

CANADA / JUDGMENT

R. v. Chandi

2020 BCCA 305

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 305 R. v. Chandi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Chandi,

2020 BCCA 305

Date: 20201109

Docket: CA46172

Between:

Regina

Respondent

And

Armaan Singh Chandi

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated February 11, 2019 (R. v. Chandi, 2019 BCSC 384, Nanaimo Docket 81142-2).

Counsel for the Appellant:

R.L. Neary

Counsel for the Respondent:

L.A. Vizsolyi

Place and Date of Hearing:

Victoria, British Columbia

October 6, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 9, 2020

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Saunders

Summary:

The appellant and a co-accused committed a drive-by shooting in Nanaimo. The appellant was found guilty of five offences, including attempted murder. The convictions were entered on the basis of party liability, as the judge could not determine whether the appellant was the shooter or the driver. The appellant appealed his convictions for attempted murder, dangerous driving and failing to stop for police. Among other things, he contended that those verdicts were unreasonable. Specific to the attempted murder, the appellant submitted that the evidence was incapable of supporting a finding that at the time of the shooting, he knew the shots would be fired with an intent to kill. Held: appeal from conviction dismissed. On the evidence, considered in its totality, the verdicts for attempted murder, dangerous driving and failing to stop were ones that a properly instructed jury, acting judicially, could reasonably have rendered. Furthermore, the judge's reasons for conviction on the attempted murder were sufficient.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] On March 1, 2016, the appellant and a co-accused drove alongside a young man parked on a street in Nanaimo, shot at his vehicle multiple times, and then fled the scene, driving erratically and at high speeds to avoid capture by police. Eventually, the flight from police ended and the men were arrested. The appellant was in the front passenger seat of the car used in the shooting. The co-accused was driving. A balaclava and 45-calibre handgun were in the vehicle.
- [2] Following a trial by judge alone in the Supreme Court, the appellant was found guilty of five offences: attempted murder; intentionally and recklessly discharging a firearm; being masked with the intent to commit an indictable offence; dangerous driving; and failing to stop for a peace officer (Criminal Code, R.S.C. 1985, c. C-46).
- [3] The trial judge did not decide whether the appellant was the shooter or the driver when the shots were fired. From his perspective, it mattered not. Either way, the appellant was culpable for all five offences because they arose out of a "joint plan" to "shoot and kill a person and to escape undetected."
- [4] The appellant contends that the verdicts for attempted murder, dangerous driving and failing to stop for police are unreasonable. Alternatively, he says the judge did not adequately explain the conviction for attempted murder.
- [5] For the reasons that follow, I would dismiss the appeal.

Background

- [6] There is no dispute over the facts of this case, set out in *R. v. Chandi*, 2019 BCSC 384 ("RFJ").
- [7] On March 1, 2016, the victim was sitting in his car outside of his residence in Nanaimo. At about 3:55 p.m., a blue Mazda sedan drove alongside him (the "Mazda"). Multiple shots were fired from the front passenger window of the Mazda. The shooter stretched his arm out of the window, holding a handgun. Two bullets pierced the driver's side door of the victim's vehicle, near the door handle. A bullet also struck the rear passenger door on the driver's side; the rear quarter panel; and the rear tire. Bullets also hit a car parked behind the victim's vehicle. Fortunately, none of the bullets struck the victim. The Mazda had two occupants, the shooter and a driver. The shooter was wearing a mask.
- [8] The victim was a foreign student attending school in Nanaimo and erroneously identified as the intended target of the shooting.
- [9] After the shots, the Mazda travelled towards Highway 19, a main route running along Vancouver Island. South of Nanaimo, Highway 19 merges into the Trans Canada Highway and carries on towards Ladysmith and Duncan.

- [10] Police were alerted to the shooting within minutes. A number of units headed to south Nanaimo in the event the suspects fled in that direction. Approximately half an hour after the shooting, two officers in an unmarked police vehicle came across the Mazda. It completed a U-turn in front of them and passed by in the opposite direction. There were two men in the vehicle. A license plate check revealed that the Mazda was registered to the appellant's co-accused, with a residential address in Mission.
- [11] The Mazda headed south, towards Ladysmith. Police followed in the unmarked car. The Mazda travelled at speeds up to 130 kilometres per hour in 80 or 90 kilometre per hour zones. It accelerated through traffic and drove erratically. By this time, the Trans Canada Highway was crowded with commuters. Police in Ladysmith were asked to intercept.
- [12] They set up an observation point. The Mazda approached with the unmarked vehicle behind it. The Mazda made sudden lane changes to get off the highway and abruptly turned right, travelling through Ladysmith's main shopping and business thoroughfare. It turned onto a residential side street that ends in an alleyway. The Mazda turned around and headed the other way, ramming a police vehicle. It returned to the Trans Canada Highway with police in active pursuit.
- [13] One of the officers lost control of his vehicle and collided with a lamp stand. He and his passenger were injured. Other officers continued the pursuit. The Mazda veered from lane to lane, darting in and out of traffic, driving on the shoulder, and using left-hand turn lanes to proceed straight through controlled intersections.
- [14] Once the Mazda reached Duncan, it became "bogged down" in traffic and was boxed in by police. The appellant was the front-seat passenger. The co-accused was driving. There was no one else in the car.
- [15] Police searched the Mazda. A black balaclava was on the front passenger seat. Concealed inside the balaclava was an ammunition clip that fit into a partially dismantled Glock 45-calibre semi-automatic handgun. The handgun was inside a pair of gloves beneath that same seat. Among other things, the barrel was missing. The gun contained DNA from the co-accused on the pistol frame. A hair fibre matching the co-accused and his DNA were on the balaclava.
- [16] A mixed-origin DNA profile was found on the interior of the balaclava, consistent with having originated from two individuals. An expert testified that both the appellant and the co-accused were likely contributors to that profile.
- [17] After their arrests, swabs were taken from the hands and faces of both men and tested positive for gunshot residue. The appellant was swabbed approximately two hours after the shooting. He was seen to vigorously rub his hands on his pants before the swabs. He had gun residue on both hands and both sides of his face. An expert testified that this meant the appellant had fired a firearm, was in proximity to a firearm when discharged, or was in contact with a secondary source containing the gun residue, for example, handling a

recently fired weapon.

- [18] At the scene of the shooting, police located bullets and nine shell casings. An expert testified that the casings were consistent with having been fired from the Glock found in the Mazda. The bullets were consistent with having been loaded in 45-calibre cartridges.
- [19] On March 4, 2016, Nanaimo police searched a residence in an unrelated investigation and found a plastic bag containing 45-calibre cartridges in one of the bedrooms. A BC CareCard in the name of the co-accused was on a table in the living room. Near an inflatable mattress on the floor of the living room was a wallet containing a bank card in the appellant's name and a B.C. Ferries receipt for a sailing from Horseshoe Bay to Nanaimo dated February 27, 2016 (two days before the shooting).
- [20] Police seized video footage from a camera mounted on an apartment building just north of the shooting scene.
- [21] A clip from the day of the shooting showed a blue Mazda enter the parking lot of the apartment building just before 2:00 p.m. This was approximately two hours before the shooting. The vehicle appeared to have two occupants. The driver was wearing a camouflage-looking top similar to one found in the foot well behind the Mazda's front passenger seat. The driver of the Mazda parked the vehicle in a position with a view of where the shooting occurred.
- [22] A second clip, from about ten minutes later, showed a blue Mazda entering the same lot and parking in the same place. The driver appeared to be wearing the same camouflage top. However, he was alone in the vehicle and stayed there for close to an hour. The driver turned the vehicle around and the video showed the rear licence plate. The plate had been stolen the previous day from a vehicle parked not far from the scene of the shooting. After the appellant and his co-accused were arrested, that plate was located in the console of the Mazda.
- [23] A third video clip showed that at 3:06 p.m., the Mazda returned to the same spot in the parking lot and remained for half an hour or so. It left and then returned. There were two occupants in the vehicle. At 3:54 p.m., the footage showed the victim's vehicle across the street waiting for traffic to clear before making a U-turn to go back towards his residence. The rear brake lights or taillights of the Mazda activated. As the victim made the U-turn and pulled up in front of his residence, the Mazda pulled out behind him. It was 3:55 p.m. The Mazda had its front passenger window wide open and drove alongside the victim's vehicle, with its passenger side parallel to the driver's side of the victim's vehicle. The vehicles were about five feet apart. The shots were fired. Witnesses called 9-1-1 starting at 3:57 p.m.
- [24] The victim testified that he had just stopped his car when he heard the shots. He saw a car passing him and someone pointing at him with a gun in his hands. The gun was held sideways, parallel to the ground. The shooter's face was covered, and he continued to shoot as he drove by.

- [25] The appellant did not testify or call any other evidence.
- [26] On the first day of trial, the co-accused re-elected to have the charges against him moved to the Provincial Court for the purpose of guilty pleas. As a result, the appellant was tried alone on the Indictment.

Closing Submissions at Trial

- [27] In closing submissions, the Crown argued that the appellant was guilty of all five offences as a "principal actor" or a party. The Crown referred to both s. 21(1) and (2) of the Code in support of its position and emphasized that "both forms of participation are not only equally culpable, but should be treated as one single mode of incurring criminal liability": *R. v. Thatcher*, [1987] 1 S.C.R. 652 at 694.

- [28] Specific to the charge of attempted murder, the Crown said the evidence established that the appellant "knew, subjectively, what was going to occur", including efforts to kill someone:

there was a plan to murder somebody. There's many efforts taken in advance of that murder. We see the surveillance video of the preparation, waiting in the parking lot and as soon as we see the intended target -- or unintended target is -- is really what it was, but the person that they thought was the intended target come into view, they immediately go forward and attempt to kill this person. So, we have a lot of evidence leading up to the shooting, to show that this was a targeted killing, attempted killing. This is not like shooting randomly into a crowd, or trying to scare someone. This was a step-by-step very -- really well -- other than the fact that there wasn't a death involved, a well-planned out murder attempt.

[Emphasis added.]

- [29] The defence conceded that there was a "significant body of evidence from which [the judge] could conclude an intent to kill" when the shots were fired. It was also conceded that the post-shooting driving was dangerous.
- [30] However, the defence argued there were two significant impediments to convicting the appellant. First, the Crown did not prove that the appellant was in the Mazda when the shots were fired. As such, he was neither a "principal actor" nor a party to the shooting. The evidence did not physically link him to that crime, or to any of the ancillary offences committed at that time. Second, even if the judge found that the appellant was in the Mazda and "a party to the common unlawful purpose of shooting someone", he could only be responsible under s. 21(2) of the Code for offences that he knew, or ought to have known, were probable consequences of the common purpose. The appellant said it was "not objectively foreseeable that [his co-accused] would drive dangerously and evade the police".

Trial Judge's Reasons

- [31] After reciting the evidence, the judge instructed himself on the legal principles that govern cases in which the Crown relies on circumstantial evidence to prove guilt. Citing *R. v. Villaroman*, 2016 SCC 33, he noted that guilt must be the only reasonable inference to draw from the evidence, considered as a whole. If there are other reasonable inferences to draw, consistent with innocence, the Crown has not met its burden of proof: *Villaroman* at para. 35.
- [32] The judge acknowledged that an inference consistent with innocence may arise from a gap in evidence, as long as the inference is not speculative: *Villaroman* at para. 36. When assessing a circumstantial case, a judge is obliged to consider other plausible theories or other reasonable possibilities that are inconsistent with guilt. However, those theories or possibilities must be viewed logically and in light of human experience. They must not find their grounding in speculation or conjecture: *Villaroman* at para. 37.
- [33] The trial judge found that in this case, there were "no reasonable inferences to be drawn other than that [the appellant] was a principal or a party to the attempted murder and all related counts" (RFJ at para. 31). Any alternative theory was "imaginary or frivolous" (at para. 31). The judge found that the Crown's evidence in support of guilt was "exceedingly strong" (at para. 31). He concluded that:
- [32] Mr. Chandi, throughout the incident in question, was engaged with [the co-accused] in the performance of a common unlawful purpose to shoot and kill a person - the fact that [the victim] was the wrong person is neither here nor there - and to escape undetected. Mr. Chandi either fired the shots himself or drove the car past [the victim] with the specific knowledge and intention that [the co-accused] would do it, such that he is equally culpable under s. 21(2) of the Criminal Code: see *R. v. Logan*, [1990] 2 S.C.R. 731, at paragraphs 33 and 34.
- [33] It was part of their joint plan, I find, that the shooter should mask his face with the balaclava to avoid detection, along with replacing the stolen plate and discarding part of the gun. In my view, rapid flight from the scene was an integral part of the design. I find that Mr. Chandi knew or ought to have known that [the co-accused] would drive dangerously and run from police to avoid arrest, prosecution and punishment for the very serious criminal act that they had recently committed together. They are jointly liable for those offences.
- [34] In conclusion, I find that Mr. Chandi was acting in concert with [the co-accused] in the execution of a common unlawful purpose comprising the various elements described above, and that each of them is guilty in the eyes of the law for the totality of the wrongdoing alleged.

[Emphasis added.]

Issues on Appeal

- [34] The appellant challenges only three of his five convictions: attempted murder, dangerous driving and failing to stop for police.
- [35] In his factum, he contends that: (1) the trial judge misapplied the s. 21(2) test for party liability by convicting him of attempted murder without "subjective awareness of [a] specific intent to kill"; (2) the reasons for conviction for attempted murder are insufficient; and (3) the verdicts for dangerous driving and failing to stop for police are unreasonable.
- [36] As will be seen, I am of the view that the appellant's grounds of appeal are more appropriately framed as two-fold: (1) the verdicts for attempted murder, dangerous driving and failing to stop for police are unreasonable; and (2) the reasons for conviction for attempted murder are insufficient.
- [37] I propose to resolve the appeal on that basis.

Standards of Review

- [38] To establish that the verdicts are unreasonable, the appellant must demonstrate that they are ones a properly instructed jury, acting judicially, could not reasonably have rendered: *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, 2000 SCC 15.
- [39] At law, a verdict will also be unreasonable where a finding of fact, or drawn inference, is plainly contradicted by the evidence relied on for that purpose, or is demonstrably incompatible with evidence that is not otherwise contradicted or rejected: *R. v. Beaudry*, 2007 SCC 5; *R. v. Sinclair*, 2011 SCC 40; *R. v. R.P.*, 2012 SCC 22. However, it is only the first branch of the unreasonable verdict analysis that is at issue in this case.
- [40] The adequacy of reasons for conviction raises a question of law for which the standard of review is correctness: *R. v. Dinardo*, 2008 SCC 24 at para. 2; *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; *R. v. Sheppard*, 2002 SCC 26 at paras. 46, 68.

Discussion

Is the Verdict for Attempted Murder Unreasonable?

- [41] In the circumstances of this case, a conviction for attempted murder based on party liability required proof that the appellant was subjectively aware the shots would be fired from the Mazda with the specific intent to kill: *R. v. Logan*, [1990] 2 S.C.R. 731 at pp. 747-48; *R. v. Briscoe*, 2010 SCC 13 at para. 25.
- [42] The appellant concedes that on the evidence, the Crown proved that:
- (1) the appellant and his co-accused "likely were in Nanaimo together for the purpose of locating a certain individual who they intended to accost in some manner, and that both knew a firearm would be involved" (appellant's factum at para. 27);

- (2) the appellant was "likely in the vehicle at the time of the shooting, and in the hours immediately before while awaiting the intended target of the confrontation" (at para. 27); and,
- (3) the appellant "knew or ought to have known that the joint venture he was participating in would likely result in the discharge of a firearm with the intent to wound" (at para. 54).
- [43] However, he says the evidence went no further than that, and, as a result, a proper application of the test for party liability under s. 21 of the Code would invariably result in an acquittal for the attempted murder. The appellant contends that the factual foundation advanced by the Crown was equally consistent with an inference that he assisted the co-accused as the driver, but on the understanding that the co-accused would shoot at the victim with an intent to wound, rather than to kill. As long as this alternative inference was available, there could be no party liability for attempted murder, which required proof of subjective awareness of the specific intent to kill.
- [44] In his factum and at the hearing of the appeal, the appellant attempted to frame his first ground of appeal as an error of law, submitting that what is at issue here is whether the facts found by the trial judge meet the legal test for attempted murder. (See *R. v. Kingsbury*, 2012 BCCA 462 at para. 22 and the cases cited therein.) However, the complaint about the conviction for attempted murder is firmly lodged in the factual inferences drawn by the judge about the appellant's subjective state of mind at the time of the shooting, and, importantly, whether the evidence was capable of supporting those inferences. In my view, that is an unreasonable verdict argument.
- [45] Paragraph 28 of the appellant's factum makes clear the true nature of his submission. The challenge to the conviction for attempted murder is focused on the capacity of the evidence to reasonably support the judge's mens rea determination:

Where the evidence falls short on the attempted murder conviction is with respect to the Appellant's knowledge of exactly what, if he is in [the] driver's seat at the time of the shooting rather than the passenger seat, his co-accused intended to do with the firearm. In other words, it is respectfully submitted the Trial Judge erred when he found he could attribute subjective specific knowledge of an intent to kill to the Appellant even if the Appellant was the driver rather than the shooter.

[Emphasis added.]

- [46] The appellant contends that the Crown's evidence supported a conviction as a party to the offence of discharging a firearm with intent to wound, contrary to s. 244(1) of the Code, but not attempted murder. Relying on *R. v. White*, 2019 BCCA 461 (in which the Crown consented to a substituted conviction on appeal), the appellant asks that this Court dismiss the appeal against the conviction for attempted murder, but enter a conviction for a lesser offence under s. 244(1) and pass sentence on that offence.

- [47] The Crown submits that to the extent the trial judge relied on s. 21(2) to convict the appellant of the attempted murder, he erred. The appellant's culpability should have been determined with reference to s. 21(1) of the Code, which the prosecution also invoked as a path to party liability. The judge found, as a fact, that the appellant and his co-accused were involved in a joint venture with the specific objective of shooting and killing someone. The defence conceded at trial that there was a significant body of evidence from which the judge could reasonably infer the shots were fired with an intent to kill. The Crown says the finding of the appellant's active involvement in a joint (mutual) venture, coupled with evidence supporting an intent to kill by the shooter, provided ample bases from which to conclude, beyond a reasonable doubt, that the appellant was liable for attempted murder as a co-principal, or, at the very least, as an aider or abettor.
- [48] The difference between s. 21(1) and (2) is helpfully explained in *R. v. Srun*, 2019 ONCA 453:
- [57] It is well-known that s. 21 of the Criminal Code abolishes the common law distinction between principals and secondary parties. The section renders anyone who participates in a crime in any manner described in the section as "a party to an offence": *R. v. Simon*, 2010 ONCA 754, 263 C.C.C. (3d) 59, at para. 37, leave to appeal refused, [2010] S.C.C.A. No. 459.
- [58] A person may become a party to an offence under either s. 21(1) or s. 21(2). But the sections are different.
- [59] Persons who participate in the offence actually committed, whether as a principal, or as an aider, or an abettor, have their culpability determined under s. 21(1): *Simon*, at para. 39. But this is not so for those whose guilt falls to be decided under s. 21(2).
- [60] Section 21(2), the authorities teach, extends liability for crime in two respects. The first concerns the persons, the second the offence. The defining feature of s. 21(2) is participation in a common unlawful purpose. Or in the language of the section forming "an intention in common to carry out an unlawful purpose and to assist each other therein": *R. v. Simpson*, [1988] 1 S.C.R. 3, at p. 15; *Simon*, at para. 40.
- [61] Section 21(2) extends liability to persons whose participation in the offence actually committed would not be captured by s. 21(1). But these persons must have participated in the original common unlawful purpose with others and either knew or, in most cases, should have known that one or more of the other participants in the original purpose would likely commit the offence in pursuing their original purpose: *Simon*, at para. 41.
- [Emphasis added; italics in the original.]
- See also *R. v. Cooper*, 2020 BCCA 206 at paras. 26-28.
- [49] I agree with the Crown that on the facts as found by the judge, culpability for the offence of attempted murder was determinable under s. 21(1) of the Code, rather than s. 21(2). See, for example, *R. v. Murphy*, 2012 NSCA 92, aff'd 2013 SCC 21. In that case, the appellant was found guilty of attempted murder for his role in providing driving directions to the person

who shot into the target's vehicle. On appeal, he argued the evidence was insufficient to infer that when he gave the directions, he knew the shooter had a "goal" of committing murder (at para. 19). A majority of the Nova Scotia Court of Appeal upheld the verdict. The Crown relied on s. 21(1) in support of the conviction, not s. 21(2) (at para. 47).

- [50] I also agree with the Crown that in light of the judge's conclusion that there was a joint plan to kill and the factual findings surrounding the shooting, the reference to s. 21(2) does not constitute reversible error. Similar to the approach taken in *R. v. Devloo*, 2020 MBCA 3 at paras. 82-86, the invocation of s. 21(2), rather than 21(1), is akin to the judge misspeaking and did not prejudice the appellant. Based on the findings made by the trial judge, and the language employed by him, the outcome would have been the same under s. 21(1).
- [51] The trial judge found that the appellant actively participated in the shooting, by either firing at the victim or by driving the car alongside the victim's vehicle while his co-accused held a handgun out the passenger window and fired as many as nine shots. The appellant's direct, personal involvement in the shooting made him a party to the attempted murder as a co-principal, an aider or an abettor. In those circumstances, resort to s. 21(2) was not necessary. Instead, a conviction could be entered on the basis of s. 21(1), as long as the Crown proved that the appellant had knowledge of (or wilful blindness to) the co-accused's intent to kill: *Briscoe*; *R. v. Russell*, 2020 BCCA 108 at para. 23.
- [52] The judge concluded that the Crown discharged that burden. He found, as a fact, that the appellant and his co-accused shared a common purpose (or goal) to "shoot and kill a person" (RFJ at para. 32). In that context, the appellant "either fired the shots himself or drove the car past [the victim] with the specific knowledge and intention that [the co-accused] would do it" (at para. 32; emphasis added). The judge further found that the shooting occurred in "execution" of the common purpose (at para. 34). In other words, the shots were fired at the victim to achieve the shared goal. It was on that basis that the requisite elements for party liability were found to be established, including the mens rea component. It is clear from paragraph 32 of the reasons for judgment that in convicting the appellant of attempted murder, the trial judge was aware of the need for proof of subjective foreseeability of an intent to kill. He explicitly referred to *Logan*, which holds that in the context of attempted murder, the Crown must prove that the party knew it was probable that in carrying out the "common venture", the accomplice would do something with the intent to kill (at pp. 747-48).
- [53] The appellant says the judge's conclusion on subjective foreseeability is unreasonable. He contends that attributing awareness of an intent to kill to the appellant cannot withstand scrutiny because a properly instructed jury, acting judicially, could not reasonably have concluded that an inference of guilt was the only reasonable inference to draw from this evidence. There were other competing inferences available, including that the appellant, as driver, assisted his co-accused in accosting the victim with a firearm for the sole purpose of wounding him.

- [54] In my view, the appellant's claim of an unreasonable verdict is without merit. The evidence, summarized above and considered in its entirety, provided a compelling basis from which to conclude that the appellant and his co-accused travelled together to Vancouver Island for the purpose of carrying out a targeted murder and, working together, they knowingly took steps to execute that plan. This included evidence that they lay in wait for the victim with a 45-calibre handgun. They drove alongside the victim's vehicle while he was in the driver's seat, and, from five feet away, fired up to nine shots in his direction using that same gun. Two of the bullets hit the driver's side door at the level of the door handle. The victim testified that the masked shooter was pointing the gun at him while the Mazda drove by. Based on the evidence, the trial judge was of the view that any suggestion the appellant was something other than a full participant in a plan to kill was "imaginary or frivolous" (RFJ at para. 31). This perspective was reasonably open to him. As explained in Villaroman, circumstantial evidence does not have to "totally exclude" other conceivable inferences before it can reasonably support a guilty verdict (at para. 56, citing *R. v. Dipnarine*, 2014 ABCA 328 at para. 22).
- [55] In support of his argument, the appellant cites various attempted murder cases in which the evidence was found insufficient to prove a specific intent to kill by the known shooter, or subjective awareness of a specific intent to kill by an alleged party (for example, *R. v. Ali*, 2015 BCSC 2034 and *R. v. Sweeney*, 2002 MBQB 246). Pointing to the outcomes in those cases, some of which involved drive-by shootings, the appellant says they show that the evidentiary foundation in this case did not have the capacity to support the mens rea required for party liability on the charge of attempted murder.
- [56] I have reviewed the appellant's cases. I do not consider it necessary to detail them here. They simply reflect the practical reality that whether the Crown is able to prove an intent to kill, or discharge its burden for party liability under s. 21(1) or 21(2) of the Code, is determined case-by-case. In some cases, the factual matrix may be insufficient to meet that burden. In others, it will be sufficient. In *R. v. McCallum*, 2002 BCCA 198, for example, this Court upheld a conviction for attempted murder against the driver of a vehicle who stopped to allow the shooter to exit and fire at police while attempting to flee from a robbery, based on inferences drawn from circumstantial evidence.
- [57] Ultimately, it was for the trial judge to "draw the line in [this] case that separate[d] reasonable doubt from speculation": Villaroman at para. 71. The defence conceded at trial that the manner in which the shooting unfolded could reasonably support a finding of a specific intent to kill. In light of that concession, and the undisputed evidence of the appellant's direct involvement in the planning and execution of the shooting, it was open to the judge to conclude that the evidence, as a whole, excluded all reasonable alternatives to guilt. It may be that not every trier of fact would inevitably have reached the same conclusion and convicted of attempted murder; however, standing alone, that possibility does not mean that the verdict was unreasonable: Villaroman at para. 69.

- [58] I would not accede to this ground of appeal. As a result, it is not necessary to address the appellant's suggestion that this Court should enter a conviction under s. 244(1) of the Code in substitution for the verdict of attempted murder, or the availability of that proposed remedy at law.

Are the Verdicts for the Driving Offences Unreasonable?

- [59] The appellant contends that the verdicts for dangerous driving and failing to stop for police are also unreasonable. Throughout the driving observed by police, the appellant was a passenger in the car. He was not in control of the Mazda. The appellant says that in this context, it was unreasonable for the judge to conclude that driving dangerously while leaving Nanaimo, driving evasively during the overt police pursuit, and failing to stop to avoid capture was objectively probable conduct that the appellant ought to have foreseen, allowing convictions for these offences on the basis of s. 21(2).
- [60] The appellant emphasizes that at the trial, neither the Crown nor the judge pointed to "any decision from any Court in Canada where a passenger at the time of a police chase was convicted of [driving] offences in like circumstances". He says that if the guilty verdicts on these offences are allowed to stand, it would mean that "every passenger in every vehicle involved in something illegal would be guilty of dangerous driving and flight from police if police attempted to pull the vehicle over and the driver chose to flee dangerously" (appellant's factum at paras. 78-79).
- [61] The Crown says the judge was right to rely on s. 21(2) for the driving offences given the appellant's status as a passenger and the absence of evidence that the appellant actively encouraged or somehow facilitated the manner of driving. The Crown also says the guilty verdicts on these offences are ones that a properly instructed jury, acting judicially, could reasonably have rendered.
- [62] The trial judge found, as a fact, that "rapid flight from the scene was an integral part" of the joint plan (RFJ at para. 33; emphasis added). Avoiding detection was also part of that plan (at para. 33). There was undisputed evidence that the appellant and his co-accused took active steps to prevent their identification as the perpetrators of the shooting. The shooter donned a balaclava while driving past the victim's vehicle. A stolen license plate was attached to the Mazda prior to the shooting. That plate was replaced, afterward, to facilitate travel away from Nanaimo. The Mazda drove at high speeds when leaving Nanaimo, before active engagement in an overt police chase. It is apparent from the residential search conducted days after the shooting that both men left behind personal items. Parts of the handgun were discarded between the shooting and capture. The Mazda abruptly turned off the Trans Canada highway once it came into view of police in Ladysmith and rammed a police car on its way out. The flight from the scene and the driving conduct evince a determination to hurriedly get out of Nanaimo and to resist apprehension.

- [63] The Crown says that based on the totality of this evidence, it was open to the judge to infer that the appellant knew, or should have known, that in pursuit of the joint plan to commit a murder, rapidly leave the scene, and avoid detection, the co-accused would likely drive at high speeds, run from police to avoid capture, and drive erratically if necessary to resist apprehension. Doing so was completely consistent with, and to be expected from, the overall design. I agree.
- [64] Contrary to the appellant's suggestion, I note there is Canadian jurisprudence in which party liability for dangerous driving by a passenger has been recognized as available under s. 21(2) of the Code. In *R. v. Bartlett* (1998), 124 C.C.C. (3d) 417 (Ont. C.A.), for example, a new trial was ordered because of errors in the charge to the jury; however, the Court accepted that liability for dangerous driving can arise under s. 21(2) on proof that the accused knew, or ought to have known, that in carrying out an unlawful common purpose, a co-accused would probably drive in a manner that was dangerous to the public (at para. 12). See also *R. v. Akapew*, 2009 SKCA 137.
- [65] The facts of those cases are different from this one, but they demonstrate in principle that driving offences are not exempt from the application of s. 21(2). Instead, as with any other collateral offence committed in pursuit of an unlawful common purpose, whether the test for party liability has been met will depend on the evidence specific to the case and the inferences that can reasonably be drawn from that evidence.
- [66] Respectfully, the appellant's claim that upholding the driving verdicts in this case will mean that "every passenger in every vehicle involved in something illegal" will be guilty of all related driving offences is overstated. Section 21(2) culpability requires an individualized assessment, with the Crown having to prove that the accused participated in the common unlawful purpose and either knew, or should have known, that one or more of the other participants would likely commit the driving offences in pursuing that purpose. It is a case-specific and fact-intensive enquiry.
- [67] I would not accede to this ground of appeal.

Are the Reasons for Conviction Insufficient?

- [68] The appellant says the trial judge erred in law by providing reasons for judgment that do not adequately explain the evidentiary basis for proving a subjective foreseeability of the intent to kill. Instead, the judge appears to have assumed that if he found the appellant was in the vehicle at the time of the shooting, that was the end of the matter and he need not consider the appellant's actual state of mind. The appellant says a careful analysis of the mens rea requirement for party liability for the attempted murder was critical given the availability of alternative inferences regarding the appellant's knowledge at the time of the shooting. The failure of the judge to show how he grappled with those inferences, and why he rejected them, is said to have left the appellant not knowing why he was convicted of attempted murder.

- [69] Relying on the "functional approach" to assessing the sufficiency of reasons, the Crown says the reasons for conviction easily withstand scrutiny once they are assessed in the context of the record, the live issues at trial, and the submissions made by counsel: *R. v. R.E.M.*, 2008 SCC 51 at para. 41.
- [70] In my view, the reasons for judgment adequately explain the pathway to conviction on the attempted murder and allow for meaningful appellate review.
- [71] The judge understood that the appellant was being prosecuted for each of the charged offences as a principal or a party, on the basis that he and the co-accused were involved in a "joint errand to commit murder by means of a drive-by shooting" (RFJ at paras. 2, 22). He was told by Crown counsel in closing submissions that before convicting of attempted murder on grounds of party liability, the judge had to be satisfied beyond a reasonable doubt of a subjective intent:

Now, I mentioned briefly yesterday that attempted murder is one of those offences where the intention is specific and subjective and so, s. 21(2) does not apply in full, as it's written in the Criminal Code and *R. v. Logan*, on page 2, takes us through exactly how it relates to attempted murder.

I will pause just to say, if Your Lordship has any doubt as to whether the intention for attempted murder was present, either as a principal or as a party, you can convict Mr. Chandi under count 2, which is the intentional discharge of a firearm, under count 2.

Now, the Crown is arguing that Mr. Chandi knew, subjectively, what was going to occur. There's more than enough evidence as to preparation, both before and afterwards in disposing of items, in trying to hide from the police and all of the facts, when taken as a whole, do show that subjective intention and allow for Mr. Chandi be -- to be convicted under s. 21(2) for attempted murder. But you do have to turn your mind, in my respectful submission, to that question.

[Emphasis added.]

- [72] The judge was reminded of the principles governing circumstantial evidence and the need to ensure that any inference of guilt drawn from the evidence was the only reasonable inference available.
- [73] Both the requirement for proof of subjective intent and the principles governing circumstantial evidence are explicitly referred to in the reasons (RFJ at paras. 32 and 30, respectively). The judge was plainly alive to them.
- [74] In response to the Crown's theory, counsel for the appellant at trial (not counsel on the appeal) raised two main issues.
- [75] First, he did not dispute that the circumstances surrounding the firing of the handgun provided an "adequate basis" from which the judge could infer an intent to kill. In other words, the judge could find that the shooting met the legal requirements for attempted murder. However, it was the defence position that the Crown did not prove the appellant was

in the Mazda at the time of the shooting. Without that evidence, the defence said the Crown's theory of a "joint venture, joint enterprise, co-principals, or any common unlawful purpose" involving a planned murder, as applicable to the appellant, necessarily fell by the wayside. The Crown could not prove that the appellant was a party to the crime. In those circumstances, the defence argued, any subjective intent associated with the shooting could not be attributed to the appellant.

- [76] Second, the defence conceded that the driving after the shooting and in response to police was dangerous within the meaning of the Code. However, the appellant's trial counsel argued there was no evidence that the appellant aided or abetted the driving offences. Active engagement in those offences, as opposed to passive acquiescence, was required before the appellant could be convicted under s. 21(1). Alternatively, even if the judge found that the appellant was present at the shooting and therefore a party to that offence, it was "not objectively foreseeable that the driver would drive dangerously and evade the police", such that s. 21(2) of the Code applied.
- [77] These were the submissions the judge responded to in his reasons for conviction (RFJ at paras. 26-28). After a comprehensive recitation of the evidence (no errors in apprehension of the evidence are alleged on appeal), the judge summarized the Crown and defence positions (at paras. 22-29), and then moved into his analysis of the live issues at trial, as framed by the defence. He found, as a fact, that the appellant was a "[co-]principal or a party to the attempted murder of [the victim] and all related counts" (at para. 31). On his view of the evidence, considered as a whole, "no alternative theory commend[ed] itself that is not imaginary or frivolous" (at para. 31). Moreover, the judge found that the appellant, "throughout the incident in question, was engaged with [the co-accused] in the performance of a common unlawful purpose to shoot and kill a person" and that escaping undetected, including "rapid flight from the scene", formed part of that "joint plan" (at paras. 32-33; emphasis added). The two men were "acting in concert" (at para. 34).
- [78] In light of these findings, it is readily apparent why the judge found the appellant guilty as a party to the attempted murder. He rejected the defence submission that the evidence did not put the appellant in the car at the time of the shooting. He also found, as a fact, that the appellant and his co-accused had a joint plan to kill someone. He found that the appellant was an active participant in that plan and that the shooting formed an integral part of its execution. The shooting was the means by which to give effect to the shared objective.
- [79] In those circumstances, the appellant's subjective awareness of a specific intent to kill logically and inferentially flowed from his direct involvement in the joint venture. That is how I interpret paragraph 32 of the reasons for judgment. The shots fired from the Mazda were intended to kill the victim in furtherance of the plan to commit murder. The appellant knew that because of his direct involvement in seeking to achieve the shared objective.

- [80] The judge made his findings based on the "totality of the evidence" (RFJ at para. 31). I have already explained how it was reasonably open to him to interpret the evidence as he did. The appellant says the judge should have specified what evidence he took into account in his mens rea determination. I have two comments about that submission. First, a judge is not obliged to discuss every piece of evidence in setting out their conclusions: *R. v. Harms*, 2020 BCCA 242 at para. 51. Second, and importantly, the appellant's submission on this ground of appeal fails to appreciate the legal impact of the judge's factual conclusions that the appellant and his co-accused were active participants in a joint plan to kill, and that the shooting formed part of their design. Those conclusions provided a solid foundation from which to hold the appellant culpable for attempted murder as a co-principal, an aider or an abettor.
- [81] Contrary to the appellant's position, this case is not comparable to *R. v. Aikman*, 2019 BCCA 312, in which the Court found that the reasons did not disclose the route taken to convict on the impugned counts, or reveal any assessment of the evidence relied upon in support of those convictions (at paras. 57 and 63). The flaws with the reasons in that case, coupled with the judge's failure to consider the admissibility of evidence that was central to finding a joint venture, resulted in an order for a new trial (at para. 63).
- [82] Here, the judge instructed himself on the principles governing circumstantial evidence, including the need to consider "[a]lternative innocent [inferences]" before drawing an inference of guilt (RFJ at para. 30). He turned his mind to the alternative inference left with him by the defence, namely, that the appellant got into the Mazda after the shooting. He rejected that inference with explicit reference to parts of the evidentiary foundation, including: the "reasonably brief interval in locating the suspect vehicle, the real evidence found all around [the appellant] when he was arrested, and the DNA and [gunshot residue] evidence linking him positively and persuasively to the shooting" (at para. 31).
- [83] In my view, the reasons for conviction are responsive to the live issues as raised at trial, as well as the parties' main arguments: *R. v. Walker*, 2008 SCC 34 at para. 20. They indicate that the judge understood the legal principles he was bound to consider, including the requirement of subjective awareness for attempted murder under s. 21: *Russell* at para. 59. Finally, once read as a whole, they reveal a logical connection between the evidence, the law on party liability in the attempted murder context, and the conviction for that offence: *R.E.M.* at para. 41.
- [84] I would not accede to this ground of appeal.

Disposition

- [85] For the reasons provided, I would dismiss the appeal from conviction.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice Saunders"

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