

2004 NWTSC A1

CR S-1-CR20030000103

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

IAN ADAM KIRBY



Transcript of the Ruling of The Honourable Justice J.Z. Vertes on the Defence Motion for a directed verdict, at Yellowknife in the Northwest Territories, on September 28th A.D., 2004.

APPEARANCES:

Ms. L. Colton: Counsel for the Crown.
Ms. K. Payne: Counsel for the Accused

Charge under s. 220(b) and s. 215(2)(a)(ii) of the
Criminal Code of Canada

1 THE COURT: The accused is charged with two
2 counts; Count 1 being that on September 30th, 2003
3 at Yellowknife he did, by criminal negligence, cause
4 the death of Betsy Kirby contrary to Section 220(b)
5 of the Criminal Code. And Count 2, that on the same
6 date, being the spouse of Betsy Kirby, he did fail
7 without lawful excuse to provide the necessaries of
8 life to Betsy Kirby and did thereby endanger the
9 life of Betsy Kirby contrary to
10 Section 215(2) (a) (ii) of the Criminal Code.

11 The Crown has completed its case and the
12 defence has brought a motion for a directed verdict
13 of acquittal on the basis of no evidence to support
14 the charges. In other words, defence submits that
15 there is no evidence on the basis of which the
16 accused could reasonably be convicted.

17 The theory of the Crown is that the accused was
18 present when his wife hung herself and that he did
19 nothing to intervene to save her until it was too
20 late and he was asked to do so by the deceased's
21 young child. The defence argues that the evidence of
22 the two principal witnesses is so internally
23 contradictory that it is tantamount to being no
24 evidence.

25 On a motion for a directed verdict of
26 acquittal, the test is whether there is any
27 admissible evidence, either direct or

1 circumstantial, which, if believed by a properly
2 instructed jury acting reasonably, would justify a
3 conviction. If there is, then there is no
4 justification in directing a verdict of acquittal.
5 On the application of this test, it is not my
6 function as the trial Judge to test the quality of
7 the evidence or its reliability. It is not a
8 question of determining whether the case is weak or
9 strong.

10 Defence counsel submitted that there is still a
11 responsibility to do some limited weighing of the
12 evidence at this stage. I agree. But that weighing
13 is limited simply to see if the evidence registers
14 at all as some evidence to meet the test. In other
15 words, to weigh the evidence to determine if it is
16 any evidence upon which a reasonable jury properly
17 instructed could return a verdict of guilty. It is
18 not weighed for frailties or contradictions but
19 solely to see if there is any evidence which, if
20 believed, could support a conviction.

21 This is not a jury trial but the same principle
22 applies. The question before me is simply whether
23 there is some evidence that, if accepted by the
24 trier of fact, is capable of satisfying every
25 essential element of the crimes charged.

26 To convict on Count 1, the charge of criminal
27 negligence causing death, the Crown must prove (A),

1 that the accused did something or omitted to do
2 something that was his duty to do; and (B), that he
3 showed a wanton or reckless disregard for the life
4 or safety of the deceased; and (C), that his conduct
5 caused the death of the deceased.

6 The first element relates to Count 2 in the
7 indictment, the charge of failing to provide the
8 necessaries of life and thereby endangering the life
9 of the deceased, since that is the legal duty that
10 the Crown alleges that the accused failed to do.

11 Section 215(1) of the Criminal Code, being the
12 basis for Count 2, sets out the duty of the accused:
13 Everyone is under a legal duty to provide
14 necessaries of life to their spouse or common-law
15 partner.

16 Section 215(2) sets out the offence, and I
17 paraphrase, everyone commits an offence who, being
18 under a legal duty within subsection (1), fails to
19 perform that duty if the failure to perform that
20 duty endangers the life of the person to whom the
21 duty is owed.

22 The law has held that providing medical aid or
23 intervening to save life is a "necessary" as that
24 term is used in Section 215.

25 The offence in Count 2 imposes liability on an
26 objective basis. So the Crown must prove beyond a
27 reasonable doubt that (A) the failure to perform the

1 duty would endanger the life of the deceased was
2 objectively foreseeable in the circumstances; and
3 (B), that the conduct of the accused represented a
4 marked departure from the standard of care required
5 of a reasonable person in the circumstances.

6 There is evidence presented in this case of the
7 following: First, the accused and the deceased were
8 husband and wife. Therefore the legal duty imposed
9 by Section 215(1) arises. Two, the deceased died by
10 hanging. Assuming, as indicated by the evidence,
11 that this was a suicidal act, the question becomes
12 whether the failure of the accused to intervene was
13 a marked departure from the standard of conduct
14 required. And here, as both counsel seem to agree,
15 the nub of the question is whether the accused was
16 with his wife when she hung herself.

17 There is evidence, if believed, to support a
18 conclusion that the accused was with the deceased
19 when she hung herself in the washroom. I refer
20 specifically to the evidence of Crystal Kalaserk.

21 During her examination-in-chief, she related
22 what she heard being discussed between the accused
23 and the deceased in the washroom, a discussion
24 referring to suicide, and then she testified as to
25 how she asked the young boy Brent to go check on
26 them and what she heard when Brent did this.

27 She testified, and I quote,

1 He went and knocked on the washroom
2 door, then I heard the door open and I
3 heard Brent say can you take that off
4 my mom, Ian. And then I heard Ian say
5 just wait a second and he said can you
6 please take it off, and then Ian said
7 I'll take it off and then Brent came
8 back into the room with me but he
9 never told me anything about what he
10 saw.

11 I refer also to the evidence of Brent Nelson,
12 and, in particular, to those occasions when he
13 testified that when he went into the washroom after
14 having to open the door using a Q tip, that he saw
15 his mother slumped on the floor with the washroom
16 curtain around her neck and the accused sitting on
17 the toilet looking at his watch, and that he asked
18 the accused to remove the shower curtain from around
19 his mother's neck.

20 This evidence, if believed and accepted by the
21 trier of fact, would show that the accused was
22 present and his presence could lead to an inference
23 that he had knowledge of what was happening and was
24 aware of what his wife was doing.

25 There is also evidence, primarily from the
26 expert witness, that hanging would expose someone to
27 the risk of death. Indeed I think it may be fair to

1 say that that is a common sense inference, that
2 anyone with the capacity to think would be able to
3 draw. So, if there is a duty to intervene to
4 preserve life or to prevent harm to one's spouse,
5 and I think in law there is, then I think any trier
6 of fact could conclude from the evidence, if
7 accepted, that with the deceased's action of hanging
8 herself with the shower curtain, it was objectively
9 foreseeable that a failure to intervene would
10 endanger her life. I think that a trier of fact
11 could conclude from this evidence that the
12 reasonable person in those circumstances would
13 intervene to try to save the deceased's life. These
14 are objective assessments that a trier of fact could
15 make from the evidence if accepted by the trier of
16 fact.

17 There is some evidence to support Count 2.
18 This then provides the basis for Count 1.

19 The legal duty on the accused was to provide
20 necessities of life. By his failure to intervene,
21 the accused could be said to have omitted to do his
22 duty. Thus, the first essential element is capable
23 of being satisfied by the evidence.

24 On the second element, the Crown must prove a
25 wanton or reckless disregard for the life of the
26 deceased. It must be a marked and substantial
27 departure from what a reasonably prudent person

1 would do in the circumstances. This is an objective
2 standard.

3 Again, there is evidence, if believed, that
4 demonstrates that the accused was aware of the
5 deceased attempting to kill herself, that he was
6 there when she did so and that he did nothing until
7 asked by young Brent to do so. In other words, he
8 was aware of the risk of death.

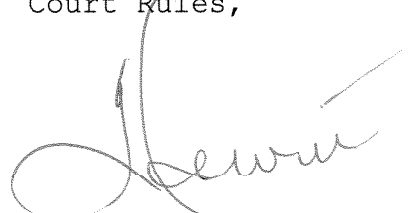
9 Finally, for this omission to cause the
10 deceased's death, it must be at least a contributing
11 cause of the death. There is evidence that hanging
12 quickly leads to unconsciousness, brain damage and
13 ultimately to death. There is evidence capable of
14 supporting the inference that prompt intervention by
15 the accused could have saved his wife's life and his
16 lack of intervention thereby contributed to her
17 death.

18 Now, there are certainly, as pointed out by
19 defence counsel, inconsistencies in the evidence.
20 But I repeat what I said earlier - this is an
21 application to dismiss the charges on the basis of
22 no evidence capable of supporting the charges. I am
23 not engaged in a weighing of the evidence to
24 determine which parts of the evidence should be
25 believed or should be rejected, which parts of the
26 evidence are capable of proving the charges beyond a
27 reasonable doubt or fail to do so. That is a

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

different assessment completely. But in my opinion,
just because there are inconsistencies in the
evidence, that is not the same thing as saying there
is no evidence upon which a properly instructed jury
acting reasonably could not convict on these
charges. For these reasons, the application to
dismiss at this stage is itself dismissed.

Certified to be a true and
accurate transcript pursuant to
Rules 723 and 724 of the Supreme
Court Rules,



Lois Hewitt,
Court Reporter