In the Court of Appeal of Alberta

Citation: R v Derksen, 2024 ABCA 304

Date: 20240925
Docket: 2303-0003A
Registry: Edmonton

Between:

His Majesty the King

Respondent

- and -

Winston Derksen

Appellant

The Court:

The Honourable Justice Bernette Ho
The Honourable Justice Anne Kirker
The Honourable Justice Alice Woolley

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Justice E.J. Simpson
(Sitting with a Jury)
Convicted on the 17th day of February, 2022
(Docket: 200259786Q1)

Memorandum of Judgment

The Court:

[1] The appellant was convicted by a jury of second-degree murder. Crown counsel made several submissions in its closing address to the jury that defence counsel objected to on the basis they undermined trial fairness. Before the jury received final instructions, the appellant brought a mistrial application. The trial judge dismissed the mistrial application and concluded that the Crown errors could be addressed through a corrective instruction to the jury.

[2] The appellant appeals on the basis that the trial judge erred by concluding a corrective instruction was sufficient to address the risks to trial fairness that arose from the Crown's closing submissions.

[3] For the reasons that follow, the appeal is dismissed.

Background

[4] The appellant and his then girlfriend, Deidre Lafferty, picked up Faisal Aden from a correctional facility in the Northwest Territories on the morning of December 2, 2019. Two days later, a third-party spotted what he thought was a dead body in a ditch off a highway in northern Alberta. It was the body of Faisal Aden. Faisal Aden had suffered multiple gunshot wounds including two fatal gunshot wounds to the back of the head.

[5] The appellant and Ms. Lafferty were both charged with Faisal Aden's murder. Each claimed the other was responsible. The appellant's trial proceeded first. Ms. Lafferty testified as a witness for the Crown and was still awaiting her own trial.

[6] The Crown called other witnesses including the investigating officers and a forensic pathologist who testified as to cause of death.

[7] The appellant testified on his own behalf and said it was Ms. Lafferty who killed Faisal Aden.

[8] The defence closed its case on Thursday, February 10, 2022. The next day, Friday, February 11, defence counsel presented closing submissions. Defence counsel acknowledged that much of the evidence was uncontested and the case came down to the two different versions of events offered by the appellant and Ms. Lafferty, thus credibility was the key issue for the jury.

[9] The Crown's closing submissions followed. The Crown suggested that the appellant may have tailored his testimony to the evidence at trial and that Ms. Lafferty was more worthy of belief because she did not hear the testimony of other witnesses:

> But I'm going to make a comment on a risk that's present in this case. A risk that [Mr. Derksen] tailored his testimony to the evidence that he had already heard. As I mentioned earlier, [Deidre] Lafferty testified with an exclusion of witnesses. She didn't know what the other witnesses were saying. Mr. Derksen did. [Transcript 584/26-29]

[10] The Crown suggested that the appellant's evidence was self-serving and that he was lying because he did not want to be convicted of murder:

> But to be clear, the Crown's position is Mr. Derksen's version of events is self-serving, he said it to protect himself from conviction, and it is entirely untrue. The evidence that is led by the Crown proves this case beyond a reasonable doubt. The decision will be yours to make. [Transcript 585/29-32]

[11] The Crown suggested the appellant was lying because his testimony could only be corroborated by a person that had since passed away and because he chose to speak to police but did not tell them what he ultimately testified to at trial:

> You'll note the convenience that the person he alleges provided him the gun and asked him to pick up this person from the correctional centre is -- has passed away. She's not available. I will add to that that Mr. Derksen has a right to remain silent. He didn't have to testify, nor did he ever have to speak to the police. But he did choose to speak to the police. And when he did so, he gave them a false statement. So what you heard in court had never been heard by the police. [Transcript 583/26-31]

[12] The Crown suggested that defence counsel improperly impeached Ms. Lafferty when she provided inconsistent testimony:

> [Defence counsel] was asking [Ms. Lafferty] about the time when the gun was thrown to her. And he didn't put that inconsistency to her. He didn't ask her, why did you say it one way one time and the other way another time? And there are rules about how we ordinarily impeach witnesses. And this -- and to be fair to a witness, if you want to say they were inconsistent or -- then what you want to do is give them an opportunity to explain themselves. Because sometimes there's an innocent explanation. I don't want to speculate what her explanation might have been. I can think of a couple. But she would have the opportunity ordinarily to explain why she said those two different things. [Transcript 582/5-13]

[13] And the Crown suggested that constitutional and evidentiary protections afforded to Ms. Lafferty should bolster her credibility:

> It was put to her during cross-examination that she was motivated to protect herself from prosecution or conviction. Well, there's two aspects to this. The first is, the combined affect of the *Canada Evidence Act* and the *Charter of Rights* is that she can testify in this proceeding and it cannot be used against her in her own trial. You may be familiar with American TV where people take the fifth, where they say, I decline to answer on the grounds that it may incriminate me. You can't do that in Canada. In Canada, the rule is you have to answer even incriminating questions when you are testifying in a matter that is not your own case. The safety is that it cannot then be used against you at a later time. [Transcript 576/4-11]

[14] After the Crown's closing, the jury was discharged for the weekend and told to return Monday morning at 10:30. The trial judge reminded the jury not to deliberate yet: "So think about what the Crown, think about what the defence have said, wait for the final instructions, and then I will have you start your deliberations." [Transcript 586/11-13]

[15] Counsel and the trial judge reconvened that afternoon to begin the pre-charge discussions. During this discussion, defence counsel first raised his objection to statements made by Crown counsel in closing submissions that morning:

> …And it was just some things that, number one, I think needs to be addressed. And I should have paused everybody and had you bring the jury back, or at least had a conversation about bringing the jury back. With some comments that [Crown counsel] made in his closing submissions. And I think this is going to have to be addressed outside of your charge. For some of them. Others [sic] ones I think can go in the charge, and you can think about them tonight. [Transcript 599/32-36]

[16] Following preliminary submissions by defence counsel about the nature of the alleged improper statements made in the Crown's closing submissions, the trial judge stated he was not recalling the jury at that juncture and defence counsel was free to bring an application. The pre-charge discussion was adjourned to the next day. On Saturday, February 12, defence counsel stated he was going to bring a mistrial application. He indicated the application would be ready the following day, being Sunday, February 13.

[17] The trial judge and counsel reconvened on Sunday, February 13 after defence counsel filed written submissions in support of a mistrial application. The trial judge held that the mistrial application would proceed the following day, Monday, February 14. The trial judge gave two reasons for delaying the hearing of the mistrial application: he needed time to read the materials and the hearing should proceed in open court in front of the public – who had been told that the trial would resume Monday morning when the jury was scheduled to receive final instructions.

[18] On Monday, February 14, at defence counsel's request, the trial judge told the jury the following:

> …Unfortunately, after you heard the submissions of the Crown and defence, and I allowed you to go asking you to be back today, we have – defence and Crown have discussed with me some problems that the defence has pointed out that pertain to what…the Crown counsel said to you in his submissions. We began dealing with those on Friday and again Saturday. But I am now going to have to make a ruling about those matters. That means that that is going to take some time to hear from these – these counsel in this public courtroom out of your presence…
>
> … And the problems with respect to the Crown's submissions I have to deal with. And you will hear eventually what I do about it. [Transcript 642/38-643/22]

[19] The jury was asked to return on Wednesday, February 16 for whatever next steps needed to be taken.

[20] The trial judge heard oral submissions respecting the mistrial application for the remainder of the morning of February 14 and dismissed the mistrial application that afternoon. Pre-charge discussions continued February 15, and the jury was charged on February 16.

Mistrial Ruling

[21] The appellant alleged that the Crown made six errors in its closing submissions that could not be cured by a corrective instruction to the jury. Specifically, the appellant alleged that the Crown erred by:

i) suggesting to the jury that the appellant tailored his evidence to conform to the Crown's case;

ii) suggesting the appellant had a motive to lie because of his self-interest in an acquittal;

iii) inviting the jury to engage in reasoning that reversed the burden of proof;

iv) incorrectly articulating the principles referred to in *Browne v Dunn* (1893), 6 R 67, 1893 CanLII 65 (HL);

v) referring to irrelevant matters not in evidence by arguing that the constitutional and evidentiary protections afforded to Ms. Lafferty bolstered her credibility; and

vi) suggesting that an adverse inference be drawn because the appellant testified to a different version of events than the one he provided to police.

[22] The Crown took the position that a corrective instruction could cure the Crown's errors. Thus, the issue for the trial judge was not whether the Crown's submissions were legally impermissible – the Crown conceded it had made erroneous submissions – the issue was the appropriate remedy. The trial judge stated the issue before him as:

> In the eyes of the reasonable, well-informed, right-thinking observer, do the errors create a real danger of compromising trial fairness such that this is a clear case where I should grant the application, or can the errors be remedied by a clear direction to the jury? [Transcript 672/22-24]

[23] Citing the factors from *R v Khan*, 2001 SCC 86 at paras 75-86 (LeBel J concurring) for determining whether a trial has been unfair and therefore whether a miscarriage of justice has occurred,[1] the trial judge concluded that five of the six errors alleged by the defence raised a risk of trial unfairness. As to the centrality of the issue, the trial judge noted that credibility of the appellant and Ms. Lafferty was central to the case but there was circumstantial and direct evidence from the forensic pathologist and investigating officers that was available to the jury. It was not the case that the jury only had the appellant and Ms. Lafferty's testimony to consider. He also considered the relative gravity of the errors and how much influence they could have on the verdict, the fact that a jury was involved, and whether the errors could be remedied at the trial, and in what manner. Finally, he considered the timing of when the issue was raised by defence counsel.

[24] The trial judge considered the first two Crown errors to be the most concerning and, with the exception of the alleged *Browne v Dunn* error, concluded that the effect of the Crown errors – without correction – raised a risk of improper reasoning on the part of the jury.

[25] On remedy, the trial judge concluded that this was not one of the "clearest of cases" requiring a mistrial and the errors could be remedied with a strongly worded corrective instruction, noting that the jury had not yet begun deliberations. The trial judge found that the errors were "much less serious" than the errors in *Khan* – where the jury was given a transcript containing discussions about inadmissible evidence – and in *Khan* the Supreme Court of Canada held that the trial judge's instruction was sufficient to cure the irregularity. The trial judge also noted several appellate authorities endorsing the use of a correcting or limiting instruction to remedy similar situations, citing *R v Chacon-Perez*, 2022 ONCA 3; *R v Boudreau*, 2012 ONCA 830, leave to appeal to SCC refused, 35493 (7 November 2013); *R v Finta*, [1994] 1 SCR 701, 112 DLR (4th) 513; *R v Trochym*, 2007 SCC 6; and *R v Munroe*, (1995), 96 CCC (3d) 431, 79 OAC 41, aff'd [1995] 4 SCR 53, 102 CCC (3d) 383.

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[1] The factors being: 1. whether the irregularity pertained to a question which was central to the case; 2. the relative gravity of the irregularity; 3. the type of trial whether by jury or by judge sitting alone; 4. whether the irregularity may have been remedied in full or in part at trial; 5. the effect of the irregularity on the fairness of the trial and the appearance of fairness; and 6. the attitude of defence counsel if and when confronted with the irregularity.

[26] The trial judge held that the corrective instruction would identify the Crown error, explain why it was improper, correct any misstatement of the evidence and the law, and caution the jury against the prohibited chains of reasoning.

[27] When the jury returned on Wednesday, February 16 the jury were first given a corrective instruction. The trial judge told the jury to listen carefully as they would not be given the corrective instruction in writing. The jury was then handed a written copy of the final instruction to follow along with while the trial judge provided the final instructions.

Standard of Review

[28] A trial judge has broad discretion to declare a mistrial where there is a real danger that trial fairness has been compromised: *Khan* at para 79; *R v Cawthorne*, 2016 SCC 32 at para 39; *R v Burke*, 2002 SCC 55 at para 74. A trial judge is in the best position to gauge the impact of closing submissions on the jury: *R v McGregor*, 2019 ONCA 307 at para 182; *R v Rose*, [1998] 3 SCR 262 at para 127, 40 OR (3d) 576. The decision to grant or deny a mistrial is discretionary and entitled to great deference unless the trial judge proceeded on wrong principle or where the failure to declare a mistrial is so clearly wrong as to amount to a miscarriage of justice: *R v Karim*, 2010 ABCA 401 at para 27; *R v Donszelmann*, 2015 ABCA 284 at para 8; *R v Healy*, 2020 ABCA 197 at para 33; *R v Lavallee*, 2020 ABCA 464 at para 34.

Analysis

[29] The appellant does not take issue with the trial judge's conclusion that five of the Crown errors raised the risk of trial unfairness. The appellant asserts that the trial judge correctly assessed the risk created by the Crown errors but that the trial judge's own reasons show that he should have declared a mistrial. The appellant argues that the trial judge erred in concluding that a corrective instruction to the jury could cure the cumulative effect of the Crown errors, particularly since the Crown's erroneous closing submissions went to the main issue in the case, being credibility. Further, the trial judge erred by failing to account for the additional prejudice caused by the passage of time between when the Crown made the erroneous submissions to the jury (Friday, February 11) and when the jury was given the corrective instruction (Wednesday, February 16). Finally, during the oral hearing, the appellant submitted that the corrective instruction was deficient because it did not go far enough in explaining the rationale behind the legal principles cited. Given all the foregoing, the appellant takes the position that the only appropriate remedy to prevent the occurrence of an unfair trial in this case was a mistrial. The appellant acknowledges that a mistrial is reserved for the "clearest of cases": *Karim* at para 27; *Lavallee* at para 33; *R v Anderson*, 2018 ABCA 412 at para 11, leave to appeal to SCC refused, 38502 (16 May 2019). He says this is one of those "clearest cases".

[30] We disagree.

[31] Contrary to the appellant's argument, the trial judge expressly considered the cumulative effect of the Crown errors and whether a corrective instruction would suffice. Relative to the second *Khan* factor requiring consideration of the gravity of the Crown errors and the degree of influence on the jury, the trial judge stated:

> The first two matters raised by the defence cause me the most concern: a) a motive to lie as an accused, b) tailor his evidence after hearing the case for the Crown. They could without correction lead the jury to improper reasoning. Indeed, the cumulative effect because of the number of errors does raise a risk regarding the five matters that I consider inappropriate. All of these add to the risk subject to possible corrective measures favours a mistrial. [Transcript 673/29-34]

[32] Though brief, the reasons make clear that the trial judge considered the cumulative effect of all Crown errors, particularly the two he considered the most serious. The trial judge reviewed each of the Crown errors on their own and then concluded that the errors could be "effectively addressed with carefully and strongly worded instructions to the jury".

[33] We also disagree with the suggestion that the trial judge failed to account for any additional prejudicial effect arising from the amount of time that the jury had to consider the Crown's errors. Specifically, we do not accept the characterization that the jury members had six days to "stew" on the Crown errors.

[34] As defence counsel acknowledged on Friday, February 11, he did not raise concerns about the Crown's closing submissions until after the jury had been discharged for the weekend. Little could be done at that juncture; counsel and the trial judge agreed they were not calling the jury back at that time. Defence counsel was concerned about the Crown's closing submissions but asked for time to assess whether these were errors that could be addressed in the jury instruction or if more was needed. Defence counsel subsequently brought a mistrial application.

[35] While the corrective instruction was not provided to the jury until Wednesday, February 16, the jury was alerted to the fact that there were issues with the Crown's closing submissions when they returned to the courthouse on Monday, February 14 after the weekend. They were advised of next steps and did not return to the courthouse until after the trial judge heard and decided the mistrial application and was ready to provide the final jury instructions on the afternoon of Wednesday, February 16. The jury then commenced deliberations. In the circumstances, we see no error in the way the trial judge handled the matter and the trial moved forward as efficiently as possible while preserving trial fairness.

[36] We are of the view that the trial judge did not err in principle in concluding that a standalone corrective instruction, together with the final jury instruction, sufficiently addressed the risk of improper reasoning by the jury created by the Crown errors. Nor are we persuaded that the failure to declare a mistrial resulted in a miscarriage of justice.

[37] The standalone corrective instruction, delivered before the final instruction, was clear, concise and directly addressed the Crown errors: see for example *R v Clyke*, 2021 ONCA 810 at para 40. The jurors were first reminded that the appellant was presumed to be innocent and that the burden of proof always remained with the Crown. Then the trial judge reviewed the problematic areas of the Crown's closing submissions. The trial judge identified each error and explained why the error was improper. The jury was told to disregard the suggestion or inference advanced by the Crown. The trial judge also explained why the Crown error was problematic, contrary to the appellant's submission that the corrective instruction did not include an explanation of the rationale behind legal principles cited.

[38] For example, relative to the Crown's suggestion that the appellant tailored his evidence, the trial judge instructed:

> In the Crown's closing arguments, the Crown suggested to you that Winston Derksen may have tailored his evidence – excuse me, tailored his testimony to the evidence that he had already heard. The Crown suggested that this may make Winston Derksen's version of events less worthy of belief. This is not an inference you can draw, and it was improper for the Crown to suggest it.
>
> Every accused person has a constitutional right to the presumption of innocence and to know the case against him. That includes the right to full disclosure of the police investigation and the right to be present for his trial to hear the evidence against him. The *Criminal Code* also requires an accused person to be present at his trial.
>
> In this case, Winston Derksen has an obligation to be personally present for this entire trial. Winston Derksen also has a constitutional right to hear the testimony of all the Crown witnesses. This would be true whether Winston Derksen testified or not. You must not include (sic) that Mr. Derksen's evidence is less worthy of belief because he listened to the testimony of all Crown witnesses before he testified, and you must disregard that suggestion by the Crown. [Transcript 733/3-19]

[39] The trial judge also addressed the suggestion that Ms. Lafferty's credibility could be bolstered because Ms. Lafferty did not hear the other evidence at trial:

> Crown also suggested to you that Deidre Lafferty's evidence is more worthy of belief because she did not hear the testimony of any other witnesses before she testified. That is not an inference that you can draw, and it was improper for the Crown to suggest it.
>
> Remember that Deidre Lafferty has also been charged with murder in relation to this incident and is still awaiting trial. The fact that she did not hear the testimony of other witnesses in the trial does not make her more worthy of belief.

> You must evaluate Deidre Lafferty's evidence without considering that she was not present in court to hear the evidence of other witnesses. You must disregard the Crown's suggestion that you should believe her because she was not present in court before she testified. [Transcript 733/21-32]

[40] Several key topics addressing the Crown errors were repeated in the final jury instruction, including the presumption of innocence and how the jury was to assess witness credibility. The trial judge provided details around several of Ms. Lafferty's inconsistencies and how those should be considered. In addition, the Crown's erroneous suggestion that the death of Ms. Lafferty's sister was "convenient" for the appellant was addressed in the final jury instruction.

Conclusion

[41] Having regard for the standard of review, the trial judge's decision that a corrective instruction was sufficient to address the trial unfairness resulting from the Crown errors demonstrates no reviewable error. The trial judge was well-positioned to assess whether the Crown errors presented a clear case requiring a mistrial, and his exercise of discretion to issue a corrective instruction is owed deference. Further, his conclusion is consistent with the principle that jurors will follow instructions given to them: *Khan* at paras 81-82 citing *R v Corbett*, [1988] 1 SCR 670 at 692-94, 41 CCC (3d) 385; *R v Barton*, 2019 SCC 33 at para 177.

[42] Accordingly, the appeal is dismissed.

Appeal heard on September 5, 2024

Memorandum filed at Edmonton, Alberta
this 25th day of September, 2024

Ho J.A.

Kirker J.A.

Woolley J.A.

Appearances:

J. Russell
for the Respondent

Z. Al-Khatib
for the Appellant