No. CA042490
Vancouver Registry

COURT OF APPEAL

BETWEEN:

REGINA

RESPONDENT

AND:

CODY HAEVISCHER

APPELLANT

APPELLANT'S FACTUM

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INDEX

OVERVIEW

1) For the purposes of the grounds of appeal at issue here, the Crown's case distilled to these parts:

   a) The Crown proved that a conspiracy to murder Corey Lal was formed between Mr. Johnston, Person X, and others,

   b) Mr. Haevischer was not a member of the conspiracy when it was formed,

   c) On October 19, 2007, Person X and Mr. Johnston travelled to Mr. Haevischer's apartment in the Stanley apartment complex in Surrey (the "Stanley"), arriving there at 1:48 pm[1],

   d) Person X, Mr. Johnston, and KM (Mr. Haevischer's girlfriend), cleaned guns in the apartment,

   e) Person X, Mr. Johnston, and Mr. Haevischer, wearing similar dark clothing with hoods, left the apartment in KM's car, at approximately 2:16 pm,

   f) The trio arrived at the Balmoral apartment building at 2:23 pm,

   g) Six people were killed in apartment number 1505 between approximately 2:30 pm, and 2:45 pm,

   h) Person X, Mr. Johnston, and Mr. Haevischer left the Balmoral apartment building at 2:47 pm and returned to Mr. Haevischer's apartment in the Stanley.

   i) Person X, Mr. Johnston, Mr. Haevischer, KM, and Mr. Haevischer's brother, engaged in post-offence conduct such as destroying evidence and fleeing (i.e. Mr. Haevischer and KM left their apartment, and never returned).

2) Looking only at Mr. Haevischer's potential criminal liability, the Crown faced two serious problems. First, there was no direct evidence that Mr. Haevischer

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[1] All times in this summary are taken from the trial judge's summary of events at para 399 of her reasons AB 3541-3543

entered the conspiracy to kill Mr. Lal; second, there was no direct evidence that Mr. Haevischer participated in the killings as either a principal or a party. Notwithstanding those significant gaps in the Crown's case, the trial judge convicted Mr. Haevischer. This factum is about the trial judge's legal errors in the analysis she relied on to convict Mr. Haevischer notwithstanding the serious problems in the Crown's case.

3) Dealing first with the conspiracy, the judge found that Mr. Haevischer entered the conspiracy at some point between the moment Mr. Johnston and Person X arrived at the Stanley apartment, and the arrival of Mr. Haevischer, Mr. Johnston, and Person X at the Balmoral apartment 35 minutes later. The judge relied entirely on circumstantial evidence to make that finding. Mr. Haevischer respectfully submits that the judge committed legal error in her treatment of that body of circumstantial evidence.

4) Turning to the convictions for the murders, the judge again relied circumstantial evidence to find Mr. Haevischer guilty of murder. She also relied on her finding that Mr. Haevischer was a member of the conspiracy to find that he was a party or co-principal to the six murders. Mr. Haevischer respectfully submits that the judge again erred in her treatment of the circumstantial evidence she relied on to find Mr. Haevischer was a party to the offence of murder, and she further erred in her application of the principles of party liability.

PART I ~ STATEMENT OF FACTS

A. OVERVIEW:

5) The facts underlying the convictions at issue, and the general procedural history of the prosecution are as set out in the Agreed Statement of Fact (not yet filed as of the filing of this factum). Additional references to the facts needed to support the arguments are set out below.

6) Before turning to the evidence, there are two unusual features of this case that

must be kept in mind. The first is that Person X, who conceded that he committed at least three of the killings in issue, was not permitted to testify. As is set out in the Agreed Statement of Fact, and as is extensively analyzed in one of the appellants' joint factums, the judge prevented Person X from testifying for reasons that are unknown to Mr. Haevischer. In other words, the only Crown witness with any direct knowledge of the killings was put beyond the reach of cross-examination. The evidence of an otherwise competent and compellable witness has been excluded from the record.

7) The second unusual feature is directly related to the first; the accused were excluded from 38 days of the trial process. It was during those *ex parte*, *in camera* proceedings that the judge made the decision to put Person X beyond the reach of cross-examination. Mr. Haevischer has no idea what evidence was heard during those proceedings, and he has no way of gauging how anything said or done during those proceedings might have influenced any procedural or substantive decision made by the trial judge. To be clear, and more precisely, Mr. Haevischer has no way of knowing, for example, whether evidence attributable to Person X which was heard by the judge during the closed proceedings influenced her assessment of the circumstantial evidence that was admitted, and on which the convictions rest.

B. THE ADDITIONAL EVIDENCE:

8) As noted at the outset, the trial judge had to rely on circumstantial evidence to convict Mr. Haevischer of the offences of conspiracy and murder. In convicting Mr. Haevischer, the judge drew inferences of guilt from various pieces of circumstantial evidence. This review of additional evidence that is not addressed in the Agreed Statement of Facts will present circumstantial evidence that was capable of supporting inferences inconsistent with guilt.

9) As the trial judge notes at paragraph 144 of her Reasons for Judgment, it was during "a meeting of RS [Red Scorpion] members" that occurred "sometime in the summer of 2007" that Jamie Bacon "circulated a set of handwritten rules he

had drafted". The rules were supposedly the framework for the governance of the Red Scorpions. Person Y was asked about the rules. His testimony included the following:

> Q Okay. And the last page, the second one down, "RS members come before family, money, and all aspects of life. If someone of any relation to a member has a problem with another member the person must side with RS." What's that all about?
> A Basically that the membership is preeminent above anything else and everything else. Whether personal relationships with -- just trying to elevate the level of accountability to one another and to the gang.
> Q Okay. So loyalty, is that -- was that a part of the Red Scorpions?
> A Yes.
> Q Is that -- is that --
> A Ostensibly.
> Q -- an important thing in the gang?
> A Yes.
> Q What does it mean? Why -- why is it so important?
> A **There's so much treachery. So many of the homicides that you hear about usually end up being by ex-friends or it's -- there's so much treachery in the gang so it's just a big -- it's a big mirage** or it's just one of the falsehoods they put, you know, loyalty, respect all that. That's just an -- it's when it's -- it's when it's convenient, the reality of it. But anybody in the gang will swear that no, they're different. But **nobody's different, it's all the same.** T3588, ll. 10-37 (and see T4116)

10) In cross-examination he gave further testimony about the "Rules". He said, for example that he kept a copy of the Rules "to laugh and joke about, because it was ludicrous. Half the stuff in [there was] just stupid"; the rules were ludicrous, the majority of them" (T4101-4102). Person Y gave similar evidence when he testified that "the whole gang is set up as a hypocrisy" (T3792 ll. 31-42).

11) Person Y gave this evidence about the true nature of life in the Red Scorpions:

> A ... because in the gang -- just another reason why I didn't want to do it anymore. **Your friends are the ones who kill you**. You didn't get killed by your enemies, **it's always your friends setting you up** if your friend is in a position where he needs money or he needs something and you just happen to be doing really well, watch -- watch out. It's -- that's just the gang. So it's always your friends or -- **there's no friends in the gang. It's all smoke and mirrors**. T3803, ll. 14-25

12) Cross-examination elicited more of his views on the nature of gang life:

> A. ... but everybody in the game, they -- they're -- it's all loyalty, honour and trust and respect until it's no longer convenient for me. (T4209)
>
> • • •
>
> A ... The game is that. It's all -- it's all based on lies and -- there's no respect or honour. It's all ... It's all lip service. (T4211)
>
> • • •
>
> A I guess by definition, if you're in the game you're a liar and a hypocrite. (T4219)

13) Person Y also explained that of the "serious gang members that were murdered", a large percentage of them were murdered by proxy of their best friend" (T3912, ll. 27-44).

14) Person Y described a meeting in the parking lot of the "Reflex gym" the day before the killings at the Balmoral apartment. Person Y testified that present for the meeting were: himself, Person X, Jamie Bacon and Mr. Johnston. According to Person Y, during that meeting, Person X was told by Jamie Bacon in a "very firm" tone that "[the killing of Corey Lal] had to happen ... no excuses". Person Y described his thoughts after that meeting:

> In my head I -- I thought for sure – **I didn't even think this was going to happen really**. The -- the day -- the day that it was supposed to happen, by the time we went to [REDACTED]'s that night I had forgot about it, because I -- I was sure that it was just going to be one more thing that -- because that's just -- **I didn't have any faith in [Person X] or Matt. It was like the blind leading the blind**. T3634, ln39 – 3636, ln 15)

15) The morning of the killings, Person Y and Jamie Bacon met "at the gym". During that meeting, Jamie Bacon told him that Mr. Johnston had called and reported that "they already had the guy [Corey Lal] tied up". Person Y and Jamie Bacon obviously did not believe Mr. Johnston:

> A ... It just sounded like -- we even joked oh, that -- that Matt's -- he's known as like a -- just he lies -- **he lies about everything, right?** T3637, ll. 3-10 (and see T4027, ll.4-35)

16) The night of the killings (before the news was public) he had the same view:

> A ... I wasn't in the least bit thinking that something actually

> happened. I thought for sure it was just going to be some convoluted story about -- about -- that it was put off for another day. (T3647, ll. 23-30)

17) In cross-examination, Person Y was asked about committing robberies as one of his activities in the Red Scorpions between 2002 and 2007. He testified that it he "didn't do small robberies", his robberies typically involved taking "$25,000 and up". He estimated that he committed "around fifty" such robberies in those five years. He also committed smaller robberies where he would take "guns or [expensive] watches", "from gangsters" – he recalled taking "maybe eight watches" during that period. He seemed to take more guns, however, as he had "taken at least a half a dozen" in 2007. (T3741-3743)

18) In addition to seeing Mr. Johnston as a liar, there is no doubt that Person Y had a very low opinion of Mr. Johnston generally. He said this:

> Q He [Mr. Johnston] was a fellow that you thought was pretty emotionally immature; correct?
> A I thought he was slow in all things.
> Q Okay. I was coming to that one next. From your perspective he was intellectually unsophisticated; correct?
> A Yeah. Yeah.
> Q Okay. Now, I can -- I can take you to passages in your statements where you consistently refer to him as having maturity and intellectual level of a 12-year-old, for instance. Right?
> A Yeah.
> Q Okay. That was your view of Matt Johnston, 2007, right?
> A Correct. (T3756, ll. 22-40)

19) The next important piece of additional evidence from Person Y relates to the involvement of a man named Sophon Sek in the events at issue. The Crown's general theory of the case was that Mr. Sek was enlisted to help the conspirators gain access to suite 1505 once they were inside the Balmoral apartment building. On the Crown's theory, Mr. Sek was the person who helped the accused gain entry to the actual apartment by knocking on the apartment door[2]. According to Person Y, he was "under the impression" that Mr. Sek "was held in the dark

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[2] See for example the Crown's submissions on its application to adduce evidence of discreditable conduct – Application 74 Transcript at pp. 61-62, and the direct examination of Mr. Le on the main trial - Transcript at 4354, ll. 4-10.

about the murder part of it ... [h]e was, at first, **only told that it was going to be a robbery and he was going to let them in, it was going to be like an extortion**." And then later on it became -- he -- he became aware of that. But initially he was only -- I was under the impression that he only knew it was going to be a robbery". (T4029) The Crown chose not to call Mr. Sek as a witness.

20) Person Y also acknowledged that being killed was "not the only consequence" for failing to pay "a tax"; "they could just get beat up and have their lines taken". (T4115)

21) Person Y testified about how he helped Jamie Bacon "expand his business"; they "pulled moves on people back to back, extortions to move [their] lines [dial-a-dope drug lines] (T4096, ll 23-30). They "used fear and terror as part of [the] toolbox to -- to intimidate people to either give -- either surrender their – their dial-a-dope line or whatever it is that they have that we want" T4106.

22) Person Y acknowledged that one of the rules was "no talking in cars" (T4103). He agreed that there was a "concern about wiretaps ... in a vehicle" they were "associated to" (T4107).

PART II ~ ERRORS IN JUDGMENT

A. The trial judge committed legal error in her assessment of circumstantial evidence.

B. The trial judge committed legal error in her application of the principles of party liability.

PART III ~ ARGUMENT

A. The trial judge committed legal error in her assessment of circumstantial evidence.

OVERVIEW

23) As noted at the very outset, the convictions of Mr. Haevischer for both offences turn on circumstantial evidence. There was no direct evidence that he entered the conspiracy to commit murder, and there was no direct evidence that he committed any act related to the killings (as either a principal or a party).

24) Mr. Haevischer's basic complaint is that the trial judge committed legal error in her assessment of the circumstantial evidence, and those errors entirely undermine the verdicts.

ANALYSIS

1. The first *Villaroman* error – inferences <u>consistent</u> with innocence:

25) Mr. Haevischer's simple proposition is that the trial judge erred in law by adopting an approach to the treatment of circumstantial evidence that wrongly required inferences consistent with innocence to be based on "proven facts". That approach is contrary to the fundamental principles relating to the treatment of circumstantial evidence that were outlined by Justice Cromwell in his reasons for the Court in ***R. v. Villaroman***, 2016 SCC 33.

26) As Justice Cromwell points out at paragraph 13 of his reasons, the "nub of the issue in" ***Villaroman*** was "whether the trial judge erred by requiring that "any other conclusion than guilt" be based on the evidence". Before directly addressing that issue, Justice Cromwell reviewed the law relating to the use of circumstantial evidence, and in particular, the "rule in *Hodge's Case*", and the problems it has caused. After that review of the law, and after commenting on "the relationship between circumstantial evidence and reasonable doubt", Justice Cromwell returned to the main issue and said this:

> [35] **At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts**": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. **<u>However</u>, that view is no longer accepted. In assessing circumstantial evidence, <u>inferences consistent with innocence do not have to arise from proven facts</u>**: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. **Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence**. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
>
> [36] I agree with the respondent's position that **a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence**. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence <u>or lack of evidence</u>": para. 30 (emphasis added). **A certain gap in the evidence may result in inferences other than guilt**. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. (all emphasis added)

27) In the instant case, the trial judge began her analysis of the applicable law at paragraph 567 of her reason under the heading "Charges Against the Accused". The first charge she examined was the single count of conspiracy to commit murder of Corey Lal in Count 7. The judge reviewed the law relating to a charge

of conspiracy to commit murder under these headings:

a) General Principles – paragraphs 571 – 575,

b) Types of Evidence Establishing Conspiracy and Membership – paragraphs 576 – 585,

c) Co-conspirators' exception – paragraphs 586-587[3],

d) The Use of Circumstantial Evidence – paragraphs 588-591.

28) For ease of reference, the entirety of the judge's statement of the law relating to the use of circumstantial evidence is reproduced here:

> [588] Where the Crown's case against an accused is based on circumstantial evidence, the trier of fact must be satisfied that the only rational inference is the guilt of the accused. In *R. v. Griffin,* 2009 SCC 28, the Supreme Court of Canada stated the proposition this way at para. 33:
>
> > The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. …
>
> [589] As stated by the Court in *R. v. Kresko,* 2013 ONSC 1159 at para. 31, the issue at the end of a trial is not whether guilt is the most reasonable inference, but whether the Crown has proved beyond a reasonable doubt that guilt is the sole rational inference. The Court went on to say at para. 32:
>
> > The strength of an inference to be drawn from circumstantial evidence is determined by the probative value of the underlying evidence; see *R. v. Handy,* [2002] 2 S.C.R. 908, at para. 26. When assessing the strength of an inference the trier must also consider any alternative explanation or contradiction, and the accused may submit any other plausible theory: see *Fontaine v. Loewen Estate,* [1998] 1 S.C.R. 424, at para. 33.
>
> [590] The trier of fact must assess the evidence, **and the inferences arising from the evidence**, as a whole rather than on a piecemeal basis. The test involves a judicial assessment of **the cumulative effect**

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[3] The paragraph immediately after the heading "Co-conspirators exception" has no number – but it is clearly not a continuation of the preceding paragraph – 585.

> **of all of the evidence** and not a piecemeal assessment: *R. v. Robinson,* 2003 BCCA 353 at para. 40.
>
> [591] The line between inference and speculation can be a fine one, and where evidence is circumstantial it is critical to distinguish between the two. D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2006) at 95 states:
>
> > Inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. **There can be no inference without objective facts from which to infer the facts that a party seeks to establish. <u>If there are no positive proven facts from which an inference may be drawn, there can be no inference</u>, only impermissible speculation and conjecture**. (all emphasis added)

29) Mr. Haevischer respectfully submits that the passage from the 2006 edition of *Watt's Manual of Criminal Evidence* cited by the judge <u>cannot</u> be reconciled with Justice Cromwell's clear statement in 2016 in ***Villaroman*** that "inferences consistent with innocence do not have to arise from proven facts".

30) Contrary to ***Villaroman***, Justice Watt's statement of principle does <u>not</u> distinguish between inferences proving guilt, and "inferences consistent with innocence"; he clearly treats them as <u>both</u> requiring "positive proven facts". The trial judge in the instant case offered no suggestion that she took a different view. This court is left with no other conclusion than that the trial judge adopted the approach of requiring "positive proven facts" when drawing "inferences consistent with innocence". The court is left with no other conclusion than the trial judge erred in her assessment of circumstantial evidence.

31) It is impossible for this court to be sure that the judge's misstatement of the law did not taint her entire 728 paragraph ruling. There is no way for the court to know what gaps in the evidence that were capable of supporting "inferences consistent with innocence" the judge did <u>not</u> consider.

32) There are at least two obvious types of potential gaps in the evidence. The first are situations where there is simply no evidence about what might have happened during a particular period.

33) As an example, there is no evidence of any conversation between Mr.

Haevischer, Mr. Johnston, and Person X during the 7-minute car ride from Mr. Haevischer's apartment at the Stanley to the Balmoral apartment complex. The point is significant because, as the judge found, Mr. Johnston and Person X had simply turned up at Mr. Haevischer's apartment, "apparently without any notice" (Reasons at para 627), and there was no evidence from KM about any conversation in the apartment that would support a finding of a conspiracy to commit murder. In short, on the clear findings of the trial judge, if Mr. Haevischer entered a conspiracy to commit murder, he had to do it between the time the others arrived at his apartment and when the trio arrived at the Balmoral – but there were two huge gaps in the evidence. There was no evidence of conversation in the apartment and there was no evidence of conversation in the car. The gaps are as consistent with no discussions about a conspiracy to commit murder as they are with discussions about a conspiracy to commit a lesser offence such as robbery or extortion.

34) It is important to never lose sight of the presumption of innocence and the burden of proof. It is not for Mr. Haevischer to demonstrate that whatever conversation there might have been between the men during the 35 minutes was innocent (or not about murder). It is for the Crown to prove beyond a reasonable doubt that there was conversation that resulted in Mr. Haevischer entering an agreement to commit murder. On the approach advocated in Justice Watt's 2006 edition of his *Manual of Criminal Evidence*, which was adopted by the trial judge, the gap in the evidence which could support "inferences consistent with innocence" is disregarded.

35) The second type of gap in the evidence that needs to be considered arises when witnesses are unable to give positive evidence on a particular point. When a witness says something like: "I don't know", "I can't recall", "I don't remember", I'm not sure", It might have been", "I didn't see that", I didn't hear that", I wasn't there" or any similar phrase, they are, depending on the circumstances, potentially creating a significant gap in the evidence on a material point.

36) As a single example of a such a gap in the evidence, KM's testimony about what

happened in the apartment after Mr. Johnston and Person X arrived included this exchange:

> Q Okay. Was there any conversation that you can recall about why you were cleaning the guns or what they were used for?
> A Not really, no; like it was just, hey, come do this.

37) In this instance, KM's inability to "recall" any conversation "about why [they] were cleaning the guns" can give rise to "inferences consistent with innocence" – i.e. that there was no discussion about the purpose of cleaning the guns – which is itself a gap in the evidence on the question of whether Mr. Haevischer entered a conspiracy to commit murder (vs robbery for example).

38) Even if the Court concludes that these examples are not apt, the fact remains that the trial judge relied on an incorrect statement of principle, and it is impossible for this court to tease the error out of her broader decision. This error of law warrants a new trial.

2. Post-offence conduct – no value in determining intent:

39) The second legal error the judge committed in relation to circumstantial evidence was her treatment of evidence of post-offence conduct.

40) The judge describes the post-offence conduct in paragraphs 345 through 398 of her reasons. In the simplest terms, the post-offence conduct consisted of the destruction of evidence (cell phones belonging to the victims and clothing belonging to the accused), flight (Mr. Haevischer and KM abandoned their apartment), and certain discussion between and amongst the accused[4].

41) In her brief summary of the law relating to the limited usefulness of evidence of post-offence conduct the judge made these (correct) comments:

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[4] There was evidence of post-offence discussions and activities that did not clearly involve Mr. Haevischer. It is not entirely clear whether the judge relied on that evidence of post-offence conduct in convicting Mr. Haevischer. For present purposes it does not matter as the judge clearly erred in relying on the post-offence conduct at all.

> [679] Post-offence conduct, if admissible, can provide circumstantial evidence of the culpability of the accused. Evidence of post-offence conduct must be relevant to a live issue and not subject to any exclusionary rule. It may also be excluded where its probative value is outweighed by its prejudicial effect. **Such evidence has no probative value where an accused's post-offence conduct is equally explained by, or is equally consistent with, two or more offences. That is to say, where the evidence cannot logically support an inference of guilt with respect to one crime rather than another (for example, murder as distinct from manslaughter) then it has no probative value** and should not be admitted: *R. v. White*, 2011 SCC 13.
>
> [680] Whether or not a given instance of post-offence conduct has probative value with respect to an accused's culpability depends entirely on the specific nature of the conduct, its relationship to the evidence as a whole, and the issues raised at trial. There will be cases where, as a matter of logic and human experience, an accused's post-offence conduct will support an inference regarding his level of culpability: *White* at para. 42. (emphasis added)

42) Mr. Haevischer respectfully submits that, notwithstanding her correct summary of the law, the judge misused the evidence of post-offence conduct in finding he was guilty of murder and in finding he was a member of the conspiracy to kill Corey Lal.

43) Dealing first with the use of evidence of post-offence conduct to convict Mr. Haevischer of murder, the judge said this:

> [704] Mr. Haevischer arranged the immediate destruction of the victims' cell phones, as well as the clothing he had been wearing at the time of the murders. This is circumstantial evidence suggesting that Mr. Haevischer was not only present at the crime scene but **actively involved in the killings. Destruction of the clothing <u>suggests</u> that Mr. Haevischer knew it might contain blood or other forensic evidence tying him <u>to the murders</u>**. That, in turn, suggests that he was not standing passively some distance away from the events going on in the suite. **It is a reasonable inference that Mr. Haevischer arranged the destruction of the evidence to eliminate his detection as one of <u>the perpetrators</u>**: *White* at para 42. (all emphasis added)

44) Assuming, without conceding, that it was open to the judge to begin her analysis of the post-offence conduct by drawing the inference that "Mr. Haevischer knew [the clothing he later destroyed] might contain blood or other forensic evidence tying him to the murders", the fact that he destroyed the clothing, and the fact

that he engaged in other post-offence conduct, did not allow the judge to draw an inference that he was a "perpetrator" of "the murders" rather than a perpetrator of manslaughter (as a party to robbery). Physical proximity to the killings reveals nothing about intent.

45) The proposition that evidence of post-offence conduct might identify a perpetrator, but not the degree of guilt, was highlighted by Justice Major in his reasons for the Court in ***R. v. White***, [1998] 2 SCR 72, "***White*** (1998)":

> 29 By contrast, a no probative value instruction is not required where the accused has denied any involvement in the facts underlying the charge at issue, and has sought to explain his or her actions by reference to some **unrelated culpable act**. **In such cases it is the identity of the accused as the perpetrator, rather than the extent of his or her culpability, that is in issue**, and it will almost invariably fall to the jury to decide whether the evidence of post-offence conduct can be attributed to one culpable act rather than another. (all emphasis added)

46) In the instant case, there was no suggestion that the post-offence conduct was attributed to a different culpable act; it was obviously implicit that the post-offence conduct all related to the events that happened in, or at, apartment 1505 of the Balmoral Apartments. The post-offence conduct had no relevance beyond, at most, establishing that Mr. Haevischer was a perpetrator in the broadest sense that he was there, or somehow involved in the events. It was of no value in determining whether he had the intent required to support a conviction for murder rather than manslaughter.

47) Justice Major's decision in **White** (1998) was reviewed and commented on by Justice Rothstein in his reasons for the majority in ***R. v. White***, [2011] 1 SCR 433 "***White*** (2011)", which the trial judge in the instant case referred to in para 704 of here reasons. It is not entirely clear, however, why the judge referred to para 42 of ***White*** (2011), in which Justice Rothstein said this:

> [42] Thus, *Arcangioli* and *White (1998)* should be understood as a restatement, tailored to specific circumstances, of the established rule that circumstantial evidence must be relevant to the fact in issue. In any given case, that determination remains a fact-driven exercise. **Whether or not a given instance of post-offence conduct has probative value with respect to the accused's level of**

> **culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial. There will undoubtedly be cases where, as a matter of logic and human experience, certain aspects of the accused's post-offence conduct support an inference regarding his level of culpability**. (emphasis added)

48) The point made by Justice Rothstein in para 42 of ***White*** (2011) is that there may be cases where the nature of the post-offence conduct does allow a trier of fact to draw an inference about the "level of culpability" of the accused. Justice Rothstein's comments in para 42 of ***White*** (2011) echo these comments made by Justice Major in ***White*** (1998):

> 32 This distinction provides some guidance as to when a "no probative value" instruction will be warranted, but it is not a formula. The result will always turn on the nature of the evidence in question and its relevance to the real issue in dispute. **It is possible to imagine cases in which evidence of post-offence conduct could logically support a distinction between two levels of culpability for a single act,** or between two offences arising from the same set of facts. **By way of illustration, where the extent of the accused's flight or concealment is out of all proportion to the level of culpability** admitted, it might be found to be more consistent with the offence charged. Post-offence conduct might also be relevant in cases where the accused has admitted to committing a physical act but asserts that the act was justified in some way; in those circumstances, an act of flight or concealment might constitute some evidence from which, along with other evidence, the jury could infer that the accused was conscious that he or she had committed a culpable act and had not, for example, acted in self-defence. See *Peavoy*, *supra*, at p. 241; *Jacquard*, *supra*, at p. 348. (all emphasis added)

49) Taken together, Justice Rothstein's decision in ***White*** (2011), and Justice Major's decision in ***White*** (1998) make it clear that, in some cases, post-offence conduct might support an inference about the level of culpability. Both rulings leave no doubt, however, that the question is necessarily contextual, and it will therefore obviously require a principled analysis explaining how the post-offence conduct at issue could reveal something about the level of culpability.

50) There is no such analysis in the instant case. Instead, there is simply a reference to para 42 of ***White*** (2011), and finding that the post-offence conduct supports the inference that Mr. Haevischer was a "perpetrator" of "the murders". Again, the

nature of the post-offence conduct at issue in the instant case, taking into account the "the record as a whole and the issues raised at trial", was not capable of supporting a conclusion that Mr. Haevischer had the *mens rea* for murder rather than manslaughter. There was nothing in the post-offence conduct at issue that made it "out of all proportion" to the offence of manslaughter, and which would thereby allow it to support a conviction for murder.

51) In the circumstances of this case, all the post-offence conduct is as consistent with being a perpetrator of a manslaughter committed during a robbery as it is with having the specific intent to kill needed to support a conviction for murder. Again, proximity to a killing (and the destruction of evidence and flight) are not proof of intent. In short, the evidence of post-offence conduct has no probative value on the issue of intent.

52) Moving on, the next (related) problem with the judge's analysis on the issue of post-offence conduct is that it fails to consider alternative explanations for destroying the clothes. The judge failed to consider whether Mr. Haevischer destroyed the clothes, not because he was a party to a murder, but simply because the clothing itself could be used to link him to the event – without any forensic evidence being on the clothing, and without any actual involvement in the crimes committed beyond being present when the two other men carried out killings he was not aware were about to happen.

53) Consider, for example, that Mr. Haevischer destroyed his distinctive or recognizable clothing because he had been seen entering and /or leaving the building by either of Ms. Helen Lee or Ms. Youngmee Kim [5], and that fact became a critical consideration when the event turned out to be a mass killing, which would be investigated by the police, rather than a criminal-on-criminal drug rip-off (robbery) which would not, or at least might not, be investigated. In addition to illustrating the judge's failure to consider alternate explanations for the post-offence conduct, this example reveals the flaw in the trial judge's

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[5] See Reasons for Judgment at paragraphs 318-342 for the judge's review of their evidence (AB 3523-3528)

foundational premise in her assessment of the evidence of post-offence conduct.

54) The judge began her analysis with this sentence: "Destruction of the clothing suggests that Mr. Haevischer knew it might contain blood or other forensic evidence tying him to the murders" (para 704). The trial judge clearly began her assessment of the evidence of post-offence conduct with the assumption that Mr. Haevischer "knew" he was guilty, and she then used the post-offence conduct to find he was guilty. That is a flawed approach – ***White*** (1998) at para 54. The correct approach is to look at the evidence of post-offence conduct to decide whether it actually contributes to a finding of guilt. In the instant case, the post-offence conduct could logically support a finding that Mr. Haevischer was somehow involved in the events at issue – but it was of no value in determining his level of culpability.

55) It might be argued that the judge's observation that Mr. Haevischer destroyed the clothing because he "knew it might ... [tie] him to the murders" should be read broadly, and as nothing more than a way of saying that Mr. Haevischer knew he was linked to the events that resulted in the deaths of the six victims. If that approach is adopted, it serves only to highlight the earlier argument that the evidence of post-offence conduct is of no value in determining the level of intent.

56) On any approach, the most important point to keep in mind is that the evidence of post-offence conduct was not capable of proving the degree of culpability – i.e. murder vs. manslaughter. The fact that the post-offence conduct is **in**capable of proving the degree of culpability for the murder charges is what make the judge's reliance of the evidence to support the conviction for conspiracy to commit murder an error.

57) The judge relied on the evidence of post-offence conduct this way in her analysis of the charge of conspiracy:

> [634] **The evidence of events after the murders only strengthens the logical inference that Mr. Haevischer was a participant in the conspiracy**. Upon his return to his apartment with Mr. Johnston, Mr. Haevischer boiled the victims cell phones and directed that the phones, and the clothing he and Mr. Johnston had been wearing, be destroyed.

> He told his brother on a whiteboard that people died. He directed K.M. to pack her things and the two left their apartment at the Stanley, never to return. Later that evening before it had been reported on the news, Mr. Haevischer told Windsor Nguyen by whiteboard that six people died. The next day he told his RS associates that items connecting him to the crime scene had been burned. He arranged for the BMW that transported him and his cohorts to and from the scene to be cleaned and detailed.

58) The very simple proposition is that if the evidence of post-offence conduct is not capable of proving that Mr. Haevischer had the intent required to support a murder conviction rather than a conviction for manslaughter, the same body of evidence is incapable of proving that he was a member of a conspiracy to commit murder (rather than some lesser offence such as robbery). There is little more that can or needs to be said on this point. The judge was simply wrong to rely on the evidence of post-offence conduct at all in finding that the conspiracy to commit murder alleged in Count 7 was proved beyond a reasonable doubt.

59) In summary, the judge erred in placing any weight on the post-offence conduct on the critical issue of intent in both the murder counts, and in the conspiracy count.

3. The second *Villaroman* error – filling in the blanks:

60) The third error the judge committed was described by Justice Cromwell in ***Villaroman***. After describing the general nature of the rule in ***Hodge's Case***, Justice Cromwell said this:

> [26] However, that is not all that *Hodge's Case* was concerned with. **There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw**. Baron Alderson referred to this risk in *Hodge's Case*. He noted **the jury may "look for — and often slightly . . . distort the facts" to make them fit the inference that they are invited to draw**: p. 1137. Or, as his remarks are recorded in another report, the danger is that **the mind may "take a pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form parts of one connected whole"**: W. Wills, *Wills' Principles of*

> *Circumstantial Evidence* (7th ed. 1937), at p. 45; cited by Laskin J. in *John*, dissenting but not on this point, at p. 813. (emphasis added)

61) Mr. Haevischer respectfully submits that the trial judge in the instant case fell into exactly the sort of error identified by Justice Cromwell. She "unconsciously fill[ed] in blanks", and she "bridge[d] gaps in the evidence to support the inference that the Crown invite[d] her... to draw", and she "adapt[ed] circumstances to one another". The best illustration of this sort of error is found in the judge's analysis of the allegation that Mr. Haevischer was a member of the conspiracy to commit the murder of Corey Lal.

62) It will be recalled that there was no direct evidence that Mr. Haevischer entered the conspiracy (and Mr. Haevischer acknowledges that direct evidence was not necessary). As the judge points out at paragraph 592 of her reasons, "... [a]lthough the Crown acknowledges that there is no evidence to suggest that Mr. Haevischer knew about the plan to murder Mr. Lal before Mr. Johnston and Person X arrived at his apartment on the afternoon of the murders, it maintains that the only rational inference from all of the evidence is that he had been informed of that plan by the time he arrived at suite 1505." The task for the judge was to determine whether the circumstantial evidence supported the Crown's argument. It was within that analysis that the judge wrongly filled in blanks and bridged gaps.

63) The judge's analysis of that question begins at paragraph 623 of her reasons. After repeating the question that she faced, the judge began her substantive analysis with these comments:

> [625] In October 2007, Mr. Haevischer was a tattooed member of the RS with all of the obligations of loyalty that entailed. He had been a member of the original RS and remained a member of the Asian side after the merger. Mr. Haevischer socialized with RS members and attended the regular RS dinners. He also ran drug lines with fellow RS member Windsor Nguyen. **As a drug trafficker, Mr. Haevischer had the same interest in protecting the RS's drug turf and its reputation as a group not to be defied as did the other members of the group**. **He kept guns and ammunition in his apartment, and was involved in acts of violence incidental to the drug trade**. (emphasis added)

64) This passage undoubtedly raises issues involving Mr. Haevischer's character.

The evidence of bad character was before the court pursuant to a ruling in an application brought by the Crown to lead evidence of prior bad acts and character for the limited purposes of demonstrating narrative, motive, opportunity and means[6]. It must be recognized, however, that the simple fact Mr. Haevischer might have had the same motive to kill Corey Lal as the other two people is not proof that those people necessarily told Mr. Haevischer that the plan involved a murder.

65) It would be "filling in the blanks" to say that, because Mr. Haevischer had a shared general interest in the affairs of the Red Scorpions, the others in the gang would have necessarily told him the full details of what was to occur.

66) The simple point is that the only real use of the evidence of motive is to allow one to reason backwards in the sense that, if Mr. Haevischer committed the murders, one can understand why he did it - but the reverse is not true. Proof that he had a broad shared motive is not proof that the plan to kill was necessarily communicated to him.

67) The judge's next comment was this:

> [626] **Not only was Mr. Haevischer a tattooed member of the RS but he also had a significant association with Mr. Johnston**. Mr. Johnston was Mr. Haevischer's gang mentor, vouching for his entry into the RS as a tattooed member. Personally the two men were very close, like brothers. Both accused argue in their final submissions that there is no evidence that the RS were a cohesive group and that, to the contrary, secrets were kept and information was shared unevenly. Whatever the validity of that argument in regards others, that was not the case with respect to Mr. Johnston and Mr. Haevischer. **The association between the two men was close and strong. They had a history that was both personal and professional**. (emphasis added)

68) As with the evidence of motive, Mr. Haevischer's "significant association with Mr. Johnston" is of no help in answering the question of whether Mr. Johnston necessarily told Mr. Haevischer that the plan was to commit a murder (rather than some other lesser offence of the sort that seems to have been a central part

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6 Ruling re: Application No. 74 Admissibility of Discreditable Conduct of Accused

of the Red Scorpions' business model). The evidence of the relationship between Mr. Haevischer and Mr. Johnson reveals just that, a relationship between the two men. Only by "filling in blanks", "bridging gaps" or "adapting circumstances to one another" is it possible to say that the relationship between the men was such that Mr. Johnson necessarily revealed that the plan was a plan to commit murder.

69) Moving on, the next point the judge made was this:

> [627] Mr. Johnston was a key participant in the conspiracy on the day of the murders. He met with other coconspirators at the Korean restaurant, and then secured entry to the Balmoral by obtaining D.Y.s fob. Person X, for his part, obtained the Glock from Person Y, both men also present at the Korean restaurant. **Mr. Johnston and Person X then proceeded directly to the Stanley to enlist the help of Mr. Haevischer, apparently without any notice. Mr. Johnston displayed considerable confidence that Mr. Haevischer would assist without any hesitation, and he was not disappointed.** (all emphasis added)

70) While it might be thought a picayune point, there was nothing in the evidence to support the positive assertion that the two men went to Mr. Haevischer's apartment "to enlist" his help. The most that can be said is the two men went there, and once there cleaned some guns and bullets with the assistance of Mr. Haevischer's girlfriend KM. Moreover, it is only by "filling in the blanks" and assuming that the purpose of the visit was to "enlist the help of Mr. Haevischer" that it can also be said that "Mr. Johnston displayed considerable confidence that Mr. Haevischer would assist without any hesitation".

71) Even if these concerns are brushed aside, the fact remains that saying Mr. Johnston "was not disappointed" – i.e. he was able to enlist Mr. Haevischer - assumes that Mr. Johnston told Mr. Haevischer it was a plan to commit murder. That is, of course, precisely the question the circumstantial evidence is being relied on to prove.

72) The judge's next point was this:

> [628] Mr. Haevischer's girlfriend helped Mr. Johnston and Person X prepare two guns in a manner designed to ensure that they could not be traced to the users. Even the bullets were cleaned with Windex. While this was going on, Mr. Haevischer put on the same attire as his cohorts. **By the time he left the Stanley, he knew that he had been enlisted**

> **to assist his RS associates in a venture that involved the use of cleaned and loaded guns in circumstances requiring that they shield their identities with hoodies and any traces of themselves with gloves. In other words, Mr. Haevischer knew he was enlisted to commit a crime involving violence. By his conduct, it is apparent that he agreed to his enlistment for a venture of that nature.** (all emphasis added)

73) The suggestion that Mr. Haevischer knew he was "enlisted to commit a crime involving violence" again assumes the fact it is meant to prove. The nature of the activities of the Red Scorpions was such that the three men could have been headed off to commit all manner of crimes that involve guns but not necessarily violence. As Person Y said, when he helped Jamie Bacon "expand his business"; they "pulled moves on people back to back, extortions to move [their] lines [dial-a-dope drug lines] (T4096, ll 23-30). They "used fear and terror as part of [the] toolbox to -- to intimidate people to either give -- either surrender their – their dial-a-dope line or whatever it is that they have that we want" T4106. Again, criminal acts involving guns, but not necessarily violence, were part of the Red Scorpions business model. Only by bridging gaps and filling in blanks is it possible to conclude that the prospect of violence was necessarily the prospect of murder.

74) The final point to note about paragraph 628 is that the final sentence is ultimately a conclusion that restates (begs) the question. The suggestion that Mr. Haevischer "agreed to his enlistment for a venture of that nature [a crime involving violence]" leaves unanswered the real question of whether he knew the "crime involving violence" was murder. Restating the question does nothing to answer it.

75) The judge next said this:

> [629] Mr. Johnston and Person X knew the overarching plan was to invade Mr. Lal's apartment and kill him. The plan was fraught with danger given that suite 1505 was a stash house and there was no apparent way of knowing whether Mr. Lal would be alone or whether he would have ready access to his own firearms. **Violence was part of the drug trade, and they must have anticipated that an armed standoff was a possibility. Further, there was the likely prospect of workers coming to reload or residents in other suites on the 15th floor coming and going.** (all emphasis added)

76) Mr. Haevischer respectfully submits that the underlined portions of paragraph 629 are self-evidently examples of "filling in blanks", "bridging gaps", or any of the other similar errors identified by Justice Cromwell in ***Villaroman*** as quoted earlier. There is simply no basis to conclude what the men anticipated, or what, to them, was a "likely prospect". With the greatest of respect, putting these thoughts into the minds of the three men is nothing other than pure speculation. Keeping in mind that these are inferences which the Crown might urge, it is appropriate to note that there are no proven facts capable of supporting the inferences.

77) It is also worth pausing here to note that the introduction of the idea that the three men knew "that there was the likely prospect of workers coming to reload or residents in other suites on the 15th floor coming and going" represents a dramatic shift in the nature of the conspiracy that was being alleged. The judge's comments suggest that – on a purely objective test - the members of the conspiracy actually had a broad agreement to somehow deal violently with anyone they encountered in apartment 1505. That was, of course, not the conspiracy the Crown alleged or attempted to prove. The point is important to the issue of intent on the murder counts. Very simply, the suggestion that the accused knew (on an objective test) of "the likely prospect" that others would be in the apartment could wrongly be used as a springboard to a finding of intent in relation to the killings in the apartment. The issue of intent on the murder counts is addressed in the second ground of appeal below.

78) On a more practical level, and with the greatest of respect, it is impossible to reconcile the suggestion that the trio knew "there was the likely prospect of workers coming to reload or residents in other suites on the 15th floor coming and going", with the judge's later finding that, once in the suite, "they had the unanticipated and daunting task of controlling the five other individuals who happened to be at the scene" (reasons at para 696). The judge's conclusions cannot be reconciled.

79) Very simply, in the absence of any proof that the accused were aware that

anyone else would be present in the suite, it was wrong for the judge to use the suggestion that they were aware of that risk as circumstantial evidence capable of proving the conspiracy count. The judge wrongly "filled in [some] blanks", and "bridged some gaps".

80) Returning to the judge's analysis, after setting out the background to the events as considered above, the judge began to formally address the question at issue - i.e. whether Mr. Haevischer was told that the plan involved murder, and whether he entered a conspiracy to commit murder:

> [630] With all of this in mind, **the question is whether Mr. Johnston would enlist his close friend and associate for such a venture without telling him what the venture entailed**. **The suggestion that he would keep Mr. Haevischer in ignorance of the plan begs the question why Mr. Johnston and Person X enlisted his help at all. It is difficult to think of any reason for Mr. Haevischer's enlistment other than his assistance to execute a plan involving multiple unknowns**. To keep Mr. Haevischer in ignorance of the plan would surely have placed him, and the others, in harm's way. **To seek Mr. Haevischer's assistance, yet keep him in ignorance of the plan to kill Mr. Lal, would be antithetical to the close personal and professional association between the two men.** Had Mr. Johnston wanted, for some reason, to shield Mr. Haevischer from the full force of the plan, he would not have enlisted him at all. (all emphasis added)

81) The first thing to note is that the simple fact Mr. Haevischer was recruited (enlisted) for "his assistance to execute a plan involving multiple unknowns", is obviously not proof that the he knew the full details of the plan. There are all sorts of self-evident reasons why Mr. Johnston and Person X would enlist Mr. Haevischer's help without telling him the true nature of the plan. The first, and most obvious answer, is that Mr. Johnston and Person X foresaw a risk that if they told him what was truly happening, Mr. Haevischer might simply refuse to participate at all. Another answer is that, like Mr. Sek, who was to help them gain entry to the apartment, Mr. Haevischer could fulfil a role such as exterior security without knowing the full plan.

82) The court can never lose sight of the fact that the Crown had to prove that Mr. Haevischer agreed to a plan that involved murder. The simple fact that several people participate in the same event is not proof that they all had the same

intent, or the same state of knowledge when the plan was executed.

83) The next thing to note about paragraph 630 is that there is no principled analysis underlying the proposition that "keep[ing] Mr. Haevischer in ignorance of the plan would surely have placed him, and the others, in harm's way". The suggestion imputes a level of rational forethought that that is inconsistent with arriving at an apartment building mid-day, not wearing masks, to commit a murder that would inevitably bring unwanted police attention to the players in the Surrey drug trade. Again, it is filling in blanks to attempt to get into the minds of the other two people to conclude that there was some logical reason why they would necessarily have told Mr. Haevischer the true nature of the plan.

84) The same comments address the final sentence in paragraph 630. There is simply no principled basis on which the court can get into the mind of Mr. Johnston and find it impossible that he would have enlisted Mr. Haevischer without revealing all the elements of the plan.

85) The final, and perhaps most important point to note about paragraph 630 is the suggestion that "keep[ing] [Mr. Haevischer] in ignorance of the plan to kill Mr. Lal, would be antithetical to the close personal and professional association between the two men". With the greatest of respect, this conclusion is something in the nature of psychoanalysis that is wrongly used to fill in blanks and bridge gaps. It is akin to saying that married people never keep secrets, or, in the parlance of the street, there is in fact honour among thieves. The judge's conclusion might be tenable if the Crown had managed to prove that, historically, Mr. Johnston – a man well known to be a liar - always told Mr. Haevischer the full details of his plans. That was not the evidence. The judge simply imbued the relationship between Mr. Johnston and Mr. Haevischer with a special quality in the absence of any evidence on the point.

86) It must also be kept in mind that the judge found that the motive for the crime was gang related. As person Y, testified, the true nature of gang life was "treachery ... It's a big mirage", and "there's no friends in the gang. It's all smoke

and mirrors", and finally, Mr. Johnston "lies about everything"[7]. A reasonable inference is that it would be "antithetical" to the nature of gang life, and to Mr. Johnston's history of lying, for him to actually tell Mr. Haevischer the truth.

87) After addressing all the foregoing points, the judge shifted her focus and asked this question:

> [631] On Mr. Haevischer's part, **one must ask whether it is reasonable to infer that he would accompany Mr. Johnston**, his close RS associate, on a venture involving cleaned and loaded guns, wearing clothing designed to conceal his identity and heading to a large residential apartment complex **without asking what the venture entailed and the dangers he should expect to face at the Balmoral**. Mr. Haevischer was no underling of Mr. Johnston; he was a tattooed member of the RS with his own guns, his own drug lines and considerable history with the RS. (emphasis added)

88) The simple answer to the question posed by the judge is that the irrational thinking that would have led Mr. Haevischer to participate in the event <u>at all</u>, is exactly the same irrational thinking that would lead him to participate without knowing the full plan. There is no requirement that criminals behave rationally, and it is wrong to base a conviction on the supposition that they do.

89) More to the point, there is <u>no</u> evidence that Mr. Haevischer failed to ask, "what the venture entailed", and most importantly, there is equally <u>no</u> evidence that Mr. Johnston told him the truth. That was the very question the judge had set out to answer.

90) Even posing the question from Mr. Haevischer's point of view represents a subtle shift in the burden of proof. It requires Mr. Haevischer to demonstrate either that he unreasonably failed to ask, "what the venture entailed", or that he did ask, and Mr. Johnston lied. The burden was on the Crown to prove that Mr. Johnston or Person X told Mr. Haevischer what "the venture entailed", it was not for Mr. Haevischer to prove the contrary.

91) The judge moves on in her analysis to offer her ultimate conclusion that Mr.

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[7] (T3588, ll. 10-37 - and see T4116; T3803, ll. 14-25; T3637, ll. 3-10 - and see T4027, ll.4-35)

Haevischer was a member of the conspiracy:

> [632] In light of the nature of the venture and its risks, one must ask whether there is any logical inference that can be drawn other than that by the time he arrived at the Balmoral, Mr. Haevischer knew precisely the nature of the main objective, which was the killing of Mr. Lal. In my view, there is no other logical or reasonable inference that can be drawn. From all of the evidence, I am satisfied that by the time Mr. Haevischer exited the BMW in the parkade of the Balmoral, hood up and gloves on, he knew the trio was on its way to charge into suite 1505 and kill Mr. Lal.

92) Mr. Haevischer respectfully submits that, when carefully analyzed as was done above, the judge's decision was the product of the sorts of errors identified by Justice Cromwell in ***Villaroman***, and repeated here for ease of reference:

> [26] However, that is not all that *Hodge's Case* was concerned with. **There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw**. Baron Alderson referred to this risk in *Hodge's Case*. He noted **the jury may "look for — and often slightly . . . distort the facts" to make them fit the inference that they are invited to draw**: p. 1137. Or, as his remarks are recorded in another report, the danger is that **the mind may "take a pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form parts of one connected whole"**: W. Wills, *Wills' Principles of Circumstantial Evidence* (7th ed. 1937), at p. 45; cited by Laskin J. in *John*, dissenting but not on this point, at p. 813. (emphasis added)

93) The Crown's case, at its highest, demonstrated that Mr. Johnston and Person X were members of a conspiracy to kill Corey Lal; Those two men attended Mr. Haevischer's apartment, where they cleaned guns and bullets; they, and Mr. Haevischer, left the apartment; they were dressed in a way that suggested a desire to avoid detection; they travelled to the Balmoral where six people were killed (executed); the three men (and others) engaged in post-offence conduct which revealed nothing about the intent of anyone involved in the events. This summary of the Crown's case reveals a huge gap in the evidence, there is no direct evidence fixing Mr. Haevischer with knowledge of the purpose of the conspiracy. The trial judge filled that gap using circumstantial evidence by "filling in the blanks", and "bridging gaps" with unscientific conclusions about the nature

of the relationship between Mr. Haevischer and Mr. Johnston. Again, with the greatest of respect, the judge engaged in "adapting circumstances to one another, and even straining them a little, if need be, to force them to form parts of one connected whole". In short, she erred in her approach to the use of circumstantial evidence.

4. Summary on the judge's error relating to the use of circumstantial error:

94) As has been demonstrated, the judge committed at least three legal errors in her treatment of circumstantial evidence. First, contrary to ***Villaroman***, she wrongly required that "inferences consistent with innocence" be based on proven facts. There is no way for this court to tease that error out of the reasons. The judge's second error was in relying on evidence of post-offence conduct to find Mr. Haevischer's level of culpability when the evidence was incapable of supporting such a finding. At the very least, she erred in concluding that the evidence of post-offence conduct was of any value in concluding that Mr. Haevischer entered a conspiracy to commit murder rather than some lesser crime. Finally, she erred by filling in blanks and bridging gaps in the evidence rather than recognizing that the circumstantial evidence fell short of supporting a finding that the Crown proved beyond a reasonable doubt that Mr. Haevischer entered the conspiracy to murder Corey Lal.

B. The trial judge committed legal error in her application of the principles of party liability.

OVERVIEW

95) Mr. Haevischer respectfully submits that the judge erred in her findings that Mr. Haevischer was either a co-principal or an aider or abettor to the six murders. More particularly, the judge erred in her analysis of the crucial element of intent.

ANALYSIS

1. General principles of party liability:

96) The trial judge began her analysis of party liability by stating the Crown's theory of liability, and by offering a general statement about the nature of party liability:

> [663]The Crown in the present case submits that the circumstantial evidence establishes that Mr. Haevischer and Mr. Johnston, along with Person X, **pursuing the objective of the conspiracy to murder Corey Lal**, forced their way into suite 1505 and **jointly participated in confining and killing the six victims**.
>
> [664] It is the Crowns primary position that Mr. Haevischer and Mr. Johnston are liable for the six counts of first degree murder as coprincipals under s. 21(1)(a). **However, as observed by Dickson C.J.C. in *Thatcher,* , the law is indifferent whether the accused personally committed the offence as a principal or aided or abetted another in committing the offence, so long as the Court is satisfied beyond a reasonable doubt that the accused did one or the other**. (all emphasis added)

97) Mr. Haevischer respectfully submits that the judge's analysis of ***Thatcher*** is not entirely accurate. The focus in ***Thatcher*** was on the jury, not on "the Court". Chief Justice Dickson said this in his ruling in ***Thatcher***:

> 73 In sum, this Court has held that it is **no longer necessary to specify in the charge the nature of an accused's participation** in the offence: *Harder*. Moreover, **if there is evidence before a jury** that points to an accused either committing a crime personally or, alternatively, aiding and abetting another to commit the offence, **provided the jury is satisfied** beyond a reasonable doubt that the accused did one or the other, it is "a matter of indifference" which alternative actually occurred: *Chow Bew*. It follows, in my view, that **s. 21 precludes a requirement of jury unanimity as to the particular nature of the accused's participation** in the offence. **Why should the juror be compelled to make a choice on a subject which is a matter of legal indifference**? (all emphasis added)

98) The key point to note is that the issue addressed in ***Thatcher*** was one of juror unanimity; the question was whether all jurors had to agree on the same route to a conviction - i.e. whether all members of the jury had to agree that the accused was either a principal or a party. Chief Justice Dickson held that it was open to a

jury to be divided on the question of the particular route to a conviction but still enter a conviction unanimously. While it does not matter in a jury case whether the accused is convicted as a co-principal or party, it does matter in a judge-alone trial. It matters because, unlike a jury, a judge has an obligation to deliver reasons which "justify and explain the result ... and enhance meaningful appellate review" - ***R. v. Sheppard***, [2002] 1 SCR 869, at paras 24-25.

99) Mr. Haevischer hastens to add that there is no doubt a trial judge sitting without a jury may convict an accused as both a co-principal and an aider or abettor – but doing so requires clear reasons which "justify and explain the result". In the instant case, the trial judge did not offer the necessary clear analytical pathway explaining the basis on which she found the Crown had proved all elements of each of the six separate counts of murder. More precisely, the focus of this argument is on the failure of the trial judge to explain how she found that the Crown proved the critical element of intent.

100) Returning to the judge's ruling, she very clearly indicated that she saw no real need to distinguish between the possible routes to a conviction under s.21(1). Immediately after referring to ***Thatcher*** in paragraph 664 as quoted above. The judge said this:

> [665] Section 21(1) is designed to prevent the acquittal of an accused who was either a principal or an aider/abettor, but whose precise role in the killings is unclear. **Both forms of participation are not only equally culpable, but are to be treated as one single mode of incurring criminal liability:** *Thatcher,* at para. 72. Thus, where evidence of concerted action in the commission of the offence exists, it is open to the Court to convict all of the accused either as principals or as aiders or abettors pursuant to s. 21(1), even though the extent of the individual participation in the violence is unclear: *R. v. Wood* (1989), 1989 CanLII 7193 (ON CA), 51 C.C.C. (3d) 201 (Ont. C.A.) at 220; see also *R. v. Suzack* (2000), 2000 CanLII 5630 (ON CA), 141 C.C.C. (3d) 449 (Ont. C.A.) at para. 152. (emphasis added)

101) Mr. Haevischer again respectfully submits that the judge's interpretation of ***Thatcher*** is not entirely accurate. While para 72 of ***Thatcher*** does note that all routes to a conviction in s.21 "should be treated as one single mode of incurring criminal liability", the focus of Chief Justice Dickson's comments was again on

the question of jury unanimity. He said this:

> 72 Thus, s. 21 has been designed to alleviate the necessity for the Crown choosing between two different forms of participation in a criminal offence. The law stipulates that both forms of participation are not only equally culpable, but should be treated as one single mode of incurring criminal liability. **The Crown is not under a duty to separate the different forms of participation in a criminal offence into different counts. Obviously, if the charge against Thatcher had been separated into different counts, he might well have been acquitted on each count notwithstanding that <u>each and every juror</u> was certain beyond a reasonable doubt either that Thatcher personally killed his ex-wife or that he aided and abetted someone else who killed his ex-wife**. This is precisely what s. 21 is designed to prevent. (all emphasis added)

102) While the judge was correct to note in para 665 of her reasons that, as a matter of law, all three routes to a conviction in s.21(1) represent "one single mode of incurring criminal liability", it must be remembered that each route to conviction has separate, very distinct elements. In either a jury trial, or a judge alone trial, the Crown must lead evidence against each accused on every element of the offence, and it must lead evidence on every element of the party liability provisions. A judge sitting without a jury has an obligation to consider each route to conviction separately, against each accused separately, and the judge has an obligation to explain the analytical pathway that leads to a conviction.

103) What must be avoided is a judge treating s.21 as a sort of safety valve or shortcut that permits a conviction in complex cases in the absence of an analysis of how the evidence led by the Crown satisfies every element of the offences alleged, and how the evidence satisfies every element of the party liability provisions. In the instant case, the judge effectively treated s.21 as relieving her of the obligation to undertake the necessary analysis in the absence of any direct evidence about what happened in apartment 1505. As noted, of particular interest in the instant case is the key element of intent and the absence in the reasons of any meaningful analysis of how the Crown proved that Mr. Haevischer had the required subjective foresight of death needed to support six convictions for murder.

2. Intent to commit murder as a co-principal under s.21(1)(a):

104) The trial judge reviewed a number of cases which have commented on s.21(1)(a) as a route to a conviction for murder. Mr. Haevischer takes no issue with any of the cases referred to by the judge. The most important point to take from the cases is that they all note, in some way, that for the Crown to secure a conviction of an accused as a co-principal under s.21(1)(a), it must prove that the accused acted "with the requisite intent". When the charge at issue is murder, the Crown must prove that the accused had a subjective foresight of death. As an example of this proposition at play, the Court said this in its *per curium* reasons in ***R. v. Podolski***, 2018 BCCA 96:

> [247] We agree with the appellants that, based on the "acting in concert" theory, **the Crown had to establish beyond a reasonable doubt that <u>each</u> principal or co-principal accused had the subjective foresight** that his participation in the beating **would cause** Marnuik bodily harm that he knew was likely **to cause death** and was reckless as to whether death ensued or not: see *R. v. Martineau,* 1990 CanLII 80 (SCC), [1990] 2 S.C.R. 633. (underlining in original, bold emphasis added)

105) The statement of principle in ***Podolski*** reflected the Crown's theory in that case, which was that several men "acted in concert" to beat Mr. Marnuik to death. Re-worded for the circumstances of the instant case, that statement of principle would be this:

> "... the Crown had to establish beyond a reasonable doubt **that <u>each</u> principal or co-principal accused had the subjective foresight** that his participation in the events **would cause** the death of six separate victims".

106) With the burden on the Crown in mind, it is appropriate to now look at what the Crown actually proved. Assuming, without in any way conceding, that the conviction for a conspiracy to commit the murder of Corey Lal is sustainable, the Crown proved that when Mr. Haevischer and the other two men entered apartment 1505 (assuming they all entered) they <u>each</u> did so with the intent that their participation in the events would cause the death of just <u>one</u> person; Corey Lal. The Crown had not alleged or tendered any evidence to prove any broader intent. More particularly, the Crown did not allege or tender evidence that they

each knew that their participation in the events would cause the death of six people, not just one.

107) The judge described what she obviously concluded was the intent of the three men as they entered apartment 1505:

> [690] Mr. Johnston and Mr. Haevischer, together with Person X, were members of a conspiracy to murder Mr. Lal. **The common purpose of the three men was to gain access to suite 1505 and kill Mr. Lal**. They achieved that purpose. (all emphasis added)

108) In paragraphs 691 through 701 of her reasons, the judge goes on to describe some of the forensic evidence found in the apartment 1505, and she also offers what seems to be a hypothetical interpretation of the events that happened in the apartment based on the forensic evidence. In other words, the judge weaves together a possible narrative based on the circumstantial evidence.

109) Importantly, in developing her hypothetical narrative, the judge does not assign any particular role or individual act to either Mr. Haevischer or Mr. Johnston. That is simply a reflection of the fact that there was no evidentiary basis on which to determine what each man did in the apartment (again assuming they both entered the apartment). The judge did, however, conclude that Person X was a "shooter" on the basis that his DNA was found on the recovered gun.

110) It is worth highlighting that, although it is not addressed directly, the judge's hypothetical summary of events recognizes the limitations of the Crown's theory that there was only a conspiracy to kill one person. The judge's reasons recognize that the circumstances anticipated by the conspiracy did not match the circumstances the three men encountered in the apartment. The judge described the complexity of the situation:

> [695] Mr. Mohan likely arrived (or was brought in) either shortly before or shortly after Mr. Narong, which required the intruders to deal with five, and then six, individuals. **The subsequent arrivals of Mr. Narong and Mr. Mohan had to have been unexpected,** and required one of the intruders to gain control of each of those two victims while the other four were being kept under control in the suite. The three intruders must have been aware of **the ongoing risk that others might arrive unexpectedly** and would also have to be dealt with. Suite 1505 was a

> stash house thus there was always the possibility that other workers might show up. Further, it was one of seven suites on the 15th floor of the Balmoral, all sharing a common hallway and elevators; residents of the other suites could come and go at any time, as was likely the case with Mr. Mohan.
>
> [696] The intruders had two tasks at hand: to kill Mr. Lal and, secondarily, to take the drugs and money they could find in the apartment. **At the same time, they had the <u>un</u>anticipated and daunting task of controlling the five other individuals who happened to be at the scene.** The crime scene evidence suggests that they took and maintained control over the victims by dividing them into two groups. They placed one group by the fireplace, where Mr. Schellenberg had been working, and the other group at the opposite end of the room by the entrance to the apartment. All six were in submissive positions when shot, lying face down with their hands above or by their heads. The intruders must have used threats and instilled extreme fear in the victims in order to obtain their compliance to take these defenceless positions. (all emphasis added)

111) The judge's acknowledgement that it was "unexpected" that there would be people other than Corey Lal in the suite is an acknowledgement of the limitations of the conspiracy the Crown alleged. The Crown alleged a conspiracy to kill one person, not six. The Crown had to prove the specific intent to kill six people, not just one. The situation the three men faced once at the apartment was starkly different than the circumstances contemplated by the alleged conspiracy. The Crown had to prove that Mr. Haevischer's alleged intent to kill Corey Lal survived the dramatic change in circumstances. The fact that Mr. Lal was killed some time after the men entered the apartment is <u>not</u> proof that Mr. Haevischer maintained the alleged intent to kill Corey Lal.

112) Notwithstanding the shortcomings of what the Crown alleged on the issue of intent, the judge nevertheless found intent. She said this:

> [702] The evidence concerning the timing of events and the scene the killers left behind leaves little doubt that the three RS associates jointly and actively participated in the murders, **and did so with the necessary intent**. (emphasis added)

113) Again, to that point in her ruling, the judge had failed to offer any analytical framework or pathway to finding that Mr. Haevischer had the necessary specific intent needed to support convictions for six counts of murder. The <u>only</u> analysis

which comes near addressing the issue of intent is this:

> [703] **Although there need only be evidence of joint participation, there is also strong evidence of common purpose**. The two accused and Person X were acting in concert to kill Mr. Lal as members of a conspiracy to that end. They arrived at the suite with that common purpose. Both Mr. Haevischer and Mr. Johnston had the subjective intent to murder Mr. Lal, and they achieved that objective. **They had the same self-interest in killing the other five victims to eliminate witnesses to their involvement in the murder of Mr. Lal**. (all emphasis added)

114) In the final sentence of paragraph 703 the judge very clearly finds that Mr. Haevischer and Mr. Johnston would have had a motive for the killings – i.e. killing everyone to eliminate witnesses. What the judge never addresses, however, is the basis on which she might have found that Mr. Haevischer acted pursuant to that motive. As is well understood, having a motive and acting on it are two entirely different things.

115) It must be kept in mind that there is no forensic evidence capable of revealing what Mr. Haevischer did during the events in the apartment. There is no act attributable to him from which it would be possible to reason backwards that it must have been done pursuant to a motive of killing witnesses. Moreover, except for the killings themselves, nothing done in the apartment was necessarily done for the sole purpose of the killings. As an example, making everyone present lie down on the floor is as consistent with a robbery as it is with a plan to murder. If all the Mr. Haevischer did was make the victims lie on the floor to facilitate a robbery, while the other two men decided to shoot them, he is not a co-principal to a murder. It must also be kept in mind that the burden was on the Crown to prove that Mr. Haevischer acted with the requisite intent; it was not for Mr. Haevischer to prove otherwise.

116) The problem for the Crown in this case is that the evidence it led did not self-evidently allow for a finding that Mr. Haevischer's intent expanded from the alleged agreement to kill one person, to an actual intent to kill six (again without conceding that the Crown proved any murderous intent or that it survived the discovery of unexpected circumstances in the apartment). The trial judge's

analysis fails to explain how she concluded that Mr. Haevischer actually acted pursuant to a shared motive to kill. The absence of the necessary analysis on the question of intent represents an error in the application of the principles of party liability in relation to co-principals under s.21(1)(a).

3. Liability for murder as an aider or abettor under ss. 21(1)(b) & (c):

117) For ease of reference, s.21 provides:

> Parties to offence
>
> 21. (1) Every one is a party to an offence who
>
> (*a*) actually commits it;
>
> (*b*) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (*c*) abets any person in committing it.

118) In her review of the principles relating to aiding and abetting, the trial judge referred to the decision of Justice Charon in ***R. v. Briscoe, [2010] 1 SCR 411***. In condensed form, the key considerations Justice Charon identified that apply where the Crown alleges either aiding or abetting are these:

> [14] The *actus reus* of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence. While it is common to speak of aiding and abetting together, the two concepts are distinct, and liability can flow from either one. Broadly speaking, "[t]o aid under s. 21(1)(*b*) means to assist or help the actor. . . . To abet within the meaning of s. 21(1)(*c*) includes encouraging, instigating, promoting or procuring the crime to be committed" **...**
>
> [15] Of course, doing or omitting to do something that resulted in assisting another in committing a crime is not sufficient to attract criminal liability. **...** The aider or abettor must also have the requisite mental state or *mens rea*. Specifically, in the words of s. 21(1)(*b*), **the person must have rendered the assistance *for the purpose* of aiding the** principal offender to commit the crime.
>
> [16] The *mens rea* requirement reflected in the word "purpose" under s. 21(1)(*b*) has two components: intent and knowledge. For the intent component, it was settled in *R. v. Hibbert*, 1995 CanLII 110 (SCC), [1995] 2 S.C.R. 973, that "purpose" in s. 21(1)(*b*) should be understood as essentially synonymous with "intention". **The Crown must prove**

> **that the accused intended to assist the principal in the commission of the offence. ...**
>
> [17] As for knowledge, in order to have the intention to assist in the commission of an offence, **the aider must know that the perpetrator intends to commit the crime**, although he or she need not know precisely how it will be committed. **That sufficient knowledge is a prerequisite for intention is simply a matter of common sense**. Doherty J.A. in *R. v. Maciel*, 2007 ONCA 196 (CanLII), 219 C.C.C. (3d) 516, provides the following useful explanation of the knowledge requirement which is entirely apposite to this case (at paras. 88-89) **...** (**bold emphasis added**, *italics in original*)

119) At the risk of oversimplification, Mr. Haevischer submits that, to support a conviction as an aider or abettor, the Crown must prove that the accused actually did something **for the purpose** of aiding or abetting; it is not enough to show only that the accused's actions had the effect of aiding or abetting. It is worth noting that in reasons on behalf of the Ontario Court of Appeal in ***R. v. Helsdon*** 2007 ONCA 54, Justice O'Connor emphasized the stringent nature of the *mens rea* needed to support a conviction as an aider:

> **28** I do not agree with the Crown's submissions. The starting point for determining the *mens rea* required for s. 21(b) is the language of the paragraph. The language of para. (b) is very specific. It requires that an accused do or omit to do something for *the purpose of aiding another to commit an offence*. On the face of it, **a requirement that an accused do something for the purpose of achieving a prohibited result imposes a very high degree of subjective *mens rea***. "Purpose" under s. 21(b) is synonymous with "intention": *R. v. Hibbert* (1995), 99 C.C.C. (3d) 193 (S.C.C.). While the *Criminal Code* does not contain a definition of either "purpose" or "intention", the normal meaning of those words suggests that a person must subjectively advert to a specific objective and that he or she, therefore, must have knowledge of the facts that constitute that objective. (*italics in original* all other emphasis added*)*

120) Returning to the critical element of intent, in her reasons in ***Briscoe,*** Justice Charron described what the Crown must prove to secure a conviction for murder against and aider or abettor:

> [18] It is important to note that Doherty J.A., in referring to this Court's decision in *R. v. Kirkness*, 1990 CanLII 57 (SCC), [1990] 3 S.C.R. 74, rightly states **that the aider to a murder must "have known that the perpetrator had the intent required for murder**". While some of the language in *Kirkness* may be read as requiring that the aider share the

> murderer's intention to kill the victim, the case must now be read in the light of the above-noted analysis in *Hibbert*. The perpetrator's intention to kill the victim must be known to the aider or abettor; it need not be shared. *Kirkness* should not be interpreted as requiring that the aider and abettor of a murder have the same *mens rea* as the actual killer. **It is sufficient that he or she, armed with *knowledge* of the perpetrator's intention to commit the crime, acts with the intention of assisting the perpetrator in its commission.** It is only in this sense that it can be said that the aider and abettor must intend that the principal offence be committed. (emphasis added)

121) In the instant case, to secure a conviction against Mr. Haevischer as an aider, the Crown had to prove that he did something for the purpose of assisting the shooters, knowing that they both intended to kill the six victims. Quite obviously, a conviction for murder as an aider will necessarily require a significant level of detailed analysis to demonstrate the basis on which a conviction can be entered. There was no such analysis in the instant case.

122) The judge's entire analysis on the application of ss.21(1a) & (b) was this:

> [706] However, if I am wrong in my conclusion that each of Mr. Johnston and Mr. Haevischer was a principal in the murders, I am satisfied that the evidence outlined above amply establishes that one of them was a principal in the murders as a shooter, and that the other was at the very least an aider or abettor to the shooters. **The non-shooter, as aider or abettor, possessed the requisite intent and actively assisted the shooters from the time the first victims were confined until all six were executed**. As such, he was a significant contributing cause of the six deaths as required for second degree murder.
>
> [707] To be clear, my alternative conclusion does not rest on a different characterization of the facts relating to the non-shooter. I do not suggest that the conduct of the non-shooter as an aider or abettor is any different factually from the conduct I have concluded renders him a co-principal. If I am wrong in law to conclude that the conduct of the non-shooter renders him a principal under subsection (a) of s. 21 (1), then, in the alternative, it renders him an aider or abettor under subsection (b) or (c). **As discussed, s. 21(1) is designed to prevent the acquittal of an accused who is either a perpetrator or an aider/abettor, but whose precise role in the killings is unclear. Both forms of participation are treated as one single mode of criminal liability**: *Thatcher,* at para. 72; *Rojas,* at para. 65. (all emphasis added)

123) The judge's analysis of Mr. Haevischer's liability as an aider or abettor suffers the same flaw as the analysis of his liability as a co-principal. There is no analysis of

the basis on which it could be safely concluded that he knew the shooters intended to kill the victims. Again, it is not enough that something Mr. Haevischer did had the effect of "assisting" the shooters; the Crown had to prove that Mr. Haevischer did something for the purpose of aiding the shooters, knowing that they intended to shoot the six victims. The trial judge's reasons do not explain how she might have found that Mr. Haevischer had the necessary intent.

4. Summary:

124) The trial judge's observation in para 707 of her reasons that "s. 21(1) is designed to prevent the acquittal of an accused who is either a perpetrator or an aider/abettor, but whose precise role in the killings is unclear" is not entirely accurate. It must always be remembered that to convict someone as a party to murder, the Crown has to prove the "requisite intent". In the instant case, the Crown alleged, and it led evidence to prove, that the Mr. Haevischer entered the apartment with the intent to kill one person. To convict him of the murders of six people, the judge had to explain how she found that, in the "unexpected" and "unanticipated" circumstance he encountered, Mr. Haevischer's intent survived the unexpected change in circumstances, and she had to explain how she found that his intent expanded to become an intent to kill six people. The failure of the reasons to "justify and explain the result ... and enhance meaningful appellate review", represents an error in the judge's application of the principles of party liability in s.21.

PART IV ~ NATURE OF ORDER SOUGHT

125) That this Appeal be granted, and a new trial be ordered.

October 13, 2020

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PART V
AUTHORITIES