

File No. 34517

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF MANITOBA)

BETWEEN:

ROBERT JOSEPH KOCIUK

APPELLANT
(Appellant)

- and -

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT

Mr. Leonard J.W. Tailleux
Legal Aid Manitoba
514 St. Mary Avenue
Winnipeg, Manitoba
R3C 0N6

Tel.: 204 985-9723
Fax: 204 774-7504
letai@legalaid.mb.ca

Counsel for the Appellant

Mr. Brian A. Crane
Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3

Tel.: 613 233-1781
Fax: 613 563-9869
brian.crane@gowlings.com

Agent for the Appellant

Ms. Elizabeth Thomson
Attorney General of Canada
Suite 510
405 Broadway Street
Winnipeg, Manitoba
R3C 3L6

Tel.: 204 945-7221
Fax: 204 948-1315

Counsel for the Respondent

Mr. Brian A. Crane
Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3

Tel.: 613 233-1781
Fax: 613 563-9869
brian.crane@gowlings.com

Agent for the Respondent

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OVERVIEW

1. This is a "cold case" file of a homicide which occurred on or about May 15, 1984.
2. The Appellant was arrested in 2005 and provided statements regarding the charges.
3. The trial started by way of pre-trial motions in April, 2009 and before the Jury in February and March 2010.
4. The Appellant was convicted of first degree murder on March 5, 2010 and sentenced to life imprisonment without eligibility for parole for 25 years.
5. The Appellant appealed to the Manitoba Court of Appeal on a number of grounds of appeal including, inter alia:
 - (1) Errors the Trial Judge made with respect to the various *Carosella* (*R. v. Carosella*, [1997] 1 S.C.R. 80) applications regarding lost or dissipated evidence.
 - (2) The Crown abrogating rulings regarding what could be addressed to the Jury which could not be cured by the Trial Judge's subsequent cautions.
 - (3) Various other rulings and instructions related to the evidence including supplementary argument related to the Jury instruction as set forth by Beard, J.A.

PART I **STATEMENT OF FACTS**

6. The deceased was a Beverly Dyke. She was found partly dressed and stabbed several times on the evening of May 17, 1984 in the bush in the area of Moray Street and Saskatchewan Avenue, in the City of Winnipeg.

i) At the time the Appellant was on parole at a halfway house at 205 Arlington Avenue. The police had him under surveillance for a series of bank robberies in Winnipeg.

ii) The Appellant was in fact arrested in the afternoon for a robbery on May 17, 1984 of the C.I.B.C. on Nairn having been followed from the halfway house to the C.I.B.C. wherein he robbed it. He was arrested immediately after.

iii) Ed Saluk, on May 26, 1984, found a knife in the area of Moray Street and Saskatchewan. He took it home, heard the news of the homicide and contacted the Winnipeg Police to turn the knife over to them. While under surveillance the police observed the Appellant on May 16, 1984 around noon to one p.m. in the area of Moray. He had parked a Chevy Nova (it was a Robert Ives' vehicle) on Moray Street a couple of hundred yards south of Saskatchewan Avenue and was observed searching for something.

iv) Greg Kalen was a neighbour of Ms. Dyke. On May the 16th from 1:00 p.m. to 2:00 p.m. he saw Ms. Dyke walking back and forth from her doorstep to the curb. She just

sat on the curb.

v) The Appellant was spoken to by police detectives, Shipman and Morin, on May 26, 1984 at Stony Mountain Institution regarding the homicide because of the surveillance (as well searched his room which he was in at a halfway house). He initially indicated he was collecting salvage and when informed of the homicide stated that he did holdups and not murders and that the reason he drove there was someone was to meet him there to give a gun for a robbery. When he suspected he was under surveillance he feigned salvaging for something and simply left. He also provided samples to the police.

vi) Because of that information, the fact he was arrested the day after for robbery and Greg Kalen's statement, he was not charged.

vii) Nothing much happened with the investigation until 1988 when detectives Shipman and Morin received information that a Leonard White had made various statements confessing to the homicide of Ms. Dyke. They attended Saskatchewan Penitentiary in Prince Albert on November of that year.

viii) Leonard White was charged and cautioned for the homicide. He confessed to the homicide stating that he and an individual he called Ricky Morris picked Ms. Dyke up in front of the Maryland Hotel. She was taken to the area Mr. White stated was around the area of Whytewold. There he stated Ricky Morris had raped her, came back to the car and White instead of raping her went out to the bush and stabbed her several times.

ix) He gave various details of the homicide: Appellant's Record ("A.R.") IV, pp. 57-65. The motive for the homicide according to White was his extreme anger towards women originating from a sexual assault perpetrated on him as a youth by a woman. It was agreed he was residing in Winnipeg at the time.

x) Leonard White was in the penitentiary for violence and in fact had committed a knife attack on a random female sticking a knife down her throat: A.R. II, pp 163-166. There was an agreed statement of facts filed concerning Mr. White's predisposition for violence: A.R. IV, pp. 66-71. He gave samples to the police as well.

xi) Detective Morin stated that in the end he wasn't charged because of information received (although he had no notes of same) indicating White had made various claims about killing (although none investigated) and his partner in the penitentiary at the time, Ken Kirton, stated he would sometimes brag about killing in the past when he was challenged or threatened. In addition both Morin and Shipman felt the information about the homicide he received from the press, radio, etc. (although there was no evidence that he was in possession of articles related to the homicide): A.R. II, p. 87 to III, p. 88. White died in 1999.

xii) At some point during the investigation of this matter the purported knife used in the homicide was lost by the police (Detective Morin had custody of it and has no recollection what might have happened to it). In addition all the surveillance notes of the officers were lost (it was agreed by the witness George Shultz that it was possible that other officers were conducting evening or nighttime surveillance) and no records were

left of the Arlington Street halfway house: A.R. IV, pp. 221-228.

xiii) In about 2005 a match was made with the Appellant's DNA from a sample obtained in Ms. Dyke's genitalia (Dr. Markesteyn assumed this was sperm which was not moving – ceases to move in usually 4 to 5 hours): A.R. II, pp. 61ff.

xiv) The Appellant was interviewed and statements obtained from him: A.R. IV, pp 86-220. He was charged with first degree murder.

PART II POINTS IN ISSUE

1. That the learned trial judge erred by failing to properly and fairly relate the evidence to the elements of the offence.

2. That the learned trial judge's duty in jury instructions is not relieved in putting to the jury all alternative bases of defence simply because trial counsel does not stress those alternatives.

PART III **ARGUMENT**

1. That the learned trial judge erred by failing to properly and fairly relate the evidence to the elements of the offence.

2. That the learned trial judge's duty in jury instructions is not relieved in putting to the jury all alternative bases of defence simply because trial counsel does not stress those alternatives.

A. Beard J.A.'s Analysis

7. These issues with respect to the adequacy of the Jury instruction were raised by Beard J.A. requiring supplementary argument. Those issues were set forth by Chartier J.A.: A.R. 1, pp. 28-29.

“At the appeal hearing, my colleague Beard J.A. Raised an issue which had not been raised by counsel at trial or new counsel on appeal. The parties requested additional time to respond. That issue was subsequently put to paper and sent to the parties. It reads as follows:

...[W]hether the way in which the evidence was related to the elements of the offences of murder and sexual assault in the jury charge may not have fairly left the theory of the defence with the jury.

In other words, in explaining the elements of murder and sexual assault, was the evidence of the two events throughout the charge (i.e. often referring to the jurors considering “the circumstances of the murder/crime scene”) without explaining that the evidence of one event may not be relevant to the other event? For some examples of the evidence referred to in the jury charge, see the following pages of the transcript of the charge: pp.62, ll. 4-7; 66, ll. 12-14; 69, ll. 1-13; 70, ll. 11-27; 72, ll. 23-33; and 73, ll. 26-28.

The position of the defence, as set out in the jury charge, was as follows: That Leonard White killed the deceased; that the accused had sex with the deceased, but it is not known when or in what manner that occurred; that Dr. Markesteyn stated that sperm can remain in the vagina for up to five (5) days before they begin to deteriorate; and that the crown did not prove that the sex was non-consensual.”

For example, should the jury have been told that the DNA evidence may not be of assistance in determining the identity of the murderer if the jury concluded that the sexual assault occurred on another occasion than the murder?

Also, should the jury have been told that the evidence of the stabbing and related wounds may not be relevant to the sex, or the use of the weapon in relation to the sex, if the sex and the stabbing occurred on two different occasions or were two consecutive but discrete events, those being that the perpetrator had consensual sex followed by the stabbing?”

8. It is clear that the defense theory advanced by trial counsel could be summarized as follows:

9. (1) Leonard White's confession of the homicide formed the basis of the implicit exculpatory case for the Appellant. If believed, or if that confession raised a reasonable doubt, the other person referred to by White being at the scene (presumptively the Appellant) would not be guilty of the homicide either directly or by way of being a party to the offence and the sexual intercourse would have been consensual or not at the scene by virtue of the admission of the Appellant that the DNA in her was his.

(2) Because of the testimony of Dr. Markesteyn – that non-motile sperm can exist in a vagina for up to four to five days (see: A.R. I, p. 23) – and accepting that it

was not necessary for there to be "spillage" of the sperm on the panties while being upright for a period of time, the Appellant had sexual intercourse with Beverly Dyke and it was not proven beyond a reasonable doubt it was non-consensual.

10. This theory is summarized by Beard J.A.: A.R. I, p.50:

Each party provided the trial judge with a summary of their theory, which was included in the charge. The theory of the defence is as follows:

It is the position of the defence that [the accused] did not kill [the victim]. It is the position of the defence that Leonard White killed [the victim] and his confession reveals details of the murder that were not contained in the media reports.

It is the position of the defence that [the victim] was still alive when [the accused] was seen on May 16, 1984.

It is agreed by the defence that [the accused's] DNA was present in [the victim's] vagina.

It is the position of the defence that [the accused] had intercourse with the [victim]. It is not known, however, when or in what manner this intercourse occurred. Based upon Dr. Markesteyn's evidence that non-motile sperm can remain within the vagina for five days, it is the position of the defence that the Crown has not proven that [the victim] had non-consensual sex beyond a reasonable doubt.

11. Before dealing with how these theories related to the points noted by Beard J.A., an examination of the charge to the jury is necessary as it relates to the fairness of the charge as a whole.

12. It is clear that the Trial Judge dealt with both the theory of the defense and the Crown in general. However, how the theory of the defense was related to the

elements of the offence by the Trial Judge has become an issue in this appeal. Particularly, when the elements of murder and sexual assault are dealt with they are not related to the defence theory. Indeed, it appears, the converse occurs where the Crown's theory is reemphasized. This becomes evident starting at roughly A.R. IV, p. 9 and following for several pages.

13. A more obvious example can be seen when the Trial Judge deals with the elements of sexual assault with a weapon and murder and whether "they were part of the same series of events": A.R. IV, p. 19, (lines 4-5). In that context, the Trial Judge states that "you might want to consider some of the following evidence": A.R. IV, p. 20, (lines 1-23):

Examine photograph 13, a photograph of the murdered victim at the crime scene. In that photograph you see the victim who appears naked from the waist down. Her bra appears pushed up. The position of the body and its state of undress may suggest that the alleged sexual assault with a weapon took place at the same location and during the same time as the murder.

You may also wish to consider that if the sexual intercourse occurred before the murder at the scene where the body was discovered, why was there not more leakage of sperm on the panties as suggested in a commonsensical way by Dr. Markesteyn.

Consider as well the evidence of Dr. Markesteyn when commenting upon the state of Beverly Dyke's body. He noted that there was evidence of recent sexual intercourse prior to the murder. Suggestive of the fact that the sexual assault may have occurred at the scene, it is a fact that Dr. Markesteyn did not have to go too far into Beverly Dyke's vagina to get the white substance that he identified. You may find that this, too, is reflective of recent sexual intercourse, such so as to connect the sexual assault with a weapon with the time period during which the murder was taking place.

14. None of the defence theory or evidence is used to address this issue – only the Crown's version of the evidence. Moreover, the issue of “sexual assault with a weapon” is inextricably linked without reference to the frailties of the evidence on the weapon, the fact the Crown did not prove the sex was non-consensual, the fact the possibility that consensual sex could have occurred before the murder (at least 4-5 days non-motile sperm), the issue with respect to Mr. White's confession, etc.

15. Merely stating as the Trial Judge states in A.R. IV, p. 20 (lines 24-28), that if the Jury has reasonable doubt about these matters then 'x' is not the kind of instruction which relates the favourable defence evidence and theory of that evidence to the actual charge.

16. Another example is seen at A.R. IV, p. 11 (line 9ff): “To convict someone of first degree murder, Crown counsel must prove that the person is an active participant in the killing. To decide this issue, you must consider all the evidence and use your good common sense.” However, instead of referring directly to the the confession of Leonard White and all the evidence related to that, the Trial Judge only refers to the evidence of Dr. Markesteyn, “given the evidence of Dr. Markesteyn about the cause of death and the numerous stab wounds found on Beverly Dyke's body, if you conclude beyond a reasonable doubt it was Robert Kociuk who stabbed Beverly Dyke, then you should have no difficulty concluding that what Mr. Kociuk did was an essential, substantial and integral part of the killing of Beverly Dyke”: A.R. IV, p. 11 (lines 13-19).

17. When dealing with the issue “Did Robert Kociuk commit a sexual assault

with weapon”, the Trial Judge goes on to examine the elements which the Crown had to prove: A.R. IV, p. 11, (line 29ff). Again, the Trial Judge only makes reference to the testimony of the Crown witness Dr. Markesteyn and no defence theory or evidence: A.R. IV, p. 13 (lines 1-13).

18. As an additional point, it is difficult to see why the Trial Judge conjoined the two different offences of sexual assault and sexual assault with a weapon. That is, he did not deal with these as separate offences which can either of which make out first degree murder in the context set out in s. 231 (5)(b) or (c). This seems to have made it inevitable that if the jury found that the person sexually assaulted the victim inevitably they would have had to possess a weapon (contrary to a theory which saw the second person in Leonard White's confession as being Mr. Kociuk committing a sexual assault but having no part in the murder).

19. Again, the Trial Judge's review of the elements involving the sexual assault with a weapon is solely referenced to Dr. Markesteyn's testimony with respect to the state of the victim's body, although, again in reference to only Dr. Markesteyn, he notes that “although there was redness on the vaginal area suggestive of recent sexual intercourse, such redness could be consistent with rough consensual sex”: A.R. IV, p. 14 (lines 11-32), also; p. 17, (line 32 to line 12 p. 18). This and other instructions in the context of the application of the law to the defence theory is virtually absent.

20. As Beard J.A. summarizes there were three identifiable “deficiencies” in the charge: A.R. I, pp. 49-50:

There are three deficiencies in the charge, those being:

- the trial judge failed to adequately relate the evidence of sexual intercourse to the element of identity in relation to the murder;
- the trial judge failed to adequately instruct the jury on the issues raised by the evidence as it relates to the elements of the allegation of sexual assault with a weapon; and
- the trial judge failed to adequately explain how the evidence relates to the elements of sexual assault.

21. Beard J.A. goes on to state:

The accused did not testify at the trial. In earlier statements to the police, which were admitted at trial, he denied knowing the victim or ever having had sexual intercourse with her. By the time of the trial, he changed his position and he admitted, through his counsel, that his DNA was in the victim's vagina and that he had had sexual intercourse with her at some point in time, but he maintained his position that it was Leonard White who killed her. Defence counsel pointed out in argument that the fact that his DNA was found in the victim's vagina doesn't mean that he sexually assaulted her and killed her.

22. Then the kernel of Beard J.A.'s objection to the charge is stated as follows:

While the trial judge advised the jury of the defence theory that the Crown had not proven beyond a reasonable doubt either when the sexual intercourse took place or that it was non-consensual, he did not adequately incorporate this into his explanation of the elements when explaining how to apply the evidence to the law. In the result, the alternatives arising from the position of the defence regarding the "when" of the sexual intercourse and the Crown's obligation to prove non-consent were not fairly put to the jury, especially in relation to the second factual scenario set out above, which was not put to the jury at all.

23. It is at this seminal point where s. 231 (5) (b) and (c) are conflated by the Trial Judge essentially removing the alternative explanations with respect to the issue of

sexual assault and sexual assault with a weapon as the instruction merely is reduced to (c).

24. Beard J.A. articulates this conflation by her assessment of how the Trial Judge dealt with the issue of the DNA and identity and then following the inevitable logic: A.R. I. p. 55 (paras. 20 & 30):

What he did not do was to explain that, if the jury found that the sexual intercourse occurred on a prior occasion, then the fact that the accused's DNA was found in the victim's vagina would be of little or no assistance in determining the murderer's identity. His review of the evidence linked the evidence of the sexual intercourse to the stabbing [writer's emphasis] without any warning to the jury that this linkage was not the only way to view this evidence. Given the other evidence regarding the identity of the murderer, this oversight on its own, might not be fatal to the charge. What it does, however, is it begins the linkage between the evidence of sexual intercourse and the stabbing that the trial judge repeats throughout the rest of the charge without ever explaining any alternative view of the evidence in which there would be no linkage.

25. It is clear that whoever stabbed the victim, caused the victim's death. There was no dispute about that. Leonard White in fact confessed to the homicide. The Crown's theory was that the Appellant stabbed the victim. That being the case, the Trial Judge in his jury instruction stated, "Did Mr. Kociuk, in stabbing Beverly Dyke, do something that was an "essential, substantial and integral part" of the killing of Beverly Dyke?": A.R. IV, p. 10 (lines 32-34). Beard J.A was correct in noting that "This element was never at issue and should not have been left to the jury": A.R. I., p. 56. The only issue at this point was whether it was the Appellant who stabbed the victim.

If the jurors found that it was the accused who stabbed the victim, the only finding open to them was that he did something that was an "essential substantial and integral part" of the killing of the victim. A finding that this element was not proved, or that there was a reasonable doubt in that regard, was not available on the evidence and would have been wrong. Leaving this element to the jurors was unnecessary and risked causing either an error, or at least confusion, as to the real issues.

26. Immediately after this instruction with respect to the stabbing, the Trial Judge then moves to his next question, "Did Robert Kociuk commit a sexual assault with a weapon on Beverly Dyke?"

27. The other way this issue is dealt with, apart from the conflation issue, is by Beard J.A. presenting three factual scenarios open to the jury: A.R. I, pp. 53-54. The second one is pertinent at this point, "the accused had intercourse with the victim on the same occasion as, but before, the murder and the Crown failed to prove beyond a reasonable doubt that the sex was non-consensual". Beard J.A. notes that this was not adequately put to the Jury as "there was no direct or conclusive evidence that there had been a sexual assault as opposed to consensual intercourse": A.R. I, p. 57 (para. 130).

28. The evidence regarding sexual intercourse was as follows: A.R. I. p. 57 (para. 130)ff.

Apart from the accused's admission that he had had intercourse with the victim, what was the evidence regarding that intercourse and whether or not there was consent? As the trial Judge stated to counsel during discussions out of the presence of the jury, there was no direct or conclusive evidence that there had been a sexual assault as opposed to consensual intercourse. The lack of consent arose only by inference from

the evidence of the stabbing. The evidence regarding sexual intercourse was as follows, non of which, even when considered together, is conclusive, or even necessarily indicative, of sexual intercourse that is non-consensual:

– The victim was found naked from the waist down and her bra and shirt were pulled up, exposing part of her breasts.

– Dr. Markesteyn testified that he could not say whether the sex was consensual or not. He stated that there was a red bruise on the outside of the entrance to the vagina and some roughness where the bra was lifted, but he said that that indicated only rough sex, which could be either consensual or non-consensual.

– Dr. Markesteyn agreed that the damage in the area of the vagina could have been done by a different individual than the person who left the sperm that he found.

– Dr. Markesteyn examined the victim's panties in the course of checking them for sperm and did not indicate that they had been ripped or otherwise damaged in the course of being removed, which could suggest that they were removed voluntarily.

– Likewise with the rest of the victim's clothing – while a number of articles of clothing were seized, there was no mention of tearing or damage, other than from the stabbing.

– The Crown, in argument, stated that the victim's shoes were found neatly piled, not any distance apart. He argued that that was not indicative of having been kicked off while running, and that it inferentially established that she was led to that area, where her death ensued. That evidence could, likewise, suggest that she was not forced or dragged to that area against her will, but rather went willingly, which suggests that the interaction began as a consensual encounter.

– Mr. Hay, the witness who testified that he had seen a body in the bush in that area the day before the police were called, said that there was not a lot of undergrowth and he thought that he saw the body clearly. He testified that there was a blue and white blanket type of thing. In fact, the deceased was wearing a white blouse and a blue sweater. If the jury concluded that this was the body of the victim, Mr. Hay's impression which was not of a struggle but of lovers, could support the Crown's argument that the victim was led to the area and also that she went willingly. This could, again, support the scenario that the interaction began as a consensual encounter.

29. As Beard J.A. notes, "The lack of evidence regarding consent was very important in this case, but was not put to the jury on the issue of consent": A.R. I., p. 59 (para.131).

30. The point is that the issue of consent or lack of same was circumstantial which required inferences to be drawn either way of which were available. As the Trial Judge structured his instruction: A.R. I, p. 59 (para. 132):

The Jury is being told that, because they have found that the accused stabbed the victim, they can infer from that that the preceding sexual intercourse was non-consensual. While it is possible that the sexual intercourse was forced, followed by the stabbing, it is equally possible that the sexual intercourse was not forced, but that something went wrong after the intercourse and the accused then stabbed the victim. This was never explained to the jury in the context of the actual evidence in the case.

31. In dealing with the Jury instruction of sexual assault with a weapon the Trial Judge asked five questions from a pattern jury charge: A.R. IV, p. 12, (lines 1-10). Besides conflating the evidence related to the stabbing and that related to the sexual intercourse, the Appellant's admission his DNA was in the victim and thus he had had sexual intercourse with her made the issues related to (1) and (5) unnecessary and "it led to the trial judge putting erroneous options to the jury which could only have confused them": A.R. I., pp. 60-61 (para 134).

32. Beard J.A. then assesses the instruction by the Trial Judge starting at A.R. IV, p. 12, (line 16) to p. 13, (line 22) at A.R. I, p. 6 (para. 135)ff.

33. Here it is seen how the Trial Judge used "force" inextricably tied to the stabbing. It is clear that force was applied to the victim in the context of sexual intercourse which may or may not have been consensual. Beard J.A. notes that the Trial Judge's instruction noted above was wrong, "Given that the accused admitted that he had sexual intercourse with the victim, the only finding that was open to the jury was to find, beyond a reasonable doubt, that the accused did, in fact, intentionally apply force to the victim. Further, the trial judge did not even mention the defence admission that the accused had had sexual intercourse with the victim or how that admission related to this element": A.R. I, p. 62 (para. 136).

34. The instruction, again, joins inextricably the force used in the sexual intercourse with the stabbing. When the Trial Judge states to the Jury, "you may examine the physical circumstances surrounding the scene": A.R. IV, p. 14, (lines 11-32) and; "Consider also the stab wounds in Beverly Dyke's back which Dr. Markesteyn said were consistent with someone stabbed while standing up and/or attempting to start to run away. Is that consistent with consent?"; as Beard J.A. states: A.R. I, p. 63:

The deficiency is the failure to refer to any evidence or common sense view of the facts that allowed that the sexual force (i.e., intercourse), coming, as it could have, before the stabbing, could have been separate from the stabbing and without, at this stage, considering the two events as possibly different sequential events": A.R. I, p.63 (para. 137).

35. The second element which the Trial Judge put to the jury regarding consent to the use of force, the Trial Judge conflates with the stabbing, "the trial judge conflates the evidence of the sexual intercourse with that of the stabbing, without instructing the jury

that they could have been separate sequential events”: A.R. I. p. 63 (para. 138). His instruction in this respect begins at A.R. IV, p. 13 (line 25) to p. 15, (line 4). Beard J.A. makes the following salient points: A.R. I, pp. 64-65, (para. 139).

- The evidence as set out in para. 130 which could raise a reasonable doubt concerning the Crown's assertion of non-consensual sexual intercourse is not referred to other than a brief reference to Dr. Markesteyn's testimony and findings which could be consistent with consensual sex.

- No warning regarding there being no evidence about the nature of the sexual contact between the accused and the victim (words, gestures, etc. that may have accompanied the sexual intercourse).

- No explanation is given that an inference is proposed that the jurors are asked to draw from the stabbing, non-consensual sex, and the alternatives to the view of this evidence.

- There is no possibility with this charge that non-consensual force and violence could have occurred after the intercourse instead it suggests that the evidence is to be viewed as one event.

36. With respect to the fourth element this is dealt with by Beard J.A. in paragraphs 140-142 of A.R. I, pp. 65-67. The jury instruction is in A.R. IV, p. 16 (line 16), to p. 17 (line 7). While it is clear a weapon was used, at this point where is the Jury advised of the issues with respect to the knife? As Beard J.A. states, A.R. I, p. 66 (para. 141).” It is clear that a weapon was used in the stabbing. While the accused admitted to the police that he sometimes carried a knife in a pouch, there was no evidence as to when, between the accused's first encounter with the victim that day and the actual stabbing, a knife first appeared. There was no positive identification that the knife found by the police ever belonged to the accused”.

37. This tie with the defence evidence or evidence contrary to the Crown's theory is absent when this element is dealt with. This leads to the further point that merely considering the evidence of the victim's body, "without pointing out that the stab wounds could have been inflicted after the sexual activity, in which event the condition of the victim's body may not assist in determining whether the knife was used in the sexual intercourse and the stabbing and does not allow that the sexual activity could have preceded the stabbing and not involve a weapon, followed by the stabbing with the knife as a separate event": A.R. I, pp. 66 & 67, (para. 142).

38. The final element of the five elements set out by the Trial Judge in his charge, "Did Robert Kociuk apply force to Beverly Dyke in circumstances of a sexual nature": A.R. IV, p. 17 (line 8) to p. 18 (line 1ff), is dealt with by Beard J.A. at A.R. I, pp. 68-69 (paras. 144-146). Since it was already agreed by the Appellant that it was indeed his DNA in the victim this explanation was unnecessary and could only have served to confuse the jury and was an error. No reference is made to the evidence of Leonard White and applied to this element at this point so the jury could understand that "It was not open to the jury to find that the force was not of a sexual nature, or even to have a reasonable doubt in that regard." This issue is again amplified as problematic because of the conflation of the sexual intercourse and the stabbing. Here again, the only reference to the evidence itself is to the evidence of Dr. Markesteyn regarding the lack of sperm on the panties in a problematic articulation to the jury of the sperm and the panties,

"He does not explain that evidence suggests only that she did not put her panties on after the sexual intercourse and

that it does not necessarily indicate a lack of consent. In fact, he suggests the opposite in the immediately following sentence, in which he states, "it also may or may not suggest that she never got up off her back after the sexual assault [not the sexual intercourse] took place (emphasis added)".

39. The final assessment of the Trial Judge's charge to the jury by Beard J.A. concerns the Judge's question put to the Jury, "Were the sexual assault with a weapon and the murder of Beverly Dyke part of the same series of events?: A.R. IV, p. 19, (line 4ff), A.R. I, pp. 69-73 (paras. 147-154).

At this point Beard J.A. dealt with two scenarios she ascribed to the defence: A.R. I, p. 71 (para. 149):

The first scenario arises from the defence suggestion, based on Dr. Markesteyn's evidence regarding the time frame for the deterioration of sperm, that the sexual intercourse could have occurred up to five days before the autopsy. The second scenario arises from the defence position that the Crown had failed to prove that sexual intercourse was non-consensual and, therefore, there was no sexual assault. In this scenario, the sexual intercourse could have occurred at the scene, followed by the murder as a subsequent, but separate, event.

40. It should be added here that the nature of Leonard White's evidence also created the scenario.

(1) the accused sexually assaulted the victim but had no part in the homicide or;

(2) the accused had consensual intercourse with the victim but

had no part in her homicide (as Leonard White killed her).

41. In his instructions to the jury it will be noted, on this final issue of application of the defence theory to the elements of the offence, nowhere does the Trial Judge refer specifically to contrary evidence or to the natural inferences which might be made from Leonard White's evidence in their application to this element: A.R. IV, p. 20, (lines 1-12):

Examine photograph 13, a photograph of the murdered victim at the crime scene. In that photograph you see the victim who appears naked from the waist down. Her bra appears pushed up. The position of the body and its state of undress may suggest that the alleged sexual assault with a weapon took place at the same location and during the same time as the murder.

You may also wish to consider that if the sexual intercourse occurred before the murder at the scene where the body was discovered, why was there not more leakage of sperm on the panties as suggested in a commonsensical way by Dr. Markesteyn.

42. The question itself "were the sexual assault with a weapon and the murder of Beverly Dyke part of the same series of events" needs to be didacted further before this latter instruction is addressed. As stated above, it is clear that the victim was killed with a weapon. To answer this the jury:

- (1) Must find that the same person who sexually assaulted the victim also killed her with a weapon as part of the same transaction and that person was the Appellant.
- (2) Must reject the evidence of Leonard White that he did not have sex with the victim but killed her and that the other person he referred to as Ricky Morris (presumably the Appellant) sexually assaulted her but had no part in the killing.

- (3) Must reject the evidence of Leonard White that he did not have sex with the victim but killed her and that the other person he referred to as Ricky Morris (the Appellant) had consensual sex with her but had no part of the killing.
- (4) Must reject the evidence that non-motile sperm can exist in the vagina up to 4-5 days days and that it was not necessarily the case it had to show up on the panties when the person was standing and therefore the accused had sex somewhere else before but had no part in the killing and was not at the scene at all.
- (5) Must reject from an implication of the evidence that there was consensual sex at the scene but that the homicide occurred as a separate event by the Appellant.

43. It will be noted that at no time in this instruction referenced above does the Trial Judge make reference to the evidence of Leonard White and how that would play out in this examination of the elements nor to (5) at all which of course was the additional point raised by Beard J.A.

44. It is no wonder that when the Jury was excused trial counsel again asked the trial judge to clarify its theory, which he does, "It is agreed by the defence that Mr. Kociuk's DNA was present in Beverly Dyke's vagina. It is the position of the defence that Mr. Kociuk had intercourse with Beverly Dyke. It is not known, however, when or in what manner this intercourse occurred. Based upon Dr. Markesteyn's evidence that non-motile sperm can remain within the vagina for five days, it is the position of the defence that the Crown has not proven that Mr. Kociuk had non-consensual sex beyond a reasonable doubt": A.R. IV, p. 23, (lines 25-33).

45. The problem with this instruction is that it merely reiterated or clarified the theory (or at least part of it) of the defense. It did not apply, which is in part the subject

of this appeal, that theory (and the rest of the theory) to the elements of the offence. Merely reiterating the theory could bring the jury no nearer understanding how all the evidence was helpful to the defence. As was seen above, the numerous pages in the instruction regarding the elements of the offence is virtually silent with respect to this application.

46. This application of the theory of the defence with respect to the evidence and the totality of the evidence helpful to the defence to the elements of the offence was the subject of appeal in the case of *R. v. Prince*, [2007] 218 C.C.C.(3rd) 49 (Man. C.A.). In *Prince*, *supra*, various objections were made to the charge related to manslaughter. The Court found the charge was adequate and the jury not misled. However, the issue for the Court was the Judge's charge relating the facts and the defence theory to the law and on this point the Court of Appeal found the "charge to the jury did not deal adequately with the issue...in that it did not sufficiently relate the facts in the evidence that were relevant to the accused's intent, to the legal issues involving intent" and as a consequence ordered a new trial (at para. 83).

47. In *Prince*, *supra*, Freedman J.A. for the court reviewed several Supreme Court decisions to arrive at this principle (para. 52).

While the jury is the trier of fact, the judge's charge ought to focus the jury's attention on the key facts relevant to the live issues in the case. This has been explained in a number of cases, and a logical starting point is the Supreme Court of Canada's decision in *R. v. Jacquard*, [1997] 1 S.C.R. 314, 113 C.C.C. (3d) 1. For the majority, Lamer C.J.C. outlined the appropriate perspective (at paras. 14, 320:

In many cases, a trial judge need only review relevant evidence once and has no duty to review the evidence in a case in relation to every essential issue. See *John v. The Queen*, [1991] S.C.R. 781. *Cluett v. The Queen*, [1985] 2 S.C.R. 216. As long as an appellate court, when looking at the trial judge's charge to the jury as a whole, concludes that the jury was left with a sufficient understanding of the facts as they related to the relevant issues, the charge is proper. See *Cluett, supra*. At p. 231. In *Azoulay v. the Queen*, [1952] 2 S.C.R. 495. Taschereau J. stated at p. 497-98:

The rule which has been laid down, and consistently followed is that in a jury trial, the presiding judge must, except in rare cases where it would be needless to do so, review the substantial parts of the evidence, and give the jury the theory of the defence, so they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them.

... I cannot emphasize enough that the right of an accused to a properly instructed jury does not equate with the right to a perfectly instructed jury. An accused is entitled to a jury that understands how the evidence relates to the legal issues. This demands a functional approach to the instructions that were given, not an idealized approach to those instructions that might have been given... [emphasis added].

48. With respect to this final element (6) of the charge, Beard J.A. states: A.R. I, pp. 60-61 (para. 134):

Given the defence admission that the accused's DNA was in the victim's vagina and that he had had sexual intercourse with her, it was clear that the accused was admitting that he intentionally applied force to the victim and that the force was sexual in nature. Thus, it was not only unnecessary to put the first and fifth elements to the jury at all, which would have simplified and focused the charge, but it led to the trial judge putting erroneous options to the jury which could only have confused them. I will explain this as I review the instructions.

49. With respect to (5), "Must reject from an implication of the evidence that

there was consensual sex at the scene but that the homicide occurred as a separate event by the accused”, Beard J.A. states that from the available evidence this should have been left with the jury. She states: A.R. I, p. 74 (para. 157).

The defence did not argue in any detail the factual scenario that, if the jury found that the accused had stabbed the victim following sexual intercourse, they should still find that the Crown had failed to prove that the sexual intercourse was non-consensual and convict of second degree murder. The reason for this is clear – had they done so, they would then have to explain the accused's presence at the murder scene, which could have weakened or negated the primary defence that it was Leonard White who killed the victim. The Crown still has the obligation of proving all of the elements of the offence and the defence was still entitled to argue that the Crown had failed to prove both the “when” of the sexual intercourse and that it was non-consensual.

50. While Beard J.A. notes that the defence didn't argue this because “had they done so they would then have to explain the accused's presence at the murder scene” and it “could have weakened or negated the primary defence that it was Leonard White who killed the victim” if the full panoply of the favourable evidence and theory had been applied to the elements of the offence this option would have presented itself as a natural consequence of how the evidence went in: A.R. I, p. 72 (para. 158).

He should then have incorporated this into his explanation of the elements of both the murder and the sexual assault with a weapon and explained how the evidence and lack of evidence related to each element of the allegation of sexual assault with a weapon and to the charge of first degree murder so that it was fairly and clearly before the jurors for their consideration.

51. It is the Appellant's position that the Jury instruction, beyond this available

inference from the evidence, was deficient in several other ways which Beard J.A. set forth and the Appellant has argued in the foregoing, those deficiencies sufficient to call out for a new trial separate and apart from the further identified issue noted by Beard J.A.

B. The Position of the Majority in Kociuk.

52. For the majority of the court in Kociuk, Chartier J.A. (Hamilton J.A concurring) stated the issue in the following fashion: A.R., I, p. 29 (para. 68).

“When stripped to its bare essence, the critical issue raised by my colleague is whether the theory of the defence was adequately put to the jury.”

53. As referenced in the *Prince* case, supra, the issue is not whether the theory of the defence was adequately put to the jury (it was) but whether that theory was fairly (or at all) applied to the elements of the offence.

54. This then brings up the issue raised by Beard J.A., “In this scenario, the sexual intercourse could have occurred at the scene, followed by the murder as a subsequent, but separate, event”.

55. The proposition that all defences that have an air of reality must be put to the jury was stated recently in, *R. v. Sarrazin*, 2011 SCC 54. The matter was by way of Crown appeal from a dissenting judgment from the Ontario Court of Appeal (*R. v. Sarrazin* (2010), CarswellOnt 6646). The majority of the Court of Appeal ordered a new

trial because the trial judge had failed to instruct on an additional possible verdict (in that case attempted murder) which was reasonably available from the facts. By the time the matter went to the Supreme Court of Canada the Crown had conceded that issue (para. 1):

The respondents were convicted by a jury of second degree murder. They contend, and the Crown now concedes, that the trial judge failed to instruct the members of the jury on the full range of verdicts reasonably open to them on the law and the evidence.

56. The remaining issue was whether the curative proviso, s. 686(1)(b)(iii), ought to have been applied. The dissenting opinion in the Ontario Court of Appeal stated it should be applied and would have dismissed the appeal. The majority of the Supreme Court rejected the proposition by Moldaver J.A. in dissent that the curative proviso should be given a more “holistic” approach: paras. 25-27.

57. While trial counsel in *Sarrazin*, *ibid.* did request an instruction on the included offence which was rejected by the trial judge, the fact that it was not requested in the case at bar should not impede it as an available verdict since the trial judge himself left second degree murder as an available verdict which was not objected to by trial counsel. If it was left as an available verdict then all the evidence relevant to that issue should have been properly left to the jury with respect to the elements of the offence and the available evidence. As Beard J.A. plainly showed this was not done.

58. Without question, there was more than an “air of reality” (see *R. v. Cinious*, [2002] 2 S.C.R. 3, 2002 CarswellQue 261 at paras. 51-52) to this issue because as

noted above the trial judge himself left the verdict but did not show how the verdict was possible with the application of the elements of the offence to the available evidence.

59. Chartier J.A. for the majority of the court stated, A.R. I, p. 38 (para 84):

I am not prepared to interfere with the trial Judge's discretionary decision in this case. Here, the accused chose to put forward as his primary defence that it was White, not he, who killed the victim. Putting to the jury the fact scenarios, as my colleague advocates, would have, in effect, weakened this considered choice. If the jury had been charged as outline by my colleague, the accused no doubt would argue on appeal that any resulting conviction was founded on a set of facts not advocated by counsel at trial. I have not been persuaded that the trial judge erred by deferring to counsel's trial strategy and by not putting them forward to the jury.

60. There are, therefore, two problems with this assertion:

(1) The trial judge himself left second degree murder as a verdict to the jury;

(2) If the trial judge left this as a possible verdict and it was not objected to by trial counsel then the jury had to be told how on the available evidence such a verdict could be reached. The trial judge failed to do so as outlined by Beard J.A.

61. Neither trial counsel nor Appellate counsel objected to second degree murder as a possible verdict. If trial counsel had objected then no doubt Chartier's J.A. position might have some merit. The form of this would have been to request that the Trial Judge only instruct the Jury on first degree murder and an acquittal: the proverbial "all or nothing" defense. This was not done.

62. Beard J.A.'s identification of this issue on appeal required supplementary argument. This was done supporting the proposition as framed by the dissenting judge. Almost all ground of appeal's have the additional ground (here ground #11), "And on such further grounds as counsel may advise and This Honourable Court may permit."

63. The Appellant supports the proposition as set out in in *R. v. Wu*, [1934] S.C.R. 609, CarswellBC 102 (at para. 15);

There is no doubt that in the trial court an accused person is ordinarily entitled to rely upon all alternative defences for which a foundation of fact appears in the record, and, in my opinion, it makes no difference whether the evidence which forms that foundation has been given by the witnesses for the Crown or for the accused, or otherwise. What is essential is, that the record contains evidence which, if accepted by the jury, would constitute a valid defence to the charge laid. Where such evidence appears it is the duty of the trial judge to call the attention of the jury to that evidence and instruct them in reference thereto. The only evidence appearing in the record upon which even an argument could be founded that the accused shot in self-defence is that of Irwin and Bodner that, prior to the shooting, the complainant was running after the accused and his companion, waving his arms and shouting in Oriental. What he was saying we do not know. If it were material to the defence to prove that the words amounted to provocation, the onus was upon the accused to prove what the words were. On any event provocation, which would reduce murder to manslaughter, is not a defence to the charge as laid. Shooting in self defence would constitute a valid defence provided the accused brings himself within sections 53 and 54 of the *Criminal Code*. It is justifiable to repel an unprovoked attack if the force used by the accused is not meant to cause death or grievous bodily harm and is not more than is necessary for the purpose of self defence. It is justified, even if it does cause death or grievous bodily harm, if it is done under reasonable apprehension of death or grievous bodily harm to himself, and if he believes, on reasonable grounds, that it is necessary for his own preservation. There is no evidence in the record from which a jury could reasonably infer that the

accused when he shot the complainant did so under a reasonable apprehension of death or bodily harm to himself, or that he reasonably believed that he could not otherwise save himself from bodily injury. The rule, therefore, that an accused person at trial is entitled to have the jury pass upon all his alternative defences is limited to the defences of which a foundation of fact appears in the record. Even then the rule, in my opinion, is not without exception, and one exception is, that it has no application where the accused, by the defence which he sets up at the trial, has negated the alternative defence for which he afterwards seeks a new trial.

64. The Appellant wholly adopts the reasoning and application of the law by Beard J.A. in quoting from *R. v. Pickton*, A.R. I, p. 47 (para. 103):

Finally this issue has been dealt with by the Supreme Court of Canada most recently in *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198. Charron J., speaking for the majority, stated as follows (at para. 27):

Regardless of counsel's joint position, the trial judge should not have agreed to include this instruction in the charge. Discussions between counsel and the trial judge about the content of the charge can provide invaluable assistance in crafting correct jury instructions and, as such, should be encouraged. However, it is the trial judge's role to instruct the jury on all relevant questions of law that arise on the evidence. In some cases, these instructions will not accord with the position advanced by counsel for the Crown or the defence.

65. Additionally, Beard J.A. notes the proposition in *R. v. Murray* (1994), 20 O.R. (3d) 156 that trial counsel's position is not determinative if there is an air of reality or deficiency in the charge: A.R. I, p. 45 (para. 100).

66. Again, the latter proposition is informed in this case by the additional point that second degree murder was left to the jury and not objected by counsel at trial or on appeal. The issue was how it could be arrived at from the available evidence. The Appellant in supplementary argument and in this Factum supports the reasoning of Beard J.A.

67. In addition, as was argued in detail above, beyond this issue other problems with the charge have been identified.

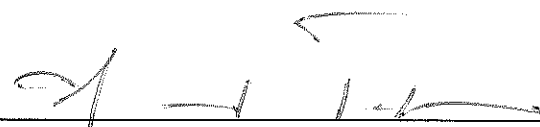
PART IV **SUBMISSION ON COSTS**

NIL

PART V ORDER SOUGHT

68. The Appellant agrees with A.R. I, p. 75 (para. 160) of Beard J.A. regarding the instruction as a whole and therefore requests that the conviction be set aside and a new trial be ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



LEONARD J. W. TAILLEUX,
Counsel for the Appellant

PART VI LIST OF AUTHORITIES

	PARA.
<i>R. v. Cinous</i> , [2002] 2 S.C.R. 3	58
<i>R. v. Prince</i> , [2007] 218 C.C.C. (3d) (Man. C.A.)	46, 47
<i>R. v. Sarrazin</i> (2010), CarswellOnt 6646 (Ont. C.A.)	55
<i>R. v. Sarrazin</i> 2011 S.C.C. 54	55, 56
<i>R. v. Wu</i> , [1934] S.C.R. 609	63
<i>R. v. Pickton</i> , [2010] 2 S.C.R. 198 (CarsWell B.C.2000)	64