

Case Name:

**R. v. Thibeault**

Between

**Her Majesty the Queen, Respondent, and  
Zacharias Thibeault, Appellant**

**[2018] O.J. No. 5686**

**2018 ONCA 876**

Docket: C62907

Ontario Court of Appeal

**J.M. Simmons, R.G. Juriansz and M.L. Benotto JJ.A.**

Heard: October 22, 2018.

Judgment: November 1, 2018.

(15 paras.)

*Criminal law -- Criminal Code offences -- Offences against person and reputation -- Homicide -- Second degree murder -- Appeal by accused from conviction for second degree murder dismissed -- Victim was known drug dealer found dead in apartment -- Causes of death included multiple stab wounds and blunt force trauma to head -- Crown relied on circumstantial evidence accused knew victim and had threatened him prior to killing and robbing him -- Although trial judge erred in finding certain evidence regarding alternate suspect was inadmissible hearsay, error was of no consequence -- Defence failed to adduce evidence to support alternate suspect theory -- No error arose from failing to leave manslaughter with verdict given nature of victim's injuries.*

*Criminal law -- Procedure -- Trial judge's duties -- Charge or directions -- Defences -- Evidence of witnesses -- Inferences of guilt -- Appeal by accused from conviction for second degree murder dismissed -- Victim was known drug dealer found dead in apartment -- Causes of death included multiple stab wounds and blunt force trauma to head -- Crown relied on circumstantial evidence accused knew victim and had threatened him prior to killing and robbing him -- Although trial judge erred in finding certain evidence regarding alternate suspect was inadmissible hearsay, error was of no consequence -- Defence failed to adduce evidence to support alternate suspect theory -- No error arose from failing to leave manslaughter with verdict given nature of victim's injuries.*

Appeal by the accused, Thibeault, from a conviction for second degree murder. The victim was a known drug dealer. He was found dead in his apartment approximately 27 hours after being last seen alive at a nearby Tim Hortons restaurant. The victim died from a loss of blood caused by multiple stab wounds and blunt force trauma to his head. The Crown relied on significant circumstantial evidence that the accused and victim were known to one another. The Crown alleged that the accused was in financial need, threatened the victim for ripping him off in a drug deal, and was subsequently found in possession of the victim's stolen belongings, including a substantial amount of cash. The defence relied upon the theory of an alternate suspect. The accused was convicted by a judge sitting with a jury. The accused appealed.

HELD: Appeal dismissed. The trial judge erred in refusing to admit evidence of inconsistent explanations for a cut on the hand of the alternate suspect on the basis it constituted inadmissible hearsay. The error was ultimately of no consequence, as the defence failed to adduce evidence connecting the accused and alternate suspect, and failed to adduce evidence regarding the whereabouts at the approximate time of the murder to connect the alternate suspect to the killing. There was no evidence of motive, animus or propensity on the part of the alternate suspect. Anticipated evidence that the alternate suspect was aware of information held back by the police did not materialize. The evidence relied upon by the defence failed to establish any realistic opportunity for the alternate suspect to have committed the murder. The admission of threatening text messages sent to the victim by the accused did not require a caution against propensity reasoning. Given the nature of the injuries sustained by the victim, the trial judge was not required to leave the lesser included offence of manslaughter with the jury.

**Appeal From:**

On appeal from the conviction entered by Justice Harrison S. Arrell of the Superior Court of Justice, sitting with a jury, on October 28, 2015.

**Counsel:**

Dirk Derstine and David Parry, for the appellant.

Randy Schwartz, for the respondent.

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**REASONS FOR DECISION**

The following judgment was delivered by

**1 THE COURT:**-- The appellant appeals his conviction for the second degree murder of Kadar Omar.

**2** The deceased, a known drug dealer, was found dead in his Hamilton apartment at around 7 p.m. on March 30, 2013. He was last seen alive at a Tim Hortons near his home at around 4 p.m. on March 29, 2013. He had suffered blunt force trauma to the head and multiple stab wounds to his face and neck, some of which were superficial. The immediate cause of death was blood loss due to multiple stab wounds; the blunt force injuries also contributed to the death.

**3** In addition to contentious evidence of a confession from a witness subject to both *Vetrovec* and *Titus* cautions, the Crown relied on significant circumstantial evidence to support its case, including:

- \* evidence that the appellant and the deceased were connected - they had been friends for several years and the deceased was the appellant's drug dealer;
- \* evidence that although the deceased had recently moved, the appellant knew where he lived and had been to his home;
- \* evidence that the appellant was in need of money immediately before the killing and evidence that the deceased was carrying a substantial quantity of cash prior to his death;
- \* evidence that the appellant had sent threatening text messages to the deceased about two weeks before the killing, complaining that the deceased had ripped him off in a drug deal;
- \* evidence that the appellant had turned off his cell phone between approximately 11 a.m. and 11 p.m. on March 29, 2013;
- \* evidence that the appellant was in possession of the deceased's stolen belongings, including clothing, a PlayStation and a significant quantity of cash around 8 to 9 p.m. on March 29, 2013.

**4** The appellant raises three main issues on appeal.

**5** First, the appellant argues that, having made a pre-trial ruling permitting the appellant to lead alternate suspect evidence, the trial judge erred in excluding as hearsay what the appellant submits was key evidence relating to his alternate suspect theory. Further, the appellant submits that the trial judge erred in then holding there was no air of reality to the alternate suspect theory and

withdrawing it from the jury's consideration.

**6** The Crown concedes and we agree that the trial judge erred in ruling inadmissible the evidence of certain witnesses concerning inconsistent explanations by the alternate suspect for a cut on his hand. The purpose of the evidence was not to establish the truth of the explanations, but rather to show that the alternate suspect had provided inconsistent explanations. That purpose did not contravene the hearsay rule against leading evidence of out-of-court statements to prove the truth of their content.

**7** Nonetheless, we reject this submission. The pre-trial alternate suspect ruling assumed that the appellant would marshal evidence at trial showing, among other things, that the deceased and the alternate suspect were acquainted with each other, and some realistic basis derived from police information or cell phone evidence concerning the alternate suspect or his whereabouts at the approximate time of the deceased's death to connect the alternate suspect to the killing. This evidence did not materialize at trial.

**8** In particular, there was no evidence at trial that the deceased and the alternate suspect knew each other, had ever met or had even crossed paths. Cell phone records positively established they had not been in communication in the months leading up to the victim's death. There was no evidence of motive, *animus* or propensity on the part of the alternate suspect. Anticipated evidence that the alternate suspect was aware of information held back by the police did not materialize.

**9** Further, the evidence relied upon by the defence failed to establish any realistic connection between the alternate suspect and the deceased or the murder. Evidence that the alternate suspect had recently acquired a watch that looked something like the deceased's missing watch contained no trace of the deceased's DNA and was not identified by the deceased's long-time girlfriend as being the deceased's watch. Evidence from a friend that the alternate suspect was acting paranoid following the murder was limited to one occasion about a week after the murder and happened after the alternate suspect had been using cocaine.

**10** The evidence also failed to establish a realistic opportunity for the alternate suspect to have committed the murder. Cell phone evidence placed the alternate suspect in the vicinity of the deceased only as of 12:30 a.m. on March 30, 2013, which was hours after the appellant was seen wearing the deceased's clothing and with his belongings. Moreover, the cell phone evidence indicated the alternate suspect was busy texting much of the time.

**11** Second, the appellant argues that the trial judge erred in permitting the Crown to adduce evidence of the threatening text messages from the appellant to the deceased and further erred in failing to caution the jury against improper use of the text messages. We reject this submission.

**12** The trial judge's ruling that the probative value of this evidence exceeded its potential for prejudice is subject to deference on appeal: *R. v. Shafia*, 2016 ONCA 812, 341 C.C.C. (3d) 364, at para 255, leave to appeal to S.C.C. refused, [2017] S.C.C.A. No. 17. Given that the messages

supported inferences of animus and motive we see no basis on which to interfere with the trial judge's conclusion that the probative value of this evidence exceeded its potential for prejudice. No request to edit the messages was made to the trial judge. Where evidence of threats against a victim are admissible on the issue of motive, it is not necessary that the trial judge caution the jury against propensity reasoning: *R. v. Merz* (1999), 46 O.R. (3d) 161 (C.A.) at paras. 57 - 59, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 240.

**13** Third, the appellant argues that the trial judge erred in failing to leave the lesser included offence of manslaughter with the jury. We do not accept this submission.

**14** The deceased suffered six stab wounds to the neck; multiple incised wounds to the neck and face; a penetrating stab wound to the neck that severed the jugular vein and carotid artery; multiple sharp force injuries to the arms and legs; and multiple blunt force injuries to the head and neck. Furthermore, all ten of the deceased's fingers were amputated. Even without the penetrating neck wound, the multiple sharp force injuries and blunt force injuries would have contributed to death. Having regard to these injuries, there was no air of reality to the theory that the perpetrator did not have one of the necessary intents for second degree murder. Further, the defence theory that the appellant merely robbed the deceased who was killed by a co-perpetrator was speculative. The trial judge did not err in concluding that manslaughter was not an available verdict.

**15** We reject the grounds of appeal raised by the appellant. The appeal is dismissed.

J.M. SIMMONS J.A.

R.G. JURIANSZ J.A.

M.L. BENOTTO J.A.

---- End of Request ----

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