absence of intent for murder. In the words of Morden J.A. for the Court:

Nowhere did the trial judge instruct the jury that, as a matter of law, accident related to the absence of intent for murder. The examples of accident were not helpful and could have had no useful application on the issues in the case. They appeared to relate to what may be called physical accidents in non-culpable contexts. The only part of the dictionary definition which could convey the meaning of an "unintended act" is that which uses the words "undesignedly".

Related to the foregoing, following the trial judge's consideration of accident he instructed the jury that if they were not satisfied that the shooting was "not an accident" then they were to move on to consider whether or not the Crown has proved one or other of the two specific intents set out in s. 212(a)(i), (ii)." This confers the impression that "accident" is a separate issue from intent - even though reference had earlier been made to the accused's position that accidental discharge meant that he did not have the intent necessary for murder and also the trial judge had instructed the jury that accidental shooting resulted in "manslaughter only". There were several passages in the charge where the question of intent was dealt with separately from the issue of accident. [At 486-7; emphasis added.]

- [21] In *R. v. Sutherland* (1993) 84 C.C.C. (3d) 484, the accused had shot his estranged girlfriend and testified that his rifle had discharged accidentally and that he had not pointed the gun at her. There was expert evidence to support the possibility that the fatal bullet had ricocheted before striking the deceased. The trial judge told the jury:

The issue, therefore, before you is whether or not the Accused is guilty of murder as I defined it. The defence of accident arises from the evidence you've heard. If a reasonable doubt exists in your mind as to whether the defence is made out you must return a verdict of not guilty of first degree murder. I, therefore, intend to review the evidence in respect to this defence.

Nothing more was said about the defence of "accident", and the jury convicted the accused of first degree murder. The Saskatchewan Court of Appeal allowed his appeal, noting that the trial judge had failed to "link the defence of accident to the absence of intent. Nowhere did he state that if the shooting was accidental it negated intent." (At 494; my emphasis.) Vancise J.A. for the majority concluded on this ground:

While the trial judge stated on a number of occasions that the appellant never intended to kill the victim, it was an accident, he did not at anytime instruct the jury that as a matter of law the defence of accident negates or relates to the absence of intent. I am of the opinion that even when read in the context of all the evidence and with his other instructions to the jury, that is that [sic] it was necessary for them to determine whether the appellant intended to cause the death of the victim, the issue of accident as it related to intent was not put fairly to the jury. In my opinion his instructions are inadequate on the issue of accident as it relates to intent and amount to misdirection. [At 496; emphasis added.]

In *R. v. Pawliuk* 2001 BCCA 13, 151 C.C.C. (3d) 155, this court adopted the reasoning in *Sutherland*, and stated that it is insufficient to deal in a jury charge with the issue of intent "without instructing specifically on the issue of how accident operates to negate intent." (The trial judge in *Pawliuk* was found to have made that connection.) See also the judgment of Ryan J.A. in *R. v. O'Brien*, 2003 NBCA 153, 174 C.C.C. (3d) 208 (N.B.C.A.), adopting *Sutherland* and *Stevenson*.

[22] It will be recalled that in the case at bar, defence counsel told the trial judge he did not want "the defence of accident" to be put to the jury on the ground that it "could lead to an acquittal". He preferred instead to frame the question as one of intention or mens rea. The trial judge adopted this suggestion and expressed the view (notwithstanding the Crown counsel's many references to "accident" in his summation) that accident had never been raised as a defence. With respect, these comments reveal a serious misapprehension not only of Mr. Roe's position, but also of the role that accident could play in relation to mens rea. As a result of her misapprehension, the trial judge failed to 'crystallize' the question of whether accident negated intention or mens rea, and failed to summarize for the jury the evidence relating to that question. As for the tactical decision made by defence counsel, this also rested on a misapprehension. Clearly, if the jury were left with a reasonable doubt concerning Mr. Roe's intent for murder, it would be open for them to convict on the included offence of manslaughter, for which only an objective standard of dangerousness must be met. In my respectful opinion, the appeal must be allowed on this basis alone.

[23] There is also a second ground for allowing the appeal in this case - the trial judge's failure to answer the jury's questions regarding manslaughter in a meaningful way. The case-law is replete with statements to the effect that a jury's questions are extremely important and that their significance 'far exceeds' instructions given in the main charge: see *R. v. Naglik* [1993] 3 S.C.R. 122 and *R. v. Petel* [1994] 1 S.C.R. 3, both quoted from in *R. v. W.D.S.* [1994] 3 S.C.R. 521 (at 529-30). The majority in *W.D.S.* continued:

There can be no doubt about the significance which must be attached to questions from the jury and the fundamental importance of giving correct and comprehensive responses to those questions. With the question the jury has identified the issues upon which it requires direction. It is this issue upon which the jury has focused. No matter how exemplary the original charge may have been, it is essential that the recharge on the issue presented by the question be correct and comprehensive. No less will suffice. The jury has said in effect, on this issue there is confusion, please help us. That help must be provided. [At 530.]

[24] In the case at bar, the trial judge was bound to ensure that the jury understood the elements of both second degree murder and manslaughter. This was so even if defence counsel had admitted Mr. Roe's guilt on the included offence of manslaughter. (If he had not admitted manslaughter, then Mr. Roe's appeal would succeed on the ground that the judge effectively instructed the jury to find Mr. Roe guilty of at least manslaughter, thus usurping the jury's function: see *R. v. Gunning*, supra, at paras. 30-1 and *R. v. Krieger* 2006 SCC 47, [2006] 2 S.C.R. 501, at paras. 22-4.) The confusing "decision tree" given to the jury compounded the difficulty by, among other things, posing the jury's questions in reverse order. The jury was troubled in drawing the line between the two offences and they required a full instruction. I am of the view that without it, the appellant did not receive a fair trial.

[25] It is unnecessary for me to deal with the fourth ground of appeal advanced by Mr. Nowlin on the appellant's behalf, namely that the trial judge erred in failing to put the defence of provocation to the jury.

[26] Since I am not persuaded that the verdict would necessarily have been the same had the jury been fully instructed, I would allow the appeal and direct a retrial.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Tysoe"

I Agree:

"The Honourable Madam Justice D. Smith"

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