CA035709

Vancouver Registry
Supreme Court File No. X065319-47
New Westminster Registry

NOTICE OF APPEAL

British Columbia Court of Appeal

Between:

REGINA

Respondent

And:

ROBERT WILLIAM PICKTON

Appellant

PARTICULARS OF CONVICTION

1.	Place of Conviction:	New Westminster, British Columbia
2.	Name of Judge:	The Honourable Mr. Justice Williams
3.	Offences of which Appellant convicted:	6 counts of second degree murder
4.	Section of *Criminal Code* under which Appellant convicted:	s. 235 (1)
5.	Plea at Trial:	Not Guilty
6.	Whether or not Jury Trial:	Jury Trial
7.	Length of Trial:	23 months [including voir dires]
8.	Sentence Imposed:	Life Imprisonment on each count, with no parole eligibility for 25 years
9.	Date of Conviction:	December 9, 2007
10.	Date of Sentence:	December 11, 2007
11.	Place of Incarceration:	Kent Institute

TAKE NOTICE THAT THE APPELLANT:

(a) appeals against his conviction upon grounds involving questions of law alone,

(b) applies for leave to appeal his conviction upon grounds involving a question of fact alone or a question of mixed law and fact, and if leave be granted hereby appeals against the conviction.

CONVICTION APPEAL - The grounds of appeal are:

Main Charge to the Jury

1. The learned trial judge erred in law in his main charge to the jury by instructing them in paragraph 8 of the written charge that they may convict [on counts 1 to 6] if satisfied that the Appellant either:

   (a) acted alone, or

   (b) acted in concert with others so long as he "actively participated in the killing of the victim",

   when there was no evidentiary foundation for a finding that he acted in concert with others, as a co-perpetrator under s. 21 (1)(a) of the *Criminal Code*: **R. v. Schell and Paquette** (1977) 33 C.C. C. (2d) 422 (O.C.A.); **R. v. Harrison**, [2001] B.C.J. No.2058 (C.A.); **R. v. Mercer**, (2005), 202 C.C.C. (3d) 130 (B.C.C.A.); **R. v. McNeil** (2006), 213 C.C.C. (3d) 365 (Ont. C.A.).

Response to Jurors' Question

2. When the jurors asked, on their sixth day of deliberations, whether they could find that the accused was the killer if they inferred that he "acted indirectly", the learned trial judge erred in law in the following ways:

   (a) if the learned trial judge concluded that the nature of the jurors' concern was not clear from their question, he erred in law by not asking the jury to return to the deliberation room to clarify the question, in order to gain "the clearest possible indication of the particular problem that the jury was confronting", and in order to be able to give a clear, correct and comprehensive answer: **R. v. Allen**, [2003] 1 S.C.R. 223; **R. v. Allen** (2002), C.R.R. (2d) 55 (Nfld. C.A.), per O'neill J.A.; **R. v. H. (L.I.)** (2003), 176 C.C.C. (3d) 526 (Man. C.A); **R. v. Hall (D.T.)** (1995), 64 B.C.A.C. 200; **R. v. Mohamed** (1991), 64 C.C.C. (3d) 1 (B.C.C.A.); **R. v. Fleimer** (1985), 23 C.C.C. (3d) 415 (Ont. C.A.).

(b) if the learned trial judge concluded that the nature of the jurors' concern was clear from their question, he erred in law in his first re-instruction to them:

(i) by failing to answer the jurors' question in the negative: **R. v. S. (W.D.)**, [1994] 3 S.C.R. 521; **R. v. Brydon**, [1995] 4 S.C.R. 253, and

(ii) by repeating his contradictory and confusing instructions from paragraphs 8 and 203-206 (count 1) of the written charge respecting the Appellant's criminal liability as a sole perpetrator and as a co-principal.

Amending Jury Charge

3. The learned trial judge erred in law in his second re-instruction to the jurors on their sixth day of deliberations, by amending paragraphs 205 (count 1), 239 (count 2) and 262 (count 3) of the written charge in a fundamental way to read that they may convict on counts 1 to 3 if satisfied that (i) the Appellant shot the victims, or (ii) "was otherwise an active participant" in the killings:

(a) because the Crown's theory had always been that the Appellant was the sole perpetrator; this second route to conviction as a co-principal under s. 21 (1)(a) of the *Criminal Code* was never part of the Crown's theory: **R. v. McCune** (1998), 131 C.C.C. (3d) 152 (B.C.C.A.); **R. v. Latimer**, [2001] 1 S.C.R. 3,

(b) because this second route to conviction was not supported by sufficient evidence to sustain a conviction: **R. v. G. G.** (2001),156 C.C.C. (3d) 497 (B.C.C.A.); **Harrison**, *supra*; **Mercer**, *supra,*

(c) because, in the absence of a negative answer to the jurors' question, this second re-instruction raised the reasonable possibility that one or more jurors might understand that they could convict the Appellant under a third route to conviction, as an aider or abettor, under s. 21 (1)(b) or (c) of the *Criminal Code* when:

(i) that route to conviction was not supported by sufficient evidence to sustain a conviction: **Harrison**, *supra*; **Mercer**, *supra*, and if it was, there had been no instructions to the jury with respect to the *actus reus* and *mens rea* for aiding and abetting: **R. v. Greyeres**, [1997] 2 S.C.R. 825; **R. v Cousins** (1997), 119 C.C.C. (3d) 432 (Nfld. C.A.).

4. In the alternative, if the learned trial judge was correct in his second re-instruction to the jury, he erred in law:

   (a) by failing to instruct the jury that they could convict the Appellant under the second route to criminal liability (as a co-principal) only if they were satisfied that he had the requisite intent for murder,

   (b) by failing to give counsel a reasonable opportunity to make further submissions to the jury in relation to the additional and/or alternative second and third routes to criminal liability (as a co-principal, or as an aider or abetter), and

   (c) by failing to make consequential changes to other aspects of his instructions, on similar fact evidence and counts 4, 5, 6, which were affected by this second re-instruction.

Similar Fact Evidence

5. The learned trial judge erred in law with respect to similar fact evidence:

   (a) when he permitted the Crown to lead before the jury significant, prejudicial evidence relating to "Jane Doe" which ultimately failed to meet the test for admissibility as similar fact evidence for an off-Indictment count,

   (b) when he ruled that the evidence on one or more counts, including the "barn incident", was admissible as similar fact evidence on one or more other counts, and

   (c) when instructing the jurors about how they might use similar fact evidence in their deliberations: **R. v. Arp**, [1998] 3 S.C.R. 339.

Appellant's Statements

6. The learned trial judge erred in law:

   (a) in admitting into evidence the Appellant's statements to the police: **R. v. Oickle**, [2000] 2 S.C.R. 3; **R. v. Burlingham**, [1995] 2 S.C.R. 206; and to the undercover officer: **R. v. Liew**, [1999] 3 S.C.R. 227, and

   (b) in his instructions to the jurors on how they might use the Appellant's statements, which were critical to the Crown's case, in their deliberations: **R. v. MacKenzie**, [1993] 1 S.C.R. 212.

Other Grounds

7. Such other grounds as counsel may advise.

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Relief Sought: A new trial be ordered on second degree murder on all six counts.

Appellant's Address for Service: 1500 - 701 West Georgia Street
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Dated: January 8, 2008

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To: The Registrar, Court of Appeal
800 Smithe Street, Vancouver, B.C.

And To: Attorney General's Ministry
Criminal Appeals

Vancouver Registry

B.C. Court of Appeal

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V.

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