Federal Court  Cour fédérale

Date: 20130917

Docket: T-457-12

Citation: 2013 FC 958

Ottawa, Ontario, September 17, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

LEON WALCHUK

Applicant

and

CANADA (MINISTER OF JUSTICE)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Honourable Rob Nicholson, Minister of Justice [the Minister], pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Minister denied the Applicant's request for ministerial review of his second-degree murder conviction under s. 696.1 (1) of the *Criminal Code*, RSC, 1985, c C-46 [the Code].

I. Background

[2] On June 14, 2000, the Applicant, Leon Walchuk, was convicted of the second-degree murder of his wife, Corrine Walchuk [the Victim]. He was sentenced to life in prison with no

chance of parole for 16 years. At the time of her death they had been separated for four years and were in the midst of acrimonious divorce proceedings.

[3] The general circumstances surrounding the Victim's death are not in dispute. At approximately 7:00 pm on March 30, 1998, the Victim drove to the Applicant's farmhouse to meet the Applicant. Approximately 20 minutes later, the Victim's car had been driven into the farmhouse, the Victim was lying with severe head injuries in the basement, and the house was on fire. The Applicant called the fire department via his mother at 7:24pm and some neighbours and the Applicant's children arrived soon after. The Applicant did not tell anybody that the Victim was in the basement until the fire department arrived at 7:40pm. The immediate cause of the Victim's death was smoke inhalation from the fire, but she had also suffered severe brain injuries caused by the Applicant beating her with a hockey stick. This likely caused her to lose consciousness prior to the fire. There was also evidence that she had been dragged along the ground and down the stairs to the basement. Forensic pathologists were called by the defence and prosecution. While they differed on the severity of the head wounds suffered by the Victim, they agreed that if her injuries had been treated, she would have survived.

[4] The trial judge adopted the prosecution's theory that the Applicant had severely beaten the Victim with a hockey stick, left her in the basement, poured some gasoline on the stairs and a landing, and ignited it with a match, intentionally killing her. As part of this conclusion, the trial judge agreed, at para 26 of his decision, that an accelerant was present, and at para 16, that an electrical fire as a result of the car crash was not the cause of the fire. At trial, various expert witnesses were called. Among them were James Fairbank, who testified that an accelerant was used

to start the fire; Wayne Davies, who testified that an electrical source was not the cause of the fire; and Arthur Hunter, who testified that the fire was not the result of a vehicle failure.

[5] In addition to this expert evidence, the judge noted other circumstantial evidence pointing towards the Applicant's guilt:

- He had severely beaten the Victim and left her in the basement;
- He did not immediately tell anyone that she was inside the house;
- He hid personal items outside the farmhouse, which is a common pre-arson activity;
- He had plans, but no money, for a new home;
- He expressed surprise to an undercover police officer that the farmhouse did not "go up";
- The night of the death was the first time the children had not been at the farm house at 7:00pm for pickup by the Victim;
- He had made serious threats to the Victim in the past;
- He made it clear that no one else was welcome on the property that night; and
- His financial dispute with the Victim may have provided a motive for her murder.

[6] The defence's theory was that the Victim became enraged, drove into the farmhouse in an attempt to kill the Applicant, and proceeded to hit the Applicant with a hockey stick, chasing him into the basement. The Applicant then managed to take the hockey stick from the Victim, and beat her with it. The Applicant then left the basement, noticed there was a fire, attempted to put it out with his jacket, and failed. He heard the Victim screaming, but by that point, there was nothing he could to help her.

[7] The Applicant's conviction was upheld on appeal on March 5, 2001, after the Saskatchewan Court of Appeal held that James Fairbank was appropriately qualified as a witness and his investigation methods were appropriate. In addition, the Court of Appeal held that the trial judge appropriately relied on the rest of the evidence.

[8] In 2006, the Applicant approached the Innocence Project at Osgoode Hall for assistance with his case. On February 12, 2009, the Applicant submitted an application to the Minister pursuant to section 696.1 of the Code. In support of this application, the Applicant included three reports contradicting the opinion evidence introduced by the Crown in his trial. These included reports by Peter Pendlebury, Gerald Hurst, and Jack Henderson, fire and arson experts. These reports all agreed on the following:

i) There was no evidence supporting the opinion that an accelerant was used; and

ii) The opinion that it could not have been an electrical fire was erroneous.

[9] On September 21, 2010, the Applicant received the Department of Justice Criminal Conviction Review Group's [CCRG] investigation report. This report included a written opinion by Peter Senez, a fire expert consultant retained by the CCRG. Mr. Senez stated that the theory of the fire as advanced in the Fairbank report was incorrect, and that the origin and cause theory presented by the Pendlebury, Hurst and Henderson reports were likely correct. He also noted that there was still enough circumstantial evidence to warrant consideration of an incendiary fire, but the weight accorded to that evidence depended on whether the evidence of Mr. Hunter and Mr. Davies was accepted.

[10] The Applicant made final submissions to the Minister in response to the CCRG report on November 1, 2010.

[11] On November 4, 2011, the Minister dismissed the Applicant's 696.1 application. The Minister reviewed the reports and acknowledged that they "question" the conclusions of both Mr. Fairbank and Mr. Davies. However, he noted that a remedy under 696.1 is extraordinary, and even if the fire was not started by an accelerant, there would remain sufficient circumstantial evidence for the trial judge to determine that the Applicant intended to kill the Victim. In support of this conclusion, the Minister referred to the circumstantial evidence described above.

II. Issues

[12] The issues raised in the present application are as follows:

A. What is the meaning of the term "miscarriage of justice?"

B. Was the Minister's decision reasonable?

III. Standard of review

A. *Applicant's Position*

[13] The Applicant contends the standard of review is correctness. First, it is argued that the question of what constitutes a "miscarriage of justice" is of central importance to the legal system, whose resolution has significance outside the operation of the statutory scheme in consideration. It appears throughout the Code in provisions relating to criminal appeals, empanelling new juries at trial, and powers of provincial appellate courts, as well as other acts such as the *Supreme Court Act*,

RSC 1985, c S-26 s 65.1(2) and the *National Defence Act*, RSC 1985, c N-5, s 241. Furthermore, interpretation of the term "miscarriage of justice" is outside the Minister's area of expertise: the Code is not the Minister's home statute or within his core function or expertise in the sense used to accord deference to other administrative regimes (*Canadian Human Rights Commission v Canada*, 2011 SCC 53 at para 24). This warrants review on the standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 89).

[14] Second, section 696.3 does not give the Minister power to decide questions of law. In the absence of explicit authority, the interpretation of a statute by a minister responsible for its implementation is reviewed on a correctness standard unless Parliament has decided otherwise (*Georgia Strait Alliance v Canada (Minister of Fisheries and Oceans)*, 2012 FCA 40 at para 86).

[15] Third, where there is parallel jurisdiction to interpret a statute, the presumption of reasonableness will be rebutted (*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35 at paras 14-15). Interpretation of the term "miscarriage of justice" has occurred in several cases in different courts (*Reference re Milgaard*, [1992] 1 SCR 866; *Re Truscott*, 2007 ONCA 575 at para 58).

B. *Respondent's Position*

[16] The Respondent argues that the Minister's decision should be reviewed on the reasonableness standard. First, subsection 696.3(4) contains a privative clause relating to any miscarriage of justice application. This supports the application of the reasonableness standard (*Dunsmuir* at para 52).

[17] Second, the considerations that the Minister is required to take into account under s. 696.4 when deciding on a miscarriage of justice application are extremely broad, and this power ought to be exercised only in "extraordinary" circumstances. This suggests deference is owed (*Dunsmuir* at para 89).

[18] Third, section 696.3 is based in the royal prerogative of mercy, which was traditionally not reviewable by the court (*Thatcher v Canada (Attorney General)*, [1997] 1 FC 289). While the reference to this prerogative was removed in 2002, introductory marks by the then-Minister of Justice, Anne McLellan, indicated the new provisions were likewise based on the prerogative of mercy (*Debates of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue 20 – Evidence, (5 Dec, 2001), [*Debates of the Standing Senate Committee*]).

[19] This discretionary power remains rooted in the royal prerogative (*Bilodeau c Canada*, 2009 QCCA 746 at para 25; *McArthur v Ontario (Attorney General)*, 2012 ONSC 5773 at para 22). Furthermore, its exercise has since been held to be reviewable on the standard of reasonableness (*Bilodeau v Canada (Minister of Justice)*, 2011 FC 886 at para 64; *Daoulov v Canada (Attorney General)*, 2008 FC 544 at para 22).

C. *What is the Applicable Standard?*

[20] The correct approach for determining the standard of review is stated in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48:

> As this Court held in *Dunsmuir*, a court deciding an application for judicial review must engage in a two-step process to identify the

> proper standard of review. First, it must consider whether the level of deference to be accorded with regard to the type of question raised on the application has been established satisfactorily in the jurisprudence. The second inquiry becomes relevant if the first is unfruitful or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review. At this second stage, the court performs a full analysis in order to determine what the applicable standard is.

[21] Notwithstanding the persuasive and well-argued position of the Applicant's counsel that I should deviate from the decisions in *Thatcher*, *Bilodeau* (2009), *Bilodeau* (2011), *McArthur*, and *Daoulov*, I must decline to do so. In my opinion, the standard of review is satisfactorily established on the basis of this jurisprudence and the Supreme Court's recent decision in *Agraira*. In *Agraira*, the Court addressed the exercise of ministerial discretion in a context which required the concurrent interpretation of the term "national interest." In so doing, the court rejected the bifurcated standard of review proposed by the Federal Court of Appeal and applied the reasonableness standard to both the exercise of discretion and the interpretation of the term "national interest." While the term "national interest" involves different considerations than those underlying the interpretation of the term "miscarriage of justice," I am satisfied that *Agraira*, when read with the other jurisprudence cited by the Respondent, is determinative that the reasonableness standard of review applies in the instant application.

IV. Analysis

A. Was the Minister's interpretation of the term "Miscarriage of Justice" reasonable?

[22] The Minister did not offer an express definition of the term "miscarriage of justice" in his decision. As in *Agraira*, this Court is left to assess the reasonableness of the Minister's implied

interpretation, an exercise in which the deference owed to the Minister is not diminished by the absence of an explicit definition (*Agraira* at para 63).

[23] On page 7 of his decision, the Minister states:

> Even assuming that the fire that killed the victim was not started by an accelerant, I am of the view that there is compelling evidence remaining that Mr. Walchuk intended to kill the victim based on the following…I am of the view that based on the trial judge's findings, these new reports-whether considered alone or together-would not have impacted the trial judge's decision to convict in any event"

[24] In my mind, the Minister's implied interpretation, which focuses on whether the Applicant would have been convicted notwithstanding the additional expert evidence, was reasonable. This implied interpretation is reasonable owing to its congruence with an analysis using the modern approach to statutory interpretation, which requires consideration of the "plain words of the provision, its legislative history, its evident purpose, and its statutory context" (*Agraira* at para 64).

[25] A useful starting point is provided by the Applicant's citation of *Black's Law Dictionary*, which defines a miscarriage of justice as a situation where "[a] grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."

[26] The Applicant and the Respondent do not seem to disagree that at a broad level, a plain reading of the term "miscarriage of justice" involves an individual being convicted for a crime that they did not commit.

[27] This plain meaning approach is supported by legislative history that evinces the purpose of the provision. In the *Debates of the Standing Senate Committee*, then-Minister McLellan described the amendment to include the term "miscarriage of justice" as being:

> …reserved for people who have already exhausted all judicial avenues of appeal concerning their conviction and who allege that they have suffered a wrongful conviction."

[28] The Applicant also argues that the interpretation can be supported with reference to the curative proviso in 686(1)(b)(iii) of the Code. This provision allows a Court to dismiss an appeal despite the presence of an error at trial, where the court believes there has been no "substantial wrong or miscarriage of justice."

[29] In defining the circumstances which preclude the use of the curative proviso, various cases have shaped the interpretation of the term "miscarriage of justice." This includes:

- "…whether there is any possibility that a trial judge would have a reasonable doubt on the admissible evidence." (*R v S (PL)*, [1991] 1 SCR 909 at para 14);
- "…the verdict would necessarily have been the same if such error had not occurred" (*R v Bevan*, [1993] 2 SCR 599 at para 42);
- "…the miscarriage of justice lies…in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable." (*Re Truscott*, 2007 ONCA 575 at para 110).

[30] The Applicant suggests that an inquiry into the other existing evidence is not relevant, citing *Reference re Milgaard*, [1992] SCR 166 at para 19, for the proposition that despite the continued presence of admissible evidence, a continued conviction would amount to a miscarriage of justice if

an opportunity were not provided to consider the fresh evidence. In so doing, the Applicant suggests that the appropriate inquiry on a miscarriage of justice application is whether there is "any possibility that a trier of fact would have a reasonable doubt on the admissible evidence."

[31] The root of former s.690 of the Code mercy prerogative and, I believe, equally of section 696.1 of the Code, is a safeguard against mistakes in the criminal justice system that result in a wrong conviction. In this context, a mistake occurs when new evidence would inevitably lead to a wrongful conviction. Accordingly, I do not agree with the Applicant that the other evidence ought not to be considered when considering if there has been a miscarriage of justice. While the Applicant cites *R v John*, [1985] 2 SCR 476 at para 9, for the proposition that a reviewing court cannot be expected to extract or insert certain evidence into the record and consider whether the verdict would be the same, that is precisely the task undertaken when considering fresh evidence on appeal under the test from *R v Palmer*, [1980] 1 SCR 759. There seems no principled reason not to do so in the context of section 696.1 of the Code.

[32] Given the above, I am of the opinion that the Minister's implied interpretation of the term "miscarriage of justice", which focused on whether the Applicant would have been convicted notwithstanding the new expert evidence, was reasonable.

B. *Was the Minister's Decision Reasonable?*

[33] I agree that the Minister's decision is reasonable.

[34] The Applicant argues that the Minister did not turn his mind to the distinction between murder and manslaughter in the Code. In order to establish murder, the Crown needs to prove beyond a reasonable doubt that the Applicant either intended the Victim's death or was aware that there was a danger his conduct could bring about his wife's death, but persisted despite the risk (section 229 of the Code, *R v Hinchey*, [1996] 3 SCR 1128 at para 110).

[35] To meet the threshold for murder, an accused's actions must have amounted to a significant contributing cause of death, and their mental state must require subjective foresight of death (*R v Nette*, 201 SCC 78 at para 69; *R v Martineau*, [1990] 2 SCR 633 at para 12). The requirements for manslaughter (death by means of an unlawful act or criminal negligence) are distinct. For death by means of an unlawful act, the crown must prove the mens rea of the unlawful act and prove that the accused ought to have had foresight of a risk of bodily harm which is neither trivial nor transitory (*R v Creighton*, [1993] 3 SCR 3 at para 78). This distinction is relevant, because mandatory minimums, increased stigma, and restricted parole eligibility apply to murder versus manslaughter. The Applicant argues that the new evidence provided requires a more detailed causation analysis, given that the physical evidence relied on by the trial judge (use of a accelerant to cause the fire), in convicting the Applicant of murder has been effectively proven to be wrong.

[36] The Applicant also disputes a number of the Minister's assertions regarding the circumstantial evidence. Most relevant is that the Minister erred when he relied solely on the

circumstantial evidence. As the Senez report warned, such evidence is only probative if the evidence of Davies and Hunter is accepted. Given that the Davies evidence has also been proven to be unlikely, the Applicant submits that the Minister was unreasonable in relying on it.

[37] The Respondent paraphrases *WR v Canada (Minister of Justice)*, [1999] FCJ No 1059 at para 10 [*WR*], for a set of governing principles that should guide the Minister when deciding to exercise what was then the royal prerogative. The Respondent chiefly draws on these principles to illustrate that the Minister's role is not to exercise appellate jurisdiction over the courts, and that a remedy under this section should only be given after a careful consideration of the proper roles of each of the decision-makers involved, as well as the circumstances of the case at issue.

[38] None of the new expert reports concluded that the fire was accidentally set, or preclude the possibility that the Applicant had set the fire some other way. The reports are consistent with the possibility that the Applicant had set the fire after driving the Victim's car into the porch. Combined with the other circumstantial evidence, there is a sufficient basis to reasonably find that the Applicant intentionally set the fire. The Minister also notes that these reports "could not conclude that (the Applicant) did not intentionally start the fire in another manner or in another location."

[39] The Senez report notes that the weight as to whether an incendiary fire occurred is dependent on the court's confidence that both a vehicular or electrical fire can be ruled out as sources. The Minister is correct that it is unlikely that the origins of the fire will ever be conclusively established. As a result, the Applicant's conviction for murder leans more heavily on the circumstantial evidence before the trial judge.

[40] Furthermore, the other issues raised by the Applicant regarding the Minister's consideration of the circumstantial evidence is an attempt to re-argue issues that were not raised on appeal.

[41] While the new expert evidence changes the variables necessary to conclude, beyond a reasonable doubt, that the Applicant was guilty of second-degree murder, the Minister should be accorded deference in reaching his decision. I agree that as in *WR*, a decision to exercise discretion under this section is an extraordinary remedy and one that must consider the different decision-makers involved. It is not a forth level of appeal.

[42] I do not agree with the Applicant's argument that the Minister failed to turn his mind to the distinction between manslaughter and murder. The Minister states in his decision that he found, regardless of the content of the expert evidence, that the Applicant intentionally started the fire that killed the Victim. This is a necessary finding to conclude that the Applicant was guilty of second-degree murder.

[43] In light of the deference to be accorded the Minister's decision under section 696.1 of the Code, the Minister's decision was reasonable. There is still a great deal of circumstantial evidence supporting the Applicant's conviction for murder and it is within the range of acceptable outcomes that the Minister would conclude that there is no possibility that a trier of fact would not convict the Applicant of second degree murder, notwithstanding the conclusion of the new expert reports concerning the cause of the fire that ultimately resulted in the victim's death. The Minister justified this outcome in an intelligible manner with reference to the relevant circumstantial evidence.

JUDGMENT

THIS COURT'S JUDGMENT is that the Application is dismissed.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-457-12
STYLE OF CAUSE:	Walchuk v. Canada (Minister of Justice)
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 4, 2013
REASONS FOR JUDGMENT AND JUDGMENT BY:	MANSON J.
DATED:	September 17, 2013

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