Court File No. CA42488
Vancouver Registry

BRITISH COLUMBIA COURT OF APPEAL

(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE JUDGMENT OF THE HONOURABLE MADAM JUSTICE WEDGE PRONOUNCED THE 2ND DAY OF OCTOBER, 2014 AT VANCOUVER, B.C.)

BETWEEN:

REGINA

RESPONDENT

AND:

MATTHEW JAMES JOHNSTON

APPELLANT

APPELLANT JOHNSTON'S FACTUM

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

I. Overview

1. This factum concerns issues relating only to the appellant Matthew Johnston. There are two separate "joint" factums dealing with common grounds of appeal for both Mr. Johnston, and his co-appellant, Cody Haevischer.

2. Mr. Johnston was convicted of conspiracy to commit murder, and six counts of first-degree murder, relating to the shooting deaths of six people in suite 1505 of the Balmoral Tower in Surrey on October 19, 2007. The case against Mr. Johnston was entirely circumstantial because of the trial judge's exclusion of the evidence of Person X, an eyewitness to the shootings and a co-perpetrator. The exclusion of Person X's evidence occurred following a lengthy *voir dire* conducted *ex parte*. The appellants say the decision to exclude the appellants from all stages of that hearing ran afoul of s. 650(1) of the *Criminal Code*, and was an error in law, giving rise to one of the grounds of appeal set out in Joint Factum #1. Both appellants also dispute the trial judge's handling of the *Vetrovec* witnesses in this case.

3. Mr. Johnston raises two independent arguments on appeal. First, as set out in ground 2 of his Amended Notice of Appeal, the trial judge erred in preferring inferences sought by the Crown over competing inferences of equal strength, arising on the evidence before the Court. Second, Mr. Johnston expands upon the s. 650(1) error identified in ground 4 of the Amended Notice of Appeal and argued in the Joint Factum, focusing in particular on the detrimental impact of that ruling on his fair trial interests.

4. Joint Factum #1, at paras. 5-25, sets out the background of the police investigation, the pretrial ruling excluding the evidence of Person X, and the evidence of the key *Vetrovec* witnesses at trial.

II. Trial Judge's Reasons for Judgment ("RFJ")

5. Mr. Johnston takes issue primarily with one key inference drawn by the trial judge: **that he was in suite 1505 at the Balmoral at the time the shootings occurred**. This inference was drawn from Person Y's evidence regarding two intercepted conversations which occurred while Person Y was acting as a police agent: one on 17 February 2008, and another on 23 March 2008.

6. Person Y gave evidence about the intercepts. The trial judge placed significant weight on Person Y's interpretation of hand signals used by Mr. Johnston during the conversation that occurred on 23 March 2008. Person Y testified that Mr. Johnston made a "gun gesture" while saying "and this person was supposed to do this".[1] While saying "I was told to do something", Mr. Johnston pointed to his eyes, which Person Y interpreted to mean that it was Mr. Johnston's job to "keep point" and "go look for the spots".[2] Later, Mr. Johnston said, "I watched them do this … both of them" while making a gun gesture pointing downward. Person Y interpreted this gun gesture to mean "shooting downward".[3] The trial judge held that this latter comment, and accompanying gesture, "supports the inference that Mr. Johnston saw the killings as they occurred, and was therefore present at the scene at that time". The trial judge also took from these comments that Mr. Johnston "was aware the plan involved the shooting of someone".[4]

7. This finding was key to the judge's determination of Mr. Johnston's role in the offences. In summarizing the law relating to first-degree murder, the trial judge held that co-perpetrator liability can arise where two or more persons together form an intention to commit an offence, are present at the commission of the offence, and play an active role in the offence with the requisite intent. It is clear that the judge placed considerable reliance on the inference that Mr. Johnston was *in the suite* at the time the shooting occurred, in finding that he was guilty of first-degree murder as a co-perpetrator. The

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[1] Trans., Vol. 11, March 12, 2014, p. 3685, ll. 31-46.
[2] Trans., Vol. 11, March 12, 2014, p. 3686, ll. 3-9.
[3] Trans., Vol. 11, March 12, 2014, p. 3687, ll. 2-16.
[4] RFJ, para. 459.

judge held that Mr. Johnston, Mr. Haevischer, and Person X all "jointly and actively participated in the murders".[5]

8. The trial judge reasoned that if she was wrong in holding that both Mr. Johnston and Mr. Haevischer were co-perpetrators, each of them was culpable for second-degree murder as an aider and abettor due to the fact that they "actively assisted the shooters from the time the first victims were confined until all six were executed".[6] She went on to reason that they were culpable of first-degree murder due to evidence of planning and deliberation, as well as evidence of forcible confinement. In relation to the former, the trial judge noted that the decision to kill witnesses was not the original plan, but "became the plan" at some point, presumably while all three were in the room.

PART II – ISSUES

9. This factum raises two related issues:

1. Did the trial judge err by preferring inferences sought by the Crown over competing inferences of equal strength, arising on the evidence before the Court?

2. Did the trial judge err by failing to address the scope of the exclusion of Person X's evidence?

PART III – ARGUMENT

Ground 1: Did the trial judge err by preferring inferences sought by the Crown over competing inferences of equal strength, arising on the evidence before the Court?

A. Overview

10. In closing submissions, counsel for Mr. Johnston argued that the evidence fell short of establishing that Mr. Johnston was aware of the plan to murder Corey Lal, and that the evidence supported an alternate inference that Mr. Johnston was part of a plan

[5] RFJ, para. 702.
[6] RFJ, para. 706.

to rob, not kill, Corey Lal. Counsel argued that the gun gesture described by Person Y was open to an alternate interpretation: that Mr. Johnston was describing the use of Windex to clean the firearms, a topic that came up in the 17 February 2008 statement.[7] The judge rejected this argument at para. 461, because the gesture was not used in the 17 February 2008 statement to describe cleaning guns with Windex, and because Person Y's interpretation of the gesture as a gun firing downward was not challenged in cross-examination.

11. Mr. Johnston says there was ample evidence before the Court, in the intercepts, to support an alternate plausible inference: that Mr. Johnston was *not* in the room at the time of the shooting, and was not aware of all of the details of "the plan". This was not speculation. It was a plausible theory grounded in the evidence. The judge failed to grapple with the contradictory evidence in the intercepts and erred in her failure to adequately consider this alternate plausible theory.

B. Legal Principles

12. Circumstantial evidence describes a type of evidence that requires the trier of fact to draw an inference; it is often contrasted with direct evidence which, if accepted proves a fact without any intermediate step of drawing an inference. There is a special concern inherent in the inferential reasoning process when circumstantial evidence is relied upon. The concern is that the trier of fact may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference the Crown invites it to draw.[8] To counteract this tendency to "fill in the blanks" unconsciously, the leading case of ***Villaroman*** emphasizes that the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt. Furthermore, although the Crown need not disprove every possible conjecture, it is the Crown's burden to disprove, beyond a reasonable doubt, all reasonable possibilities. Those theories must not be speculative or fanciful. As Cromwell J. for the Court noted:

> … the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the

[7] Referenced at RFJ, paras. 433 to 436.
[8] ***R. v. Villaroman****,* 2016 SCC 33, at para. 26.

> circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.[9]

13. In evaluating other plausible theories or possibilities, it will not be the case that the competing inference must be as reasonable as the inference of guilt. It need only be a reasonable competing inference, because all it has to do is raise a doubt in the mind of the trier of fact.[10]

C. The Inference that Mr. Johnston was Inside the Suite at the Time of the Shootings

14. In drawing the inference that Mr. Johnston was in the suite at the time of the shootings, the trial judge relied primarily on the specific excerpts of the intercept from 23 March 2008 referred to in her reasons for judgment. However, in both intercepts, Mr. Johnston indicated clearly that he was *not* in the suite at the time the shooting occurred. He did so both directly and by implication.

15. The clearest reference to Mr. Johnston not being present at the time of the shootings came in the second scenario on 23 March 2018.

16. In the second scenario, Person Y was part of a feigned drug transaction involving Mike Le and two undercover officers. Mr. Johnston was also present. The undercover officers and Person Y created a pretext for Mr. Johnston and Person Y to talk, and a conversation ensued in a hotel stairwell. A transcript was filed along with audio of the stairwell conversation as exhibit 183 at trial. Person Y once again pressed Mr. Johnston about details of the shootings.[11] Mr. Johnston said unequivocally that he did not have a firearm, and that he did not know who was carrying which of the two firearms. He also told Person Y, in response to a question about why guns were used at all: “I don’t know. I don’t know the whole story. I don’t know the plan.”

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[9] ***R. v. Villaroman****, supra,* at para. 38; emphasis added.
[10] ***R. v. Griffin***, 2009 SCC 28, at para. 34-35, and 79.
[11] The conversation is excerpted at para. 440 of the RFJ.

17. In response to Person Y asking him why Person X asked him for his firearm, Mr. Johnston said that he had no answers to Person Y's questions.[12] The following exchange then occurs:

> MJ I watched – I watched him do this on. Both of them.
>
> Y Who?
>
> MJ Like they're just—like you know what I mean. On…
>
> Y Okay
>
> MJ …the–the two people that–You know what I mean? I don't–without getting into that. Right?[13]

18. Finally, Person Y pointedly asked Mr. Johnston why the shooting happened at all, and whether it was because Person X panicked:

> Y: They weren't even supposed to fuckin'—what? Like, dude, how did it end up—end up being six people? It was supposed to be like—How the fuck? Dude, I wuh (ph)—I wish I was there man. I wish to God. I wouldn't walked (ph) out (ph). I would've fuckin'—Dude, this is just (ph)—fuck, man. Did—did—did—Did [Person X] panic? Is that what happened?
>
> MJ I wasn't inside (ph), man. The—you know that. You—and [Person X] has already told you …[14]

19. This last statement, "Person X has already told you", is directly in line with Person X's anticipated evidence, which was that Mr. Johnston left the suite prior to the shootings.[15]

20. Mr. Johnston also *implied* in the earlier conversation on 17 February 2008 that he was not in the suite at the time of the shootings. At several points, Person Y expressed outrage, largely directed at Person X, over the fact that Person Y's DNA was recovered

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[12] Summarized at para. 443 of the RFJ.
[13] RFJ, para. 443.
[14] RFJ, para. 449.
[15] This was set out in Exhibit 212, Tab 2, in a document titled "[Person X] Willsay, dated Oct 24, 2011 (Appeal Book, p. 2028, at para. 93 ("AB")). The appellants expect the evidence led in closed hearings in Application 65 must likewise have included Person X's anticipated evidence for trial.

from one of the firearms used in the offence. Person Y wanted to know, in no uncertain terms, why the firearm had not been properly cleaned, and made a reference to learning from Person X that the firearms had been "boiled". Mr. Johnston denied knowing what happened to the firearms after the offence, and in particular whether they were boiled:

> Y Okay but where what where was the gun left? Did you see okay [Person X].
>
> MJ I don't know. I really don't know. You have to talk to him.
>
> Y Okay but he told me they boiled them dude. Did you see him boil my gun?
>
> MJ No. I don't know anything about it man.
>
> Y Okay this is the thing though man. That mother-fucker got a gun from me man right before he went, alright? I I didn't know he was gonna use the fuckin thing number one. Number two fuckin uh he told me he it was bur (sic) that he that he boiled. I I never even heard of that shit in the first fuckin place, man, you were with him. If you didn't see fuckin' uh how's that gonna make sense man. They want to get my DNA man, to put it on … (indiscernable). Don't fuckin' lie to me then alright. Would he have told his girlfriend about that shit?
>
> MJ I don't think so. Last thing I want to do is talk about something I know nothing about whatsoever.[16]

21. This reference to the boiled guns is significant. The Crown led evidence about the crime scene. The police located a pot of water at the scene close to shattered glass, and one of the discarded firearms.[17] Person X was to testify that he intended to place the firearms in a pot of water just prior to the shootings.[18] Person Y also agreed in cross-examination that Person X told him that he (Person X) had boiled the guns.[19] This evidence, although it was supportive of the inference that Mr. Johnston was not inside the suite at the time of the shootings, was apparently not considered by the judge.

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[16] Appeal Book, Part II – Exhibits ("AB II"), p. 1438.
[17] Trans., Vol. 2, 11 Oct. 2013, p. 639 and Vol. 3, 15 Oct. 2013, pp. 704-5.
[18] Can refer either to the "Proposed Evidence" document filed 5 Oct 2012, at para. 78, or DK statement of 22 March 2009, Doc. 0004814, p. 57, filed as fresh evidence.
[19] See Trans., Vol. 12, 27 March 2014, p. 3998, ll. 34.

22. The trial judge failed to resolve these contradictions in the intercepts, preferring Person Y's interpretation of the hand gestures over the plain meaning of the words spoken. Regardless of the fact that defence counsel pressed the judge to accept one particular alternate inference—the "Windex" theory—Mr. Johnston says the trial judge was obliged to consider the evidence as a whole, and in particular whether the Crown had disproven other rational inferences which were, in this case, clearly before her in the form of Mr. Johnston's own utterances.

23. At trial Mr. Johnston advanced the theory that he had knowledge only of a plan to rob Corey Lal of drugs and money, and not a plan to kill Corey Lal. There was no direct evidence of Mr. Johnston participating in the conspiracy; rather, the trial judge relied on the circumstantial evidence in drawing that conclusion. This was not a case where Mr. Johnston was relying on an absence of evidence in advancing another "plausible theory". Rather, there was evidence pointing in both directions. The intercepts were *supportive* of this theory, and in particular, Mr. Johnston's words "I don't know the plan". The downward "gun" hand gesture was as consistent with a description of confinement at gun point as it was with Mr. Johnston having observed the shooting. Nonetheless, the learned judge did not make any reference in her reasons to these apparent contradictions. Instead, she focused on what Mr. Johnston did *not* say in the intercepts (that it was a robbery that went horribly wrong), rather than what he did say.

Ground 2: Did the trial err by failing to address the scope of the exclusion of Person X's evidence?

A. Overview

24. As noted above, the s. 650(1) error was argued in Joint Factum #1. This separate pleading is intended to highlight a related error, namely, the trial judge's failure to adequately safeguard Mr. Johnston's fair trial rights by engaging with counsel for Mr. Johnston on the scope of the exclusion of Person X's evidence. It was the judge's duty to protect Mr. Johnston's fair trial rights.

B. Legal Principles

25. Every accused person has a *Charter*-protected right to a fair trial. In criminal cases, the court plays a special role in safeguarding this right and must be "vigilant" in ensuring it is not violated.[20] This is particularly so where an accused person is at a disadvantage vis-à-vis the state. In such cases, the trial judge's role is enhanced. The judge has a *duty* to take a proactive role, if necessary, in safeguarding the accused's fair trial rights, short of becoming an advocate for the accused.[21]

C. Argument

26. As noted, the judge held that Mr. Johnston was present in the room, actively participating either as a co-perpetrator, or as an aider and abettor, at the time of the shootings. The judge made this finding despite the fact that she was aware, based on materials filed by Crown in open court[22] (and presumably based on her knowledge of Person X's anticipated evidence at the *Basi* hearing), that Person X was expected to testify that Mr. Johnston was in fact *outside* of the suite at the time the shootings occurred. It is certainly acknowledged that Person X's anticipated evidence would have both helped, and hurt, Mr. Johnston's case; however, on one very central point—Mr. Johnston's absence at the time of the shootings—Person X's evidence would be helpful.

27. Mr. Johnston was excluded from all stages of the hearing that led to the inadmissibility of Person X's anticipated evidence. He was not privy to the arguments made, if any, in relation to the scope of the judge's exclusionary order. He is unaware of the reasons for the judge's finding that Person X's evidence was inadmissible at trial. However, it is Mr. Johnston's position that the trial judge was not obliged to, in effect, "throw the baby out with the bathwater". There were important issues to be resolved: What uses could be put to Person X's evidence? Should defence counsel be permitted

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[20] ***R. v. Ahmad***, 2011 SCC 6, at para. 7.
[21] ***R. v. McGibbon*** (1988), 45 C.C.C. (3d) 334 (Ont. C.A.); ***R. v. Wheelton***, 1992 CanLIII 2816 (Y.T.C.A.) at p. 20; ***R. v. Neidig***, 2018 BCCA 485 at para 93.
[22] The Proposed Evidence filed by the Crown Oct 5, 2012 (AB).

to refer to the evidence in cross-examination? Could the evidence be put to *any* potential use by the defence? These questions were left unanswered.

28. While counsel for Mr. Johnston did not raise these issues with the trial judge, we submit that counsel was in an unenviable informational vacuum. Without knowing the reasons for the exclusion, or the connection to Person X, counsel could not make informed tactical decisions about whether to raise the issue, and if so, on what basis. Despite this feature, as argued in Joint Factum #1, Mr. Johnston should have been given the *opportunity* to know about, and express a position on, any proposed remedies for non-disclosure and impingements on trial fairness. And we emphasize: it was the trial judge who held the ultimate duty of safeguarding the fairness of the trial.

III. Conclusion

29. The evidence, taken at its highest, supported an inference that Mr. Johnston was not aware of the plan to murder Corey Lal, and that he was not in the room at the time of the offences, based on his own utterances in the intercepted conversations with Person Y. The trial judge failed to grapple with this body of evidence and failed to adequately consider these alternate inferences. In effect, the judge fell into the error identified in ***Villaroman*** by “filling in the gaps” in the evidence and preferring the inference invited by the Crown over other plausible theories.

30. This error was compounded by the judge’s failure to engage counsel for Mr. Johnston in a discussion about the scope of the exclusion of Person X’s evidence, and in particular, whether any use could be made of his statement that Mr. Johnston was outside of the suite at the time of the shootings.

PART IV – ORDER SOUGHT

31. The appeal should be allowed a new trial ordered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of January 2020.

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PAGE(S)