News

Problems with judge's answer to jury prompts new trial in B.C. murder case

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In trials dealing with serious criminal charges, the words in a judge's jury instructions are as important as the actions jurors are asked to consider in determining the degree of culpability of an accused, as a recent British Columbia Court of Appeal ruling revealed.

In *R. v. Williams* 2019 BCCA 49, a three-judge panel of the appellate court ordered a new trial for Kenneth Bryson Williams, who was convicted by a jury of second-degree

murder on Nov. 3, 2016, over the stabbing death of Robert Tyson Smith during a fight between Smith and the appellant's friend, Robert White, at an intersection in downtown Vancouver.

In its Feb. 8 ruling, the Appeal Court found that the trial judge erred in failing to address the jury's question as to whether it was "acceptable legally" for jurors to consider whether Williams, who had consumed a considerable amount of alcohol on the evening of Smith's death, "continued drinking" during 90 minutes of "unaccounted" time prior to the stabbing. If so, and on the defence of intoxication, the jury was asked to consider the lesser charge of manslaughter if there was a reasonable doubt Williams had the intent to murder Smith.

But the trial judge's answer to the question "fell short of the clear and comprehensive response" required and resulted in a "miscarriage of justice," Justice Gregory Finch wrote in his reasons for the decision, concurred in by Justices Elizabeth Bennett and John Hunter.

Edward Prutschi, Bytensky Prutschi Shikhman

"By telling the jury 'not to focus' " on the period before the fatal stabbing, "it is likely the jury would have understood the answer as a direction from the judge to move away from and regard as less significant a factual issue it considered to be important in evaluating the defence of intoxication," Justice Finch said.

"By telling the jury 'not to speculate' on what may or may not have happened during the 'unaccounted time,' there is a risk that the jury would have understood the determining whether the appellant consumed additional alcohol during the period would necessarily involve impermissible speculation."

He concluded that it was "likely that the jury proceeded to a verdict without understanding how to resolve uncertainty on a factual issue it considered to be important to the evaluation of the defence of intoxication" and that the trial judge's failure to answer the jury's question "in an adequate manner was prejudicial to the appellant's effort to seed a reasonable doubt" about whether the appellant had the *mens rea* required to be convicted of second-degree murder.

In June 2017 Williams was sentenced to life in prison with no chance of parole for 10 years.

Toronto criminal defence lawyer Edward Prutschi said the quashing of Williams' conviction on appeal turned on when jurors can infer facts as opposed to speculating on them.

"As lawyers, we've got to leave open the possibility that if there is a reasonable inference that can be drawn, the jury is entitled to make that distinction and determination," said Prutschi, a partner with Bytensky Prutschi Shikhman and a legal analyst with CTV News.

"It's not for a trial judge to make the inferences for a jury or take away the possibility of an inference for a jury. If there is an evidentiary foundation for an inferential finding of fact, a jury should be allowed to make that."

The B.C. Appeal Court held that the trial judge should have "clarified the distinction between impermissible speculation and inference, and reviewed the evidence the jury could consider in determining whether to infer that the appellant continued to drink" during the 90 minutes prior to the stabbing incident.

Williams testified at trial that he intended to get drunk the evening of Smith's death but didn't know whether he stabbed the man. A bartender at Earl's on Top restaurant where Williams and White had been drinking also testified, and said that he heard them mention that they planned to go to a liquor store afterward. However, police officers who appeared at the scene of the stabbing told the trial that Williams showed no signs of impairment.

Tony Paisana, Vancouver trial and appellate lawyer

Vancouver trial and appellate lawyer Tony Paisana praised Justice Finch for highlighting in his reasons "the importance of allowing a jury to draw its own inferences,

particularly when there might be an absence of evidence or ambivalent evidence that may or may not support a defence inference. That often either gets glossed over or we often forget about the importance of the case law that exists, and this case is a good illustration of that principle in the sense that the jury is grappling with what do they do when they don't know what happened."

In the decision, Justice Fitch noted that based on the bartender's testimony at trial, the jury could have concluded that Williams went to the liquor store to buy more booze, and since he was not in possession of any alcohol at the time of his arrest, jurors could have also determined that he and White drank whatever they purchased prior to the stabbing.

The court also reaffirmed that "when a jury is asking a question, it's a clue to everyone that is a really important aspect of the jury's reasoning process and to be exceptionally careful when responding," said Paisana, an associate with Peck and Company who chairs the law reform committee of the Canadian Bar Association's criminal justice section.

However, Toronto civil litigator Omar Ha-Redeye views the *Williams* ruling as raising the issue of how law enforcement will deal with future charges of murder or manslaughter and the evidence that police officers collect on behalf of the Crown to help illustrate the state of intoxication of an accused.

"What the parties were left with at trial was speculative evidence from forensic toxicologists about speculative mathematical models on what the blood alcohol *could* have been," he explained, noting that the Appeal Court stated that "unfortunately, no post-arrest investigative steps were taken to obtain a breath or blood sample from the appellant."

Omar Ha-Redeye, Toronto civil litigator

For Ha-Redeye, that "suggests this type of objective evidence would be more useful in determining whether intoxication could apply," but that it "provides no guidance" on how police officers would gather this evidence.

If Williams was truly intoxicated, he would not have been in a position to properly provide consent for such samples, said Ha-Redeye.

"If he was not truly intoxicated, he should have properly obtained legal counsel, who would have instructed him to refuse such tests. Compelling such tests outside of the context of operating a motor vehicle is particularly challenging for law enforcement."

He said that alternatively, law enforcement might be able to rely on video evidence to demonstrate intoxication.

Video-surveillance evidence was referenced in the Appeal Court ruling that showed the appellant and White drinking at Earl's, but which also presented Williams as appearing co-ordinated following his arrival at the police station.
"The existing video evidence was therefore conflicting," said Ha-Redeye, who runs his practice from the Fleet Street Law incubator.

"The question is whether law enforcement should have obtained *additional* video evidence to substantiate the level of intoxication," he said.

"Videos of accused in custody can be used sparingly, demonstrating the intake and lack of coercive techniques and the right to counsel. But although law enforcement would not want to ask specific questions about the case related to the consumption of alcohol prior an accused obtaining counsel, it is possible that some prior video, where basic biographical information, is provided might demonstrate signs of impairment, or lack thereof," he explained.

"The relevance for this particular defence is that the accused's state of mind immediately after the offence is what is relevant. Future cases may attempt to capture this by video, as long as their approaches remain Charter compliant."

Counsel for the appellant and Crown were contacted but declined to comment on the decision.

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