COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Colley, 2024 ONCA 524
DATE: 20240703
DOCKET: C66693 & C68802

Trotter, Thorburn and Sossin JJ.A.

DOCKET: C66693

BETWEEN

His Majesty the King

Respondent

and

Ravyn Colley

Appellant

DOCKET: C68802

AND BETWEEN

His Majesty the King

Respondent

and

Joel Roberto

Appellant

Frank Addario and Lynda Morgan, for the appellant Ravyn Colley

Mark Halfyard, Lindsay Board and James Bray, for the appellant Joel Roberto

Lisa Joyal, Andrew Cappell and Jim Clark, for the respondent

Heard: December 5-6, 2023

On appeal from the convictions entered by Justice Todd Ducharme of the Superior Court of Justice, sitting with a jury, on July 20, 2017.

By the Court:

A. INTRODUCTION

[1] The appellants, Joel Roberto and Ravyn Colley, were both charged with first degree murder for killing their son, Jaelin, who was four years old at the time. Mr. Roberto pled not guilty; Ms. Colley pled not guilty to first degree murder but guilty to manslaughter, a plea that was unacceptable to the Crown.

[2] The jury found Mr. Roberto guilty of second degree murder and Ms. Colley guilty of first degree murder. Mr. Roberto was sentenced to life imprisonment with no parole eligibility for 18 years. Ms. Colley was convicted of first degree murder and was sentenced to life imprisonment with no parole eligibility for 25 years.

[3] Both appellants advance a number of grounds of appeal. They challenge the admissibility of certain pieces of evidence and the manner in which the trial judge instructed the jury. They also seek to adduce fresh evidence concerning the conduct of the trial. This evidence relates to the trial judge's repeated attempts to have the appellants plead guilty to second degree murder. Some of the attempts were made in-chambers, another by email, and others in open court.

[4] In the first in-chambers meeting, the trial judge expressed his opinion that the appellants would very likely be convicted of first degree murder. He did so in

strong language, advising defence counsel that their clients were “fucked” if they went to trial. He encouraged all counsel to resolve the case by having both appellants plead guilty to second degree murder.

[5] Days later, a disturbing video was played in court during pre-trial motions. It depicted Jaelin with serious injuries about an hour before he died. The trial judge requested counsel’s presence in his chambers again. He said that the video was “a fucking disaster” and further encouraged guilty pleas.

[6] The trial judge followed up with an email to counsel, asking whether there was a proposed resolution. Finally, and despite the fact that both appellants were represented by experienced and competent counsel, the trial judge spoke directly to the appellants in court. He told tell them he thought they would be convicted of first degree murder and urged them to plead guilty to second degree murder.

[7] Ms. Colley’s counsel brought a motion seeking recusal of the trial judge and a mistrial based on a reasonable apprehension of bias. The trial judge dismissed the motion.

[8] The appellants submit that the fresh evidence demonstrates a reasonable apprehension of bias on the part of the trial judge. They also submit that they were excluded from their trial, contrary to s. 650(1) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[9] We accept both submissions and allow the appeals on each of these grounds.

[10] The appearance of fairness and the integrity of the trial was irretrievably compromised by the trial judge's in-chambers unsolicited opinions about the evidence, by the manner in which he expressed these opinions, and by addressing the appellants directly in open court, all with the mission of having them plead guilty. Regrettably, there must be a new trial.

B. FACTUAL BACKGROUND

[11] The facts of this case are horrific.

[12] On October 13, 2014, at about 2:09 a.m., Mr. Roberto called 911. He reported that his son Jaelin had become non-responsive. He said that two days earlier Jaelin had fallen down eight or nine stairs onto a tiled floor and hit his head.

[13] When firefighters arrived at 2:15 a.m., neither Mr. Roberto nor Ms. Colley answered the door. After knocking three times, they were finally let in. They discovered an emaciated child, who had obvious injuries to his face and body. A firefighter attempted to insert an airway into Jaelin's mouth, but his jaw was clenched shut. Jaelin was already dead.

[14] An autopsy revealed a litany of injuries all over Jaelin's body. He had significant fresh bruises to his face, including a laceration that went most of the way through his lower lip. He suffered significant blunt trauma and other impact

injuries on his thighs. Jaelin had a fractured wrist and a very inflamed ulcer inside his mouth. He also suffered a traumatic brain injury, leaving him in an unconscious or semi-conscious state, causing him to vomit. This injury jeopardized his airway.

[15] Jaelin also suffered from moderate to chronic malnutrition. He weighed 27.6 lbs at death. He weighed 29 lbs three years earlier when he was only 16 months old. Jaelin's malnutrition had been present for many weeks to months. Ms. Colley had another son, Treydyn, who seemed healthy and well-nourished.

[16] The immediate cause of Jaelin's death was "aspiration of gastric contents", complicated by "blunt impact head trauma in a child with malnutrition."

[17] Early in the investigation, the police discovered a short video on Mr. Roberto's cellphone. It was taken at 1:18 a.m., just before the 911 call. In the video, Jaelin is propped up on a couch in the basement of the family home. He is hurt badly, with angry-looking purplish/red injuries to his face. His eyes are swollen shut and he appears to be in a state of altered consciousness. There is vomit on his nose, mouth, and clothing. Jaelin draws his hands into fists and flexes his arms. A forensic pathologist and a neuropathologist described this movement as "neurological posturing" – involuntary activity due to brain damage.

[18] Mr. Roberto took the video while Ms. Colley held up Jaelin's chin. Ms. Colley testified that she was unaware that Mr. Roberto was filming. Mr. Roberto testified that Ms. Colley directed him to make the video.

[19] After the video was taken, Mr. Roberto took Jaelin into the shower and washed his body with cold water. He brought him upstairs, changed him into different clothes, set him down on the living room floor, and then called 911.

[20] Ms. Colley testified and acknowledged she was guilty of manslaughter for failing to provide the necessaries of life to Jaelin. She knew that he was underweight, but said she did not have the wherewithal to feed him, due to her limited education and an alcohol addiction. Although she attended many of her own medical appointments, she had not taken Jaelin to see a doctor for years for fear that the Children's Aid Society would take both of her children away. Ms. Colley testified that Mr. Roberto assaulted Jaelin the day that he died and that she should have called 911, but was too intoxicated to understand how ill Jaelin was. She lied to the police about Jaelin falling down the stairs.

[21] Mr. Roberto also admitted his guilt to manslaughter, based on his failure to provide the necessaries of life. He testified that Ms. Colley intentionally caused Jaelin's death by withholding food from him and by assaulting him. He failed to intervene because he was not the primary caregiver. He denied assaulting Jaelin.

C. THE ISSUES ON APPEAL

[22] As indicated at the beginning of these reasons, the appellants submit that the trial judge erred in admitting their statements into evidence, contending that

the police violated their rights under s. 10(b) of the *Charter* by insufficiently informing them of the jeopardy they faced.

[23] They submit that the trial judge also erred in failing to find that the search of Mr. Roberto's phone that led to the discovery of the video of Jaelin infringed s. 8 of the *Charter*.

[24] Both appellants also advance a number of grounds of appeal concerning the adequacy and correctness of the trial judge's final instructions to the jury.

[25] All of these grounds are in addition to their claim that the trial judge displayed a reasonable apprehension of bias and improperly excluded them from their trial, contrary to s. 650(1) of the *Criminal Code*.

[26] The remainder of these reasons address the last two grounds. In finding that there was a reasonable apprehension of bias and that the appellants were excluded from part of their trial, we conclude that there has been a miscarriage of justice and a new trial is warranted. Thus, there is little practical utility in evaluating the adequacy of the trial judge's instructions to the jury. Moreover, it will be for the new trial judge to determine the admissibility of the appellants' statements to the police and the video of Jaelin. As we explain below, these rulings are tainted by the trial judge's in-court comments, when he foreshadowed that they may "produce results" in terms of guilty pleas.

D. THE FRESH EVIDENCE

(1) Introduction

[27] The grounds of appeal discussed below arise from two meetings between all counsel and the trial judge in his chambers, in which he strongly encouraged the appellants to plead guilty to second degree murder. The trial judge followed up with counsel by email. He addressed the matter twice in open court. On the second occasion, he addressed the appellants directly, urging them to plead guilty.

[28] The fresh evidence consists of the affidavits of three defence counsel who represented the appellants at trial (two for Mr. Roberto and one for Ms. Colley). Counsel were cross-examined on their affidavits. The respondent did not apply to adduce fresh evidence. Thus, there is no affidavit from either of the two lawyers who prosecuted the case at trial. In its factum on the fresh evidence motion, the respondent “does not take issue with the contents of the affidavits”. The accounts of trial counsel are also largely confirmed by the trial judge’s comments in court, and in his ruling, in which he refused to recuse himself and declare a mistrial.

[29] In order to maintain a cohesive narrative, we review the substance of the fresh evidence in conjunction with what happened in court. But before embarking on this exercise, we make some general observations.

[30] First, when the following events transpired, the trial had commenced, even though a jury had not yet been selected. The trial judge was conducting pre-trial

motions to determine the admissibility of the appellants' statements and the video of Jaelin. The trial judge heard evidence on these motions.

[31] Second, both appellants were represented by counsel. In its factum, the respondent notes, appropriately in our view, that "the [appellants] were served by very capable and experienced trial counsel." The Crown was equally well-represented.

[32] Third, none of the lawyers in this case sought out the trial judge, or any other judge for that matter, with a view to resolving the case. It was the trial judge who initiated each of the five points of contact with counsel that are outlined below. By the time the trial judge became involved, the case had already been the subject of at least one pre-trial conference in the Superior Court. This is an important procedural requirement under the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, SI/2012-7. The pre-trial conference(s) had failed to bring about a resolution of this case. The parties were at an impasse – there was no agreement. On appeal, the respondent contends that the in-chambers discussions with the trial judge were essentially a continuation of the pre-trial conference process. As discussed in more detail below, we reject this submission. The pre-trial phase was over; the trial judge was engaged in an adjudicative capacity.

(2) The Events Detailed in the Fresh Evidence

(a) The First In-Chambers Meeting

[33] On May 10, 2017, during pre-trial motions, the court took a break in the afternoon. The trial judge said: “If I can see the lawyers, please.” He was asking counsel to attend his chambers. He did not explain why he asked them to attend. The appellants were not present. What transpired in-chambers was not recorded.

[34] Once in-chambers, the trial judge asked whether there had been resolution discussions. He saw no problem with discussing potential guilty pleas with counsel because he was not the trier of fact. The Crown said she would be prepared to accept guilty pleas to second degree murder, but that both appellants had to accept this offer.

[35] The trial judge gave his unsolicited views about the strength of the evidence against the appellants. This was before he had finished hearing evidence and submissions concerning the appellants’ statements and the video of Jaelin. He told counsel that juries do not like “child killers” and that the appellants were “fucked” if they proceeded to trial on first degree murder.[1] The trial judge said that he recommended guilty pleas to second degree murder out of a sense of

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[1] The record is less than clear on this issue, but the trial judge may have apologized for his use of profane language. In the affidavit of one defence counsel, she said that another lawyer made a comment about inappropriate language. However, in her affidavit, that lawyer denied ever saying anything to the trial judge, but admitted that her facial expressions may have conveyed her surprise or disapproval.

"compassion" for the appellants. He could not see a plausible route to convictions on manslaughter for either appellant.

[36] In their fresh evidence affidavits and in cross-examination, counsel said that they were not interested in discussing guilty pleas, although this appears not to have been communicated to the trial judge.

[37] This first meeting did not last very long, perhaps 15-20 minutes. When counsel returned to the courtroom, Crown counsel asked Ms. Colley's counsel if she was going apply for a mistrial in view of what just happened. Ms. Colley's counsel recalled telling the Crown that she "needed to process what had occurred." In cross-examination, she said, "I'm sure we were all thinking about it at that time."

(b) The Trial Judge Follows Up in Court

[38] The motions continued on May 11 and 12, 2017. On May 15, 2017, the trial judge said in court: "I take it my compassionate intervention last week has gone nowhere." Ms. Colley's counsel said, "we haven't really had a chance to discuss it."

[39] The trial judge said that he recognized that there was a dispute about the extent of the abuse suffered by Jaelin. He suggested that, if the appellants entered guilty pleas, either he or another judge could conduct a *Gardiner* hearing (see *R. v. Gardiner*, [1982] 2 S.C.R. 368) to determine this issue. He said that, if there were to be guilty pleas to second degree murder, elevated parole ineligibility

periods would be required. He invited counsel to email him if they reached a resolution. They never did.

(c) The Second In-Chambers Meeting

[40] On May 17, 2017, the video of Jaelin was played in court. As the court recessed, the trial judge said: “So, I’ll just speak to you in the back.” Again, he did not explain why he asked them to re-attend. The appellants were not present. The proceedings were not recorded. The pre-trial motions were on-going.

[41] Once in chambers, the trial judge said that, in his view, the trial would effectively turn into a long guilty plea to first degree murder. He referred to the video of Jaelin as “a fucking disaster”. In encouraging guilty pleas, the trial judge said that he did not consider the appellants to be “two innocent people in the jaws of the criminal justice system.”

[42] The trial judge said that nothing said in-chambers would prejudice his rulings on the pre-trial motions, and that his position on a potential resolution would be the same even if he were to exclude all of the evidence challenged on the *voir dire*. With respect to the video, apart from whether it was obtained in violation of s. 8 of the *Charter*, the trial judge said that he did not see how it would be excluded based on his residual discretion to exclude unduly prejudicial evidence. This was a disputed issue. The trial judge had not yet given his ruling.

[43] The trial judge offered other opinions during this in-chambers meeting. Although he had still not determined the admissibility of Ms. Colley's statement, he told trial counsel that he did not think the statement was believable. He further said that it looked as though Mr. Roberto did not wish to attend court. However, he thought the opposite of Ms. Colley, who he perceived as being "nurture[ed]" by her counsel, who consulted with her after each witness testified.

[44] The trial judge asked counsel to email him if they thought the case might resolve. However, the trial judge said that he was perfectly content to proceed with the trial with counsel, who he considered to be experienced and competent.

[45] For the purposes of the discussion below, we wish to note that the fresh evidence record reveals that, although neither of the in-chambers meetings were recorded, trial counsel told their clients what had transpired, as they were obliged to do.

[46] However, Ms. Colley's counsel explained that she may not have repeated everything that the trial judge said, such as comments she considered to be hurtful or gratuitous. As she explained, "I don't like to hurt my clients or hurt their feelings." With respect to the trial judge's "your clients are fucked" comment, and his description of the video as a "fucking disaster", trial counsel said that she may not have conveyed this to her client in the same terms. Similarly, she likely did not repeat the trial judge's observations about the so-called "nurturing" nature of their

solicitor-client relationship. Trial counsel said during cross-examination, “I’ve never had this experience before in 20 years of being a criminal defence lawyer. I’ve never had a judge speak like that about the case, or to refer to my advocacy [as] being ‘nurturing’. I mean, I’ve never had that happen before.”

(d) The Trial Judge Follows Up by Email

[47] On May 23, 2017, the trial judge emailed all counsel, asking: “I take it that there is not any proposed resolution for a plea to 2nd degree murder?” No one responded.

(e) The Trial Judge Addresses the Appellants Directly

[48] On May 24, 2017, the appellants were arraigned. The jury panel was brought into court and initial screening was done. The trial judge discussed scheduling matters and then the following exchange occurred:

> THE COURT: And, Mr. Roberto and Ms. Colley, as I’m sure you know, I have been urging your counsel and the Crown to try and resolve this case with a plea to second degree murder. I take it those discussions have not produced any results.
>
> [CROWN COUNSEL]: No, sir.
>
> THE COURT: Okay. Well, I’m still hopeful that once I make my rulings that they make, they may produce results. And I say that again because, and I say this because Ms. Colley attempted to plead guilty to manslaughter at the beginning of this process. I have a significant concern that both of you may be convicted of first-degree murder. And I do not, and admittedly I don’t know everything about the case, so it may be that you

> have evidence to give that will cast things in a completely different light. But from what I've seen of the case, I think there's a significant chance that you could be convicted of first-degree murder and I do not understand how it is that you would only be convicted of manslaughter. So, I think that means the best you can do after a trial is being found guilty of second-degree murder.
>
> Now I could be wrong, I've only been doing this for 14 years, I'm not infallible. Before that I was defence lawyer who did a lot of difficult cases like this. So, I've shared with your lawyers and the Crown my opinion about how this case should be resolved. And, again it can be resolved at any time. [Emphasis added.]

[49] Following this exchange, Ms. Colley's counsel consulted with some of her colleagues about what she should do, in light of the in-chambers meetings and the trial judge's direct communication with her client. She considered whether to bring a mistrial application. She said in cross-examination that she did not take this step lightly; she considered it to be "a big deal". She said, after the trial judge spoke directly to the appellants, "it just seemed like it had to be done" and "we felt at that point it was our only recourse." After lunch that day, Ms. Colley's counsel advised the trial judge that she intended to bring a mistrial application.

(3) The Mistrial Application

[50] The mistrial and recusal application was argued on May 25, 2017. Ms. Colley's counsel submitted that the two in-chambers meetings, his email to counsel, and his communications directly with the appellants created a reasonable apprehension of bias. She also submitted that the appellants had both been

excluded from their trial, contrary to s. 650(1) of the *Criminal Code*. Counsel for Mr. Roberto joined in the application, but made no submissions.

[51] Ms. Colley's counsel placed great emphasis on the trial judge's words, delivered in court the previous day: "Well, I'm still hopeful that once I make my rulings that may make, that may produce results." When he said these words, the trial judge had yet to rule on the admissibility of the video of Jaelin or the appellants' statements, although he subsequently admitted all of this evidence.

[52] Ms. Colley's counsel also pointed out that she did not give any indication to the Crown or the court that her client was "interested in resolution after the trial date [had] been set." The trial judge said that counsel did not object to the in-chambers discussions, and that she had failed to tell him that her client was not interested in a resolution. He said that, had there been any resistance from counsel, he would have desisted in his efforts to bring about guilty pleas.

[53] As trial counsel said during the cross-examination on her affidavit, "[the trial judge] says, 'Come into chambers,' so you go into chambers". She noted that the two Crown Attorneys also attended in-chambers and, like defence counsel, did not object to what was happening in the moment.

(4) The Trial Judge's Ruling

[54] The next day, on May 26, 2017, the trial judge gave an oral ruling dismissing the application for recusal and a mistrial. He stated the test for reasonable

apprehension of bias in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (discussed below). The trial judge said:

> I readily concede that I was attempting to persuade the parties to resolve this matter with a plea to second-degree murder, as I was concerned about the possible outcomes of the trial. I shall say no more about my reasons for doing so for fear of causing further offense.

[55] The trial judge said that no counsel resisted the in-chambers discussions, nor did they give any indication that they thought it was inappropriate to engage in such discussions. None of the lawyers told him that there would be no point in having resolution discussions, or that there would not be a resolution in this case. The trial judge said, “If they had, I would have desisted.”

[56] As for his comments made directly to the appellants, the trial judge repeated the passage from the transcript (excerpted at para. 46, above). He then said: “I reject the suggestion that I have an actual bias based on the two in-camera meetings or my comments in court.” He explained:

> My intervention was motivated by a sense of genuine compassion for both Mr. Roberto and Ms. Colley, not by any bias against either of them. I expressed a preliminary concern that Ms. Colley and Mr. Roberto may be convicted of first-degree murder, and I indicated that I did not see a route to a conviction for manslaughter.

[57] The trial judge emphasized that he was not the trier of fact. He said that the same “informed person” would realize that his opinions were preliminary. He recognized that the evidence might be different and his views about the evidence

may be wrong. He insisted that he still had an open mind. He denied undermining the solicitor-client relationship between the appellants and their counsel. He commented positively on their professionalism and competence.

[58] The trial judge also rejected the submission that he had wrongly excluded the appellants from their trial contrary to s. 650(1) of the *Criminal Code*. After referring to two cases from this court, the trial judge said:

> I did not discuss trial evidence, as I have not heard any. I did discuss some of the challenges the defence might face in the trial, but nothing in these meetings affected 'the vital interests of the accused."
>
> I also note that at neither of these meetings did either defence counsel suggest that the meetings did impact on "the vital interests of the accused," or raise a concern about s.650 (1) of the *Code*. [Emphasis added.]

[59] The motion was dismissed and the trial continued.

(5) The Fresh Evidence is Admissible

[60] The power of an appellate court to admit fresh evidence is found in s. 683(1)(d) of the *Criminal Code*:

> **683 (1)** For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,
>
> …
>
> **(d)** receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness. [Emphasis added.]

[61] The respondent acknowledges that it is “in the interests of justice” that we examine the fresh evidence, but submits that the evidence should not be admitted.

[62] The principles that apply to the type of fresh evidence tendered on this appeal have been discussed numerous times in this court’s jurisprudence, most recently in *R. v. Jaser*, 2024 ONCA 448, a case that also involved a reasonable apprehension of bias claim.

[63] In *Jaser*, at paras. 302-305, the court discussed the two categories of fresh evidence most often adduced under s. 683(1)(d). The first category is evidence that relates to a factual or legal determination made at trial, including rulings or the ultimate determination of the trier of fact: *R. v. Widdifield* (1995), 25 O.R. (3d) 161 (C.A.), at pp. 186-171. In these circumstances, the exercise of discretion to admit the fresh evidence is governed by the principles in *R. v. Palmer*, [1980] 1 S.C.R. 759. Where fresh evidence is admitted on this basis, the conviction must be set aside: *R. v. Stolar*, [1988] 1 S.C.R. 480.

[64] The second category of fresh evidence is not adduced for the purpose of challenging a factual or legal issue at trial; it is focused on the validity or fairness of the trial process. This court has admitted evidence in this category in different circumstances, including cases involving the exclusion of the accused from their trial in violation of s. 650(1) of the *Criminal Code* (*R. v. S.M.*, 2022 ONCA 765, 164 O.R. (3d) 561; *R. v. Mills*, 2024 ONCA 204), and claims of reasonable

apprehension of bias (*R. v. Poulos*, 2015 ONCA 182, 124 O.R. (3d) 675; *R. v. Cowan*, 2022 ONCA 432, 162 O.R. (3d) 321; and *Jaser*). The *Palmer* criteria are not applicable in this context. When fresh evidence is admitted on this basis, it does not automatically trigger a new trial. Instead, if admitted, it must then be determined whether the substantive claims, in this case a reasonable apprehension of bias and an infringement of s. 650(1), have been established: *Jaser*, at paras. 304-305.

[65] The fresh evidence tendered on appeal falls into the second category. There is no principled basis to refuse its admission. It is relevant to important procedural issues at trial. The evidence is in a proper form and is compliant with the rules of evidence. There is no suggestion that the evidence is unreliable. The responding party had the full opportunity to conduct cross-examinations. The respondent chose not to adduce evidence in response. The factual assertions are not disputed.

[66] The fresh evidence is admitted.

E. REASONABLE APPREHENSION OF BIAS AND THE RIGHT TO BE PRESENT

(1) Introduction

[67] The appellants submit that the fresh evidence provides cogent evidence of a reasonable apprehension of bias on the part of the trial judge by engaging in improper efforts to have the appellants plead guilty to second degree murder. He

did so at a time when he had not yet ruled on the contentious pre-trial motions that were before him. The appellants take particular issue with the trial judge's in-court comment, where he said, "Well, I'm still hopeful that once I make my rulings that they make, they may produce results." They characterize this as an attempt to leverage the appellants into pleading guilty. The appellants further contend that it was improper for the trial judge to address the appellants directly. This was an unwarranted interference into their solicitor-client relationships.

[68] The appellants further submit that the in-chambers discussions infringed s. 650(1) of the *Criminal Code*. The topic of the discussions, including the strength of the case against the appellants and the prospect of pleading guilty to second degree murder, impacted on their vital interests. They contend that, in all of the circumstances, this court should not apply the curative proviso in s. 686(1)(b)(iv).

[69] The respondent submits that the trial judge's comments, in-chambers and on the record, do not reflect a reasonable apprehension of bias. The respondent also submits that the in-chambers meetings did not run afoul of s. 650(1) because the trial judge was merely involved in pre-trial resolution discussions. That is, he was conducting a further judicial pre-trial, at which resolution discussions routinely take place. In the alternative, the respondent submits that, if s. 650(1) was infringed, the court should apply s. 686(1)(b)(iv) and dismiss the appeal. The respondent places great emphasis on the lack of resistance by counsel to the in-chambers meetings, and the fact that the appellants were informed by their

counsel about what transpired in-chambers. Indeed, the substance of the in-chambers discussions was mentioned twice in the courtroom, including when the trial judge addressed the appellants directly.

(2) There Was a Reasonable Apprehension of Bias

[70] The principles relating to a reasonable apprehension of bias have been discussed in many decisions of this court, including the recent cases of *R. v. Marrone*, 2023 ONCA 742, 431 C.C.C. (3d) 330; *Cowan*; and *Jaser*. As Zarnett J.A. said in *Marrone*, at para. 92: “It is a fundamental right of a party to a judicial proceeding that the judge is, and appears, impartial. Bias is the inverse of impartiality.”

[71] It has long been recognized “that justice should not only be done, but should manifestly and undoubtedly be seen to be done”: *R. v. Sussex, ex party McCarthy*, [1924] 1 K.B. 256, at p. 259. See also *Roy*, at p. 99; *Jaser*, at para. 310; and *R. v. K.J.M.J.*, 2023 NSCA 84, at para. 1. This principle is at the foundation of the test for reasonable apprehension of bias, which was re-stated in *Jaser*, at para. 311:

> The test for establishing a reasonable apprehension of bias is whether a reasonable person, properly informed and viewing the matter realistically and practically, would conclude that the decision-maker could not decide the case fairly: *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369, at p. 394, *per* de Grandpré J. (dissenting); *Yukon Francophone School Board, Education Area No. 23 v.*

Yukon Territory (Attorney General), 2015 SCC 25, [2015] 2 S.C.R. 282, at paras. 20-21; and *Marrone*, at para. 93

See also *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 60.

[72] In *R. v. Dowholis*, 2016 ONCA 801, 133 O.R. (3d) 1, at para. 18, the court said: “There is a strong presumption of judicial impartiality and a heavy burden on a party who seeks to rebut this presumption.” It may only be rebutted “by cogent evidence that demonstrates that something the judge did or said gives rise to a reasonable apprehension of bias”: *R. v. Richards*, 2017 ONCA 424, 349 C.C.C. (3d) 284, at para. 45. Moreover, the impugned conduct or comments of the trial judge must be viewed in the context of the entire record to determine whether the alleged bias influenced the decision-making process or the overall appearance of the fairness of the proceedings: *R. v. MacMillan*, 2024 ONCA 115, at para. 78; *Jaser*, at para. 313.

[73] This court has also repeatedly expressed disapproval of trial judges inviting counsel into their chambers during the trial to comment on the evidence and encourage guilty pleas, both because of the risk to impartiality and the risk that the accused’s vital interests may be affected: *R. v. Schofield* (2012), 109 O.R. (3d) 161 (C.A.), at paras. 19-21; *R. v. Roy* (1976), 32 C.C.C. (2d) 97 (Ont. C.A.), at pp. 98-99; *R. v. James*, 2009 ONCA 366, 95 O.R. (3d) 321, at para. 21; *Poulos*, at paras 19-22; *R. v. Dayes*, 2013 ONCA 614, 117 O.R. (3d) 324, at paras. 19-22;

and *S.M.*, at para. 38. In *Schofield*, MacPherson J.A. noted that negative comments made in-chambers by the trial judge about the appellant's just-finished testimony "seriously compromised the trial judge's impartiality": at para. 21. The court in *S.M.* said, at para. 38, that "in-chambers comments about the evidence are particularly problematic if resolution is not achieved and the trial continues. The appearance of impartiality is lost."

[74] The respondent correctly submits that the reasonable apprehension of bias test is more difficult to satisfy when the trier of fact is a jury and the impugned conduct of the judge did not occur in the presence of the jury: see *Jaser*, at para. 313; *R. v. Murray*, 2017 ONCA 393, 138 O.R. (3d) 500, at para. 97; and *R. v. John*, 2017 ONCA 622, 350 C.C.C. (3d) 397, at para. 51. However, it is possible to establish a reasonable apprehension of bias claim in these circumstances.

[75] The recent case of *Cowan* provides an example where the conduct of a judge in the context of a jury trial may still give rise to a successful reasonable apprehension of bias. In that case, the trial judge met with Crown counsel for dinner and drinks almost immediately after the jury found the appellant guilty of second degree murder.

[76] Similarly, the situation that unfolded in *R. v. Walker*, 2010 SKCA 84, 258 C.C.C. (3d) 36 illustrates the dangers of in-chambers commentary by a trial judge

in a trial with a jury. In the middle of a jury trial, the trial judge invited counsel into chambers and discussed the strength of the case and the applicability of potential defences. She inquired into whether discussions about plea bargaining had taken place. In allowing the appeal, Richards J.A. (as he then was) said the following, at para. 38: “If the criminal justice system is to be perceived as being fair and impartial, judges cannot convene private and unrecorded meetings in mid-trial for the purpose of expressing their views about the substance of the proceedings and making inquiries about plea bargaining.” That is precisely the situation in this case.

[77] In our view, the appellants have met the high burden of establishing that the trial judge’s words – both in and out of court – gave rise to a reasonable apprehension of bias. In the middle of pre-trial motions into the admissibility of key pieces of evidence, the trial judge expressed his view that the appellants were “child killers” and should plead guilty to second degree murder. He expressed his views in-chambers, using aggressive and inappropriate language. He did so on two separate occasions.

[78] A reasonable and informed member of the community would conclude that the trial judge’s initial expression of his opinion demonstrated that he had pre-judged the case in concluding that both appellants were guilty of murder. This view was reinforced each time the trial judge broached the issue with counsel, including the second in-chambers meeting, when the trial judge again expressed himself using profane language. The trial judge acknowledged in his ruling that he was not

apprised of all of the circumstances of the case, and that he might be wrong in his assessment. However, this did not stop him from expressing his strong opinions, nor did it lessen his persistence in attempting to have the appellants plead guilty.

[79] This alone was enough to demonstrate a reasonable apprehension of bias. However, the scenario was worsened when the trial judge addressed the matter on the fifth occasion, in open court. It was at that point that the trial judge linked his views about the appellants' guilt to his evidentiary/*Charter* rulings on the pre-trial motions that were still in progress. After being told again that there would be no resolution of the case, he foreshadowed that his rulings might "produce results" in terms of the appellants' resolve to proceed to trial. With these words, the trial judge entwined his views of the appellants' guilt with his adjudicative function, tainting the rulings he subsequently delivered. A reasonable and informed observer would interpret these words as suggesting that the rulings might be made with the goal of encouraging guilty pleas, rather than being decided on the merits.

[80] When the trial judge addressed the appellants directly, he risked undermining their solicitor-client relationships. He offered no explanation for doing so in his reasons dismissing the recusal/mistrial application. Both appellants were represented by experienced and capable criminal defence lawyers. By-passing counsel as he did may well have left a reasonable and informed observer with the impression that defence counsel were not doing their jobs properly. It contributed to the growing appearance of unfairness of this trial.

[81] The respondent submits that, after dismissing the appellants' mistrial and recusal applications, there were no further problematic incidents and the trial was conducted fairly. They say that any alleged shortcomings in the trial judge's final instructions cannot be linked to what transpired weeks earlier when the trial judge encouraged guilty pleas.

[82] We agree with the proposition that the remainder of the trial was without incident. However, the appearance of fairness – and the dignity of the proceedings – had already been lost. The fact that there were no further issues could not undo the trial judge's earlier comments. Moreover, a cloud had been cast over the trial judge's pre-trial rulings relating to key pieces of highly inculpatory evidence.

[83] It may very well be that the trial judge saw himself as acting compassionately towards the appellants, who were both facing the potential of a first degree murder conviction. But regardless of his motivation for doing so, the trial judge's persistence in encouraging a resolution undermined the perception of his impartiality. Looking at the entirety of the events, reasonable and informed members of the community would conclude that the trial judge would not be impartial in his dealings with the appellants, who he had already decided were "child killers", and not "two innocent people in the jaws of the criminal justice system".

[84] The respondent relies on *R. v. Bird*, [1997] O.J. No. 2074 (Gen. Div.), in which McIsaac J. wrote, at para. 7, that in applying the test for reasonable apprehension of bias, “the test is not the perception of the accused who is caught up in the criminal litigation but the impartial, detached reasonable observer who is cognizant of our legal traditions of judicial impartiality”. Although the inquiry is an objective one, it does not follow that the perspective of an accused person ought to be factored out of the equation. Any accused person who found themselves similarly situated to the appellants would be unlikely to experience the trial judge’s numerous guilty plea promptings as “compassionate”. Being apprised of the mere gist of what transpired in-chambers (as opposed to verbatim accounts, which would have had a far worse impact on the appellants’ perception of the trial judge’s impartiality), combined with what the trial judge said to the appellants directly in court, would lead any accused person to believe that, even though their ultimate fate lay in the hands of the jury, the trial judge was against them. Any reasonable and informed observer would reach the same conclusion.

[85] We allow the appeal on this ground. The appellants have demonstrated a reasonable apprehension of bias. This amounts to a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the *Criminal Code*.

(3) The Right to Be Present Was Violated

(a) The Scope of s. 650(1) of the *Criminal Code*

[86] We also allow the appeal on the related ground that the trial judge excluded the appellants from their trial, contrary to s. 650(1) of the *Criminal Code*. This section provides that, subject to certain exceptions that have no application in this case, "an accused … shall be present in court during the whole of their trial."

[87] The courts have taken an expansive view as to what constitutes part of the trial for the purposes of s. 650(1): see *James; R. v. Hertrich* (1982), 137 D.L.R. (3d) 400 (Ont. C.A.), at p. 426; and *R. v. Barrow*, [1987] 2 S.C.R. 694. In *R. v. Burnett*, 2021 ONCA 856, 159 O.R. (3d) 321, at para. 60, Watt J.A. said: "Few words are required to explain the combined effect of ss. 650(1) and 650.1 of the *Criminal Code*. In court. On the record. In the presence of the accused. No more is required. Nothing less will do."

[88] The "whole of their trial" may extend to what transpires in a trial judge's chambers. In *Poulos*, LaForme J.A. said the following, at paras. 18-20:

> Not every in-chambers discussion will constitute part of the accused's "trial". The classification of an in-chambers discussion as part of the trial will depend on whether the context and contents of the discussion involved or affected the vital interests of the accused or whether any decision made bore on "the substantive conduct of the trial": *R. v. Simon*, 2010 ONCA 754, 104 O.R. (3d) 340, at para. 116, leave to appeal refused, [2010] S.C.C.A. No. 459.

> In this case, the discussion of the evidence and of a possible plea bargain involved or affected the vital interests of the appellant. This inevitably arose once the trial judge expressed a view about the complainants' testimony and proposed that the accused enter a guilty plea, although to a lesser and included offence.
>
> This court has warned that "the default position in all criminal trials is that any conversation involving trial counsel and the judge ought to take place in the [accused's] presence, in open court, and on the record": *R. v. Dayes*, 2013 ONCA 614, 117 O.R. (3d) 324, at para. 68. Such a practice would avoid the time-consuming and occasionally discomforting inquiry into whether this court can salvage a verdict tainted by a s. 650(1) violation through resort to the *curative proviso*. [Emphasis added.]

There are numerous examples in the case law where appellate courts have held that similar in-chambers discussions about bringing about a resolution breach s. 650(1) of the *Criminal Code*: see *Walker*, at para. 22; *Roy*, at pp. 98-99; *James*, at para. 21; *S.M.*, at paras. 36-37; *Dayes*, at para. 68; and *Schofield*.[2]

[89] There can be little doubt in this case that the trial judge's request that counsel attend chambers so that he could deliver his unsolicited assessment of the appellants' fortunes at trial, and his encouragement to plead guilty, impacted on their vital interests for the purpose of s. 650(1). Contrary to the respondent's submissions, there was nothing "preliminary" about these in-chambers meetings. The trial judge addressed the essential issue at trial – the appellants' guilt. He

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[2] In *Poulos, S.M.*, and *Schofield*, the Crown conceded that s. 650(1) of the *Criminal Code* was infringed in the circumstances.

stressed that the evidence against them was overwhelming. He pre-judged a live issue on one of the motions that was before him – whether the prejudicial impact of the video of Jaelin outweighed its probative value.

[90] This brings us to the trial judge's comment in his ruling in which he dismissed the mistrial/recusal motion: "I did not discuss trial evidence, as I have not heard any." This is not accurate. The trial judge may not have heard evidence alongside the jury as part of the trial proper, but he had clearly heard and analyzed evidence. He was engaged in pre-trial motions to determine the admissibility of certain critical pieces of evidence. He heard and saw the appellants' statements and the video of Jaelin, which he characterized as a "fucking disaster". All of this evidence was admitted and subsequently presented in the presence of the jury. The vital interests of the appellants were squarely engaged.

[91] The message was made clear over 30 years ago that trial judges should not conduct resolution discussions in chambers. In Hon. G.A. Martin (Chair), *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer for Ontario, 1993) ("the Committee") the Committee made the following recommendation, at p. 378:

> 77. The Committee is of the view that, absent exceptional circumstances, it is inappropriate to engage in resolution discussions with the trial judge in Chambers.

[92] The Committee was concerned about the appearance of impropriety and the loss of the perception of impartiality: at pp. 378-382. See also Patrick Curran,

"Discussions in the Judge's Private Room", [1991] Crim. L.R. 79. As noted in the discussion above, this court has on numerous occasions discouraged what happened in this case.

[93] Section 650(1) of the *Criminal Code* was infringed in the circumstances of this case.

(b) The Curative Proviso Should Not be Applied in This Case

[94] Further, we would decline to apply the proviso in s. 686(1)(b)(iv) of the *Criminal Code*, which provides:

> **(iv)** notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of the offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby[.]

[95] In *S.M.*, the court discussed the ambit of this provision, especially in terms of measuring "prejudice", at para. 45:

> In the context of s. 686(1)(b)(iv), "prejudice" may include: (a) prejudice to the ability of an accused to properly respond to the Crown's case and to receive a fair trial; and (b) "prejudice to the appearance of the due administration of justice": *Burnett*, at para. 64; *R. v. E. (F.E.)*, 2011 ONCA 783, 108 O.R. (3d) 337, at para. 33.

In that case, the appeal was allowed, turning on the second prong mentioned above – "prejudice to the appearance of the due administration of justice." See also *James*, at para. 17. We proceed on the same basis in this case.

[96] In *R. v. Simon*, 2010 ONCA 754, 104 O.R. (3d) 340, Watt J.A. provided, at para. 123, a list of considerations for determining whether a breach of s. 650(1) may be salvaged by this curative proviso:

> Relevant factors may include, but are not limited to,
>
> i. the nature and extent of the exclusion, including whether it was inadvertent or deliberate;
>
> ii. the role or position of the defence counsel in initiating or concurring in the exclusion;
>
> iii. whether any subjects discussed during the exclusion were repeated on the record or otherwise reported to the accused;
>
> iv. whether any discussions in the accused's absence were preliminary in nature or involved decisions about procedural, evidentiary or substantive matters;
>
> v. the effect, if any, of the discussions on the apparent fairness of trial proceedings; and
>
> vi. the effect, if any, of the discussions on decisions about the conduct of the defence.

[97] In our view, when these factors are considered, they cannot support the application of the curative proviso in s. 686(1)(b)(iv).

[98] In terms of the first factor, there can be no doubt that the exclusion of the appellants was deliberate, on both occasions.

[99] Counsel did not object to either meeting in-chambers. However, it is the undisputed evidence of all counsel that they did not know why they were being invited into chambers. It might be said that they should have been able to surmise

why they were invited back on the second occasion. At the same time, it is equally plausible that, in light of the fact that counsel conveyed no movement on the resolution issue, it would have been surprising for the trial judge to raise the matter again.

[100] One factor that favours the application of s. 686(1)(b)(iv) in this case is that the appellants were apprised of the in-chambers discussions by their counsel. However, as noted above, counsel for Ms. Colley did not apprise her client of all of the details of what occurred. The trial judge did refer to these discussions in open court on May 15, 2017, when he mentioned a *Gardiner* hearing, and again on the last occasion when he addressed the appellants directly and alluded to the outcome of his impending rulings. However, given the problematic aspects of this last appearance, we do not agree that it should work in favour of applying the curative proviso.

[101] We also note that, while the trial judge's views on resolution were apparent on the record, the manner in which he expressed himself in-chambers was not. It is unlikely that any counsel would have been prepared to repeat the trial judge's profane language in open court.

[102] As for the fourth factor from *Simon*, the discussions were not preliminary in nature. They touched on important evidentiary matters. They also struck at the very core of the trial – the appellants' ultimate criminal liability for murder. Again,

we do not accept the respondent's submission that the trial judge was essentially engaged in a pre-trial conference. He was not. He was already engaged in deciding the admissibility of certain pieces of evidence, something only a trial judge may do in their adjudicative capacity.

[103] In terms of the last factor mentioned in *Simon*, the fresh evidence does not address whether the trial judge's in-chambers discussions had any impact on decisions about the conduct of the defence. Both appellants exercised their right to testify in their own defence and called other evidence. Thus, we consider this to be a neutral factor, if not slightly favourable to the respondent.

[104] On balance, the factors identified in *Simon* strongly work against the application of the curative proviso in s. 686(1)(b)(iv). The breaches were serious in this case, in the ways described above. What transpired during these breaches gave rise to a reasonable apprehension of bias. The exclusion of the appellants from their trial resulted in "prejudice to the appearance of the due administration of justice": *Burnett*, at para. 64; *R. v. E. (F.E.)*, 2011 ONCA 783, 108 O.R. (3d) 337, at para. 33.

[105] We also allow the appeal on this basis.

F. CONCLUSION AND DISPOSITION

[106] The appeals are allowed.

[107] Given that there must be a new trial, there is no value in considering the grounds related to the trial judge's final instructions to the jury. The judge conducting the re-trial will deliver case-specific final instructions, tailored to the evidence adduced at that trial.

[108] We also decline to address the trial judge's admissibility rulings concerning the appellants' statement and the video of Jaelin. It will be for the trial judge who presides at the re-trial to determine the admissibility of this evidence. Nothing in these reasons should be taken as commenting, one way or the other, on the correctness of the trial judge's rulings in this case.

[109] The appeals are allowed and a new trial is ordered. As the Crown did not appeal Mr. Roberto's acquittal on the charge of first degree murder, he is ordered to be tried on the charge of second degree murder: *Criminal Code*, s. 686(2)(b); *R. v. Guillemette*, [1986] 1 S.C.R. 356, at p. 361; and *R. v. Wong* (2006), 209 C.C.C. (3d) 520 (Ont. C.A.), at para. 17. Ms. Colley will stand trial for first degree murder.

Released: July 3, 2024 "G.T.T."

"Gary Trotter J.A."
"Thorburn J.A."
"L. Sossin J.A."