Citation: R v McDonald, 2017 MBCA 72 Date: 20170731
Docket: AR16-30-08560

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

B E T W E E N:

	)	***G. F. Wiebe***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***J. M. Mann***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
RAYMOND JEREMY MCDONALD	)	***February 7, 2017***
	)	
(Accused) Appellant	)	*Judgment delivered:*
	)	***July 31, 2017***

MONNIN JA

[1] After a trial before judge and jury, Raymond Jeremy McDonald (the accused), along with one of his co-accused, Skylar Kyle Spence (Spence), were convicted of first degree murder. The accused appeals his conviction.

[2] The accused raises two grounds of appeal. On the first ground, he submits that the trial judge erred in refusing his motion to sever his trial from Spence. On the second ground, he argues that the trial judge erred in admitting portions of a prior consistent statement of a jailhouse informant

and failing to properly instruct the jury to prevent its improper use in their deliberations.

Investigation

[3] On July 8, 2009, the body of Bernard Hart (the victim) was found in a forested area near the City of Thompson, Manitoba. Due to the advanced decomposition of the body, which was located over a month after his death, the autopsy was unable to ascertain the cause of death which was described as "Unascertained".

[4] Sometime later, the accused and Spence were incarcerated at The Pas Correctional Centre. As a result of their discussions with a fellow inmate (the informant), during which both made admissions convincing the latter that they had been involved in the victim's murder, the informant contacted the police and provided a statement.

[5] Using the information obtained from the informant, the police resumed their investigation, including the exhumation of the victim's body and its examination by a forensic anthropologist. She concluded that there was evidence of both sharp and blunt-force trauma. The victim's death was reclassified as a homicide.

[6] Police continued their investigation, which included interviewing the two other co-accused who were both youths at the time of the offence (hereinafter referred to as the youth co-accused). They implicated Spence and the accused in the events leading to the death of the victim. All four were charged and the matter proceeded to a preliminary inquiry and then to

trial. Both youth co-accused pleaded guilty to second degree murder and were sentenced as youthful offenders.

[7] The accused brought a motion for severance of his trial from that of Spence on the grounds that there was a risk of unfairness in the likely use by the jury of admissions made by Spence. The motion was denied with the trial judge expressing the view that jury instructions would be sufficient to delineate the manner in which such statements could be used by the jury.

Trial

[8] At the outset of the trial, Spence offered a plea to manslaughter which was rejected by the Crown.

[9] The Crown's case consisted of the evidence of the investigating police officers, medical evidence from both the pathologist and forensic anthropologist, and the evidence of the two youth co-accused and the informant. Both youth co-accused were not as forthcoming in their trial testimony as they had been in their statements to the police and, accordingly, the Crown used that evidence in order to elicit information to contradict some of their evidence at trial.

[10] From the evidence of the youth co-accused, the Crown's position was that, after an argument at an apartment where all four accused were present, the victim was brutally assaulted. After incapacitating him, a decision was made to take the victim from the apartment to the woods to "finish him off". The evidence as to whose decision it was pointed to Spence, but there was evidence that all may have participated.

[11] The fact that a knife was brought into the woods was confirmed, but the evidence as to who brought it and who wielded it against the victim was inconsistent.

[12] After the events, a story was concocted to be used if any questions were asked about the victim's presence at the apartment and his disappearance. Again, the evidence as to who participated or came up with the suggestion was inconsistent.

[13] During the cross-examination of the informant by counsel for the accused, she obtained admissions that part of the informant's evidence attributing statements to the accused was, in fact, statements made by Spence. As well, she obtained an admission that the accused had never spoken of taking the victim out to the bush. The Crown sought to re-examine the informant on part of his prior consistent statement to the police over the objection of defence counsel. The Crown was allowed to read into the record a portion of the statement which indicated that the accused had said the following to the informant: "We fucking carried him to the bush and we finished it off, and we finished it, man." The defence was given the right of cross-examination of the witness on the re-examination.

[14] In his address to the jury, Crown counsel made reference to that excerpt on three separate occasions as part of his submission that the accused was involved in the decision to kill the victim and participated.

[15] In his instructions, the trial judge set out the limited use that could be made of statements made by a co-accused and that they could not be used against another co-accused. However, he gave no instructions as to the use

that could be made of the excerpt from the previous consistent statement which had been read in on re-examination.

[16] The position of Spence at trial was that, while he conceded that he participated in the beating of the victim in the apartment, there was evidence that the victim could have been deceased prior to being moved and, therefore, Spence, at most, was guilty of manslaughter and not murder. As to the accused, his position at trial was that there was no credible evidence of participating in a common design or a planned or deliberate decision to kill the victim or the physical aspects of the killing. As a result, he could not be found guilty of first or second degree murder.

[17] The jury convicted both on the charge of first degree murder.

Issues

[18] I have concluded that the appeal should be allowed on the basis of the accused's second ground of appeal. As the matter will be returned to the trial court for a new trial involving the accused alone, there is no need to deal with the question of severance.

Standard of Review

[19] The standard of review of the ruling by the trial judge allowing the excerpt from the prior statement to be entered into evidence is one of deference subject to the application of the correct principles of law (see *R v MNP*, 2014 MBCA 2 at para 15; and *R v Blackman*, 2008 SCC 37 at para 36).

[20] Whether it should have been followed by a limiting instruction is subject to review on the basis of a functional approach (see *R v Jacquard*, [1997] 1 SCR 314 at paras 32, 62).

Analysis

Admissibility of the Statement

[21] In his direct examination, the informant was asked the following:

> Q Okay. Do you have any recollection of Raymond saying how he got to the bush, how [the victim] got to the bush?
>
> A They were taking turns carrying him.
>
> Q They were taking turns carrying him?
>
> A Yeah.
>
> Q Did he say who they were?
>
> A Him, Skylar and [the youth co-accused].
>
> Q Him --
>
> A Him, Skylar, [the youth co-accused].
>
> Q [The youth co-accused]. Okay.
>
> Do you recall anything that Raymond told you that happened to [the victim] outside when -- after they carried him to the bush?
>
> A No.
>
> Q Pardon me?
>
> A Yeah, actually.
>
> Q Tell us what you remember.

> A I remember how he was telling me it smelt like, it smelt like wet metal, the blood.
>
> Q Yeah.
>
> A And how they were dragging him through the bush and stuff like that, how his pants kept falling off and where they left him by the tracks.

[22] In cross-examination by counsel for the accused, the informant was asked the following:

> Q Similarly, Mr. [Informant], Raymond McDonald didn't say anything to you about [the victim] getting stabbed, did he?
>
> A No.
>
> Q [The victim] didn't say -- sorry. Raymond didn't say anything to you about [the victim] being taken into the bush, did he?
>
> A No, he didn't.
>
> Q He didn't, did he?
>
> A No.

[23] In re-examination, Crown counsel sought to refresh the informant's memory, to which counsel for the accused objected. At first, both Crown counsel and the trial judge were concerned that it would leave the jury with the impression that evidence given by the informant was of recent fabrication. Crown counsel introduced this area of re-examination as follows:

Q Thank you. And the next question I have for you, my friend [counsel for the accused] was cross-examining you and you agreed that you had never said anything about Raymond McDonald telling you about going into the bush. For the purpose of refreshing your memory --

. . .

[CROWN COUNSEL]: Is ask this witness to read the bottom six lines of page 12 of his statement and the top four lines of page 13 of his statement wherein that very topic is canvassed by this witness to the police. It won't do, in my respectful submission, to leave the impression my friend left when it had been mentioned in the statement.

So now what I'd like to do is show you the statement.

THE COURT: Yes, can I see it?

This is consistent with what he said in his direct.

[CROWN COUNSEL]: It is. But the impression was left on cross -- my friend left an impression with the jury that he didn't mention anything about this to the police when, in fact, he did.

THE COURT: Yeah.

[CROWN COUNSEL]: And I say it won't do.

THE COURT: It leaves the impression of recent fabrication.

[CROWN COUNSEL]: Yeah. And as much as I regret asking the witness to read all of the bottom of page 12, that has to be read, in my respectful submission, to put it in context --

THE COURT: Right.

[CROWN COUNSEL]: -- that it's actually Raymond that said these things.

THE COURT: Okay.

[COUNSEL FOR THE ACCUSED]: Sorry. I just want to clarify. What thing are you talking about that he said he hadn't -- that he said in direct that he changed on cross?

[CROWN COUNSEL]: Well, what he -- what I recorded his saying in cross, My Lord, excuse me for a second. Excuse me for a sec. I've misplaced my notes, My Lord, I'm sorry. Ah, here we go. I recorded: Raymond McDonald did not say anything about going into the bush. That's what I recorded on cross-examination.

THE COURT: Um-hum.

[CROWN COUNSEL]: And I say that is proper re-examination, My Lord, if only for the purpose of clarification. But in my respectful submission, it goes further.

. . .

THE COURT: Right. And he said, testified earlier that he was nervous and scared and said he didn't know a bunch of things and didn't answer appropriately. [Counsel for the co-accused] suggested it was a lie; the witness didn't agree. But that's a separate issue. The issue is whether or not he said it earlier in the face of your suggestion that leaves the jury, can only leave the jury with the impression that it was not said to the police earlier.

[COUNSEL FOR THE ACCUSED]: Well, except, My Lord, that I didn't say to him, you never told the police that. I said, I'm suggesting to you that Raymond McDonald didn't tell you that, which is a different issue. I never left the impression that his statement didn't contain it. He gave the answer in direct. He answered differently on cross. And the real -- you know, we should be excusing the witness for this, I'm sorry.

THE COURT: Well, it doesn't much matter at this point because -- all right. We'll have you wait outside for a minute, please.

(WITNESS ASIDE)

THE COURT: It leaves the impression of recent fabrication.

[24] As a result of the ruling, Crown counsel was allowed not just to put the excerpt under issue to the witness, but to have him read it to the jury as part of the record.

[25] The general rule is that prior consistent statements are generally inadmissible as they are usually viewed as lacking probative value and being self-serving (see *R v Evans*, [1993] 2 SCR 629 at 643). An exception to the general rule is that a prior consistent statement can be admitted where it has been suggested that a witness has recently fabricated evidence. The statement has probative value if it can illustrate that the witness's story was the same before a motivation to fabricate arose.

[26] The accused submits and the Crown acknowledges that the doctrine of recent fabrication has no application to the facts of this case. The trial judge improperly referred to the doctrine for the purposes of admitting the prior consistent statement. The Crown's position on the appeal is that, while the statement could not be admitted for the purposes of refuting recent fabrication, it was admissible to correct a false impression that the witness had not included something in his statement to the police and would have left the jury with an incorrect impression (see *R v Stiers*, 2010 ONCA 382).

[27] While that may be a permissible exception, it also does not accord with the facts of this case. The trial judge suggested that part of his reasoning was that the question in cross-examination was not put in isolation and was part of a series of questions which would have suggested to the jury

that the witness had not told the police a number of facts, including the suggestion that the accused participated in the removal of the victim to the bush. In fact, the question was asked as part of a series of questions relating to whether the witness was incorrectly attributing information as to the events to the accused as opposed to Spence. The question was not in the context of what had been provided to the police in his statement or otherwise. For that reason as well, the statement was not admissible on re-examination.

[28] The Crown also argues that the ruling by the trial judge to admit the statement, but to allow cross-examination by the accused's counsel at the conclusion of the re-examination, was fair and balanced in the circumstances.

[29] I respectfully disagree. The prejudicial effect of the statement, which goes directly to the issue of the accused's participation in the premeditation aspect of the murder, cannot be ignored. It rendered that aspect of the trial unfair to the accused.

[30] As well, the trial judge erred by failing to include a limiting provision in his charge. Even if the excerpt could be admitted, it was only for the limited purpose of assessing the informant's credibility. It could not be tendered for the truth of it (see *R v Murray*, 2017 ONCA 393 at para 154).

[31] No such direction was given to the jury; not even in the face of the Crown's closing address which used the excerpt no less than three times as a central element of its argument that the accused was instrumental and part of

the decision to "finish" off the victim. In his closing address, Crown counsel stated:

> And I want to remind you of what Mr. [Informant] told me in re-examination. This is one of the keys to the case against Mr. McDonald. Mr. McDonald pretty much kept his (inaudible) he kept his mouth shut. He provided some information but not very much. But this is what Mr. [Informant] told you Mr. McDonald had told him about Mr. McDonald's involvement. My question:
>
> > Q Can we, can you advise the members of the jury what Raymond McDonald told you about going in the bush, just start with we?
> >
> > A We, we fucking carried him to the bush and we finished it off, and we finished it, man.

[32] Contrary to *Stiers*; and *R v Ellard*, 2009 SCC 27, where the lack of instruction was found not to be of significance because of the unimportance of the specific evidence admitted, in this case, it was of great importance to a central issue.

[33] I therefore conclude that the trial judge erred in allowing Crown counsel to have the excerpt read to the jury and also erred in failing to address the limited use that the excerpt could have in the jury's deliberations.

Curative Provisos—Section 686(1)(b)(iii) of the Criminal Code

[34] The Crown argued that, if a limiting instruction should have been included in the charge to the jury, the substantial incriminatory evidence against the accused and the failure of defence counsel to ask for such an

instruction should lead this Court to apply the curative proviso in section 686(1)(b)(iii) of the *Code* to uphold the verdict.

[35] The powers of this Court on an appeal of this nature are set out in section 686 of the *Code* as follows:

> **Powers**
> **686(1)** On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> **(a)** may allow the appeal where it is of the opinion that
>
> . . .
> **(ii)** the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> **(b)** may dismiss the appeal where
>
> . . .
> **(iii)** notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) 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,
>
> [emphasis added]

[36] In *R v Sekhon*, 2014 SCC 15, Moldaver J, for the majority, outlined well-known basic principles relating to the use of curative proviso (at para 53):

> As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error . . . not been

> made" (*R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617, aff'd in *R v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28). Flowing from this principle, this Court affirmed in *Khan* that there are two situations where the use of s. 686(1)(*b*)(iii) is appropriate: (1) where the error is harmless or trivial; or (2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 2931).
>
> [emphasis added]

Trivial or Harmless Error

[37] The character of an error was described by LeBel J for the majority in *R v Van*, 2009 SCC 22 (at para 35):

> An error falling into the first category is an error that is harmless on its face or in its effect. The proviso ensures that an appellate court does not need to overturn a conviction solely on the basis of an error so trivial that it could not have caused any prejudice to the accused, and thus could not have affected the verdict. Indeed, it would detract from society's perception of trial fairness and the proper administration of justice if errors such as these could too readily lead to an acquittal or a new trial (e.g. *Chibok v. The Queen* (1956), 24 C.R. 354 (S.C.C.), at p. 359). . . . Errors might also be characterized as having a minor effect if they relate to an issue that was not central to the overall determination of guilt or innocence, or if they benefit the defence, such as by imposing a more onerous burden on the Crown (*Khan*, at para. 30). The question of whether an error or its effect is minor should be answered without reference to the strength of the other evidence presented at trial. The overriding question is whether the error on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial, that any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made.
>
> [emphasis added]

[38] In this case, one of the critical issues to be considered by the jury was the participation by the accused in the decision and action of taking the victim to the bush and killing him.

[39] That it was not an insignificant or minor aspect of the case is highlighted by the fact that Crown counsel seized upon it in his closing address and described the statement as one of "the keys to the case".

[40] In *R v Jaw*, 2009 SCC 42, while holding that a curative proviso did not need to be applied as the trial judge did not err, LeBel J, for the majority, referred to the nature of the error as a harmless one because (at para 43): "The evidence of the appellant's post-offence conduct was of very little significance to the case against him and was not emphasized at trial by either the Crown or the trial judge" (emphasis added).

[41] In my view, the incendiary nature of the excerpt as it pertains to a critical issue of the trial cannot be considered harmless or of a minor nature. It is not one which cannot be seen as having an impact on the verdict and "there is a reasonable possibility that the verdict would have been different" (*R v Scott*, 2013 MBCA 7 at paras 49, 55) but for the jury's consideration of that excerpt.

Overwhelming Evidence to Convict

[42] The Crown's position on the appeal is that the evidence from both youth co-accused who testified, directly implicating the accused in the murder, is of such a substantial nature that it should be considered overwhelming, as required to invoke the proviso.

[43] The test of overwhelming evidence is very high. In *R v Trochym*, 2007 SCC 6, Deschamps J, for the majority, considered the standard of "overwhelming" evidence and concluded that it was higher than a reasonable doubt. She stated (at para 82):

> This standard should not be equated with the ordinary standard in a criminal trial of proof beyond a reasonable doubt. The application of the proviso to serious errors reflects a higher standard appropriate to appellate review. The standard applied by an appellate court, namely that the evidence against an accused is so overwhelming that conviction is inevitable or would invariably result, is a substantially higher one than the requirement that the Crown prove its case "beyond a reasonable doubt" at trial. This higher standard reflects the fact that it is difficult for an appellate court, in particular when considering a jury trial, since no detailed findings of fact will have been made, to consider retroactively the effect that, for example, excluding certain evidence could reasonably have had on the outcome.

[44] More recently, in *R v White*, 2011 SCC 13, Rothstein J discussed the inevitability of a conviction as follows (at para 94):

> By contrast, the second category consists of errors that, while serious and prejudicial, can have had no impact on the verdict because the case against the accused was overwhelming. Here, the appellate court must evaluate the strength of the other evidence to determine whether a conviction would have been inevitable even if the serious error had not been made. If a properly instructed jury would inevitably have convicted, upholding the conviction produces no significant injustice to the accused (*Van*, at para. 36). It is also in the public interest to avoid the cost and delay of a new trial that could not realistically produce a different result (*Van*, at para. 36, citing *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 46, *per* Binnie J.). Still, "given the difficult task for an appellate court of evaluating the strength of the Crown's case retroactively, without the benefit of hearing the witnesses' testimony and experiencing the trial as it unfolded", the high standard of invariable or inevitable

> conviction must be met to cure serious errors (*Van*, at para. 36, citing *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 82).

[45] While I agree with the Crown that there was substantial evidence which would lead to a conclusion of involvement by the accused in the beating, as well as participation in the events in the bush, the accused was not convicted of manslaughter or second degree murder. What is at issue here is the role of the accused in the decision to "finish it off" which is where the argument of premeditation leading to a finding of first degree murder rests. The fact that there may have been evidence which would allow a jury to convict is not the test. Simply because the convictions are justifiable on the evidence does not make them inevitable (see *R v KJW*, 2015 ONCA 870 at para 67).

[46] The fact that defence counsel did not ask for a limiting instruction is not fatal to the accused's argument, as conceded by the Crown. While it is relevant in considering the application on the curative proviso (see *R v Tymchyshyn (C) et al*, 2016 MBCA 73; and *Ellard*), it cannot be determinative of the issue. In the first case noted, the position of defence counsel at trial was a calculated tactical decision, different from the position taken on appeal. Here, counsel for the accused made a spirited objection against the introduction of the statement, indicating its significance from her point of view. There is no suggestion that her not asking for a limiting instruction was part of a tactical decision. As to *Ellard*, the Court concluded that defence counsel's failure to seek a limiting instruction was "an accurate reflection of the insignificance of the substance and impact of the evidence elicited on re-examination" (as per Abella J at para 47). Again, in this case,

there is clear indication that defence counsel had considered the statement as an important one to the jury's deliberation.

[47] This situation should be compared to *R v Iyeke*, 2016 ONCA 349, where the improper submission of counsel on the address was described as follows (at para 7):

> Crown counsel in her closing address told the jury that the informant had told the police that the appellant was in possession of a gun and they should consider this fact. This was no casual passing reference but, rather, the centrepiece of the Crown's closing address. She repeatedly linked the information about the presence of the gun to the confidential informant. She also invited the jury to consider whether it was reasonable that the gun belonged to somebody else given the fact that the confidential source had told the police that the appellant was in possession of a gun.

[48] In that case, the Ontario Court of Appeal held that a limiting instruction should have been provided and rejected the Crown's argument on appeal that the proviso should be applied as defence counsel did not object or request a limiting instruction. As well, the Court noted (at paras 9-10):

> We see no plausible tactical reason to explain the trial counsel's failure to object and seek an instruction correcting the misinformation and directing the jury it could not use the informant's tip for the truth of its contents. In any event, the jury charge is ultimately the responsibility of the trial judge, not defence counsel.
>
> Crown counsel's mistaken and improper closing address, left uncorrected, rendered the trial unfair. This is not a case for the application of the proviso. It is for a jury to assess the credibility of the appellant's testimony the gun was not his.

[49] For these reasons, I am of the view that the curative proviso has no application to this case and should not be used to uphold the verdict.

Conclusion

[50] The appeal should be allowed and a new trial ordered for the accused.

Monnin JA

I agree: Burnett JA

I agree: Pfuetzner JA