Citation: R v Williams, 2020 MBCA 72 Date: 20200710
Docket: AR18-30-09180

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Madam Justice Diana M. Cameron
Madam Justice Karen I. Simonsen

B E T W E E N :

	)	***G. G. Brodsky, Q.C.*** *and*
	)	***Z. B. Kinahan***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***J. M. Mann*** *and*
	)	***J. W. Avey***
- and -	)	*for the Respondent*
	)	*(via videoconference)*
DANIEL VERNON WILLIAMS	)	
	)	*Appeal heard:*
(Accused) Appellant	)	***April 22, 2020***
	)	
	)	*Judgment delivered:*
	)	***July 10, 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, all appeals are heard remotely by videoconferencing until further notice.

SIMONSEN JA

[1] The accused appeals his conviction, by a jury, for manslaughter (see section 234 of the *Criminal Code* (the *Code*)) by the unlawful act of failing to provide the necessaries of life to his 21-month-old daughter (the child). He asserts that the trial judge erred in instructing the jury with respect to objective foreseeability of risk of bodily harm, lawful excuse and causation.

[2] The accused also seeks leave to appeal and, if granted, appeals his eight-year sentence on the basis that it is demonstrably unfit.

[3] For the reasons that follow, I would dismiss the conviction appeal, grant leave to appeal the sentence, but dismiss the sentence appeal.

The Evidence

[4] At birth, the child was apprehended by a child welfare authority and placed with foster parents, where she thrived. At nine months of age, as a healthy baby, she was returned to her parents' care. She died one year later.

[5] At the trial, it was agreed that the child's mother, who had earlier pleaded guilty to second degree murder, inflicted the fatal injury on the child in the family residence at a time when the accused was not present.

[6] It was also agreed that, in the year leading to the child's death, she had been repeatedly beaten by her mother, causing injuries as described by a number of physicians, including Dr. Susan Phillips, the pathologist who performed the autopsy. Evidence from the child's half-sisters described the repeated assaults, abuse and neglect of the child by her mother. The accused resided with the child and her mother, and one of the half-sisters testified that, while he was sometimes at work, on other occasions, he was present when the mother inflicted the abuse.

[7] Dr. Phillips testified that the cause of death was blunt force injury to the child's abdomen which resulted in injuries to her internal organs and significant blood loss. The blood loss was the mechanism of her death.

[8] The autopsy also revealed that the child had numerous other injuries throughout her body, at various stages of healing. In addition to extensive bruising, abrasions, lacerations and scarring, she had five missing teeth, which the experts opined was due to a traumatic event that had occurred at least three months before death. She had 11 rib fractures, a fracture to her right shoulder bone, a severely displaced fracture to her left upper arm bone, and a fracture to the lower end of her left arm at the elbow joint, all of which, according to the radiologist, Dr. Martin Reed, were anywhere between at least three to eight weeks, and possibly months old. She also had fractures on both sides of her skull; while those fractures were very difficult to date, Dr. Phillips did not observe any hemorrhage associated with the left skull fracture, which was consistent with it being a healing fracture. In addition, tissue was missing from the end of the child's nose, which had not been medically treated. She was also grossly malnourished, with both her length and weight being significantly below the third percentile for children her age.

[9] The medical records indicate the child saw a doctor once in the time she was in the care of her parents, when she was 10 months old.

[10] Given her serious malnourishment, the medical experts thought she would have been anemic, and that her other injuries would have contributed to her anemia, which would then have caused her to have more negative effects from blood loss.

[11] Dr. Phillips testified that the child's "undernutrition and her multiple previous injuries made her more vulnerable to any additional trauma." As a result, she was of the opinion that malnutrition and the repeated injuries were significant contributing factors to the child's death. While Dr. Phillips

acknowledged that it was possible that the child may have died regardless of the malnutrition and previous injuries, she also testified:

> Well, she lost 30 to 40 per cent of her blood volume [from the fatal assault], which is significant, but it -- it's not necessarily going to lead to death. It -- it may well have, without medical care, it may well have in particular. It's a significant amount of blood -- blood loss. She probably would have been symptomatic, whether it would have led to death on its own, I can't say, but I think she was rendered more vulnerable to acute blood loss by being already anemic.

[12] The Crown tendered the statement the accused had provided to the police in which, after denying that he saw anyone assault the child, he admitted that he had seen the mother angrily pick her up by the arm and carry her to the bathroom. He also said that he had seen the mother roughly change the child's diaper and heard the child's head hit the floor. He had observed that the child was crawling "funny", that there was a "limp on her crawl", and that she did not want to be picked up for about one to two weeks before she died.

[13] In the police statement, the accused also indicated that he had not done anything to help the child, that he and the mother had decided to isolate her so that family members would not report them, and that he and the mother had also decided not to get her medical attention that he knew she needed—all because they did not want to lose their other two children to the child welfare authority.

[14] The accused did not testify.

[15] The Crown argued that the accused committed the unlawful act of failing to provide the necessaries of life to the child by: failing to provide her

with nourishment; failing to provide her with medical attention; and failing to protect her from abuse at the hands of her mother.

[16] The jury was given the option of convicting the accused of manslaughter, convicting him of the included offence of failing to provide the necessaries of life, or acquitting him. They convicted him of manslaughter.

The Offences

[17] Unlawful act manslaughter requires proof: of all of the elements of the predicate offence (failure to provide necessaries); the predicate offence was dangerous, involving an objectively foreseeable risk of bodily harm that is neither trivial nor transitory; and the death was caused by the unlawful act (see *R v Creighton*, [1993] 3 SCR 3 at 42-45; and *R v Nette*, 2001 SCC 78 at paras 44-46).

[18] Failure to provide necessaries of life under sections 215(1)(a) and 215(2)(a)(ii) of the *Code* requires proof: of a legal duty as a parent (or other similar relationship) to provide the necessaries of life for a child under the age of 16; that, by failing to perform that duty, the accused showed a marked departure from the conduct of a reasonably prudent parent in the same circumstances; that, by failing to perform that duty, the accused endangered the life of the child or caused or was likely to cause the health of the child to be endangered permanently; of objective foreseeability that the failure to provide the necessaries of life would lead to a risk of danger to life, or a risk of permanent endangerment to the health of the child; and that, if raised, there was no lawful excuse for failing to perform the duty (see section 215; and *R v Naglik*, [1993] 3 SCR 122 at 143-44).

Analysis and Decision

Conviction Appeal—The Jury Instructions

Standard of Review

[19] Jury instructions are to be reviewed on a standard of adequacy, not perfection, using a functional approach that takes into account the nature of the evidence before the trial court, the live issues that were raised, the positions of the parties on those issues, and the addresses of counsel. It is only when considering whether the instructions reflect the proper application of legal principles to the facts of the case that a correctness standard applies (see *R v Scott*, 2013 MBCA 7 at paras 4-5).

Objective Foreseeability of Risk of Bodily Harm

[20] I am not persuaded that the trial judge erred in any of the three ways that the accused says she failed to properly instruct the jury about objective foreseeability.

[21] First, the accused argues that the trial judge ought to have told the jury that the child's murder by the mother was not objectively foreseeable. However, it is not necessary that the accused objectively foresee a murder. To be found guilty of manslaughter, the *mens rea* requirement is that there be objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act (see *R v Javanmardi*, 2019 SCC 54 at para 67; and *Creighton* at pp 44-45, 56).

[22] The accused also alleges the trial judge failed to instruct the jury that the requirement for objective foreseeability was based on the extent of the

accused's knowledge and the explanations given to him by the mother regarding the child's condition. The trial judge did, in fact, instruct the jury in that regard. She stated in her instruction with respect to the *mens rea* for failure to provide necessaries that they must consider "[w]hat would a reasonable person in [the accused's] circumstances with the information that he had think", and she then told them they must consider what a reasonable person would think about the risk to the child when observing what the accused saw.

[23] Additionally, the accused asserts that the trial judge erred in instructing the jury that, if they found that the mental element of failure to provide the necessaries of life had been proven, they would have no difficulty finding that the mental element of manslaughter was also met. I do not agree, as the *mens rea* for failure to provide necessaries requires objective foreseeability of risk of danger to life or risk of permanent endangerment to health (see section 215(2)(a)(ii) of the *Code*; and *Naglik*), which is more stringent than the *mens rea* for manslaughter, namely, objective foreseeability of risk of bodily harm that is not trivial or transitory.

Lawful Excuse

[24] The accused alleges that the trial judge erred when instructing the jury that there was no lawful excuse for failing to provide the necessaries of life arising on the evidence; he says that the instruction failed to consider the mother's explanations to cover up her abuse of the child. However, the effect of this argument would be to import subjective awareness into the lawful excuse element of the offence. As noted in *Naglik* at pp 145-46, a lack of subjective awareness is not a lawful excuse.

Causation

[25] I also do not accede to the accused's assertion that the trial judge erred in her instruction to the jury about causation.

[26] The accused submits that, because Dr. Phillips testified that it was possible that the child may have died even if she was not previously malnourished and injured, the trial judge should have instructed the jury that the accused's actions could not be a significant contributing cause of the child's death. Dr. Phillips did testify that the child might have died from the mother's final assault even if she had not been anemic, especially if she did not receive medical care. Nonetheless, she was of the view that the child was more vulnerable to the fatal assault because of her anemia and, as a result, her malnourishment and repeated injuries were significant contributing factors to her death. There can be many contributing causes of death. As stated in *R v Maybin*, 2012 SCC 24, "an unlawful act may remain a legal cause of a person's death even if the unlawful act, by itself, would not have caused that person's death, provided it contributed beyond *de minimis* to that death" (at para 14). And, even where an accused's actions accelerate or hasten the death of another, those actions will be a significant contributing cause of the death (see *R v Chief*, 2019 MBCA 59 at paras 25-26).

[27] In his factum, the accused asserted that the trial judge had made errors in the language of her instruction regarding causation but, at the appeal hearing, he took the position that no legal errors were made; rather, the instructions, while correct, were not sufficiently clear to explain complicated legal issues to the jurors.

[28] Guided by the leading Supreme Court of Canada authorities on causation (*Nette* and *Maybin*), I am not persuaded that the trial judge erred or that her instructions lacked clarity. While the accused says that the trial judge did not explain the meaning of "intervening cause" and "overwhelming intervening cause", the meaning of those terms was, in my view, clear from the context in which they were used. The accused also suggests that the trial judge's use of the term "overwhelming intervening cause", when referring to the actions of the mother, imposed too high a standard. The term "overwhelming intervening cause" comes from *Maybin* (see paras 47, 59). The instructions ultimately, and correctly, focussed on whether the accused's conduct was a significant contributing cause of the death.

[29] To conclude, the trial judge's instructions clearly meet the expected standard and there is no basis for intervention by this Court on the appeal against conviction.

Sentence Appeal

Standard of Review

[30] The standard of review on a sentence appeal is well established. As stated by this Court in *R v Johnson*, 2020 MBCA 10 (at para 9):

> Appellate courts must show great deference when reviewing sentencing decisions. Succinctly put, appellate intervention is only justified in cases where a material error has an impact on the sentence or when the sentence is demonstrably unfit. A material error includes an error in principle, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor. It also includes an overemphasis of the appropriate factors (see *R v Lacasse*, 2015 SCC 64 at paras 41, 43-44, 51).

(See also *R v Friesen*, 2020 SCC 9 at paras 25-26.)

Fitness of Sentence

[31] In thorough reasons, the trial judge found the facts based on the evidence at trial, which could not be inconsistent with the jury's verdict (see section 724 of the *Code*; and *R v Woodard*, 2009 MBCA 42 at para 60). She was satisfied that the accused had failed to provide the necessaries of life to the child in all three ways alleged by the Crown—failing to provide nourishment, failing to provide medical care and failing to protect her from her mother's abuse—and that those failures "resulted in malnourishment, untreated injuries and physical abuse inflicted by [the mother], each of which was a contributing cause of [the child's] death."

[32] Another factual finding made by the trial judge was that the accused had been aware that the child was being mistreated such that she suffered bodily harm, but that he and the mother together decided that they would not get her medical attention for fear of losing their other children to the child welfare authority.

[33] The trial judge addressed the nature of the accused's actions and recognised the role of the mother in the child's death. She concluded that the accused's moral blameworthiness was very high based on his multiple opportunities to take action to protect the child.

[34] There is no suggestion that the trial judge made any palpable and overriding error in her factual findings.

[35] Rather, the accused contends that she failed to properly weigh the relevant factors with the result that the sentence imposed is harsh and excessive. In particular, he says that she erred by: concluding that his moral culpability was very high because she did not properly consider his degree of participation or non-participation in the child's death, given that he was not the principal actor and was not present when the fatal assault was committed; relying on case law regarding violent acts or criminal negligence rather than a failure to provide necessaries of life; and failing to give proper weight to the *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688), his rehabilitative efforts and prospects, and to the evidence that he suffered from battered spouse syndrome.

[36] The trial judge considered the accused's circumstances as an Indigenous person and the "broad, systemic and background factors that affect Indigenous people generally." While appreciating that the accused would have experienced some impact of colonialism and racism, she found that he did not suffer any particular difficulties, and that he had a "fairly stable upbringing" that did not expose him to significant alcohol abuse or domestic violence within his home. In my view, the trial judge was entitled to conclude that the *Gladue* factors had a "limited impact" on his moral blameworthiness.

[37] Relying on *R v Okemow*, 2017 MBCA 59 at paras 72-73, the trial judge afforded little weight to the evidence about the accused suffering from battered spouse syndrome. The pyschotherapist called to testify about that syndrome was not a psychologist or psychiatrist, and he based his opinion on information provided by the accused. Having heard his testimony, it was open to the trial judge to determine that, while the accused "may have been intimidated by a domineering and abusive spouse" who he felt would not

listen to him, "that does not explain how he could have left [the child] to waste away and suffer from her injuries without care."

[38] Appreciating the mitigating factors, the trial judge recognised that the accused had no criminal record; was assessed as a low risk to reoffend; had taken steps toward his rehabilitation, including maintaining sobriety; and had family and community support. She also noted that he had been addressing some mental health issues and had shown some remorse.

[39] A number of authorities were canvassed by the trial judge. She rightfully distinguished, as very different from this case, decisions relied upon by the accused where conditional sentences or a provincial prison term were imposed (see *R v Lam*, 2004 ABQB 78; *R v Chittamath*, 2009 ONCA 239; and *R v Guimond*, 2010 MBPC 33).

[40] As for the Crown's authorities, the trial judge referred to cases where provincial appellate courts have upheld or imposed lengthy sentences for manslaughter, including by criminal neglect, that resulted in the death of a child (or, in one case, a disabled adult)—even for offenders who had no prior criminal record:

- In *R v Cox*, 2011 ONCA 58, a sentence of nine years was upheld for manslaughter by failing to provide necessaries of life. The accused, who was the caregiver to her adult sister who was developmentally delayed and suffered with severe autism, failed to provide her with adequate care, including food, water, supervision and medical attention. The sister had been kept

locked in the basement of the residence in appalling conditions and died of malnutrition resulting in starvation.

- In *R v Choy*, 2013 ABCA 334, the Court increased a six-year sentence to eight years for the foster mother of a child who died as a result of cranial trauma caused by a violent act committed in the context of a pattern of abuse.

- In *R v Alexander*, 2014 ONCA 22, the mother of a child was convicted of manslaughter on the basis of failing to provide necessaries of life because she failed to obtain urgently needed medical attention for the child after he suffered severe burns. The Court held that a sentence of nine years and six months was appropriate.

- In *R v Will*, 2015 SKCA 11, the Court upheld a seven-year sentence for manslaughter for an accused who, in a single incident and acting out of anger and frustration, caused the smothering death of his girlfriend's 18-month-old son.

[41] The accused argues that, in the above and other manslaughter sentencing decisions (for example, see *R v SDC*, 2013 ABCA 46; and *R v Noskiye*, 2016 ABQB 254) involving the death of a child where sentences in the seven to nine-year range have been found to be appropriate, the offenders were principal actors who had a higher level of moral culpability than he did.

[42] The accused further argues that more comparable cases are *R v Da Silva* (2005), 203 CCC (3d) 1 (Ont CA); and *R v McDonald*, 2013 SKCA 38, where three-year sentences were imposed. In *Da Silva*, the offender pled

guilty to manslaughter for leaving a child in her crib on and off for four days, as a result of which she died due to dehydration. Notably, however, while a sentence of three years was upheld, the Court indicated that was "at the very bottom of the range" of what could constitute a fit sentence (at para 12). In *McDonald*, where a child was subjected to a prolonged period of neglect and the offender made a conscious decision not to seek medical attention, the Court increased a sentence of two years less a day to three years for criminal negligence causing death and stated that, but for the Crown limiting its request to three years, the Court may have found that the circumstances justified a lengthier sentence (see para 8). The usefulness of both *Da Silva* and *McDonald* is tempered by the comments the Courts made about the suitability of the sentences.

[43] Although the accused points out that the authorities submitted by the Crown and referred to by the trial judge involve offenders who were the principal actors in the death, they nonetheless provide guidance. They collectively indicate that lengthy penitentiary sentences will be imposed for those who cause the death of a child through neglect or abuse. Furthermore, almost all involve conduct occurring over a shorter period of time than what happened here. While the offender in *Cox* was guilty of serious neglect over a very lengthy period, including a failure to provide food and medical attention, it was not a situation where she failed to protect the victim from repeated assaults by another. As well, significantly, in the present case, the accused made a deliberate choice not to get the child the medical care she so desperately needed.

[44] The trial judge referenced comments made by the Saskatchewan Court of Appeal in *Will* to the effect that there is little distinction to be made

on sentencing for manslaughter by unlawful act as opposed to by criminal negligence (see also *McDonald*, where that Court stated that it is an error in principle to conclude that an intentional act of violence is more serious than a "case of a criminally negligent omission of care" (at para 6, quoting from 2012 SKQB 245 at para 26) (see also para 7)). However, our Court, in *Regina v Urbanovich and Brown* (22 March 1985), Winnipeg 350/83, 370/83), reduced the sentence of a mother who was guilty of criminal negligence in the death of her child from seven years to three years, in part on the basis of a distinction between acts of "omission" and acts of "commission".

[45] That said, in *R v Pashe*, 1995 CarswellMan 61, our Court, quoting Ruby on *Sentencing* [Clayton C Ruby, *Sentencing*, 4th ed (Markham: Butterworths, 1994)], noted a range of "several months to eight years' imprisonment" (at para 14) where an infant dies from criminal negligence in the provision of care.

[46] In my view, while intentional acts causing death will often attract stiffer sanction than acts of criminal negligence or a failure to provide the necessaries of life, causing death, that is not necessarily so. It depends on the circumstances.

[47] And the circumstances of this case are profoundly troubling, indeed, horrific. This offence involved the neglect of a young child by her parent, in three distinct ways, over a period of many months as she visibly deteriorated. Furthermore, as I have indicated, the accused made deliberate choices. He was aware of the child's suffering and knew that she needed medical attention but nonetheless repeatedly chose to do nothing about it. During that time, the child went from a healthy baby to one whose battered and emaciated

appearance shocked hospital staff. In all of the circumstances, I take no issue with the trial judge's assessment of the accused's moral culpability as very high. And, as I have explained, she made no error in her consideration of the mitigating factors.

[48] There is a strong need for denunciation and deterrence to protect society's most vulnerable members. That must be reflected in the sentence imposed.

[49] For the reasons outlined, I am not persuaded that the sentence of eight years' incarceration is demonstrably unfit.

Disposition

[50] Therefore, I would dismiss the conviction appeal. I would grant leave on the sentence appeal, but also dismiss it.

"Simonsen JA"

I agree: "Monnin JA"

I agree: "Cameron JA"