# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Lori T. Spivak

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|---|---|---|
| ***Docket: AR18-30-09198*** | ) | |
| ***B E T W E E N:*** | ) | |
| | ) | ***R. T. Amy*** *and* |
| ***HER MAJESTY THE QUEEN*** | ) | ***Z. B. Kinahan*** |
| | ) | *for the Appellant* |
| *Respondent* | ) | *M. B. S. Thomas* |
| | ) | |
| *- and -* | ) | |
| | ) | |
| ***MARK BRADLEY SHANE THOMAS*** | ) | ***B. F. Bonney*** *and* |
| | ) | ***K. M. Henley*** |
| *(Accused) Appellant* | ) | *for the Appellant* |
| | ) | *Z. E. J. Linklater* |
| *- and -* | ) | |
| | ) | |
| ***Docket: AR18-30-09199*** | ) | |
| ***B E T W E E N:*** | ) | ***J. M. Mann*** |
| | ) | *for the Respondent* |
| ***HER MAJESTY THE QUEEN*** | ) | |
| | ) | |
| *Respondent* | ) | |
| | ) | *Appeals heard and* |
| *- and -* | ) | *Decision pronounced:* |
| | ) | ***March 2, 2020*** |
| ***ZACH EDWIN JEFFREY LINKLATER*** | ) | |
| | ) | |
| *(Accused) Appellant* | ) | |

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

[1] The accused, Thomas, appeals his conviction for first degree murder after trial by jury. He submits that the trial judge erred in admitting into

evidence comments that he made to two different undercover police officers who, at different times, posed as his cellmates after he was arrested for this offence.

[2] The co-accused, Linklater, submits that, if this Court excludes the comments made to the undercover officers by Thomas, there should be a new trial on the basis that the comments were used by the jury to assess the credibility of a third person who had been implicated in the crime and who testified against each of them at their joint trial. He acknowledges that, if this Court dismisses Thomas's appeal, his appeal should also be dismissed.

[3] The parties agree, as do we, that the trial judge made no error in his review of the applicable law. They also agree that any findings of fact are reviewable on a standard of palpable and overriding error. In the criminal law context, questions of mixed fact and law are subject to review on correctness (see *R v Farrah (D)*, 2011 MBCA 49 at para 7).

[4] Thomas was arrested in Brandon and escorted to Winnipeg by the RCMP. Midway through the trip, they were joined by an undercover officer pretending to be a prisoner (UC2). Once in Winnipeg, Thomas was placed in a cell with a different undercover officer (UC1). Later, he was placed in a cell with UC2. The issue was whether either or both of the undercover officers "elicited" information from Thomas contrary to his right to remain silent pursuant to section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) (see *R v Hebert*, [1990] 2 SCR 151; *R v Broyles*, [1991] 3 SCR 595; and *R v Liew*, [1999] 3 SCR 227).

[5] From his reasons, it is apparent that the trial judge carefully considered the evidence of UC1 and UC2. He reviewed the transcripts of their

interactions with Thomas and compared them to the audio and video recordings. He made very specific findings of fact regarding the demeanour of the accused and that of the undercover officers. He then carefully considered the comments made and questions asked by the undercover officers in the context of their respective relationships with Thomas (see *Liew* at paras 47-58). He found that some comments made by the accused to each of the undercover officers were admissible and that others were elicited. In our view, the trial judge did not conduct a piecemeal analysis as suggested by Thomas. Moreover, we have not been persuaded that he erred when he concluded that the admissible comments were not obtained by any breach of Thomas's *Charter* rights.

[6] Next, Thomas argues that, having found that UC1 elicited some comments in breach of section 7 of the *Charter*, none of the evidence arising from his interaction with UC2 was admissible. We disagree. The trial judge considered the nature of the relationship with each undercover officer. He found as a fact that the undercover officers had taken part in "effectively, two separate operations" and that none of the officers involved in the investigation exchanged information during the course of the operation in order to avoid tainting the investigation. In our view, it cannot be said that the comments made to UC2 were "part of the same transaction or course of conduct" as described in *R v Mack*, 2014 SCC 58 at paras 37-38.

[7] Therefore, for the above reasons, the appeals are dismissed.

Cameron JA

Burnett JA

Spivak JA