

CANADA / JUDGMENT

R. v. Chol

2021 BCCA 279

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 279 R. v. Chol

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Chol,

2021 BCCA 279

Date: 20210714

Docket: CA46646

Between:

Regina

Respondent

And

Kiir Chol

Appellant

Restriction on publication: On the inherent jurisdiction of the court,

T.B.K's name is banned.

Restriction on publication: A publication ban has been imposed under s. 486.5 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a victim or witness, referred to in this judgment by the initials K.D., or H.J. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated
September 17, 2019 (conviction) (R. v. Chol, 2019 BCSC 1987,
Vancouver Docket 27366).

Counsel for the Appellant

(via videoconference):

J.J. Saulnier

E. Holzman

Counsel for the Respondent

(via videoconference):

M.A. Street

A.F.M. Toljanich

Place and Date of Hearing:

Vancouver, British Columbia

May 14, 2021

Place and Date of Judgment:

Vancouver, British Columbia

July 14, 2021

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Butler

Summary:

The appellant challenges the trial judge's refusal to stay the proceedings against him on the ground that the Crown's prosecution of him on a conspiracy charge was an abuse of process by relitigation. The appellant contends that the judge erred in failing to conclude that the doctrine of

abuse of process by relitigation should bar the Crown from attempting to prove the existence of a two-party conspiracy, using the same or substantially the same evidence, against a second co-conspirator where the Crown has failed to prove the existence of that conspiracy as against the first in a separate trial. Held: Appeal dismissed. The doctrine of abuse of process does not preclude the Crown from attempting to prove the existence of a multi-party conspiracy as against different co-conspirators, in different proceedings, relying on the same or substantially the same evidence. It is well established in criminal law that findings of fact made by a trier of fact in one proceeding do not bind a second trier of fact in another proceeding. Moreover, an acquittal of one co-conspirator of a conspiracy charge does not necessarily, as a matter of law, make the conviction of a second co-conspirator invalid.

Reasons for Judgment of the Honourable Mr. Justice Harris:

- [1] This is an appeal of a judgment refusing to stay proceedings against the appellant reported as 2018 BCSC 2536 (the "Reasons"). In the court below, the appellant contended that his prosecution on a conspiracy charge was an abuse of process by relitigation.
- [2] The context giving rise to this issue is relatively straightforward. The appellant was charged with conspiracy to commit murder. He was an adult. His alleged co-conspirator was a youth who was also charged with conspiracy to commit murder. The co-conspirator, as a youth, was tried in Youth Justice Court. He was acquitted of the conspiracy charge on the basis that the Crown had not proven the first step in the *R. v. Carter*, [1982] 1 S.C.R. 938, analysis. In other words, the Crown had not proved the existence of the agreement. The Crown then proceeded, however, with its prosecution of the appellant. The appellant contended that the Crown having failed to prove the existence of the conspiracy in the first trial was not entitled to attempt to prove for a second time the existence of the conspiracy in his trial. He said that to permit the Crown to do so would be a form of abuse of process by relitigation.
- [3] While recognizing fundamental principles of the criminal law, such as the principle that criminal responsibility is individual and triers of fact in one trial are not bound by findings of fact made by other triers of fact in other trials, the appellant says that there is an exception to those principles in the case of what he says is a two-party conspiracy, the proof of which depends upon the same or substantially the same evidence that was considered in an earlier proceeding. In these circumstances, different verdicts would be inherently unreasonable. As the appellant puts it, the doctrine of abuse of process by relitigation should preclude the Crown from trying to prove the existence of a two-party conspiracy, with the same or substantially the same evidence as against each conspirator, more than once.
- [4] The trial judge rejected this argument. He applied the principles governing abuse of process derived from *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [CUPE], on the basis that those principles were the most favourable to the appellant. He did not decide the case, as the Crown had urged, by requiring proof of "egregious conduct" by the Crown to demonstrate abuse of process in the criminal law context. Rather, he focused on the core question of

whether the trial of the appellant was in essence an attempt to relitigate a claim which the court had already decided. His concern was whether the appellant's trial should be stayed in order to preserve the integrity of the court's process.

- [5] The judge took into account a variety of factors in concluding that the appellant's trial was not an abuse of process. First, he observed that the fact the two alleged co-conspirators were tried separately was a consequence of the operation of the Youth Criminal Justice Act, S.C. 2002, c. 1. Accordingly, the risk of inconsistent verdicts is inherent in the statutory framework for dealing with young offenders. Second, he concluded that the Crown could proceed on the underlying substantive charges, even if the conspiracy charge was stayed. Third, as a general rule, findings of fact in the trial of one accused are generally irrelevant at a separate trial of a co-accused. Fourth, the acquittal of one of two separately tried co-conspirators does not preclude a conviction of the other. Fifth, the evidence in the two proceedings would not necessarily be the same. Taking all of these factors into account, the judge concluded that the trial of the appellant on the conspiracy charge was not an abuse of process.
- [6] The appellant contends that the judge incorrectly applied the test for abuse of process by relitigation. In short, he says the judge failed to give proper effect to the reality that the evidence in both trials would be substantially the same and was wrong to conclude that the possibility of inconsistent verdicts arising from separate trials was an acceptable outcome. The appellant argues the judge erred in principle in weighing the discretionary factors outlined in CUPE. Moreover, he goes on to argue that certain of the basic fundamental principles the judge relied on (such as the proposition that criminal liability is individual) have no proper application in what he says is necessarily a two-party conspiracy, the proof of which depends on the same evidence.
- [7] For the reasons that follow, I would dismiss the appeal.

Background

- [8] At the material time, the appellant was in custody facing a charge of murder. He had elected trial by judge and jury and requested a preliminary inquiry. Following the inquiry he was indicted on a charge of second degree murder. A witness, K.D., testified at the preliminary inquiry.
- [9] The conspiracy to commit murder charge arose out of subsequent events. The charge against Chol rested principally on evidence of recorded phone conversations between Chol and his alleged co-conspirator while Chol was imprisoned. The foundation for the conspiracy charge is succinctly set out by the judge in his Reasons:
- [5] At all material times, this accused, Chol, was in jail awaiting trial on other charges. The primary evidence against Chol consists of recordings of his conversations, while incarcerated, with T.K. and others between November 27, 2016 and January 13, 2017. In those conversations, says Crown, Chol conspired with T.K. to murder K.D., who was a key

Crown witness in Chol's upcoming trial. T.K. attended at K.D.'s house on December 20, 2016, armed with a handgun. K.D.'s mother, H.J., answered the door and when T.K. asked for K.D., she said K.D. was not home. T.K. then shot H.J. several times, clearly attempting to kill her, but failing in the attempt. H.J.'s spinal cord was severed and she was rendered a paraplegic.

[7] As I understand the Crown theory, the recorded conversations disclose the following:

1. A large conspiracy involving Chol, T.K., and several others, including somebody named Benjamin, pursuant to which anybody could be targeted for murder for a price.
2. Within that conspiracy, someone named Dario, whose voice appears on some calls, is at or near the top of the hierarchy. Benjamin is a member, someone who is supposed to facilitate supplies such as guns and transportation to jobs. Chol has a role which seems to be somewhat undefined. T.K. is obviously a gun for hire.
3. There are various potential targets of this murder conspiracy referred to in the indictment simply as "persons unknown", but apparently referred to by coded names, nicknames, or partial names in the recorded conversations.
4. A clear conspiracy between Chol and T.K. to kill K.D., the Crown witness in Chol's upcoming trial. In addition, the Crown says the calls show that Chol tells T.K. that he should kill a family member, in lieu of K.D., if necessary, in order to dissuade K.D. from testifying.
5. At some point, when Benjamin fails to perform his part in the conspiracy satisfactorily, Chol and T.K. conspire to kill him. I pause to note that this seems like a different conspiracy than the larger one relied upon by Crown. I have difficulty envisaging how one person could be a co-conspirator and a target of the same murder conspiracy.

[8] The overarching difficulty with the recorded conversations is the fact that even when one can clearly hear what is being said by the speakers, they use language which Crown says is obscured by coded meanings of words, often inconsistent within and between calls.

[10] T.K. was tried on two counts of attempted murder (one of which is unrelated to the issue before this Court), as well as conspiracy to commit murder. Justice Silverman convicted T.K. on the two counts of attempted murder, but acquitted him on the conspiracy count. The judge summarized Silverman J.'s rationale for doubting the existence of the alleged conspiracy. As explained by the judge at para. 13, those findings included the following:

1. He had serious doubts about the interpretation of the allegedly coded language urged upon him by the Crown.
2. He was not satisfied that the unnamed targets of the conspiracy existed.
3. He had doubts that the unnamed co-conspirators were who they said they were in the calls.
4. More importantly, Justice Silverman doubted that the unnamed co-conspirators were serious about finding any targets for T.K. to kill.

5. He questioned, although not in exactly the same way I have done, whether or not Benjamin could be both a co-conspirator and a target. He ultimately found that any talk between Chol and T.K. about killing Benjamin was borne of frustration and did not amount to an agreement to kill Benjamin.
 6. Silverman J. was satisfied that any conspiracy to kill K.D. could, on the evidence before him, only exist between Chol and T.K. That specific conspiracy, if it existed, was thus a two-person conspiracy.
 7. Although the recorded calls showed that Chol was encouraging T.K. to shoot somebody, perhaps K.D., Silverman J. was not satisfied to the criminal standard that such talk amounted to an agreement, what is required to prove conspiracy.
- [11] The judge framed the issue before him in this way:
- [14] It is primarily the last two of those findings that bottom the present application. The accused submits that, as a matter of law, the substantive offence of conspiracy, being an agreement to commit a specific unlawful act, requires at least two participants. Since Silverman J. made a finding that the conspiracy could only be a two-person conspiracy, with the two possible conspirators being Chol and T.K., the finding in favour of T.K. as to the existence of the unlawful agreement is also a finding in favour of this accused, Chol.

Reasons for Judgment

- [12] Since I am in substantial agreement with the Reasons of the judge insofar as the issue is framed within the principles set out in CUPE, I intend to draw heavily on his analysis.
- [13] It was common ground that the strict formalities of issue estoppel do not apply in these circumstances because there is no mutuality of parties. The judge acknowledged the appellant's formulation of the issue as differing from a multi-party conspiracy in which the verdicts may vary depending on the strength of the case against each alleged individual member. The point before the judge was that, in this case, there was no issue about individual membership because the Crown had not proven the existence of any conspiracy.
- [14] The judge also accepted that proof of the alleged conspiracy would depend critically on the appellant's participation in the series of recorded telephone conversations, without any need to have recourse to the co-conspirators' exception to the hearsay rule.
- [15] The judge acknowledged that where an issue is decided in favour of an accused, issue estoppel can arise. For the purpose of analysis, he accepted the appellant's argument that "the combined finding of a two-person conspiracy and a doubt about its existence logically equates to a finding in favour of both Chol and TK": at para. 28. He accepted also that the judgment of Silverman J. should be treated as final, even though it was subject to an appeal.
- [16] The judge then turned to analyse the principles explained in CUPE:

[33] Arbour J., for the majority described the interrelationship between *res judicata* and abuse of process in these terms:

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[34] In that case, the Court found the attempt to re-litigate a criminal conviction, which had been proved at trial to the criminal standard, and been unsuccessfully appealed, amounted to a clear abuse of the court's process.

[36] What the court said about abuse of process at paragraph 42 was this:

The remedy of abuse of process may or may not provide protection against relitigation of a particular issue. Abuse of process is a broad, somewhat vague concept, that varies with the eye of the beholder. Traditionally, it has been reserved for obviously egregious abuses of the Crown power, and this Court has said that successful reliance upon the doctrine will be extremely rare -- only in "a process tainted to such a degree that it amounts to one of the clearest of cases": *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 120. To date, the doctrine has not been much used to protect against relitigation, and indeed there is authority for the proposition that relitigation, without more, simply does not reach the threshold required for a finding of abuse of process: *Bradford & Bingley Building Society v. Seddon*, [1999] 1 W.L.R. 1482 (C.A.), at pp. 1492-93. To protect parties from relitigation, abuse of process would need to be cast in a less discretionary form than it now takes. Therefore, considering the high threshold for proof and the unpredictability of its operation, it is unlikely that the doctrine of abuse of process adequately achieves the fairness goal that underlies the doctrine of issue estoppel.

[17] After declining to apply the egregious conduct standard, the judge applied the test for abuse of process that was the most favourable from the perspective of the accused. He excerpted the test, taken from para. 37 of *CUPE*, at para. 41 of his Reasons:

In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis of the trial judge.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), *aff'd* (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (*Watson*, *supra*, at pp. 624-25)

The judge continued:

[42] Thus, the paramount consideration is the impact of the litigation itself on the administration of justice.

[43] At paragraph 42 of CUPE, the court said as follows:

The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See *Doherty J.A.*'s reasons, at para. 65; see also *Demeter (H.C.)*, *supra*, at p. 264, and *Hunter*, *supra*, at p. 536.)

[44] In considering this branch of the doctrine of abuse of process, the focus should be "less on the interests of the parties and more on the integrity of judicial decision making as a branch of the administration of justice". That is from paragraph 43 of CUPE.

- [18] The judge then turned to the application of the principles he had set out. First, he dealt with the imperative of judicial economy. He noted that because T.K. was a youth, he was required by law to be tried separately from any adult co-accused. He observed that, regardless of whether the conspiracy count should be stayed, the substantive counts would proceed in any event. This would mean that the Crown could attempt to prove through admissible evidence that the appellant was a party to the offence, and that the evidence in relation to that matter would include the intercepted telephone calls underlying the conspiracy charge. He then noted the settled proposition that findings of fact in one trial are not binding or admissible, except rarely, in a subsequent trial. The trier of fact in that trial would be free to assess and interpret the evidence to reach its own conclusion.
- [19] The judge then addressed the potential for inconsistent verdicts and inconsistent findings of fact on the same body of evidence. He addressed the argument that there is an unacceptable risk that a jury could reach a different conclusion about the existence of a conspiracy than did Silverman J. The judge said that he was extremely concerned about the possibility of seemingly inconsistent findings and the manner in which that outcome would reflect on the public's perception of the judicial system:
- [56] It is clear that conflicting decisions on identical issues, or different results based on a common body of evidence can, in and of themselves, tend to bring the administration of justice into disrepute in the eyes of the objective member of the public. That remains a serious concern for the entire justice system in all proceedings.
- [20] Notwithstanding this concern, the judge accepted that, generally speaking, findings of fact in the trial of one accused are irrelevant in the trial of a separately indicted co-accused. He reasoned:
- [60] Moreover, in the specific context of conspiracy charges, *Guimond v. The Queen*, [1979] 1 SCR 960, decided that when two co-conspirators are tried separately, the acquittal of one does not, as a matter of law, mean that a conviction of the other will be invalid. The court there expressed a view that the old rule to that effect was primarily a matter of logic, as opposed to an imperative rule of law.
- [21] The judge then examined the cases of *Remillard v. The King*, (1921) 62 S.C.R. 21 and *R. v. Hick*, [1991] 3 S.C.R. 383, from which he drew the proposition that a jury verdict is "only conclusive as between the Crown and the accused at that trial": at paras. 61-66. He then referred to a decision of this Court:
- [68] At paragraph 48 of *R. v. Millington*, 2016 BCCA 293, the court said:

It may seem surprising, indeed troubling, that different courts can reach different results on what superficially appear to be similar or identical allegations, especially where the evidence is substantially the same in the different cases. In relation to these matters, two officers have been acquitted and two convicted. Having said this, it must be remembered that criminal responsibility is individual and is to be assessed on the evidence led in relation to a particular accused: *R. v. Chow*, 2011 BCCA 338 at para. 44; *R. v. Huard*, 2013 ONCA 650 at para. 105.

- [22] At this point, the judge began to apply these basic principles to the circumstances before him:
- [70] In this case, there may well be differences in the evidence between the two trials. Crown has conceded that the most important evidence on the conspiracy charge is the intercepted communications. However, Crown also points out that there is other evidence against Chol, specifically evidence of a personal motive for him to wish to have K.D. killed. In addition, there are calls between Chol and people other than T.K. which may inform a jury's consideration of Chol's conversations with T.K. Obviously, as I infer from paragraph 7 of his reasons, Silverman J. was only considering the evidence at T.K.'s trial through a lens focused on the accused before him.
- [71] Finally, I note the obvious reality that there is always a risk of inconsistent verdicts in cases where some accused are under 18 at the time of an alleged offence, and thus must be separately tried from adult co-accused by operation of the Youth Criminal Justice Act, S.C. 2002, c.1. This is one such case.
- [23] The judge turned to the factor that he considered most militated in favour of estoppel: finality. In addressing this question he accepted that, although the Crown might have slightly different or additional evidence against the appellant than against his alleged co-conspirator, the Crown had a full opportunity to present and make its case for the existence of a conspiracy at T.K.'s trial. The judge treated finality as a factor weighing in favour of a stay, but observed that it was only one factor to be taken into account in his ultimate decision.
- [24] Finally, he turned to the overarching issue of the integrity of the administration of justice. He accepted the risk of inconsistent verdicts on substantially the same evidence, but concluded that the integrity of the administration of justice was not put seriously at risk by the circumstances of the case. In large measure this was because the operation of the statute required separate proceedings for the two accused. He summed up:
- [79] Based on CUPE, the motive of the parties is not of paramount concern. However, it is worth noting the Crown in these proceedings has at all times been motivated by a simple desire to have a determination on the merits of the complicity, if any, of Chol in what, if proved, is serious criminal activity. The proper administration of justice includes the societal interest in having serious criminal allegations adjudicated on the merits. The very basic point emphasized by Crown that Chol has not yet faced any jeopardy on these charges cannot be ignored. There is no room for the application of the twice vexed concern that informs many

issue estoppel or res judicata applications.

- [80] Any residual concerns I have concerning trial fairness and economy of judicial resources, I hope to ameliorate through exercise of my trial management powers pursuant to s. 551.3 of the Criminal Code.

On Appeal

- [25] The appellant says that there is a single issue on this appeal: namely, whether upon the acquittal of one alleged co-conspirator in a two-party conspiracy, the Crown should be barred from proceeding against the other alleged co-conspirator by relying on the same or substantially the same evidence that it used to prosecute the first.
- [26] As already observed, the appellant's argument is grounded in the doctrine of abuse of process to prevent the relitigation of already decided matters. This doctrine draws on the underlying policy concerns informing issue estoppel; namely, protecting the integrity of the adjudicative functions of the courts.
- [27] The appellant disputes the judge's conclusion that the Crown could well call different evidence at his trial from that called at T.K.'s. He says that there really was only one body of evidence set out in the intercepted telephone calls. Moreover, the Crown theory was the same in both trials. The theory was that the object of the conspiracy was to kill a witness scheduled to testify at the appellant's forthcoming trial, or to kill a family member to dissuade that witness from testifying. Ultimately, the appellant's conviction demonstrated that inconsistent verdicts had been reached in the two trials on what he says was an identical body of evidence.
- [28] The appellant goes on to criticize the judge's acceptance of the possibility of inconsistent verdicts resulting from the requirement that a youth be tried separately from an adult. He says that such an interpretation of the legislative scheme would transform the youth justice system into an avenue for Crown relitigation where an adult and a youth are co-accused, to the detriment of the adult co-accused. Rather, in the appellant's submission, the price to be paid by diverting youth into a separate justice system is the risk that an adult co-conspirator might have the benefit of a stay of proceedings if the Crown is unable to prove the existence of a conspiracy in a separate youth proceeding.
- [29] Finally, while accepting the general proposition that one fact finder does not bind another, and a verdict is only conclusive between the Crown and the accused in a particular trial, the appellant contends that the application of those principles to a two-party conspiracy has never been tested in these particular circumstances. He maintains that the offence of conspiracy is unique in our criminal law because the charge requires proof beyond a reasonable doubt that at least two people agreed to engage together in an illegal act; a person cannot be convicted of being in a conspiracy of one. He says there is no authority, in this context, that militates against a stay.

- [30] The Crown contends that the appellant's argument rests on two fallacious premises. The first is that the conspiracy was limited to a two-party conspiracy. The second is that the CUPE test is applicable in the criminal context. On this point the Crown argues that an abuse of process requires egregious Crown conduct. Such conduct was not present here, both as the judge accepted and defence counsel conceded. In any event, the judge did not err in his analysis of the discretionary factors underlying the CUPE test for abuse of process by relitigation. The Crown argues that it was open to the judge to conclude that there could be differences in the evidence between the two trials or in the fact finder's assessment of the evidence common to both. The judge also did not err in observing that the risk of inconsistent verdicts was inherent in statutorily mandated separate trials. This risk does not thereby bring the integrity of the administration of justice into disrepute. Finally, the judge properly relied on first principles in dismissing the application.
- [31] Underlying the judge's exercise of discretion are a series of fundamental principles embedded in the criminal law. The first is that criminal responsibility is individual and is to be determined by a fact finder on the basis of the evidence led in that individual's trial. The second principle is that findings of fact in one trial are not generally admissible in a second trial dealing with the same or similar subject matter. Findings of fact in the first trial are typically irrelevant to the second fact finder who must find facts based on the trier of fact's own interpretation and weighing of the evidence in the second proceeding. While issue estoppel operates in the criminal sphere where its necessary conditions are satisfied, where they are not, there is inevitably a risk of what appear to be inconsistent verdicts where two or more accused are tried on the basis of similar or substantially similar evidence. This potential outcome, while of obvious concern, is a necessary consequence of more foundational principles, as this Court explained in *R. v. Millington*, 2016 BCCA 293 at para. 48, *aff'd* 2017 SCC 53:

It may seem surprising, indeed troubling, that different courts can reach different results on what superficially appear to be similar or identical allegations, especially where the evidence is substantially the same in the different cases. In relation to these matters, two officers have been acquitted and two convicted. Having said this, it must be remembered that criminal responsibility is individual and is to be assessed on the evidence led in relation to a particular accused: *R. v. Chow*, 2011 BCCA 338 at para. 44; *R. v. Huard*, 2013 ONCA 650 at para. 105

- [32] A majority of this Court similarly opined in *R. v. Robinson*, 2017 BCCA 6 at para. 55, *aff'd* 2017 SCC 52:

In any event, the findings of other judges do not lead to the conclusion that Smith J. misapprehended the evidence in this case. He was bound to consider only the evidence and the accused before him; he was entitled to give weight to the evidence of witnesses he believed; he was not bound to try to reconcile the four cases; nor was he bound, in my view, to find a reasonable doubt based on the fact that other judges had done so in cases they had tried. If that had been the case, there would have been no point to the appellant's trial. I know of no authority that suggests the drawing of different factual inferences by this trial judge would constitute a

misapprehension of the evidence presented at trial. To the contrary, as Smith J. correctly stated:

As a matter of law, the conclusions of another trier of fact who dealt with the same offence but a different offender are irrelevant to the determination with respect to another accused in a different trial. *R. v. Tran*, 2014 BCCA 343 at para. 62. [At para. 84.]

- [33] It follows from this that the risk of potentially inconsistent verdicts standing alone is not sufficient to prevent a second trial of a co-accused where a first co-accused has been acquitted on the same charge. The second trial is not, per se, an abuse of process by relitigation.
- [34] In this case, as the judge rightly noted, the reason why there were separate trials for the two alleged co-conspirators was because that outcome was mandated by legislation. I fail to see how the fact that there were two trials here can ground an argument that proceeding with the second trial is an abuse of process. Doing so does not call the integrity of the administration of justice into doubt.
- [35] The judge partially grounded his decision on the basis that it was not apparent that the evidence in the two proceedings would be the same. Certainly, the perspective from which the trier of fact in a second trial would view the evidence of whether a conspiracy had been proven would or could be different from the perspective of the first trier of fact. The focus of the first trier of fact was on T.K.'s participation in the alleged agreement. The focus of the second trier of fact would be on the appellant's alleged participation in the conspiracy. The lens through which the evidence would be evaluated is accordingly somewhat different. Moreover, the second trier of fact would be entitled to interpret or evaluate the evidence differently. The judge took the view, in any event, that the evidence might not be identical. The judge did not have the benefit of the full record of the evidence at T.K.'s trial. He appears to have been provided with the reasons for judgment of Silverman J., which do not contain a complete description of that evidence, although he did have transcripts of certain of the recorded phone calls and a roster of all the phone calls.
- [36] I cannot say that the judge erred in his approach to this or the other underlying issues. The application for a stay was brought before trial. It was brought before the judge could confidently determine whether the evidence to be led at the second trial would be identical to or substantially the same as the evidence at the first trial. Once the evidence had been led at the appellant's trial, counsel did not seek to renew the application for a stay on the basis that it was now clear that both finders of fact were being invited to assess whether a conspiracy had been proven on the basis of identical or substantially the same evidence.
- [37] The appellant acknowledges the force of the general principles described above, but says that they do not apply to a situation in which the issue is whether the existence of an agreement in a two-party conspiracy has been proven. I am unable to accede to that argument. First, the judge here did not accept that the issue before him should be viewed as engaging only a two-party conspiracy. Rather, the Crown had alleged a multi-party conspiracy. But more significantly, applying the abuse of process by relitigation to the

existence of a two-party conspiracy would violate the fundamental principles described above. Had T.K. been convicted of conspiracy to murder on the basis that an agreement existed between him and the appellant, one would not expect the appellant to accept that the existence of such an agreement had finally been predetermined against him for the purposes of his own trial. Surely he would contend, and rightly so, that the existence of such an agreement had to be proven at his trial on the basis of evidence admissible against him without regard to the findings of fact in the previous trial.

- [38] As observed by Tammén J., the decisions in *Guimond v. The Queen*, [1979] 1 S.C.R. 960, *Remillard v. The King*, (1921) 62 S.C.R. 21, *R. v. Hick*, [1991] 3 S.C.R. 383, and *Millington*, establish or reaffirm two important principles: that (i) "findings of fact in the trial of one accused are irrelevant at the trial of a separately indicted co-accused"; and, (ii) "when two co-conspirators are tried separately, the acquittal of one does not, as a matter of law, mean that a conviction of the other will be invalid": Reasons at paras. 59-60. As noted above, these principles are rooted in the overarching tenet that criminal responsibility is individual and must be assessed as against the specific individual charged. In addition, fairness dictates that an accused must only be tried on the evidence admissible against him or her by an impartial and independent judge.
- [39] Neither of the above-cited principles supports the appellant's position "that where the same or substantially the same evidence is admissible as against each [separately tried] conspirator at the first step of *Carter*, it would be illogical to acquit one on the first step of *Carter* and convict the other." Indeed, as expressly noted at p. 982 of *Guimond*, this illogical result surfaces only in cases involving "jointly tried conspirators." This is because only one trier of fact (whether judge or jury) assessed the identical or substantially identical body of evidence against both conspirators. In such circumstances, the law of contradiction holds that there cannot be a conspiracy between A and B but no conspiracy between B and A.
- [40] Although what I have said is sufficient to lead to the dismissal of the appeal, it may be helpful to comment, nonetheless, on the judge's reliance on *CUPE* to determine whether the appellant's trial was an abuse of process. With great respect, I do not think the judge ought to have used this framework which, in my view, is applicable in the civil but not the criminal law context. Rather, the judge ought to have assessed the application from the perspective of whether the Crown's conduct in proceeding with a second trial was egregious.
- [41] *CUPE* was a civil case involving an attempt by an offender to relitigate, before an administrative tribunal, the facts underlying his conviction for sexual assault in a prior proceeding. The majority of the Supreme Court of Canada focused on civil cases in articulating the principle of abuse of process by relitigation. I agree with the Crown that doctrines such as abuse of process and issue estoppel must be assessed in the context of the nature of the proceeding and that they take "on particular nuances in the criminal sphere": see *R. v. Mahalingan*, 2008 SCC 63 at para. 38 (referring to issue estoppel). In *Mahalingan*, decided five years after *CUPE*, a majority of the Supreme Court observed that the doctrine of abuse of process in the criminal sphere "may or may not provide protection against

relitigation" and that it had been typically "reserved for obviously egregious abuses of the Crown power," but not much used: at para. 42. The Court did not refer to CUPE in its articulation of the approach to abuse of process, although the case is referred to elsewhere in the judgment.

- [42] In *R. v. Punko*, 2012 SCC 39, decided four years after *Mahalingan*, the Supreme Court accepted that, if Crown conduct was found to be "sufficiently egregious, the doctrine of abuse of process could provide protection against relitigation": at para. 21. The court did not refer to CUPE. In my judgment, in the criminal context, abuse of process by relitigation requires egregious conduct by the Crown that seriously compromises the integrity of the justice system: see *R. v. Anderson*, 2014 SCC 41 at para. 50 and *R. v. Reimer*, 2020 BCCA 102 at para. 43. I accept the Crown submission that where an alleged relitigation does not affect the fairness of an accused's trial, the accused must generally demonstrate that the Crown's pursuit of the prosecution is egregious. As noted in *Mahalingan*, "relitigation, without more, simply does not reach the threshold required for a finding of abuse of process": at para. 42.
- [43] Respectfully in my view, this is the test that ought to have been applied. Had it been applied, the result would have been the same since, as the judge noted and the appellant conceded, the Crown conduct was not egregious.

Disposition

[44] I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Dickson"

I agree:

"The Honourable Mr. Justice Butler"

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