Citation: R v Overby, 2020 MBCA 121 Date: 20201209
Docket: AR19-30-09319

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice William J. Burnett
Madam Justice Lori T. Spivak

B E T W E E N :

	)	***S. A. Inness*** *and*
	)	***M. B. Cheater***
	)	*for the Appellant*
HER MAJESTY THE QUEEN	)	*(via videoconference)*
	)	
Respondent	)	***A. Y. Kotler***
	)	*for the Respondent*
- and -	)	*(via videoconference)*
	)	
BRETT RONALD OVERBY	)	*Appeal heard and*
	)	*Decision pronounced:*
(Accused) Appellant	)	***November 25, 2020***
	)	
	)	*Written reasons:*
	)	***December 9, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba*, Court of Appeal Rules*, Man Reg 555/88R, this appeal was heard remotely by videoconference.

MONNIN JA (for the Court):

[1] After hearing the submissions of counsel, we dismissed this appeal with brief reasons to follow. These are those reasons.

Introduction

[2] The accused was convicted by a jury of second degree murder. At trial, he admitted having killed the victim in his home but argued that the

circumstances warranted a finding of manslaughter. He was unsuccessful. He appeals his conviction on very narrow grounds.

[3] A general search warrant was issued by a Provincial Court judge allowing a search of the accused's home. The accused sought to cross-examine the affiant of the Information to Obtain (ITO) on a number of issues, including questions concerning alternate suspects.

[4] In a brief endorsement (the first decision), the trial judge denied the request to cross-examine save for a limited issue which did not include the issue of alternate suspects.

[5] As a result of the execution of the warrant, traces of the victim's blood were found in the accused's basement. Prior to trial, the accused challenged the issuance of the warrant on the basis that the ITO failed to satisfy the legal requirements for its issuance. As a result, he argued that his section 8 *Charter* rights (see the *Canadian Charter of Rights and Freedoms*) were breached and the evidence arising from the search should be excluded.

[6] In a subsequent endorsement (the second decision), the trial judge performed a *Garofoli* review (see *R v Garofoli*, [1990] 2 SCR 1421) of the warrant and concluded that there were reasonable grounds for the issuing judge to have drawn the inferences that a homicide had occurred and that forensic techniques to be used in the accused's home and vehicle could lead to evidence of the crime.

[7] On the appeal before us, the accused seeks to set aside those two decisions, arguing:

(a) with regard to the first decision, the trial judge erred in failing to allow cross-examination of the affiant on the issue of alternate suspects; and

(b) with regard to the second decision, the trial judge erred in finding that there was evidence upon which the issuing judge could have made reasonable inferences that a crime had been committed and that evidence could be obtained at the accused's home.

Standards of Review

[8] In our view, this appeal fails as the accused is unable to meet the standards of review that apply to the two decisions in question.

[9] As to the first decision relating to granting leave to cross-examine, it is a discretionary order left to the trial judge and subject to a deferential standard. It is only to be disturbed if the trial judge misdirects himself or if the decision is so clearly wrong as to amount to an injustice (see *Garofoli* at 1465; *R v Pires; R v Lising*, 2005 SCC 66 at paras 46-47; and *R v Pilkington (C)*, 2016 MBCA 80 at para 19).

[10] With respect to the appeal concerning the second decision, it is also subject to a deferential standard of review given that it is a second-level appeal, as stated in *R v Pilbeam*, 2018 MBCA 128 (at para 9):

> Appellate deference will be afforded to a decision made on a *Garofoli* review absent a failure to apply the correct standard or other error in principle, a misapprehension of the evidence, or a failure to consider relevant evidence (see *Evans* [*R v Evans (ED)*,

> 2014 MBCA 44] at para 20; *R v K (T)*, 2014 MBCA 97 at para 8; and *R v Do*, 2018 MBCA 50 at para 16).

[11] We are of the view that both grounds fail and that appellate intervention is unwarranted.

First Ground—Alternate Suspects

[12] While, in his quest to cross-examine the affiant on the ITO, the accused sought to do so in five different respects, on appeal, he argues only the denial to cross-examine on the issue of alternate suspects.

[13] The accused argues that, while the trial judge set out the law properly, he applied it incorrectly. By performing a review of whether the two alternate suspects, who had been investigated by the police, were still credible suspects, the trial judge set the bar too high on the question of whether cross-examination with respect to these two individuals could assist in determining whether the statutory preconditions for the issuance of the warrant had been met.

[14] We disagree. The trial judge's decision shows that, in accordance with the information in the ITO, the accused was "the primary suspect" and also "only a suspect in the investigation at this time". The issue before him was whether information about the two other possible suspects would tend to discredit the existence of the statutory preconditions needed to be met to issue the warrant. His conclusion that they would not is not unreasonable and is entitled to deference from this Court.

[15] In our view, the accused's stated objective to cross-examine on the issue of alternate suspects failed to link the evidence sought to be obtained to

why it was alleged that the ITO was deficient with respect to meeting the statutory preconditions. It was well within the trial judge's discretion to find that such evidence was not relevant or probative or likely to be helpful. We would not accede to this ground of appeal.

Second Ground—Sufficiency of the ITO

[16] On the second ground, the accused argues that the ITO did not provide sufficient evidence to allow the issuing judge to draw the inference that the victim was murdered or that a search of the accused's home and vehicle could provide evidence of the crime. In his endorsement, the trial judge stated:

> I cannot say that the inference was not available to her or that it was an unreasonable inference. Cut to its core, [the victim's] world lost contact with her contemporaneous with her having used a mobile device through a Wi-Fi network available at and around [the accused's] home, and having used a device [the accused] owned for a message she sent around the same time. That she lived a high-risk lifestyle supported inferences she died, either by accident or violence. [The accused's] telling police he had never met her, when in fact he had, and that he did not have the type of mobile device she used when in fact he had, opened the inference that he was hiding knowledge of what happened to her. In such circumstances, it is a common sense inference that such deceit is not normally for innocent reasons. All of this, along with the rest of the information, reasonably allowed the necessary inferences to be drawn by the issuing judge as she did. Indeed, I would have drawn the same inferences.

[17] The accused argues that the disappearance of the victim over such a lengthy period of time and the loss of contact, as well as the fact that she was involved in a high-risk lifestyle, might lead one to suspect death by suicide or drug overdose but not necessarily by criminal conduct. The accused also

argues that, while there was evidence of his Wi-Fi being used, there was no evidence that it was used in his home since he had allowed use of his Wi-Fi from his yard. In the accused's argument, there was therefore no reasonable inference that could be drawn that the victim was ever in his home justifying a warrant to search it.

[18] Again, we disagree. The question before the issuing judge was not whether there was proof beyond a reasonable doubt of a murder or that evidence of it would be located in the premises; only whether there were reasonable inferences that could be drawn from the information in the ITO allowing the issuing judge to reach that conclusion. As to the wrongful death, the affiant pointed out that there was information in the ITO that, not only had the victim been involved in a very dangerous drug lifestyle, but she had not contacted her family which was her practice to do. No body had been found and no 911 call was made, either of which would be expected in the event of a suicide or drug overdose.

[19] As to the Wi-Fi, Crown counsel pointed out that the messages were sent not only using the accused's Wi-Fi, but also with a device that could be linked to him. As well, his attempts to deceive police by his denials and attempts to have his girlfriend limit her evidence to the police could form part of the assessment of the inferences to be drawn.

[20] We are all of the view that the trial judge committed no palpable or overriding error in his review of the sufficiency of the information provided to obtain the warrant, and no error when he concluded that the issuing judge could have issued the warrant on the basis of the information in the ITO.

[21] We would not accede to this ground of appeal.

Conclusion

[22] In the circumstances, the appeal was dismissed.

"Monnin JA"

"Burnett JA"

"Spivak JA"