BETWEEN: DOUGLAS LEO BEAMISH APPELLANT AND: HER MAJESTY THE QUEEN RESPONDENT

R. v. Beamish

File No. AD-0693 Charlottetown

Prince Edward Island Supreme Court (Appeal Division)

1999 W.C.B.J. 626821; 43 W.C.B. (2d) 202

July 22, 1999, Decided

APPEAL -- No substantial wrong -- Admission of evidence --Prejudicial evidence concerning accused's prior spousal abuse involving different complainant improperly admitted but evidence otherwise compelling

EVIDENCE -- Admissibility --Accused's prior threat to estranged spouse admissible as showing animus where accused charged with spouse's murder

EVIDENCE -- Similar facts --Evidence of prior spousal abuse by accused involving different complainant not admissible where accused charged with spousal murder

SUMMARY: Appeal by accused from his conviction on a charge of second degree murder, dismissed -- The accused had been convicted of killing his former common-law wife -- (1) The trial judge had admitted testimony concerning the content and signature of a letter delivered by the accused to the deceased at a time when they were separated, in which the accused sought the deceased's return and asserted that if they could not be together, he was going to kill himself, the deceased and their children -- The trial judge correctly found the evidence relevant as being capable of demonstrating an animus by the accused towards the deceased consistent with the offence alleged -- (2) The trial judge had also admitted certain similar fact evidence, being a vicious beating which the accused had administered to another former common-law spouse years earlier as well as an incident in which the accused held the woman at knife-point, saying he was going to kill her -- The trial judge, however, erred in admitting that evidence of prior discreditable conduct, which was clearly very prejudicial -- There was nothing that gave that evidence much probative value beyond showing that the accused was a bad person capable of committing acts of extreme violence against women -- The only real issues in the case here were whether the accused was the killer of the deceased and whether it was planned and deliberate -- The accused had not invoked any defence that the testimony concerning the other woman would tend to rebut nor were there unique identifying signatures common to both attacks -- (3) The trial judge had granted leave to the Crown to call more than five expert witnesses, as required by s. 7 of the Canada Evidence Act, but only after-the-fact -- If there was an error here in that regard, it was procedural and not a substantive one -- The curative provisions of ss. 686(1)(b)(iii) and (iv) of the Criminal Code should be invoked if necessary - (4) The trial judge had admitted DNA evidence pertaining to the identity of cat hair found on a jaket similar to the one which the accused had been wearing the day before the deceased's disappearance -- The weight to be attached to that evidence was for the jury to decide and the trial judge had aptly cautioned the jury about the limited use and significance of probability estimates given by experts concerning that evidence - (5) Trial judges could overdo the expression of their opinion concerning the evidence but this was not a case where the trial judge went too far -- The trial judge had pointed out some of what he regarded as being significant or interesting but made it abundantly clear throughout his charge that the jury alone were to decide the facts and were not bound by anything which the trial judge said about the worth of the evidence - (6) The curative provisions of s. 686(1)(b)(iii) should be adopted here in relation to the improper admission of the prior discreditable conduct evidence -- The remaining admissible evidence was so compelling that any reasonable jury would inevitably have convicted the accused.

COUNSEL: The Appellant present and representing himself
Darrell E. Coombs Counsel for the Respondent

JUDGES: Carruthers C.J.P.E.I., Mitchell and McQuaid JJ.A.

Mitchell J.A. :

Douglas Leo Beamish appeals the conviction for the murder of Shirley Duguay entered against him on July 19, 1996, following a trial by judge and jury. The appellant contends the conviction should be set aside and a new trial ordered because the trial judge erred by failing to exclude or limit certain evidence and by improperly charging the jury.

Shirley Duguay's battered and partially decomposed body with hands tied behind her back was discovered in a shallow grave in a wooded area of North Enmore, Prince Edward Island, on May 6, 1995. She had been missing since October 3, 1994. The appellant, her former common law husband, was eventually charged with first degree murder. After a long trial, the jury found him not guilty of first degree murder but guilty of second degree murder. The trial judge subsequently sentenced the appellant to life imprisonment without eligibility for parole for eighteen years.

The appellant's notice of appeal listed eighteen grounds, but in his factum and argument he reduced the issues to five. Four deal with matters of evidence and one takes issue with the judge's directions to the jury on several counts.
GROUND ONE

The first ground of appeal is that the trial judge erred in admitting the testimony of Nelson Beamish regarding the content and signature of a letter delivered by the appellant through Linda Beamish to Shirley Duguay in the summer of 1992. Douglas Leo Beamish and Shirley Duguay were separated at the time. Nelson Beamish, brother of the appellant, was married to Linda Beamish, a sister of Shirley Duguay. The letter itself was not introduced in evidence, but Nelson Beamish testified that he saw the appellant deliver the letter, that Shirley Duguay gave it to him, and that he read it. According to Nelson's recollection, it stated the writer did not know why Shirley left him, that he wanted her to return and try to work things out. The writer went on to say if they could not be together, there was no point in living and he was going to kill himself, Shirley and their three children. Nelson said the letter was signed "D. Beamish" and that the signature appeared to have been written in blood although the letter itself was in ink. On cross-examination Nelson conceded that for all he knew the signature could have been in some reddish substance other than blood.

The trial judge admitted this evidence over the objections of counsel for the appellant. He found the evidence was relevant and its probative value outweighed its prejudicial effect. He did caution the jury about the limited way in which they should use the evidence. In my view, the trial judge was correct in finding the evidence relevant, and that it was not excluded by the rule against hearsay. The evidence was an out-of-court statement made by the appellant that was capable of demonstrating an animus on his part toward Shirley Duguay which was consistent with the offence with which he was charged. I would not interfere with the trial judge's exercise of discretion to allow the evidence notwithstanding its possible prejudicial effect. He considered the correct principles, he acted judicially, and his decision is not demonstrably wrong or unreasonable. Furthermore, the prejudicial impact of the evidence was minimized by the cross-examination of defence counsel and by the trial judge's caution to the jury about the limited use they could make of that evidence.
GROUND TWO

The second ground of appeal claims the trial judge erred in admitting certain similar fact evidence. During its case-in-chief the Crown presented evidence from Anne Buker, another former common law spouse of the appellant, about a vicious beating he administered to her at her home in Toronto many years earlier. The examination of Shirley Duguay's remains indicated that she had been severely beaten about the face and head. The trial judge permitted Anne Buker to testify that on one occasion in the mid-1980's, the appellant was at her house drinking with her and another person. The third person left and when he did, the appellant demanded sex. She refused. He became angry and hit her in the face. He grabbed her by the hair of the head and dragged her into a bedroom where he forced her to have sex with him. She testified the appellant held a butcher knife to her throat and said that he was going to kill her that night. When the incident in the bedroom was finished, the children were awake and crying. They were put on the couch in the living room. In front of them, the appellant threw the appellant on the rug and put the knife to her throat again saying that he was going to kill her. He then went and took a bath. He still had the knife with him in the bathroom. She testified that while he was in the tub he yelled for her to come into the bathroom. When she did, he grabbed her by the hair and pulled her down into the tub and bit her on the face. He told her not to bother trying to call for help because he had cut the phone wires. She checked and found the wires were in fact cut.

The trial judge ruled this evidence admissible because he found it was relevant and that its probative value exceeded its prejudicial effect. In my view, giving all due deference to his ruling, the trial judge erred at law by admitting this evidence of prior discreditable conduct by the appellant. The evidence was clearly very prejudicial and despite what the trial judge said, there is nothing that gives it much probative value beyond showing that the appellant was a bad person capable of committing acts of extreme violence against women. The trial judge's finding that the evidence was of high probative value in relation to identity, modus operandi , and design has little to support it. The only real issues in the

case were whether the appellant was the killer of Shirley Duguay, and if so, whether it was planned and deliberate. The appellant did not invoke any defence that Anne Buker's testimony would tend to rebut. There was little about the attack on Anne Buker that would tend to identify the appellant as the person who murdered Shirley Duguay or to show that it was planned and deliberate. There was no unique identifying signature common to both attacks. The similarities in the two offences (battering of the head, face and neck areas of a woman) were not so distinctive or remarkable as to be capable of supporting a reasonable inference that both offences were likely committed by the same person. It is difficult to see how the evidence could be more than minimally probative of any issue in the case or that its admission would serve much purpose other than for drawing the prohibited inference the appellant must have committed the offence because he is the kind of person capable of doing so. The greater the prejudicial effect of the evidence the greater the probative value it must have to justify its admission. There are certainly no exceptional circumstances about Anne Buker's evidence which elevates its probative value above its undoubted highly prejudicial effect so as to render it admissible.

GROUND THREE

The appellant's third ground of appeal complains the trial judge erred by allowing the Crown to call more than five expert witnesses without obtaining leave as required by s.7 of the Canada Evidence Act . In fact, the trial judge did grant leave, albeit after the fact. If there was an error here, it was procedural and not a substantive one. Furthermore, the appellant has not demonstrated any prejudice as a result of this procedural irregularity or that the failure to obtain prior leave has caused any miscarriage of justice. Accordingly, I would invoke s-ss.686(1)(b)(iii) and 686(1)(b)(iv) of the Criminal Code to cure the defect if there was any.

GROUND FOUR

The fourth ground of appeal claims the trial judge erred in admitting DNA evidence pertaining to the identity of cat hair found on a jacket similar to one the appellant had been seen wearing the day before Shirley Duguay disappeared. In my view, this ground has no merit. The appellant's arguments under this heading all go to the weight to be attached to the experts' estimate of the probability of the cat hair on the jacket being from a cat other than the one living in the same house as the appellant. The weight to be attached to the evidence was for the jury to decide. The trial judge twice aptly cautioned the jury about the limited use and significance of the probability estimates given by the experts.

The appellant's experienced counsel at trial did not challenge the admission of the expert opinion of Dr. Stephen lames O'Brien on the basis the PEI database used to estimate the probability of a chance match may have included some cats that were related to each other. It should also be noted that the PEI survey of cats was compared to a couple of others from elsewhere and was found to be consistent with them in terms of pattern of allelic variation, the key factor in determining the degree of probability of a chance match. Hence, there would not appear to be any real basis to believe the expert's confidence in his assessment of the probabilities of a chance match in this case would be appreciably altered upward even if some of the cats in the PEI survey might have been related. Obviously, the possibility of some of the cats being related must have been known to Dr. O'Brien and his colleagues. According to Dr. O'Brien, the PEI survey was an ad hoc one taken from the area of the crime scene. Dr. Bondt, the veterinarian who did the selection, was not given specific direction to ensure she did not include any samples from related cats. A truly random sample from a particular location does not exclude the possibility of some relatives being included. Dr. O'Brien obviously remained confident about his conclusion the likelihood of a chance match was remote despite the fact the PEI database might have included some related cats as did the Toronto one he compared. It should be noted that Dr. O'Brien's confidence in his estimate was not boosted so much by the number of cats as by the large number of loci they used. He said: "We used a lot of loci instead of a lot of cats." [Appeal Book Vol. 7, tab 17, page 168, line 10.]

The appellant's final submission under the heading of the fourth ground of appeal is that Dr. Bondt was not properly trained or accredited in collecting DNA samples and that Dr. O'Brien and his associates were not accredited when they did the testing. These claims have no merit. There is evidence the samples collected by Dr. Bondt were suitable, that proper quality control procedures were followed, and that there was no contamination. The reliability of the DNA evidence was not discredited by the defence at trial. In any event, the issues raised by the appellant on this point would go to weight, not to admissibility.

GROUND FIVE

The appellant's final ground of appeal takes issue with the trial judge's charge to the jury. His complaint about the charge pertains to some of the trial judge's references to the evidence.

The appellant complains the trial judge wrongly indicated to the jury he gave contradictory evidence when in fact he didn't testify at all. The appellant is referring to the part of the charge where the judge was explaining to the jury there were conflicts in the evidence they would have to consider in the course of their deliberations. As examples, the

trial judge pointed out some apparent inconsistencies between the appellant's out-of-court statement to the CBC interviewer and the and the evidence of other witnesses (Theresa Beamish, Pamela Beamish and Cory Ellis) pertaining to the same matters. The trial judge specifically stated to the jury at that point he was not discussing the creditworthiness of the evidence, but only using those references to demonstrate they would have to deal with some conflicts in the evidence. The trial judge made it very clear the appellant's out-of-court statement was not testimony given in court. When one reads the charge as a whole in the context of the trial, there is virtually no likelihood the jury would be left with the impression the appellant had falsely testified under oath. The trial judge was merely pointing out to the jury inconsistencies between the appellant's out-of-court statement and the evidence of some other witnesses. When he referred to the appellant's evidence, he was obviously referring to his out-of-court statements the Crown had introduced through other witnesses during the trial. It was, of course, up to the jury to decide whether the out of court statements were in fact made.

The trial judge on many occasions during his charge emphasized to the jury they were the sole finders of fact and when their view of the facts differed from his, theirs prevailed. He told the jury they were entitled to draw reasonable inferences from the facts they accepted. He then pointed to some examples from the evidence where they might infer the appellant had knowledge about what had happened to Shirley Duguay. He told the jury it was up to them to determine the significance of this evidence and that they should be cautious about it.

The trial judge properly pointed out to the jury that the Crown witness, Cory Ellis, was a jailhouse informer. He also reminded them that Cory Ellis might have had a mental problem. Accordingly, these would be factors they would take into account in assessing his credibility. The trial judge repeatedly pointed out to the jury it was up to them alone to decide who and what they believed and how much weight to give to the various pieces of evidence introduced.

The appellant takes issue with the trial judge telling the jury that when assessing the expert evidence they ought to consider, among other things, his or her qualifications and methods. In my view this instruction was perfectly appropriate. How could the jury properly weigh an expert's evidence or conclusions without considering his or her qualifications and methods just because someone is found qualified by the judge to give opinion evidence during a trial does not mean the jury is obliged to accept it. The jury has to consider qualifications, not for purposes of admissibility, but in order to assign appropriate weight.

The appellant takes offence to some of the trial judge's expressions of personal opinion and characterization of certain evidence. Trial judges are permitted to state their opinions and to make observations about evidence so long as they make it clear these are not binding on the jurors and that they are free to make up their own minds. Judges can overdo it but this is not a case where the trial judge went too far with his expressions of opinion about the evidence. Although he pointed out some of what he regarded as significant or interesting, he made it abundantly clear throughout his charge the jurors alone were to decide the facts, that they were not bound by anything he said about the worth of the evidence, and that they were free to take a different view from his.

The final criticism the appellant has of the trial judge's charge is the reference he makes to the Anne Buker similar fact evidence. I agree with him on this one. As I indicated earlier, this evidence should not have been admitted let alone highlighted during the charge. However, it should be noted the trial judge did caution the jury about the limited use they should make of similar fact evidence. Unfortunately, that does not overcome the fact the evidence should not have been presented to the jury in the first place.

DISPOSITION OF APPEAL

There certainly are many cases where the improper admission of prior discreditable conduct evidence would require a new trial. This is not one of them. The Crown has asked the court to invoke the curative proviso contained in s-s.686(1)(b)(iii) of the Criminal Code . I consider this a proper case for doing so because, despite the error in admitting the evidence of prior discreditable conduct, no substantial wrong or miscarriage of justice has occurred. I recognize that the standard for the application of s-s. 686(])(b)(iii) is high, and that the court must be satisfied there is no reasonable possibility of a different result. After reviewing all of the admissible evidence, I have concluded this case meets the test for the application of the curative proviso. In my view, if the similar fact evidence of Anne Buker had been excluded, and even if the testimony of Cory Ellis and Nelson Beamish was omitted, the remaining admissible evidence is so compelling that any reasonable jury acting judicially and properly instructed would inevitably convict the appellant. Discounting the evidence of Buker, Ellis, and Nelson Beamish, the remaining lay and forensic science evidence makes a case against the appellant that would be irresistible to conscientious jurors properly instructed as to the meaning of reasonable doubt. The Crown has to prove its case beyond a reasonable doubt but not to an absolute certainty, and it does not have to overcome doubts that are fanciful, imaginary, disingenuous, or frivolous. Although it does not include an

eyewitness account of the assault, the admissible evidence against the appellant taken as a whole is so overwhelmingly persuasive it allows for no rational conclusion other than he murdered Shirley Duguay. Any other conclusion would be illogical and based on something other than reason and common sense. In my view, a reasonable and properly instructed jury, absent the evidence of prior discreditable conduct, still could not possibly entertain a reasonable doubt as to the guilt of the appellant. Accordingly, I would dismiss the appeal.

The Honourable Chief Justice N.H. Carruthers : I AGREE

The Honourable Mr. Justice J.A. Mcquaid : I AGREE

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