IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *R. v. Butler*, 2020 NLSC 30
Date: February 24, 2020
Docket: 201901G0524

HER MAJESTY THE QUEEN

v.

PHILIP CHARLES BUTLER

Restriction on Publication: Pursuant to subsection 648(1) of the *Criminal Code*, no information regarding any portion of the trial at which the jury was not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

Before: Justice Valerie L. Marshall

Place of Hearing:	St. John's, Newfoundland and Labrador
Date of Hearing:	February 13, 2020
Date of Oral Decision:	February 14, 2020

Summary:

The Accused applied for a directed verdict of acquittal on the charge of second degree murder. The application was dismissed.

Appearances:

Scott Hurley and Alana Dwyer	Appearing on behalf of the Crown
Karen Rehner and Timothy O'Brien	Appearing on behalf of the Accused

Authorities Cited:

CASES CONSIDERED: *R. v. Carte*, 2017 BCSC 2423; *R. v. Charemski*, [1998] 1 S.C.R. 679; *R. v. Arcuri*, 2001 SCC 54; *R. v. Tippett*, 2011 NLTD(G) 101; *R. v. Jiwa*, 2010 ONSC 1636; *R. v. Walle*, 2012 SCC 41; *R. v. Roberts-Stevens*, 2018 ONSC 3159.

STATUTES CONSIDERED: *Criminal Code of Canada*, R.S.C. 1985 c. C-46.

EDITED REASONS FOR JUDGMENT GIVEN ORALLY

MARSHALL, J.:

INTRODUCTION

[1] Philip Charles Butler has been charged with second degree murder of his brother, George Butler. The offence is alleged to have been committed on May 21, 2018 in Conception Bay South, Newfoundland and Labrador.

[2] The jury trial in this matter commenced on February 3, 2020. The Crown has called 13 witnesses. Following the close of the Crown's case, Defence Counsel filed this application seeking a directed verdict of acquittal on the charge of second degree

murder; and that the indictment be amended to remove the words "second degree murder" and to substitute the word "manslaughter".

THE LAW

[3] In this case, the Crown has relied upon section 229(a) of the *Criminal Code* for the purpose of establishing second degree murder. Section 229(a) of the *Code* states, as follows:

> **229** Culpable homicide is murder
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> > **(a)** where the person who causes the death of a human being
> >
> > **(i)** means to cause his death, or
> >
> > **(ii)** means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

[4] In order to establish second degree murder under section 229(a) of the *Criminal Code*, the Crown must prove beyond a reasonable doubt that the Accused caused George Butler's death; that the Accused caused George Butler's death unlawfully; and that the Accused had the state of mind required for murder.

[5] As submitted by Defence Counsel, the state of mind required for murder is that of specific intent to cause death, or bodily harm that an accused knows is likely to cause death. It is not merely an intent to apply force or cause bodily harm. Defence Counsel referred to *R. v. Carte*, 2017 BCSC 2423, in which the British Columbia Supreme Court stated with respect to the *mens rea* required for second degree murder as follows, at paragraph 123:

> **123** A conviction for second degree murder requires proof beyond a reasonable doubt of the subjective foresight of death. As explained in *R. v. Creighton*, [1993] 3 S.C.R. 3 at 58, subjective *mens rea* requires that the accused be proved to have intended the consequences of his or her acts, or be proved to have knowledge of the probable consequences of those acts, and proceed recklessly in the face of that known risk.

[6] Counsel all agree that when considering this application for a directed verdict, the law to be applied is from the leading case of *R. v. Charemski*, [1998] 1 S.C.R. 679, where the Supreme Court of Canada stated at paragraphs 2 and 3, as follows:

> **2** The leading case on the issue of directed verdicts is *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, which sets out the test to determine whether a case should go to a jury in these terms, at p. 1080: "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty". See also *R. v. Monteleone*, [1987] 2 S.C.R. 154, at p. 160. In other words, a motion for a directed verdict should not be granted "in any case in which there is admissible evidence which could, if it were believed, result in a conviction". See *Shephard*, at p. 1080.
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> **3** For there to be "evidence upon which a reasonable jury properly instructed could return a verdict of guilty" in accordance with the *Shephard* test (at p. 1080), the Crown must adduce some evidence of culpability for every essential definitional element of the crime for which the Crown has the evidential burden. See Sopinka et al., The Law of Evidence in Canada (1992), at p. 136. Thus, in a murder prosecution, the Crown must adduce evidence on the issues of identity, causation, the death of the victim and the requisite mental state. If the Crown fails to adduce any evidence to discharge the evidential burden on any of these issues, the trial judge should direct a verdict of acquittal.

[7] The test to be applied when considering a directed verdict motion is essentially the same as the test for committal at a preliminary inquiry. The test is “whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty”. Chief Justice McLachlin stated this in *R. v. Arcuri*, 2001 SCC 54 at paragraph 21, as follows:

> **21** The question to be asked by a preliminary inquiry judge under s. 548(1) of the Criminal Code is the same as that asked by a trial judge considering a defence motion for a directed verdict, namely, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty": *Shephard*, supra, at p. 1080; see also *R. v. Monteleone*, [1987] 2 S.C.R. 154, at p. 160. Under this test, a preliminary inquiry judge must commit the accused to trial "in any case in which there is admissible evidence which could, if it were believed, result in a conviction": *Shephard*, at p. 1080.

[8] Chief Justice McLachlin further stated that the test is the same whether the evidence is direct or circumstantial. However, when the evidence called by the Crown with respect to the elements of the offence is circumstantial evidence, then the judge may "engage in a limited weighing of the evidence" and assess whether the evidence "is reasonably capable of supporting the inferences that the Crown asks the jury to draw". She stated this at paragraphs 22 and 23 in *R. v. Arcuri*, as follows:

> **22** The test is the same whether the evidence is direct or circumstantial: see *Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at pp. 842-43; *Monteleone*, supra, at p. 161. The nature of the judge's task, however, varies according to the type of evidence that the Crown has advanced. Where the Crown's case is based entirely on direct evidence, the judge's task is straightforward. By definition, the only conclusion that needs to be reached in such a case is whether the evidence is true: see Watt's Manual of Criminal Evidence (1998), at par. 8.0 ("[d]irect evidence is evidence which, if believed, resolves a matter in issue"); McCormick on Evidence [page840] (5th ed. 1999), at p. 641; J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at par. 2.74 (direct evidence is witness testimony as to "the precise fact which is the subject of the issue on trial"). It is for the jury to say whether and how far the evidence is to be believed: see *Shephard*, supra, at pp. 1086-87. Thus if the judge determines that the Crown has presented direct evidence as to every element of the offence charged, the judge's task is complete. If there is direct evidence as to every element of the offence, the accused must be committed to trial.
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> **23** The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence -- that is, those elements as to which the Crown has not advanced direct evidence -- may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence because, with circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established -- that is, an inferential gap beyond the question of whether the evidence should be believed: see Watt's Manual of Criminal Evidence, supra, at par. 9.01 (circumstantial evidence is "any item of evidence, testimonial or real, other than the testimony of an eyewitness to a material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue"); McCormick on Evidence, supra, at pp. 641-42 ("[c]ircumstantial evidence ... may be testimonial, but even if the circumstances depicted are accepted as true, additional reasoning is required to reach the desired conclusion"). The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The

> judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks [page841] only whether the evidence, *if believed*, could reasonably support an inference of guilt.

[9] In this case, circumstantial evidence has been adduced by the Crown with respect to the element of intent. Based on *R. v. Arcuri*, in considering this directed verdict application, I must determine "whether the evidence, if believed, could reasonably support an inference of guilt". I must neither assess credibility, nor draw factual inferences.

[10] As submitted by Defence Counsel, facts supporting inferences need not be proven facts, but must be in evidence. Defence Counsel's submission is supported by the following comments of the British Columbia Supreme Court in *R. v. Carte*, at paragraphs 20 to 22, as follows:

> **20** During this weighing process, the Court does not assess witness credibility, draw inferences from the evidence, or make findings of fact. Nor does the Court ask itself whether, on the evidence, it would convict as the trier of fact.
>
> **21** Instead, a no-evidence motion in a circumstantial case requires the Court to weigh the evidence only to the extent necessary to determine whether, if the evidence is believed, it "could reasonably support an inference of guilt": *R. v. Arcuri*, para. 23. See also: *R. v. Fraser*, 2016 BCCA 89, at para. 71, citing *R. v. Bains*, 2015 ONCA 677, at paras. 158-160.
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> **22** As explained in *R. v. Fraser*, inferences in support of guilt must be:
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> > [73] ... reasonably and logically drawn from facts established by the evidence. Inferences which do not flow reasonably and logically from established facts are condemned as conjecture and speculation: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, 97 C.C.C. (3d) 193 at 209 (Ont. C.A.).

[11] In Philip Butler's case, the Defence acknowledges that there is some evidence upon which, if believed, could reasonably support the inference that the Accused caused George Butler's death, and that he caused George Butler's death unlawfully.

Defence Counsel's position is that the evidence could not, however, reasonably support an inference of specific intent.

ISSUE

[12] The issue to be decided is whether the Crown has adduced evidence which, if believed, could reasonably support the inference that Philip Butler had the specific intent required to cause the death of George Butler, or to cause bodily harm which was likely to result in the death of George Butler.

ANALYSIS

[13] As stated, the Defence acknowledged that there is some evidence upon which the jury could conclude that Philip Butler unlawfully caused the death of George Butler, and which supports the general intent offence of manslaughter. However, Defence Counsel submitted that the facts in evidence do not reasonably support the inference that Philip Butler had the subjective intent necessary to support a charge of second degree murder.

[14] More specifically, Defence Counsel referred the Court to the testimony of Darlene Squires, Jonathan Butler and Dwayne Westcott, who suggested in their evidence that Philip Butler told them he believed that he had caused the death of George Butler. Darlene Squires testified that on May 21, 2018, the Accused had called or texted her indicating that "I think I killed someone". Jonathan Butler testified that on May 21, 2018 when he met Philip Butler, Philip Butler spoke with him about George Butler's animosity towards Jonathan Butler; and he then said that "I didn't have to worry about it anymore because - because he had killed George". Further, Dwayne Westcott testified that on May 21, 2018, Philip Butler said to him that he and his brother had gotten into a fight and "he strangled him out". In cross-examination he used different words when he said that Philip Butler told him he "choked him out".

[15] Further, as submitted by Defence Counsel, the only evidence relating to motivation was from Darlene Squires, who agreed in cross-examination that she had heard Philip Butler say to Jonathan something like “George was freaking out that morning and that he [Philip] was trying to stop him from hurting Jonathan”.

[16] As well, as submitted by Defence Counsel, the same witnesses’ evidence suggested that there had been drinking and drug use by George Butler and Philip Butler leading up to the incident.

[17] Defence Counsel also referred to Dr. Avis’ expert evidence. Dr. Avis concluded that the death of George Butler was caused by another person’s actions, and that the cause of death was asphyxia by neck compression. Specifically, the mechanism was by manual strangulation. He ruled out manual strangulation by hands; rather, he suggested that the strangulation was by a broader application of force such as a choke hold with the arm. His evidence was that when asphyxia occurs, the brain is deprived of oxygen, and death may ensue.

[18] Defence Counsel suggested that the foregoing evidence could reasonably support the inference of the general intent of manslaughter, but the evidence falls short of supporting the inference of the specific intent of second degree murder.

[19] Defence Counsel relied upon the decision of Justice Seaborn in *R. v. Tippett*, 2011 NLTD(G) 101, where he referred to *R. v. Jiwa*, 2010 ONSC 1636, in which the Ontario Court stated at paragraph 8, as follows:

> **8** Determining an individual's state of mind in a murder case is often determined by resort to inferences about the natural consequences of someone's actions, and whether by acting in a certain fashion a person can be inferred to have foreseen the natural consequences of their acts. As Justice Gillese noted in *Magno, supra*, this is nothing more than a "common sense proposition". The Court in *Magno, supra*, at para. 18, cited the following passage from *R. v. Giannotti* (1956), 115 C.C.C. 203 (Ont. C.A.) at p. 213 with approval:

> The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But, while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference, then it should not be drawn.

[20] Further in *R. v. Tippett*, Justice Seaborn concluded he could not find a reasonable inference that the probable or natural consequence of Mr. Tippett's actions was the death of the victim; and he could not find evidence to support an inference of specific intent. He stated this at paragraph 18, as follows:

> **18** **A**s noted previously, to establish second degree murder in this case, there must be <u>some</u> evidence of the subjective intent of the accused, Jeffery Tippett. There must be some evidence that he knew what he was doing was likely to kill Tameron Rose. Without evidence as to what Jeffery Tippett's actions were that injured Tameron Rose, other than a blunt force injury to the back of his head, or evidence as to the degree of force required to cause the injuries in question, other than to say it was a significant force, I do not find there to be a reasonable inference that the probable or natural consequence of Jeffery Tippett's actions was the death of Tameron Rose. Therefore, I do not find that the evidence before me, if believed, is capable of supporting the inference that Jeffery Tippett knew he was likely to cause Tameron Rose's death by his actions. The evidence relied on by the Crown gives rise, at best, to speculation or suspicion as to Jeffery Tippet's subjective intent and does not give rise to a reasonable inference.

[21] As submitted by Defence Counsel, and as stated in *R. v. Jiwa*, an accused can be inferred to have intended the natural consequences of their actions. However, in Philip Butler's case, the Defence submitted that there is no evidence upon which the jury could reasonably infer that death, or bodily harm likely to result in death, were the natural and probable consequences of Philip Butler's actions. Any such inference would be based on speculation, and not supported by evidence. More specifically, the Defence referred to the fact that there was no evidence as to the length of an alleged physical altercation between Philip Butler and George Butler; there was no evidence as to how long the alleged choking continued; and there was no evidence as to the amount of force required, or length of time it would take for death via asphyxia.

[22] In contrast, the Crown takes the position that evidence has been adduced from which the jury could make a reasonable inference of the requisite intent for second degree murder. The Crown pointed to the evidence of a physical altercation between the Accused and George Butler related to George Butler's animosity towards Jonathan Butler. The Crown submitted this was in the evidence from Darlene Squires, Jonathan Butler and Dwayne Westcott; and is supported by pictures in evidence of injuries to Philip Butler and George Butler.

[23] Further, the Crown also pointed to the evidence of statements made by Philip Butler admitting that he killed his brother. Particularly, the Crown points to evidence of the Accused saying to Dwayne Westcott that he choked out George Butler.

[24] In addition, the Crown pointed to the evidence of motive in statements made by the Accused to Darlene Squires suggesting that he was trying to stop George Butler from hurting Jonathan Butler; and that the Accused told Jonathan Butler that he no longer needed to worry about George Butler, because he had killed him.

[25] The Crown submitted the above mentioned evidence supports a common sense inference that the Accused intended the consequence of his actions. The Crown referred to *R. v. Walle*, 2012 SCC 41, where the Supreme Court of Canada discussed the effects of intoxication on the inference that a sane and sober person intends the consequence of his or her actions (at paragraphs 40 to 68). The Supreme Court of Canada stated as follows, at paragraph 64:

> **64** That said, I do not mean to suggest that the common sense inference instruction should be tied to a rigid formula. Thus, by way of example, while trial judges may choose to refer to the "sane and sober" person when instructing a jury on the common sense inference, they need not do so. A simple instruction along the lines that "a person usually knows what the predictable consequences of his or her actions are, and means to bring them about", would suffice. (See Canadian Judicial Council, *Model Jury Instructions* (2012) (online), at *Homicide*, Offence 229.a, at para. 6.)

[26] In reference to the above excerpt from *R. v. Walle,* Defence Counsel submitted that the evidence could not reasonably support the inference that the level of bodily harm which ensued was a predictable consequence of Philip Butler's actions. As already stated, Defence Counsel suggested that such an inference would be speculative due to the lack of evidence.

[27] After considering all submissions, the case law and the evidence, with respect I do not agree with Defence Counsel's suggestion that the evidence could not reasonably support the inference that the Accused had the specific intent required to establish second degree murder. Rather, in my view, the evidence reasonably supports more than one inference, including an inference of specific intent. The inference of specific intent can be reasonably inferred, particularly based upon the evidence of Dwayne Westcott and Dr. Avis.

[28] To elaborate, as submitted by the Crown, the nature of the evidence that had been adduced in *R. v. Tippett* regarding the injury to the victim differs from the evidence in Philip Butler's case. In *R. v. Tippett*, the evidence was that the victim had suffered a blunt force injury to the back of the head, and that the blunt force injury was against a flat surface. There was no evidence as to what Mr. Tippett's actions were that injured the victim. By contrast, as submitted by the Crown, there is evidence in this case regarding how the victim sustained his injuries. Particularly, the evidence is that Philip Butler told Dwayne Westcott that he "choked out" George Butler, or words to that effect. This evidence is consistent with Dr. Avis' evidence regarding the manner of strangulation causing death.

[29] In my view, it is reasonable to infer that if an accused describes his actions as "strangling out" or "choking out" a person, then that accused would usually know that a predictable consequence of his actions is death, or bodily harm he knows is likely to cause death (*R. v. Walle*, at paragraph 64).

[30] I therefore agree with the Crown's position that in particular, this evidence of Philip Butler saying that he choked out George Butler, if believed, reasonably supports the inference that Philip Butler intended to cause George Butler's death; or that he intended to cause bodily harm to George Butler, knowing that his actions

could cause death, and he proceeded on with his actions. To be clear, however, this is not the only reasonable inference that can be drawn from that evidence, and the remaining evidence adduced by the Crown. Indeed, there are reasonable inferences which can be made on the evidence, which are favourable to the Accused on the element of specific intent.

[31] Nevertheless, an application for a directed verdict does not invite consideration of a judge's views on different reasonable inferences which can be drawn from the same evidence. It is up to the jury to decide which inferences to make, and which verdict to enter. As suggested by the Crown, if there is more than one inference which can be made, the Court cannot prefer one inference over the other in this application. Rather, the inference that favours the Crown is to be relied upon in an application for a directed verdict. This was well stated in *R. v. Roberts-Stevens*, 2018 ONSC 3159, at paragraph 11, as follows:

> **11** However, where the evidence on the directed verdict motion is entirely or largely circumstantial, as it is here, if more than one inference is available from a particular fact or group of facts, the case law establishes that I am to rely upon the inferences that favour of the Crown at this mid-trial stage in determining whether or not to grant the motion. That is not the case if the matter goes to the jury, but on the directed verdict application, I must look to all of the evidence but also prefer the inferences that favour the Crown as the foundation for deciding whether the test is met.

CONCLUSION

[32] Based on the foregoing analysis, I have concluded that there is "evidence upon which a reasonable jury properly instructed could return a verdict of guilty" on the count of second degree murder. The application for a directed verdict on the count of second degree murder is therefore dismissed. The trial shall continue on the charge of second degree murder.

[33] I have reached this conclusion after carefully considering the submissions of Counsel, the case law and the evidence. To be clear, in accordance with the direction in *R. v. Arcuri,* I have only engaged in a limited weighing of the evidence. I have

not concluded that the Accused is guilty. I have not drawn factual inferences, and I have not assessed credibility. Consequently, I have determined that the evidence, if believed, could reasonably support an inference of the specific intent required for second degree murder.

[34] Order accordingly.

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VALERIE L. MARSHALL
Justice