IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

HER MAJESTY THE QUEEN	)	***Z. M. Jones***
	)	*for the Appellant*
Respondent	)	
	)	***A. Y. Kotler*** *and*
- and -	)	***J. W. Avey***
	)	*for the Respondent*
JEFFREY JAMES KIONKE	)	
	)	*Appeal heard:*
(Accused) Appellant	)	***January 29, 2020***
	)	
	)	*Judgment delivered:*
	)	***March 16, 2020***

On appeal from 2017 MBQB 60

STEEL JA

[1] The accused was convicted of two counts of second degree murder after trial before a judge sitting alone.

[2] The accused admitted being present when the victims were stabbed, but denied stabbing either of them or causing their deaths in any way. He alleges that he was in the wrong place at the wrong time. He appeals his conviction alleging misapprehension of evidence, unreasonable verdict and misuse of post-offence conduct on the part of the trial judge.

[3] For the reasons outlined below, I would dismiss the appeal. The trial judge's inferences were reasonable and supported by the evidence. There

was no error of law in her use of the accused's post-offence conduct.

Facts

[4] The deaths occurred in the rented suite of the victims (Crow and Sinclair) on the third floor of a multi-level rooming house. The accused rented one of the suites on the second floor where he stayed intermittently. When not at his residence he stayed with his girlfriend (Randall) and her son (Ford).

[5] The victims were stabbed to death. In the case of Sinclair, he had at least 16 and possibly as many as 18 separate stab wounds. Crow had suffered at least 10 if not 12 distinct stab wounds. Both had sustained significant injuries to both their hands and/or arms.

[6] The bodies were discovered in a small room to the left of the entrance, covered with blood, as were the mattress, walls and floor. There was no blood trail from the suite to any other suite in the building or to any other floor of the building. In addition to the significant amount of blood in the entryway and the room in which the victims were located, drops of blood were also observed in the kitchen and living room. There were also signs of a struggle.

[7] The accused's DNA was located in a number of areas, including at the front entry of the building, on a copper pipe found on the stairs to/from the victims' suite, in two places in the victims' kitchen near the entrance to the living room and in the living room near the entrance to the kitchen mixed with Sinclair's blood.

[8] When he was arrested, the accused admitted having been in the

victims' suite, but denied any involvement in the killings. He said he saw the victims stab each other and was stabbed himself by Sinclair while trying to take the knife away from him. He said the victims were stabbing each other with his knife which they must have stolen from his suite. After the incident he said that he showered and threw his clothes, shoes, and knife into the river because he was afraid the police would blame him for the deaths.

[9] He testified at the trial and gave differing versions of the event. He agreed that when he was first interviewed by police he lied to them about his involvement. Similarly, he admitted having changed his evidence concerning his marihuana consumption on the night of the murders; the sequence of events surrounding the stabbing of Crow; and his ability to run notwithstanding his back injury. He agreed that he had gone up to the victims' suite intending to confront Sinclair and "punch the shit out of him." He maintained, however, that he had not stabbed either victim and did not know how they had sustained their additional wounds.

Trial Judge's Decision

[10] The trial judge held that it was clear from the evidence that both victims suffered from multiple stab wounds that were not self-inflicted. The trial judge also found that there was no evidence to support the scenario that the wounds to Sinclair and Crow were inflicted anywhere but inside their suite and at the same time. The accused testified that he was in their suite, but that the victims stabbed each other during an argument and that upon seeing him, Sinclair stabbed him in the thigh and the finger. He denied stabbing them.

[11] The trial judge found that she did not believe the accused nor did his

testimony raise a reasonable doubt. She rejected the accused's testimony as being internally inconsistent and unbelievable and provided examples in her analysis. She listed a number of falsehoods admitted to by the accused including that the accused had last seen Crow about a month earlier, that he owned knives from an old restaurant, but that they were still at that restaurant; that he had never been inside Crow's and Sinclair's suite and that the cut on his finger was received three or four days earlier while he was cutting a loaf of frozen bread at Randall's residence.

[12] Moreover, the scenario described by the accused on the stand as to the manner in which the two victims stabbed each other varied from the version he told police. To police, on a number of occasions, the accused testified that Crow was accidentally stabbed in the throat by Sinclair when Sinclair slipped in the blood. Yet, on cross-examination, the accused changed his evidence from that which he told the police because of other forensic evidence that was available at the trial. Moreover, the accused admitted asking his girlfriend to lie for him.

[13] In coming to her decision, the trial judge also relied on the accused's post-offence conduct. She cautioned herself that she should not use the evidence to decide if it was the accused who committed the killings unless she rejected any innocent explanation. She rejected his explanation that he was afraid that he would be wrongly convicted given that Sinclair, who could have exonerated him, was still alive when he left the suite. There was no suggestion from the accused that he thought Sinclair would falsely implicate him.

[14] She held that the Crown had proven its case beyond a reasonable doubt and that "the extreme measures taken by [the accused] to be consistent

only with having been involved in the killings, especially when considered alongside the numerous falsehoods he told police" (at para 38).

[15] The accused appeals on three grounds:

> (1) That the trial judge erred in her assessment of the accused's credibility and drew inferences that were unavailable from the evidence, all of which resulted in an unreasonable verdict (see section 686(1)(a)(i) of the *Criminal Code*).
>
> (2) That the trial judge misapprehended the evidence leading to a miscarriage of justice.
>
> (3) That the trial judge wrongly used evidence of post-offence conduct to draw conclusions as to the accused's guilt.

Standard of Review

Unreasonable Verdict

[16] The standard of review as to the reasonableness of a verdict in a judge-alone trial was summarised by the Supreme Court of Canada in *R v Yebes*, [1987] 2 SCR 168; *R v Biniaris*, 2000 SCC 15 at para 36; and *R v Sinclair*, 2011 SCC 40 at paras 4, 16 (*Sinclair*). To decide whether a verdict is unreasonable, an appellate court must determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or is shown to be incompatible with evidence that

has not otherwise been contradicted or rejected by the trial judge.

[17] In re-examining the sufficiency of the evidence, the appellate court is required to reweigh the evidence, to some extent, and consider its effect on the issues (see *Yebes* at p 186; and *R v Whiteway (BDT) et al*, 2015 MBCA 24 at para 29). However, in reviewing the reasonableness of the verdict in light of the evidence and its effect, an appellate court must defer to the trial judge's evaluation of the evidence and findings of credibility. Findings of fact will not be disturbed on appeal absent demonstration that the trial judge committed a palpable and overriding error (see *R v Gagnon*, 2006 SCC 17 at para 10). In *R v Villaroman*, 2016 SCC 33, the Court stated, "Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence" (at para 55).

Misapprehension of Evidence

[18] The standard of review for a misapprehension of evidence by a trial judge was articulated by the Supreme Court of Canada in *R v Lohrer*, 2004 SCC 80 (at para 2):

> . . . The misapprehension of the evidence must go to the substance rather than to the detail. It must be material rather than peripheral to the reasoning of the trial judge. Once those hurdles are surmounted, there is the further hurdle (the test is expressed as conjunctive rather than disjunctive) that the errors thus identified must play an essential part not just in the narrative of the judgment but "in the reasoning process resulting in a conviction".

[19] A misapprehension of the evidence may refer to a mistake as to the substance of the evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence. The error must be readily obvious (see *Sinclair* at para 53). A misapprehension of the evidence is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge. Even if this Court would have assigned more or less weight to the evidence than the judge did, that is not a basis for this Court to interfere with his fact finding (see *R v Pelletier*, 2019 MBCA 126 at para 7).

Assessment of Credibility

[20] An appellate court should show deference to a trial judge's assessment of credibility, especially where the case turns on credibility, and appellate intervention is rarely warranted in such circumstances (see *R v Rocha*, 2009 MBCA 26 at para 35). Before an appellate court will intervene in a trial judge's findings as to credibility there must be a palpable and overriding error. In the absence of such error, deference must be accorded to the trial judge's assessment. If a trial judge's credibility assessment of a witness can be reasonably supported by the record, it cannot be interfered with on appeal.

Post-Offence Conduct

[21] The trial judge has the discretion to determine the relevance and admissibility of post-offence conduct, which is to be treated no differently from other forms of circumstantial evidence, (see *R v White*, 2011 SCC 13 at para 31). However, each case of post-offence conduct is highly contextual and fact specific. The trier of fact must consider whether there are alternative

reasonable explanations for the post-offence conduct of an accused and must be alive to the special risks posed by such evidence (see *R v Calnen*, 2019 SCC 6 at para 25).

Analysis and Reasons

Assessment of Credibility and the Drawing of Inferences

[22] A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is merely conjecture and speculation.

[23] The accused objects to three inferences drawn by the trial judge. The first was that the accused brought the knife with him to the victim's suite. The evidence strongly supported the trial judge's inference. It was the accused's knife and it had his initials on it. It came from his room. There was no evidence that it had been taken from his room previously. Indeed, the accused said nothing about having missed it, despite the fact that it was his only knife and he had a great deal of food in his fridge and his freezer.

[24] The accused intended to confront Sinclair and was expecting violence. He had had some run-ins with Sinclair before. Randall, the accused's girlfriend, testified that a few weeks earlier, Sinclair confronted both of them and accused them of stealing his bike. He screamed at them on a number of occasions. He continued to threaten both of them and went so far as to kick in the door of the accused's suite which forced her to call 911 for police assistance. Randall confirmed that the accused was afraid of Sinclair

because of his violence and his larger size. The accused testified that he had gone up to the victims' suite intending to confront the male victim and "punch the shit out of him." He knew he was no match for Sinclair.

[25] Consequently, the trial judge's inference was a reasonable one based on the evidence. It was far more likely that the accused brought the knife to the victims' suite than that he went upstairs unarmed to initiate a fight he knew he would lose, only to then find his own knife being used against him, the victim of an incredible coincidence.

[26] The second inference was that the accused's injuries and weakened condition gave him a reason to bring a knife to confront Sinclair. The defence called the accused's chiropractor, who corroborated the accused's testimony about the treatment he had received surrounding the time of the murders. In his opinion, the accused's injuries would have made it painful to carry out basic living and work-related functions. It is true the accused led the evidence of his weakened condition in order to argue that he would have had difficulty committing the murders.

[27] The accused objects to the trial judge's use of this evidence and that of his chiropractor to support her conclusion that he had a reason to bring a knife with him to confront Sinclair. He characterises this as a "misapprehension of the evidence" and an "illegitimate inference". As mentioned earlier, a misapprehension of the evidence is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge.

[28] The trial judge declined to draw the inference that the accused wished. From the evidence, she was entitled to do so. She did not make a

mistake as to the substance of the evidence, fail to consider evidence relevant to an issue or fail to give legal effect to evidence that she did consider. On the contrary, she accepted the accused's evidence that he "had problems with his back and his hand at the time the murders would have taken place" (at para 34).

[29] As the chiropractor confirmed, however, these problems would not have prevented the accused from carrying out the murders. Rather, he confirmed, "If you can overcome or ignore pain or take medications . . . then you can do things." The chiropractor in cross-examination testified that this pain would not have prevented the accused from carrying out these functions and his diagnosis of the accused was based in significant part on self-report information relevant to the accused's ability to continue collecting employment income assistance benefits.

[30] Indeed, the accused testified that he was sanding and prepping "[p]retty well all of" the suites in the Chestnut Street house shortly after the murders.

[31] Here, the trial judge made the inference that while the accused's injuries did not exculpate him, they did provide a reason to give himself an advantage by bringing a knife to his confrontation with the victims. This was not a misapprehension, nor was it an "illegitimate inference"; on the contrary, the accused conceded that without such an advantage he stood little chance against Sinclair (see *Whiteway* at para 32).

[32] The third inference, objected to by the accused, is that the female victim was stabbed because she was a witness or because she screamed. As the trial judge stated, motive is not an essential element of the offence. It does

not matter why the accused stabbed the female victim. What matters is the evidentiary support for the trial judge's finding that the accused was responsible.

[33] To begin with, there was no evidence whatsoever suggesting that a third party was responsible for Crow's injuries or that the attack had taken place anywhere else or at any other time. On the contrary, the evidence strongly suggested that the same person was responsible for both stabbings.

[34] Next, as an initial matter, the trial judge concluded that the accused had brought the knife upstairs with him. No other knives were located. Thus, Sinclair could not have stabbed Crow prior to the accused's arrival. Nor could he have attacked her after the accused left since the accused took the knife with him and by his own account, Sinclair was already near death by the time he left the suite.

[35] Moreover, as the trial judge observed, the accused's version of events was "just not believable" (at para 25). Given the number of serious wounds sustained by both victims, neither would have been in a position to aggressively stab the other. It is worth noting in this regard that both victims had sustained significant injuries to their hands and/or arms, making such an outcome even less likely.

[36] As a result of all of the above, the trial judge concluded (at para 37):

> In my view, it defies belief that [the accused] would go up in his weakened state, and unarmed, to confront Crow and Sinclair only to then find them stabbing each other with what turned out to be his knife. The only rational conclusion is that he was angry and aggravated by the disturbance and went upstairs to the suite with his knife in hand to confront Sinclair and Crow . . ..

[37] The totality of the evidence supported the trial judge's conclusion.

Post-Offence Conduct

[38] The Supreme Court of Canada case of *Calnen*, was not available at the time the trial judge prepared her reasons. However, in my opinion, her analysis was entirely consistent with that case.

[39] In *Calnen*, the Supreme Court of Canada reiterated that post-offence conduct is, like any other evidence, admissible when it is relevant and more probative than prejudicial. Because of the ambiguous nature of such evidence, however, it is important that counsel and the judge understand "the issue, purpose and use for which such evidence is tendered" and "articulate the reasonable and rational inferences which might be drawn from it" (at para 113).

[40] The accused argues that the trial judge failed to conduct such an analysis. I disagree. While she did not go into the detail she might have used had she been instructing a jury, her reasoning was clear and her use of the accused's post-offence conduct was legitimate and supported by the evidence. She specifically stated that "a cautious approach to the evidence requires that one not use the evidence to decide if [the accused] committed the killings unless there is a rejection of any innocent explanation for the behaviour" (at para 38). Here, the innocent explanation offered was that the accused was scared he might be blamed for the stabbings.

[41] She assessed this explanation in light of the evidence and observed that it made no sense—the person best placed to exonerate the accused was Sinclair, who was still alive when the accused left the suite. As a matter of

fact, the accused testified that he could hear Sinclair's laboured breathing as he went to the bathroom to shower. As she stated, "What better way to extricate yourself from possible charges than to immediately call for help for Sinclair" (at para 38).

[42] Instead, the accused did the opposite. He left Sinclair to die and engaged in a concerted effort to remove signs of his presence, going so far as to use bleach on his face to remove traces of blood and foregoing medical attention in favour of stitching up his own stab wound. The extreme measures also included such matters as: showering with his clothes on to remove the blood on his clothing and changing into different clothes; putting the bloody clothes, knife and bloody shoes in a bag and tossing them in the river; returning to bleach the tub where he had showered; returning later to the suite to remove prints from the doorknob; and pressuring Randall to lie to the police about where he got the cut on his finger (see para 26).

[43] Nor did the trial judge, as alleged by the accused, rely unduly on the accused's repeated lies to police or assume that they meant he must also have been lying about his involvement in the murders. Instead, she considered them as part of an extensive pattern of behaviour designed to conceal his presence in the victims' suite during the stabbings.

[44] As Martin J observed in her reasons, adopted by the majority, in *Calnen* (at paras 112, 144):

> In order to draw inferences, the decision maker relies on logic, common sense, and experience. As with all circumstantial evidence, a range of inferences may be drawn from after-the-fact conduct evidence. The inferences that may be drawn "must be reasonable according to the measuring stick of human experience"

> and will depend on the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence . . .. That there may be a range of potential inferences does not render the after-the-fact conduct null . . .. In most cases, it will be for the jury or judge to determine which inferences they accept and the weight they ascribe to them. "It is for the trier of fact to choose among reasonable inferences available from the evidence of after-the-fact conduct." . . ..
>
> . . . [T]he mere existence of two or more *plausible* explanations given for after-the-fact conduct does not make that conduct *equally consistent* with those explanations such that a proffered inference may lose its probative force.

Rather it is up to the finder of fact to choose between competing inferences and decide what to make of an accused's post-offence conduct.

[45] What matters is that the finder-of-fact engages in this analysis and not jump to conclusions based on an accused's behaviour following an incident. This is what the trial judge did. The trial judge's use of the accused's post-offence conduct was legitimate and consistent with the Supreme Court of Canada's recent decision in *Calnen*. She considered innocent explanations for his behaviour and did not use his actions as evidence of guilt until she had rejected these explanations as inconsistent with the evidence.

[46] As to the impugned inferences, the evidence supported the trial judge's conclusion.

[47] I would dismiss the appeal.

Steel JA

I agree: Monnin JA

I agree: Pfuetzner JA