In the Court of Appeal of Alberta

Citation: R v Vader, 2019 ABCA 191

Date: 20190517
Docket: 1703-0027-A
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent

- and -

Travis Edward Vader

Appellant

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Jack Watson

Memorandum of Judgment

Appeal from the Conviction of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 15th day of September, 2016
(Docket: 130781800Q1)

Memorandum of Judgment

The Court:

[1] On July 3, 2010, Lyle and Marie McCann, a retired married couple, left Edmonton for a summer vacation with family members in British Columbia. They were driving in a large motor home, which was towing a Hyundai SUV (the SUV). The McCanns were video-recorded at a Canadian Superstore in St. Albert, buying groceries and gasoline. They left that store at 10:08 am on July 3, heading west on Highway 16.

[2] In the late spring of 2010, the appellant, Travis Vader, (Vader or the appellant), was unemployed and penniless, wrestling with a serious substance abuse problem. On July 3, 2010, he drove to the home of a friend (Olson), in a Ford F350 truck he had stolen five days before. The truck needed oil but Vader had no money to buy any. Olson gave him a quart of lawn mower oil which Vader put in the truck. Vader left at approximately 12:15 pm.

[3] Two hours later, Vader used the McCanns' cell phone to call a former girlfriend. He then used that phone to make other calls and to send text messages. Later that day, at approximately 5:15 pm, he re-appeared at Olson's residence. This time he was driving the McCanns' SUV. Now he had money. He gave Olson $50 to buy beer and some additional minutes for his (Vader's) cell phone which had run out of time days before. Olson did as he was asked; the beer purchased was "Boxer beer". The two men drank some of the beer and then, at about 7:00 pm, Vader left, still driving the McCanns' SUV and taking the remainder of the Boxer beer with him.

[4] Two days later, Vader moved the McCanns' motor home to a remote area near a campsite west of Edmonton and set it ablaze. The vehicle was totally destroyed by the fire; no human remains were found in the ashes.

[5] On July 9, 2010, Vader moved the stolen Ford F350 truck he had been driving earlier to another remote area west of Edmonton and set it on fire. Subsequent police examination located a key fob for the McCanns' SUV from the back of that truck.

[6] The McCanns' SUV was found abandoned on July 16, 2010. It was seized and forensically examined. DNA analysis revealed blood from both McCanns on items found inside the SUV. Vader's fingerprints were found on a can of Boxer beer located inside the SUV and his DNA (blood) was also found inside the SUV.

[7] A "Boag" baseball cap, identical to the one Mr. McCann was wearing when he was filmed at the Superstore on July 3, was found in the SUV. It had a bullet hole through the front of the cap. It was stained with blood. DNA examination determined the blood to be that of Mr. McCann.

[8] Elsewhere in the SUV were items purchased by the McCanns while at the Superstore. DNA from both of the McCanns and Vader was found on some of those items. The trial judge concluded that some of these items had been sprayed with blood before they were put in the SUV.

[9] No one has seen or heard from either of the McCanns since Vader used their phone at 2:14pm on July 3, 2010. Their bodies have never been recovered.

[10] Vader did not testify at trial.

[11] Following a careful analysis of all of the evidence, only some of which has been referred to above, the trial judge concluded that Vader had killed both of the McCanns in the course of an armed robbery (***R v Vader***, 2016 ABQB 505 [*Trial Decision*]). In reaching this conclusion, the trial judge rejected a number of alternative theories offered by defence counsel to account both for the disappearance of the McCanns, and some of the more incriminating evidence. They included the suggestion that shortly after leaving the Superstore on July 3, Mr. McCann may have interrupted the trip to engage in some target practice and used his own cap as a target. As to the blood on the cap, it was suggested that after the target practice he may have had a bloody nose and bled on his cap. Alternatively, counsel suggested that the McCanns may have been intercepted by human traffickers who secreted them away in some unknown place where they remain today, alive.

[12] These and other imaginative theories were rejected as either bizarre or illogical, and all were noted to be unsupported by any evidence.

[13] That Travis Vader killed Lyle and Marie McCanns during an armed robbery and then concealed their remains, has been proven beyond any reasonable doubt. That fact is not disputed on this appeal. Rather, the appeal is concerned with the time taken to bring the appellant to trial and the alleged errors of the trial judge after he mistakenly convicted the appellant of murder. The appellant contends that these errors can now only be remedied by a stay of proceeding, or, perhaps a new trial on charges of manslaughter only.

The Erroneous Convictions

[14] It was the Crown's position that the killing of the McCanns was both intentional and planned and deliberate, and therefore first degree murder. The appellant countered there was insufficient evidence the McCanns were even dead or that he had killed them, and that in any event there was no evidence that the killings were either intentional or planned and deliberate. Following lengthy closing submissions, the trial judge reserved his decision.

[15] In the comprehensive judgment that followed, the trial judge resorted to s. 230 of the *Criminal Code* to convict the appellant of murdering the McCanns. Section 230 had previously been struck down as constitutionally offensive and thus could no longer support a conviction for murder (***R v Martineau***, [1990] 2 SCR 633). Ultimately, the trial judge vacated the murder

convictions and substituted convictions for manslaughter instead. The appellant was then sentenced to imprisonment for life.

Grounds of Appeal

[16] The appellant advances the following grounds of appeal:

i) Without the benefit of *Jordan*, and without anticipating 6 ½ months of delay still to come, the trial judge erred in dismissing the appellant's application for a stay of proceedings pursuant to s. 11(b) of the *Charter;*

ii) The trial judge's decision to substitute two verdicts of guilty of manslaughter was contrary to the *functus officio* doctrine;

iii) The trial judge's decision to substitute two verdicts of guilty of manslaughter raised a reasonable apprehension of bias in the mind of an objective and informed observer, and otherwise compromised the integrity of the trial process;

iv) The trial judge violated s. 662(3) of the *Criminal Code* by substituting two guilty verdicts for the lesser included offence of manslaughter without first determining whether or not the evidence proved the greater offence of murder.

i) Section 11(b)

[17] This was by any measure an extraordinary and complex case. Early in the investigation it became clear to the police that the McCanns may have been killed. With that, a massive investigation was undertaken to find their bodies and their assailant.

[18] More than 600 police officers from both Alberta and British Columbia were involved in that investigation which continued for almost two years until, on April 18, 2012, the appellant was charged with the first degree murder of both McCanns. A preliminary inquiry was set to be heard in September/October of the following year, 2013.

[19] In the interim, the Crown focused on ensuring that it and the defence would receive full disclosure of the investigation. That became a major undertaking, fully described in the trial judge's decision responding to the appellant's application for a judicial stay based on an alleged violation of his right to trial within a reasonable time (***R v Vader***, 2016 ABQB 55 [the 11(b) Decision]).

[20] Difficulties occasioned in obtaining the necessary disclosure paralyzed the prosecution and eventually caused the Crown to enter a stay of proceedings pursuant to s. 579 of the *Criminal Code*. The prosecutor then in charge of the case later testified at the s. 11(b) *voir dire* that she stayed the proceedings to ensure that once she had full disclosure there was still a viable case to

prosecute and that it was in the public interest to do so. Remarkably, the disclosure problem took more than 5000 hours to rectify.

[21] Upon receiving the disclosure and sharing it with the appellant, the Crown elected to recommence proceedings on December 19, 2014. The trial was then set to be heard during March and April of 2016. As the trial judge later observed, no earlier time was available for a trial of such length. In the meantime, in January 2016, the appellant brought an application for a judicial stay arguing that the Crown's earlier stay of proceedings was an abuse of process and that, in any event, his right to a trial within a reasonable time as guaranteed by s. 11(b) of the *Charter* had been violated.

[22] The evidence pertaining to the stay application was heard over seven days. Ultimately the trial judge dismissed the abuse of process argument finding that there was none. As to the appellant's s. 11(b) argument, the trial judge conducted a thorough "*Morin*" analysis (***R v Morin***, [1992] 1 SCR 771), and upon balancing the appropriate factors, dismissed the application, noting that although it was "a very close call" the trial should proceed (the 11(b) Decision).

[23] The trial began six weeks later on March 8, 2016 and concluded on May 27. Final arguments were heard on June 22 and 23, 2016. Thus the trial took approximately two and a half months longer than had been anticipated. The judgment itself was on reserve until September 15, 2016, when the trial judge delivered it orally; a delay of another three months.

[24] In the interim, on July 8, 2016, the Supreme Court rendered its decision in ***R v Jordan***, 2016 SCC 27 [*Jordan*]. Following *Jordan,* the court is to determine the delay between the laying of the charge and the end of the trial. If the delay is over the presumptive ceiling after deducting for defence delay, including both waiver and conduct, the court is to look at the exceptional circumstances, in particular discrete events and the complexity of the case; other exceptional circumstances are not excluded. Delays resulting from these exceptional circumstances are also to be deducted. If the delay still exceeds the presumptive ceiling, but the case was in the system before *Jordan* was decided, the transitional exception may apply.

Jordan Analysis

[25] Here the total delay between the initial laying of the charges and the sentencing of the appellant was 58 months. That clearly exceeds the 30 month *Jordan* ceiling and is thus presumptively unreasonable. Accordingly, the Crown bears the burden of establishing that the delay was reasonable having regard to the exceptional circumstances of the case.

[26] Although the transitional exception is particularly relevant in this case, it may be convenient to begin with a consideration of the unforeseen events that followed the trial judge's decision on the appellant's s. 11(b) application, which was rendered six weeks before the beginning of the trial. First, the trial took two and a half months longer to complete than was

scheduled. The Crown argues that this period of time should be deducted as a discrete exceptional circumstance, relying on the Supreme Court's statement in *Jordan* at para 73 that:

> ... if the trial goes longer than reasonably expected — even where the parties have made a good faith effort to establish realistic time estimates — then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.

Based on this statement, the Crown's position should be accepted.

[27] Next there is the delay occasioned while the judgment was on reserve, a period of approximately three months. Discounting the period of reserve for the final judgment, either as an exceptional circumstance or as being outside the presumptive period altogether, accords with a number of authorities; ***R v Mamouni***, 2017 ABCA 347, leave denied [2018] SCCA No 176 (QL); ***R v K.(K.G.)***, 2019 MBCA 8, on appeal as of right (SCC No 38532); ***R v Brown***, 2018 NSCA 62; ***R v Rice*** 2018 QCCA 617; ***R v King*** 2018 NLCA 66; and ***Lecompte v R***. 2018 NBCA 33. Of interest, some of these decisions distinguished final judgments from interlocutory judgments in relation to this point.

[28] It will be remembered that the trial judgment was already on reserve when *Jordan* was released. The ensuing 135-page decision was comprehensive, addressing the many issues raised at trial. We think the time taken to produce such a comprehensive judgment was not unreasonable and accept that the appearance of *Jordan* while the judgment was under way gave little time to adapt.

[29] In the case before us, the time on reserve was not "shocking, inordinate and unreasonable" as in ***R v Rahey***, [1987] 1 SCR 588, and would have been characterized in *Morin* as inherent delay, not attributable to either party (see also, ***R v Schertzer***, 2009 ONCA 742 at paras 114-115). Under *Jordan* this time would properly be discounted as an exceptional circumstance.

[30] We turn next to the delay caused by the trial judge's mistaken reliance on s. 230 of the *Criminal Code*. Counsel had not mentioned this provision in their submissions and only realized the trial judge would be relying on it when the reasons for judgment were delivered orally. The error required time to correct. Slightly more than four months' delay occurred after the appellant was convicted of second-degree murder until he was ultimately sentenced.

[31] Immediately upon being convicted of murder, although he had yet to be sentenced, the appellant filed a notice of appeal. He also filed an application for a mistrial. On October 31, 2016, at the hearing of that application, the trial judge vacated both murder convictions and substituted convictions for manslaughter instead. He dismissed the mistrial application eight days later. In those reasons, the trial judge described the proceedings flowing from his mistake as "exceptional circumstances" (***R v Vader***, 2016 ABQB 625 at para 19 [Mistrial Decision]).

[32] We are satisfied that the trial judge correctly characterized his error and the time required to rectify it as an exceptional circumstance. Clearly both he and counsel needed time to consider the implications of the mistake and the options available to correct it. In ***R v Cody***, 2017 SCC 31 at para 58, the court recognized that, "Mistakes happen...they are an inevitable reality of a human criminal justice system and can lead to exceptional and reasonably unavoidable delay that should be deducted for the purpose of s. 11(b)." Thus, the delay required to remedy the error may properly be deducted.

[33] We note, as well, that in *Jordan* the court set apart the "sentencing" period, leaving open the possibility that under the new framework the presumptive guidelines should apply only to the rendering of judgment or perhaps to the end of the trial evidence; see also ***R v W(SC)***, 2018 BCCA 346, leave denied [2018] SCCA No 452 (QL); ***R v Jurkus***, 2018 ONCA 489, leave denied [2018] SCCA No. 325.

[34] In any event, the remaining delay is well over the presumptive ceiling. That leads us to a consideration of the transitional exceptional circumstance.

Transitional Exceptional Circumstance

[35] In *Jordan*, the court noted that the "drastic consequences" occasioned by the abrupt change of law introduced by *Askov* (***R v Askov***, [1990] 2 SCR 1199), risked undermining the integrity of the administration of justice (*Jordan* at para 92). To avoid that, the court created the "transitional exceptional circumstance", (the transitional exception), for cases already in the system where the delay exceeded the presumptive ceiling, emphasizing (*Jordan* at para 97):

> As we have said, the administration of justice cannot countenance a recurrence of *Askov*. This transitional exceptional circumstance recognizes that change takes time, and institutional delay - even if it is significant - will not automatically result in a stay of proceedings.

[36] Accordingly, in cases where the charges were brought prior to *Jordan* and the delay is over the presumptive ceiling, the Crown may argue that the transitional exception justifies the delay in excess of the presumptive ceiling. This asks the court to consider whether a delay that would be unreasonable under *Jordan* may nonetheless be justified due to the parties' reasonable reliance on the law as it previously existed.

[37] As explained in *Cody* at para 69 (emphasis added):

> *It is presumed that the Crown and defence relied on the previous law until Jordan was released*...The determination of whether delay in excess of the presumptive ceiling is justified on the basis of reliance on the law as it previously existed must be undertaken contextually with due "sensitive[ity] to the manner in which the previous framework was applied (*Jordan* at paras. 96 and 98).

[38] Here the appellant asserts that the transitional exception does not apply as the prosecutor did not say she was relying on the pre-*Jordan* law when she testified at the s. 11(b) *voir dire*. The appellant notes that the prosecutor advised only that she entered the stay because the disclosure "crisis" left her without the information necessary to determine if the prosecution was still viable and in the public interest. This, says the appellant, is evidence that rebuts the presumption. With respect, this submission is a *non sequitur*.

[39] During her testimony on the s. 11(b) *voir dire*, the prosecutor was not asked about delay in relation to s. 11(b) or *Morin*. Her reason for the stay and her silence on the impact it may have had on the appellant's s. 11(b) right, did not in any way foreclose reliance on the *Morin* framework or rebut the presumption that the Crown would rely on that framework in the event the appellant brought a s. 11(b) application. Simply put, there was no other framework to rely on. And, when the appellant brought his s. 11(b) application one year after the Crown recommenced proceedings, the Crown *did* rely on a *Morin* analysis to justify the delay, and did so without objection from the appellant, who relied on it as well. To be clear, *Jordan* had not been decided when the s.11(b) application was heard and even the trial judge's ruling on that application preceded *Jordan* by more than six months.

[40] In our opinion, it is unreasonable to assert that the prosecutor's explanation for entering a stay of proceedings amounted to a repudiation of the *Morin* framework. There is no connection between the two. Absent some clear evidence (of which there was none here) that the Crown had some other framework in mind or would concede a s. 11(b) application if made, the presumption applies.

[41] The transitional exception may justify a presumptively unreasonable delay where the parties involved reasonably relied on the law as it previously existed. The court mandated "a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice" (*Jordan* at para 96). *Jordan* was not intended to automatically transform what had been reasonable delay into an unreasonable one (*Jordan* at para 102).

[42] Subsequently in *Cody* the court reiterated:

> Under the *Morin* framework, prejudice and seriousness of the offence "often played a decisive role in whether delay was unreasonable" (*Jordan,* at para. 96). Additionally, some jurisdictions are plagued with significant and notorious institutional delays, which was considered under *Morin* as well ... For cases currently in the system, these considerations can inform whether any excess delay may be justified as reasonable. (para, 69).

[43] That follows the observation in *Jordan* that delay may exceed the ceiling because the case is of moderate complexity in a jurisdiction with significant institutional delay problems (*Jordan* at

para 97). In his decision on the s. 11(b) application the trial judge identified institutional delay as a significant factor in the time required to bring the case to trial (s. 11(b) Decision at paras 94-96):

> 94 This period greatly exceeds the *R v Morin* benchmark to move a matter to trial in a superior court. If the reason for why the Crown 'knocked over the first domino' and set the 'downstream' cascade of events in motion was innocent or had a reasonable explanation then it seems to me that some of the period between when Mr. Vader's trial was re-set and will be conducted could potentially be attributed to inherent or institutional delay.
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> 95 *A significant fraction of that time would fall into the latter category because the functionality of the Albert Court of Queen's Bench has been badly compromised by inadequate court personnel staffing and a judicial complement that is woefully understrength on a per-capita basis when compared to other provincial superior courts in Canada. This fact is notorious and has been repeatedly emphasized by the administrative justices of this Court. Escalating pre-trial delays are the inevitable result of this ongoing neglect of and support for the Court.*
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> 96 *This is well known to experienced criminal trial counsel, such as those involved in this matter. That is one reason why I put no weight on the fact that neither sought to have this trial heard on an accelerated or expedited basis. As this Charter, s 11(b) analysis shows, there is a powerful basis for the parties and court to engage in collaborative attempts to obtain an earlier trial date to respect Mr. Vader's right to a timely hearing. The simple fact is that the well is dry, and any attempt to accelerate the resumed trial process would have been futile.* [Emphasis added]

[44] Following the release of *Cody*, the Ontario Court of Appeal in ***R v Picard***, 2017 ONCA 692, suggested that in determining whether the transitional exception justified a delay above the presumptive ceiling, an assessment of all of the circumstances was required, including:

i. The complexity of the case.

ii. The period of delay in excess of the *Morin* guidelines.

iii. The Crown's response, if any, to institutional delay.

iv. The defence efforts if any, to move the case along.

v. Prejudice to the accused.

[45] As well in ***R v Regan***, 2018 ABCA 55 at para 113, this court observed:

> The gravity of the charge would loom large in any pre-*Jordan* analysis, and in our view, the nature of the offence would have framed the parties' understanding of whether any delay was justifiable.

[46] See also ***R v Sher***, 2018 ABCA 365 at para 49.

[47] With respect to a *Morin* analysis, we have the benefit of the trial judge's January 26, 2016 decision dismissing the appellant's s. 11(b) application on proper application of the *Morin* framework. The Crown delay was justified on the following considerations that are relevant under *Morin* and the transitional exception: (i) as admitted by the appellant, this was a very complex case; (ii) apart from the stay period, neither party could have done anything to expedite the trial; (iii) the Crown's decision to stay the charges was a "good-faith damage control step" that "raises confidence in the administration of justice"; (iv) the offences involved are "among the most serious offences known to Canadian law" and (v) prejudice to the appellant was attenuated by the fact that he was, at times, detained for other offences and was not subject to any liberty restrictions as a result of these charges throughout the stay period.

[48] This decision was rendered six weeks before the trial started. We see no reviewable error in the trial judge's assessment and the appellant does not allege any.

[49] Rather the appellant relies on the trial judge's expressed concern about the delay to that point, specifically his observation that his decision was "a very close call", and his comment that: "Mr. Vader's trial rests on the threshold of being unreasonably delayed" (11(b) Decision at para 105).

[50] The appellant argues that the subsequent unforeseen delays - the trial taking two and a half months longer than anticipated, the additional three months while the decision was on reserve, and the four additional months required after the initial decision was rendered - would have pushed the trial judge's "close call" of a case "on the threshold of unreasonable delay", over the edge into unreasonable delay territory and warranting a judicial stay of proceedings.

[51] The Crown replies that these additional delays would also have been excused under a *Morin* analysis and thus the trial judge's decision would not have changed had he foreseen the subsequent developments. We agree and, as explained above, we find that an application of the *Jordan* framework would have yielded the same result. We conclude that the unforeseen delays that occurred after the trial judge's 11(b) decision, did not push the prosecution beyond "the threshold of reasonableness".

[52] As we observed at the outset, this was a complex case. The court in *Jordan* characterized particularly complex cases as those that, because of the nature of the evidence or the issues, require an inordinate preparation and trial time. Hallmarks of such cases often include voluminous disclosure, a large number of witnesses, expert witnesses, complex or novel legal issues and a large number of issues in dispute (*Jordan* at para 77). These characteristics were present here.

[53] Although a typical murder trial would not qualify as presenting an exceptional circumstance, this was not a typical murder case. That fact was properly acknowledged by the appellant, who at the s. 11(b) *voir dire* fairly observed that this was "an exceptionally complicated case", with "exceptionally large disclosure". And later, in his written submissions the appellant conceded that "this is one of the most unusual cases" (Appellant's Factum at para 74).

[54] In such situations, where the issues and the charges warrant inordinate time, the complexity of the case may be considered an exceptional circumstance, such that the time taken is justified and the delay is reasonable (*Jordan* at para 80). In our opinion, the complexity of this case, including the difficulties associated with prosecuting a murder trial "without a body", though not a full answer, was a significant factor in justifying the delay.

[55] In conclusion, although the trial took substantially longer to complete than the 30 month presumptive ceiling, we think that in light of the extraordinary circumstances of this case, the delay was not unreasonable and that the appellant's submission must fail.

ii) The *functus officio* doctrine

[56] The appellant contends that although the *functus officio* doctrine permitted the trial judge to vacate his invalid second-degree murder verdicts, it prohibited him from reassessing the merits of the verdicts and pronouncing two, entirely different verdicts. He maintains that any amendment to a verdict previously announced must be consistent with the manifest intention of the original verdict.

[57] With respect, that is precisely what happened here. The final verdicts reflected the facts as found by the trial judge; the earlier verdicts did not. The trial judge did not reassess the evidence or his findings of fact. He simply corrected his mistake and substituted the correct verdicts for the ones he had mistakenly imposed earlier. What changed was the result, not the factual findings.

[58] To be clear, the trial judge found the appellant caused the McCanns' bodily harm in the course of a robbery, thereby killing them. That, without more, is a classic form of manslaughter, not murder.

[59] In considering the *functus officio* doctrine, one must remember that this was a trial by judge alone. In such cases, "... where a trial judge convicts an accused but has not yet sentenced him or her, the trial judge is not *functus* in respect of that charge, and can, in exceptional circumstances, vacate the adjudication of guilt before sentencing" (***R v Henderson***, (2004) 189 CCC 3rd 447 (ONCA) at para 29).

[60] As to the powers included within the authority to "vacate the adjudication of guilt", ***R v Goodkey***, 2013 BCSC 1429, is instructive. There the judge convicted the accused of possession for the purpose of trafficking, rather than trafficking. On realizing his mistake, the judge corrected his

verdict. The British Columbia Court of Appeal upheld the decision, finding in effect that the same factual analysis supported both verdicts (2015 BCCA 64 at para 171).

[61] The situation is different where a judge wishes to change the verdict from one of guilty to not guilty, or the reverse, (see ***R v Griffth***, 2013 ONCA 150, at paras 33-36 and ***R v Hargraves***, (1982) 69 CCC 2nd 380 ONCA, at para 15).

[62] But the law is clear, the *functus officio* doctrine does not prevent the correction of errors where no reconsideration of the evidence is required and where the court's intention is manifest, such that the correction is consistent with that intention (***R v Krouglov***, 2017 ONCA 197 at para 35; see also ***R v Malicia*** (2006) 82 OR (3rd) 772; and ***R v Roberts***, 2004 BCCA 436 at para 7). That is what happened here.

[63] One further point may be mentioned. The verdict of the trial judge may have been announced, but it had not yet been entered. The court was not *functus officio* in law because the verdict was not yet entered: see ***Neale v Gordon Lennox***, [1902] A.C. 465, at 473. As pointed out by ***R v Burke***, 2002 SCC 55 at para 48, [2002] 2 SCR 857, the ability to repair a verdict before entry is not an undermining of the doctrine of *functus officio*:

> 48 To the contrary, the administration of justice would be brought into disrepute by barring the court from correcting a recorded verdict where there is no perceptible injustice to the accused and no reasonable apprehension of bias. See V. Maric, Annotation to *R. v. Burke* (2001), 41 C.R. (5th) 135, at pp. 136-37, where it was observed:
>
> Such rigidity jeopardizes the integrity of the jury system since it forces the court to tell the jurors that despite the fact that they have dutifully carried out the oath that they had sworn to uphold by listening to days of evidence and then rendering a unanimous and otherwise valid verdict, their decision must be ignored... . [T]he interests of the state and the general public would not be served ... .

In those circumstances, not only would the policy issues used to justify the standard in *Head* not come into play, but the application of the rule in *Head* to this specific situation would run contrary to one of its own underlying policy concerns, namely the administration of justice.

[64] Major J in ***Burke*** went on to add after discussing a list of authorities on *functus officio*:

> 52 These cases affirm the same general rule used by this Court in *Head,* i.e., that post-discharge, a trial judge is *functus and has no authority to alter a recorded verdict*. However, the case law in these jurisdictions also recognizes an exception to the general rule and permits a rare residual jurisdiction to inquire into the proper verdict in limited circumstances. In addition to the evolving jurisprudence, policy concerns warrant moving beyond *Head* to develop an exception to the general rule.

> A movement away from the rigidity of the Head rule is timely, given both the policy issues involved and the bulk of modern case law on this point. In my opinion, although *Head* forms the general rule that prohibits changes to a criminal verdict post-discharge, we should not foreclose the possibility of a limited and exceptional jurisdiction remaining with the trial judge to recall the jury for the purposes of inquiring into the alleged error, which may result in correction of the recorded verdict. The question then is under what circumstances should this jurisdiction be exercised." [Emphasis added]

iii) Reasonable apprehension of bias

[65] The appellant next argues that a reasonable informed observer may be left with a reasonable apprehension of bias upon realizing the trial judge corrected his mistake and then imposed the maximum sentence available on conviction for manslaughter – life imprisonment, the same as the mandatory sentence on conviction for murder.

[66] We will dispose of this submission summarily, both because we think it lacks merit and because the appellant has also appealed his sentence, and that appeal is still to be heard.

[67] To begin, we note that a life sentence imposed upon conviction for manslaughter is not the same as a mandatory life sentence imposed on conviction for murder. The latter requires the offender serve a minimum of 10 and perhaps as many as 25 years imprisonment before being eligible for parole. The former has no such mandatory requirement and although the trial judge could have directed the appellant serve a minimum period of imprisonment before being eligible for parole pursuant to s. 743.6 of the *Criminal Code*, he did not do so.

[68] In terms of a reasonable apprehension of bias, the law presumes a judge is impartial and that presumption requires significant evidence to rebut (***R v S(RD)***, (1997) 3 SCR 484). The test is high: ***Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)***, 2015 SCC 25 at para 25, [2015] 2 SCR 282. See also: ***R v Nero***, 2016 ONCA 160 at para 30, 334 CCC 3d 148; ***R v Slatter***, 2018 ONCA 962 at para 14, 369 CCC (3d) 112.

[69] Here, the reasonable informed observer would have read the reasons for judgment, understood the findings of fact and the trial judge's error. That observer would have appreciated the serious nature of the offences: the killing of an elderly couple during an armed robbery and the disposal of their bodies, which have never been recovered. That same observer would take into account the findings of fact made by the trial judge in deciding the appellant was responsible only for the unintentional killing of the McCanns.

[70] In conclusion, we do not think that the reasonable informed observer would conclude that bias infected the trial judge's handling of this case, or that the appellant had been dealt with unfairly, either during the trial or in the result. On this record, such a proposition is untenable.

iv) Section 662(3) of the *Criminal Code*

[71] The relevant section provides:

> 662.(1) **Offence charged, part only proved** – A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted
>
> > (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
> >
> > (b) of an attempt to commit an offence so included.
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> 662.(3) **Conviction for infanticide or manslaughter on charge of murder** – Subject to subsection (4), where a count charges murder and the evidence proves manslaughter or infanticide but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide, but shall not on that count find the accused guilty of any other offence.

[72] The appellant was charged with two counts of first degree murder by way of a direct indictment. It was the position of the Crown that the killings were both intentional and planned and deliberate. In considering these issues, the trial judge found the appellant caused the death of the McCanns "in an event that caused bloodshed and involved a firearm" (Trial Decision at paras 670 & 675). While recognizing that use of a firearm is often proof of an intention to kill, the trial judge was not prepared to draw that inference in this case (para 674). Likewise, as to whether the killings were planned and deliberate, the trial judge concluded there were "other reasonable possibilities" (para 685). Still, he was satisfied beyond a reasonable doubt that the appellant inflicted violence that caused the victims' death and that he was therefore guilty of culpable homicide (para 677).

[73] With that, the trial judge turned to consider whether the killings were murder or manslaughter. He found they were murder by relying on s. 230 of the *Criminal Code*, which, before it was struck down, did not require proof of an intention to cause death. Subsequently, on realizing his mistake, the trial judge entered convictions for manslaughter. In the result, he did not expressly determine that the killings were not intentional as defined in s. 229 of the *Criminal Code*. The appellant maintains that this omission was fatal, requiring a retrial, but on charges of manslaughter only.

[74] We pause to observe that this proposed remedy would still leave the appellant's complaint, that it had never been determined whether he intentionally killed the McCanns, unanswered.

[75] In our opinion, although not expressly addressed, the trial judge's reasons implicitly establish that he was not satisfied beyond a reasonable doubt that the killings were intentional; that he was only prepared to find the appellant "in one manner or another, caused the death of Lyle and Marie McCann" (para 677).

[76] That the trial judge resorted to s. 230 to find the killings were murder further establishes he had a reasonable doubt as to whether they were intentional. As mentioned, s. 230 did not require proof of an intention to kill to sustain a conviction for murder, only proof of an intention to inflict bodily harm. That is well short of the prerequisite intent for murder prescribed in s. 229. Culpable homicide unaccompanied by a murderous intent is manslaughter, not murder.

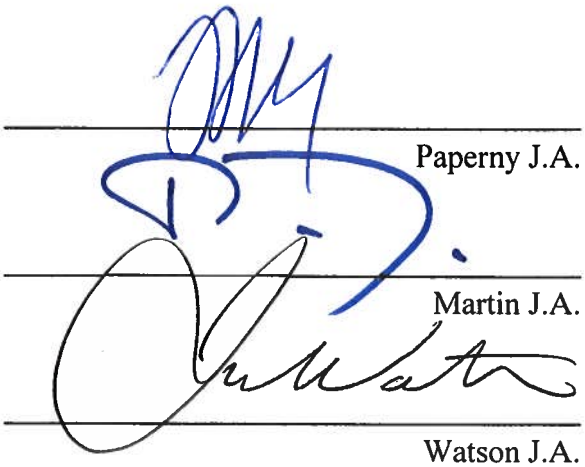
[77] While it may have been better had the trial judge expressly found the appellant did not possess one the intents to kill referred to in s. 229, his failure to do so did not prejudice the appellant and the omission was not fatal. Based on the facts as he found them, the trial judge was ultimately correct in convicting the appellant of manslaughter.

[78] In conclusion, we see no prejudice having befallen the appellant as a consequence of the trial judge's analysis, and no benefit in a retrial to test again whether the appellant should have been convicted of manslaughter, in the robbery killing of the McCanns.

[79] The appeal is dismissed.

Appeal heard on November 30, 2018

Memorandum filed at Edmonton, Alberta
this 17th day of May, 2019



Paperny J.A.

Martin J.A.

Watson J.A.

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