COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Clarke, 2014 ONCA 777
DATE: 20141106
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Cronk, LaForme and Lauwers JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Andre Clarke

Appellant

Lindsay Daviau, for the appellant

Amy Alyea, for the respondent

Heard: October 22, 2014

On appeal from the convictions entered on October 25, 2010 and the sentence imposed on June 15, 2012 by Justice Michael R. Dambrot of the Superior Court of Justice, sitting with a jury, with reasons for sentence reported at, 2012 ONSC 2776.

BY THE COURT:

[1] The appellant was convicted of manslaughter, unlawful confinement, robbery, and use of an imitation firearm. He and his co-accused, Nevin Joseph, tied up the owner of a flower shop they were in the process of robbing and covered her face in duct tape, which resulted in her death by suffocation. The appellant appeals against conviction on the basis that the trial judge erred in

refusing to grant his *Corbett* application: *R. v. Corbett,* [1988] 1 S.C.R. 670. He also seeks leave to appeal his sentence and, if leave is granted, appeals from sentence, as discussed below.

The Conviction Appeal

[2] The conviction appeal focuses on the trial judge's *Corbett* ruling.

[3] Mr. Joseph was called as a Crown witness. He testified that he and the appellant committed a series of armed robberies in February 2008. The fourth robbery resulted in the victim's death. Mr. Joseph placed direct responsibility for taping the victim's mouth and nose on the appellant. The appellant denied any involvement in the events that led to the charges.

[4] The appellant has a lengthy criminal record, which the trial judge laid out in his ruling. The appellant argues that the trial judge erred by refusing to grant his *Corbett* application concerning his prior robbery convictions. He says: "at a minimum, the trial judge should have removed the convictions that are similar to the charges for which [the appellant was] being tried", particularly his prior convictions for robbery.

[5] A *Corbett* ruling is discretionary, and an appellate court ought not to intervene "absent error in principle, a misapprehension of material facts, or an exercise of the discretion which, in the totality of the circumstances, must be

regarded as unreasonable": *R. v. Mayers*, 2014 ONCA 474, at para.3. There is no basis for appellate intervention in this case.

[6] The trial judge recognized his obligation to balance the probative value of the record against the prejudicial effect of its admission in order to ensure a fair trial. He noted, correctly, that the record contained a number of offences involving dishonesty that would be "highly probative on the issue of the likely truthfulness of the accused."

[7] In the credibility contest between Mr. Joseph and the appellant, the trial judge noted that Mr. Joseph's credibility had been "vigorously challenged" on the basis of his involvement in the string of robberies leading up to the charges in the indictment.

[8] The trial judge was troubled about admitting evidence of the appellant's past robbery convictions, echoing the Supreme Court in *Corbett* by observing that: "I am naturally most chary of admitting evidence of similar crimes." He considered editing the robbery convictions out of the record, but concluded that "doing so would significantly minimize both the seriousness and the persistence of the record, important considerations when assessing credibility." He added: "to omit the robberies in this case would overwhelmingly reduce the seriousness of the record, and create an artificial gap in it, from 1992 to 1999, followed by a few minor convictions." The remaining record, after omitting the robberies, would

have had the effect of deleting any indication of crimes of violence apart from the appellant's youthful assault conviction in 1991.

[9] The trial judge's overriding consideration was that, without the inclusion of evidence of the appellant's prior robberies and associated convictions, "the jury would have a false basis to consider the competing versions of the events [in] issue if they are left to believe that the accused, unlike Mr. Joseph, had an unblemished past." He pointed out that: "without involvement in the robbery, there is no basis to conclude that the accused was involved in the murder." This favoured the introduction of the appellant's whole record.

[10] The appellant takes particular aim at two lines in the ruling in which the trial judge states: "I acknowledge that counsel for the accused did not broaden the attack on Mr. Joseph's credibility to an attack on his character in general. In this case, I see little significance to this distinction." We read this not as an erroneous basis for admitting the robbery record, but simply as an acknowledgement that vigorous cross-examination on robbery by its very nature implicates the character of the witness, not only his credibility. In our view the trial judge was fully alive to the distinction between credibility and character.

[11] The trial judge concluded that the balance between prejudice and probative value obliged him to admit the robbery convictions, but he took steps to tailor the ruling and to blunt its impact from the viewpoint of similar act evidence,

by excluding the appellant's firearm, weapons and disguise convictions associated with his 1994 robbery convictions. In his view, this would minimize the extent of the similarities between those offences and the one in the indictment, which might "otherwise take on the trappings of near signature." He also excluded the weapons offences from the appellant's 1991 conviction. We see no reversible error in this approach or in the trial judge's reasoning in this regard. Indeed, we agree with it.

[12] The trial judge was alive to the need to caution the jury about propensity reasoning. He gave a *Vetrovec* warning in relation to Mr. Joseph's evidence and a "strong mid-trial warning" to the jury about the use of the appellant's criminal record, which he repeated in his charge. See *R. v. Vetrovec*, [1982] S.C.J No. 40. The appellant does not complain about the content of these warnings.

[13] We view the trial judge's discretionary ruling as an unobjectionable and careful application of the *Corbett* principles. The conviction appeal, therefore, is dismissed.

The Sentence Appeal

[14] The trial judge concluded that the appellant met both the dangerous offender and the long-term offender criteria. He found the appellant to be a long-term offender and imposed a ten year period of supervision in the community.

He also sentenced him to a global sentence of 18 years' imprisonment, less eight years to reflect approximately four years of pre-sentence custody.

[15] The appellant seeks leave to appeal his sentence arguing that the trial judge erred by attributing a state of mind to him — recklessness as to the likelihood of death — that was at odds with the jury's verdict of manslaughter. He also submits that the sentence of 18 years' imprisonment was outside the typical range for manslaughter. He seeks a reduction of the global sentence to 12 years' imprisonment, less eight years credit for pre-sentence custody. He does not appeal the long-term offender finding.

(i) The *mens rea* finding

[16] The appellant was charged with first degree murder but was found guilty of manslaughter by the jury. The principal submission of the appellant is that, by acquitting the appellant of the murder charge, the jury must have accepted one of two facts: (i) the appellant did not bind the victim; or (ii) that he bound her but left a breath hole. He argues that, in fashioning sentence, the trial judge erred in principle by relying on factual findings that the jury must have rejected.

[17] We reject this submission.

[18] The specific language complained of is found in para. 59 of the trial judge's reasons:

> The offender would have it that the verdict precludes the attribution of any alternative state of mind to him that

> aggravates the commission of the offence. I do not agree. The circumstances of this case lead me inexorably to the view that while the offender did not know that what he was doing was likely to cause death, he did know that what he was doing to [the victim] put her at risk of death, but he did not care. He was utterly indifferent to the consequences of his acts. No one of sound mind who taped the face of a victim as [the appellant] did, and immobilized her in the way that he did, making her utterly incapable of freeing herself, could have known less. [Emphasis added]

[19] In our view, the trial judge was entitled to make this finding and did not err in citing as an aggravating factor the appellant's knowledge of the risk of death.

[20] There are two provisions of the *Criminal Code* that are important: s. 724(2)(a) makes it clear that the trial judge must accept as proven all facts that are essential to the jury's verdict of guilty; and s. 724(3)(e) stipulates that while a trial judge is entitled to find relevant facts for the purposes of sentencing, the Crown has the burden of proving aggravating facts beyond a reasonable doubt.

[21] Here, the jury's acquittal of first degree murder implicitly demonstrated that it was not satisfied beyond a reasonable doubt that the appellant either intended to kill the victim, or that he knew that what he was doing was *likely* to cause death. It was, therefore, not open to the trial judge, as he noted, to find that the appellant intended to cause the victim's death, or knew that what he was doing was *likely* to cause death.

[22] However, this is not what the trial judge concluded. Instead, he found that the appellant knew that what he was doing to the victim *put her at risk of death*. This finding is not inconsistent with the jury's acquittal on the first degree murder charge but it is consistent with its manslaughter verdict.

[23] The leading case on the *mens rea* for manslaughter is *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 (S.C.C.), where, at para. 12, the Supreme Court wrote:

> [T]he test for the mens rea for unlawful act manslaughter in Canada, as in the United Kingdom, is (in addition to the mens rea of the underlying offence) objective foreseeability of the risk of bodily harm which is neither trivial nor transitory, in the context of a dangerous act. Foreseeability of the risk of death is not required [emphasis added].

[24] Although foreseeability of the risk of death is not required for manslaughter, the Supreme Court's reasoning in *Creighton* does not preclude such a mental state for a manslaughter conviction. In fact, there have been cases in which a sentencing judge considered the foreseeability of the risk of death in imposing a harsher sentence for manslaughter: see *R. v. Druken*, 2005 NLTD 209, 252 Nfld. & P.E.I.R. 314, at paras. 113-119. Thus, while foreseeability of the risk of death is not required for manslaughter, that mental state is not precluded by a manslaughter conviction.

[25] Accordingly, the trial judge in this case was entitled to make the factual finding — that the appellant knew that what he was doing to the victim put her at risk of death — to assist in the determination of an appropriate sentence. Nor did he err in treating this factor as an aggravating circumstance. And, although he did not employ the language of "beyond a reasonable doubt", his use of the term "inexorably" satisfies us that he was convinced to that standard of proof.

[26] This ground of appeal is dismissed.

(ii) The fitness of sentence

[27] The appellant submits that the sentence imposed by the trial judge was outside the typical range for manslaughter, which he says is seven to twelve years. Given this, he asks this court to reduce the global sentence to four years — 12 years' imprisonment, less eight years credit for pre-sentence custody. We do not agree. In the circumstances of this case, the sentence is fit.

[28] The Crown relies on this court's decision in *R. v. Devaney*, 2006 CanLII 33666 as authority for the proposition that, "although a range for aggravated manslaughter can be identified as 8-12 years ... a sentence above that range is not manifestly unfit" (emphasis added). We are reminded that even life sentences may be imposed in particularly serious cases. In this context, we think it important to make two preliminary comments.

[29] First, whether the trial judge described the appellant's offence as "aggravated manslaughter" is of little assistance. As this court stated at para. 33 in *Devaney*, labeling a subcategory of manslaughter as "aggravated manslaughter" for the purpose of sentencing is inappropriate. As Feldman J.A. viewed it:

> ... it is not useful to attach a label to a subcategory of the offence, then to try to pigeonhole the facts of any case into the label. Adding a descriptive label to a set of facts within the defined offence adds a level of complexity to the sentencing exercise that is both unnecessary and potentially diverting for the court and could lead to errors.

[30] Second, the correct approach in each case is to impose a sentence that fits the facts and circumstances of the particular case and the particular offender. Similar sentences for similar offences and offenders should be the objective, not naming subcategories of manslaughter for the purpose of comparing cases and imposing similar sentences: *Devaney*, at para. 34.

[31] Here the trial judge referenced *Devaney* and its stern objection to naming subcategories of manslaughter and was alive to this issue. He recognized that there appeared to be a sentencing range in more serious manslaughter cases of eight to twelve years imprisonment. And, he was aware that for any case, there is no one correct, fit sentence. In the end, the approach the trial judge ultimately took in sentencing the appellant was consistent with that mandated by *Devaney*.

[32] A trial judge is entitled to deviate from the range where there are facts or circumstances that distinguish the situation significantly from those cases where sentences were imposed within the range. This may arise from the nature of the victim, the nature of the crime itself, or the history or current circumstances of the offender. The trial judge is entitled to impose a sentence that adequately reflects the significance of those facts. This may, in the right case, result in a sentence outside the normal range.

[33] The experienced trial judge in this case provided thoughtful and thorough reasons for sentencing this offender for these offences. He had "absolutely no doubt" that the appellant did the acts that caused the victim's death. He carefully reviewed the evidence and concluded that the appellant taped and tied the victim, and placed her in a position and place that resulted in her death by suffocation.

[34] Further, the trial judge had the benefit of and relied on the evidence of risk provided by the psychiatric experts on the dangerous offender/long term offender application. He carefully considered the details of the appellant's background and extensive criminal record. He properly took into account the many callous, aggravating features of the offences, including the appellant's state of mind and the horrifying and intimidating treatment of the victim throughout the masked armed robbery. And, he took into account the ongoing planned crime spree, which included three previous similar act robberies, the recruitment of the

younger co-accused and the impact of the crimes on all the direct and indirect victims.

[35] The trial judge described the offence as one of extreme gravity, and the offender as one who presents a high level of moral culpability. Although he viewed this as a case that did not warrant a life sentence, he found that it was deserving of a sentence "well in excess of 12 years" in order to satisfy the principles of denunciation and deterrence and to "promote a sense of responsibility in [the appellant] for the harm done to victims and an acknowledgment of it" (para. 163).

[36] This court's role, which is to decide if the sentence appealed from is demonstrably unfit, was succinctly captured by Feldman J.A. at para. 15 in *Devaney*. Her helpful comments guide this court in performing that role in this case:

> One factor for the reviewing court to consider is whether the sentence imposed was outside the "normal range", and therefore was demonstrably unfit because of its inconsistency with sentences imposed in similar circumstances. But where the trial judge has given reasons that point to specifics of the victim, the crime, or the offender that warrant a sentence outside the normal range, it is unlikely that such a sentence will be found to be demonstrably unfit for that reason.

[37] In this case, the trial judge, in deciding the fit and proper sentence to be imposed on the appellant, gave extensive and compelling reasons in which he

examines the blameworthiness of the appellant, his extensive criminal record, the brutality of his crimes and the impact of those crimes on others. Although the sentence he imposed is outside the “normal range” for other particularly serious cases of manslaughter, it is not demonstrably unfit. There is no reason for this court to interfere with the significant deference accorded to the trial judge in imposing the sentence he did in this case.

[38] Accordingly, while the appellant is granted leave to appeal his sentence, the sentence appeal is also dismissed.

Released: “HSL” November 6, 2014

“E. A. Cronk J.A.”
“H.S. LaForme J.A.”
"P. Lauwers J.A."