R. v. Ian Adam Kirby, 2004 NWTSC 68

Date: 20041001
Docket: CR S-1-CR2003000103

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

IAN ADAM KIRBY

Transcript of the Reasons for Judgment of The Honourable Justice J.Z. Vertes, at Yellowknife in the Northwest Territories, on September 30th A.D., 2004.

APPEARANCES:

Ms. L. Colton: Counsel for the Crown

Ms. K. Payne: Counsel for the Accused

THE COURT: I must say that this case raised a number of complex issues of law and fact but, in essence, it is truly a human and a family tragedy.

On September 30th, 2003, at approximately 12:15 p.m., police and emergency medical personnel attended at the apartment shared by the accused Ian Adam Kirby and his wife Betsy Kirby. Inside the apartment were Betsy Kirby's 7-year-old son, Brent, and his 19-year-old cousin, Crystal. In the bathroom of the apartment, they found Betsy Kirby lying on the floor, with no apparent life signs. The medical attendants attempted resuscitation efforts but eventually without success.

The conclusion suggested by the evidence, a conclusion that I accept, is that Betsy Kirby died by hanging herself with the shower curtain attached to the shower curtain rod in the bathroom.

Later that same day, at approximately 11 p.m., the police located the accused in a local bar and arrested him.

The theory of the Crown is that the accused was present when his wife hung herself and that he did nothing to intervene to stop her or to obtain help to prevent her death. He is charged, therefore, with two offences:

(1) criminal negligence causing death, contrary to Section 220(b) of the Criminal Code; and,

(2) failing, without lawful excuse, to provide the necessaries of life to his wife and thereby endangering her life, contrary to Section 215(2) (a) (ii) of the Criminal Code.

I will review the significant evidence in detail but I wish to first set out what I consider to be the parameters of this case.

This is not a case about euthanasia or assisted suicide. This is not a case where the Crown alleges that the accused did anything, either by way of a physical act or encouragement or persuasion, that led to Mrs. Kirby's death. The Crown's allegation is that the accused did nothing when, in law, he was required to act. This is therefore a question of whether an omission to act can form the basis for criminal liability.

Generally speaking, the criminal law imposes liability for acts, some conduct that is prohibited. But there are certain situations where an omission to act may lead to criminal liability. But that can only arise if there is a legal duty, not merely a moral duty, to act.

Section 215 of the Criminal Code imposes a specific legal duty to act, that being, to provide necessaries of life in certain categories of relationships. Specifically, Section 215(1) (b) requires every person to provide necessaries of life to their spouse. It also makes it a criminal offence to fail, without lawful excuse, to provide necessaries of life where the failure to do so endangers the life of their spouse. Thus Parliament clearly intended to make the omission to provide necessaries of life, in certain circumstances, a crime.

I think it is agreed that the term "necessaries of life" encompasses more than just food, clothing and shelter. It includes anything necessary to preserve life, such as medical aid or intervention to prevent serious harm or risk of death.

To convict the accused on the charge of failing to provide necessaries of life, the Crown must prove two things. First, that it was objectively foreseeable, in the circumstances, that the failure to provide necessaries would endanger the life of the deceased. Second, that the conduct of the accused represented a marked departure from the standard of a reasonable person in the circumstances.

The crime of criminal negligence also imposes liability for omissions. Section 219 of the Criminal Code states that a person is criminally negligent who, in omitting to do anything that is his legal duty to do, shows wanton or reckless disregard for the lives or safety of others. This is not a crime of intention or deliberation. Mere indifference to the risk of harm is enough so long as there is an awareness of the risk, or recklessness, or willful blindness to it.

To convict the accused on a charge of criminal negligence causing death, the Crown must prove three things. First, that the accused omitted to do something that was his duty to do. Second, that he showed a wanton or reckless disregard for the life or safety of the deceased. Third, that his conduct caused, in the sense of being a contributing factor to, the death.

The accused did not testify in this case. I say this only because, while there was evidence that he had been consuming alcohol, there was no evidence to support an inference, or even to raise a doubt, that the accused, at the material time, lacked the capacity to appreciate the risk or comprehend what was happening.

The expert medical evidence in this case has some significance. Dr. Dowling testified that hanging leads to a rapid sequence of events. Hanging cuts off the blood flow to the brain. Unconsciousness would occur within six to ten seconds. Brain damage starts to occur within three

minutes. Death would ensue within five to ten minutes. If rescue occurs within the first three minutes, it is likely a hanging victim would recover spontaneously.

Dr. Dowling also testified that it is a common misconception that hanging requires full suspension of the body. It would be sufficient to stand and then bend the knees so that the weight of the upper body would cause the necessary pressure to be applied by whatever was around the neck. That is what happened in this case.

Finally Dr. Dowling noted that the deceased had an intoxicating level of alcohol in her system at the time of death. The blood-alcohol concentration was 260 milligrams of alcohol in 100 millilitres of blood (over three times the allowable limit for drinking and driving). But he opined that Mrs. Kirby's level of intoxication would have had no medical effect on the cause of death.

The critical evidence, as both counsel observed, is that of Brent and Crystal. That is because, in my opinion, and I think counsel agree on this as well, the crucial question is whether the evidence proves that the accused was with his wife when she committed suicide. If he was, then I think it follows that he must have been aware of the risk to her life. His conduct, or lack of action, must then be viewed objectively to determine if he exercised the appropriate standard of care. If he was not, then I think it follows as well that there is no proof of his awareness of the risk. And, in my opinion, that minimal awareness is a prerequisite to criminal fault, whether one labels it is as advertance to the risk, or recklessness, or willful blindness.

Certain facts emerge clearly from the evidence. The accused and his wife were drinking on the night of September 29th. They went out. The accused came home at about 1 a.m. He went to sleep. Then early on the morning of September 30th, everyone in the apartment was awakened by loud music turned on by the deceased. The accused and the deceased were together in the apartment during the morning. They were drinking. They were arguing. At one point the accused was injured and bleeding from a cut above the eye. He tried to leave the apartment but was physically restrained by his wife. Betsy Kirby was described by Crystal as seeming to be very drunk.

So this much is clear. The atmosphere in the home that morning was highly volatile, fueled by alcohol and arguing between the spouses.

It is also clear that the deceased tended to become volatile when drinking. She had also tried to commit suicide in the past.

The child Brent, now 8 years old, testified on giving a promise to tell the truth. I was satisfied that he could articulate his evidence and that he appreciated the need to tell the truth.

On his examination-in-chief, Brent related how he went to the bathroom; the door was locked; he managed to open it; and when he went in he saw his mother tied up with the shower curtain around her neck. He said she was laying on the floor. He said that the accused was in the bathroom, sitting on the toilet, and looking at his watch. His mother was lying on her knees with her face down. She looked pale. He asked the accused to take the shower curtain off her and the accused did so. After that, the accused left. It was later that Brent asked Crystal to come look at his mother and eventually Crystal called the police.

On cross-examination, Brent seemed to give a different version. He was questioned by defence counsel, quite properly, on a previous statement that he had given to a police officer. He said that when he went to the bathroom, it was just him and his mother in there and that he saw her tie the shower curtain around her neck. He asked her to stop but she did not. And it was later he then called Crystal.

Having reviewed this testimony several times, I am satisfied that, while he may have said in an earlier statement that he was in the bathroom with his mother, his evidence regarding seeing his mother tie the shower curtain around her neck was a mistake or the result of confusion or simply a reflex agreement with the leading questions posed by defence counsel. I say that because there are numerous examples throughout the cross—examination where Brent gives a reflexive "yes" as the answer to a question which, when it is rephrased, he really means a "no" answer.

Brent, in his cross-examination, also says that when he later went back to the washroom the accused and his mother were in there. So, as defence counsel suggests, this could mean that the accused came in only after his wife had already hung herself. Or, it could be, and I think this is the more plausible explanation, that Brent was returning to his narrative to the effect that when he saw his mother tied up with the shower curtain the accused was already in the washroom. But Brent does go on to repeat that when he was first in the washroom it was just him and his mother. However, he also contradicts himself later on when, once again, defence counsel asks him:

> "But the first time, when it was just you and your mother in the bathroom, that's when you saw her put the shower curtain around her neck, is that right, Brent?"

And Brent answered:

> "I didn't see her put it on her neck".

Then defence counsel again reminded him of the previous statement that he saw his mother tie herself up.

Defence counsel argues that the internal contradictions in this evidence are so serious as to at least raise a reasonable doubt. Brent's evidence, in defence counsel's submission, is simply too unreliable to justify the conclusion that the accused was present when his wife hung herself.

Now I recognize the frailties of a child's evidence. A child may be easily confused or may wish to be agreeable to suggestions made by adults. Brent struck me as a bright young boy but no different than any other boy of his age. But there are two reasons why I conclude that I can rely on certain aspects of his testimony.

First, on re-examination, Crown counsel took Brent back to the earlier statement that he gave to the police officer, the statement upon which he was questioned by defence counsel. And Crown counsel followed up from where defence counsel left off. I think it worthwhile quoting from the transcript of the evidence:

> MS. COLTON: Brent, I know that you must be tired, I just have a few more questions for you, okay. Ms. Payne was asking you some questions about when you talked to the police officer, to Nini, when you gave your statement. I'm going to ask you some more questions about that, all right. Now, Ms. Payne asked you about on page 6 of the statement that Nini asked you, And who was in the bathroom when you went in there? And you said, Me and my mom. Do you remember telling that to Nini? I'm going to keep reading you some questions just after that, all right. Nini asked you, Okay, so you said that you went into bathroom maybe six or seven times. How many times when you went into the bathroom were they in there? And you said, When I first went in, they were in there. And I said what happened to her, she -- he said that she wanted to tie herself so she did. Do you remember that, saying -- the question and the answer?

Answer by Brent: “Yes”.

Question: And then Nini said, m’hm. And you said, And I told him take it off, okay, please, and he take it off, he went out the door. Do you remember saying that to Nini?

Answer: Yes.

Question: Now, I’m going to go to a different part of the statement, this is at page 8, about halfway down the page. Nini asked you, M’hm, who put the shower curtain on your mom? Answer, my mom. Do you remember Nini asking you that and you said “my mom”?

Answer: Yes.

Question: And then Nini asked you, How do you know? And you said ‘Cause Ian told me, I don’t know anything else. Do you remember telling that to Nini?

Answer: Yes.

And then a little later on in the transcript, the question by Ms. Colton,

Question: So, Brent, can you tell us now how do you know that your mom tied the shower curtain around her neck?

Answer: I don’t know.

Question: You said before when I was asking you questions that when you went into the washroom, after you used the Q tip to get into the washroom, that your mom was tied up with a shower curtain, right?

Answer: Yes.

Question: Did you see yourself how she got tied up with the shower curtain?

Answer: No.

Question: You are shaking your head no?

Answer: Yes.

Question: And when you went into the washroom and you saw her tied up, was there anybody else in the washroom besides you and your mom?

Answer: Ian.

This gives, in my opinion, a complete and coherent narrative account. Brent said that when he went into the bathroom he saw his mother tied up with the shower curtain and the accused was already in there. I accept this evidence.

The second reason why I find I can rely on this evidence is because it was supported to a strong degree by the evidence of Crystal. Her evidence, in its essential parts, was unchallenged.

Crystal testified that she saw the deceased stop the accused from leaving the apartment. She saw the accused go into the washroom with his wife following him. She heard the two of them arguing in the washroom. She heard the deceased say something like she wanted to kill herself and the accused calling her a chicken because she wanted to kill herself. Then it got quiet. Crystal, who was watching television with Brent, asked Brent to check on them because she did not want anything to do with them because they were drinking. She said that Brent knocked on the washroom door. And then she testified as follows:

> "He went and knocked on the washroom door. Then I heard the door open and I heard Brent say can you take that off my mom Ian, and then I heard Ian say just wait a second and he said can you please take it off and then Ian said I'll take it off and then Brent came back into the room with me but he never told me anything about what he saw".

This evidence, in my opinion, corroborates the substantive narrative given by Brent in his testimony and I accept it.

Therefore, I find the following facts as having been established by the evidence. The accused and his wife were in the washroom together. There was talk of suicide. Mrs. Kirby hung herself with the shower curtain. The accused did nothing to prevent her from hanging herself and only intervened after Brent asked him to untie the shower curtain. He then left without calling for assistance or even telling Crystal what had happened.

Turning first then to Count 2 of the Indictment, the charge of failing to provide necessaries of life, since this is, as Crown counsel put it, the foundation for the prosecution.

The accused and the deceased were married, living together, and therefore there was a duty imposed by the Criminal Code to provide necessaries of life. In my opinion, intervening to prevent death or serious harm is a "necessary" as that term is used in the Criminal Code.

The first question: Was it objectively foreseeable, in the circumstances, that the failure to intervene would endanger the life of the deceased? Clearly the answer must be "yes". The deceased was drunk and volatile, she had tried to commit suicide before, and she had just talked about killing herself. I think anyone, certainly any adult free of cognitive difficulties, could foresee that Mrs. Kirby's life was endangered by her actions and that the failure to intervene or to get immediate assistance ran the risk of serious harm or death. Any adult, in these circumstances, would have had to take her effort to hang herself seriously.

The second question: Did the conduct of the accused represent a marked departure from the standard of a reasonable person in the circumstances? Here I want to discuss a point raised by defence counsel.

Defence counsel argued that the law does not require a spouse to intervene in the face of a settled intention by the other spouse to commit suicide. She submitted that a distinction can be drawn between the duty owed by a parent to a child, where the child is incapable of mature judgment, and that owed by one adult to another. Essentially, she said, if one spouse decides to commit suicide, of her own free will, there should be no legal obligation on the part of the other to stop her.

Counsel referred me to the case of R. v. Sidney (1912) 1912 CanLII 118 (SK CA), 20 C.C.C. 376 (Sask. C.A.) where a father was acquitted of causing the death of his wife and son by allowing them to

wander out on a freezing night. The Court there found that the wife had left of her own free will and had therefore caused her own death, and that the father reasonably believed that his wife was caring for the son.

It is important to note several distinguishing features of that case. First, the charge there was causing death by omitting to provide necessaries. That causation issue plays no part in the current law set out in Section 215. The charge in Count 2 simply requires that the omission endanger life. Second, there is an important factual difference. The Court in Sidney found, as a fact, that the accused, in the circumstances, did not know nor ought to have known that his assistance was necessary. He thought that his wife and son were going to a neighbour.

In the case before me, the accused must have clearly recognized that his wife was intent on killing herself and that, if he did not stop her or get help, there was a real likelihood, a real risk, that she would do so.

Furthermore, I am inclined to agree with Crown counsel in her submission that, when considering the duty of a spouse under Section 215 the real question is whether the conduct in question, in the circumstances of the particular case, shows a marked departure from the standard of a reasonable person. To use Crown counsel's example, if one spouse was terminally ill and decided, with full control of his or her faculties, to commit suicide, and the other spouse stood by in a show of support but did nothing, it may be that in those circumstances that other spouse's conduct, or omission to act, would not be considered a marked departure from the reasonable standard. Thus, it would not be a crime. But that is not what happened here. The evidence revealed a drunken volatile domestic situation. Under those circumstances I have no hesitation in concluding that any reasonable person would have at least tried to stop their spouse from killing herself. And, in my opinion, the fact that Mrs. Kirby wanted to kill herself does not amount to a lawful excuse for the defendant. As Crown counsel noted, the Supreme Court of Canada in the well-known Rodriguez case, (1993) 1993 CanLII 75 (SCC), 85 C.C.C. (3d) 15, said that the protection of life is a fundamental state interest reflected in the various Criminal Code provisions that prohibit murder and other violent acts against others notwithstanding the consent of the victim and the aiding and counselling of suicide.

For these reasons, I find the accused guilty on Count 2.

Turning now to Count 1, the charge of criminal negligence causing death, the first question is whether the Crown has proven that the accused omitted to do something that was his duty to do. By my finding of guilt on Count 2, I am satisfied that the accused had the duty to intervene to try to stop his wife from killing herself and his inaction was an omission.

The second question is whether the accused showed a wanton or reckless disregard for the safety of others, in this case his wife. The Crown does not have to prove that the accused meant for his wife to die. But the Crown does have to prove more than carelessness. Was the accused's conduct, or in this case his failure to act, a marked and substantial departure from what a reasonably prudent person would do in the circumstances? This is an objective assessment based on the standards of reasonable people. Was he reckless, or heedless, or indifferent to the consequences of his failure to act?

In my considered opinion, the answer to all of these questions, if looked at on an objective basis, is "yes".

Having found, as a fact, that he was in the washroom at the time his wife hung herself; being satisfied that he did nothing to intervene until he was asked to do so by the deceased's young son; coupled with the facts, as I find them to be, that even afterward he took no steps to obtain aid, or to call for

assistance, or to even tell Crystal of what happened; I am satisfied beyond a reasonable doubt that the accused's conduct was indeed a marked and substantial departure from what the reasonable person would do in those circumstances.

Since he was there, he must have been aware that his wife's actions, in hanging herself by the shower curtain, posed a significant risk to her life or safety. Even if he was one of those labouring under what Dr. Dowling called the common misconception that hanging requires full suspension, he, as a normal adult, must have realized that the action of tying the shower curtain around her neck and then slumping down posed a significant risk to his wife's health. But, in any event, there is no evidence as to whether the accused shared that misconception. By the evidence demonstrating that the accused simply sat there until Brent asked him to untie his mother, I am satisfied as well that he either gave no thought to the consequences of his wife's actions or at least was indifferent to those consequences. This is not the conduct of the reasonably prudent person, much less the acceptable conduct for a husband who owed not only a moral but legal duty to his wife.

As I said before, this is not a case where it can be said that there were rationally objective reasons for Mrs. Kirby's decision to take her life.

All the evidence points to her being in an irrational, drunken state. In such a situation it is no answer to say simply that it was her decision and her husband should respect that. He should have intervened. There was no evidence of any personal danger to himself in doing so. He should have done something.

Finally, the third question is whether the accused's conduct caused his wife's death. By "cause", the law means that what the accused did, or as in this case did not do, was at least a significant contributing cause, and not just a minimal or insignificant cause.

Defence counsel submitted that there was no evidence that the accused knew or could have acted within the very narrow time—frame necessary to save life or to prevent brain damage as testified to by Dr. Dowling. This is significant because Crown counsel submitted that, since prompt removal of the pressure around the neck could have led to Mrs. Kirby's spontaneous recovery, the delay in providing aid was a contributing cause of her death. It seems to me that the question of whether the accused knew or did not know that he had to do something within the first three minutes is immaterial. I found, as a fact, that he was there. I found that he should, as a reasonable person, have done something. I can safely say, as I have already, that any rational adult would realize that prompt action is required if someone is trying to hang oneself. If the accused had done something on his own volition, anything to try and aid his wife, even if his efforts came too late, I doubt that we would be here now. To say that he should have done something is not to say that that would have saved Mrs. Kirby's life. But it could have. We simply do not know. But what we do know is that his indifference to his wife's fate, in simply sitting there as time passed by, undoubtedly contributed to her death.

For these reasons, I find the accused guilty on Count 1.

As I mentioned to counsel at the close of argument yesterday, in my opinion both charges rest on the same set of circumstances. Therefore in my opinion it would be unjust to enter multiple convictions. Therefore, a formal conviction will be entered only on Count 1, the charge of criminal negligence causing death. Count 2 will be stayed.