**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

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# JOHNSTON'S REPLY FACTUM

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## A. The Trial Judge Misapplied the Law and Misapprehended Evidence

1. Mr. Johnston disagrees with the Crown's characterization that he is simply "re-arguing his case" by taking issue with the inferences drawn by the trial judge.[1] In his factum, Mr. Johnston has identified legal errors in the trial judge's reasoning process that led to his convictions.

2. The trial judge found that Mr. Johnston was in the room at the Balmoral at the time of the shootings. As Mr. Johnston has stated at paragraph 5 of his factum, this was a key finding that led to his convictions. The trial judge inferred from Person Y's evidence regarding Mr. Johnston's "gun gesture" that Mr. Johnston was present at the scene to observe the killings and that he was aware of a plan to shoot someone.[2] Mr. Johnston has already argued that these findings were tainted by the trial judge's misapplication of the law on circumstantial evidence, and adopts the submissions of Mr. Haevischer at paragraphs 2 and 3 of his reply factum.

3. Mr. Johnston has further argued that the trial judge "failed to grapple with the contradictory evidence in the intercepts" when she concluded that he was present at the time of the killings and was aware of the plan to kill Corey Lal.[3] The failure to consider evidence relevant to a material issue, or a failure to give proper effect to material evidence can amount to a misapprehension of evidence under *R. v. Morrisey,* 1995 CanLII 3498 (Ont. C.A.), at para. 32. And where that misapprehension was essential to the reasoning process that resulted in a conviction, it amounts to a miscarriage of justice.[4]

4. Here, the trial judge failed to consider exculpatory evidence from Mr. Johnston's mouth *that the Crown tendered in the form of audio-recorded intercepts* in which Mr. Johnston denied to Person Y that he was in the Balmoral suite at the time of the offences: "I wasn't inside (ph) man. The—you know that. You—and [Person X] has

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[1] Respondent's Factum #4 at para. 2.
[2] Reasons for Judgment ("RFJ"), at para. 459.
[3] Respondent's Factum #4 at para. 11.
[4] *R. v. Lohrer*, 2004 SCC 80, at paras. 1, 2 and 8.

already told you…"[5] As counsel for Mr. Johnston argued in closing submissions, there are other exculpatory statements in that exchange, including his contention that he knew nothing about Person Y's planned involvement[6], and the fact that he didn't see Person X do anything with the gun and didn't have a gun in his hand the entire time.[7] In her reasons for judgment, the trial judge reviewed the agent scenarios with Person Y and found that, "[a]t no time did Mr. Johnston deny his involvement in the events."[8] She then concluded that Mr. Johnston was aware of the plan to shoot someone and that he was present at the scene of the murders.[9] The trial judge therefore misapprehended this exculpatory statement—which was admitted as evidence—and this misapprehension was essential to her reasoning process.[10] These are legal errors.

5. The Crown argues at paragraph 23 of its factum that the judge "implicitly" rejected Mr. Johnston's intercepted words when he said he was not present at the time of the shooting. However, the judge made *no mention* of having rejected Mr. Johnston's statement on the basis that it was not credible. Indeed, had she properly turned her mind to Mr. Johnston's exculpatory statement and had concerns it conflicted with other evidence, she would have been required to assess its credibility by applying the principles in *W.(D.)*—even though Mr. Johnston did not testify.[11] The law is settled that these principles apply where the trial judge must assess credibility on a vital issue "arising out of evidence favourable to the defence in the Crown's case."[12]

6. If the trial judge rejected Mr. Johnston's denial that he was in the room at the time of the shootings and wasn't aware of the plan, because it conflicted with other evidence, she was bound by law to explain her credibility findings. There was no ambiguity in the words, "I wasn't inside, man" and "I don't know the plan". This was not a statement to a police officer which the appellant could reasonably have expected to be used against him at trial—it was a statement to a criminal associate with a fearsome reputation as a

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[5] RFJ, para. 449.
[6] Transcript ("Trans."), Vol. 18, p. 6154, ln. 39.
[7] Trans, Vol. 18, p. 6158, ln. 25; p. 6159 ln. 1.
[8] RFJ, para. 460.
[9] RFJ, para. 462.
[10] See, e.g., *R. v. A.D.*, 2000 BCCA 346.
[11] *R. v. Allale*, 2019 ABCA 154 at paras. 32 and 33; *R. v. W.(D.)*, [1991] 1 S.C.R. 742.
[12] *R. v. B.D.*, 2011 ONCA 51 at para. 114.

ruthless killer, acting as an undercover agent, and feigning outrage over the fact that a firearm laden with his DNA was left behind at the scene of the crime. Person Y was demanding a true account of what occurred. The judge identified no basis upon which to reject selective parts of the statement as the Crown contends.

7. To selectively draw from a "confession" by an accused person for some purposes — but reject the same evidence for others — is problematic. It gives rise to the appearance of a results-driven approach: choosing some items from a statement but not others, for no discernable reason other than whose case they support. Doing this *requires* an explanation for the inconsistency, and the incongruity in both selecting and rejecting portions of a statement. No such explanation was given here.

8. We submit that the trial judge committed a legal error, rather than a factual one. She misdirected herself on the question of whether she was required to consider Mr. Johnston's exculpatory utterances, rather than focusing exclusively on Person Y's interpretation of his words.

9. The exculpatory statements were not peripheral. They were directly supportive of the defence theory that Mr. Johnston was involved in a planned robbery and had no knowledge of a planned murder. Furthermore, these utterances directly contradict the alleged (unrecorded) statement to Person Y in Mr. Bacon's vehicle in the Foggy Dew parking lot where, according to Person Y, Mr. Johnston admitted to being present at the scene following the shootings and witnessing bodies in the fireplace.

10. The trial judge made no mention of these contradictions and inconsistencies. She simply did not engage with the exculpatory utterances. They remain suspended over Mr. Johnston's convictions, and undermine the logic of the trial judge's stated inferences. This error resulted in an unfair trial, and a miscarriage of justice.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2020.

Brock Martland, QC

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## LIST OF AUTHORITIES