Court of Queen's Bench of Alberta

Citation: R v Bird, 2020 ABQB 594

Date: 20201013
Docket: 150219624Q2
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Alan Devon Bird

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice A. D. Macleod

Introduction

1) Mr. Bird is charged with second degree murder, contrary to s 235(1) of the *Criminal Code,* RSC 1985, c C-46 [*Criminal Code*] in connection with the shooting of Jamie Roberto Orellana. In a previous decision (***R v Bird***, 2018 ABQB 1026) I directed a verdict of not guilty with respect to first degree murder because, in my view, the evidence would not support the inference of planning or deliberation beyond a reasonable doubt.

2) I have since heard evidence as to whether Mr. Bird suffered from Fetal Alcohol Spectrum Disorder (FASD) and, if so, what effect it had upon him on the date of the homicide. I also heard from his mother, who gave evidence as to her use of alcohol while pregnant with Alan as well as his upbringing.

Issues to Be Determined in This Decision

3) Taking into account all of the evidence including the evidence related to Mr. Bird's FASD:

1) At the time of the shooting did Mr. Bird possess the requisite *mens rea* for second degree murder? Has the Crown proven the specific intent beyond a reasonable doubt?
2) Has the Crown proven beyond a reasonable doubt that the events leading up to the shooting, including Mr. Orellana's physical assault upon Mr. Bird, would not cause an ordinary person to lose the power of self-control or alternatively that Mr. Bird did not act on the sudden before there was time for his passion to cool. These are the elements from section 232 of the *Criminal Code* as written on February 22, 2015.
3) If the Crown has proven the first two questions beyond a reasonable doubt then the Defence submits that the objective standard prescribed by section 232, specifically the "ordinary person" standard violates sections 7 and 15 of the *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982 (UK),* 1982, c 11 [*Charter*].

Facts

4) I will summarize the facts which are more fully set out in my previous decision. The incident occurred on February 22, 2015 on the front lawn of a duplex located in the 500 block of 26th Avenue N.E., just off Edmonton Trail in Calgary, Alberta. Mr. Bird sometimes occupied half of a duplex with his girlfriend and the victim was an occupant of the other side along with two other roommates.

5) The occupants of 402A were waking up in the early afternoon following a late Saturday evening. Mr. Paradise and the victim went outside for a smoke and noticed Mr. Bird sitting on the front porch of the neighboring duplex. He appeared upset and, indeed, he and his girlfriend had had a fight and she had locked him out of her side of the duplex. He had little sleep the night before and was recovering from a hang over.

6) He went around to the back of the duplex and started banging on his girlfriend's door which caused an awful ruckus, according to the surviving occupants of the neighboring duplex.

7) Mr. Paradise and the victim went around back and asked Mr. Bird to stop making all the racket. He replied that it was none of their business, his girlfriend had his "shit" and he needed his "shit". He invited them to do something about it, if they so wished, and after a bit of toing and froing, the victim punched Mr. Bird in the face. Mr. Bird was then challenged by Mr. Orellana to do something about that. Mr. Bird responded something to the effect that he was not going to do anything about it. The door then opened to his girlfriend's duplex and Mr. Bird went in.

8) After about one minute, Mr. Bird appeared on the doorstep with a gun and emptied the gun into the victim's body. During the course of firing the shots the accused is reported to have said something to the effect of "not so tough now". The shooting was fatal. The time which elapsed between the punch and the shooting was approximately one minute, perhaps 75 seconds.

The shooting was witnessed by a number of people. Mr. Bird then walked away quickly and attempted to hide the gun on a nearby golf course. He was soon picked up by the Police.

9) Upon arrest the Accused voluntarily made a number of statements which became part of the Agreed Statement of Facts:

> "I'm sorry man, I fell victim to the system."
>
> "I know between right and wrong and yet I do wrong. I know I'm supposed to do good in life."
>
> "I just want society to feel what I feel. I'm angry and I want them to feel the same."
>
> "I'm sorry," "It's weird that people know right from wrong, but do the wrong thing anyways."
>
> "I've had a lot to live up to being a Bird." "My family is like that man, I have a lot to live up to ... My life has changed – do you know is he still alive?"

The Medical and Expert Evidence

10) Both Alan Bird and his mother are key components to the diagnosis of FASD. Alan was examined and interviewed and his mother was interviewed extensively. Both gave evidence.

11) In addition, I heard extensive expert evidence. Alan was diagnosed with FASD by a team of experts including Suzanne Johnson, the owner and team leader with MediGene Services Inc., as well as two other members of her team, Dr. Harris Yee and Ms. Hinds-Nunziata, a registered psychologist. MediGene has been practicing exclusively in the area of FASD for the past twenty years.

12) I also had the benefit of the testimony of Dr. Monty Nelson, an expert in neuropsychology with a specialization in FASD. He is a leading expert in the field and, in addition to his work as a clinician, he trains other clinicians on the 2015 Canadian Diagnostic guidelines for FASD. He has co-authored a book entitled *Fetal Alcohol Spectrum Disorders: Ethical and Legal Perspectives* with the Honourable Margarite Trussler, formerly of this Court. He has frequently testified in Court as an expert witness and has personally conducted approximately 1500 clinical FASD assessments.

13) I heard from Dr. Jacqueline Pei who is an expert in developmental and behavioral psychology with a specialization in FASD. She is a well known expert in this area and not only has experience as a clinician and a researcher, but has written extensively in the area and has been an FASD advisor to the Government of Alberta since 2013.

14) On behalf of the Crown I heard from Dr. Waquar Waheed. While Dr. Waheed is a well qualified psychiatrist he has had less experience with FASD.

The MediGene Witnesses

15) Each of the witnesses on the MediGene team discussed their various roles as well as the protocol followed by them in coming to the diagnosis that Mr. Bird indeed suffers from FASD. The protocol was consistent with the 2015 Canadian Practice Guidelines.

16) I am satisfied that Mr. Bird suffers from FASD and that it is a permanent condition in the sense that FASD is a life long disability without a cure. It affects many of the brain's functions and it affects individuals differently. It affects Alan's IQ and cognitive ability, his ability to reason, his ability to process information, his affect regulation and, very significantly in this case, his executive function. His ability to reason, particularly in situations of stress, is severely affected. When that part of the brain, referred to as the amygdala, is engaged (under high stress) it tends to disable the front part of the brain, which is used in planning, thinking rationally and regulating emotion and problem solving. In other words, in times of stress and high emotion, Alan has a disability which limits his capacity for self-control.

17) Medi-Gene's report is exhibit 35 and the school records relied upon were entered as exhibit 36.

Dr. Monty Nelson

18) Dr. Nelson also examined the background information available with respect to Mr. Bird's childhood, the information gleaned from his mother and he also examined Mr. Bird. He agreed with the diagnosis of Medi-Gene and that Alan's disability was caused by his mother's use of alcohol during her pregnancy with Alan. It was not, in his opinion, caused by any trauma suffered by Alan or by the extensive use of drugs and alcohol by Mr. Bird personally. He further agreed that Alan's childhood upbringing and the considerable adversity which he suffered at the hands of his parents and surrogate parents contributed to his difficulty. Alan was constantly subjected to abuse by people in whose care he was and he was always around people who were drinking heavily and fighting both verbally and physically. At an early age he moved from Manitoba to Alberta and was involved in drug trafficking. Violence became a significant part of his life. He was involved in a knifing incident just months before this shooting and, notably, this caused him to procure the handgun which was used in the killing of the victim in this case.

19) Dr. Nelson testified as to how someone like Mr. Bird would react to being overwhelmed, stressed or angry. The following is an excerpt of his evidence given on October 9, 2019:

> Mr. Jugnauth: […] Is there a stress response system that is engaged when people are faced with adverse circumstances?
>
> Dr. Nelson: Certainly. We talk quite often in -- in our work about the HPA axis which means the hypothalamus-pituitary-adrenal system axis. It's basically a system of biochemical responses to stress. It's deep in the brain. It's the system that determines whether a situation is something you got to run from, a situation that maybe you've got to fight through. That fight or flight system, that HPA axis is such a critical response system for any of us.
>
> Mr. Jugnauth: Is the -- are you familiar with the term, "amygdala"?
>
> Dr. Nelson: That's exactly right. It's -- the amygdala is part of that mid-brain system.
>
> Mr. Jugnauth: So it's part of this HPA system that you're talking about?
>
> Dr. Nelson: Yeah, so the -- the amygdala is the centre for mood in the brain. It's -- it's like the little switch that turns on when you're very, very overwhelmed or stressed or angry. The way the brain is built is that the front parts of the head are

ultimately the control system of the brain. We were as a species developed -- as a species we developed with the low structures of the brain, the amygdala. That's what kept the cave men alive. They could figure out if something was going to eat them or if they had to kill it or if they had to run away. That's -- the brain evolved over millions of years. We developed other structures. The outer layer of the brain especially the front part is the most recent in terms of human development. And why that's important is that front part of the head, it puts the brakes on. When you're thinking about something violent. When you're thinking about running. It's the front part of the head that helps you reflect for a moment, determine if something is appropriate, and then act differently or to inhibit a response. In situations like these when we have an example of an individual who says that in a moment he just shot the gun till there was no more bullets left, that to me reflects someone who's acting out of a very raw emotion, without any sort of frontal moderation of that. The amygdala, when it gets fired up, when that mood centre really starts to light up, it controls the whole brain. A healthy brain can suppress that. A brain that's either been injured due to a birth injury or an injury later in life has a hard time coping with intense mood. And it will pick responses that are sometimes appropriate and sometimes not.

Mr. Jugnauth: Does -- does a brain that's been adversely affected by prenatal alcohol exposure suffer from the same issues with respect to regulating the amygdala?

Dr. Nelson: Very much so. Very much so. Our emotions are such a complex phenomenon and they're so intense. They're designed to keep us alive.

Mr. Jugnauth: Q And when this amygdala stress response system turns on, is it essentially binary with relative to other cognitive functions. Is it one or the other, in effect?

Dr. Nelson: Well, we're always using our moods to make decisions. What makes us feel, safe what makes us feel comfortable, what makes us stressed. The difference is the level of intensity. We've got an amygdala system, when it kicks in on alert, you know, there's this term "the amygdala hi-jack". When it's excited, when the amygdala lights up on -- on imaging, the rest of the brain can be almost held hostage to it.

[…]

Mr. Jugnauth: And the notion of an amygdala hi-jack, is that a common occurrence for people who have FASD in your clinical experience?

Dr. Nelson: It certainly is.

20) In other words, when Mr. Bird was confronted with the circumstances of February 22, 2015, the FASD interfered with his ability to access the executive functioning of his brain which could have enabled him to control his anger and emotions. Dr. Nelson’s report was entered as exhibit 40.

Dr. Jacqueline Pei

21) Dr. Pei's CV was entered as exhibit 41 and her report was entered as exhibit 42. Like Dr. Nelson, Dr. Pei is an expert in the area of FASD. Dr. Pei used the analogy of a stress cup in describing how the amygdala part of the brain takes over from that part of the brain that is responsible for the executive function. Mr. Bird has a smaller stress cup than normal and as a result it takes less in terms of stress or emotion to cause the cup to overflow and the amygdala part of the brain takes over from the executive part.

22) During her testimony, Dr. Pei opined on how that may have affected Mr. Bird on the day of the shooting. It is Dr. Pei's view that Alan's disability is a possible and rational explanation for his disproportionate reaction to being punched in the face.

Conclusion on Expert Testimony

23) In summary, I understood the experts to opine that FASD is a disability which tends to interfere with the front part of the brain which is used to regulate our self-control. Those who suffer from FASD and, in particular, the accused Alan Bird, has more difficulty in accessing his executive brain function which is vital to regulating an angry response to an insult.

24) It is impossible to know what Mr. Bird was thinking on the day of the shooting and the experts are unable to opine as to exactly what was going on in his mind. Furthermore, it is impossible to know at what moment an amygdala hi-jack occurred and the precise effect it may have had at the very moment of the shooting. Nor do the experts opine that Mr. Bird did not know what he was doing on that day. But they do express the view that Mr. Bird's FASD would have made it more difficult for him to make a more measured response to being punched in the face. I accept that evidence.

Analysis

Mens Rea

25) S 229 of the *Criminal Code* says that culpable homicide is murder if the person who causes the death of a human being "means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not".

26) It is clear on the evidence that Mr. Bird intended to hurt Mr. Orellana; he said as much. To give effect to that intention, he retrieved a gun that he had recently purchased and killed the victim by shooting him at close range. In my view there can be no reasonable doubt that Mr. Bird had the subjective foresight that the bodily harm he was inflicting on the victim was likely to result in death and he was reckless as to whether the victim lived or died.

27) Of course, we cannot know precisely what Mr. Bird was thinking at the time he pulled the trigger. But we are entitled to draw the common sense inference that a sane or sober person normally intends the natural and probable consequences of his conduct: ***R v Seymour***, [1996] 2 SCR 252 at para 19, 1996 CanLII 201 (SCC). It is acknowledged that drawing this inference is permissive and not mandatory.

28) However, Mr. Bird bought the gun with the intention that he might use it. He knew what the gun was for and what it would do. He deliberately retrieved the gun following the punch to

his face and was aware that he was shooting it. The expert evidence does not suggest that Mr. Bird was unable to understand what he was doing. Rather, his disability would make it more difficult for Mr. Bird, when he was under stress, to exercise a degree of self-control that would be the case of an ordinary person.

29) I am satisfied beyond a reasonable doubt that the requirement of *mens rea* for second degree murder has been made out by the Crown.

Provocation

30) I am of the view that the wrongful act or insult represented by Mr. Orellana punching Mr. Bird in the face was not sufficient to deprive an ordinary person of the power of self-control. I am satisfied of that beyond a reasonable doubt and, therefore, it follows that the Crown has proven beyond a reasonable doubt, based on the objective test, that Mr. Bird was not provoked within the meaning of s 232 of the *Criminal Code*.

31) It will be recalled that Mr. Bird had challenged Mr. Orellana by telling him to do something about it if he was unhappy. He was, in effect, taunting him and challenging him to a fight. Furthermore, after the victim punched him in the mouth, he was then challenged, in return, to do something about that. Mr. Bird said he was not going to do anything and went into his girlfriend's apartment. He returned with a gun about a minute later.

32) In my view, what Mr. Orellana did to Mr. Bird would not have caused an ordinary person to lose self-control sufficiently to cause the death or severe harm to the provoker. Mr. Bird argues that s 232 of the *Criminal Code* does not require that it be shown that an ordinary person would have done what Mr. Bird did; ie., shoot the victim repeatedly at close range with a firearm. He need only show that an ordinary person might lose self-control. But surely the matter must be kept in context. Whenever it is suggested that someone loses self-control it is almost meaningless unless it is put into context. We are not talking about losing control of one's manners or returning a punch to the face. We are talking about provocation in the context of a charge of murder caused by shooting the victim at close range with a deadly firearm.

33) In fact, the Supreme Court of Canada in ***R v Mayuran,*** 2012 SCC 31 addressed this very point. In finding there was no air of reality to the defence of provocation, Abella J concluded that an ordinary person in the defendant's circumstances would not "be deprived of self-control when "scolded" about her level of education to such a degree that she would stab the person 45 times in a responsive rage": at para 31. Accordingly, I am satisfied beyond a reasonable doubt that an ordinary person would not have committed an act of violence which could cause someone's death based upon what occurred to Mr. Bird.

Constitutionality of the Provocation Defence

34) Before I begin the analysis of the constitutional issue, I believe it is important to understand the nature of the provocation defence and its history. It is only in this context that I can properly consider the proposition that the objective standard runs afoul of ss 7 and 15 of the *Charter*. Those sections read as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on - - - mental - - - disability.

35) The Supreme Court of Canada dealt with the history of the provocation defence in ***R v Hill***, [1986] 1 SCR 313, 27 DLR (4th) 187. Chief Justice Dixon wrote the majority opinion and he underlined the general importance of the objective standard in criminal law. He said at para 18:

> 18. It is society's concern that reasonable and non-violent behaviour be encouraged that prompts the law to endorse the objective standard. The criminal law is concerned among other things with fixing standards for human behaviour. We seek to encourage conduct that complies with certain societal standards of reasonableness and responsibility. In doing this, the law quite logically employs the objective standard of the reasonable person.

36) Justice Wilson, who dissented in the result, nevertheless endorsed the objective standard and said as follows beginning at para 65:

> 65. Stupidity, of course, is not the only subjective character trait which cannot be taken into account in measuring the accused's acts against the objective standard of behaviour. Almost the entire spectrum of personality traits has been considered and rejected by English and Canadian courts as factors pertinent to the provocation defence. Thus, in *Salomon v. The Queen*, [1959] S.C.R. 404, it was determined that the temperament of the accused and his peculiar psychological make-up are not relevant to the question whether he has met the objective standard required of every person. Similarly, the fact that the accused was unusually excitable or prone to emotional outbursts was disallowed as a factor which the jury could consider in *Mancini v. Director of Public Prosecutions*, [1942] A.C. 1 (H.L.) And a tendency toward fits of rage brought on by drunkenness was excluded as an ingredient making up the standard of behaviour of the "ordinary person" in *Wright v. The Queen*, [1969] S.C.R. 335. As Laycraft J.A. has recently indicated in *R. v. Daniels* (1983), 7 C.C.C. (3d) 542 (N.W.T.C.A.), at p. 551, such varying mental and emotional capacities or personality traits, if attributed to the "ordinary person" and taken into account by the jury in the first stage of the analysis of the provocation defence, would "denude the test of objectivity".
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> 66. The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which accuseds are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard. The success of a provocation defence rests on establishing the accused's act as one which any ordinary person might have done in the circumstances and not upon eliciting the court's compassion for an accused whose act was unjustified but who could not control himself in the way expected of an ordinary person. It is evident that any deviation from this objective standard against which an accused's level of self-control is measured necessarily

> introduces an element of inequality in the way in which the actions of different persons are evaluated and must therefore be avoided if the underlying principle that all persons are equally responsible for their actions is to be maintained.

37) In ***R v Tran,*** 2010 SCC 58, Justice Charron reviewed the history of the defence and emphasized the importance of not subverting the logic of the objective test by taking into account the Accused's individual characteristics: at paras 32-34. She set out what she described as the cardinal principle – that criminal law is concerned with setting standards of human behavior that apply to everyone.

38) In doing so, Justice Charron said beginning at para 30:

> 30. The "ordinary person", as a legal concept, has generally been assimilated in the case law to the well-known "reasonable person" and the two terms are often used interchangeably: e.g., *Hill*, at p. 331. While I believe that the two fictional entities share the same attributes, at first blush some may question this as a logical inconsistency, given that a "reasonable" person would not commit culpable homicide in the first place. Indeed, "reasonableness" often defines the standard of conduct which is expected at law, and conduct which meets this standard, as a general rule, does not attract legal liability. The inconsistency is resolved when it is recalled that the defence is only a partial one, and that the defendant, even if successful, will still be guilty of manslaughter. The use of the term "ordinary person" therefore reflects the normative dimensions of the defence; that is, behaviour which comports with contemporary society's norms and values will attract the law's compassion. Meeting the standard, however, will only provide a partial defence. In this context, it seems to me that the label "ordinary person" is more suitable and this may explain Parliament's choice of words. Cory J. for the majority of the Court in *Thibert* explained how the ordinary person standard should be interpreted:
>
> > Yet, I think the objective element should be taken as an attempt to weigh in the balance those very human frailties which sometimes lead people to act irrationally and impulsively against the need to protect society by discouraging acts of homicidal violence, [para. 4]
>
> 31. Applying this objective standard has not been without difficulty. A central concern has been the extent to which the accused's personal characteristics and circumstances should be considered when applying the "ordinary person" test. Traditionally, Canadian courts, endorsing the approach of their English counterparts, adopted a restrictive approach, prohibiting any reference to the accused's characteristics or circumstances (*Bedder v. Director of Public Prosecutions*, [1954] 1 W.L.R. 1119 (U.K. H.L.); *R. v. Salomon*, [1959] S.C.R. 404 (S.C.C.); *R. v. Wright*, [1969] S.C.R. 335 (S.C.C.)). However, this approach required the court to completely ignore relevant contextual circumstances in making its determinations.
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> 32. Recognizing this deficiency, a broader approach was eventually adopted in conceptualizing the "ordinary person" so as to account for some, but not all, of the

individual characteristics of the accused. As Dickson C.J. explained in *Hill*, this more flexible approach is essentially a matter of common sense:

> ... the "collective good sense" of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question. For example, if the provocation is a racial slur, the jury will think of an ordinary person with the racial background that forms the substance of the insult. To this extent, particular characteristics will be ascribed to the ordinary person. Indeed, it would be impossible to conceptualize a sexless or ageless ordinary person. Features such as sex, age, or race, do not detract from a person's characterization as ordinary. Thus particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation.
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> [Emphasis added; p. 331.]

33. I emphasize the words of caution that, in adopting this more flexible approach, care must be taken not to subvert the logic of the objective test. Indeed, if all of the accused's characteristics are taken into account, the ordinary person becomes the accused. As Dickson C.J. noted, this approach would lead to the anomalous result that "[a] well-tempered, reasonable person would not be entitled to benefit from the provocation defence ... while an ill-tempered or exceptionally excitable person would find his or her culpability mitigated by provocation and would be guilty only of manslaughter" (p. 324).

34. Further, an individualized approach ignores the cardinal principle that criminal law is concerned with setting standards of human behaviour.

39) In ***R v Cairney***, 2010 SCC 55 Chief Justice McLachlin discussed the defence of provocation and speaking about the ordinary person standard she said beginning at para 38:

> *(b)* Contextualizing the Ordinary Person Standard
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> 38. The “ordinary person” requirement limits the availability of the defence of provocation, in order “to ensure that the criminal law encourages reasonable and responsible behaviour”: *Thibert*, at para. 14. The downside of the “ordinary person” standard is that, if applied rigidly and in the abstract, it runs the risk of rendering the defence unavailable in virtually all situations. As discussed, the truly ordinary person in Canadian society does not kill a person who insults him or her. In response to the potential unfairness that could result from a purely abstract conception of the “ordinary person”, this Court has held that the standard must be applied in a contextual manner:
>
> ... the ordinary person must be taken to be of the same age, and sex, and must share with the accused such other factors as would give the act or insult in question a special significance. In other words, all the relevant background circumstances should be considered.
>
> *(Thibert,* at para. 14)

> 39. As the appellant emphasizes in his submissions, "the history and background of the relationship between the victim and the accused is relevant and pertinent to the 'ordinary person' test": *Thibert*, at para. 17. Indeed, all contextual factors that would give the act or insult special significance to an ordinary person must be taken into account: *Thibert*, at para. 18.
>
> 40. However, the consideration of background circumstances that contribute to the significance that an ordinary person would attribute to an act or insult does not change the fact that a certain threshold level of self-control is always expected of the "ordinary person". For example, characteristics of the accused such as "a propensity to drunken rages or short tempered violence" are not relevant to the ordinary person test: *Thibert*, at para. 15. Only factors which contribute to the significance of an act or insult should be taken into account when contextualizing the standard: Ashworth, "The Doctrine of Provocation", at p. 300. The standard should not be adapted to accommodate a particular accused's innate lack of self-control, as: "... there is an important distinction between contextualizing the objective standard, which is necessary and proper, and individualizing it, which only serves to defeat its purpose": *Tran*, at para. 35. As Professor Renke underscores, "[p]rovocation should be recognized only at that point where the ordinary person's control has been taken to its limit, and that limit has been passed": p. 772.
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> 41. By appropriately contextualizing the ordinary person standard, the law on provocation strikes a balance between recognizing human frailties that lead to outbursts of violence, on the one hand, and the need to protect society by discouraging acts of homicidal violence, on the other: *Thibert*, at para. 4.

40) Our Supreme Court has clearly stated that the objective standard is fundamental to the partial defence of provocation because it reflects a basic societal objective and it also guarantees the equality of its application to everyone from whom a uniform standard of behaviour is expected.

Charter Challenge by Mr. Bird

41) Mr. Bird alleges that:

1. the operation of the objective standard in the partial defence of provocation is not in accordance with the principles of fundamental justice because Mr. Bird cannot meet the objective standard due to his disability; and
2. the objective requirement violates the equality guarantee in s 15 of the *Charter* by discriminating against persons with mental disabilities which interfere with their ability to exercise self-control.

42) I am mindful of the words of Justice McLachlin as she then was in ***R v Creighton*** [1993] 3 SCR 3 at para 79, 105 DLR (4th) 63 which are as follows:

> 79. Before venturing on analysis, I think it appropriate to introduce a note of caution. We are here concerned with a common law offence virtually as old as our system of criminal law. It has been applied in innumerable cases around the world. And it has been honed and refined over the centuries. Because of its

> residual nature, it may lack the logical symmetry of more modern statutory offences, but it has stood the practical test of time. Could all this be the case, one asks, if the law violates our fundamental notions of justice, themselves grounded in the history of the common law? Perhaps. Nevertheless, it must be with considerable caution that a twentieth century court approaches the invitation which has been put before us: to strike out, or alternatively, rewrite, the offence of manslaughter on the ground that this is necessary to bring the law into conformity with the principles of fundamental justice.

43) While that case dealt with the constitutionality of the test for manslaughter, I think the comments apply here with equal force because we are dealing with the age old defence of provocation. Moreover, that defence is discussed during the course of Justice McLachlin's reasons for judgment.

44) The allegations of unconstitutionality are serious and significant. In addition to the partial defence of provocation our criminal law is replete with references to the ordinary person and other normative standards.

Section 7 – Principles of Fundamental Justice

45) There is one case which has raised the issue of whether the objective standard set out in the provocation and the partial defence of provocation is contrary to s 7 of the *Charter*. That is ***R v Cameron***, (1992) 71 CCC (3d) 272, 7 OR (3d) 545 (Ont CA). The case is cited by both the Crown and Defence and each takes a very different position with respect to what the case stands for. It is a very short case and the judgment of the court was delivered by Doherty JA Leave to appeal was dismissed.

46) Mr. Bird takes the position that the case stands for very little because the appellant in that case was under a basic misunderstanding that the defence of provocation negated an essential element of *mens rea* for murder. As the Court of Appeal said in ***Cameron***, that it is not so because provocation merely offers a partial defence to the person against whom *mens rea* has already been proven, as it has in this case. Still, the words of Doherty JA are reasonably straightforward. Citing ***Hill***, he said "the objective component of the statutory defence of provocation serves a valid societal purpose ... and cannot be said to be contrary to the principles of fundamental justice": at para 7.

47) In his book *Fundamental Justice - section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012), Professor Stewart commented on this case at p 244 as follows:

> In *R* v *Cameron*, the Ontario Court of Appeal rejected the accused's claim that the objective element of the partial excuse of provocation was contrary to the principles of fundamental justice. The court reasoned that before the defence of provocation came into play, the Crown had to prove the full subjective *mens rea* of murder; thus, under section 232, no one could be convicted of murder without proof of the constitutionally required level of fault. Conditioning the partial excuse of provocation on an objective element was not contrary to any principle of fundamental justice. The court's reasoning is sound. Provocation does not justify conduct or negate blameworthiness; it operates as a partial excuse mitigating blameworthiness. Conditioning the defence on the response of the

> ordinary person serves merely to prevent those who are more sensitive than the ordinary person from taking advantage of the partial excuse.

48) The importance placed by our Supreme Court and other appellate courts on the objective test long after the advent of the *Charter* would be difficult to understand unless the objective test was in accordance with the principles of fundamental justice.

49) In his reply brief, Mr. Bird's counsel makes extensive reference to Justice McLachlin's reasons in ***Creighton*** and argues that her judgment makes Mr. Bird's point. Mr. Bird argues that he was unable to meet the ordinary person standard because of his disability. Any justification for a uniform standard of care stops at the point of incapacity because convicting and punishing a person who lacks the capacity to do what the law says serves no useful purpose. This is why s 16 of the *Criminal Code* and the Not Criminally Responsible [NCR] regime exists. Justice McLachlin makes it clear that, in the context of intentional crimes, capacity is the "ability to appreciate the nature and quality of one's conduct": ***Creighton*** at para 129.

50) Justice McLachlin's judgment in ***Creighton*** included the following beginning at para 127:

> 127. To the principle of a uniform minimum standard for crimes having an objective test there is but one exception - - incapacity to appreciate the risk. Justice Holmes, speaking of the failure to take reasonable care, put it this way (*supra*, at p. 109):
>
> > There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbors, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. [Emphasis added.]
>
> 128. Consistent with these principles, this Court has rejected experiential, educational and psychological defences falling short of incapacity. Thus it has excluded personal characteristics short of incapacity in considering the characteristics of the "ordinary person" for the defence of provocation for the offence of murder: *Salomon v. The Queen*, 1959 S.C.R. 404: *R. v. Hill*, *supra*, at pp. 335-36. One commentator sums up the non-exculpatory characteristics as follows: "Thus, the temperament, peculiar psychological make-up, unusual excitability or pugnaciousness of an accused person cannot be taken into account by the jury for the purpose of determining the level of self-control the accused should have shown. The ordinary person is none of these things" (M. Naeem Rauf. "*The Reasonable Man Test in the Defence of Provocation: What are the Reasonable Man's Attributes and Should the Test be Abolished*" (1987), 30 Crim. L. Q. 73, at p. 79).
>
> 129. To summarize, the fundamental premises upon which our criminal law rests mandate that personal characteristics not directly relevant to an element of the offence serve as excuses only at the point where they establish incapacity, whether the incapacity be the ability to appreciate the nature and quality of one's conduct in the context of intentional [page 66] crimes, or the incapacity to

> appreciate the risk involved in one's conduct in the context of crimes of manslaughter or penal negligence. The principle that we eschew conviction of the morally innocent requires no more.

51) As was the case in ***Cameron***, I have already been satisfied beyond a reasonable doubt that Mr. Bird had the requisite *mens rea* to commit second degree murder of Mr. Orellana. It cannot be said on behalf of Mr. Bird that he did not have the capacity to appreciate the nature and consequences of his actions. Nor can it be said that he is morally innocent. To this point, what I find particularly significant is that Mr. Bird chose to purchase a handgun and keep it readily accessible. Mr. Bird immediately reached for this handgun when he lost his self-control and used it to kill Mr. Orellana.

52) However, our jurisprudence is clear that in order to be able to take advantage of the partial defence of provocation an accused must show that an ordinary person, faced with what the accused is faced with, would have lost control. Fairness and parity in application of the law depends on this. As the Supreme Court in ***Hill*** said at para 18:

> 18. If there were no objective test to the defence of provocation, anomalous results could occur. A well-tempered, reasonable person would not be entitled to benefit from the provocation defence and would be guilty of culpable homicide amounting to murder, while an ill-tempered or exceptionally excitable person would find his or her culpability mitigated by provocation and would be guilty only of manslaughter.

Therefore, if for whatever reason, whether it be psychological or a personality disorder, the accused is unable to meet the norm of the ordinary person, the partial defence is not available.

53) It will be recalled that Chief Justice McLachlin in ***Cairney*** quoted from Professor Renke (now Justice Renke of this Court) that, "provocation should be recognized only at that point where the ordinary person's control has been taken to its limit and that limit has been passed": at para 40. That has been the consistent position of our country's highest Court and I can only conclude that the objective test is consistent with the principles of fundamental justice.

Discrimination under Section 15

54) Does the law relating to the partial defence of provocation discriminate against persons with mental disabilities contrary to s 15 of the *Charter*? The defendant argues that it does.

55) As we have seen, the criminal law often incorporates normative standards such as ordinary person or reasonableness. These standards reflect "community standards" which are applied by juries to individual cases. The Supreme Court has said that these normative standards, when applicable, are to be standards against which an Accused is measured. To allow these standards to be individualized would be to subvert the very logic of using them in the first place. Accordingly, it cannot be that every time an Accused with a disability contends that it prevents them from meeting the ordinary standard there is a breach of s 15. In other words, the objective standard is a fundamental principle which demands that we examine critically the assertion that it is discriminatory.

Overview of Section 15

56) Discrimination is the evil which s 15 seeks to prevent. The test for assessing a s 15(1) *Charter* claim was summarized recently by the Supreme Court in ***Quebec (AG) v APTS***, 2018 SCC 17 at para 25:

> 25. ...The test for a *prima facie* violation of s. 15 proceeds in two stages: Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds? If so, does the law impose "burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating . . . disadvantage" (*Taypotat*, at paras. 19-20).

57) Since ***Andrews v Law Society of British Columbia***, [1989] 1 SCR 143 at 171, 56 DLR (4th) 1, the Supreme Court has emphasized substantive equality as the engine for the s 15 analysis: ***APTS*** at paras 25-26. In ***Withler v Canada (Attorney General)***, 2011 SCC 12 the Chief Justice and Abella J said this about the right protected under s 15 at para 31:

> 31. The two steps reflect the fact that not all distinctions are, in and of themselves, contrary to s. 15(1) of the Charter (*Andrews; Law; Ermineskin Indian Band*, at para. 188). Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination...
>
> (Emphasis added).

58) A guiding question to the analysis is "whether the distinction restricts access to a fundamental social institution, or affects 'a basic aspect of full membership in Canadian society'": ***Law v Canada (Minister of Employment and Immigration)***, [1999] 1 SCR 497 at para 74, 170 DLR (4th) 1 citing ***Egan v Canada***, [1995] 2 SCR 513 at paras 63-64, 124 DLR (4th) 609. Cases involving a "complete non-recognition of a particular group" will have a greater adverse impact than laws that "recognize or accommodate the group, but does so in a manner that is simply more restrictive than some would like": ***Lovelace v Ontario***, 2000 SCC 37 at para 88 citing ***Egan*** at paras 63-64.

59) The burden of proving an infringement of s 15(1) lies with the claimant. If they successfully establish discrimination, the onus then turns to the government to justify the rights infringement under s 1: ***Andrews*** at 178; ***Law*** at para 81.

Does the Partial Defence of Provocation Violate Section 15?

60) As has been noted by judges and legal writers, the concept of equality is elusive and does not mean the same thing to everyone. Mr. Bird believes that he is discriminated against on the basis of his FASD because he is not treated the same as an ordinary person who would be entitled to the partial defence of provocation if he lost self-control. To many others, including members of our judiciary, equality, in the context of provocation, means that the law expects a minimum standard of self-control from everyone.

61) In this area there are no absolute rules. As Justice McIntyre said in ***Andrews*** beginning at p 168:

> For the reasons outlined above, the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*.

> Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula.
>
> It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charte*r. It is, of course, obvious that legislatures may — and to govern effectively — must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions.
>
> (Emphasis added).

62) In this case, the nature of the argument made by defence is similar to the s 15 argument made in ***Alberta v Hutterian Brethren of Wilson Colony***, 2009 SCC 37 [***Hutterian Brethren***] and "easily" dispensed of by the Supreme Court in a brief four paras. Notably, beginning at para 107, Chief Justice McLachlin said this:

> 107. The respondents claim that "[r]efusing to issue licences to the Wilson Members who otherwise qualify for such licences simply because they refuse to abandon their religious belief in the Second Commandment, but issuing licences to the comparator group simply because they do not share such religious belief, clearly demeans and infringes upon the human dignity of the Wilson Members" (Factum, at para. 39). However, photo licences are not issued to other drivers "simply because they do not share such religious belief", but rather because they meet the statutory requirements for issuance of a licence — which include having a photo taken.
>
> 108. Assuming the respondents could show that the regulation creates a distinction on the enumerated ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice. There is no discrimination within the meaning of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, as explained in *Kapp*. The Colony members' claim is to the unfettered practice of their religion, not to be free from religious discrimination. The substance of the respondents' s. 15(1) claim has already been dealt with under s. 2 (a). There is no breach of s. 15(1).
>
> (Emphasis added).

63) Under s 232 of the *Criminal Code*, if the accused is unable to exercise the self-control of an ordinary person, the partial defence of provocation is not available. That is the way the law operates, and similar to the court's conclusion in ***Hutterian Brethren***, it is not because of any discrimination against those who have FASD. While FASD may make it more difficult to meet

the ordinary person test, there are many reasons why a person may lose self-control under circumstances where the fictional ordinary person would not have.

64) As has been articulated above, the Supreme Court has clearly defended the importance of the objective person standard in the partial defence of provocation to set societal standards for human behaviour and ensure equal application of the law for all: ***Hill*** at paras 18 and 65; ***Tran*** at paras 30-34. The reason the law operates as it does is in no means to discriminate against individuals like Mr. Bird who have conditions or personality traits that make it more difficult to meet the ordinary person standard. In fact, it is the opposite, whereby setting a uniform standard helps to maintain parity in the availability of this partial defence, for those found guilty of second degree murder.

65) While I accept the expert evidence regarding the nature of Mr. Bird's disability, I do not agree with defence that the law as it is discriminates against those with mental disability and perpetuates disadvantage, prejudice and stereotypes. The criminal law does consider mental disability and understands that there are situations where it would not be fair to treat everybody the same. For individuals where incapacity, as discussed by Chief Justice McLachlin in ***Creighton***, is established, the defence of provocation and challenges of meeting the objective person standard will never be an issue because they will be found NCR. Indeed, having reviewed the case law on provocation, I find that inability to access this defence due to mental disability has not been an issue.

66) For everyone else, it is only after the trier of fact is satisfied beyond a reasonable doubt that the elements of murder are established, that provocation even becomes relevant. And it is important to keep in mind the nature of the defence. Provocation, where successful, serves to partially excuse conduct sufficiently blameworthy to merit punishment out of society's compassion for human frailty. The objective standard ensures that the defence does not "extend to killings committed in circumstances that the community... regards as unreasonable and beyond the pale of any acceptable justification: ***R v Pilon***, 2009 ONCA 248 at para 73.

67) There are many reasons why an accused might not meet the ordinary person test. Only one relates to a characteristic of FASD. So, it is not solely based on the basis of association with those that have FASD that a distinction is made. Indeed, were the courts to make an exception in this case for those with FASD, one wonders how many others who do not meet the ordinary person standard would argue that they too be entitled to exceptional treatment based on personal characteristics. Doing so would erode the very premise of having an objective person standard and threaten the legitimacy of the partial defence.

68) Accordingly, I find that the defence did not meet the burden of establishing that the objective test in s 232 of the *Criminal Code* violates s 15(1) of the *Charter*. The law does not create a distinction on the enumerated ground of mental disability. If I am wrong, then the distinction "arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice": ***Hutterian Brethren*** at para 108. The law is not discriminatory and the objective person standard serves a valid and necessary function.

Conclusion

69) In the result, therefore, I find that:

1) Mr. Bird had the requisite *mens rea* for second degree murder at the time he shot the victim;

2) The punch in the face by the victim and the facts upon which Mr. Bird claims to have lost self-control would not have resulted in an ordinary person losing self-control. Accordingly, Mr. Bird is not entitled to the partial defence of provocation under section 232 of the *Criminal Code;*

3) The ordinary person standard for the partial defence of provocation does not violate sections 7 and 15 of the *Charter;*

4) I find Mr. Bird guilty of second degree murder.

Heard on the 13th, 14th and 15th days of August, 2018, the 8th, 9th and 10th days of October, 2019, the 13th and 14th day of January and the 21st day of May, 2020.
Dated at Calgary, Alberta this 13th day of October, 2020.

A.D. Macleod
J.C.Q.B.A.

Appearances:

Ken McCaffrey and Heather Morris
for the Crown

Derek Jugnauth
for the Accused