

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hosannah, 2020 ONCA 617

DATE: 20200930

DOCKET: C61085 & C61143

Simmons, Watt and Roberts JJ.A.

DOCKET: C61085

BETWEEN

Her Majesty the Queen

Respondent

and

Sean Hosannah

Appellant

DOCKET: C61143

AND BETWEEN

Her Majesty the Queen

Respondent

and

Maria Hosannah

Appellant

James Lockyer, for the appellant, Sean Hosannah

Jack Gemmell, for the appellant, Maria Hosannah

Jamie Klukach, for the respondent

Heard and released orally: September 29, 2020 by videoconference

On appeal from the convictions entered on October 8, 2014 and the sentences imposed on April 10, 2015 by Justice John R. Sproat of the Superior Court of Justice, sitting with a jury.

REASONS FOR DECISION

[1] About six years ago, a jury found the appellants guilty of unlawful act manslaughter arising out of the death of their 27-month-old daughter. The unlawful act alleged was failure to provide the necessities of life from their daughter's birth in late November, 2008, until her death.

[2] The appellants were sentenced to terms of imprisonment of similar length.

[3] Each appealed their conviction and sentence. About five years ago each was released from custody pending their appeals which have come on for hearing today by videoconference.

The Background Facts

[4] One day in late February, 2011, the deceased stopped breathing while in her mother's arms. Her father called 911.

[5] Paramedics responded, but could not resuscitate the deceased. Later that day, she was pronounced dead at hospital.

The Trial Proceedings

[6] At the appellants' joint trial, the Crown advanced its case that the appellants committed unlawful act manslaughter by failing to provide the deceased with the necessities of life on two discrete bases:

- i. that they failed to provide her with adequate food and/or a balanced diet of protein and vitamins; and
- ii. that they failed to provide her with medical attention by failing to follow up on a referral to a pediatrician 11 months before her death.

The Malnutrition/Asthma Theory of Liability

[7] At the post-mortem, the examining forensic pathologist, Dr. Pollanen, found evidence that the deceased suffered from malnutrition due to inadequate feeding and a diet deficient in protein and vitamins. She had rickets from Vitamin D deficiency. She had megaloblastic anemia, a blood disorder caused by Vitamin B12 deficiency.

[8] Dr. Pollanen testified that the deceased's lung histology displayed signs of both chronic and recent asthma. Her breathing problems the night she died were consistent with an asthma attack. Despite the absence of signs of a fatal asthma attack in her lungs, Dr. Pollanen concluded that the deceased suffered an asthma attack while in a critical state of illness due to protein malnutrition and vitamin deficiency. This combination led to lack of oxygen, shock and death.

[9] Dr. Stanley Zlotkin, a pediatric nutritionist, gave evidence that the deceased's protein and vitamin deficiencies were due to an unbalanced diet of longstanding which had resulted in stunted growth.

[10] At trial, Dr. Pollanen gave evidence that the deceased died of a combination of asthma and malnutrition which led to a failure of blood circulation and death. An asthma attack caused low blood oxygen levels. Her protein malnutrition and vitamin deficiencies caused a failure of blood circulation and a failure to oxygenate the brain. Dr. Pollanen could not separate the asthma attack and the malnutrition causally. Both led to oxygen deficiency.

[11] Dr. Zlotkin did not have all the information he required to make a nutritional assessment according to his usual practice. However, he agreed with Dr. Pollanen's conclusion that when she died, the deceased suffered from severe malnutrition, combined with Vitamin D deficiency rickets, megaloblastic anemia and protein malnutrition. The anemia was attributable to Vitamin B12 deficiency, a rarity among children.

[12] Dr. Zlotkin also agreed with Dr. Pollanen's conclusion of protein malnutrition. This can occur, he said, after a prolonged period of diet with inadequate protein. He attributed the deceased's growth history to inadequate nutrition due to insufficient feeding. This process of malnutrition had begun when the deceased was between four and seven months old and continued until she died at 27 months.

The Lack of Medical Attention Theory

[13] The second basis of liability advanced by the Crown was grounded on an alleged failure by the appellants to take the deceased to an appointment with a pediatrician that had been recommended and was to have been arranged by a doctor who had seen the deceased at a walk-in clinic.

[14] There were evidentiary problems associated with this basis of liability including the absence of contemporary records concerning the referral and a denial by the appellants that any such referral was recommended or appointment made.

The Charge to the Jury

[15] In his charge to the jury, the trial judge left both bases of liability for the jury's consideration. He also left the included offence of failure to provide necessities of life for the jury's consideration.

The Appellate Proceedings

[16] In the years following the appellants' convictions, their counsel consulted a variety of medical experts on what has been termed the protein malnutrition/asthma basis of liability. They tender the reports of two experts, a forensic pathologist and an expert in pediatric bone disorders and genetics, as fresh or new evidence on the appeal from conviction.

The Opinion of Dr. Michael Shkrum

[17] Dr. Michael Shkrum is a forensic pathologist. He disagrees with Dr. Pollanen's opinion about the cause of the deceased's death. In his view, the deceased died of heart failure due to megaloblastic anemia and Vitamin D deficiency. The deceased had an enlarged heart. This could have resulted from her Vitamin D deficiency rickets and/or her anemia. This predisposed her to heart failure. Vitamin D deficiency rickets is associated with sudden unexpected deaths in children, as well as with heart disease.

[18] Dr. Shkrum disagrees with Dr. Pollanen's conclusions that the deceased died from complications of an asthma attack. There were no characteristic signs of acute asthma at autopsy and no definitive evidence that the deceased died of an acute asthma attack. Dr. Shkrum agrees with Dr. Pollanen that the deceased had Vitamin D deficiency rickets and megaloblastic anemia due to a deficiency in Vitamin B12.

[19] Dr. Shkrum also found no compelling evidence that the deceased suffered from protein malnutrition as was described by Drs. Pollanen and Zlotkin. The deceased's weight was low for her age, but appropriate for her height. She could not be described as "wasted", nor was she at increased risk of sudden death from acute malnutrition or starvation.

[20] Dr. Shkrum also questions whether diabetes could be definitively ruled out as a contributing cause of death. However, he does acknowledge that there was no conclusive evidence of diabetes or of ketoacidosis, a potentially fatal complication of diabetes.

[21] In his response to Dr. Shkrum's report, Dr. Pollanen agrees that the deceased did not die during an acute asthma attack. He no longer adheres to his evidence at trial that asthma played a role in the deceased's death. He now attributes her death to malnutrition. He does not agree with Dr. Shkrum about congestive heart failure, but accepts that Vitamin D deficiency can cause significant functional impairment, such as cardiac output dysfunction and arrhythmia.

The Opinion of Dr. Miller

[22] Dr. Miller concludes that the deceased had severe Vitamin D deficiency rickets. This is a systemic disease affecting not only bones, but also the heart, muscles and immune system. It could also be associated with the deceased's stunted growth and delayed development, signs Dr. Pollanen considered indicative of protein malnutrition. In Dr. Miller's opinion, Dr. Pollanen underestimated the potential severity of Vitamin D deficiency rickets.

[23] In his response, Dr. Zlotkin did not resile from his opinion that the deceased had a serious form of protein malnutrition. Although, as Dr. Shkrum concluded, the

deceased was not acutely malnourished, but she was severely chronically malnourished for both her weight and height. Although not at risk of sudden death from acute malnutrition, she was at risk of sudden death from protein-energy malnutrition.

The Fresh Evidence

[24] The appellants seek to introduce as fresh or new evidence the reports of Dr. Shkrum and Dr. Miller. Neither has been cross-examined. The parties jointly submit that the opinions should be received under s. 683(1)(d) of the *Criminal Code*.

The Principles Governing Admissibility

[25] Fresh or new evidence may be admitted on appeal if the panel of the court hearing the appeal considers it in the interest of justice to receive it. The "interests of justice" include, but are not limited to:

- i. the interests of accused in having an adjudication of their guilt determined on the basis of all the available evidence; and
- ii. the preservation and promotion of the integrity of the criminal justice process in which the trial provides the opportunity to present their cases and advance arguments about disposition and the appeal offers the parties the opportunity to challenge the correctness of what happened at trial.

See, *R. v. Truscott*, 2007 ONCA 575, 225 C.C.C. (3d) 321, at para. 101.

[26] An essential aspect of “the interests of justice” is the reliability of the verdict rendered at trial. And so it is that fresh evidence may be tendered and admitted on appeal to challenge factual findings essential to the trial verdict: *R. v. Manasseri*, 2016 ONCA 703, 344 C.C.C. (3d) 281, at para. 201. This includes factual findings critical to proof of an essential element of the offence of which an appellant has been convicted.

[27] The criteria or principles which inform the exercise of our authority to receive fresh or new evidence in the interests of justice may be reduced to three:

- i. admissibility;
- ii. cogency; and
- iii. due diligence.

See, *Truscott*, at para. 92; *Manasseri*, at para. 203.

The Admissibility Requirement

[28] The parties agree, as do we, that the proposed evidence would be admissible if tendered at trial. It consists of the opinions of duly qualified experts within their respective fields of expertise. It satisfies the requirements laid down by the Supreme Court of Canada in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at paras. 19, 24.

The Cogency Requirement

[29] To satisfy the cogency requirement the proposed evidence must be relevant to a potentially decisive trial issue; be reasonably capable of belief; and sufficiently probative that it could reasonably be expected to have affected the result at trial: *Truscott*, at para. 99; *Manasseri*, at para. 205.

[30] The proposed evidence is relevant to a decisive issue at trial – the cause of the deceased's death. The appellants were charged with unlawful act manslaughter. It was incumbent on the Crown to prove beyond a reasonable doubt, if it could, that the appellants' unlawful act of failing to provide the necessities of life was a substantial contributing cause of the death of the deceased. The proposed evidence is relevant because of its tendency to show what caused the deceased to die and, by inference, whether her death originated in any unlawful conduct by the appellants.

[31] The proposed evidence, the opinions of well-qualified experts on issues within their respective fields of expertise, is reasonably capable of belief.

[32] The proposed evidence is also sufficiently probative that, when taken together with the other evidence adduced at trial, in particular the opinions of Drs. Pollanen and Zlotkin, it could reasonably be expected to have affected the result at trial.

[33] By way of example, the opinion of Dr. Shkrum undermines the diagnosis of protein malnutrition, a critical component of Dr. Pollanen's trial evidence about the mechanism of death. Dr. Shkrum's opinion that the deceased did not die from complications during an acute asthma attack contradicts Dr. Pollanen's trial evidence to that effect. Indeed, Dr. Pollanen now agrees with Dr. Shkrum's conclusion that asthma played no role in the deceased's death.

[34] The proposed fresh evidence also assigns a different significance to the Vitamin D deficiency of the deceased as a contributing factor in her death. Dr. Pollanen now agrees that, in giving evidence at trial, he had not considered the deleterious functional effects of this deficiency.

[35] Although the jury could have concluded that reasonable parents would be aware of the absence of protein in their child's diet and the risk that it posed, a jury could conclude that a reasonable parent may not realize that their child's diet lacked adequate vitamins D and B12.

The Due Diligence Issue

[36] Despite the lack of due diligence at trial in obtaining this evidence, we are not persuaded that its absence warrants rejection of this obviously cogent evidence when tendered for reception in this court. The medical issues raised by the fresh evidence are complex. The basis of liability to which they are directed was the lynchpin of the case for the Crown at trial. The Crown's principal witness

on cause of death – Dr. Pollanen – has modified the opinion he gave at trial about cause of death. Lack of due diligence, we are satisfied, affords no ground to reject this evidence.

Disposition

[37] For these reasons, we admit the opinions of Dr. Shkrum and Dr. Miller as fresh evidence, allow the appeals from conviction, set aside the convictions entered at trial and order a new trial on the indictment.

“Janet Simmons J.A.”

“David Watt J.A.”

“L.B. Roberts J.A.”