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COURT OF APPEAL
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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. CA042488

BETWEEN:

REGINA

v.

AND:

MATTHEW JAMES JOHNSTON

Respondent's factum #4
Responding to Johnston's factum on the issues of drawing inferences and the scope of exclusion

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This factum is in response to the appellant Johnston's individual factum raising two issues. First, he says that the judge erred in preferring inferences sought by the Crown over competing inferences. Second, he says that the first alleged error was compounded by the judge's failure to engage his counsel in a discussion about the scope of the exclusion of Person X's evidence, which is an expansion of the alleged s. 650 error advanced by both appellants in their joint factum #1.

2. With respect to the first issue, Johnston, like Haevischer, is re-arguing his case at trial before this Court. He continues to advance the alternative view that he was aware of a plan only to rob Corey Lal, not to murder him (AF, 10). He contends that his supposed lack of "aware[ness] of all the details of 'the plan'" (AF, 11), combined with him not being present inside the apartment at the time the shootings occurred (AF, 11) resulted in the Crown's case falling short of establishing that he was a co-conspirator to murder and absolves him of criminal liability in respect of all six murders.

3. The judge was well aware of this view of the case (see *R. v. Haevischer*, 2014 BCSC 1863 ("RJ"), at paras. 595 and 617 in respect of the conspiracy count and RJ, 640 in respect of the six murder counts). She was well aware of her obligation as the trier of fact, when assessing the circumstantial evidence, to consider any alternative inference put forward by the defence (RJ, 589). She did consider them. She also considered the evidence in its entirety, and assessed whether the circumstantial evidence, viewed logically and in light of human experience, was reasonably capable of supporting an inference other than Johnston's guilt. She found that it was not.

4. As will be outlined below, the findings of fact made and inferences of fact drawn by the judge, not alleged to be plainly and materially wrong, could not be more at odds with this defence view of the case. She found Johnston to be not only a member of the conspiracy to murder Mr. Lal (the review of the material evidence at RJ, 609-621 and the conclusion stated at RJ, 622), but a "key participant" in it on the day the murders were committed (RJ, 627). In addition, she found him liable for the six counts of first

degree murder – Mr. Lal and the five other victims who were potential witnesses to that murder – given his active participation with the requisite intent (summarized at RJ, 705-708, 717 and 727) either as a co-perpetrator who actually committed the murders jointly with his RS associates or, in the alternative, as an aider or abettor.

5. Johnston contends that the judge ought to have drawn other inferences than she did given some of the words he used during his intercepted conversations with Person Y. He submits that his statements – "I don't know the plan" (or words to that effect) and "I wasn't inside man" – amount to "contradictory evidence" with which the judge "failed to grapple" and "adequately consider" (AF, 11).

6. Stated simply, these statements are only contradictory if the judge credited them. She was entitled to accept all, some or none of Johnston's explanations. She would determine how much, if at all, she accepted them based on her assessment of the evidence as a whole, not within the strict confines of the intercepted conversations considered in isolation. In light of her findings of fact inculpating Johnston so thoroughly, it is necessarily implicit that she rejected the explanations on which Johnston wholly relies. Inferences inconsistent with guilt need not necessarily be based on proven facts but they cannot be based on evidence the trier of fact has rejected and that are completely at odds with the unchallenged factual findings she made.

7. The competing inferences at the heart of this ground of appeal are not as "strong", let alone "of equal strength" (AF, 3), as the inferences actually drawn. They are, given the evidence as a whole, unreasonable.

8. Johnston's argument on his second issue similarly fails in light of the evidence as a whole. Johnston contends that there was a detrimental impact on his fair trial rights where the judge did not engage him in a discussion about whether any use could be made of Person X's statement that Johnston left suite 1505 prior to the shootings (AF, 30). However, the judge's finding that Johnston was in the room at the exact moment of the shootings was not central to his guilt; her finding of active participation in the suite with the requisite intent and knowledge was central.

9. There was no detrimental impact on Johnston from the ruling that the Crown

could not call Person X as a witness. Person X's statement to police to the effect that Johnston was not in suite 1505 at the exact moment of the shooting – after pulling inside potential witnesses, ensuring they were under control at gunpoint, telling the shooters to "do it", and having left to call the elevator to aid in their escape – overwhelmingly inculpated him in the six murders.

Facts

10. The respondent relies on the contents of the Agreed Statement of Facts, as augmented in Part III herein.

11. The respondent does not agree that the case against Johnston "was entirely circumstantial" (AF, 2). The admissions he made to Person Y in the early evening hours of the day of the murders, and his two intercepted conversations with Person Y in 2008 (see respondent's factum #1 at paras. **91-98**) constituted admissible direct evidence.

12. The respondent also disagrees with the assertion that the contested inferences that Johnston was inside suite 1505 at the time the shootings occurred (AF, 5) and that he "was aware the plan involved the shooting of someone" (AF, 6, quoting from RJ, 459) were drawn by the judge solely from Person Y's evidence regarding the two intercepts.

13. As his counsel did at trial, Johnston highlights a conflict between two possible interpretations of the hand gestures he made during an intercepted conversation with Person Y. Johnston favours an interpretation that he was indicating that the guns were pointed downwards. Person Y interpreted them to mean that the guns were "shooting downward" (AF, 6; respondent's factum #1 at para. 96). The judge resolved this conflict at RJ, 461: "the gesture Person Y demonstrated in the witness stand was clearly that of a person cocking and firing a gun in a downward direction, not someone using a spray

bottle".[1] (emphasis added)

14. Johnston did not testify or call a defence at trial.

PART II – RESPONDENT'S POSITION ON ISSUES ON APPEAL

15. The judge did not err in drawing the contested inferences.

16. The judge did not err by not addressing the scope of the exclusion of Person X's evidence.

17. To the extent Johnston is alleging legal error, if necessary, the respondent will rely on the curative proviso, s. 686(1)(b)(iii). The prosecution's case against him was overwhelming. There was no substantial wrong or miscarriage of justice.

PART III – ARGUMENT

Issue #1 – The judge did not err in drawing the inferences that Johnston was aware of the plan to murder Corey Lal and actively participated in the six murders

The law re: circumstantial evidence and other applicable general legal principles

18. The respondent adopts its statement of general legal principles and "lessons learned" from *R. v. Villaroman*, 2016 SCC 33, from its factum responding to the individual factum filed by Haevischer who also challenges the inferences drawn, and rejected, by the judge.

The basis on which Johnston is seeking this court's intervention is unclear

19. Johnston fails to specify the nature of the error he attributes to the judge in drawing the two contested inferences: namely, that he was aware of the plan to murder Corey Lal and that he was inside suite 1505 at the Balmoral at the time the shootings occurred.

20. Johnston has not alleged that the guilty verdicts are unreasonable or unsupported by the evidence, either in the conventional *Yebes/Biniaris* sense or in the

[1] At trial, the defence favoured an inference, rejected by the judge, that Johnston was demonstrating how the guns had been cleaned at Haevischer's apartment using Windex (see RJ, 461). On appeal, this inference has been modified to reflect the mere downward pointing of guns and not the firing of guns.

Beaudry sense.[2] He has not alleged that the trial judge misapprehended the evidence. He has not alleged that the trial judge misunderstood the test for assessing circumstantial evidence, including the obligation to consider non-speculative innocent inferences advocated by the defence as arising either from the evidence or the absence of evidence.

21. If Johnston is alleging legal error akin to that found by the Alberta Court of Appeal in *Villaroman* – that the judge erred in law in her analysis in relation to the circumstantial evidence – the respondent submits that she did not so err.

22. If Johnston is alleging that the judge erred in fact in drawing these inferences, he has not alleged that either the underlying facts or the contested inferences themselves are unsupported by the evidence and thereby palpably and overridingly wrong. The respondent submits that the judge did not commit any reviewable error of fact.

23. In essence, this ground of appeal boils down to a disagreement with the judge over two specific inferences she drew. Unfortunately for Johnston, his approach on appeal is flawed. By concentrating so exclusively on his own intercepted spoken words to Person Y as the foundation for the inferences he continues to favour, he adopts a piecemeal examination of the circumstantial evidence, contrary to law: *R. v. Vickers*, 2016 BCCA 98, at para. 29; *R. v. Bransford*, 2019 BCCA 408, at para. 56. In addition, as previously stated, he wrongly premises the inferences inconsistent with guilt on evidence the trial judge implicitly, but necessarily, rejected in making her findings of fact.

24. Finally, in law, given the judge's other factual findings, whether Johnston was inside suite 1505 at the precise moment the six victims were shot to death, or whether, as he contends, an equally reasonable inference was that after having seen the six victims confined at gunpoint, defenceless on the living room floor, he then left and was not inside when the murders actually occurred (AF, 21-23), is immaterial to his liability

[2] In *R. v. Bransford*, 2019 BCCA 408, at para. 32, Dewitt-Van Oosten JA wrote: "There is a second path to intervention under s. 686(1)(a)(i), known as a "*Beaudry* error". In judge-alone trials, a verdict in a circumstantial case may also be found unreasonable after scrutiny of the "logic of the judge's *findings of fact or inferences drawn from the evidence admitted at trial*": *Sinclair* at paras. 4, 15, and 45 (italics in original)."

for the murder of Mr. Lal or of the five other victims either as a co-perpetrator or as an aider or abettor.

25. The submission that Johnston knew only of a plan to rob, not murder, Mr. Lal featured prominently at trial. It was the centrepiece of Johnston's defence to all charges. Appellate deference is owed to the judge's rejection of the competing inference the defence favours. It was fundamentally within her purview as the trier of fact to make this very determination upon a consideration of the evidence in its entirety and not simply upon the two intercepted conversations. It is not the function of this Court to substitute its view of the evidence for that of the trier of fact or to revive an exculpatory inference that the trier of fact reasonably rejected: *R. v. Robinson*, 2017 BCCA 6, at para. 38; *R. v. De Aquino*, 2017 BCCA 36, at para. 33; *R. v. Nguyen*, 2020 BCCA 166, at paras. 23-24. Yet, this is precisely what Johnston is asking this Court to do.

26. Johnston's piecemeal approach to the evidence is unsound. Not only does it ignore all the other evidence implicating him, it ignores the first of Johnston 's conversations with Person Y. In respect of the contested inferences, Johnston ignores the obvious context of the March 23rd intercept – Person Y, known by Johnston to be a co-conspirator, was asking Johnston about the murders, even making reference to his initial intent to "murk" Mr. Lal himself.[3] He was not asking Johnston about a robbery. In this context, Johnston's failure to assert his "innocence" defies common sense.

The judge reasonably rejected the inference that Johnston knew only of a plan to rob Corey Lal

27. Person Y testified that at a regular RS dinner meeting at a hot pot restaurant some weeks before the murders, as a consequence of Mr. Lal's failure to pay the tax imposed by the deadline, Jamie Bacon wanted Mr. Lal killed. Michael Le indicated that he had a connection (Sek) to Mr. Lal. Person Y offered to kill Mr. Lal himself, requiring only that Mr. Lal be taken to a parking lot. Le argued that Mr. Lal be robbed instead but Bacon's view prevailed as any action short of killing him would make the RS look weak. Mr. Lal was to be murdered (RJ, 182-194). Johnston was at the dinner meeting but not

[3] "Murk" is gangster slang for "murder" (T. March 12, 2014, p. 3686(31-34).

involved in this discussion.

28. In the days leading up to the date of the offence, at Le's instigation, the plan evolved to include a home invasion style robbery in addition to the murder of Mr. Lal. Person Y withdrew his offer, wanting no part of a venture involving others and presenting such obvious risks. When he told Bacon this, Bacon said he would have Person X, Johnston and maybe one other do it instead (RJ, 195-198, respondent's factum #1 at para. 84). This statement of Bacon's was admissible against Johnston pursuant to the co-conspirator's exception to hearsay rule (RJ, 212).

29. Person Y's evidence that the conspiracy was one to murder Mr. Lal was challenged in cross-examination but his evidence remained unshaken. The judge accepted Person Y's evidence about the conspiracy's objective (RJ, 193). She also accepted Le's evidence that the conspiracy was to murder Mr. Lal, not rob him (RJ, 202). She found that the existence of the conspiracy to murder Mr. Lal was proven beyond a reasonable doubt (RJ, 603). In light of this unequivocal finding, the question becomes why Johnston would think differently. As the judge proceeded to find, he didn't.

30. Johnston attended a Korean restaurant in Surrey early in the afternoon of October 19th. Also in attendance were other conspirators. So, too, was Sek. Johnston left for a time and then returned with a fob given to him by D.Y. a RS drug dealer and Balmoral resident, to get inside the Balmoral. The judge found that the restaurant served as "the staging place for those individuals involved in the conspiracy of which Mr. Lal was the target". It was here that Person Y gave Person X a Glock handgun which was later found at the crime scene (RJ, 231-257, respondent's factum #1 at para. 84). As the judge so aptly noted, "[w]ithin a couple of hours of this gathering, Mr. Lal, the object of the conspiracy, was shot to death" (RJ, 602). What was intended was relatively quickly achieved.

31. The judge found that the crime scene evidence "belie[d] the argument that the plan had been only to rob Mr. Lal" (RJ, 620). From the presence of drugs and money left behind in the apartment that could have been discovered with a small measure of

diligence, she drew “a reasonable inference” that “the plan to rob Mr. Lal of his money and drugs was incidental to the plan” to kill him. One might well also consider her findings that the murders were execution-style shootings precisely administered rather than the random or haphazard shots of a panicked shooter (RJ, 71-72) as also militating against the killings having occurred during a robbery gone wrong.

32. Based on the crime scene evidence, the judge found that “it is implausible” that robbery was the plan (RJ, 621). Had it been, in the judge’s view, the trio could simply have abandoned it when they encountered other people inside the apartment in addition to Mr. Lal. Instead, they murdered Mr. Lal as had been their intention from the start pursuant to the RS group motive. The trio murdered the other five pursuant to their shared interest in eliminating eye-witnesses to their crime (RJ, 703).

33. Undeterred, Johnston continues to maintain that his belief that this was the case was a reasonable inference to draw on the evidence. It serves therefore to consider the other evidence upon which the judge found that Johnston’s membership in the murder conspiracy was the “only one logical inference” to draw (RJ, 608). And, as will become apparent, given this other evidence and the available findings of facts drawn from it by the judge, whether or not Johnston was inside the suite or out in the hallway at the very moment the shootings occurred was immaterial to her finding that he was a conspirator to murder and a party to the murders pursuant to s. 21(1)(a), (b) or (c).

34. The judge found that Johnston went to Haevischer’s apartment at the Stanley confident that his attempt to enlist Haevischer’s assistance would be successful (RJ, 627). Johnston’s confidence was not misplaced. Haevischer, as a loyal RS member, was obligated to provide the assistance his fellow RS member requested. This was part of the RS gang’s credo (RJ, 169). Haevischer and Johnston were also close friends, "like brothers almost" (RJ, 159).

35. The judge noted that Johnston’s membership in the conspiracy can also be inferred from his conduct from this point forward (RJ, 612). While at the Stanley, he cleaned the guns and bullets with Person X and K.M., Haevischer’s girlfriend. The trio then left in gloves and hoodies. They had with them two loaded handguns. Johnston

instructed K.M. to move his vehicle from the front of the Stanley to the back so it could not be seen from the street. The three men then left in K.M.'s BMW and arrived at the Balmoral underground parkade with hoods up and gloves on. Johnston used D.Y.'s fob at 2:23 p.m., approximately seven minutes before Mr. Lal and three others were initially confronted and confined in suite 1505. Use of the fob gave them access to the elevators in the secure portion of the building.

36. Very shortly after the murders of the six victims, the trio sped away from the Balmoral and returned to the Stanley. Johnston, carrying a bag containing money and the victims' cell phones, accompanied Haevischer inside (RJ, 613). At RJ, 614, the judge found Johnston's actions on October 19th "were those of a key player in the plan to obtain access to Balmoral and, once inside, to kill Mr. Lal".

37. The judge then turned to a consideration of Johnston's admissions after the fact (RJ, 614-616). In the first, taking place a few hours after the murders, speaking in "a charged and excited state", Johnston "told Person Y that there had been a lot of bodies, using six fingers to indicate how many, and that he had pulled someone in. He also mentioned a fireplace and how they put bodies in or by it." (RJ, 615) This admission alone showed he was at the scene "exerting control over at least one of the unexpected arrivals": RJ, 685, 700. Notably, during this brief conversation, "[t]here was no suggestion of a planned robbery that had gone horribly awry" (RJ, 615). See respondent's factum #1 at para. 92.

38. In the February 17, 2008 conversation with Person Y, the first to be surreptitiously recorded, Johnston "indicate[d] that he was aware guns were going to be used at Mr. Lal's apartment, as he acknowledged watching Person X clean a gun with Windex". No hand gestures accompanied the Windex reference (RJ, 461, respondent's factum #1 at para. 94).

39. In the March 23, 2008 intercepted conversation, Johnston "used language that implicitly acknowledged that he had a role in what was part of a pre-arranged plan which involved others shooting the victim". He "also indicated that he had watched the killings, which place[d] him at the scene" (RJ, 616). As at trial, these hand gestures,

Person Y's interpretation of them in his testimony and the judge's acceptance of his interpretation, play a significant role on appeal. See respondent's factum #1 at paras. 114-118.

40. Before turning to the matter of the hand gestures, the respondent notes that the judge was fully cognizant of the defence position that Johnston was aware only of a planned robbery. She set out the substance of Johnston's position at RJ, 617 in nine bullet points. Over the ensuing three paragraphs, she effectively deconstructs each of them, essentially on the basis of evidence reviewed above.

41. In finding that Johnston was a co-conspirator to murder, the judge said the following about Johnston's admissions. At RJ, 614, she wrote: "His admissions after the fact leave no doubt that [Johnston] knew of the plan and accepted a role in it, was present for the murders in suite 1505, and played an active role in the events as they unfolded". At RJ, 619, the judge wrote: "Finally, in his recorded admissions to Person Y, Mr. Johnston never denied his involvement in the murders, nor, crucially, did he ever claim that the murders were the result of a botched robbery despite many opportunities to do so in the face of Person Y's questioning".

42. At trial, in terms of his spoken words on the intercepts, defence counsel argued that Johnston never once admitted "to knowing about a murder plan" (RJ, 617(i)). It is not surprising, given that context, that the judge noted that Johnston similarly never claimed that the murders were the result of a botched robbery. Common sense, logic and life experience alone strongly militate in favour of such a claim being the natural response one would expect from any robber who has been unwittingly implicated in the execution-style murder of six people. The judge ought not to be criticized for, and most certainly did not err by, making reference to this glaring omission (AF, 23).

43. The inference inconsistent with Johnston's membership in a conspiracy to murder Mr. Lal is simply not sustainable on any view of the evidence unless that view is restricted to Johnston's intercepted spoken words. Examined in this piecemeal manner, it might be a conceivable or possible inference but it is not a reasonable inference: *Villaroman*, at para. 42, citing *R. v. Dipnarine*, 2014 ABCA 328, at paras. 22 and 24-25.

The same is true for the second competing inference promoted by Johnston concerning his precise whereabouts at the time the six men were shot to death.

Johnston's proven active participation in the killings, jointly with the others, renders his whereabouts at the precise moment the shootings occurred immaterial

44. The respondent accepts Johnston's description of the evidence concerning Person Y's interpretation of Johnston's hand gestures set out at AF, 6.[4] However, the respondent does not accept that the judge's finding, based on his statement "I watched – I watched him do this on. Both of them", accompanied by the shooting downward hand gesture, that Johnston "saw the killings as they occurred, and was therefore present at the scene at that time" (RJ, 459), as compared with the entire body of circumstantial evidence the judge considered, was any more "key" to her determination of Johnston's role in the offences (AF, 7).

45. Further, the possibility that Johnston, having seen the confinement of the victims on the floor at gun point (AF, 23), had stepped out of the apartment moments before the shootings is wholly immaterial to his liability for murder given the judge's unchallenged findings of fact underlying her findings of joint and active participation pursuant to an intention in common to first kill Mr. Lal as RS leaders had dictated, and then to kill the five others to eliminate eye witnesses to their crime.

46. The judge's reasons are inconclusive with respect to the identities of the second shooter (Person X being one) and the non-shooter. Due to her finding of a joint endeavour involving all three, they did not have to be conclusive. In the present case, absent the intercepted conversations in February and March admissible against Johnston, there is an abundance of circumstantial evidence of concerted action in the commission of these murders. The judge details it at RJ, 685-702. In such circumstances, it was open to her to convict both accused before her either as co-principals or as aiders or abettors pursuant to s. 21(1) even though the extent of individual participation in the killings was unclear.

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[4] The trial judge's detailed review of the evidence concerning the March 23, 2008 intercept is found at RJ, 438-455, and her assessment of the scenario admissions is found at RJ, 456-462.

47. The law of party liability is covered more thoroughly by the respondent in respondent's factum #3 at paras 108, 118, 126, 128-132 responding to the second ground of appeal advanced by Haevischer in his individual factum. For the purposes of this factum, the respondent adopts those submissions. Further, Johnston does not allege error in the judge's self-instruction on the law of party liability (RJ, 662-678).

48. In their respective individual factums, both appellants unsurprisingly vie for the role of the non-shooter as neither seriously contends that there is a basis in law for either of the two shooters to be acquitted and found guilty of the lesser offence of manslaughter. Assuming for the sake of argument that Johnston was the non-shooter, given the unchallenged findings of fact made by the judge, there is no great uncertainty about his degree of participation in the events that unfolded in suite 1505 of the Balmoral.

49. Stated briefly, this was a joint venture requiring three men from start to finish. Three men dressed for action arrived together. Three men burst into the apartment by means of the subterfuge provided by Sek. Two of the three were armed with loaded handguns. Initially there were four people that needed to be controlled. This control was attained through commands, intimidation and instilling fear, all accomplished at gunpoint. When Mr. Narong arrived and Mr. Mohan somehow separately came to be inside the apartment, control over them had to be acquired while the initial victims remained unresisting. Dealing with these additional victims required the participation of the non-shooter. In his admissions to Person Y – "[I] pulled someone in" – Johnston credited himself with this role. About this admission, the judge viewed it as

> [701] . . . one more piece of evidence which underscores the intense and fluid dynamic unfolding in and around suite 1505 and the enormous challenges it created for the three intruders to manage. 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.

50. The victims had their cell phones taken from them. The apartment itself was cursorily searched for money and drugs. The crime scene made evident that these actions took place before the shootings occurred, while the victims remained controlled and unresisting.

51. To repeat, this was a three man job. The judge found exactly this: "[t]he 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" (RJ, 702). On the entirety of the evidence before her, the inference that Johnston saw the shootings as they occurred was a reasonable one.

52. Johnston does not offer a view of the case that reveals how long before the shootings occurred he is supposed to have left the apartment during the 15 minutes the intruders were inside. On the judge's findings of fact, it could only have been shortly before given all that had to be, and was, accomplished in challenging and changing circumstances. If we take Johnston at his intercepted word, it wasn't long at all. After all, he was there long enough to see the victims confined at gunpoint, giving him plenty of time to have jointly and actively participated in all that transpired.

53. Even if the judge was wrong in drawing the inference that Johnston saw the shootings as they occurred, something the respondent does not admit and specifically disputes, it is of no moment. It is but one element in the web of circumstantial evidence going to his participation in the killings. Removing this inference from the judge's reasoning does not render her finding Johnston was either a co-principal or an aider or abettor unreasonable (by analogy, see *R. v. Duong*, 2019 BCCA 299, at para. 82). Similarly, the immateriality of this one inference discredits the notion that this inference was something the judge relied on "considerably" in finding Johnston guilty of six counts of first degree murder.

54. Johnston has failed to demonstrate that the judge committed any error in drawing the two inferences on which this ground of appeal concentrates. She carried out a comprehensive analysis of all the evidence and drew inferences she was entitled to draw. Her findings of underlying facts and the inferences she drew from them are

entitled to appellate deference in the absence of palpable and overriding error. None have been shown. None have been pled. And if the judge erred in law (see para. **21** above), the s. 686(1)(b)(iii) curative *proviso* applies: the case against Johnston was overwhelming. This ground of appeal ought to be dismissed.

The verdicts are reasonable and supported by the evidence

55. It is the respondent's position that the substance, or gist, of this aspect of the appeal invokes the remedial power of this Court found in s. 686(1)(a)(i) of the Criminal Code despite the fact Johnston's factum is silent in this regard and despite the relief he seeks being a new trial rather than an acquittal. The respondent submits that the verdicts returned are reasonable and supported by the evidence.

56. This Court has recognized, in language that is apposite here, that "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": *Vickers*, at para. 22; see also *R. v. Coffey*, 2020 BCCA 75, at para. 17.

57. In *Bransford*, at para. 31, 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*, 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 *Yebes* (citation omitted).

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

Issue #2 – The judge did not err by "failing to address" the scope of exclusion of Person X's evidence

59. Johnston argues that the first alleged error by the judge in not drawing the inferences sought by Johnston was "compounded" by the judge's "failure to engage counsel in a discussion about the scope of the exclusion of Person X's evidence" (AF, 30). As set out above, on the evidence as a whole, there *was* no error by the judge in drawing the inferences she did that Johnston knew of the plan to kill Lal and was inside the suite at the time of the shootings, let alone one "compounded". Further, the finding that Johnston was inside the suite at the time of the shootings was not central to her findings of his guilt, either as a member of the conspiracy to murder Lal, or co-perpetrator of that planned murder and those of the five other victims who were potential witnesses.

60. Contrary to his argument, Johnston has not established prejudice resulting from being excluded from making submissions prior to the judge's ruling that Person X could not be called by the Crown in the trial of this matter, nor from the ruling itself. The judge's ruling that Person X could not be called as a witness by the Crown and stating that his evidence was inadmissible for reasons that had to remain under seal was not detrimental to Johnston. Rather, it was a windfall.

61. As a starting point, the respondent reiterates its argument, set out in the respondent's factum #1, that the judge did not violate s. 650(1) of the *Criminal Code,* nor err in law, when she excluded the appellants from the hearing into the Crown's claim of informer privilege. Nor did she exclude them in a way that created a significant appearance of unfairness or actual unfairness necessitating a new trial. Simply put, they were excluded to protect the privilege. Indeed, the judge communicated that Person X's evidence was inadmissible for reasons sealed to protect informer privilege, but as a result of *amici* having raised fair trial concerns arising from the non-disclosure protected by informer privilege: *R. v. Haevischer*, 2013 BCSC 1526 ("*Abbreviated Ruling*"), paras. 6, 10.

62. However, even if Johnston's exclusion prior to the ruling *had* violated s. 650 or been an error in law, the curative *proviso* would apply. There was no appearance of unfairness, nor was there any actual unfairness given the nature of the ruling, and the lack of objection to its scope. Person X's anticipated evidence was contrary to the position advanced by Johnston at trial, and was highly inculpatory.

(i) Lack of objection to scope of the ruling speaks to lack of unfairness

63. Johnston's failure to raise the question now raised about whether Person X's anticipated evidence that Johnston was not in the room at the time of the shooting could have been used for any purpose speaks to the lack of unfairness arising from the ruling that the Crown could not call Person X as a witness at trial.

64. As stated in the respondent's factum #1, Johnston had every opportunity to seek various remedies resulting from Person X's exclusion, such as applying to have Person X's evidence adduced through alternate means. He says there were important issues to be resolved, such as whether Person X's statement to the effect that Johnston left the room just before the shooting could be put to any use by the defence. Yet he never raised these issues, sought any such remedy, or asked the court to do anything to resolve the issues he now says needed to be resolved.

65. Johnston's explanation for not having done so does not reduce its import. Johnston contends that "without knowing the reasons for the exclusion, or connection to Person X", he could not make an "informed tactical decision" about whether to raise with the judge any issues about what use, if any, could be made of Person X's evidence. Yet, after receiving the ruling and prior to trial, Johnston was in a position to make submissions if he viewed the scope of the ruling as detrimentally impinging upon trial fairness, contrary to its express intent. A lack of invitation does not equate to a lack of opportunity. He did not do so.

66. Notably, Johnston (and Haevischer) <u>did</u> use Person X's anticipated evidence for the limited purpose of cross-examining Michael Le with respect to tainting (hence, it

forms part of the record).[5] Yet, even in the face of Crown expressly submitting in closing that Johnston's March 23, 2008 intercepted statement to Person Y showed that he was in suite 1505 when the victims were killed, Johnston did not seek any remedy.[6]

67. Instead, in Johnston's closing submissions, he maintained that there was a reasonable inference to be drawn that he was never in suite 1505.[7] This was contrary to Person X's anticipated evidence, summarized below, which placed Johnston in the suite, actively participating. Johnston also agreed that the Crown was correct that it was immaterial whether the non-shooter was inside or outside the suite (e.g. holding the elevator) at the exact moment of the shootings, if the non-shooter assisted the two shooters leading up to the fatal shots knowing the victims were to be murdered.[8] Again, Person X's anticipated evidence that Johnston was not in suite 1505 at the time of the shootings, inextricably wound up with his anticipated evidence as to when and why Johnston entered and then left after giving the order to kill ("do it"), was contrary to this submission denying knowledge on the part of the non-shooter.

68. Johnston further contends that even if his reason for not raising the issue is unpersuasive, it was the judge who had the "ultimate obligation" to safeguard his fair trial interests. The judge did so. The judge did what was required pursuant to her duty to protect his fair trial interests as well as to protect the privilege. As stated in our response to the s. 650 issue in the respondent's factum #1: the robust protection of the *amici* was provided to the appellants, and the ruling led to highly inculpatory evidence being excluded from the Crown's case against Johnston and Haevischer.

69. There was no unfairness in the judge drawing from the evidence as a whole an inference of fact that was contrary to Person X's anticipated evidence that Johnston left the room just before the shootings. It is trite law that the judge was bound to decide the case only on the admissible evidence before her, and counsel would have known that.

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[5] AB Ex. 212; T. April 28, 2014, p.4509(21-27), pp.4519(3)-4523(17), pp.4524(14)-4526(28), pp.4542(17)-4543(39), p.4547(4-25); T. May 5, 2014, pp.4922(20)-4931(32); T. May 6, 2014, pp.5066(21)-5076(10); T. May 13, 2014, pp.5367(31)-5368(1)
[6] T. July 2, 2014, pp.5574(28)-5574(36)
[7] T. July 11, 2014, pp.6137(37)-6138(8)
[8] T. July 11, 2014, p.6143(4-40)

70. Further, even if the judge erred in not engaging counsel in discussion as to the scope of the exclusion, as set out above, the judge's finding that Johnston was in the room at the exact moment of the shootings was not central to Johnston's convictions: on either the conspiracy count or the first degree murder of Lal, or for the first degree murders of any of the five other victims and potential witnesses to that murder. And the evidence was overwhelming that Johnston participated in the murders of all six with the requisite intent.

(ii) No actual unfairness

71. Particularly where Johnston seeks a new trial, it matters that the judge's ruling that the Crown could not call Person X as a witness worked to Johnston's benefit.

72. Johnston focusses on a select piece of Person X's anticipated evidence, which when taken out of context and in isolation might appear "helpful" or exculpatory. However, Person X's anticipated evidence was wholly inculpatory.

73. Person X was expected to testify that Bacon directed him to kill Corey Lal, and that part of Johnston's role was to make sure that happened. While Haevischer, Johnston and Person X waited for the door-knocker in a suite on the 12th floor of the Balmoral, Johnston and Person X discussed stealing from and killing Lal. All three entered the suite for that purpose.[9] All three rushed into suite 1505 and forced the occupants to the ground.[10] Johnston ransacked the apartment and collected money and phones from the victims and put them in bags.[11] Johnston chased Mr. Narong after Narong tried to escape, and forced Mr. Narong down beside the two other people whom Haevischer was holding at gunpoint.[12] They decided to kill all five people – Johnston told Person X and Haevischer to "do it" and that Johnston would have the elevator

[9] Ex. 212, AB p.2171(2182 of 3692), paras. 57-58; p.2263(2274 of 3692), l.1370-1409; pp.2270(2281 of 3692), l.1661 – p.2271(2282 of 3692), l.1696
[10] Ex. 212, AB p.2172(2183 of 3692), paras. 59-60; p.2271(2282 of 3692), l.1722-1726; p.2272(2283 of 3692), l.1743-1747
[11] Ex. 212, AB p.2172 (2183 of 3692), para.61; pp.2272(2283 of 3692), l.1742 – 2273(2284 of 3692), l. 1798
[12] Ex. 212, AB, p.2172 (2183 of 3692), paras. 62-64; pp.2273(2284 of 3692), l.1811 – 2274(2285 of 3692), l.1859

waiting for them.[13] Johnston returned with Christopher Mohan, a neighbour, accusing him of being "their friend" despite Mr. Mohan's pleas otherwise. Johnston forced Mr. Mohan down beside the other two people Person X was holding at gunpoint.[14] Johnston then left the room to assist escape by calling the elevator, while the other two men shot the victims in the back of the head.[15]

74. Person X would have confirmed what mattered for culpability. What mattered to the judge in finding culpability for second-degree murder was active participation in the murders with the requisite intent and a common purpose, up until all six victims were executed, as shown by the timing and crime scene: RJ, 701-706. What mattered to the judge in finding culpability for first-degree murder was that: either the perpetrators had time in the suite to decide, and did decide, to proceed with the plan to kill Mr. Lal and to kill the other five people to avoid getting caught: RJ, 711-716; or alternatively, the non-shooter caused the deaths in the course of an unlawful confinement by being "instrumental in managing the scene… dealing with unexpected arrivals and preventing eyewitnesses from escaping the scene": RJ, 723-726.

75. Accepting that Person X would likely have given evidence that Johnston did not see "the killings as they occurred" (RJ, 459), it could not have assisted the appellant. Whether Johnston was in the room at the *exact moment of* the shootings or left *just before* the trigger was pulled is a factual distinction that could not have made a legal difference.

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[13] Ex. 212, AB pp.2172-2173(2183-2184 of 3692), paras. 62-64; p.2275(2285 of 3692), l.1860-1889
[14] Ex. 212, AB p.2173(2184 of 3692), para. 65; p.2275(2286 of 3692), l.1883-1901
[15] Ex. 212, AB p.2276(2287 of 3692), l.1903-1929; p.2277 (2288 of 3692), l.1957-1960

PART IV – NATURE OF ORDER SOUGHT

76. The respondent submits that this Court ought to dismiss grounds two and four of Johnston'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

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