COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Lambert, 2024 ONCA 391
DATE: 20240514
DOCKET: C68323

Tulloch C.J.O., George and Monahan JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Alexander Lambert

Appellant

Brian Snell, for the appellant

Molly Flanagan, for the respondent

Heard: April 17, 2024

On appeal from the conviction entered on December 2, 2019 and the sentence imposed on January 15, 2020 by Justice K. Gorman of the Superior Court of Justice, sitting with a jury.

REASONS FOR DECISION

[1] The appellant was found guilty by a jury of second-degree murder in connection with the death of David Hole. The trial judge imposed a life sentence, without parole for a period of 15 years.

[2] He appeals his conviction on the basis that the trial judge erred in her *Browne v. Dunn* instruction to the jury as well as in her instructions on the state of

mind required for murder. He further appeals his sentence, and more specifically, the imposed 15-year period of parole ineligibility on the basis that the trial judge overemphasized aggravating factors and underemphasized mitigating factors in her sentencing analysis.

[3] At the conclusion of oral submissions, we advised counsel that the conviction appeal was dismissed with reasons to follow. We reserved on the sentence appeal.

[4] These are our reasons explaining why we dismiss both the conviction and sentence appeals.

BACKGROUND FACTS

[5] It is agreed that Mr. Hole died while in the basement apartment of one James McGillivary, and that both Mr. McGillivary and the appellant were present at the time. It was also agreed that there was a physical altercation between Mr. Hole and the appellant, and that the appellant had placed Mr. Hole in a chokehold which rendered him unconscious. The appellant and Mr. McGillivary later disposed of Mr. Hole's body.

[6] What was in dispute was whether the appellant had caused Mr. Hole's death and, if so, whether he had the state of mind required for second-degree murder.

[7] Mr. McGillivary, who testified for the Crown, said that he, Mr. Hole, and the appellant were smoking crack cocaine in the basement of his apartment on the

day in question. Mr. McGillivary said that when Mr. Hole attempted to leave, the appellant followed him up the basement stairs. An altercation ensued, during which time Mr. McGillivary said he observed the appellant striking Mr. Hole with a mallet and then placing him in a chokehold. The altercation ended when Mr. Hole stopped moving and lay on the ground. Mr. McGillivary said the appellant checked Mr. Hole's pulse and said, "he's dead".

[8] Mr. McGillivary and the appellant divvied up Mr. Hole's money and drugs and smoked crack cocaine while Mr. Hole's body lay on the floor nearby, before moving the body into a closet. At some point, Mr. McGillivary picked up the mallet from the ground and put it in a hole in the staircase wall, before discarding it outside later that night. The next day, Mr. McGillivary and the appellant moved Mr. Hole's body to the backseat of his car and drove the car to a parking lot, where they locked it and walked away. Mr. Hole's body was discovered some weeks later.

[9] The appellant testified at trial. He acknowledged that he and Mr. Hole had been engaged in an altercation and that he placed Mr. Hole in a "sleeper hold", intending to cut off his airway or his blood flow in order to render him unconscious. He said he did so in order to calm Mr. Hole down. After Mr. Hole lost consciousness, the appellant placed him on the floor. The appellant testified that he did not believe he had killed Mr. Hole using the chokehold.

[10] The appellant said that after placing Mr. Hole on the floor, he went out for a cigarette. When he returned, he saw Mr. McGillivary standing over Mr. Hole's body, either holding the mallet or Mr. Hole's fanny pack of drugs. According to the appellant, Mr. McGillivary said, "he [Mr. Hole] is dead".

[11] The appellant maintained that he did not kill Mr. Hole because he did not believe that the sleeper hold would kill him. He further testified that Mr. McGillivary was always talking about robbing and killing Mr. Hole, and that Mr. McGillivary must have killed Mr. Hole by choking him and using the mallet.

ANALYSIS

A. THE TRIAL JUDGE REASONABLY EXERCISED HER DISCRETION IN PROVIDING A *BROWNE V. DUNN* INSTRUCTION

[12] At the request of the Crown, the trial judge included a *Browne v. Dunn* instruction in her charge to the jury. The trial judge included the instruction on the basis that the appellant had testified to several facts that led to the inference that Mr. McGillivary had wielded the mallet and killed Mr. Hole, and yet Mr. McGillivary was never confronted with the substance of this allegation.

[13] After explaining that the rule in *Browne v. Dunn* is intended to ensure trial fairness by providing a witness with the opportunity to respond to contradictory evidence, the trial judge instructed the jury as follows:

> So a failure to ask a question about such evidence is something you will want to consider. For example, [the appellant] testified that when he returned downstairs from his cigarette break, he saw James McGillivary standing over Mr. Hole's body. Initially he said, with the hammer in his hand.
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> He testified that he never used the hammer and he testified that he saw James McGillivary put the hammer in the bag. Further, he testified that Mr. McGillivary was always talking about robbing and killing David Hole. These assertions were never put to Mr. McGillivary for his agreement or denial.
>
> Well, witnesses not cross-examined about events that are significant to the facts in issue in this trial, you may take the failure to cross-examine the witness into account in assessing how much, if you will, believe that witnesses' evidence and the contradictory evidence that [the appellant] gave later. It is for you to say.

[14] The appellant argues that this instruction was an error for two reasons.

[15] First, he says it was factually incorrect to tell the jury that Mr. McGillivary had not been questioned about these matters. For example, the appellant argues that Mr. McGillivary was asked in cross-examination whether he had hit Mr. Hole with the mallet, and whether he had suggested to the appellant that he wanted to rob and kill Mr. Hole.

[16] Second, relying on the decision of this court in *R. v. McNeill* (2000), 48 O.R. (3d) 212 (C. A.), the appellant says, even if it could be argued that some of these matters had not been put to Mr. McGillivary in a clear enough way, the trial judge

was under an obligation to also tell the jury that the appellant should not be held responsible for the actions of his lawyer.

[17] Designed to ensure trial fairness, the rule in *Browne v. Dunn* is not fixed or subject to a pre-determined formula. The extent of its application lies within the discretion of the trial judge who should be accorded considerable deference in its application: *R. v. Foreshaw*, 2024 ONCA 177, at para. 54. Such deference is appropriate since "[a] trial judge has a reserved seat at trial. We have a printed record": *R. v. Quansah*, 2015 ONCA 237, 323 C.C.C. (3d) 191, at para. 101, leave to appeal refused, [2016] S.C.C.A. No. 203.

[18] Viewed through this lens, we see no error in the trial judge's *Browne v. Dunn* instruction. While the appellant's counsel had indeed touched on certain aspects of these matters in his cross-examination of Mr. McGillivary, he never directly confronted Mr. McGillivary with the substance of the contradictory evidence, namely, that it was Mr. McGillivary rather than the appellant who had killed Mr. Hole. In our view, it was reasonable for the trial judge to provide a *Browne v. Dunn* instruction in the manner she did.

[19] Nor was the trial judge required to provide an instruction similar to that found necessary in *McNeill*. In *McNeill*, the Crown had cross-examined the accused about his lawyer's failure to cross-examine a witness on certain matters. In these circumstances, fairness required the trial judge to instruct the jury that the accused

should not be held responsible for the conduct of his counsel. But no such cross-examination of the appellant occurred in this case, and no corresponding obligation to provide an instruction as was found necessary in *McNeill* arose here.

[20] As noted above, there is no fixed formula that must be followed in providing a *Browne v. Dunn* instruction. In this case, the trial judge reasonably exercised her discretion to provide a *Browne v. Dunn* Instruction and we see no basis for appellate intervention.

B. THE TRIAL JUDGE DID NOT ERR IN HER INSTRUCTIONS ON THE STATE OF MIND REQUIRED FOR MURDER

[21] The appellant concedes that, at various points in her charge, the trial judge correctly instructed the jury on the proper state of mind required for murder.

[22] For example, her instructions included the following clear direction on this issue:

> For an unlawful killing to be murder, Crown counsel must prove beyond a reasonable doubt that [the appellant] either meant to kill David Hole, or meant to cause David Hole bodily harm and that he knew it was likely to kill David Hole and was reckless as to whether or not David Hole died or didn't.
>
> In other words, to prove that [the appellant] committed murder, the Crown must satisfy you beyond a reasonable doubt, either that [the appellant] meant to kill David Hole or that he meant to cause David Hole bodily harm that he knew was so serious and dangerous, that it would likely kill him, and proceeded, despite his knowledge that Mr. Hole would likely die as a result. [Emphasis added].

[23] She reiterated the mental element required for the offence of murder later in her instructions:

> To help you determine whether the Crown has proven beyond a reasonable doubt that [the appellant] had one of those intents required to make the unlawful killing of David Hole, murder, you may conclude, as a matter of common sense, that a person usually knows the predictable consequences of his or her actions, and means to bring them about.
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> …
>
> You may, but are not required to reach the conclusion about [the appellant]. Indeed, you must not do so if, on the evidence as a whole, including [the appellant's] position that what happened was an accident, you have a reasonable doubt whether he had one of the intents required to make the unlawful killing murder.
>
> Consider, in particular, whether that evidence causes you to have any reasonable doubt about whether he knew that David Hole would likely die from the bodily harm that he caused. It is for you to decide based on all of the evidence. [Emphasis added].

[24] After summarizing the relevant evidence, the trial judge repeated once again her earlier instruction that the jury had to decide whether the Crown has proven beyond a reasonable doubt "that [the appellant] meant either to kill David Hole or meant to cause him bodily harm, that [the appellant] knew was likely to kill David Hole, and was reckless as to whether or not Mr. Hole died."

[25] The trial judge then provided the following instruction which the appellant argues was in error (the "impugned instruction"):

> In deciding whether [the appellant] had either state of mind required to make the unlawful killing of Mr. Hole, murder, you must consider the evidence of [the appellant] that he did not cause the death of David Hole.
>
> You should consider this evidence not just by itself on the particular issue, to which it relates, but all together and along with any other evidence that might suggest that [the appellant] acted instinctively, in his desire to calm David Hole down.
>
> The evidence does not necessarily mean that [the appellant] did not have either state of mind necessary to make the unlawful killing of David Hole murder.
>
> The fact that [the appellant] may have been upset with Mr. Hole or wanted to calm him down, is not necessarily inconsistent with either state of mind required to make an unlawful killing murder. As a matter of fact, evidence of some of these states or conditions may actually give rise to one of other of the states of mind required to make an unlawful killing murder. [Emphasis added].

[26] The appellant argues that the impugned instruction was confusing. He submits that it may have been taken by the jury to mean that, even if they believed he did not intend either to kill the deceased or to apply force that he knew was likely to cause death, they could still find he had the state of mind required to convict him of murder. He further argues that the impugned instruction was erroneous in law because it failed to alert the jury that the appellant could not be convicted of murder in the absence of a subjective foresight of death.

[27] We do not agree.

[28] The trial judge clearly instructed the jury on three separate occasions that the appellant could only be convicted of murder if they found either that he intended

to kill Mr. Hole, or that he intended to apply force that he knew was likely to kill him, and yet proceeded anyway. The impugned instruction does not derogate from or alter her instructions in that regard.

[29] By the appellant's own admission, he put Mr. Hole in a "sleeper hold" with the intention of cutting off blood flow to Mr. Hole's brain and to render him unconscious. Thus, although the appellant's motive may well have been to calm Mr. Hole down, it was open to the jury to find that he acted on that motive by intentionally applying force that he knew was likely to cause Mr. Hole's death. There was nothing improper in this instruction as proof of motive is not necessary to prove intent: *R. v. Chartrand*, [1994] 2 S.C.R. 864, at p. 893.

[30] The jury was clearly instructed that, to find the appellant guilty of murder, the Crown had to prove beyond a reasonable doubt that the appellant intended to kill Mr. Hole or intended to cause him bodily harm that he knew was likely to cause death. Consistent with the functional approach to the assessment of jury instructions set out *R v. Abdullahi*, 2023 SCC 19, 483 D.L.R. (4th) 1, at paras. 34-37, the jury was adequately and sufficiently instructed to decide the case according to the law and the evidence.

[31] We therefore would not give effect to this ground of appeal.

C. THE TRIAL JUDGE DID NOT ERR IN IMPOSING A 15-YEAR PAROLE INELIGIBILITY PERIOD

[32] The appellant argues that the trial judge erred by overemphasizing the aggravating factors and under emphasizing the mitigating factors in imposing a life sentence with a 15-year parole ineligibility period. He argues that the trial judge may have been overwhelmed by her distaste for the nature of the offence, as shown in her description of it as a "brutal, senseless act of violence".

[33] As with all appeals against sentence, the determination of parole ineligibility is owed substantial deference on appeal: *R. v. Yabarow*, 2023 ONCA 400, 427 C.C.C. (3d) 532, at para. 68. The weight assigned to aggravating and mitigating factors lies within the discretion of the sentencing judge. An appellate court cannot intervene simply because it would have weighed these factors differently. Absent an error in principle that had an impact on sentence, the period of parole ineligibility should only be disturbed if it is demonstrably unfit: *R. v. Shropshire*, [1995] 4 S.C.R. 227, at paras. 43-53; *R. v. Lacasse*, 2015 SCC 64, 3 S.C.R. 1089 at paras. 44, 49-50, 78.

[34] In our view, the trial judge committed no error in principle that impacted the sentence. The trial judge considered the relevant aggravating and mitigating factors and it is not for this court to substitute our views as to their relative weight. The trial judge's use of adjectives such as "brutal" and "senseless" to describe the

offence did not amount to an error in principle. She was entitled to use such descriptive language based on her assessment of the appellant's conduct.

[35] Moreover, the 15-year period of parole ineligibility falls within the range of parole ineligibility periods imposed in similar circumstances and is not therefore demonstrably unfit: *R. v. Hamade*, 2015 ONCA 802, at para. 32.

CONCLUSION

[36] For these reasons the appeal against conviction is dismissed. While leave to appeal sentence is granted, the sentence appeal is dismissed.

"M. Tulloch C.J.O."
"J. George J.A."
"P.J. Monahan J.A."