# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella

***B E T W E E N :***

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| ***HER MAJESTY THE QUEEN*** | ) | |
| | ) | ***M. P. Cook*** |
| | ) | *for the Appellant* |
| *Respondent* | ) | |
| | ) | ***A. Y. Kotler*** |
| *- and -* | ) | *for the Respondent* |
| | ) | |
| ***MICHAEL DANIEL BOURGET*** | ) | *Appeal heard and* |
| | ) | *Decision pronounced:* |
| | ) | ***February 4, 2019*** |
| *(Accused) Appellant* | ) | |

**MAINELLA JA** (for the Court):

[1] After a trial by judge alone, the accused was convicted of second degree murder in the stabbing death of Jenilee Ballantyne (the victim). He raises three grounds of appeal: unreasonable verdict, uneven scrutiny of the evidence and misapplication of *R v W(D)*, [1991] 1 SCR 742.

[2] The key issue in the trial was the accused's state of mind. He and the victim had only first met earlier on the evening in question. After a night of sex and consuming drugs and alcohol, he got into a confrontation with her in his bedroom. His roommate testified that he thought the commotion at about 3:45 a.m. was just "loud sex," when, in actuality, the accused was stabbing the victim repeatedly in the neck while he pinned her face down on

his bed. After she stopped resisting, he retrieved his hockey bag, emptied it, and stuffed her into it. He asked his roommate for help to move the victim, made his bed to cover the bloodstains and then drove his vehicle for roughly ten minutes to his cousin's house with the victim in the trunk, arriving at between 4-4:30 a.m. There he changed some of his clothes and left the knife he had used. He moved his car and then walked away. The victim was left in the trunk inside the hockey bag in minus-30-degree weather. According to the pathologist, it took between 15 minutes to a couple of hours or more for the victim to bleed to death.

[3] We reject the submission that the verdict was unreasonable because of self-defence, provocation or advanced intoxication. It was reasonably open for the judge, on the sum of the evidence, to find that the accused was the aggressor with the knife, not the victim as he claimed in his evidence, and that there was no wrongful act or insult sufficient to deprive an ordinary person of the power of self-control. Noteworthy is the fact that the victim had several defensive wounds and the judge accepted the evidence of the accused's roommate's girlfriend who said that, earlier in the night, the accused had stated that the victim was "driving him so crazy that he could stab her." In terms of intoxication, while it is undisputed that the homicide was the culmination of almost a full day of significant alcohol and drug use by the accused, the purposeful nature of his after-the-fact conduct reasonably supports the inference that, despite his intoxication, he had the requisite intent for second degree murder (see *R v Jaw*, 2009 SCC 42 at para 40; *R v Rodgerson*, 2015 SCC 38 at paras 18-23; and *R v Calnen*, 2019 SCC 6 at paras 2, 119, 221). In summary, we are not persuaded that the judge reached his decision by an illogical or irrational reasoning process; nor are we

convinced that his verdict was unreasonable within the meaning of section 686(1)(a)(i) of the *Criminal Code* (see *R v Sinclair*, 2011 SCC 40 at para 69).

[4] As counsel appropriately conceded, an argument of an unbalanced scrutiny of the evidence is a difficult one to make, as credibility assessments are the province of a trial judge and attract significant deference on appeal. The standard is rigorous as it is not the role of an appellate court to retry the case, a task to which it is particularly ill-suited. To succeed on this ground of appeal, it is not enough to demonstrate that another trial judge may have assessed the evidence differently. The uneven scrutiny error requires something in the trial judge's reasons, or elsewhere in the record, that clearly demonstrates that different standards were applied. The fact that the accused was not believed on the key issues in the trial does not surprise us. There were several inconsistencies and improbabilities with his evidence on what happened in his bedroom. In our judgment, the judge's assessment of all of the witnesses in the case was fair and balanced and his credibility findings can be reasonably supported by the record (see *R v CAM*, 2017 MBCA 70 at paras 33-37).

[5] Finally, we are satisfied that the judge properly applied *W(D)*. That analysis is not a "catechism" that a trial judge must recite and follow in a particular order or risk reversal (*R v CLY*, 2008 SCC 2 at para 11). What is important is the determination—after taking into account a trial judge's reasons when considered as a whole, mindful that he or she is presumed to know the law—that the correct burden and standard of proof were applied. That is the case here. The judge gave lengthy reasons wherein he resolved several factual disputes and made clear findings of credibility. Importantly, he said that, even though the accused's evidence did not leave him with a

reasonable doubt, he could "convict only if the rest of the evidence that [he] accepted prove[d] [the accused's] guilt of second degree murder beyond a reasonable doubt" (emphasis added).

[6] In the result, the appeal is dismissed.

Mainella JA

Cameron JA

Burnett JA