Federal Court of Appeal  Cour d'appel fédérale

Date: 20150407

Docket: A-351-13

Citation: 2015 FCA 85

CORAM: **DAWSON J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

LEON WALCHUK

Appellant

and

CANADA (MINISTER OF JUSTICE)

Respondent

Heard at Toronto, Ontario, on October 15, 2014.

Judgment delivered at Ottawa, Ontario, on April 7, 2015.

REASONS FOR JUDGMENT BY: DAWSON AND STRATAS JJ.A.

CONCURRED IN BY: NEAR J.A.

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REASONS FOR JUDGMENT

DAWSON and STRATAS JJ.A.

[1] On June 14, 2000, Mr. Walchuk was convicted of the second-degree murder of his estranged wife, Corrine Walchuk.

[2] Section 696.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, allows a convicted person to seek ministerial review of the conviction on the grounds of miscarriage of justice. Mr. Walchuk

made such an application, which was denied by the then Minister of Justice, the Honourable Robert Nicholson. The Minister was not satisfied there was a reasonable basis upon which to conclude that a miscarriage of justice likely occurred. A judge of the Federal Court dismissed Mr. Walchuk's application for judicial review of that decision (2013 FC 958). This is an appeal from the Federal Court's decision. For the reasons that follow, we have concluded that the Minister's decision was reasonable and so the appeal should be dismissed.

I. Factual Background

[3] By 1998, Mr. and Mrs. Walchuk had been engaged in bitter divorce proceedings that included a protracted battle over the division of matrimonial property. They had separated in 1994 and in the interim shared custody of their two young children.

[4] On March 30, 1998, Mrs. Walchuk arrived at the house on the family farm to pick up their children. The children were not there. A fight between Mr. and Mrs. Walchuk ensued. In the end, Mrs. Walchuk's car was crashed into the front porch of the house, the house caught on fire, and she was found dead at the bottom of the basement stairs. She had died in the fire from carbon monoxide poisoning. The autopsy revealed numerous injuries to her body, including severe lacerations to her skull.

[5] Mr. Walchuk was charged with the first-degree murder of his wife. He was tried by a judge sitting alone.

[6] The case against Mr. Walchuk was circumstantial, and he exercised his right not to testify. However, shortly after his arrest and while in custody, Mr. Walchuk made certain statements to a police officer who was acting undercover as his cellmate. At trial, the police officer testified about those statements. Neighbours coming to the scene of the burning house also testified about Mr. Walchuk's conduct and certain statements he had made.

[7] The theory of the defence's case, as assisted by some of Mr. Walchuk's statements, was that Mrs. Walchuk, after seeing her children were not at the house, became very angry. They fought. In a fit of rage, Mrs. Walchuk tried to run Mr. Walchuk over with her car and in so doing drove her car into the porch of the farmhouse, breaking through the porch and an interior wall of the farmhouse. She then got out of her car and hit Mr. Walchuk with a hockey stick. They ended up in the basement where Mr. Walchuk grabbed the hockey stick and struck her repeatedly with it. He said "I just kept hitting her, I couldn't stop". He became aware that the porch had caught on fire, perhaps as a result of the car crashing into it. He went upstairs and tried to smother the flames with his jacket. When he could not smother the fire he left the porch and walked away from the house. He heard his wife calling for help, but there was nothing he could do for her.

[8] The theory of the Crown's case was that after leaving his wife unconscious or nearly unconscious at the bottom of the basement stairs, Mr. Walchuk poured gasoline at the top of the stairs and around the porch area. He then drove his wife's car into the porch wall near the door. At this time the farmhouse was either already burning or the fire was started shortly after the car was driven into the porch. A fire investigator, Mr. Fairbank, gave expert testimony that an accelerant was used on the stairs leading to the basement. Two other experts testified.

Mr. Davies, an electrical inspector, testified it was unlikely that the source of the fire was electrical in nature. Mr. Hunter, an expert in motor vehicle examination, testified that the fire did not start from Mrs. Walchuk's car.

[9] For reasons reported as 2000 SKQB 275, a judge of the Court of Queen's Bench of Saskatchewan ("Judge") convicted Mr. Walchuk of second-degree murder. The Judge had no reasonable doubt that at the time of Mrs. Walchuk's death, Mr. Walchuk had formed the intent to kill his wife. Mr. Walchuk severely beat his wife, after the beating he left her incapacitated in the burning farmhouse, the beating was a principal factor in his wife's death and Mr. Walchuk intentionally set the fire. The Judge had, however, a reasonable doubt that the murder was the subject of planning and deliberation. Thus, he found Mr. Walchuk guilty of second-degree murder, not first-degree murder. Mr. Walchuk was sentenced to life imprisonment, with no chance of parole for 16 years.

[10] For reasons cited as 2001 SKCA 36, the Saskatchewan Court of Appeal dismissed the appeal against conviction and dismissed the appeal against the order concerning the period of parole ineligibility.

[11] In February 2009, supported by the Innocence Project at Osgoode Hall, Mr. Walchuk submitted an application to the Minister of Justice pursuant to section 696.1 of the *Criminal Code*.

[12] Mr. Walchuk's application was based upon three new arson experts' opinions that challenge the Judge's conclusion that the fire was intentionally set with an accelerant. All three experts are of the view that, contrary to Mr. Fairbank's opinion at trial on which the Judge relied, an accelerant was not used to start the fire. All three experts also disagree with Mr. Davies' opinion that the cause of the fire was not electrical in nature.

[13] Mr. Walchuk's application was reviewed by the Criminal Conviction Review Group of the Department of Justice which retained an independent arson expert, Mr. Senez. Mr. Senez agreed with the new experts that no accelerant was present, and that there was strong evidence to suggest that the fire originated at the exterior of the farmhouse, entering the house through the kitchen window and patio door. The damage, in his view, correlated "to ignition scenarios relating to the vehicle or the building electrical systems". He further concluded that:

> There is ample circumstantial evidence that is unexplained to warrant consideration of an incendiary fire. … [T]he weight as to whether this is an incendiary fire is dependent on the Court's confidence that Arthur Hunter (the expert who examined the automobile as a possible cause of the fire) is correct that the fire did not occur as a result of a vehicle failure and that the electrical inspector, Mr. Wayne Davies, satisfactorily eliminated the building wiring as being a potential cause.

[14] Subsequently, the Review Group prepared an investigative report to assist the Minister. A copy was provided to the Innocence Project, which made submissions responding to issues raised in the investigative report.

II. The Minister's Decision

[15] The Minister carefully summarized the new expert evidence. He concluded that all of the experts question the conclusion reached by Mr. Fairbank that an accelerant was used to start the fire. This seriously undermined the Crown's theory that Mr. Walchuk intentionally started the fire using an accelerant. The Minister noted that several of the experts also questioned the conclusions reached by Mr. Davies that ruled out an electrical cause of the fire. Notwithstanding, in the Minister's view none of the experts could conclude that Mr. Walchuk did not intentionally start the fire in another manner or in another location; the experts concluded only that an accelerant was not used on the basement stairs to start the fire.

[16] The Minister went on to consider his role in this type of application. He noted that sections 696.1 to 696.6 of the *Criminal Code* (set out in the appendix to these reasons) authorize him to order a new trial or to refer a case to a Court of Appeal if he is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred. The Minister went on to observe that this remedy is extraordinary, and can be exercised only when he is satisfied that there are new matters of significance that cast doubt on the correctness of the conviction. In this circumstance, the Minister stated it "is not my role to review the same evidence and arguments previously presented to a court and substitute my opinion for that of the court."

[17] The Minister went on to note that when determining whether evidence is new and significant the Minister traditionally looks to the test developed by appellate courts in assessing the admissibility of fresh evidence on appeal, citing *Palmer and Palmer v. The Queen*, [1980] 1 S.C.R. 759, (1979), 50 C.C.C. (2d) 193. The Minister set out the four relevant factors applied by appellate courts, of which the Minister said the most important factor was that the new evidence, if believed, could reasonably have affected the verdict.

[18] Ultimately, the Minister concluded as follows:

> I have carefully reviewed all the evidence tendered at your client's trial as well as the findings of fact by the trial judge that are not disturbed by any findings in relation to whether an accelerant was used to start the fire that killed the victim. I am mindful that in exercising my discretion I must consider all information that I consider to be relevant. With this in mind, I refer to several specific findings of the trial judge that:
>
> - Corrine Walchuk was left dead or dying at the bottom [of] the basement stairs, having been beaten by Leon Walchuk to a point where she was either unconscious or in any event unable to escape the fire as a result of her injuries.
>
> - Mr. Walchuk did not immediately tell anyone including the firefighters on site that the victim was trapped in the basement of the house.
>
> - Mr. Walchuk hid personal items outside of the farmhouse, none of which would have been of interest to the victim.
>
> - Hiding items is a frequent pre-arson activity that suggests that Mr. Walchuk was planning to set the fire.
>
> - Mr. Walchuk had plans, but no money, for a new home.
>
> - During his conversation with an undercover officer while in lock-up, Mr. Walchuk stated on four occasions that the farmhouse should have "gone up" and, had it done so, evidence of the nature of the victim's death would have been far less clear than it was.
>
> - The night of the victim's death was the first time the children were not ready for pick-up.

- There was no doubt that Mr. Walchuk had made serious threats towards the victim.

- In order to ensure that the victim would be alone and more vulnerable when picking up the children, Mr. Walchuk made it clear that no one else was welcome on his property.

- The impending divorce trial and property division that was at stake may have been the motive for the victim's murder.

The judge also concluded that he had no reasonable doubt that your client had intentionally started the fire that caused the victim's death, that his severe beating of the victim was a principal factor in her death, and that he had formed the intent to kill her.

…

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: the trial judge's findings that the beating he administered to her was a principal factor in her death; that he left her in a burning building incapable of leaving on her own; and that he failed to immediately notify anyone of the victim's presence in the home while the firefighters were attempting to extinguish the fire.

While it may now be impossible to establish conclusively the origins of the fire, there were many findings of fact by the trial judge that point to Mr. Walchuk's guilt that are not disturbed by the Saskatchewan Court of Appeal; nor do the conclusions of any of the reports touch the core of those findings. 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.

Thus I conclude that while the new expert reports cast doubt on whether an accelerant was used to start the fire, there is sufficient remaining evidence that points to Mr. Walchuk intentionally killing the victim. Given this remaining evidence, I am not satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in your client's case and, under the circumstances, I should not exercise my discretion and grant the extraordinary remedy sought.

III. The Decision of the Federal Court

[19] After setting out the background facts, the Judge concluded that the standard of review to be applied to the Minister's decision was reasonableness (reasons of the Judge at paragraph 21).

[20] The Judge then considered whether the Minister's interpretation of what constitutes a miscarriage of justice was reasonable. He found that the Minister's implied interpretation of that phrase was whether the appellant would have been convicted notwithstanding the new expert evidence; the Judge found this interpretation to be reasonable (reasons of the Judge at paragraph 24).

[21] The Judge next considered whether the Minister's decision was reasonable. In his view, none of the new expert reports concluded that the fire was accidentally set, or precluded the possibility that Mr. Walchuk had set the fire some other way. As the Judge stated, "[t]he 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" (reasons of the Judge at paragraph 38). In the result, the Judge dismissed the application for judicial review.

IV. The Issues

[22] In our view, the issues to be determined on this appeal are:

i. What is the standard of appellate review to be applied to the decision of the Federal Court?

ii. What is the standard of review to be applied to the decision of the Minister?

iii. Applying the proper standard of review, should the Minister's decision be set aside?

V. The Standard of Appellate Review

[23] The law in this respect is well-settled: did the Federal Court select the appropriate standard of review and apply it correctly? This requires the reviewing court to "step into the shoes" of the lower court so to focus on the administrative decision at issue (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45 and 46).

VI. The Standard of Review to be Applied to the Minister's Decision

[24] Counsel for Mr. Walchuk concede that the standard of review to be applied to the Minister's decision as a whole is reasonableness. However, they argue that a pure question of law is embedded in the decision: what constitutes a "reasonable basis to conclude that a miscarriage of justice likely occurred"? This extricable question is said to be reviewable on the standard of correctness.

[25] The Judge rejected this submission (reasons of the Judge at paragraph 21). In our view, he was correct to do so. The Judge reasoned that in *Agraira* the Supreme Court rejected the bifurcated standard of review proposed by the appellant.

[26] Before us, counsel for Mr. Walchuk argue that *Agraira* is distinguishable because there a completely different context was before the court: the question involved the meaning of "national interest". This required the relevant Minister to assess public policy and exercise discretion. Counsel for Mr. Walchuk argue that in our case the Minister is to embark "on a single legal and forensic inquiry". Further, relief from statutory inadmissibility, the issue in *Agraira*, is a privilege, whereas an application under section 696.1 and its consideration by the Minister is a right. Finally, counsel argued that the Minister of Citizenship and Immigration is responsible for the administration of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 in a way that the Minister of Justice is not responsible under the *Criminal Code*.

[27] In our view, *Agraira* is not distinguishable for the following reasons.

[28] First, there is nothing in *Agraira* to suggest that the Supreme Court intended to confine its reasons to the particular context before it.

[29] Second, we do not agree that the Minister was faced with an extricable question of law that he was obliged to answer correctly. The Minister was required to consider whether he was "satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred" (subsection 696.3(3) of the *Criminal Code*), a matter involving an inseparable mix of

facts and law. In making this decision pursuant to section 696.4, the Minister was required to take into account "all matters the Minister considers relevant" including, as pertinent to the facts of this case:

i. whether the application is supported by new matters of significance that were not considered by the courts;

ii. the relevance and reliability of the information presented in connection with the application; and

iii. an application under section 696.1 is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

[30] The language of this legislative scheme does not suggest that the Minister was faced with an extricable question of law that had to be answered correctly. As stated by this Court in *Farwaha v. Canada (Minister of Transport, Infrastructure and Communities)*, 2014 FCA 56, 455 N.R. 157 at paragraph 81 (albeit in a different statutory context), to find an extricable question of law would amount to an artificial and unacceptable parsing of the Minister's task.

[31] The Judge was of the view that the Minister's decision as a whole was reviewable on the standard of reasonableness. In our view, he was correct although the governing authority was not cited by him. That authority is the decision of this Court in *Daoulov v. Canada (Attorney General)*, 2009 FCA 12, 388 N.R. 54 at paragraph 11.

VII. The margin of appreciation we should afford to the Minister

[32] Under reasonableness review, the range of acceptable and defensible outcomes available to the Minister – or the margin of appreciation we should afford to him – depends on "all relevant factors" surrounding the decision-making: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23 and *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paragraph 44. In *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paragraph 38, Justice Moldaver noted that in the context of statutory interpretation, the range of reasonable outcomes can sometimes be limited to a single outcome, *i.e.*, no margin of appreciation at all.

[33] Certain factors can shed light on the margin of appreciation: *Farwaha*, above at paragraphs 90-92. In the context of this particular decision, there are factors narrowing the margin of appreciation:

i. the importance of the decision to Mr. Walchuk;

ii. the importance to the criminal justice system of what has been called the final safety net for those who are the victims of wrongful conviction. Any wrongful conviction undermines public confidence in the justice system; and

iii. the terms of the relevant sections in Part XXI.1 of the *Criminal Code* and associated settled law constrain the Minister's discretion (see paragraph 56, below). This is not a discretionary decision based on policy.

[34] Although these are narrowing factors, the Minister will often be entitled to leeway. In the context of the weighing and assessment of the evidence, the words "satisfied," "reasonable," "likely" and "extraordinary" appear in paragraphs 696.3(3)(*a*) and 696.4(*c*) – words admitting of some subjectivity and impression. This is buttressed by the strong privative clause declaring that the Minister's decision is "final" and "not subject to appeal": *Criminal Code*, subsection 696.3(4).

[35] In the end, we do not believe the result of this particular appeal turns on the margin of appreciation we give to the Minister. For argument's sake, we will review the Minister's decision on a strict basis, granting him no margin of appreciation. Even on an exacting basis, there are no grounds to set aside the Minister's decision.

VIII. Reasonableness Review of the Minister's Decision

(1) Preliminary considerations

[36] We shall proceed on the basis that under section 396.3 of the *Criminal Code*, the Minister would have to find a "miscarriage of justice" if credible evidence is established that could reasonably be expected to have affected the verdict at trial: *Reference re Milgaard (Can.)*, [1992]

1 S.C.R. 866, 90 D.L.R. (4th) 1. We express no other comment on the meaning of "miscarriage of justice" under this section.

(2) The requirements for second degree murder

[37] Second degree murder has three essential elements, each of which must be proven beyond a reasonable doubt:

(a) *Mr. Walchuk caused Mrs. Walchuk's death*. For an act or omission to cause someone's death, it must be at least a significant contributing cause, one that is beyond something that is trifling or minor in nature. There must not be anything that somebody else does later that results in Mr. Walchuk's act or omission no longer being a contributing cause of Mrs. Walchuk's death. See generally *R. v. Maybin*, 2012 SCC 24, [2012] 2 S.C.R. 30; *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488; *R. v. Harbottle*, [1993] 3 S.C.R. 306, 84 C.C.C. (3d) 1; *R. v. Smithers*, [1978] 1 S.C.R. 506.

(b) *Mr. Walchuk caused Mrs. Walchuk's death unlawfully*. In considering this, one should consider all the circumstances of Mr. Walchuk's conduct, including the nature of the act alleged, and anything said at or about the same time.

(c) *Mr. Walchuk had the state of mind required for murder.* Key to a conviction for murder is subjective *mens rea*: *R. v. Martineau*, [1990] 2 S.C.R. 633, 58 C.C.C.

> (3d) 353. Specifically, it must be shown that Mr. Walchuk meant either to kill Mrs. Walchuk or to cause her bodily harm that Mr. Walchuk knew was likely to kill her, and he was reckless whether she died or not: *Criminal Code*, paragraph 229(*a*); *R. v. Cooper*, [1993] 1 S.C.R. 146, 78 C.C.C. (3d) 289. The Crown does not have to prove both. One is enough. If the foregoing elements are present but the Crown has failed to prove either mental state, Mr. Walchuk committed manslaughter.

(3) Assessing whether the requirements were met

[38] As mentioned above, three expert reports were tendered as fresh evidence to the Minister and the Minister considered them. They state that Mr. Walchuk did not set the fire using an accelerant in the manner posited by the Crown and accepted by the trial judge. We shall assume that that is true. We shall go even further and assume for the moment that they conclusively prove that Mr. Walchuk did not set the fire in any way.

[39] At trial, the theory of counsel for Mr. Walchuk was that Mrs. Walchuk, in anger, crashed her car into the porch of the house and that is how the fire started: reasons of the Judge at paragraph 30. We shall also make the assumption – favourable to Mr. Walchuk – that that is exactly what happened.

[40] In our view, there is more than enough to support the Minister's conclusion that a miscarriage of justice had not likely occurred. We shall examine each of the elements of the offence of second degree murder and how they pertain to Mr. Walchuk's case.

(a) Mr. Walchuk caused Mrs. Walchuk's death

[41] The evidence – much of it admitted by Mr. Walchuk – shows that he factually and legally caused Mrs. Walchuk's death. He beat her with a hockey stick so forcefully that the shaft of the stick broke, leaving her incapacitated or unconscious in the basement of the burning house: reasons of the Judge at paragraphs 20 and 25. Her injuries, described in more detail below, were most severe. Left untreated, they may have ultimately led to her death: reasons of the Judge at paragraph 14; Appeal Book at pages 332-333 (autopsy report). But, in the end, she died from carbon monoxide poisoning from the fire: reasons of the Judge at paragraph 14.

[42] Mr. Walchuk's act of beating Mrs. Walchuk in the burning house to the point of incapacitation or unconsciousness left her unable to escape, exposing her to lethal carbon monoxide fumes. But for Mr. Walchuk's act, Mrs. Walchuk could have escaped the fire and survived. Mr. Walchuk's act set in motion a series of events that led to her death. His act was a "principal factor in her death": reasons of the Judge at paragraph 41. The first element of the offence of second degree murder is present.

[43] Indeed, this case resembles three other homicide cases where causation has been found:

- *R. v. Sinclair et al.*, 2009 MBCA 71, 245 C.C.C. (3d) 331, rev'd on a different point, 2011 SCC 40, [2011] 3 S.C.R. 3. Three accused beat the victim and left him incapacitated in the middle of a road. Ten minutes later, a car ran him over, killing him. Was the car a new intervening cause that broke the chain of causation such that the accused could not be found guilty? No. But for the beating of the victim and his vulnerable location in the middle of the road, he would not have died.

- *R. v. Hallett*, [1969] S.A.S.R. 141 (S. Aust. S.C.), cited with approval by the Supreme Court of Canada in *Maybin*, *Nette*, and *Harbottle*, all above. The accused beat the victim and left him unconscious at the edge of the sea. The tide rose and he drowned. Here, as in *Sinclair*, the accused's conduct was a sufficient cause of death. But for the beating of the victim to unconsciousness at the edge of the sea, he would not have died.

- *Maybin*, above. In a bar, the two accused repeatedly punched the victim in the face and head, leaving him unconscious. Seconds later, reacting to the commotion, a bouncer naturally arrived on the scene to restore order. He punched the victim, who died soon afterward. The Supreme Court of Canada held that the accuseds' punches were either the direct cause of death or they rendered the victim vulnerable to the bouncer's intervention that resulted in death. In short, but for the accuseds' actions, the victim would not have died.

(b) Mr. Walchuk caused Mrs. Walchuk's death unlawfully

[44] Before the Minister, it does not seem to have been disputed that Mr. Walchuk committed an unlawful act, a brutal assault, in causing Mrs. Walchuk's death. Rather, Mr. Walchuk contends that, at most, he should have been convicted for manslaughter because he did not have the mental state, or *mens rea*, of murder.

[45] We now turn to that issue. In doing so, the assumptions favourable to Mr. Walchuk continue to apply.

(c) Mr. Walchuk had the state of mind required for murder

[46] After the car crashed into the porch but before he went into the house, Mr. Walchuk saw sparks and fire coming from a wire leading to the porch: Appeal Book at pages 619 and 624 (transcript of evidence). This is consistent with one of the new experts' view that the car or the electrical apparatus in the porch area damaged by the car started the fire: Appeal Book at page 420. Despite the sparks and fire, Mr. Walchuk followed Mrs. Walchuk downstairs into the basement and beat her savagely.

[47] There is plenty of evidence showing that Mr. Walchuk meant either to kill Mrs. Walchuk or meant to cause her bodily harm that Mr. Walchuk knew was likely to kill her. The evidence is circumstantial. But intention can be found from the totality of the circumstances, both specific and general, from acts, words and motives: see, *e.g.*, *R. v. K.(A.)* (2002), 169 C.C.C. (3d) 313

(Ont. C.A.); *R. v. MacDonald*, 2008 ONCA 572, 92 O.R. (3d) 180; *R. v. Bigras*, 2004 CanLII 21267; *R. v. Bouchard*, 2013 ONCA 791, 314 O.A.C. 113 at paragraphs 47-53; *R. v. Dahr*, 2012 ONCA 433, 294 O.A.C. 301 at paragraphs 13-14. The totality of the circumstances includes the following:

- Mr. and Mrs. Walchuk were embroiled in a bitter divorce, with an acrimonious dispute over property and support: reasons of the Judge at paragraphs 2, 3 and 39; Appeal Book at pages 629 and 655-656 (transcript of evidence);

- at the time of Mrs. Walchuk's death, a court hearing to determine that dispute was to be held in a couple of weeks: reasons of the Judge at paragraphs 2, 3 and 39;

- Mr. Walchuk had made numerous death threats against his wife, some of which were recorded on a tape recorder found beside her body: reasons of the Judge at paragraphs 35 and 36; Appeal Book at page 656 (transcript of evidence);

- on previous occasions when Mrs. Walchuk was to receive the children into her care, she would pick them up at 19:00 from the house and they would be ready; unusually, on the day Mrs. Walchuk was killed, Mr. Walchuk was with the children at his mother's house at 18:30; at 19:00, he arrived at the house to meet Mrs. Walchuk but the children were not with him: reasons of the Judge at paragraphs 4-5 and 34; Appeal Book, pages 493 and 498 (Investigation Report) and pages 652-655, 662 and 664-665 (transcript of evidence);

- Mr. Walchuk took steps to ensure that on the day of the killing Mrs. Walchuk's father, who visited the house regularly, was not there; similarly, he took steps to ensure that a best friend and cousin of Mrs. Walchuk, who normally accompanied Mrs. Walchuk to pick up the children, was not there: reasons of the Judge at paragraphs 37 and 38;

- as for what took place in the basement of the burning house, Mr. Walchuk later admitted, "I just kept hitting her": reasons of the Judge at paragraph 20; that admission and the severity of Mrs. Walchuk's wounds tend to show an intention not just to hurt, but to kill;

- the beating was "without mercy"; Mrs. Walchuk suffered "severe craniocerebral injury," "diffuse hemorrhagic cerebral damage," injuries suggestive of an "unleashing of hostile, aggressive impulses by the assailant," "significant blood loss," "subdural hematoma," "subarachroid hemorrhage," and "intra-cerebral bleeding including brain stem hemorrhages" and an exposed skull; these would have led to "a rapid loss of consciousness" and "without any other injuries and/or trauma, were potentially fatal": reasons of the Judge at paragraphs 14 and 25; Appeal Book, page 333 (autopsy report);

- the severe injuries would have "rendered the victim pregnable to fire" and it was "likely" that Mr. Walchuk's beating left her "unconscious at the time of the conflagration": reasons of the Judge at paragraphs 14, 15 and 25;

- having escaped the burning house, Mr. Walchuk was only mildly injured and, it can be inferred, could capably and knowingly interact with those who arrived on the scene: reasons of the Judge at paragraphs 22 and 28;

- when reporting the fire to his mother, Mr. Walchuk did not advise that his wife was unconscious and trapped in the basement: reasons of the Judge at paragraphs 7 and 26;

- when three neighbours arrived soon after the incident, Mr. Walchuk did not tell them his wife was unconscious in the basement: reasons of the Judge at paragraphs 7-10 and 26;

- when one of the neighbours asked where Mrs. Walchuk was, Mr. Walchuk replied that he did not know: reasons of the Judge at paragraph 9; Appeal Book, page 493 (Investigation Report);

- when his daughter expressed concern about her cat, Mr. Walchuk assured her the cat was out of the house and safe but he did not tell her that her mother was unconscious in the basement: reasons of the Judge at paragraphs 26 and 27; and

- only after the house was fully engulfed in flames – well after the porch first caught on fire, ten minutes after the neighbours arrived, and fifteen minutes after

> Mr. Walchuk had spoken to his mother – did he tell anyone that his wife was in the basement: reasons of the Judge at paragraph 10.

[48] We note that these circumstances are far stronger than cases such as *K.(A.)* and *MacDonald*, both above, where the evidence was sufficient to establish the state of mind for murder. They are also quite similar to *Bigras*, above, where the accused created an opportunity to beat the victim, the accused beat the victim senseless, and then the victim was left immobile in circumstances where death was a real risk.

[49] If we relax the assumption that the car started the fire when Mrs. Walchuk crashed it into the house, there is additional evidence that Mr. Walchuk intended to kill. Relaxing the assumption is warranted, as the new experts' reports disproved only the theory that Mr. Walchuk used an accelerant to set fire to the house. The reports leave open the possibility that Mr. Walchuk still set fire to the house in some other way, perhaps using matches, perhaps crashing Mrs. Walchuk's car into the porch. Here is the additional evidence:

- Mrs. Walchuk, a minimum wage earner, would not likely have crashed her only car into the house: reasons of the Judge at paragraph 30;

- when two neighbours arrived at Mr. Walchuk's farm and noticed a slight injury to his forehead, Mr. Walchuk said that he hit his head while driving a car: reasons of the Judge at paragraph 8;

- Mr. Walchuk came to the house with a book of matches from his wedding ten years ago in his pocket and, after the fire, three matches were missing: Appeal Book, pages 640 and 665 (transcript of evidence); reasons of the Judge at paragraph 18;

- before the incident, Mr. Walchuk had secreted certain items from the house before the fire – items with sentimental value only to him – a behaviour common to many arsonists: reasons of the Judge at paragraphs 17 and 29; and

- before the incident, he also removed his son's all terrain vehicle from the porch and secreted it in the barn, he left the propane tank on the porch; the car ended up crashing into the porch; later, four times in jail, Mr. Walchuk told an undercover police officer posing as his cell mate that the house "should have all gone up; what with a barbeque, gasoline, gas in an antifreeze container, I can't figure out why it didn't"; had it exploded, evidence as to the nature of Mrs. Walchuk's death would have been less clear: reasons of the Judge at paragraph 33; Appeal Book, page 496 (Investigation Report) and pages 619, 623-624, 630 and 634 (transcript of evidence).

IX. The Reasons of the Trial Court

[50] Mr. Walchuk places considerable emphasis on the reasons of the trial judge. On a construction of those reasons, he notes that the Judge seemed to emphasize the incendiary nature

of the fire in finding that Mr. Walchuk had the intention to murder. In Mr. Walchuk's view, if the fire were not incendiary, the basis for a finding that he had an intention to kill falls away.

[51] We disagree with this submission for the following reasons.

[52] First, in our view, reasons for judgment of a trial judge in a criminal matter should not be seen as an expression of everything the judge was thinking about the facts and law in the case. When drafting reasons, a trial judge need not be encyclopaedic. Reasons need not "set out every finding or conclusion in the process of arriving at the verdict," "describe every landmark along the way," or "verbaliz[e]…the entire process engaged in by the trial judge in reaching a verdict": *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paragraphs 18 and 35; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 at paragraph 30; *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at page 525, 138 C.R. (4th) 4 (C.A.). In his reasons, the Judge did emphasize the incendiary nature of the fire in support of his conclusion that Mr. Walchuk intended to murder his wife. But to the extent that the new evidence shows that the fire was non-incendiary, that does not necessarily mean that the conviction is unsafe and there has been a miscarriage of justice.

[53] Second, the proviso in subparagraph 686(1)(*b*)(iii) offers us some guidance. It allows an appeal court to maintain a trial decision where no "substantial wrong or miscarriage of justice" has occurred. For example, it may be that a trial judge, in convicting an accused, has improperly ruled against the accused on the admissibility of some evidence. But if, upon a review of all of the other evidence, there is no reasonable possibility that the verdict would have been different

had the error not been made, the conviction will be upheld under the proviso: *R. v. Bevan*, [1993] 2 S.C.R. 599, 82 C.C.C. (3d) 310; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823.

[54] Here, as we have demonstrated, if Mr. Walchuk's possible involvement in the fire is disregarded and if one reads the Judge's reasons organically and contextually alongside the record – as we must (see *R.E.M.*, above at paragraphs 16-17) – one must conclude that there is no reasonable possibility that the verdict would have been different: see, in particular, the summary of evidence at paragraphs 38-49 above; see also the Judge's explicit consideration of some of that evidence at paragraphs 38-39 and 41 of his reasons. One cannot be "satisfied" that it is "likely" that there has been a miscarriage of justice – one of the statutory standards under paragraph 696.3(3)(*a*) that must be met in order for the Minister to grant relief.

[55] Further, the Minister's task is not to act like an appellate court sitting over what earlier courts have done or to stand in the trial judge's shoes and re-do the fact-finding: *Criminal Code*, paragraph 696.4(*c*). Nor is the Minister's task as simple as blue-pencilling any unsustainable portions of the trial judge's reasons and examining what is left in the trial judge's reasons. The Minister's proper task is larger.

[56] What is the Minister's task? In our view, in order to make a decision that passes muster under reasonableness review, the Minister must examine the trial judge's reasons, all of the evidence (both helpful and unhelpful to the applicant), any admissible fresh evidence, and any other new evidence, advice and insights obtained by using the department's resources and the Minister's investigatory powers under section 696.2 of the *Criminal Code*. Then, following the

recipe and standards set out in section 696.3 and 696.4 and the relevant Regulations and acting in a procedurally fair manner, the Minister must reach conclusions that are acceptable and defensible on the facts and the law. In doing all this, the Minister must single-mindedly focus on the administration of justice as a true minister of justice, putting aside any pre-conceived views or partisanship: *Boucher v. The Queen*, [1955] S.C.R. 16, 110 C.C.C. 263.

X. Conclusion

[57] In this case, much of the record before the Minister was prepared on his own initiative. There is no suggestion it is inadequate to the task at hand. Overall, its tone is appropriate and its substance is fair. The Minister's reasons show that he followed the correct methodology in carrying out his task, especially when his reasons are viewed in the context of this record. The outcome reached – the dismissal of Mr. Walchuk's application under section 696.1 of the *Criminal Code* – was acceptable and defensible based on this record. Therefore, the Minister's decision was reasonable.

XI. Proposed disposition

[58] For all the foregoing reasons, we would dismiss Mr. Walchuk's appeal. In these circumstances, we would exercise our discretion on costs as the Federal Court did. Therefore, we would not award costs.

"Eleanor R. Dawson"
J.A.

"David Stratas"
J.A.

"I agree
D.G. Near J.A."

APPENDIX

696.1 (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

(2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.

696.2 (1) On receipt of an application under this Part, the Minister of Justice shall review it in accordance with the regulations.

(2) For the purpose of any investigation in relation to an application under this Part, the Minister of Justice has and may exercise the powers of a commissioner under Part I of the Inquiries Act and the powers that may be conferred on a commissioner under section 11 of that Act.

(3) Despite subsection 11(3) of the Inquiries Act, the Minister of Justice may delegate in writing to any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or

696.1 (1) Une demande de révision auprès du ministre au motif qu'une erreur judiciaire aurait été commise peut être présentée au ministre de la Justice par ou pour une personne qui a été condamnée pour une infraction à une loi fédérale ou à ses règlements ou qui a été déclarée délinquant dangereux ou délinquant à contrôler en application de la partie XXIV, si toutes les voies de recours relativement à la condamnation ou à la déclaration ont été épuisées.

(2) La demande est présentée en la forme réglementaire, comporte les renseignements réglementaires et est accompagnée des documents prévus par règlement.

696.2 (1) Sur réception d'une demande présentée sous le régime de la présente partie, le ministre de la Justice l'examine conformément aux règlements.

(2) Dans le cadre d'une enquête relative à une demande présentée sous le régime de la présente partie, le ministre de la Justice possède tous les pouvoirs accordés à un commissaire en vertu de la partie I de la Loi sur les enquêtes et ceux qui peuvent lui être accordés en vertu de l'article 11 de cette loi.

(3) Malgré le paragraphe 11(3) de la Loi sur les enquêtes, le ministre de la Justice peut déléguer par écrit à tout membre en règle du barreau d'une province, juge à la retraite, ou tout autre individu qui, de l'avis du ministre, possède une formation ou

experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation under subsection (2).

une expérience similaires ses pouvoirs en ce qui touche le recueil de témoignages, la délivrance des assignations, la contrainte à comparution et à déposition et, de façon générale, la conduite de l'enquête visée au paragraphe (2).

696.3 (1) In this section, "the court of appeal" means the court of appeal, as defined by the definition "court of appeal" in section 2, for the province in which the person to whom an application under this Part relates was tried.

696.3 (1) Dans le présent article, « cour d'appel » s'entend de la cour d'appel, au sens de l'article 2, de la province où a été instruite l'affaire pour laquelle une demande est présentée sous le régime de la présente partie.

(2) The Minister of Justice may, at any time, refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

(2) The Minister of Justice may, at any time, refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

(3) On an application under this Part, the Minister of Justice may

(3) Le ministre de la Justice peut, à l'égard d'une demande présentée sous le régime de la présente partie :

(*a*) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,

a) s'il est convaincu qu'il y a des motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite :

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or

(i) prescrire, au moyen d'une ordonnance écrite, un nouveau procès devant tout tribunal qu'il juge approprié ou, dans le cas d'une personne déclarée délinquant dangereux ou délinquant à contrôler en vertu de la partie XXIV, une nouvelle audition en vertu de cette partie,

(ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it

(ii) à tout moment, renvoyer la cause devant la cour d'appel pour audition et décision comme s'il s'agissait d'un

were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or

(*b*) dismiss the application.

(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

696.4 In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including

(*a*) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;

(*b*) the relevance and reliability of information that is presented in connection with the application; and

(*c*) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

696.5 The Minister of Justice shall within six months after the end of each financial year submit an annual report to Parliament in relation to applications under this Part.

696.6 The Governor in Council may make regulations

appel interjeté par la personne déclarée coupable ou par la personne déclarée délinquant dangereux ou délinquant à contrôler en vertu de la partie XXIV, selon le cas;

b) rejeter la demande.

(4) La décision du ministre de la Justice prise en vertu du paragraphe (3) est sans appel.

696.4 Lorsqu'il rend sa décision en vertu du paragraphe 696.3(3), le ministre de la Justice prend en compte tous les éléments qu'il estime se rapporter à la demande, notamment :

a) la question de savoir si la demande repose sur de nouvelles questions importantes qui n'ont pas été étudiées par les tribunaux ou prises en considération par le ministre dans une demande précédente concernant la même condamnation ou la déclaration en vertu de la partie XXIV;

b) la pertinence et la fiabilité des renseignements présentés relativement à la demande;

c) le fait que la demande présentée sous le régime de la présente partie ne doit pas tenir lieu d'appel ultérieur et les mesures de redressement prévues sont des recours extraordinaires.

696.5 Dans les six mois suivant la fin de chaque exercice, le ministre de la Justice présente au Parlement un rapport sur les demandes présentées sous le régime de la présente partie.

696.6 Le gouverneur en conseil peut prendre des règlements :

(*a*) prescribing the form of, the information required to be contained in and any documents that must accompany an application under this Part;

a) concernant la forme et le contenu de la demande présentée en vertu de la présente partie et les documents qui doivent l'accompagner;

(*b*) prescribing the process of review in relation to applications under this Part, which may include the following stages, namely, preliminary assessment, investigation, reporting on investigation and decision; and

b) décrivant le processus d'instruction d'une demande présentée sous le régime de la présente partie, notamment les étapes suivantes : l'évaluation préliminaire, l'enquête, le sommaire d'enquête et la décision;

(*c*) respecting the form and content of the annual report under section 696.5.

c) concernant la forme et le contenu du rapport annuel visé à l'article 696.5.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-351-13
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MANSON DATED SEPTEMBER 17, 2013, NO. T-457-12	
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PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 15, 2014
REASONS FOR JUDGMENT BY:	DAWSON AND STRATAS JJ.A.
CONCURRED IN BY:	NEAR J.A.
DATED:	APRIL 7, 2015

APPEARANCES:

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