
CANADA / JUDGMENT

R. v. Hall

2020 BCCA 9

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 9 R. v. Hall

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hall,

2020 BCCA 9

Date: 20200110

Docket: CA45793

Between:

Regina

Respondent

And

Joshawa James Michael Hall

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated

February 10, 2017 (conviction) (R. v. Hall, 2017 BCSC 246,

New Westminster Docket X079493).

Counsel for the Appellant:

M. Reinhart

Counsel for the Respondent:

J.A. Dyck

Place and Date of Hearing:

Vancouver, British Columbia

December 9, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 10, 2020

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Fenlon

Summary:

On appeal from conviction, the appellant argues that the trial judge: (1) misapprehended evidence; (2) committed a Beaudry error by unreasonably addressing a conflict in the evidence; (3) failed to consider whether details provided by a Vetrovec witness were fed to the witness by police; and (4) erred in principle in her Vetrovec analysis. Held: Appeal dismissed. First, the judge did not misapprehend the evidence, but concluded that inconsistencies in the evidence of the Vetrovec witness did not fatally undermine her assessment of the witness's credibility or reliability. In any event, the alleged errors did not play an essential role in the reasoning process leading to the convictions. Second, the judge's finding that the appellant was the shooter does not betray a fundamental flaw in her reasoning process as is required to make out a Beaudry error. The judge recognized the conflict in the evidence but did not ascribe to it the significance the appellant would have liked. Third, in the absence of an evidentiary foundation it cannot be successfully argued for the first time on appeal that the judge erred in failing to address a speculative theory that the witness's evidence was tainted by police procedures. Finally, there was a considerable body of evidence the judge was entitled to regard as confirmatory of the testimony of the Vetrovec witness that the appellant was the perpetrator of the offences.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] In the early morning hours of May 19, 2014, a residence on Alderson Avenue in Coquitlam, British Columbia was targeted in a drive-by shooting. At least six shots were fired at the house. No one was injured. Between 6:30 and 7:30 a.m. on the same day, the window of a ground floor apartment on Brunette Avenue in Coquitlam was smashed. The resident of that apartment was roused by the sound of breaking glass and discovered that a rifle had been thrown through the window and onto her living room floor. The Crown alleged that the appellant was responsible for offences arising out of these two incidents.
- [2] Identity was the central issue at trial. Proof of identity turned largely on the judge's assessment of the credibility and reliability of the evidence of Samantha Fenton, an unsavoury witness to whom the principles in *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811 applied.
- [3] Ms. Fenton was abusing drugs at the time of the offences. She worked for the appellant in the drug trade. She testified that she drove the appellant (and others) to the scene of both offences in her silver PT Cruiser. Her evidence on this point was inconsistent with an exculpatory statement she gave to the police that she was not present when any of the offences were committed and that her vehicle had been used by the appellant and others that evening without her permission. She admitted lying to the police about not being present when the offences were committed. She had an obvious motive to do so.
- [4] With respect to the Alderson Avenue shooting, Ms. Fenton testified that she drove west on Alderson and parked her PT Cruiser in front of a residence. It was common ground at trial that the residence was located on the north side of Alderson Avenue. On Ms. Fenton's account, the passenger side of the vehicle faced the residence. Ms. Fenton testified that, after she stopped her vehicle, the appellant discharged a rifle at the residence through the open window of the front passenger seat. Her account of the drive-by shooting was inconsistent with other evidence adduced at trial in two potentially significant ways.
- [5] First, Ms. Fenton testified that she drove west on Alderson away from the scene after the shooting stopped. Alain Boire, who also lived on the north side of Alderson Avenue near the home targeted in the shooting, testified that he heard gunshots in the early morning hours, looked out his window and saw a vehicle resembling a PT Cruiser travelling east away from the scene. If Ms. Fenton drove to and from the scene by travelling east along Alderson Avenue, the appellant could not have discharged the rifle out of the front passenger seat as he would have been facing the south side of Alderson Avenue.
- [6] Second, Ms. Fenton's evidence that the appellant discharged the rifle after she stopped her vehicle was inconsistent with the evidence of Sgt. Mackenzie, the forensic identification officer who took photographs of the scene. Sgt. Mackenzie testified that the bullet trajectories were such that, at some point, the shooter was moving.

[7] On February 10, 2017, the appellant was convicted by a judge of the Supreme Court of British Columbia of four offences arising out of these two incidents:

- two counts of committing mischief by wilfully damaging the residences located on Alderson Avenue and Brunette Avenue, contrary to s. 430 of the Criminal Code, R.S.C. 1985, c. C-46 [Code];
- one count of intentionally discharging a firearm into or at a place [the Alderson Avenue residence] knowing or being reckless as to whether another person was present in that place, contrary to s. 244.2(3)(b) of the Code; and
- one count of careless use of a firearm, contrary to s. 86(1) of the Code -- a count that was conditionally stayed by the trial judge.

[8] The appellant appeals his convictions on four grounds:

1. That the judge misapprehended the evidence of Sgt. Mackenzie that at some point the Alderson Avenue shooter was moving. In summarizing Sgt. Mackenzie's evidence, the judge said he testified that the shooter "might have been moving" (emphasis added);
2. That the judge committed the type of error identified in *R. v. Beaudry*, 2007 SCC 5, by addressing the conflict in the evidence between Ms. Fenton and Mr. Boire in an unreasonable fashion;
3. That the judge erred by failing to consider whether certain details provided by Ms. Fenton in her testimony which were relied on to confirm her account may have been fed to her by the police; and
4. That the judge erred in law in her *Vetrovec* analysis by failing to confine her consideration of confirmatory evidence to evidence that restored faith in the salient part of Ms. Fenton's account -- specifically, that the appellant was the person who committed the offences. The fourth ground of appeal was not pressed in oral argument, but neither was it abandoned.

[9] The common thread linking all four grounds of appeal is that the judge made errors in finding that the evidence of Ms. Fenton was an independently confirmed and reliable account of the appellant's responsibility for the offences underlying the two incidents.

[10] The appellant seeks an order allowing the appeal, setting aside the conviction and directing a new trial.

[11] For the reasons that follow, I am unable to give effect to the appellant's grounds of appeal. I would, therefore, dismiss the appeal from conviction.

II. Chronology of Events

[12] I will review only so much of the evidence as is necessary to address the grounds of appeal.

1. Alderson Avenue

- [13] Isabella Franco lived with her mother and other family members in the upper level of the Alderson Avenue residence. She had purchased drugs from the appellant in the past. In a Facebook exchange with the appellant that occurred in August 2013, the appellant demanded payment from Ms. Franco for drugs supplied to her. When she said she would not or could not pay, the appellant said, "[I] always get paid". He also said that if she did not pay, "[t]hen ur [sic] mom will pay end of story".
- [14] In the late evening hours of May 18, 2014, the appellant attended at the apartment of Caleb Sorenson, who occupied the lower level of the Alderson Avenue residence. Mr. Sorenson knew and recognized the appellant from school. He testified that the appellant opened his basement suite door and discharged a can of bear spray in his face. He said the appellant's visit was unexpected and that he could offer no motive for the appellant's assaultive conduct.
- [15] Ms. Fenton testified that just before midnight on the evening of May 18, 2014, the appellant asked her to give him a ride so he could confront someone who owed him money. He directed her to a residence in a neighbourhood she was unfamiliar with. She parked "right in front of the house." Ms. Fenton testified that the appellant and another person walked up the driveway to a door on the right side of the house. She testified that she "believed" that the side door was under a carport. In fact, the door to Mr. Sorenson's suite is located on the front of the right-hand side of the house, immediately adjacent to the carport. The door to Mr. Sorenson's suite is not under the carport. I would note, however, that anyone parking directly in front of the house would likely have their view of the door to the basement suite obstructed by a clump of bushes located at the front of the house on the right-hand side. In any event, Ms. Fenton testified she heard a knock at the door, saw a light come on and heard the sound of the door being kicked. The appellant and the other person then returned to the vehicle talking about what they had just done. Ms. Fenton testified the appellant and the other person were excited and talking about mace or bear spray.
- [16] The police and ambulance personnel were dispatched to the scene. The discharge of bear spray affected not just Mr. Sorenson but occupants of the upper level of the Alderson Avenue residence.
- [17] Before the commencement of the trial, the appellant pleaded guilty to assault with a weapon arising out of this incident. The trial judge recognized that the probative value of the guilty plea was limited to the context it provided in understanding events that followed. Specifically, this evidence linked the appellant to the Alderson Avenue residence just hours before the drive-by shooting occurred. It was capable of establishing not only the appellant's animus towards the occupants of the residence, but that he had acted on that animus just a few hours before the drive-by shooting. The appellant's counsel does not dispute that the circumstances giving rise to the plea were also capable of being used as evidence confirming Ms. Fenton's implication of the appellant in the drive-by shooting committed in relation to the same residence a few hours later.

- [18] Ms. Fenton testified that shortly after the bear spray incident, the appellant asked her to drive him and others back to the same residence on Alderson Avenue. She did so and parked with the passenger side of the PT Cruiser closest to the house. On Ms. Fenton's evidence she would have parked on the north side of Alderson Avenue facing west. She said a long gun was passed by someone in the back of the vehicle to the appellant who was sitting in the front passenger seat. She saw the appellant fire the gun at the residence. She testified that she heard the gun being discharged once but believed it was fired multiple times based on the length of time they sat in her vehicle in front of the house. Ms. Fenton testified that she was in shock, her adrenaline was flowing and that with "what was going on I couldn't really -- I was just focused on the area more than what was going on inside my vehicle." She said she sped away from the scene after the shooting by travelling west on Alderson Avenue. She said she was sure about this. She said she turned left at the appellant's direction after leaving the scene and travelled south down a hill and away from Alderson Avenue. That is the extent of her evidence on the route she took from the scene.
- [19] As noted earlier, her testimony on this issue was inconsistent with the observations of Mr. Boire. Mr. Boire lived on the north side of Alderson Avenue about 66 feet east of the residence targeted in the drive-by shooting. He testified that on May 19, 2014, at about 3:00 a.m., he was awakened by a rapid succession of five or six bangs. Midway through the succession of bangs he went to a window that looks out on Alderson Avenue. He did not see anything immediately. He testified that a dormer on his house blocks his view to the west. Shortly thereafter, he saw a vehicle that was shaped like a PT Cruiser pass by his house heading east. The vehicle only came into view when it was directly in front of his house. It stopped briefly and then sped off.
- [20] Sgt. Mackenzie identified six bullet holes on the exterior of the Alderson Avenue residence and on a vehicle parked in the driveway. Although he had not been qualified to give expert opinion evidence, Sgt. Mackenzie gave evidence in examination in chief and on cross-examination on the trajectory of the bullets. He surmised that, at some point, either the shooter was moving or there was more than one shooter.
- [21] Ms. Fenton testified that the appellant asked her to drive him back to the same residence on Alderson Avenue about 30 minutes later "to see if there was any action going on". She testified that when they drove past the Alderson Avenue residence for the third time, she saw ambulance and police vehicles outside. It was common ground at trial that Ms. Fenton's evidence on this point could not be accurate. The ambulance and police vehicles that attended the residence after the appellant discharged the bear spray had cleared the scene by this time.
2. Brunette Avenue

- [22] Ms. Fenton testified that at about 6:00 a.m. the same morning, she drove the appellant and another person to an area off Brunette Avenue to buy cigarettes and have breakfast. She testified the appellant got out of her vehicle, ran up to the lower left side of an apartment building on Brunette Avenue and smashed a window. She described the building as derelict and light grey in colour. She did not see the appellant in possession of a rifle as he ran towards this building.
- [23] Lyla Mervyn lived in an apartment on Brunette Avenue in May 2014. She testified that the appellant left her a drunken voicemail message on May 18, 2014, in which he threatened to burn down her building. Subsequently, the appellant and Ms. Mervyn engaged in an exchange of profane and mutually insulting text messages.
- [24] Ms. Mervyn testified that a window of her ground floor apartment was broken between 6:30 and 7:00 a.m. on the morning of May 19, 2014. As noted earlier, when she got up to investigate she found a rifle on her living room floor.
- [25] The appellant's fingerprints were found on the rifle thrown through the window of Ms. Mervyn's apartment. The appellant was further connected to the rifle by an exchange of text messages he had with a friend on May 14, 2014. In that exchange, the appellant complained that he was in possession of a gun with some kind of brass circle that jammed the barrel. The rifle seized from Ms. Mervyn's apartment had a brass fitting in the barrel which prevented it from being fired.
- [26] The rifle seized from Ms. Mervyn's residence was not the rifle used in the drive-by shooting on Alderson Avenue.

3. The Appellant's Position at Trial

- [27] The appellant did not testify at trial.
- [28] It was put to Ms. Fenton in cross-examination that she was never at the scene of these offences and that the exculpatory version of events she initially related to the police was true. It was suggested to her that in implicating the appellant she was parroting back information about the offences she learned from others.
- [29] In closing submissions made on his behalf, the appellant suggested that Ms. Fenton was not present when the offences were committed or, if she was, her evidence implicating the appellant in the commission of the offences was unconfirmed and could not be relied on as proof beyond a reasonable doubt that he was the perpetrator.
- [30] With respect to the Alderson Avenue shooting, defending counsel emphasized Sgt. Mackenzie's evidence that, "the shooter may have been moving." He invited the judge to contrast Sgt. Mackenzie's evidence with the evidence of Ms. Fenton that the vehicle was stationary when the appellant shot at the residence. He also highlighted the discrepancy in the evidence given by Ms. Fenton and Mr. Boire as to the direction the PT Cruiser was travelling when it left the scene.

III. Reasons for Judgment

- [31] In oral reasons for judgment indexed as 2017 BCSC 246, the judge concluded that Ms. Fenton's evidence was "the only evidence capable of proving the identity of the accused as the perpetrator" and that her evidence must meet the standard of proof beyond a reasonable doubt.
- [32] In addressing the credibility of Ms. Fenton and the reliability of her trial testimony, the judge cited *Vetrovec* and *R. v. Khela*, 2009 SCC 4, before coming to the following conclusions:
- [78] Ms. Fenton's description of the house on Alderson Avenue, while vague, was not generic. She was correct about the location of the driveway at the right hand side of the house and the door to the basement suite situated more or less under a carport.
- [79] Ms. Fenton's description of Ms. Mervyn's apartment building was quite specific. She said it was grey and derelict looking, which is accurate. She also correctly identified the location of the window that she said she saw the accused break.
- [80] I am satisfied that those details and the details about Alderson Avenue were not lucky guesses, nor were they the product of someone telling her what they had done rather than her seeing it for herself. There was sufficient detail from her about the appearance of the two residences to provide some confirmation of her account.
- [81] I acknowledge Ms. Fenton mixed up the second and third visits to the house, as her evidence conflicts with the evidence of Cst. Chiu that when he attended the house in response to the gunshot complaint he did not recall ambulance or other emergency personnel.
- [82] Ms. Fenton's evidence of how she drove away from the house after the shooting also conflicts with the evidence of Mr. Boire, who saw the PT Cruiser-like vehicle eastbound, not westbound. The witness said that after the first shot she was not focussed on what was going on in the car; she was in shock.
- [83] I am not satisfied these inconsistencies are fatal to reliance on her evidence or leave me with reasonable doubt, in light of the other confirmatory evidence I have accepted.
- [84] I find further confirmation of Ms. Fenton's evidence in the rifle seized from Ms. Mervyn's residence. Ms. Fenton did not see the accused take a rifle out of her car, but she was aware he went up to a building and smashed a window. I find the rifle that landed in Ms. Mervyn's living room was the same one the accused was lamenting about in his text exchange with [his friend], the one with the brass circle showing and no hole. His fingerprints were on it.
- [85] While I agree with Mr. McMurray that it does not make much sense for the accused to throw a rifle into Ms. Mervyn's house when he knows it likely has his fingerprints on it, I accept the rifle made its way into the house either as a projectile to break the window or a blunt instrument to break the window, following which it was launched into the house.

[86] Finally, Ms. Fenton testified that the accused told her he wanted to confront someone who either owed him money or it had something to do with drugs, he was referring to the dated drug debt owed him by Ms. Franco, or his unsatisfactory communications with Ms. Mervyn, or both. I appreciate the debt owed by Ms. Franco was dated but not, I find, forgotten.

[87] The question I must ask myself is whether, to paraphrase the words of Mr. Justice Fish at para. 15 of *R. v. Khela*, I find the evidence elsewhere in the dance to provide sufficient comfort that Ms. Fenton was telling the truth about the accused's involvement ... I am satisfied there is evidence to confirm materials [sic] parts of her account and her evidence satisfies me beyond a reasonable doubt that the accused was the perpetrator of the acts ...

[Emphasis added.]

IV. Analysis

1. The alleged misapprehension of the evidence of Sgt. Mackenzie

[33] The appellant submits that the judge misapprehended Sgt. Mackenzie's evidence by saying he testified that the shooter might have been moving. Sgt. Mackenzie testified the Alderson Avenue shooter would have been moving. The appellant argues that this alleged misapprehension is material because Sgt. Mackenzie's opinion contradicted Ms. Fenton's testimony that the car was stationary when the shooting occurred.

[34] I am not persuaded by the appellant's position on this point.

[35] The standard an appellant must meet to obtain relief on misapprehension of evidence grounds is high: *R. v. Lohrer*, 2004 SCC 80 at para. 2; *R. v. Webber*, 2019 BCCA 208 at para. 27. The error must be plainly identified. It must also be material in the sense that it formed a central element of the trial judge's reasoning process that led to a conviction. One way of determining whether the misapprehension played an essential role in the reasoning process resulting in a conviction is to consider whether striking it from the judgment would leave the reasoning on which the conviction is based on unsteady ground: *Lohrer* at paras. 6-9; *R. v. Sinclair*, 2011 SCC 40 at paras. 53, 56.

[36] With these principles in mind, I begin by noting that the judge's summary of Sgt. Mackenzie's evidence mirrored the summary of that evidence given by defending counsel in his closing submissions.

[37] More importantly, I am not persuaded that the reasons for judgment have been shown to reflect a misapprehension of Sgt. Mackenzie's evidence. After the impugned passage, the judge turned to consider the reliability of Ms. Fenton's account and whether there existed independent evidence tending to confirm her identification of the appellant as the Alderson Avenue shooter. In doing so, she recognized the defence position that "[t]he shot pattern is consistent with the shooter moving, whereas Ms. Fenton said the car was stationary" (emphasis added). This passage demonstrates that the judge did not misapprehend the evidence on this issue. Rather, she concluded that this and other

inconsistencies were not fatal to her reliance on Ms. Fenton's evidence in light of the other evidence that confirmed her account and implicated the appellant in the commission of the offences. In my view, that is a factual finding to which deference is owed.

- [38] Further, even assuming that the judge misapprehended Sgt. Mackenzie's evidence, I am not persuaded that the alleged error has been shown to have played an essential role in the reasoning process leading to the convictions.
- [39] There was a substantial body of independent evidence relied on by the judge to confirm Ms. Fenton's testimony that the appellant was the perpetrator of the Alderson Avenue offences. That evidence included the appellant's attendance at the residence earlier in the evening when he assaulted Mr. Sorenson. The appellant's conduct on this occasion was not only powerful evidence demonstrating his animus towards the residents of the building, but evidence of his preparedness to act on that animus a few hours before the drive-by shooting. In addition, the judge found that the drug debt owed by Ms. Franco, who lived in the Alderson Avenue residence, had not been forgotten. This evidence supplied the appellant with a motive for the commission of the offences.
- [40] As I would not give effect to this ground of appeal for the reasons stated, I need not address the Crown's position that Sgt. Mackenzie's evidence respecting the trajectory of the bullets fired at the residence was inadmissible because he had not been qualified to give opinion evidence on this point.
- [41] The appellant also suggested in oral argument that the judge misapprehended Ms. Fenton's evidence as to the location of the door leading to Mr. Sorenson's basement suite. As noted earlier, Ms. Fenton testified that the appellant went to a side door at the front of the house on the right side. As to the precise location of the door, she said, "I believe [it] was under a little carport." In fact, the door was adjacent to the carport on the right side of the front of the house.
- [42] In dealing with this evidence, the judge said Ms. Fenton was correct about the door to the basement suite being situated "more or less under a carport." I do not regard this as a misapprehension of Ms. Fenton's evidence, let alone a significant one. Put simply, I do not consider it reasonable to suppose that this alleged inconsistency had a material bearing on the trial judge's reasoning process, either standing alone or in combination with her alleged misapprehension of the evidence of Sgt. Mackenzie.
2. The alleged Beaudry error
- [43] With respect to the Alderson Avenue shooting, the appellant submits that the judge committed a Beaudry error by failing to address in a reasonable way the contradictory evidence given by Ms. Fenton and Mr. Boire about the direction the PT Cruiser was travelling as it left the scene.

- [44] The appellant's argument rests on the judgment of Justice Fish in *Beaudry* at paras. 83 and 97. Justice Fish concluded that an appellate court may find a verdict to be unreasonable if the trial judge has made a finding of fact essential to the verdict that is not logically supported by the evidence upon which it purports to rest, or because the reasons given in support of a verdict are fundamentally incompatible with evidence that has not been contradicted or rejected. Justice Fish dissented in the result in *Beaudry*, but any doubt that his judgment reflected the holding of the Court on this point was dispelled in *R. v. Sinclair*, 2011 SCC 40. Although Fish J. also dissented in the result in *Sinclair*, his articulation in that case of the circumstances in which a *Beaudry* error is committed is authoritative:
- [19] Illogical or irrational reasoning can render verdicts unreasonable under s. 686(1)(a)(i) of the Code, in various ways. *Beaudry* identifies two. First, a verdict is unreasonable where the judge draws an inference or makes a finding of fact essential to the verdict that is "plainly contradicted by the very evidence from which it was drawn" or upon which it has been made to rest (para. 105). In that case, the essential finding is illogical or unreasonable in light of the evidence relied upon in making the finding. Here, the rule of law speaks the language of logic: From accepted evidence "X", a court cannot lawfully infer "not X".
- [21] A verdict is likewise unreasonable where the judge draws an inference or makes a finding of fact essential to the verdict if that inference or finding of fact is "'demonstrably incompatible' with evidence that is neither contradicted by other evidence nor rejected by the trial judge" (*Beaudry*, at para. 79, per Binnie J.).

(See also *R. v. R.P.*, 2012 SCC 22 at para. 9.)

- [45] I understand the appellant to rely on the second way in which a verdict may be unreasonable pursuant to *Beaudry*. This route to an unreasonable verdict requires an appellant to demonstrate that a finding of fact essential to the verdict was demonstrably incompatible with evidence that was neither contradicted nor rejected by the trial judge. To succeed on *Beaudry* grounds, an appellant must do more than show that a particular factual finding or inference is the product of a flaw in the trial judge's reasoning process. It must be shown that the flaw played a central role in the reasoning process that led to a conviction: *R. v. Scuby*, 2015 BCCA 430 at para. 31; *R. v. Zadeh*, 2016 BCCA 474 at para. 27.
- [46] Appellate intervention on "*Beaudry* grounds" will be rare: *Sinclair* at para. 22; *Zadeh* at paras. 25-27, *R. v. Ali*, 2013 BCCA 346 at para. 17. As Justice Bennett noted in *Ali*, the decisions in *Sinclair* and *Beaudry* are not an invitation to appellate dissection of reasons for judgment. A similar point was made in *R. v. Thla Ceu*, 2018 BCCA 480 at para. 43:

The *Beaudry/Sinclair* error is narrow; it captures only findings of fact or inferences essential to the verdict that are plainly contradicted by the evidence relied on by the trial judge or incompatible with evidence not otherwise contradicted or rejected by the judge. ... Evidence is often contradictory, and it is the trial judge's job to make sense of the evidence and to make findings despite contradictory evidence.

- [47] I am not persuaded that the verdict is unreasonable in the Beaudry sense. While the judge did not reject the evidence of either Mr. Boire or Sgt. Mackenzie, her factual finding that the appellant was the shooter was not the product of a fundamentally flawed reasoning process that is demonstrably incompatible with the evidence of these two witnesses.
- [48] The critical question the judge had to decide was whether the evidence established beyond a reasonable doubt that the appellant was the shooter. She was obliged to consider evidence that confirmed and undermined Ms. Fenton's testimony that he was, including the evidence of Mr. Boire. The judge did so and concluded, in light of the other confirmatory evidence she accepted, that the discrepancies in Ms. Fenton's account did not fatally undermine the reliability of her evidence or give rise to a reasonable doubt about whether the appellant committed the shooting.
- [49] In coming to this conclusion, the judge did not make a finding of fact that Ms. Fenton drove west away from the scene (contrary to Mr. Boire's evidence) nor did she make a finding of fact that all of the shots were fired from the front passenger seat (contrary to Sgt. Mackenzie's opinion). The judge accepted that after the first shot was fired, Ms. Fenton was in a state of shock and not focused on what was going on in the car. I take from this that the judge accepted Ms. Fenton was in a panicked state and may have been wrong about the particulars of the shooting, including how she drove away from the scene.
- [50] In my view, the judge's factual finding that the appellant was the Alderson Avenue shooter does not betray a fundamental flaw in her reasoning process of the narrow kind contemplated by Beaudry. She was entitled to conclude that Ms. Fenton, in her panicked state, may have been wrong about some of the events surrounding the shooting, but accept her evidence that the appellant was the person who discharged the weapon at the Alderson Avenue residence.
- [51] In sum, the judge did not ignore the conflicts in the evidence between Ms. Fenton on the one hand and Mr. Boire and Sgt. Mackenzie on the other. Neither did she make a specific factual finding inconsistent with evidence she did not reject. She recognized the discrepancies, but did not ascribe to them the significance the appellant would have liked. That, in my view, is not a Beaudry error. Accordingly, I would not give effect to this ground of appeal.
3. The alleged failure to consider whether Ms. Fenton had been supplied with confirmatory evidence by the police
- [52] The appellant submits that the judge erred by failing to consider whether Ms. Fenton's generally accurate description of the Alderson Avenue residence and Brunette Avenue apartment building was the product of information that had been supplied to her by the police. The appellant notes that Ms. Fenton acknowledged being shown a photograph of Ms. Mervyn's apartment on Brunette Avenue for the purposes of identifying the window she said was broken by the appellant. He submits that it is a reasonable inference Ms. Fenton may also have been shown photographs of the Alderson Avenue residence that enabled her to give a generally accurate description of that residence.

- [53] The appellant acknowledges that this evidence was not developed nor was the point pursued at trial. Ms. Fenton was never asked whether she had been shown a photograph of the Alderson Avenue residence.
- [54] Despite the gaps in the record and the fact that the appellant's trial counsel did not pursue this line of inquiry, the appellant now submits that the judge had an independent obligation to consider whether Ms. Fenton's ability to describe the Alderson Avenue residence targeted in the drive-by shooting was tainted by police procedures. The appellant goes further to suggest that the judge's failure to consider the point constitutes a misapprehension of evidence on a material issue. I do not agree.
- [55] In my view, and in the absence of an evidentiary foundation permitting assessment of this issue, it cannot successfully be argued that the judge erred in failing to deal with what amounts to a speculative theory advanced for the first time on appeal. I would not give effect to this ground of appeal.
4. The alleged error in applying *Vetrovec* to the evidence of Ms. Fenton
- [56] The appellant argues that the evidence relied upon by the judge to confirm Ms. Fenton's account that the appellant was the perpetrator of the offences was, at most, evidence capable of confirming only that she was present at the time the offences were committed. The appellant submits that this evidence was not confirmatory evidence implicating him in the commission of the offences. In essence, the appellant submits that the judge erred in her application of *Vetrovec* principles to this case by failing to consider whether the confirmatory evidence restored faith in Ms. Fenton's testimony that the appellant was the perpetrator.
- [57] The appellant's submission on this point focuses once again on the Alderson Avenue shooting. In my view, it has little, if any application to the mischief committed in relation to the apartment on Brunette Avenue. Ms. Fenton's evidence that the appellant committed the offence on Brunette Avenue was powerfully confirmed by evidence linking him to the rifle thrown through Ms. Mervyn's window.
- [58] I would not accede to this ground of appeal.
- [59] First, the appellant argued at trial that Ms. Fenton lied under oath about being at the scene of these offences. In this context, it was open to the judge to consider evidence that confirmed Ms. Fenton's testimony that she was present at the relevant time.
- [60] Second, the judge did not simply focus on evidence that confirmed aspects of Ms. Fenton's testimony in ways unrelated to the appellant's responsibility for the offences. The judge considered a significant body of evidence that she was entitled to regard as confirmatory of Ms. Fenton's testimony that the appellant was the perpetrator of the offences committed in relation to the Alderson Avenue residence. This is confirmed by the trial judge's concluding remarks which I will repeat for convenience:

[87] The question I must ask myself is whether, to paraphrase the words of Mr. Justice Fish at para. 15 of *R. v. Khela*, I find the evidence elsewhere in the dance to provide sufficient comfort that Ms. Fenton was telling the truth about the accused's involvement I am satisfied there is evidence to confirm materials [sic] parts of her account and her evidence satisfies me beyond a reasonable doubt that the accused was the perpetrator of the acts

[Emphasis added.]

V. Conclusion

[61] For the foregoing reasons, and despite the able advocacy of Ms. Reinhart, I would dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Fenlon"

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