No. CA042490
Vancouver Registry

COURT OF APPEAL

BETWEEN:

REGINA

RESPONDENT

AND:

CODY HAEVISCHER

APPELLANT

APPELLANT'S FACTUM IN REPLY

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

1) It will be recalled that Mr. Haevischer has argued that the trial judge committed at least three errors in her assessment of the circumstantial evidence. He argued that the trial judge first erred by requiring that inferences consistent with innocence be based on proven fact, he argued next that she erred in her reliance on evidence of post-offence conduct to find that he had the specific intents required to support the convictions, and finally, he argued that elements of her analysis of the circumstantial evidence were flawed. At the risk of over-simplification, the Crown's response to these arguments is to emphasize that the court owes deference to the findings of fact of the trial judge and to her assessment of circumstantial evidence. The Crown argues that Mr. Haevischer's complaints all relate to findings of fact based on the assessment of circumstantial evidence. Mr. Haevischer respectfully submits that the Crown's arguments fail to adequately address his complaints.

1. Inferences consistent with innocence.

2) Mr. Haevischer's argument on this point focused on the trial judge's reliance on a general statement of principle from the 2006 edition of Justice Watt's *Manual of Criminal Evidence*. For ease of reference, the relevant passage in the judge's reasons was this:

> [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)

3) As Mr. Haevischer pointed out in his factum, the emphasized passage in the above quotation cannot be reconciled with Justice Cromwell's ruling in ***Villaroman***, also repeated here for ease of reference:

> [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. **However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts**: *...* . (all emphasis added)

4) Mr. Haevischer's basic proposition is that the trial judge's statement of principle is wrong, and its effect cannot be teased out of the entire ruling.

5) The Crown offers two responses. First, the Crown argues, effectively, that the trial judge's ruling does not mean what it says. Second, the Crown argues that Mr. Haevischer failed to offer up any, or enough, examples of gaps in the evidence to justify setting aside the verdict. Both arguments are flawed.

a. The plain meaning of what the judge wrote:

6) In response to the fact that the plain wording of Justice Watt's manual cannot be reconciled with ***Villaroman***, the Crown offers a two-part argument urging the court to find that the statement of principle asserted by the trial judge is nevertheless inoffensive. The first part of the Crown's response is to characterize the quotation from Justice Watt's manual as a "general principle not related to inferences consistent with innocence or the specific principle being addressed by Cromwell J. in ***Villaroman***" (RF #3 at para 36). The Crown's second response is to suggest that the statement of principle is inoffensive because the context of the trial judge's reliance on the passage was limited to when "[s]he is clearly speaking about proof of the Crown's case on the conspiracy count" (RF #3 at para 37).

7) While it is correct to think of Justice Watt's statement as a "general principle" when written in 2006, it would be wrong to think that it was written with any thought given to the issue of "inferences consistent with innocence or the specific principle being addressed by Cromwell J. in ***Villaroman***". The simple truth is that when Justice Watt wrote the statement at issue in 2006, the law had not evolved to the point where the courts recognized the very real danger that judges were searching for "positive proven facts" to support inferences consistent with innocence. As the Crown points out in its

factum, the current version of Justice Watts manual now "includes an annotation consistent" with ***Villaroman***. (RF #3 at para 36).

8) As the Crown itself recognizes, Justice Watt's statement of principle was a "general principle"; there is nothing about the broader quotation reproduced by the trial judge that qualifies or minimizes the scope of the principle. Put another way, the general principle, on its face, applies to wrongly exclude inferences consistent with innocence unless they are accompanied by "positive proven facts".

9) While the trial judge erred in echoing Justice Watt's incorrect statement of principle, it is perhaps understandable given that ***Villaroman*** was not decided until two years after her ruling in the instant case. For the sake of completeness, it should be noted that while the decision in ***Villaroman*** settled the law nationally, this court had already settled the law in British Columbia with the decision in ***R. v. Defaveri***, 2014 BCCA 370 (at para 10). The decision in ***Defaveri*** was released October 03, 2014, the day after the ruling in the instant case.

10) Moving on, and as noted above, the Crown also suggests that the offensiveness of the incorrect statement of law is offset by the fact that it appears when the judge "is clearly speaking about proof of the Crown's case on the conspiracy count" (RF #3 at para 37). The actual structure of the Reasons to the point the offending passage appears is this (beginning at para 567):

> VI. CHARGES AGAINST THE ACCUSED
>
> A. Criminal Conspiracy: Count 7
>
> (1) The Law of Criminal Conspiracy
>
> (a) General Principles
>
> (b) Types of Evidence Establishing Conspiracy and Membership
>
> (c) Co-conspirators exception
>
> (d) The Use of Circumstantial Evidence (para 588)

11) The structure of the reasons reveals that while the judge quoted Justice Watt's wrong principle of law within her consideration of "The Law of Criminal Conspiracy", it is also true that it is under the broader heading of Part VI of her reasons - "CHARGES AGAINST THE ACCUSED". Moreover, there was no consideration of the applicable

legal principles in any of the five preceding parts of the reasons. The fact that the offending passage is found within the judge's consideration of "The Law of Criminal Conspiracy" does nothing to make it any less offensive. Again, the passage is a statement of general principle, and it is in no way limited to just the law of conspiracy.

12) Mr. Haevischer respectfully submits that it is a bit nonsensical to take comfort from the fact that the offending passage is found in a portion of the reasons addressing the "proof of the Crown's case on the conspiracy count" as the Crown urges. It is non-sensical because there is no burden on an accused to prove anything so there would never be a section in a ruling devoted to "Proof of Innocence". The Crown's argument on the point might have some strength if the ruling at issue had included a separate section or part devoted to a consideration of broad general principles. If that were the case, it would allow for the conclusion that the judge intended to limit the reach of the offending passage to just the proof of the Crown's case. There was, however, no such broad consideration of general legal principles.

13) The fact that the passage at issue appears in any particular part of the ruling does nothing to diminish the reality that it cannot be reconciled with ***Villaroman*** and that it represents a clear error of law.

b. Misplaced reliance on *Russell*:

14) In addition to urging the court to ignore the plain wording of the passage at issue, the Crown urges the court to find that Mr. Haevischer has failed to meet a burden of pointing out all the gaps in the evidence to which the error of law might apply. The Crown's submission on the point is this:

> 40. If there were inferences consistent with innocence that were not drawn because there were no proven facts to support them in addition to those expressly raised by his counsel in closing submissions, **it is incumbent on Haevischer to identify them: *R. v Russell*, 2020 BCCA 108 (also indexed as *R. v. Dingwall*), at para. 44**. He has failed to do so. Equally, **if there were gaps in the evidence that were capable of supporting such inferences** (AF, 31), in addition to those raised in the defence closing and expressly considered by the judge in her reasons, **he similarly has not identified them**: *Russell*, at para. 51. Instead, he is rearguing the defence case advanced before the judge. (emphasis added)

15) Mr. Haevischer understands the Crown to rely on the ***Russell*** decision as creating a burden on an appellant to demonstrate not just that the trial judge erred by misstating the law she relied on, but also to demonstrate the individual instances where there were gaps in the evidence which were not properly given effect by the judge. Mr. Haevischer respectfully submits that the court should be extremely cautious about accepting the Crown's arguments.

16) In ***Russell,*** there were three appellants: Mr. Russell, Mr. Richet and Ms Dingwall. All three had been convicted of several offences relating to a so-called "drive-by" shooting. The Crown's case was entirely circumstantial. There was no evidentiary basis on which the trial judge could attribute any particular act to any individual accused (although there was no doubt that Ms. Dingwall was not one of the three people present at the scene of the shooting). The appellants were convicted as parties, and as in the instant case, the trial judge did not engage in a separate analysis of the elements of the various offense or the various routes to conviction. As in the instant case, the trial judge summarized the law relating to the use of circumstantial evidence in a manner that was inconsistent with ***Villaroman***.

17) All three judges in ***Russell*** (Newbury, Willcock and Butler J.J.A.) accepted that the trial judge (Abrioux J. as he then was) erred by misstating the law relating to the use of circumstantial evidence. All three judges nevertheless dismissed the appeals in relation to the two male appellants. In partial dissenting reasons, Justice Butler would have allowed Ms. Dingwall's appeal. Justice Butler would have allowed the appeal on two alternate bases; that the trial judge erred in his treatment of the circumstantial evidence (filling in blanks etc) which resulted in an unreasonable verdict, and that the trial judge's misstatement of the law relating to circumstantial evidence was "reflected in convictions on an evidentiary record insufficient to prove the case beyond a reasonable doubt" (at paras 78-79).

18) On August 11, 2020, Ms Dingwall filed an appeal to the Supreme Court of Canada as of right. On August 20, 2020, Mr. Russell and Mr. Richet applied for leave to appeal to the Supreme Court of Canada. They have sought leave in part on the basis that Justice Butler's reasons in dissent ought to have applied to them as well as to Ms.

Dingwall. Additionally, the two men, and Ms. Dingwall, sought leave on the basis that this court erred in the application of the principles of party liability.[1]

19) Turning to the substance of this court's decision in ***Russell***, the Crown in the instant case relies on the following passage to assert that Mr. Haevischer had a burden to identify "inferences consistent with innocence that were not drawn because there were no proven facts to support them":

> [44] The appellants in this case contend that one cannot be satisfied that the trial judge's mis-statement of the law did not taint his entire reasons. However, they did not suggest any reasonable inference that might arise from the evidence *or absence* of evidence that was not considered and rejected by the trial judge. ...

20) Mr. Haevischer respectfully submits that to the extent paragraph 44 of ***Russell*** imposes a burden on an appellant, it is wrongly decided and should not be followed.

21) It has to be kept in mind that all three judges in ***Russell*** accepted that the trial judge committed a legal error in his statement of principle regarding circumstantial evidence. In other words, the appellants passed the threshold of demonstrating an error of law. In the ordinary course, it would then be for the Crown to urge the court to nevertheless dismiss the appeal on an application of the curative proviso in s.686(1)(b)(iii).

22) As is well understood, the application of the proviso is limited "to cases where the evidence against an accused is *overwhelming* or where it can be safely said that the legal error was *harmless* because it could have had no impact on the verdict"; per Justice Binnie on behalf of the majority at para 25 in ***R. v. Sarrazin***, 2011 SCC 54 (italics in original). Importantly, in either case, "...the onus **resting upon the Crown** is to satisfy the Court that the verdict would necessarily have been the same if such error had not occurred. (emphasis added)"[2]. It is also well understood that the question of whether an error of law is harmless does not take into account the strength of the

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[1] Ms Dingwall's appeal and all three leave applications are filed under Supreme Court of Canada No. 39274

[2] Per Justice Cartwright in his concurring reasons in ***Colpits v. The Queen***, [1965] SCR 739

Crown's case. This proposition is based on Justice LeBel's description of the "harmless error" test in reasons for the majority in ***R. v. Van***, 2009 SCC 22:

> [35] ... The proviso ensures that an appellate court does not need to overturn a conviction solely on the basis of an **error so trivial that it could not have caused any prejudice to the accused**, and thus could not have affected the verdict... **Errors might also be characterized as having a minor effect if they relate to an issue that was not central to the overall determination of guilt or innocence**, or if they benefit the defence, such as by imposing a more onerous burden on the Crown (*Khan*, at para. 30). **The question of whether an error or its effect is minor should be answered without reference to the strength of the other evidence presented at trial**. The overriding question is whether the error on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial, that **any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made**. (emphasis added)

23) In the instant case, using Justice LeBel's language, an error relating to the use of circumstantial evidence manifestly relates to an issue that <u>was</u> central to the overall determination of guilt or innocence.

24) Returning to the Crown's ***Russell***-based arguments in the instant case, Mr. Haevischer respectfully submits that it is self-evident that requiring an appellant to go beyond demonstrating an error of law and also demonstrate, effectively, that the error was not minor amounts to a reversed application of the curative proviso. What ought to have happened in ***Russell*** is that the court ought to have allowed the appeal on the finding that the trial judge erred. The Crown in ***Russell*** did not invoke the "harmless error" branch of the proviso and the court could not invoke it of its own motion. In the instant case, the Crown has similarly not invoked the "harmless error" branch of the proviso, and the appeal ought to be allowed on the basis that the trial judge erred in law.

25) Even if the Crown were to invoke the harmless error branch of the proviso the appeal should still be allowed. Properly understood, <u>the Crown's burden</u> on an application of the harmless error branch of the proviso would be to convince the court that there were no gaps in the 11 months of evidence that the trial judge failed to consider, and that there were no available inferences consistent with innocence that were improperly rejected by the trial judge for a want of proven facts. As Justice LeBel noted in ***Van***, in considering that issue, the court will <u>not</u> take into account the strength

of the Crown's case.

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

26) The third misuse of circumstantial evidence by the trial judge that Mr. Haevischer referred to in his factum described flaws in the analytical process the judge employed. The foundation for Mr. Haevischer's arguments is this passage from Justice Cromwell's reasons in ***Villaroman***:

> [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)

27) In paragraphs 61 through 94 of his factum, Mr. Haevischer set out and analyzed a number of examples of where the trial judge engaged in the sort of flawed reasoning described by Justice Cromwell. Rather than respond directly to the individual examples cited by Mr. Haevischer, the Crown attacks his approach as being an improper "piecemeal approach" (see, for example, RF #3 at para 56).

28) Instead of addressing Mr. Haevischer's arguments, the Crown repeats some of the highlights of the evidence led at trial, it repeats some of the findings of fact made by the judge, and it cites various cases dealing with issues such as how the Crown can prove a conspiracy (RF #3 paragraphs 43-59). The Crown urges the court to, effectively, step back from the reasoning of the trial judge and instead find that "the judge properly considered as a whole the evidence concerning Haevischer's words and actions before, during and after the achievement of the unlawful object in drawing the inference that Haevischer knew of the plan and agreed to participate in it [the conspiracy to commit murder]" (RF #3 at para 56).

29) There is no doubt that the trial judge was obliged to consider the "evidence as a whole", and there is equally no doubt that this court is to consider the judge's reasons in their entirety. Neither of those truths prevent this court from engaging in the sort of analysis presented by Mr. Haevischer. Regardless of whether Mr. Haevischer's approach is referred to as "piecemeal", or perhaps granular, or even microscopic, he is entitled to point out flaws in the logic and analysis relied on by the trial judge.

30) Mr. Haevischer is simply asking the court to engage in the sort of analysis this court undertook in ***Russell*** and he submits that the correct result of the analysis will echo this conclusion from Justice Butler's dissent in that case:

> [119] In summary, I am of the view that the trial judge engaged in the kind of speculative reasoning described by Cromwell J. in *Villaroman*. **He filled in the gaps by choosing the "best-fit narrative". The best-fit story is not proof beyond a reasonable doubt, and is insufficient to find guilt**. Ms. Dingwall's guilt was not the only reasonable inference to be drawn from the evidence and, in particular, the *lack* of evidence of her involvement in the Assault Offences. (emphasis added)

31) In the instant case, the judge chose the "best-fit narrative" and the Crown is simply urging this court to do the same rather than engage in a detailed analysis.

32) This is an appropriate point to address the standard of review. As the Crown points out at para 33 of its factum, Mr. Haevischer "makes no reference whatsoever to this standard of review [deference absent palpable and overriding error] in respect of the inferences he impugns in this appeal or to the facts underlying them." Leaving aside the point that there is no express burden on an appellant to specifically address the applicable standard[s] of review, there are two responses to the Crown's point.

33) The first response is that the ***Housen v. Nikolaisen*** standard of review specifically allows for precisely the sort of review urged by Mr. Haevischer:

> 23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then **it is only where the <u>inference-drawing process itself</u> is palpably in error that an appellate court can interfere with the factual conclusion**. ... . (underlining in original, bold emphasis added)

34) Mr. Haevischer has done nothing more than ask this court to examine the

"inference-drawing process"; an entirely acceptable, and ordinary, request.

35) The second response to the Crown's comments about the standard of review is that appellate courts across the country have recognized that flaws in the analytical process adopted by a trial judge can amount to errors of law, resulting in an unfair trial, which is, obviously, a miscarriage of justice. The most recent example of this principle in action in this court is found in ***R. v. Roth***, 2020 BCCA 240 (August 27, 2020).

36) In ***Roth***, this court allowed an appeal on the basis that the trial judge's assessment of credibility was flawed. More particularly, the trial judge erred in assessing the accused credibility against a more stringent standard than she applied to the complainant. In allowing the appeal, Justice DeWitt-Van Oosten said this in her reasons for the majority:

> [47] **It is an error of law** for a trial judge to subject the evidence of the defence to more rigorous scrutiny than the evidence of the Crown. See, for example: *R. v. Singh et al.,* 2020 MBCA 61 at paras. 31–33; *R. v. Mehari,* 2020 SKCA 37 at para. 29; *R. v. Murray*, 2020 BCCA 42 at para. 82; *R. v. E.H.*, 2020 ONCA 405 at paras. 40–41; *R. v. Willis*, 2019 NSCA 64 at paras. 40–45; *R. v. Wanihadie*, 2019 ABCA 402 at paras. 34–43; *R. v. Kiss,* 2018 ONCA 184 at paras. 82–83; *R. v. Gravesande,* 2015 ONCA 774 at paras. 18–19, 43. (emphasis added)

37) Without delving into each of the cases that Justice DeWitt-Van Oosten referred to, it is enough to note that they share a common view that an analytically flawed assessment of credibility is an error of law resulting in an unfair trial. Mr. Haevischer submits that there is, in principle, no distinction between a flawed assessment of credibility and a flawed assessment of circumstantial evidence. Both represent the same problem: a flawed analysis. Both have the same impact: an unfair trial. And both call for the same result: a new trial.

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

1. Errors of law? Unreasonable verdict?

38) The thread that runs through Mr. Haevischer's argument on this ground of appeal is that the trial judge's reasons fail to adequately demonstrate the analytical process by

which she applied the principles of party liability, and by which she found that Mr. Haevischer had the necessary specific intent required to support six convictions for first-degree murder. To be sure, the Reasons for Judgment set out the judge's conclusions on those issues, but the reasons are devoid of the necessary analysis.

39) In his factum, Mr. Haevischer proceeded step-by-step through the judge's analysis of the party liability provisions and her conclusions on the issue of intent. At each step in that process Mr. Haevischer demonstrated the flaws or shortcomings of the judge's analysis of the law and of her treatment of the circumstantial evidence.

40) At several points in its argument on this ground of appeal the Crown suggests that what Mr. Haevischer is actually doing is attacking findings of fact without first demonstrating "palpable and overriding error" (see for example RF #3 at paras 86 94, 107, and 109). Mr. Haevischer's response is the same response noted earlier in relation to the judge's use of circumstantial evidence. Very simply, the law contemplates an appellant attacking the analytical process underlying any finding of fact or inference. As noted above, ***Housen*** specifically contemplates it, and this court recently allowed the appeal in ***Roth*** on the basis that the trial judge's analytical process was flawed.

41) The Crown also notes in its factum that Mr. Haevischer "has not argued in his factum that the guilty verdicts were unreasonable or unsupported by the evidence despite this remaining a ground of appeal according to the original and amended notices of appeal filed on his behalf" (RF #3 at para 25, see also para 79). In the event this court prefers not to order a new trial on the basis of the trial judge's error of law in her analysis of party liability and intent, Mr. Haevischer submits that it would be appropriate to find that the convictions for murder are unreasonable on an application of the cases set out by the Crown in its factum (paras 75 -79), and the appropriate outcome would be substituted verdicts of manslaughter in place of the six convictions for first-degree murder.

42) At paragraph 82 of its factum, the Crown relies on para 39 of Justice Frankel's reason for the majority in ***R. v. Jir*** to make the submission that Mr. Haevischer's failure to testify "may be taken into account in assessing the reasonableness of the verdict". Mr. Haevischer does not challenge that general proposition of law. He does suggest,

however, that it is important to carefully consider what Justice Frankel said in ***Jir***:

> [39] ... Further, **the fact that Mr. Jir did not offer any explanation <u>to otherwise convincing inculpatory facts</u> can be considered in assessing the reasonableness of the verdict**. Apposite is *R. v. G.L.J.*, [1997] B.C.J. 2994 (C.A.), wherein Mr. Justice Braidwood, in dismissing an appeal from conviction for possession for the purpose of trafficking, said:
>
>> [31] As it has often been said before, although an accused need never prove his innocence**, there may come a time in a trial when the evidence, although circumstantial, <u>becomes so cogent</u> that in failing to answer it, the accused must stand condemned.** ...
>
> (all emphasis added)

43) Mr. Haevischer submits that these passages demonstrate that what matters is not simply the fact that Mr. Haevischer did not testify; what matters is the focused question of whether there were "otherwise convincing inculpatory facts" such that, without an explanation, he had to be convicted. The failure of Mr. Haevischer to testify does <u>nothing</u> to enhance the reasonableness of the verdict; it cannot serve as a makeweight operating to tip the verdict from unreasonable to reasonable. The absence of his testimony simply allows for an observation that there is no (sworn) competing explanation to the conclusion arrived at by the judge. In any event, he respectfully submits that the Crown's circumstantial case was not so "convincing", or "so cogent" that it had to be met with an explanation.

2. The court must <u>not</u> engage in a purely objective analysis:

44) Again, the main focus of this ground of appeal is on the burden on the Crown to prove that Mr. Haevischer had the necessary specific intent to support convictions for murder. The focus is also on the stringent demands and nuances of the party liability provisions, which as explained in Mr. Haevischer's factum, raise their own issues of specific intent. The Crown's argument in response, which generally echoes the trial judge's reasons, effectively invites the court to uphold the convictions on a purely objective standard.

45) As an example, in its arguments attempting to support the judge's finding of the intent required for murder, the Crown makes this submission:

> 95. This was a three person job. There were two shooters, a finding not challenged on appeal. **<u>It defies common sense</u> that the non-shooter would have stood around and done nothing while his two fellow RS gang members took control of what morphed from four victims to six over a ten-minute period.** During this period, they divided the victims into two groups of three, took their cell phones and some cash, and then shot all six victims to death. (emphasis added)

46) The suggestion that a conviction could be entered for six-counts of murder because innocence "defies common sense" is an invitation to apply a purely objective test. When it comes to the question of specific intent, the law is <u>not</u> concerned with what common sense dictates might have happened. The law <u>is</u> concerned with what the Crown proved beyond a reasonable doubt.

47) Rather than resorting to what common sense has to say about what happened, the court should look at what the Crown actually proved. Here, at most, the Crown proved that Mr. Haevischer and two others were in the apartment, that two shooters used two different guns to kill six people, that the victims had been forced to lay on the floor in separate groups, and that somebody took the wallets and phones from the victims. Those basic facts, even when considered with all of the other evidence led by the Crown, do not inevitably to lead to the single conclusion that all three of the men had to have been involved in the events and, even if they were, that all of them had the specific intent to kill. On the Crown's approach, common sense might lead to those conclusions, but the Crown had to prove more.

48) The fact that the Crown's case did not lead inevitably to a finding that all three men were involved in the murders (as murders) and the fact that the Crown's case did not lead inevitably to the conclusion that all three had the necessary specific intent is what justifies entering convictions for manslaughter rather than murder. The mere fact that the Crown can place three men, in the same room, at the same time, for the purpose of committing one crime does not amount to proof that all three men are all guilty of all of the specific intent crimes committed in the room. That was the key shortcoming in the Crown's case here, the Crown put all three men in the room but failed to prove beyond a reasonable doubt that they were all guilty of all the specific intent crimes committed in the room.

49) Ultimately, the Crown's approach as set out in its factum is exactly the sort of flawed approach identified by Justice Butler in his dissenting reasons in ***Russell*** where, to repeat, he concluded that the trial judge in that case "filled in the gaps by choosing the "best-fit narrative" ... [and] [t]he best-fit story is not proof beyond a reasonable doubt, and is insufficient to find guilt." Mr. Haevischer submits that Justice Butler's approach is correct and ought to be applied here. His approach can be applied with the simple step of asking at each analytical stage whether the trial judge's conclusion represents a statement of something the Crown proved beyond a reasonable doubt, or whether it is simply a "best-fit" for the point in issue.

3. *Thatcher*:

50) One of the points that Mr. Haevischer made in his factum is that the trial judge appears to have interpreted Chief Justice Dickson's comments in ***Thatcher*** as if they effectively relieved her of the need to engage in a focused, detailed analysis of the party liability provision on the question of whether the Crown proved that Mr. Haevischer had the necessary specific intent. In response, the Crown points to this court's ruling in ***Russell*** where Justice Newbury rejected a similar argument.

51) Mr. Haevischer respectfully submits that Justice Newbury's ruling is not determinative of this issue. Her ruling does not address any of the specific arguments advanced. Instead, she simply notes that the principle Chief Justice Dickson described in ***Thatcher*** "has been approved in many judge-alone cases since ***Thatcher***, including ***R. v. J.F.D.***, 2005 BCCA 202 at para. 14 and **R. v. Vu**, 2012 SCC 40 at para. 58." (***Russell*** at para 58).

52) To be clear, Mr. Haevischer does not challenge the correctness of the underlying principle expressed by Chief Justice Dickson in ***Thatcher,*** and which was summarized this way by Justice Moldaver in his reasons for the court in the ***Vu*** decision relied on by Justice Newbury:

> [58] Under s. 21(1), a person is criminally liable, as a party to an offence, if that person, having the requisite intent, plays one of the three enumerated roles in the offence — principal, aider or abettor. An individual will bear the same responsibility for the offence regardless of

which particular role he or she played: *R. v. Thatcher*, 1987 CanLII 53 (SCC), [1987] 1 S.C.R. 652, at pp. 689-90.

53) The ***Thatcher*** principle is a general statement on the legal effect of s.21 of the *Criminal Code*. Mr. Haevischer's complaint is that the trial judge in the instant case failed to recognize that Chief Justice Dickson's comments were in answer to a question about jury unanimity, and in the result she wrongly treated the statement of principle as if it relieved her of the burden of explaining two key things: how she concluded that the Crown proved each element of the offences, and how she applied each part of the party liability provisions of s.21. Justice Newbury's ruling in ***Russell*** does not address that problem; it does not answer Mr. Haevischer's complaint.

54) Finally, leaving aside any reference to ***Thatcher***, the fact remains that the Reasons for Judgment simply do not meet the task of explaining how the judge determined that the Crown proved each element of the offences or how she applied the party liability provision to the Crown's circumstantial evidence. That shortcoming is reversible error.

4. The curative proviso:

55) The Crown relies on the "overwhelming case" prong of s.686(1)(b)(iii). In response, Mr. Haevischer relies on Justice Arbour's comments in ***R. v. Khan***, 2001 SCC 86, reminding that "it is not sufficient for the court of appeal to agree with the first verdict or to think that the same jury would have convicted. They must be convinced that any other reasonable judge or jury would necessarily have convicted. Courts of appeal must respect the primary role of trial judges and juries in making factual determinations after having heard and seen the evidence. Thus, a finding by a court of appeal that the conviction was "inevitable" must be reserved only for the most obvious cases." (para 105)

PART IV ~ NATURE OF ORDER SOUGHT

56) That this Appeal be granted, and a new trial be ordered, or in the alternative, that the convictions for murder be set aside and convictions for manslaughter entered.

September 8, 2020

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SIMON R.A. BUCK, ROGER P. THIRKELL, DAGMAR DLAB

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