NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Cromwell*, 2016 NSCA 84

Date: 20161110
Docket: CAC 431387
Registry: Halifax

Between:

Aidan David Cromwell

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Beveridge, Saunders, and Van den Eynden, JJ.A.
Appeal Heard:	May 16, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Van den Eynden, J.A.; Beveridge and Saunders, JJ.A. concurring
Counsel:	Jerome Kennedy, Q.C., for the appellant Marian Fortune-Stone, Q.C., for the respondent

Reasons for judgment:

Overview

[1] A jury found Mr. Cromwell guilty of second-degree murder. The trial judge (Justice Glen McDougall) sentenced him to a term of life imprisonment with no eligibility for parole for 11 years.

[2] Mr. Cromwell appealed, alleging, among other grounds, that the trial judge erred by instructing the jury that his post-offence conduct could be used in deciding whether he had the necessary intent for murder, and by refusing to provide a proper limiting instruction to the jury on the use of such post-offence conduct.

[3] The Crown conceded the judge's instruction to the jury was not correct in law. The Crown further conceded the error made by the trial judge could not be saved by the curative *proviso*.

[4] Although the Crown's concessions are not binding upon this Court, given the record, the concessions were proper and fair in the circumstances. The Crown's candor is commendable.

[5] At the conclusion of submissions, the panel was of the unanimous view that the appeal should be allowed, the conviction set aside and a new trial ordered. Reasons were to follow. These are our reasons.

Issues:

[6] The appellant raised the following grounds of appeal:

1. Did the trial judge err by failing to provide a proper limiting instruction to the jury on the use of post-offence conduct?
2. Did the trial judge err by failing to edit the Appellant's videotaped police statement and the transcript of the same before providing them to the jury?
3. Did the trial judge err by failing to provide a proper limiting instruction to the jury on the use of evidence of bad character?
4. Did the trial judge err by failing to properly recharge the jury on the two questions asked during their deliberations?

5. Did the trial judge err by failing to provide the jury with a “rolled-up instruction” on the issue of the intent required for murder?

6. Is the guilty verdict for second degree murder unreasonable and not supported by the evidence?

The Appellant also made a motion to introduce fresh evidence.

[7] For the reasons set out herein, Mr. Cromwell succeeds on his first ground of appeal. As this issue is dispositive of the appeal, we need not address the remaining issues 2 through 5 nor the appellant’s motion to adduce fresh evidence. We need not deal with them, since the remedy for any or all of these putative errors would be an order for new trial. Our focus on the trial judge’s error with respect to post-offence conduct evidence should not be taken as an endorsement of the admissibility of the evidence heard by the jury in the first trial, nor the content and structure of the jury charge.

[8] We briefly address the sixth and remaining complaint that the verdict of second degree murder is unreasonable or not supported by the evidence. The only appropriate remedy, if that complaint were made out, is an acquittal. This ground was not extensively nor forcefully argued by the appellant. We agree with the Crown; this complaint has no merit. The verdict is one which a properly instructed jury acting judicially could reasonably have rendered. (See *R. v. W.H.*, 2013 SCC 22.)

Background

[9] Although the trial judge’s incorrect instruction to the jury on the use of post-offence conduct is the determinative issue, a brief review of the background, including Mr. Cromwell’s post-offence conduct, provides helpful context. I now turn to setting out the background.

[10] Late evening, on February 2, 2012, Mr. Cromwell fatally stabbed Marc Tremblay. That fact was acknowledged by Mr. Cromwell at trial. Prior to the stabbing incident, Mr. Cromwell and his girlfriend were walking along a street in Halifax. Apparently, the couple had been bickering.

[11] Mr. Tremblay, who was out walking with a friend, noticed the couple and decided to veer off and follow them. While doing so, he aggressively hurled insults at them, saying, for example, “… you suck … you pieces of shit”.

[12] Mr. Cromwell told Mr. Tremblay that he “didn’t have time for this shit” and Mr. Cromwell and his girlfriend kept on walking. There was no evidence that either Mr. Cromwell or his girlfriend wanted to engage with Mr. Tremblay. In fact, it appears they tried to ignore the insults. However, Mr. Tremblay continued to verbally insult and follow the couple, ignoring the pleas from his friend to turn back and stop antagonizing them.

[13] Shortly thereafter, a brief but fatal altercation occurred between Mr. Cromwell and Mr. Tremblay. The Crown and defence versions of the altercation differ. Because of the dispositive nature of the first ground of appeal, I need not elaborate on the varying version of events. What is clear is that Mr. Cromwell withdrew a knife from his backpack and forcefully stabbed Mr. Tremblay in the chest when they did physically encounter each other.

[14] Mr. Cromwell and his girlfriend then ran off. Mr. Tremblay tried to pursue them, but he quickly fell to the ground. Mr. Tremblay’s friend, who was close by during these events, came to Mr. Tremblay’s aid. However, Mr. Tremblay succumbed to his injuries.

[15] Prior to the altercation, Mr. Tremblay had been drinking at his friend’s apartment. Before arriving at his friend’s place, Mr. Tremblay had already consumed alcohol. He apparently drank a lot that night. The Chief Medical Examiner’s autopsy report noted a blood alcohol level of 264 milligrams per decilitre of alcohol in the victim’s blood. He opined that the blood alcohol level would have been the same at the time of death and, at this level, Mr. Tremblay would have been significantly impaired.

[16] Mr. Tremblay was 25 years old at the time of his death. He was approximately 6’2” and weighed about 218 pounds.

[17] At the time of the incident, Mr. Cromwell and his girlfriend were both 18 years old. Mr. Cromwell is a slighter build than the victim. Mr. Cromwell is 5’9” and weighed 140 to 150 pounds. His girlfriend was considerably smaller.

[18] The Crown’s characterization of Mr. Cromwell’s post-offence conduct included him fleeing from the scene and not calling police; throwing away the knife; hiding the hoodie and footwear he was wearing during the incident; hiding his backpack, which had previously contained the knife; and hiding himself in a closet of his girlfriend’s apartment when the police came to arrest him in the early hours of February 3, 2012.

[19] Through his cautioned statement to the police, Mr. Cromwell admitted to the stabbing, but argued he did not intend to kill the victim and acted in self-defence. Mr. Cromwell told police he was concerned for his girlfriend's and his own safety. He further told police that even the sight of his knife had no effect on Mr. Tremblay as he continued to advance towards him and that he thought he stabbed Mr. Tremblay in the arm/shoulder area.

[20] On the night of the incident and his arrest, Mr. Cromwell and his girlfriend were not supposed to be together. She was subject to court-imposed no contact provisions. The relevance of this point will be discussed later in relation to a possible innocent explanation for Mr. Cromwell's post-offence conduct.

[21] A jury convicted Mr. Tremblay on March 25, 2014, and Justice Glen McDougall sentenced him on August 29, 2014. (See *R. v. Cromwell*, 2014 NSSC 322.)

Analysis

Issue 1: Did the trial judge err by failing to provide a proper limiting instruction to the jury on the use of post-offence conduct?

[22] Post-offence conduct (previously called evidence of consciousness of guilt) is evidence about what the accused did after an offence has been committed. It is a form of circumstantial evidence which, in appropriate circumstances, may be used to assist the trier of fact (in this case the jury) in drawing inferences. Often, post-offence conduct is admitted to demonstrate that the accused acted in a manner that is consistent with the conduct of a guilty person, not an innocent person. (See *R. v. White*, [1998] 2 S.C.R. 72 and *R. v. Hartling*, 2013 NSCA 51.)

[23] During Mr. Cromwell's murder trial several pieces of post-offence evidence, referenced earlier in this decision, were left with the jury to consider when determining his guilt or innocence. Mr. Cromwell argued the trial judge erred in his instructions to the jury respecting the permitted use of this evidence. More specifically, the appellant argued the trial judge failed to provide a limiting instruction on the use of post-offence conduct and erred by instructing the jury that this conduct could be used to determine whether Mr. Cromwell had the required intent to murder Mr. Tremblay.

[24] The crime of murder requires proof of a particular state of mind. For an unlawful killing to be murder, the Crown bears the onus of proving Mr. Cromwell intended to kill Mr. Tremblay or meant to cause bodily harm that he knew was

likely to cause his death, and was reckless whether death ensued or not (s. 229 of the *Criminal Code*, R.S.C. 1985, c. C-46).

[25] What principles guide an appellate court's review of the sufficiency of a trial judge's instruction to a jury? An appellate court must take a functional and contextual approach. Meaning the instructions are to be reviewed as a whole, not minutely dissected. They are also to be reviewed in the broader context of the evidence, live issues at trial, and submissions from counsel. Substance prevailing over form is a well-established principle. (See *R. v. Daley*, 2007 SCC 53 and *R. v. Araya*, 2015 SCC 11.)

[26] Jury instructions need not be perfect. They need to be adequate. Anyone charged with a criminal offence, and tried before a jury, is entitled to a properly, but not perfectly, instructed jury. The manner in which the trial judge instructs the jury and relates the evidence to the law is discretionary; however, the instructions must equip the jury such that the evidence is left with them in a way which allows them to fully appreciate the issues and defences advanced. (See *Daley* and *R. v. Melvin*, 2016 NSCA 52.) These are the principles we have applied in considering the trial judge's instruction to the jury.

[27] It is widely acknowledged that post-offence conduct is inherently susceptible to error. Often, post-offence conduct is open to more than one interpretation or conclusion. The dangers lie in a jury failing to consider alternate reasons (innocent explanation) for the conduct and/or wrongly leaping from such evidence to a finding of guilt. A trial judge must be vigilant and properly instruct the jury on the use of this evidence. Otherwise, this evidence is open to misuse by a jury. (See *White* and *Hartling*.)

[28] In Mr. Cromwell's case, the Crown led evidence of post-offence conduct. If post-offence conduct evidence is admitted, a limiting instruction to the jury is usually required. The critical question is: what instruction was the trial judge required to give the jury to guide them in the handling of this post-offence conduct evidence?

[29] The Crown conceded and the panel agreed, that the trial judge erred in his instructions to the jury. I now turn to summarize how the error unfolded in Mr. Cromwell's trial.

[30] During the pre-charge conference the trial judge was alive to the issue of post-offence conduct. He sought counsel's input on how he should instruct the jury. Defence counsel took the position that post-offence conduct was of limited,

if any value, as identity of the accused was not in issue. Mr. Cromwell had admitted to stabbing Mr. Tremblay. At issue was whether that act was lawful (in self-defence), and, if not, whether Mr. Cromwell had formed the requisite intent to commit murder. Furthermore, defence counsel maintained that the post-offence conduct was open to an alternate, more favourable inference, which not did suggest a guilty conscience. That more favourable inference being, Mr. Cromwell's fleeing and hiding in a closet in his girlfriend's apartment was to protect her as she was under conditions to stay away from Mr. Cromwell.

[31] The trial judge did not provide counsel with a copy of his charge to the jury in advance. Counsel only became aware of the problematic instructions as they were being delivered. Partway through the jury charge, defence counsel, in the absence of the jury, informed the trial judge that he had concerns with the instructions on post-offence conduct and sought to have the instructions corrected.

[32] Defence counsel articulated to the trial judge that in the trial judge's formulation of questions the jury had to answer respecting the guilt or innocence of Mr. Cromwell, he incorrectly made reference to how the jury could and should use post-offence conduct evidence of the accused. Defence counsel was (and rightly so) particularly concerned with the instructions surrounding question number three.

[33] For context, the first question posed to the jury was whether Mr. Cromwell caused Mr. Tremblay's death. The trial judge instructed to the effect that Mr. Cromwell had stabbed Mr. Tremblay and thus the required element of causing his death was proven beyond a reasonable doubt. The second question was whether Mr. Cromwell unlawfully caused Mr. Tremblay's death or whether Mr. Cromwell acted in self-defence? The references the trial judge made to post-offence conduct evidence were not inappropriate at this stage of the decision tree.

[34] It is with the third question, and the trial judge's related instructions to the jury, where the critical error was made. The third question for the jury to answer was whether Mr. Cromwell had the state of mind (intent) to commit murder. In answering this third question the trial judge instructed the jury:

> . . . Crown counsel must prove that Mr. Cromwell meant either to kill Mr. Tremblay or meant to cause Mr. Tremblay bodily harm that Mr. Cromwell knew was likely to kill Mr. Tremblay and was reckless whether Mr. Tremblay died or not. The Crown does not have to prove both. One is enough. All of you do not have to agree on the state of mind as long as everyone is sure that one of the required states of mind has been proven beyond a reasonable doubt.

> If Mr. Cromwell did not mean to do either, Mr. Cromwell committed manslaughter. To determine Mr. Cromwell's state of mind, what he meant to do, you should consider all the evidence. You should consider what he did or did not do, how he did or did not do it and what he said or did not say. You should look at Mr. Cromwell's words and conduct before, at the time and after the unlawful act that caused Mr. Tremblay's death. All these things and the circumstances in which they happened may shed light on Mr. Cromwell's state of mind at the time. They may help you decide what he meant or didn't mean to do.
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> [. . .]
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> You should also consider the evidence of Jamie Slauenwhite who witnessed Aidan Cromwell, a person he knew from previous contact, and a female running away from the scene. Was this someone who knew he had committed a crime and was attempting to avoid being caught or was this a young man and his girlfriend fleeing from a perceived threat?
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> You should also consider Halifax Regional Police Service Constable Derek Fish and RCMP Constable Jody Allison's testimony regarding their efforts to, first, locate then arrest Aidan Cromwell at the Mayo apartment at 103 Evans Avenue. Again, is this the conduct of someone knowing he had committed a crime and was hiding from the police or was it someone who was simply trying to protect his girlfriend who was bound by a court order not to have any contact or communication directly or indirectly with him?

[35] Defence counsel appropriately and clearly pointed out to the trial judge that the post-offence conduct would be of little utility in deciding whether Mr. Cromwell had the intent to commit murder or manslaughter. Defence counsel explained:

> Murder or manslaughter, there'd be a guilty mind with respect to both. If the unlawful act was the stabbing, as Your Lordship points out, 267(a), the same state of mind as far as post incident conduct, the running, the hiding, all of the rest, would be identical for both states of mind, I would suggest, so it would be of little utility at that point in time.

[36] Although the trial judge indicated he would consider the concerns of defence counsel, he proceeded to finish his planned charge to the jury before doing so.

[37] Once again, during the post-charge conference, defence counsel clearly repeated his concerns with the trial judge's instructions on post-conduct evidence respecting question number three.

[38] The trial judge refused to recharge the jury on the use of post-offence conduct when answering question number three. The trial judge said this:

> And with regard to defence counsel's concern with respect to the post event conduct of Mr. Cromwell being mentioned in relation to question three and not question two, I'm not prepared to instruct the jury not to regard that in deciding whether question three has been answered or if the Crown has proved that Mr. Cromwell had the state of mind required for murder. [. . .]

[39] The trial judge did recharge the jury, instructing them to consider all of the evidence respecting question number two (whether the Crown had proved the unlawful act and by implication, disproved self-defence). The trial judge did not, as he said he would not, reinstruct on question number three (intent).

[40] At trial, Crown counsel agreed with defence counsel that there were some issues with the trial judge's instructions to the jury. However, the Crown was concerned that the potential for confusing the jury would be compounded if instructions respecting key questions the jury had to answer were reconfigured.

[41] Having summarized how the error unfolded, I now turn to relevant authorities. In *R. v. White*, 2011 SCC 13, the Supreme Court of Canada in all three judgments penned by the court recognized that evidence of post-offence conduct may not be probative as between *mens rea* for second degree murder and manslaughter. I make reference to para. 39 of Justice Rothstein's judgment where he said this:

> [39] In some cases, an item of evidence may be probative of one live issue, but not of another. For example, flight *per se* may be relevant in determining the identity of the assailant, but may not be relevant in determining the accused's level of culpability as between murder and manslaughter. In such a case, the rules of evidence remain unchanged: the evidence is left with the jury, for it to weigh with respect to the issue of identity; the jury is precluded from considering the same evidence with respect to determining the *mens rea* for murder as opposed to manslaughter, by way of a limiting instruction to the effect that this evidence is not probative of this particular live issue. That judges must sometimes give limiting instructions as to appropriate and inappropriate inferences to be drawn from the evidence is merely an application of the rule of relevance tailored to different live issues in a single case.

[42] Post-offence conduct was also an issue in *R. v. Rodgerson*, 2015 SCC 38. In *Rodgerson*, the Supreme Court of Canada upheld the majority decision of the Ontario Court of Appeal, which, in part, determined the evidence of Mr. Rodgerson's flight and lies to the police was not relevant to the issue of whether Mr. Rodgerson had the requisite intent for murder, and that the trial judge erred when he instructed the jury they could use the evidence for this purpose. Given this error (coupled with another error in instructing on additional post-offence

conduct) the Supreme Court of Canada agreed with the Court of Appeal that the error could not be saved by the curative *proviso*. Justice Moldaver, writing for the Court stated:

> [37] I should also note, in regard to the instructions on Mr. Rodgerson's flight from and lies to the police, that the legal error amounted to misdirection, not non-direction. The trial judge instructed the jury that it could use the evidence to infer that Mr. Rodgerson had the requisite intent for murder, when no such inference was available. [. . .]
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> [38] The charge contained two legal errors. First, it is not disputed that the trial judge erred by instructing the jury to consider Mr. Rodgerson's flight from and lies to the police on the issue of intent. Second, the trial judge erred in his instructions on Mr. Rodgerson's concealment and clean-up efforts.
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> [39] The Crown argues that, notwithstanding any such errors, the curative proviso should apply. I agree with Doherty J.A.'s analysis on this point. As he noted, after the jury rejected self-defence, the issue of Mr. Rodgerson's intent was "the central issue at trial", and these two errors "went directly to the jury's consideration of that issue" (para. 79). Furthermore, the Crown's case was not overwhelming. The curative proviso does not apply, and Mr. Rodgerson is entitled to a new trial for second degree murder.

[43] Similarly in *R. v. Hill*, 2015 ONCA 616, the Court of Appeal in following *Rodgerson*, found the trial judge erred when instructing the jury that certain post-offence evidence conduct of the accused was relevant to the issue of intent. Speaking for the Court, Justice Doherty reasoned:

> [61] Although Crown counsel's argument connecting some of the appellant's after-the-fact conduct to intent through proof of motive has merit, it does not assist the Crown on the appeal. The trial judge did not leave the appellant's after-the-fact conduct with the jury on the limited basis now suggested by the Crown. He invited the jury to consider the after-the-fact conduct that he identified (hiding the body, burying the body, lying to various people) as evidence of intent without any explanation or qualification. This non-direction is identical to the error identified in *Rodgerson*, at para. 28. The trial judge's open-ended invitation to the jury to consider the appellant's after-the-fact conduct as evidence from which it could infer the requisite intent for murder constituted an error in law.
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> [62] The error was potentially significant. Intent was one of two live issues at trial. Given the nature of the after-the-fact conduct, a jury could easily have concluded that the appellant acted in a callous and calculating manner for over three months in an attempt to avoid responsibility for his actions. A jury could further conclude that the callous and calculating nature of the conduct was consistent with the conduct of a murderer as opposed to someone who had not intended to kill Ms. General. Absent a proper instruction, a jury may well have

> improperly inferred from the nature of the accused's conduct after Ms. General's death that he killed her with the intent required for murder.

[44] Mr. Cromwell argued that the error the trial judge made in his case is similar to the errors in *Rodgerson* and *Hill*. Specifically, it was clearly an error of law in these circumstances to instruct the jury that the post-offence conduct could be used to determine whether he had the intent for murder or manslaughter. We agree.

[45] The Crown made several concessions relevant to this ground of appeal. I summarize them as follows:

- the trial judge incorrectly placed elements of post-offence conduct within the intent section of his charge;
- this evidence was irrelevant to resolving whether Mr. Cromwell committed murder versus manslaughter, as it was no more probative of an intent to commit murder or manslaughter;
- the error in the trial judge's charge could erroneously lead the jury to either misuse or be confused about the post-offence conduct. The danger existed that the jury could jump to guilt for murder once the jury decided that the conduct was unrelated to an innocent alternate explanation; and
- the trial judge failed to specifically instruct the jury that the post-offence conduct had no probative value on the issue of intent and could not be used for the purposes of determining intent.

[46] We unanimously agree that the trial judge did not properly instruct the jury on the proper use and limitations of post-offence conduct. In our view, the instructions were inadequate and amounted to an error of law.

[47] Is the curative *proviso* in s. 686 of the *Criminal Code* applicable? It is well established that the curative provision in s. 686(1)(b) is to be applied where the error is found to be harmless or trivial, or where the evidence is so overwhelming that, regardless of the error, a conviction was inevitable. (See *R. v. Sekhon*, 2014 SCC 15.) The Crown bears the onus of establishing that, despite the error, there would be no substantial wrong or miscarriage of justice. To its credit, the Crown also conceded the error cannot be saved by the curative *proviso*. We agree.

[48] In Mr. Cromwell's case, the error could have materially affected the jury's deliberations. As acknowledged by the Crown, once self-defence was eliminated, whether Mr. Cromwell had the requisite intent to commit murder was the central

issue for the jury to decide. They were given incorrect instructions as to how they could use certain post-offence conduct evidence in deciding that issue. The jury should have been instructed that this post-offence conduct had no probative value on the issue of intent and could not be used for the purpose of determining intent. They were not. The danger warned of in paragraph 27 herein then existed—the jury could leap from such evidence to finding the accused guilty of murder. Because it cannot be said that on this record a properly instructed jury could not convict Mr. Cromwell, the appropriate remedy is a new trial.

[49] It is worth noting that post-offence conduct is fact specific to each case. It is advisable and prudent for counsel and trial judges to carefully identify each incident of post-offence conduct and then specifically turn their minds to whether it is admissible and, during that assessment, whether its prejudicial effect outweighs its probative value. If admitted, careful attention must be given to what use it can and cannot be put. Addressing this issue fully, with clarity and at an early stage, will assist in preventing errors.

Conclusion

[50] Mr. Cromwell's appeal is allowed. We set aside his conviction and order a new trial.

Van den Eynden, J.A.

Concurred in:

Beveridge, J.A.

Saunders, J.A.