COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

2-16-CA

DENNIS JAMES OLAND

APPELLANT

- and -

HER MAJESTY THE QUEEN

RESPONDENT

Oland v. R., 2016 NBCA 58

CORAM:
The Honourable Chief Justice Drapeau
The Honourable Justice Larlee
The Honourable Justice Quigg

Appeal from conviction in the Court of Queen's Bench:
December 19, 2015

History of Case:

Decision under appeal:
Unreported

Preliminary or incidental proceedings:

Supreme Court of Canada:
[2016] S.C.C.A. No. 188

Court of Appeal:
[2016] N.B.J. No. 25
2016 NBCA 15

Court of Queen's Bench:
[2013] N.B.J. No. 457
2015 NBQB 242
2015 NBQB 243
2015 NBQB 244
2015 NBQB 245
2015 NBQB 246
2015 NBQB 247
2015 NBQB 248
2015 NBQB 257

DENNIS JAMES OLAND

APPELANT

- et -

SA MAJESTÉ LA REINE

INTIMÉE

Oland c. R., 2016 NBCA 58

CORAM :
l'honorable juge en chef Drapeau
l'honorable juge Larlee
l'honorable juge Quigg

Appel d'une déclaration de culpabilité prononcée par la Cour du Banc de la Reine :
le 19 décembre 2015

Historique de la cause :

Décision frappée d'appel :
inédite

Procédures préliminaires ou accessoires :

Cour suprême du Canada :
[2016] C.S.C.R. n^{o} 188

Cour d'appel :
[2016] A.N.-B. n^{o} 25
2016 NBCA 15

Cour du Banc de la Reine :
[2013] A.N.-B. n^{o} 457
2015 NBBR 242
2015 NBBR 243
2015 NBBR 244
2015 NBBR 245
2015 NBBR 246
2015 NBBR 247
2015 NBBR 248
2015 NBBR 257

2016 NBQB 43

Provincial Court:
[2014] N.B.J. No. 360

Appeal heard:
October 18, 19 and 20, 2016

Judgment rendered:
October 24, 2016

Counsel at hearing:

For the appellant:
Gary A. Miller, Q.C., Alan D. Gold
and James R. McConnell

For the respondent:
Kathryn A. Gregory
and Derek Weaver

THE COURT

The appellant has failed to make the case for a finding of verdict unreasonableness pursuant to s. 686(1)(a)(i) of the *Criminal Code* and there is, therefore, no basis for his acquittal by this Court. However, the conviction must be quashed and a new trial ordered on the grounds of misdirection in the judge's instructions with respect to post-offence conduct evidence, specifically the appellant's false statement to the police regarding the jacket he was wearing at the material times.

2016 NBBR 43

Cour provinciale :
[2014] A.N.-B. n^{o} 360

Appel entendu :
les 18, 19 et 20 octobre 2016

Jugement rendu :
le 24 octobre 2016

Avocats à l'audience :

Pour l'appelant :
Gary A. Miller, c.r., Allan D. Gold
et James R. McConnell

Pour l'intimée :
Kathryn A. Gregory
et Derek Weaver

LA COUR

L'appelant n'a pas réussi à prouver que le verdict était déraisonnable pour l'application du sous-al. 686(1)a)(i) du *Code criminel* et, par conséquent, il n'y a aucun fondement justifiant son acquittement par notre Cour. Toutefois, notre Cour doit annuler la déclaration de culpabilité et ordonner la tenue d'un nouveau procès en raison de directives erronées données au jury par le juge du procès en ce qui concerne la preuve relative au comportement postérieur à l'infraction, plus précisément la fausse déclaration de l'appelant à la police au sujet du veston qu'il portait au moment des faits reprochés.

The following is the judgment delivered by

THE COURT
(Orally)

[1] The appellant contests his conviction for the second degree murder of his father, a disposition made following a lengthy trial at which the appellant testified and the jury returned a verdict of guilty as charged. The victim, who was 69 years of age, was bludgeoned to death in his uptown Saint John office in the early evening of July 6, 2011.

[2] The only issue at trial was the identity of the killer. The jurors unanimously concluded it was the appellant. They did so after benefiting from a comprehensive review of the evidence by the judge and error-free instructions on the presumption of innocence, the requirement of proof beyond a reasonable doubt, their role as the judges of the facts and the difference between impermissible speculation and permissible inference. As well, their verdict followed: (1) addresses by counsel for both sides that left no stone unturned in setting out their respective take on the evidence or lack thereof, and their conflicting theories of the case; and (2) deliberations lasting some 30 hours.

[3] The appellant contends the jury's verdict is "unreasonable" within the meaning of s. 686(1)(a)(i) of the *Criminal Code* and argues this Court should set it aside on that basis, and acquit him of the charge. We respectfully disagree. Our reasons, in abridged form, are as follows.

[4] Admittedly, the jury's verdict is based on circumstantial evidence. There is, to use the vernacular, no "smoking gun". As with most, if not all, convictions without direct proof of guilt, there are gaps in the evidential puzzle. Those gaps were forcefully emphasized by defence counsel in their address to the jury and highlighted by the judge in his charge. The jury was keenly aware of those gaps when it engaged in its review of the evidence and deliberated with respect to whether the appellant's guilt was established beyond any reasonable doubt. This process was not rushed; as mentioned, the jury was

out for 30 hours. In our respectful view, once it assembled the pieces of the evidential puzzle provided by the admissions, the evidence, and the inferences that it could properly draw from that evidence, the jury could reasonably conclude a sufficiently revealing portion of the portrait of one killer emerged: that of the appellant. This conclusion is not at odds with our judicial experience.

[5] The appellant's fallback submission is that a new trial should be ordered on the basis of erroneous evidential rulings, specifically in respect of the "call detail records", the evidence derived from forensic testing of the freshly dry-cleaned brown Hugo Boss jacket seized from his residence and "communications" with his wife. In our view, the trial judge's rulings were correct, and there is, therefore, no merit to the grounds of appeal on point.

[6] Finally, the appellant contends a new trial is necessary because of critical misdirection in the charge to the jury, notably in connection with a post-offence statement the appellant made to the police in respect of the jacket he was wearing while at his father's office in the early evening of July 6, 2011. The accused told the police he was wearing a navy blazer, but video evidence showed conclusively and the appellant admitted at trial he was wearing the brown Hugo Boss jacket. Forensic testing subsequently confirmed the presence of the victim's blood and DNA on that jacket. It was the Crown's contention at trial that this admittedly erroneous statement was a lie designed to divert suspicion away from the appellant, and as such was circumstantial evidence the jury could take into account in finding the appellant was the killer, beyond any reasonable doubt.

[7] The trial judge told the jurors the issue was whether the appellant's inaccurate description of the jacket was an honest mistake or an "intentional lie" that was related to the commission of the offence charged. If it was the latter, the jurors were told they were entitled to consider the lie, together with all the other evidence in the case, in reaching a verdict of guilty. The trial judge made those observations after advising the

jurors that an "intentionally false statement […] will, in some circumstances, be evidence from which it can be inferred that the [author] is attempting to mislead the police and deflect suspicion away […] because [he or she] actually committed the offence". Significantly, the trial judge did not instruct the jurors that, even if they found the appellant's erroneous statement was a lie, it had no probative value unless they concluded, on the basis of other evidence independent of that finding, that the lie was fabricated or concocted to conceal his involvement in the murder of his father.

[8] Conduct by the accused in the aftermath of an offence may assist in establishing guilt. However, because the significance of certain types of post-offence conduct, such as the articulation of false alibis or lies, can be easily exaggerated and their occurrence misapplied, particularly by non-jurists, the law has developed rules that seek to safeguard against the risk of any prejudicial impact on trial fairness. Those rules may be summarized as follows: (1) a false alibi or a lie, without more, is not evidence that can assist the prosecution in establishing guilt; (2) a false alibi or a lie may constitute incriminating evidence if and only if, in addition to being an intentional falsehood, it was fabricated or concocted by the accused for the purpose of concealing his or her involvement or participation in the offence charged. A fabricated or concocted lie is one that is made up after giving it some thought; as such, it is distinguishable from a spontaneous unreflected or unconsidered lie; (3) in this context, a finding of fabrication or concoction cannot be made simply because the accused lied; there must be other evidence, independent of that finding upon which the trier of fact can find fabrication or concoction; and (4) instructions reflecting the foregoing are essential and they must be accompanied by a reference to the independent evidence from which the jury might reasonably infer fabrication or concoction.

[9] Regrettably, the trial judge did not apply this framework and, in the result, his instructions on a key piece of the evidential puzzle are fundamentally flawed. The jurors might well have found the appellant lied about the jacket he was wearing and, in

the closing moments of their deliberations, distilled from that bare finding the clinching element for their verdict.

[10] In our view, the respondent has not made the case for the application of s. 686(1)(b)(iii), the curative proviso, and we are therefore compelled to quash the conviction and order a new trial.

[11] We would expect that any new trial would be considerably shorter than the first one, given the work done as well as the experience and knowledge acquired by the police, counsel and the judiciary, and bearing in mind this Court's unqualified endorsement of the trial judge's evidential rulings that were contested on appeal.

[12] More detailed reasons will be filed in both official languages at the first reasonable opportunity.