COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA,
BEFORE THE HONOURABLE MADAM JUSTICE WEDGE
FROM THE VERDICT PRONOUNCED ON THE 2nd DAY OF OCTOBER 2014

Court of Appeal No. CA042490

BETWEEN:

REGINA

v.

AND:

CODY RAE HAEVISCHER

Respondent's factum #3
Responding to Haevischer's factum on issues of assessing circumstantial evidence and the principles of party liability

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This factum is in response to the appellant Haevischer's individual factum. The crux of Haevischer's argument, like Johnston's argument in his individual factum, is an attack on the judge's factual findings made upon consideration of all the evidence in this circumstantial case. He challenges the judge's findings about his knowledge of the conspiracy to murder Corey Lal and his role in the six murders. In large measure, his argument reargues his case at trial by examining pieces of evidence in isolation rather than as a whole. He contends that the judge should have drawn inferences other than those she drew. He also contends that the judge did not articulate an analytical framework in finding him liable for the six murders. In doing so, he does not point to any palpable and overriding errors in the judge's factual findings which would require appellate intervention.

2. Haevischer argues that the judge erred in finding that he had knowledge of the conspiracy to kill Corey Lal by the time he arrived at the Balmoral even though he does not challenge on this appeal that: he went there with his very close friend and fellow RS gang member Johnston and RS gang member Person X; they went there after the RS leadership decided to have Mr. Lal killed; they were armed with guns; and the objective of the conspiracy was realized - Mr. Lal was shot to death in his drug stash house.

3. Haevischer alleges that the judge made three legal errors in finding that he had knowledge of the plan to kill Mr. Lal: (i) wrongly requiring that inferences consistent with innocence be based on proven facts; (ii) filling in blanks and bridging gaps in the evidence; and (iii) relying on evidence of post-offence conduct as probative of his level of culpability.

4. The judge did not err as alleged. She did not fail to draw inferences inconsistent with guilt because they were not supported by proven facts. She failed to draw them because any such inferences were so resoundingly implausible and defied common sense by the facts as the judge found them. Furthermore, 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. He has failed to do so.

5. The judge did not err in her treatment of the circumstantial evidence by filling in blanks and bridging gaps in the evidence. Such gaps in a circumstantial case can be and, in this case were, filled indirectly by the cumulative effect of the entirety of the evidence. Haevischer alleges that the judge wrongly filled gaps in the evidence to draw the inferences and reach the conclusions she did about his knowledge of the conspiracy. This argument is flawed because it equates the absence of direct evidence with a "gap" in the evidence. Haevischer compounds this error by taking a piecemeal treatment of the evidence.

6. The judge did not err in relying on evidence of post-offence conduct. Haevischer argues that the post-offence conduct was used by the judge to determine the degree of Haevischer's liability. It was not. Rather, it was but one aspect of the circumstantial evidence used as evidence that Haevischer was a member of the conspiracy. This was a proper use of post-offence conduct given that Haevischer put his membership in the conspiracy to murder at issue on the trial. It was also used as a piece of circumstantial evidence suggesting that Haevischer was not only present at the crime scene but actively involved in the killings. This too was relevant in direct response to the defence argument that the evidence did not establish Haevischer was actively involved in the killings.

7. Haevischer's argument against the judge finding him liable for the murders of all six victims boils down to what he says was her alleged failure to articulate an analytical pathway in finding that he acted pursuant to a shared motive to kill as a principal offender; or how he, alternatively, as an aider or abettor, assisted the shooters knowing that the shooters intended to kill the six victims.

8. The judge's analysis and pathway for conviction is clear in her reasons. Her analysis flows from her finding that Haevischer knew of the plan to kill Mr. Lal by the time he arrived at the Balmoral. He arrived there with the other two RS associates with guns to murder Mr. Lal as well as to take the money and drugs located in the suite. The

judge found as a fact that Haevischer accompanied Johnston and Person X into Mr. Lal's suite. She was satisfied that Johnston and Person X would not have enlisted Haevischer's assistance in the venture only to leave him sitting elsewhere in the complex.

9. The judge also relied on the timing of the events and the crime scene evidence to find that Haevischer and his two RS associates jointly and actively participated in the murders, and did so with the requisite intent. She found that: the trio initially took and maintained control of Mr. Lal and the other three individuals who they initially encountered and, a few minutes later, the other two victims; and they commanded the victims to lie face down on the floor in submissive positions in two groups. Threats must have been used to instill fear in order to obtain their compliance. The victims were shot execution style. There were two shooters, one of whom shot the three in one group, the other shooter shot the others. In the interim, the apartment and victims were searched, and money and cell phones were taken. These are all factual findings not contested on the appeal.

10. The judge concluded that it is not plausible to suggest that one of the three RS associates would stand by and do nothing while the victims in the suite were being kept under control, unexpected witnesses were arriving, and the risk of yet other unsuspecting persons stumbling onto the scene remained a significant possibility: *R. v. Haevischer*, 2014 BCSC 1863 ("RJ"), 701. Haevischer had the same interest as the other two in killing all six, not just Mr. Lal: to eliminate witnesses to their crimes.

11. The judge relied on the same factual evidence to ground her alternative finding that the non-shooter (whoever he was) actively assisted the shooters in corralling and confining the victims knowing of the shooters' intentions.

12. This then is the articulable path which led the judge to convict Haevischer of the six murders. These are findings the judge made from her consideration of all the evidence. In the absence of a demonstration of palpable and overriding error, there is no basis for this Court to intervene.

13. Haevischer also raises an alleged legal error. He says that the judge misapprehended the principles articulated in *R. v. Thatcher*, [1987] 1 S.C.R. 652 that 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. As will be explained, there is no merit to this argument as confirmed by a very recent decision of this Court.

Statement of facts

14. The respondent relies on the facts set out in the Agreed Statement of Facts (the "ASF") as augmented in Part III herein.

15. With respect to Haevischer's Statement of Facts, the respondent takes issue with paragraph 6 of appellant's factum ("AF") and its assertion that Person X "conceded that he committed at least three of the killings in issue". This incorrectly suggests there is some uncertainty about whether he actually killed more than three of the six victims. Person X pleaded guilty to three counts of murder. The judge found as a fact that there were two shooters and that each one shot and killed three victims (RJ, 5, 64-65, 685, 698).

PART II – RESPONDENT'S POSITION ON ISSUES ON APPEAL

16. The judge did not commit legal error in her assessment of the circumstantial evidence.

17. The judge did not commit legal error in her application of the principles of party liability.

18. In the alternative, if the judge did commit any or all of the legal errors alleged, the respondent pleads the curative *proviso*, s. 686(1)(b)(iii).

PART III – ARGUMENT

Issue #1 - The judge did not commit legal error in her assessment of the circumstantial evidence

Introduction

19. The judge noted, at the commencement of her comprehensive reasons for judgment, that the Crown's case against the two appellants rested on a body of circumstantial evidence and admissions made by each appellant implicating himself in the murders (RJ, 7).

20. The Crown led three discrete bodies of evidence to prove identity: motive, means and opportunity and the appellants' respective admissions. By the end of the trial, the primary issue was less a question of the identity of the three individuals who attended the Balmoral and more a question of the degree of Haevischer's and Johnston's participation in the murders and their resultant culpability.

21. As with any case dependent upon circumstantial evidence, the inferences drawn from that evidence by the trier of fact, in this case the judge, assume great significance. For his part, Haevischer, in his individual factum, takes issue with three inferences drawn by the judge. The first is that he knew the unlawful objective he, Johnston and Person X set out to achieve, namely, the murder of a drug trade rival, Corey Lal. As he did at trial, Haevischer argues that he was unaware of this objective. The second follows from the first. He argues, as he did at trial, that he lacked the requisite mental state to be found guilty of murder. The third contested inference pertained to his participation in the events that transpired inside Mr. Lal's stash house, apartment 1505 of the Balmoral.

22. Haevischer did not testify or call a defence. His argument at trial, as it is now, was that the judge ought to have drawn inferences different from those she drew, resulting in her having a reasonable doubt about both his status as a co-conspirator to murder and his liability for murder pursuant to s. 21(1) of the *Criminal Code*.

23. In his factum (AF, 24) Haevischer identifies his "basic complaint": the judge committed legal error in her assessment of the circumstantial evidence. At AF, 94, he summarizes the three specific legal errors he alleges. One, the judge wrongly required that "inferences consistent with innocence" be based on proven facts. Two, by relying on evidence of post-offence conduct as probative of his level of culpability, for example, in concluding that he "entered a conspiracy to commit murder rather than some lesser crime". Three, the judge erred "by filling in blanks and bridging gaps in the evidence", again with particular emphasis upon her finding that Haevischer was a co-conspirator to murder.

24. With the judge's inference drawing at issue, for guidance on the proper approach to, and treatment of, circumstantial evidence, one turns to *R. v. Villaroman*, 2016 SCC 33. *Villaroman* is the leading case on the issue decided approximately a year and a half after the judge released her reasons for judgment.

25. *Villaroman* was a Crown appeal from the Alberta Court of Appeal's allowance of a defence appeal from conviction. There were two issues before the Court: one, whether the Court of Appeal erred in finding a legal error in the trial judge's analysis in relation to the circumstantial evidence; and two, whether the guilty verdict was unreasonable. The first of these arguments closely approximates Haevischer's first ground of appeal. He 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.

The essential lessons from *Villaroman*

26. Where the prosecution's case against an accused is based on circumstantial evidence, the trier of fact must be satisfied beyond a reasonable doubt that the only reasonable inference that can be drawn from the circumstantial evidence is the guilt of the accused. Throughout the years, the application of this principle has not been without difficulty. The Supreme Court of Canada sought to clarify the case law in relation to circumstantial evidence: *Villaroman*, at para. 4. This clarification included the following principles germane to the instant case:

- It is "fundamentally for the trier of fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt": *Villaroman*, at para. 56, citing *R. v. Dipnarine*, 2014 ABCA 328, at para. 22;
- Inferences that may be drawn must be considered in light of all of the evidence and the absence of evidence: *Villaroman*, at para. 30;
- Inferences inconsistent with guilt need not arise only from proven facts but they "must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense": *Villaroman*, at paras. 35-36;
- While the trier of fact "should consider 'other plausible theories' and 'other reasonable possibilities' which are inconsistent with guilt", the trier of fact "should not act on alternative interpretations of the circumstances that it considers to be unreasonable; . . . alternative inferences must be reasonable, not just possible" and must not be based on speculation: *Villaroman*, at paras. 37 and 42;
- "[T]he basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty": *Villaroman*, at para. 38;
- On appeal, the question to be asked is "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence": *Villaroman*, at para. 55; and
- Special concerns inherent in the inferential reasoning from circumstantial evidence are 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": *Villaroman*, at para. 26;
    - may jump to unwarranted conclusions: at para. 27; and
    - may "too readily" draw inferences of guilt and "too quickly" overlook reasonable alternative inferences: at para. 30.

Reasons for judgment are to be read as a whole

27. A trial judge's reasons are not to be dissected, or parsed with a scalpel, microscopically examined, analyzed as if they were an instruction to the jury or read as though they are a verbalization of the entire process engaged in by the trial judge in reaching a verdict. Rather, reasons for judgment must be read as a whole, in the context of the trial which includes the evidence in its entirety, the issues and the arguments of counsel: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.) at para. 204; *R. v. C.L.Y.*, 2008 SCC 2, at para. 11; *Villaroman*, at para. 15; *R. v. Camille*, 2020 BCCA 32, at para. 63.

Circumstantial evidence is not to be assessed piecemeal

28. The assessment of an alternative explanation or inference must not engage in a piecemeal evaluation of the evidence while ignoring its cumulative effect. Individual items of evidence are not to be examined separately and in isolation. As this Court has recently stated in *R. v. Duong*, 2019 BCCA 299, at para. 64:

> In reviewing inferences drawn from circumstantial evidence, the evidence must be assessed cumulatively and not in a piecemeal fashion: *R. v. Tahirsylaj*, 2015 BCCA 7, at paras. 29 & 30. Thus, although individual pieces of circumstantial evidence may be "reasonably or rationally explained away", the ultimate question is whether, on the whole of the evidence, the Crown has proven that the accused's guilt is the only reasonable inference: *Tahirsylaj*, at para. 38.

Standard of review

29. A trial judge's findings of fact and the inferences he or she draws from them are accorded considerable deference on appeal, as they must be reviewed on a standard of palpable and overriding error. This standard refers to errors that are "obvious or plainly seen, and which altered or may well have altered the result". Palpable and overriding errors include findings that are unreasonable or unsupported by the evidence: *R. v. Paquette*, 2019 BCCA 396, at para. 23; *R. v. R.S.B.*, 2020 BCCA 33, at para. 10; *R. v. Widdifield*, 2018 BCCA 62, at para. 30. It is the only standard of review applicable to all factual conclusions made by a trial judge: *Housen v. Nikolaisen*, 2002 SCC 33, at para. 25.

30. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal: *Housen*, at para. 24. While it is open to an appellate court to find that an inference of fact is clearly wrong, where there is evidence to support this inference, the appeal court will be hard pressed to find palpable and overriding error: *Housen*, at para. 22.

31. An appeal is not a re-trial and it is not the role of an appellate court to second guess the weight a trial judge assigns to various pieces 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 inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion: *Housen*, at para. 23.

32. This principle recognizes the expertise of trial judges and their advantageous position to make factual conclusions. The advantages the trial judge has over appeal court justices with respect to inference drawing include the trial judge's relative expertise with the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. Extensive exposure to the entire factual nexus of a case is of invaluable assistance in reaching factual conclusions: *Housen*, at para. 25.

33. The respondent notes that Haevischer makes no reference whatsoever to this standard of review in respect of the inferences he impugns in this appeal or to the facts underlying them.

The first alleged *Villaroman* error: The judge's self-instruction concerning the use of circumstantial evidence

34. At AF, 28-38, Haevischer points to RJ, 591 and asserts the judge erroneously instructed herself that inferences can only be based on proven facts, a statement of law he says is at odds with *Villaroman* at para. 35. In respect of the judge's self-instruction (RJ, 588-591), this is the only error he alleges.

35. In RJ, 591, the judge sets out a passage from D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2006) at 95 which states in part:

> If there are no positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture.

36. The mistake Haevischer makes is to assume that Justice Watt was referring to both inferences consistent and inconsistent with guilt. He was not. The excerpt from the text is a general principle not related to inferences consistent with innocence or the specific principle being addressed by Cromwell J. in *Villaroman*. The passage from Watt, properly understood, has not been overtaken or shown to be wrong by *Villaroman*.

The passage continues to be included in later editions of the text, to the present day where it cites *Villaroman* and includes an annotation consistent with Cromwell J.'s point made in para. 35.

37. The judge's use of this passage must be read in context. It is but one aspect of the section of her reasons setting out the law of criminal conspiracy. She is clearly speaking about proof of the Crown's case on the conspiracy count.

38. In *Villaroman* at para. 49, Cromwell J. confirms the importance of context:

> For example, most of the references to the effect that inferences must arise from evidence concern the *Crown's* burden to prove guilt beyond a reasonable doubt. Of course, there is no error in this regard as the Crown cannot rely on a gap in the evidence to prove an element of the offence.[1]

39. It is readily apparent that the judge did not err as alleged. This Court can be certain that there was no misstatement of the law at all let alone one that "taint[ed] her entire 728 paragraph ruling" (AF, 31). The judge did not fail to draw inferences inconsistent with guilt because they were not supported by proven facts. She failed to draw them because they were so resoundingly negatived by the facts as she found them and rendered implausible in the common sense reality of the case (see paras. **53-54** below).

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.

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[1] The appellant himself recognizes the distinction between inferences necessary to prove the Crown's case and inferences inconsistent with guilt at AF, 76: "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."

Haevischer's unfounded musing

41. The respondent agrees that there was no direct evidence that Haevischer "entered the conspiracy to commit murder" or that "he committed any act related to the killings". However, when he muses (at AF, 7) that the exclusion of Person X from testifying results in his having "no way of knowing . . . whether the 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", he is very much mistaken.

42. Haevischer's assertion is wholly without foundation. A trial judge is presumed to know the law: *R. v. R.E.M.*, 2008 SCC 51, at para. 45. In the instant case, this presumption applies in this way. The judge well understood that evidence heard for one purpose in a discrete proceeding and effectively ruled inadmissible at the trial proper is not to be considered when assessing the value and effect of the admissible evidence in order to reach a determination of guilt or innocence. A trial judge can be called upon to disabuse her mind of inadmissible evidence in any number of circumstances without there being any cause for concern about improper influence or prejudice: *R. v. B.H.E.*, [1996] B.C.J. No. 1370 (B.C.C.A.), at paras. 3-4.

The second alleged *Villaroman* error: The judge "bridged the gaps"

43. The respondent departs from the order in which Haevischer has presented his arguments by now turning to the second alleged *Villaroman* error, that is, that the judge filled in blanks and bridged gaps in the evidence in order to conclude, as a matter of fact, that Haevischer became a member of the conspiracy to murder Mr. Lal. This will entail a detailed review of the evidence and the judge's factual conclusions.

(a) Haevischer's membership in the conspiracy to commit murder

44. It was fundamental to Haevischer's defence below, and to his argument in respect of this ground of appeal (AF, 60-93), that the circumstantial case tendered by the Crown failed to prove that he knew the true objective of the conspiracy was to murder Mr. Lal and agreed to act with the others to achieve that objective. As detailed below, through the inferences she drew, the judge rejected the alternative inference as

implausible. Her rejection of this premise was critical. It contributed significantly to the finding that he was an active participant in the six murders, as discussed below under the party liability ground of appeal. Haevischer's alternative view of the case that he never went inside suite 1505 or, if he was he was merely present, became equally implausible.

45. As the judge noted in her reasons, neither Johnston nor Haevischer challenged the existence of some sort of plan against Mr. Lal (RJ, 593). Haevischer's position – he took no part in "conspiratorial discussions" before the date of the offences; he did not know the conspiracy's objective; and that it is speculative that he would have been told the objective by the time he and the others arrived at the Balmoral - is set out at RJ, 594. Pointing out the absence of direct evidence on these material points at AF, 63, 89 & 93, Haevischer contends that the judge erroneously filled the gaps in order to draw the inferences and reach the conclusions she did. Haevischer does not allege that the judge misapprehended the evidence.

46. At AF, 62, Haevischer acknowledges that direct evidence "was not necessary" in order to prove that he was a co-conspirator. Indeed, as the judge instructed herself, conspiracies are rarely proved by direct evidence. In most cases, they are proved by circumstantial evidence. Membership in a conspiracy may be inferred from evidence of conduct that assists the unlawful objective: (RJ, 578, citing *R. v. J.F.*, 2013 SCC 12, at para. 53). Further, the agreement to act together to achieve the unlawful object need not be express. It may be tacit, that is, unspoken or implied. Most importantly, a determination of the adequacy of the Crown's proof of a conspiracy and an accused's membership in it must be made on a consideration of all the evidence, including, but not limited to, what the alleged conspirators have said and done in furtherance of the common purpose (RJ, 582, citing *R. v. Yumnu*, 2010 ONCA 637, at paras. 338-339). It ought not to be made on the piecemeal approach evident in Haevischer's factum, as discussed further below.

47. By the time the judge came to consider the question of Haevischer's membership in the conspiracy (RJ, 623-634), she had already accepted the evidence of Person Y

and Michael Le that a conspiracy to murder Mr. Lal had been hatched by RS leadership in the lead up to October 19th (RJ, 193 and 202). She had also found that Johnston was a member of this conspiracy to murder and not, as his defence counsel argued, a conspiracy to commit robbery only (RJ, 608, 622).

48. In drawing the inference that Haevischer became a member of the conspiracy to murder Mr. Lal before he and his two cohorts stormed into Mr. Lal's suite, the judge looked to Haevischer's actions as a whole, before, during and after the achievement of its unlawful objective, together with some necessary context.

(b) The motive to kill Mr. Lal was a group motive

49. The RS was primarily involved in the illegal drug trade, accustomed to taking over rival drug lines using intimidation and violence (RJ, 169). As tattooed members, both Haevischer and Johnston were significantly involved in RS activities (RJ, 168). Johnston was an enforcer for the co-leaders of the RS (RJ, 170). Haevischer was involved in acts of violence incidental to the drug trade (RJ, 625).

50. In addition to being RS gang members, they were very close friends, "like brothers" (RJ, 158, 168, 626). Johnston was Haevischer's gang mentor, having vouched for Haevischer becoming a member (RJ, 159, 626). RS members were expected to be loyal to the group and its objectives, and to assist one another when called upon[2] (RJ, 127, 169).

51. The leadership of the RS ordered Mr. Lal's murder, in retribution for his non-payment of the $100,000 tax imposed upon him. The motive for the murder was a group motive. Jamie Bacon, one of the two co-leaders, believed that if Mr. Lal was not killed, the RS would look weak. Killing him would most effectively protect the gang's reputation and, by extension, its business interests. Haevischer and other members had a shared interest in protecting the RS's drug trafficking turf (RJ, 588, 589, 625). Michael Le, the other RS co-leader, agreed with the plan to murder Mr. Lal. At his

[2] While the appellant relies on the evidence of Person Y in order to denigrate the notion of loyalty amongst gangsters (AF, 11-12), he says nothing about the understanding that calls for assistance will not go unheeded.

instigation, the plan evolved to include, as a secondary objective, the taking of the drugs and money found in Mr. Lal's stash house in suite 1505 at the Balmoral (RJ, 77, 172, 205).

(c) Haevischer's preparations at the Stanley

52. On the date of the murders, after attending a meeting of some of the co-conspirators at a Korean restaurant in Surrey which served as a staging ground, Johnston and Person X proceeded to the Stanley where Haevischer lived with his girlfriend, K.M. There, using Windex and paper towel, K.M. helped the other two RS associates clean two handguns in a manner designed to ensure that they could not be traced to their users (RJ, 300-301, 628). As this was occurring, Haevischer was getting dressed in the same attire as his cohorts – hoodie and jeans (RJ, 298). Of note, the judge found it implausible that Haevischer was unaware that K.M. was helping Johnston and Person X clean guns in the living room of his apartment (RJ, 299). To the contrary, she found that he was aware the guns were being cleaned "for imminent use". By the time he left the Stanley, on the judge's findings:

(i) Haevischer knew he had been enlisted to assist his RS associates in a plan involving the use of cleaned and loaded guns in circumstances requiring that they shield their identities with hoodies and any traces of themselves with gloves;
(ii) he knew that he had been enlisted to commit a crime involving violence; and
(iii) by his conduct, it was apparent that he had agreed to his enlistment for a venture of this sort (RJ, 302, 628).

(d) The point in time Haevischer became a co-conspirator to murder

53. The judge concluded that by the time they arrived at the Balmoral, and before they barged into suite 1505, Haevischer was a member of the conspiracy knowing that he and his associates were there to murder Mr. Lal (RJ, 635). In reaching this conclusion, the judge asked herself the obvious, common sense question whether Johnston "would enlist his close friend and associate for such a venture without telling him what the venture entailed" (RJ, 630). Effectively, the judge rejected as implausible the notions that Johnston, in asking Haevischer to help, would not have told his close

friend what was in store for the trio and, in the event Johnston did not say so expressly, that Haevischer would not have asked. There would be no reason for Johnston to have enlisted Haevischer's help only to leave him in the dark when the circumstances and location made the venture fraught with a variety of risks and potential dangers. Close friends and professional associates do not treat each other this way. It equally made no sense that Haevischer, no underling of Johnston, would accompany the two others without asking what they were about to do and what dangers he should expect to face once they arrived (RJ, 630-631).

54. Essentially, the judge considered whether inviting Haevischer along for the ride was logical and in accord with common sense and concluded it was not. She expressed her conclusion this way:

> [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.

Evidence assessed cumulatively, not piecemeal

55. In his factum, Haevischer takes a piecemeal approach to the evidence relevant to the inference drawn that he knew of the plan to murder Mr. Lal by the time he arrived at the Balmoral with Johnston and Person X. He says, for example, that:

(i) the shared RS motive to kill Mr. Lal is not proof that Haevischer was told that the plan involved murder;
(ii) his friendship with Johnston is of no help in determining knowledge;
(iii) there is no evidence that Johnston and Person X went to the Stanley to enlist Haevischer's help; and
(iv) there is also no evidence of any discussions in the apartment or in the car *en route* (AF, 64-66, 68, 70).

See also, for example, AF, 9-22.

56. These submissions readily demonstrate why a piecemeal approach is wrong in law. The fact that a piece of circumstantial evidence does not in and of itself prove the fact in issue, e.g., because Johnston and Haevischer had a close relationship does not prove Haevischer's knowledge and agreement and thus his membership in the murder conspiracy, is not a helpful exercise as discussed in para. **46** above. In contrast to Haevischer's piecemeal approach, the judge properly considered as a whole the evidence concerning Haevischer's words and actions before, during and after[3] the achievement of the unlawful object in drawing the inference that Haevischer knew of the plan and agreed to participate in it.

Haevischer's take on what he knew and what he expected

57. At AF, 73, Haevischer offers an alternative view about what his expectations were when he and the others set out from the Stanley. He asserts that "the three men could have been headed off to commit all manner of crimes that involve guns but not necessarily violence". He adds, in the same paragraph, that "acts involving guns, but not necessarily violence, were part of the Red Scorpions business model". In considering whether this inference was reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience, and common sense (*Villaroman*, para. 36), the judge was obliged to consider all the evidence. This broader point of view included the reputation of the RS for using violence and intimidation to advance and expand its drug trafficking business (RJ, 169). The gang's reputation for the use of intimidation and violence was well known (RJ, 598). The group motive ascribed to the murder of Mr. Lal was to the end of advancing both the gang's business and reputational interests (RJ, 193, 598-599). Haevischer himself, as a tattooed member and loyal servant of the gang, "was involved in acts of violence incidental to the drug trade" (RJ, 625). This evidence, viewed cumulatively, starkly demonstrates how the "benign" characterization of Haevischer's knowledge and intention as proffered in his factum fails to accord with logic, human experience and common sense. In other words, it was not a reasonable inference.

[3] The respondent will address the appellant's complaints concerning the appellant's post-offence conduct in paras. **60-74** below.

58. In sum, by alleging that the judge wrongly filled gaps in the evidence to draw the inferences and reach the conclusions she did, Haevischer equates the absence of direct evidence with a "gap" in the evidence. His error is compounded by his piecemeal treatment of the evidence. His argument does not allow that such gaps can be, and in this case were, filled indirectly by the cumulative effect of the entirety of the evidence.

59. The absence of direct evidence, such as the absence of any conversation between Haevischer and Johnston concerning their objective that afternoon, does not detract from the availability of the inference that there was on the totality of the evidence: *Widdifield*, at para. 36. And by referencing aspects of the evidence such as the group motive and the close association between Haevischer and Johnston, the judge was not filling in the gaps. She was carrying out the task the law of circumstantial evidence imposes upon her. That is, she carried out a close analysis of all the evidence and drew inferences she was entitled to draw.

The judge's use of the post-offence conduct evidence

60. Evidence of post-offence, or after-the-fact, conduct is one form of circumstantial evidence which, like all circumstantial evidence, may be subject to competing interpretations to be weighed by the trier of fact. It must not be evaluated on a piecemeal basis. Instead, it must be evaluated in the context of the evidence as a whole.

61. Speaking for the majority in *R. v. White*, 2011 SCC 13, (*White, 2011*), Rothstein J at para. 17 noted that "[i]t has long been accepted that actions taken by an accused person after a crime has been committed can, under certain circumstances, provide circumstantial evidence of their culpability for that crime. Examples of such actions include flight, the destruction of evidence, or the fabrication of lies." The value of such evidence was explained by Weiler J.A. in *R. v. Peavoy* (1997), 34 O.R. (3d) 620 (C.A.), at p. 629:

> Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted in a manner which, based on human experience

> and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person. …

62. Like other forms of circumstantial evidence, an accused's words or actions after-the-fact can admit of a number of inferences, or explanations for why they acted as they did. One is a recognition by the accused that he or she has committed an unlawful (culpable) act. There are many other possible explanations such as panic, embarrassment, and fear of a false accusation. The trier of fact must take alternative explanations for the accused's behaviour into account.

63. As with all other evidence, the relevance and probative value of post-offence conduct must be assessed on a case-by-case basis. The proper legal treatment of this subset of circumstantial evidence is highly context- and fact-specific. (*White, 2011*, at para. 22)

64. The case law, in the main, is often concerned with how juries are to be instructed in this area, not an issue in the instant case. One instance in which the risk of jury error becomes especially acute arises when the accused has admitted to engaging in some form of criminal conduct related to the crime of which he stands accused. In such cases, post-offence conduct that supports an inference that the accused was aware he had committed a culpable act may be of little or no use in determining his level of culpability (*White, 2011*, at para. 25). Despite Haevischer's assertion to the contrary, this is also not an issue in the instant case.

65. At AF, 39-59, Haevischer takes issue with the judge's use of his post-offence conduct. The evidence is as follows:

(i) upon his return to his apartment with Johnston (Person X having remained outside), Haevischer boiled the cell phones taken from the victims before they were shot to death and directed that the phones, together with the clothing he and Johnston had been wearing be destroyed;
(ii) he told his brother on a whiteboard that "people died";
(iii) he told K.M. to pack her things and the two left their apartment, never to return;
(iv) later that evening he told Windsor Nguyen, an RS gang member, by whiteboard that "six people died";

(v) the next day he confirmed for RS associates that items connecting him to the murder scene had been burned; and
(vi) he arranged for the BMW they had used to be cleaned and detailed.

66. Haevischer accepts that this evidence could properly be used to prove a fact put in issue by his defence – whether he was one of the perpetrators inside suite 1505. In other words, given that Haevischer never took the position at trial that he had committed any culpable act, the evidence was admissible to help prove that he had. Haevischer takes exception with the judge using this evidence to prove either the degree of his culpability, that is, murder vs. manslaughter (AF, 46) or his membership in a conspiracy to murder rather than to rob (AF, 56). His position is summarized in this statement at AF, 54: "In the instant case, the post-offence conduct could logically support a finding that [Haevischer] was somehow involved in the events at issue – but it was of no value in determining his level of culpability". (underlining in original)

67. Haevischer misapprehends the use to which the judge actually put this evidence. His misapprehension reinforces the need to read reasons for judgment as a whole and in context.

68. The reasons refer to post-offence conduct in three places. The first is at RJ, 634, at the culmination of the section where the judge concludes Haevischer became a member of the conspiracy to murder Mr. Lal before the trio burst into suite 1505. It was but one aspect of the circumstantial evidence used for this purpose. It is important to note that by this point in her reasons, the judge had already concluded that the conspiracy was one to commit murder and that Johnston was a co-conspirator. The "jacking" of the intended murder victim's stash house was secondary. She had also already found that no other logical or reasonable inference could be drawn but that Haevischer knew the primary objective. The post-offence conduct listed in RJ, 634 is used by the judge to strengthen that inference. Haevischer's examination of this paragraph in isolation from this context gives it an unwarranted significance.

69. Given that Haevischer put his membership in the conspiracy to murder at issue, it is difficult to credit his assertion at AF, 58 that "the judge was simply wrong to rely on 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".[4] (underlining in original)

70. The second reference to the post-offence conduct is found at RJ, 679-680. Post-offence conduct is the sixth "governing legal principle" the judge set out when she turned from the conspiracy count to the six counts of first-degree murder. This reference is accordingly general. It is unobjectionable.

71. The final reference is at RJ, 704. It is the final paragraph in the section of the reasons spanning paras. 681-704 devoted to a determination of Haevischer's culpability for murder, either as a co-perpetrator or an aider or abettor. In this section, before para. 704, the judge had already rejected as implausible Haevischer's contention that he was never inside suite 1505. She had found as a fact that he was. She had found that he and his cohorts were acting with a common purpose to kill Mr. Lal. She had rejected as implausible that one of them would stand by and do nothing while the events unfolded around him. She had found that the three intruders jointly and actively participated in the murders with the requisite intent. She found that there was a shared self-interest in killing the other five victims who were witnesses to the murder of Mr. Lal.

72. Paragraph 704 must be read in this context. The post-offence conduct was not used by the judge to determine the degree of Haevischer's liability. Instead, she treated it as "circumstantial evidence suggesting that Mr. Haevischer was not only present at the crime scene but actively involved in the killings". It had clear probative value responsive to the position and arguments of defence counsel, that is, in "establishing that [he] was a perpetrator in the broadest sense that he was there, or somehow involved in the events" (AF, 46).

73. Its relevance in this respect is not in any way altered by the judge's statement, also in RJ, 704, that "[d]estruction of the clothing suggests that Mr. Haevischer knew it might contain blood or other forensic evidence tying him to the murders". In this context, "murders" is a convenient term of reference to what unquestionably were murders. Haevischer recognizes this himself at AF, 55.

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[4] The respondent presumes that Haevischer meant to state that the judge was wrong to rely on this evidence in finding that he was a member of it. It is equally difficult to credit this statement for the same reason given above.

74. Haevischer's contention that the judge failed to consider alternative explanations for the destruction of his clothing (AF, 52) lacks merit. The explanation that Haevischer did so because they could possibly link him to an event in respect of which he was merely present "when the two other men carried out killings he was not aware were about to happen" is, in light of the judge's findings of fact made on a consideration of the whole of the evidence, no more viable than the explanation that he was just along for the ride.

Conclusions on ground of appeal no. 1 (as framed)

75. A fair reading of the judge's reasons as a whole "does not support [Haevischer's] position that the judge somehow lost sight of the proper process of inference-drawing": *Villaroman*, at para. 53. Haevischer's argument encourages this Court to examine pieces of evidence in isolation and to find that certain inferences should not have been drawn from them. The proper approach is to examine the totality of the evidence. In large measure, his argument reargues his case at trial. He contends that the judge should have drawn inferences other than those she drew. In doing so, he does not point to any palpable and overriding error: *R. v. Vickers*, 2016 BCCA 98, at para. 29.

76. The judge was fully aware of the alternative inferences proffered by the defence. Specifically, she was aware of the defence view that Haevischer was unaware that the plan was to murder Mr. Lal. She clearly and emphatically rejected it.

77. There is no error in the judge's conclusion that there were no other reasonable inferences inconsistent with guilt. It is not open to this Court to conceive of inferences or explanations that are not reasonable possibilities; nor to attempt to revive inferences that the judge reasonably rejected: *R. v. Robinson*, 2017 BCCA 6, affirmed 2017 SCC 52, at para. 38; *R. v. De Aquino*, 2017 BCCA 36, at para. 33; *Duong*, at para. 65. The judge reasonably rejected the defence inferences.

78. It serves no viable appellate purpose to argue over competing inferences that could not be sustained at trial in the face of the entirety of the evidence, and that cannot be sustained now in the face of the reasons for judgment as a whole and the findings of fact they contain. At the end of the day, the judge was not left with a reasonable doubt

on all the evidence about Haevischer's guilt. Put differently, she did not find Haevischer's alternative inferences – that he did not know of the plan to murder Mr. Lal and that he was uninvolved in the murderous actions of his two confederates – to be reasonable. This was her task. In the absence of a demonstration of palpable and overriding error, let alone in the absence of Haevischer even pleading same, there is no basis for this Court to intervene. This ground of appeal should be dismissed.

The verdicts are reasonable and supported by the evidence

79. As was noted above, Haevischer has not provided argument in his factum in support of the ground of appeal alleging that the verdicts rendered against him were unreasonable or unsupported by the evidence. A majority of the cases in which an appellant contends that the trial judge erred by drawing inculpatory inferences from the circumstantial evidence when there were other reasonable inferences inconsistent with his guilt, are unreasonable verdict cases. *Villaroman* itself serves as one such example. Many of the conclusions set out in the immediately preceding paragraphs are equally applicable to and, in many instances are, from unreasonable verdict cases demonstrating the inter-connectedness of the two issues.

80. The words of this Court in *Vickers*, at para. 22, are apposite: "the substance of this appeal is better seen as an argument that the verdict is unreasonable because the evidence left open reasonable inferences that were inconsistent with guilt": see also *R. v. Dipnarine*, 2014 ABCA 328, at para. 2. This is equally true of the instant appeal.

81. In *R. v. Barreira*, 2020 ONCA 218, as Nordheimer JA explained:

> [48] That there are competing explanations for the events does not change the fact that the Crown's theory is a reasonable inference on the evidence. It was up to the jury to decide if they accepted the inference advanced by the Crown as the only reasonable inference to be drawn. It should be noted, on this point, that circumstantial evidence does not have to totally exclude other conceivable inferences. However, those alternative inferences must be reasonable, not just possible: *Villaroman*, at para. 42. . . .
>
> [49] In deciding this issue on appeal, it is not the role of this court to substitute its view of the possible inferences to that reached by the jury. . . .

82. Haevischer, as previously noted, did not testify in his defence. This may be taken into account in assessing the reasonableness of the verdict: *Tahirsylaj*, at para. 40; *R. v. Jir*, 2010 BCCA 497, at para. 39.

83. In *R. v. Bransford*, 2019 BCCA 408 this Court had before it an unreasonable verdict conviction appeal from a case involving circumstantial evidence. Dewitt-Van Oosten JA wrote, at para. 31:

> An appeal from conviction in a circumstantial case that seeks to challenge the inferences drawn (or rejected) by a trial judge attracts a deferential standard of review. It is "fundamentally for the trier of fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt": *Villaroman* at para. 56, citing *Dipnarine* (citation omitted) at para. 22. As a result, the question on appeal is whether the "trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence": *Villaroman* at para. 55, citing *R. v. Yebes* (citation omitted).

84. In the respondent's submission, the answer is an emphatic "yes". This ground of appeal should be dismissed on this basis as well.

Issue #2 - The judge did not err in her application of the principles of party liability

Introduction

85. This part of the factum responds to the following issues raised by Haevischer: that even if he had knowledge of the plan to murder Corey Lal, the Crown did not prove that his intent expanded to killing all six victims; that the judge erred in the application of party liability in relation to co-principals under s. 21(1)(a) by failing to articulate the analytical pathway in finding Haevischer acted pursuant to a shared motive to kill; that the judge similarly erred in the application of party liability under s. 21(1)(b) by failing to explain that Haevischer did something, as the non-shooter, to assist the two shooters knowing that they intended to kill the six victims; and more specifically that the judge misapprehended the principles articulated in *R. v. Thatcher*, [1987] 1 S.C.R. 652.

86. There is no merit to these arguments. The judge set out the governing legal principles and correctly applied them to the factual findings she determined. Haevischer has not alleged that the judge made any palpable and overriding errors in either her factual findings or in the inferences drawn from them. Those findings and inferences are entitled to appellate deference.

87. The judge carefully explained her reasons for finding Haevischer, as well as Johnston, guilty of first degree murder for all six victims. The plan to kill one became a plan to kill six in order to eliminate witnesses. It was considered and deliberate. Proof of their participation in the murders was found in the circumstantial evidence, particularly in the timing of the murders, the crime scene evidence, and the post-offence conduct.

88. The judge further held that the same factual evidence grounds her finding in the alternative that the non-shooter (whoever he was) actively assisted the shooters in corralling and confining the victims knowing of the shooters' intentions. Whether Haevischer was one of the shooters or an aider or abettor, the judge correctly applied the *Thatcher* principal that the law is indifferent whether an 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.

The structure used by the judge to analyse the charges

89. The judge began her analysis of the charges by first addressing count 7, the charge of conspiracy to murder Corey Lal (RJ, 568). As already stated, the judge found Haevischer's membership in the conspiracy to kill Mr. Lal to have been proven beyond a reasonable doubt (RJ, 635; ASF, 115).

90. Thereafter, the judge turned to the murder charges in counts 1 through 6. She began by setting out the governing legal principles including the requirements of s. 231(2) and s. 231(5)(e) elevating murder to first degree, followed by the party liability provisions of s. 21(1).

91. Haevischer accepts the legal principles as stated by the judge regarding s. 231, but, as stated, takes issue with her analysis of *Thatcher*.

Evidence which supports the judge's finding that Haevischer had the *mens rea* for the six counts of murder

92. The judge provided a detailed analysis for the basis upon which she concluded that Haevischer was an active participant in the six murders.

93. At trial, Haevischer raised two alternative inferences. He argued there was no evidence placing him at the crime scene and as such it was reasonable to infer that he went elsewhere in the building other than proceeding to suite 1505 with his RS associates. He also argued that it was plausible that one of the three RS members would stand by and do nothing while the victims in the suite were being kept under control. For the reasons detailed below, the judge rejected these alternative inferences as implausible and was satisfied beyond a reasonable doubt that Haevischer was actively involved in the six murders as a co-principal or, in the alternative, as an aider or abettor. (RJ, 639, 686, 701, 705)

94. Haevischer has not established that the judge erred in her factual conclusions. As evident by the judge's reasons, the only reasonable inference was that Haevischer

actively participated in the murders. He arrived at the Balmoral with his two fellow RS gang members armed with two guns in order to murder Mr. Lal on behalf of the RS. The three would have been prepared for the worst and they encountered the worst: four people as opposed to one with two more soon to arrive. They had no choice but to keep the six victims under control by having them lay on the floor in a defenseless position and must have used threats and instilled fear in order to obtain their compliance. The only reason to kill the other five was to eliminate witnesses.

95. This was a three person job. There were two shooters, a finding not challenged on appeal. It defies common sense 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.

(a) Haevischer accompanied Johnston and Person X into Mr. Lal's suite

96. The judge rejected Haevischer's argument that he did not enter suite 1505 with his two fellow RS gang members. She concluded for two reasons that Haevischer accompanied Johnston and Person X into Mr. Lal's suite. First, Johnston and Person X would not have enlisted Haevischer's assistance in the venture only to leave him sitting elsewhere in the complex given that:

(i) Haevischer's assistance in the venture must have been enlisted for a reason;
(ii) he dressed in the same manner as the other two and arrived at the Balmoral wearing gloves;
(iii) the plan to invade the stash house of a rival drug dealer, located in a large residential apartment complex, was fraught with risk; and
(iv) they did not know what they would find inside the suite or in its proximity. (RJ, 687)

97. Second, upon his return to the Stanley, Haevischer instructed his brother to destroy the clothing he had worn to the Balmoral. The judge inferred from his conduct that he believed his clothing may contain traces of evidence tying him to the crime scene. (RJ, 687-689)

(b) Haevischer, together with Johnston and Person X, were members of a conspiracy to murder Mr. Lal

98. As already stated, the judge was satisfied that Haevischer and his other two RS gang cohorts were members of a conspiracy to murder Mr. Lal, and that their common purpose was to gain access to suite 1505 and kill Mr. Lal. As the judge so aptly pointed out, they achieved that purpose (RJ, 690).

(c) The timing of events and the crime scene establish that Haevischer participated in the murders with the necessary intent

99. The timing of events and the crime scene provided significant evidence from which the judge concluded that Haevischer, together with Johnston and Person X, jointly and actively participated in the murders, and did so with the necessary intent.[5]

100. The significant times and events are:

- Haevischer, Johnston and Person X encountered 4 people, including the object of the conspiracy Mr. Lal, and Mr. Schellenberg who was present to service the fireplace, when they entered Mr. Lal's suite at 2:30 p.m.;
- The fifth person Christopher Mohan, the young man who lived with his family across the hall from suite 1505, was brought into the suite thereafter and the sixth person Edward Narong arrived at approximately 2:40 p.m.;
- The murders occurred within minutes of Mr. Narong's entry; and
- Haevischer, Johnston and Person X departed the Balmoral parkade in a hurry at approximately 2:47 p.m. (RJ 399, 691-692)

101. Haevischer does not contest these findings on appeal.

102. The judge found as a fact when Haevischer, Johnston and Person X arrived at the suite at 2:30 p.m., they took and maintained control of Mr. Lal and the other three individuals and must have done so for the 10-minute interval between their entrance to the suite and the arrival of Mr. Narong. (RJ, 693) The judge based this finding on the

[5] The evidence of the timing of events is detailed in RJ 399, 691-692 and the crime scene evidence is detailed in RJ 25-77

crime scene evidence which established that:

(i) the victims had been separated into two groups; and
(ii) they were in submissive positions prior to their deaths: face down with their arms by or above their heads.

103. From this, the judge inferred that the six victims had been commanded by the perpetrators to assume these positions. (RJ, 74)

104. The judge further concluded from the crime scene evidence that the shootings of the six victims occurred at essentially the same time given that:

(i) Mr. Narong's body lay between Mr. Schellenberg and Mr. Lal in front of the fireplace; and
(ii) each of the three was shot by the same gun. The judge found that in these circumstances it is reasonable to infer they were shot in rapid succession (RJ, 694).

105. The judge also concluded from the crime scene evidence that there were two shooters and it is reasonably likely that Person X was one of the shooters (RJ, 685). One person shot Mr. Mohan, Michael Lal and Mr. Bartolomeo. The second shooter shot Corey Lal, Mr. Narong and Mr. Schellenberg (RJ, 64). The victims were shot to death in execution-style killings (RJ, 72, 633, 685).

106. The judge explained why the only reasonable inference was that the non-shooter actively participated in the confinement of the six victims and their subsequent murders:

> [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 unanticipated 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 defenseless positions.
>
> [697] At some point before they were killed, items of clothing were placed over the heads of the victims by the fireplace. The expert forensic evidence indicates that the shots that killed the six deceased were administered carefully and with precision, finding their target with at least 16 of the 19 shots fired. The deaths were deliberate executions performed while the victims were lying defenseless.
>
> [698] One of the two shooters shot the group of victims by the fireplace, the other shot the group of victims by the computer desk at the other end of the room. The forensic evidence indicates that both shooters were in close proximity to their victims at the time they fired their guns.
>
> [699] Some of the victims' pockets were searched; all who had cell phones had them seized. The apartment was searched, and cash was taken. In light of the massive amounts of blood and yet the absence of any bloody footprints or other traces of blood in the apartment except that pooling under the victims, it is apparent that both the search of the victims and of the apartment took place while the victims were still alive and under the control of the intruders.

The judge fully explained how she found Haevischer to have the *mens rea* for murder under s. 21(1)(a)

107. Haevischer does not point to a specific error in the judge's reasons but for the *Thatcher* alleged error discussed below. Instead, he argues that the judge's analysis fails to explain how a finding of his intent to kill one person expanded to an intent to kill six and that this absence of explanation represents an error in the application of the principles of party liability in relation to co-principals under s. 21(1)(a). (AF, 116) He is wrong.

108. It is abundantly clear the judge was cognizant of the requirement under s. 21(1)(a) for the Crown to prove by direct or circumstantial evidence that Haevischer, as

well as Johnston, acting in concert with Person X, each actively participated in the *actus reus* of the killings with the requisite *mens rea* for murder (RJ, 667, 672).

109. Beginning at para. 691, the judge addressed the situation facing the intruders when they first entered suite 1505. She made factual findings followed by inferences which could be drawn from the evidence. Haevischer has not pointed to any palpable or overriding errors on the part of the judge. As such, the judge's findings are owed appellate deference.

110. Based on the totality of the evidence, the judge concluded that the four individuals present in the suite would have been under the control of Haevischer, Johnston and Person X for 10 minutes before the arrival of Mr. Narong. They together with Mr. Mohan were placed in submissive positions and shot execution style. In the interim, the apartment and victims were searched and money and cell phones were taken.

111. In light of the intense and fluid dynamic unfolding in suite 1505 in that time period, the judge concluded:

> [701] … It is not plausible to suggest (as do both accused) that one of the three RS associates could – or would – stand by and do nothing while the victims in the suite were being kept under control, unexpected witnesses were arriving, and the risk of yet other unsuspecting persons stumbling onto the scene remained a significant possibility.
>
> [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.

112. The judge found further evidence that Haevischer was not only present at the crime scene but actively involved in the killings by his post-offence conduct (see RJ, 704 and paras. **60-74** above for discussion on the post-offence conduct issue). He immediately arranged for the destruction of the clothing he had been wearing which was suggestive of his knowing that it might contain blood or other forensic evidence which could link him to the murders. The judge found: "[i]t is a reasonable inference that Mr.

Haevischer arranged the destruction of the evidence to eliminate his detection as one of the perpetrators:" (RJ, 704).

113. Haevischer argues that to this point in her ruling, the analysis regarding their joint participation failed to demonstrate that he had the specific intent to support murder convictions for the other five victims or that the intent to kill Mr. Lal had survived the change in circumstances (AF, 113, 116). Haevischer seems to suggest that while the three men may have entered 1505 with the intent to kill one, the fact that they killed the one intended plus five others cannot be used as evidence to support the original intent. The respondent disagrees.

114. The judge explained in detail her reasons for finding that the three men were acting in concert guided by a group motive to achieve the goals of the RS. Haevischer, Johnston and Person X intended to kill Mr. Lal in furtherance of those goals. They had the same self-interest in killing the other five victims to eliminate witnesses (RJ, 703). They displayed the same self-interest in eliminating other evidence which could tie them to the murders: destroying the victims' cell phones, burning the clothing they had been wearing and arranging for the car used to be thoroughly detailed.

115. Haevischer also fails to consider the analysis undertaken by the judge when considering whether his culpability is elevated to first degree murder pursuant to s. 231(2). As the judge recognized, much of the evidence relevant to the issue of the liability of Haevischer and Johnston as co-perpetrators also has a bearing on whether the murders are first degree under either s. 231(2) or s. 231(5)(e) (RJ, 682, 713, 724).

116. In her analysis of "planning and deliberation" and whether first degree murder had been made out under s. 231(2), the judge explained how she concluded that each had the necessary specific intent. Once inside suite 1505, the perpetrators "were immediately faced with a stark choice: either abandon the plan to kill Mr. Lal or proceed with the plan and deal with the other three persons who would become eyewitnesses to the killing" (RJ, 712).

117. Haevischer argues that the crime scene evidence (save for the actual killings) is as consistent with a plan to rob as opposed to a plan to kill (AF, 115). The judge specifically addresses this at RJ, 714-716:

> [714] None of the victims was a physical threat to the perpetrators; all six were lying defenceless on the floor. Once the victims were in submissive positions, the perpetrators could easily have left the suite without killing them. They decided against that option. Instead, they shot each of the victims. The crime scene evidence indicates that the shootings were calculated and deliberate executions, carried out after real consideration, not the random or scattered shots of a panicked shooter reacting impulsively to an unexpected situation.
>
> [715] The inescapable inference is that the other five persons in the suite were killed because they could identify the killers of Mr. Lal.
>
> [716] The decision was one based on necessity and self-preservation, taken in order to achieve the original plan – one conceived with thought and deliberation – of killing Mr. Lal. The decision to kill all six was not the original plan, but it became the plan. The perpetrators made a decision, with time to assess their situation, to proceed with the plan to kill Mr. Lal, and to execute the other five people in the suite to avoid getting caught.

118. Having found that the three men were acting in concert pursuant to s. 21(1)(a) means that there is no requirement to attribute specific acts to each of the perpetrators; they are all liable as co-principals, even though the extent to the individual participation is unknown: *R. v. Suzack*, [2000] O.J. No.100 (Ont. C.A.), at para. 152; *R. v. Wood*, [1989] O.J. No. 1162 (Ont. C.A.), at p. 13; *R. v. Rojas*, 2006 BCCA 193, at para. 49, citing *R. v. Sparrow* (1979), 51 C.C.C.(2d) 443 at p. 457-458.

119. In support of his argument, Haevischer relies on RJ at paras. 695-696, as an acknowledgment that it was unexpected that others would be in the suite which reflected a limitation of the theory advanced by the Crown.

120. This is both a misapprehension of the judge's reasons and the Crown theory. In finding that Johnston informed Haevischer of the plan to kill Mr. Lal, the judge articulated the dangers which could be anticipated when invading apartment 1505. At RJ, 629, she wrote:

> [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.

121. In RJ, 695, cited by Haevischer, he has emphasized and underlined the word unexpected but ignored the context in which the statement was made. The judge clearly stated, "[t]he three intruders must have been aware of the ongoing risk that others might arrive unexpectedly and would also have to be dealt with". In other words, it wasn't unexpected at all; rather, it was a contingency which had been contemplated and allowed for. This was the reason for enlisting Haevischer's assistance (RJ, 630).

122. The Crown's theory was that up until their arrival at apartment 1505, there was only an intent to kill Mr. Lal. The presence of others caused that to change. Witnesses had to be eliminated. The crime scene evidence which demonstrated that the victims were confined for a period of time, forced to adopt defenceless positions and shot execution style in a deliberate and controlled manner proved the existence of a plan to kill all of the persons inside suite 1505. The post-offence conduct engaged in by Haevischer was circumstantial evidence suggesting that Haevischer was not only present at the crime scene but actively involved in the killings (RJ, 704, see paras. **68 - 72** above).

The judge explained how liability attached as an aider or abettor

123. Haevischer argues that the judge's analysis of his liability as an aider or abettor under s. 21(1)(b) or (c) suffers from the same flaw as the analysis of his liability as a co-principal (AF, 123). Again, he does not identify any error of law or argue that the judge made palpable or overriding errors; rather, he argues that the analysis is deficient in explaining how he had the necessary intent.

124. The judge explained that the same factual matrix grounds her finding of liability for the non-shooter (whoever he was) as an aider or abettor (RJ, 707). As set out

above, a plan – the "stark choice" – was made to kill all of the victims once inside suite 1505. It is not plausible that the non-shooter simply stood by and did nothing (RJ, 701). The only plausible explanation, inferred from all of the evidence, is that the three men, acting in concert, were co-principals or the non-shooter assisted by corralling and confining the victims.

125. Haevischer further argues that it is not enough to show that he did something which had the effect of assisting the shooters; the Crown had to prove that he did so knowing that they intended to shoot the victims. In the circumstances of this case, it is reasonable to infer that when the victims are lined up in prone positions such that they can be shot execution style in the back of their heads, the person assisting is well aware of what is about to happen.

126. In a decision relied upon by Haevischer, *R. v. Podolski*, 2018 BCCA 96, this Court approved of the judge's instruction to the jury that they could rely on the common sense inference – that a sane and sober person intends the natural and probable consequences of his voluntary actions – to find that the conduct of an accused would naturally have had the effect of aiding and abetting the principal offender and that the accused therefore knew and intended that his conduct would aid or abet the principal offender (para. 237). The Court further held:

> [258] If the jurors accepted some or all of the evidence, it would have been open to them to find the requisite murderous intent was proved. In this regard, we note that direct evidence is not required to establish intent; indeed, it is rarely available. As a result, the "common sense inference" is a standard jury instruction on the element of intent in most jury charges. Absent evidence to the contrary, intent may be inferred from an accused's conduct by an application of the common sense inference: *R. v. Oluwa* (1996), 107 C.C.C.(3d) 236, at paras. 87-88 (B.C.C.A.)

127. The judge did not err in finding Haevischer equally culpable as an aider or abettor pursuant to s. 21(1)(b) or (c).

The judge made no error in her analysis of *Thatcher*

128. In his factum, Haevischer argues that the judge erred at RJ, 664 in relying on *Thatcher* for the principle that "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" (AF, 97). [emphasis added]. It is Haevischer's contention that the focus in *Thatcher* was on jury unanimity and by substituting the word "court", the judge erred in her interpretation of the *ratio* of that decision.

129. This very issue was recently considered by this Court in *Russell*. Newbury J.A. addressed this argument at paras. 57-58:

> [57] The appellants say the trial judge erred in adopting the principle expressed in *R. v. Haevischer* to the effect that "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." (At para. 664, citing *R. v. Thatcher [1987] 1 S.C.R. 652* at 694.) Counsel contends that the issue addressed in *Thatcher* was jury unanimity. The Supreme Court of Canada decided that it was open to a *jury* to be divided as to whether an accused committed the crime personally or aided another in committing it. In the appellants' submission, however, the same rule does not apply in a trial before a judge alone.
>
> [58] Counsel say this distinction is significant in a judge-alone trial because the judge has an obligation to deliver reasons which "justify and explain the result ... and enhance meaningful appellate review". (See *R. v. Sheppard 2002 SCC 26* at paras. 24-5.) With respect, I do not read *Thatcher* as being limited to jury trials. To the contrary, I read Chief Justice Dickson's comments at 694 as establishing a more general principle:
>
> > ... 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] (*sic)* 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 each and every juror 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.

> This principle 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.

130. The respondent submits that the principle articulated in *Thatcher* is that where there is evidence that a crime was committed by two or more persons acting in concert, it is open to the trier of fact, whether that be a judge or jury, to convict the accused as a principal or as an aider or abettor pursuant to s. 21 of the *Code*. As stated by Dickson C.J. at para. 72, "[t]he law stipulates that both forms of participation are not only equally culpable, but should be treated as one single mode of incurring criminal liability".

131. In *Suzack*, cited by the judge, Doherty J.A., wrote at para. 152:

> It is beyond question that where two persons, each with the requisite intent, act in concert in the commission of a crime, they are both guilty of that crime. Their liability may fall under one or more of the provisions of s. 21(1) of the Criminal Code: *R. v. Sparrow,* (1979), 51 C.C.C. (2d) 443 at 457-58 (Ont. C.A.).

132. The judge did not misinterpret *Thatcher* or misapprehend the principle of law stated therein. She correctly stated the law and correctly applied it to find each appellant guilty either as a co-principal or as an aider or abettor even though the extent of the individual participation of each is unclear.

Issue #3 - The curative *proviso* applies if the judge committed any of the legal errors alleged

133. In the alternative, should this Court find that the judge erred in law in connection with her treatment of the circumstantial evidence and inference drawing process, her use of the post-offence conduct or her application of the law of party liability, the respondent pleads s. 686(1)(b)(iii) and asks this Court to dismiss this appeal on the basis of there being no substantial wrong or miscarriage of justice.

134. The curative *proviso* has two prongs: minor error and overwhelming case: *R. v. Sekhon,* 2014 SCC 15, at para. 53. The respondent relies on the second prong. The case against Haevischer, largely circumstantial though it was, became overwhelming. His conviction was inevitable.

PART IV – NATURE OF ORDER SOUGHT

135. The respondent submits that this Court ought to dismiss grounds one, two, three, six, ten, 11, 12, 13 and 14 of Haevischer's amended notice of appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Mark K. Levitz, Q.C.
Counsel for the Respondent

July 30, 2020
Vancouver, B.C.

PART V – LIST OF AUTHORITIES

	Paragraphs(s)
Housen v. Nikolaisen, 2002 SCC 33	29-32
R. v. De Aquino, 2017 BCCA 36	77
R. v. Barreira, 2020 ONCA 218	81
R. v. B.H.E., [1996] B.C.J. No. 1370 (B.C.C.A.)	42
R. v. Bransford, 2019 BCCA 408	83
R. v. Camille, 2020 BCCA 32	27
R. v. C.L.Y., 2008 SCC 2	27
R. v. Dipnarine, 2014 ABCA 328	26, 80
R. v. Duong, 2019 BCCA 299	28, 77
R. v. J.F., 2013 SCC 12	46
R. v. J.F.D., 2005 BCCA 202	129
R. v. Jir, 2010 BCCA 497	82
R. v. Morrissey (1995), 97 C.C.C. (3d) 193 (Ont. C.A.)	27
R. v. Paquette, 2019 BCCA 396	29
R. v. Peavoy (1997), 34 O.R. (3d) 620 (C.A.)	61
R. v. Podolski, 2018 BCCA 96	126
R. v. R.E.M., 2008 SCC 51	42,
R. v. Robinson, 2017 BCCA 6, aff'd 2017 SCC 52	77
R. v. Rojas, 2006 BCCA 193	118
R. v. R.S.B., 2020 BCCA 33	29
R. v. Sekhon, 2014 SCC 15	134
R. v. Sparrow (1979), 51 C.C.C.(2d) 443	118, 131
R. v. Suzack, [2000] O.J. No.100 (Ont. C.A.)	118, 131
R. v. Russell, 2020 BCCA 108 (indexed as *R. v. Dingwall*)	40, 129
R. v. Tahirsylaj, 2015 BCCA 7	28, 82
R. v. Thatcher, [1987] 1 S.C.R. 652	13, 85, 91, 107, 129, 130
R. v. Vickers, 2016 BCCA 98	75, 80
R. v. Villaroman, 2016 SCC 33.	24-27, 36, 38, 43, 57, 75, 79, 81
R. v. White, 2011 SCC 13	61, 63, 64
R. v. Widdifield, 2018 BCCA 62	29, 59
R. v. Wood, [1989] O.J. No. 1162 (Ont. C.A.)	118
R. v. Yumnu, 2010 ONCA 637	46

RULINGS	
R. v. Haevischer, 2014 BCSC 1863	10, 19, 34, 35, 45- 47,49-53, 57, 68, 70, 71, 73, 89, 93, 96- 98, 100, 102- 106, 108, 109, 111, 112, 114-117, 119-122, 124, 128