

2010 ONSC 7086
Ontario Superior Court of Justice

R. v. Powney

2010 CarswellOnt 10761, 2010 ONSC 7086, 93 W.C.B. (2d) 825

R. v. Allan Wayne Powney

R.M. Thompson J.

Heard: September 20 - November 8, 2010

Judgment: December 20, 2010

Docket: CR-08-128

Counsel: Michael J. Murdoch, for Crown
David Midanik, for Defendant

Subject: Criminal

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Pre-trial procedure — Preliminary inquiry — Evidence — Defence evidence — Right to adduce evidence

Criminal law --- Trial procedure — Charging jury or self-instruction — Direction on theory of defence — Miscellaneous

Table of Authorities

Cases considered by R.M. Thompson J.:

R. v. Grandinetti (2005), 37 Alta. L.R. (4th) 197, 329 N.R. 28, [2005] 1 S.C.R. 27, 247 D.L.R. (4th) 385, 25 C.R. (6th) 1, 191 C.C.C. (3d) 449, [2005] 4 W.W.R. 405, 2005 CarswellAlta 81, 2005 CarswellAlta 82, 2005 SCC 5, 363 A.R. 1, 343 W.A.C. 1 (S.C.C.) — considered

R. v. McMillan (1975), 1975 CarswellOnt 7, 7 O.R. (2d) 750, 23 C.C.C. (2d) 160, 29 C.R.N.S. 191 (Ont. C.A.) — considered

R.M. Thompson J.:

1 The defence wishes to advance, either through evidence called directly or by way of cross-examination of witnesses put forth by the Crown, the alternate theory that Lynn Janssen or someone acting for or under her direction murdered Henry Janssen.

2 The defence contends that such evidence would be capable of raising a reasonable doubt in the mind of the jury when they deliberate about the guilt or innocence of Allan Wayne Powney.

3 In *R. v. McMillan* (1975), 23 C.C.C. (2d) 160 (Ont. C.A.) at paragraphs 23 and 24, Mr. Justice Martin stated:

23 I take it to be self-evident that if A is charged with murder of X, then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X: see Wigmore on Evidence, 3rd ed. (1940), vol. 1, p. 573, s. 139. A may prove that B murdered X either by direct or circumstantial evidence.

24 Evidence that a third person had a motive to commit the murder with which the accused is charged, or had made threats against the deceased is commonly admitted on this principle. Evidence directed to prove that the crime was committed by a third person, rather than the accused, must, of course, meet the test of relevancy and must have sufficient probative value to justify its reception. Consequently, the Courts have shown a disinclination to admit such evidence unless the third person is sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value:

4 In *R. v. Grandinetti*, [2005] 1 S.C.R. 27 (S.C.C.) Madame Justice Abella, after noting Martin J.A.'s words in *McMillan*, wrote in paragraph 47 that:

47 The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation.

5 Justice Abella went on to state:

48 The defence must show that there is some basis upon which a reasonable, properly instructed jury could acquit based on the defence: *R v Fontaine*, [2004] 1 S.C.R. 702, 2004 SCC 27, at para. 70. If there is an insufficient connection, the defence of third party involvement will lack the requisite air of reality: *R v Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29.

6 Justice Abella quite simply stated that the trial judge, in *Grandinetti*, correctly formulated the legal test for admitting third party evidence and pointed to the judge's ruling:

The cases establish that an accused may adduce evidence tending to show that a third person committed the offence. The disposition of a third person to commit the offence is probative and admissible provided that there is other evidence tending to connect the third person with the commission of the offence.

7 The issue for me to then determine is whether the defence has probative and admissible evidence to adduce capable of showing that Lynn Janssen, or someone under her direction, is connected to the murder of Henry Janssen. If the defence can satisfy the test it will be permitted to adduce such evidence.

8 In determining the issue, it is not for me to evaluate the quality, weight or reliability of the evidence. I am to simply determine whether there is evidence upon which a properly instructed jury, acting reasonably, could acquit the accused on the basis of their having a reasonable doubt of his guilt.

9 Motive to commit the murder will not, by itself, be sufficient to satisfy the test. There must be some other evidence linking Lynn Janssen to the murder.

10 In addition to asking that it be permitted to introduce evidence that Lynn Janssen personally committed the murder, the defence seeks permission to adduce evidence that Lynn Janssen was aided and abetted by some unknown party in the commission of the offence, or that she directed some unknown party to commit the murder.

11 There is not a scintilla of evidence that supports the proposition that some unknown party was involved in the murder of Henry Janssen. There are no facts from which an inference could be drawn. Such a conclusion could only come about through pure speculation.

12 The defence will not be permitted to advance the theory of an unknown party being involved with Lynn Janssen in the commission of the offence.

13 Having rejected the defence request to advance the theory that an unknown party was involved in the murder of Dr. Janssen, it remains for me to consider whether the defence should be permitted to advance the theory that Lynn Janssen was directly involved in the murder of her husband.

14 What are the facts that support the defence theory?

i. Lynn Janssen would benefit financially from the death of her husband. She would receive more financial assets by reason of his death than she would receive as an equalization payment under the Family Law Act should she and her husband have separated.

ii. Lynn Jansen had an affair with Allan Wayne Powney that lasted several years. That affair ended 3 to 4 months prior to the death of Henry Janssen.

iii. Both Lynn Jansen and her husband, Henry, had, in the year preceding the murder, expressed to each other (and others) their unhappiness within the marriage.

iv. Lynn Janssen and Henry Janssen had, within the year preceding the murder, spoken to each other about separating. There is some evidence that a proposed settlement was that Lynn Janssen receive the home in Jackson Cove and \$750,000. Lynn Janssen had expressed the view that this settlement would not financially permit her to remain living in Jackson Cove.

v. Lynn Janssen and Henry Janssen had, in the months preceding the murder, resolved to change their lives and devote more energy to their marriage, a fact noticed by others including Mr. Powney.

vi. Lynn Janssen was worried that her husband, Henry Janssen, would find out that she had committed adultery. She was aware that Henry Janssen would not forgive her and that his knowledge of her adultery would lead to a separation.

vii. Allan Wayne Powney wanted Henry Janssen to find out that Lynn Janssen was having an affair with him. Mr. Powney was the author of two anonymous letters to Henry Janssen, which letters were designed to cause Henry Janssen to suspect Lynn Janssen of infidelity. One of those letters was found in Henry Janssen's bag located in the car in which he was killed.

viii. Lynn Janssen knew of at least one of the anonymous letters and knew or suspected that Allan Wayne Powney was the author. Henry Janssen had confronted her with his suspicions of adultery which had been raised by the receipt of the first letter.

15 The aforementioned facts go to the issue of a possible motive for Lynn Janssen to murder her husband. However, standing alone, without some other link connecting Lynn Janssen to the murder, these facts would be insufficient to satisfy the test.

16 Is there any other evidence that could be adduced by the defence that would potentially link Lynn Janssen to the murder?

17 Murder weapon:

i. Henry Janssen was killed by a shotgun fired into his head.

ii. A sawed-off shotgun was discovered in Mr. Powney's residence together with the remainder of the barrel. The barrel is said to have distinctive corrosive etchings on it. The sawed-off shotgun and barrel were hidden behind some insulation in the ceiling area of the Powney basement.

iii. Mr. Witmer, the father-in-law of the deceased, had given a 12 gauge shotgun to the deceased several years before the murder. He identified the sawed-off shotgun and cut off barrel (corroborated by another witness) as being two parts of the shotgun he had given to Dr. Henry Janssen.

iv. The shotgun went missing from the Janssen residence several days before the murder.

v. In a statement on February 13, 2009, Mr. Powney identified the sawed-off shotgun as his. He said that he had purchased the shotgun, while it had a long barrel, five years before for \$75 from an individual named Bev Grieg. Mr. Powney stated that he had cut down the length of the barrel so he could carry the gun in his car while partridge shooting. He said he had told no one, except Dr. Janssen, about the sawed-off shotgun. He further stated that he had hidden the gun in the rafters in the basement.

vi. The sawed-off shotgun found by the police in the basement ceiling had a part broken off it. Found at the murder scene was a part to a shotgun which fits exactly to the part missing from the shotgun found in the basement ceiling.

18 The evidence presented to me could lead to the conclusion that the gun found in the Powney's basement ceiling was the weapon involved in Dr. Henry Janssen's murder.

19 There is no evidence presented to me tying Lynn Janssen to the murder weapon.

20 Opportunity:

i. Dr. Henry Janssen routinely had supper at home. He would leave work and drive the same route home. He would consistently arrive home for supper between 6:00 and 6:30 p.m.

ii. On the night of the murder, Dr. Janssen left work as usual. He never arrived home.

iii. At home were Lynn Janssen and her parents, Mr. And Mrs. Witmer.

iv. At approximately 6:30 p.m., Lynn Janssen apparently took a nap. Her father was in another room watching television and had fallen asleep. Her mother was in yet another room packing, as she and her husband were going home the next morning.

v. At 8:00 p.m., the hospital telephoned looking for Dr. Janssen as he was "on call." The telephone ringing is said to have awakened Lynn Janssen from her sleep.

vi. No one can testify that Lynn Janssen was continuously in a room in the Janssen home between 6:30 and 8:00 p.m.

vii. Lynn Janssen and her father went outdoors, travelled up the unplowed road to Scenic Caves Road and commenced looking for Dr. Janssen. His truck and his body were found near the intersection of Scenic Caves Road and County Road 9, which is on the route Dr. Janssen would have taken to go home.

viii. In order for Lynn Janssen to have committed the murder of Henry Janssen, she would have had to pretend to go to sleep, slip out of the house without either of her parents noticing, travel a considerable distance up an unplowed roadway by foot or snowmobile, drive down Scenic Caves Road towards its intersection with County Road 9, commit the murder and return to the room she had been sleeping in, undetected.

21 As I have previously indicated, it is not for me to evaluate the quality of the evidence to be adduced. That is the function of the jury. While it might strike me as highly unlikely that Lynn Janssen could have operated within this possible small window of opportunity, it could be, and will be, argued that the accused, Mr. Powney, only had a similar small window of opportunity.

22 There is some evidence of a small window of opportunity, which together with the evidence of a possible motive, is sufficient to permit the defence to adduce evidence in support of its theory that Lynn Janssen is a suspect in her husband's murder. I stress, however, that the defence is limited to the theory that she personally committed the murder and cannot advance the theory that an unknown individual assisted her or committed the murder at her direction.

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