

CANADA / JUDGMENT

R. v. Hui

2025 ONCA 754

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Hui

Collection

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COA-22-CR-0291, COA-23-CR-0481

Judges

Pepall, Sarah E.; Coroza, Steve A.; Dawe, Jonathan

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hui, 2025 ONCA 754

DATE: 20251107

DOCKET: COA-22-CR-0291 & COA-23-CR-0481

Pepall, Coroza and Dawe JJ.A.

DOCKET: COA-22-CR-0291

BETWEEN

His Majesty the King

Respondent

and

David Hui

Appellant

AND BETWEEN

DOCKET: COA-23-CR-0481

His Majesty the King

Respondent

and

Musab Saboon

Appellant

Jeff Marshman and Mitchell Chernovsky, for the appellant Musab Saboon

Anthony Moustacalis and Aiden Seymour-Butler, for the appellant David Hui

Ken Lockhart, for the respondent

Heard: April 28, 2025

On appeal from the convictions entered by Justice W. Danial Newton of the Superior Court of Justice, on April 22, 2022, and from the sentence imposed on David Hui on July 6, 2022, with reasons reported at 2022 ONSC 2402 and 2022 ONSC 3999.

Pepall J.A.:

A. Introduction [1] The appellants, David Hui and Musab Saboon, were found guilty of the kidnapping and first-degree murder of Lee Chiodo after a trial by judge alone. Both were sentenced to life imprisonment without parole eligibility for 25 years. For their kidnapping convictions, Mr. Hui received a concurrent sentence of 15 years' imprisonment and Mr. Saboon a concurrent sentence of life imprisonment. They both appeal from their convictions and Mr. Hui also appeals from his sentence for kidnapping.[1]

[2] On their conviction appeals, the appellants challenge the trial judge's credibility and reliability analysis and findings relating to a Vetovec witness, Marshall Hardy-Fox, whose evidence was key to the convictions. Mr. Hui additionally submits that the trial judge failed to apply *R. v. W.(D.)*, [1994] 3 S.C.R. 521, and also gave insufficient reasons.

- [3] On his sentence appeal, Mr. Hui submits that the trial judge failed to apply the parity principle when he sentenced Mr. Hui for kidnapping.
- [4] For the reasons that follow, I would dismiss both the conviction appeals and Mr. Hui's sentence appeal.

B. Background Facts [5] Lee Chiodo was found dead on February 24, 2019. He had been shot once in the back of his head. His body was located on a dead-end road on Mission Island in Thunder Bay. Toxicology analysis indicated the presence of fentanyl and cocaine in his blood. The identity of the murderer was not revealed by any forensic evidence. The police obtained surveillance video footage showing Mr. Chiodo leaving a bowling alley called Mario's Bowl with a Black male at 11:21:17 p.m. on the night of February 23, 2019. Video from a power generating station on Mission Island showed a vehicle driving towards the area where Mr. Chiodo's body was found at 11:38:30 p.m. and leaving at 11:43:43 p.m.

- a) Evidence of Mr. Chiodo's movements before his death [6] Evidence adduced at trial included the testimony of Amanda Leach. She was formerly Mr. Chiodo's girlfriend for 7 to 8 years. After she had left the relationship she worked and stayed at the Econo Lodge Hotel in Thunder Bay. On February 23, 2019, Mr. Chiodo contacted Ms. Leach asking if he could have a shower. He stayed in her room and slept while she worked the evening shift. She saw him a few times during her 3:00 p.m. to 11:00 p.m. shift but he had left when she returned to her room at 11:45 p.m. Mr. Chiodo used her tablet for messages. She turned it over to the police because she believed he was still logged into it and the police could then see his messages. On the Econo Lodge video, Mr. Chiodo was observed leaving the room at 11:17:42 p.m.
- [7] Crystal Leduc's evidence was admitted through an agreed statement of facts along with the transcript of her testimony from the preliminary inquiry. She had known Mr. Hui through the drug scene for about six years. She was buying drugs from him and using drugs with him in the Academy area of town. She had known Mr. Chiodo for about five years and in the period prior to his death, he was on the "same side of the drug scene" as she, "looking to acquire and struggling with addiction". Ms. Leduc met "Tony" about two weeks prior to Mr. Chiodo's death. Mr. Chiodo had brought her to 9 Trillium to do housecleaning in exchange for drugs and introduced her to Tony. Ms. Leduc knew 9 Trillium as being Stephanie's house. Tony and Mr. Hui were selling purple fentanyl and crack out of 9 Trillium and Ms. Leduc was acquiring drugs from them to sell. Over the course of two weeks, she went to 9 Trillium about a dozen times and "Dave and Tony" remained there. Dave and Tony used a little black car. The first time she was there, Mr. Chiodo acquired drugs for resale.
- [8] In February 2019, Ms. Leduc had a Facebook Messenger account with a profile under her name. She had used that account to communicate with Mr. Chiodo and others to acquire and sell drugs. She did not have her own device and would use a friend's cell phone to check her Facebook account. She agreed that if she failed to log out, anyone using the phone could access her Facebook account. On the night of February 23, 2019, she borrowed Tony's phone to check her messages and to get rid of some dope and make some money. She had a

Facebook Messenger conversation with Mr. Chiodo about some phones he was trying to sell. She had Tony's phone when he came to retrieve it. He complained that she was taking too long and took the phone back before she had a chance to log out.

- [9] Ms. Leduc's Facebook Messenger account disclosed Facebook messages commencing at 10:13 p.m., all of which she denied having sent. Someone using her account purported to seek some "h" and asked Mr. Chiodo where to meet. At 11:01:46 p.m. on February 23, 2019, a message from Mr. Chiodo to Ms. Leduc's account user stated, "Meet me at marip's [sic] bowl". Less than a minute later, Ms. Leduc's account user messaged "K I'm on my way". Following further exchanges, video surveillance showed Mr. Chiodo leaving the Econo Lodge at 11:17 p.m., entering Mario's Bowl at 11:20:22 p.m., and leaving with a Black male at 11:21:17 p.m. As mentioned, the Ontario Power Generation security video revealed a vehicle driving to the dead-end at the Ontario Power Generation station at 11:38:30 p.m. and leaving from the dead-end at 11:43:43 p.m.
- [10] That same night, the front desk clerk at Mario's Bowl, Brandon Olson, saw Mr. Chiodo[2] and a dark-skinned male interacting and described the situation as tense. He overheard a discussion about "trying to get a hold of you". Mr. Olson walked up to the men and said, "not here guys, not here" and they both left.
- [11] Another employee, Daisy Darrach, observed Mr. Chiodo and a dark-skinned male talking. She testified that "it was heated" and she asked them to leave and "take it out to the parking lot" because they were cursing. She described the dark-skinned male as "frustrated, maybe a little angry, but just mostly irritated", and that he used a stern voice although she did not recall any threats. He was bald with a medium body build and taller than her at 5 feet 7 inches. She saw them get into a sedan.
- [12] A Mario's Bowl customer, Christopher Osmulski, testified that he saw a man running and trying to hide behind the bar. He then saw a "black man come in and confront" Mr. Chiodo. He heard the Black man say "What are you doing, let's go, you're being a child, let's get out of here." The customer described the Black man's tone as "frustrated", "like almost angry". He was over 6 feet tall with an athletic build and between 150 and 180 pounds. He was bald with a well-groomed beard and thick framed black glasses. The two left together.
- [13] The assistant manager of Mario's Bowl, Megan Shperuk, testified on the comings and goings of three men from the premises. She was outside on a cigarette break and saw two men moving in the parking lot and then a man with a darker skin tone, taller than herself at 5 feet 5 inches, go inside. This man then emerged with a Caucasian man and they got into the back seat of a vehicle using the same door. A third man got into the driver's seat. It appeared to her that the driver was not driving a vehicle of his own because it seemed like he was trying to figure out the buttons. She described the vehicle as dark in colour and had an H on it which, in her mind, was either a Honda or a Hyundai.

- [14] Mr. Chiodo's body was found frozen and partially snow-covered. He was lying face down. An ejected shell casing was found less than half a metre away from his feet and a fired bullet was found directly beneath his head. He was not wearing a winter coat and toque as had been depicted in surveillance videos. That clothing was never located. The autopsy determined that the death was caused by a single gunshot wound from a firearm fired beyond one to two feet. A murder weapon was never located.
- b) Mr. Saboon and Mr. Hui's police statements [15] On March 1, 2019, Mr. Saboon was driving a black four-door Hyundai sedan and was stopped by uniformed officers assisting in the investigation into Mr. Chiodo's death. Mr. Hui and another male were in the vehicle. The vehicle was searched and one of the documents found was a Shell Canada receipt dated February 27, 2019 from a gas station in Sudbury. Additionally, the police found a white towel containing Mr. Hui's blood.
- [16] Mr. Saboon was detained for questioning, gave a statement to police, and was arrested. In his statement, he maintained that he was in Kitchener on February 23 and 24, 2019 and arrived in Thunder Bay on February 26, having travelled from Kitchener with Mr. Hui whom he described as a family friend. Mr. Saboon denied any involvement in Mr. Chiodo's murder. He had heard that Mr. Chiodo was killed because he owed money to some Toronto guys.
- [17] Mr. Saboon told police that he had friends around the Academy area of Thunder Bay. He knew Mr. Chiodo who he said came around the Academy area and was selling drugs. Mr. Saboon had been "hanging out" at 9 Trillium Way in the Academy area of Thunder Bay. The resident of 9 Trillium, "Stephanie", was a good friend whom he had known for a while. He also knew Mr. Chiodo sometimes came to Stephanie's place. Mr. Saboon said he had rented the four-door black Hyundai sedan and when in Thunder Bay, only he and Mr. Hui drove it. A subsequent search of the vehicle revealed approximately \$21,000 worth of narcotics including purple fentanyl, oxycodone pills and cocaine in a hidden compartment in the trunk. Mr. Saboon said he was 5 feet 11 inches tall.
- [18] Mr. Hui was arrested and charged on March 2, 2019. In his police statement given to Sergeant Rybak, Mr. Hui identified the man he was with on March 1, 2019 as "Tony".[3] Mr. Hui stated that he, Tony, and Mr. Hardy-Fox drove to a bowling alley, Mario's Bowl, on February 23, 2019. Tony had arranged by text to meet Mr. Chiodo at Mario's Bowl. Mr. Hui got out of the car. He was looking for Mr. Chiodo, whom he had known for a long time, because Tony had told him to do so. Mr. Hui said in his statement that when Mr. Hardy-Fox subsequently picked him up, Mr. Chiodo and Tony were in the backseat. He asserted that the group drove around for a while and he overheard Tony and Mr. Chiodo speaking about how they might go to the home of Mr. Chiodo's grandmother to get money.

- [19] Mr. Hui denied any involvement in the murder of Mr. Chiodo. He said that he asked to be and was dropped off by home after leaving Mario's Bowl but could not recall where or at what time. Detective Rybak testified in cross-examination that compared to what he knew "evidentiary-wise", there was nothing demonstrably false in what he was told by Mr. Hui. The appellants' police statements constituted their evidence at trial as neither appellant testified.
- c) Mr. Hardy-Fox's evidence [20] Mr. Hardy-Fox turned himself into the police on March 3, 2019, after learning that he was wanted for first-degree murder and kidnapping. He too provided a statement to the police but did not say at that time that either of the appellants had murdered Mr. Chiodo. Mr. Hardy-Fox was arrested and charged with first degree murder and kidnapping. His matter proceeded separately from that of the appellants.
- [21] The appellants' preliminary inquiry took place on September 17 and November 25, 2020. Mr. Hardy-Fox's testimony at the preliminary inquiry differed from the statement he had given to the police when he turned himself in. At the preliminary inquiry, he implicated the appellants in Mr. Chiodo's murder. The Crown withdrew Mr. Hardy-Fox's charge of first-degree murder after the preliminary inquiry. At the time of the appellants' trial, he had entered a plea of guilty to kidnapping and accessory-after-the-fact but had not yet been sentenced.
- [22] In 2022, Mr. Hardy-Fox testified at the appellants' trial. He stated that he developed a relationship with Stephanie and moved in with her and her children at 9 Trillium. By December 2018, he suspected that she was smoking crack and by January 2019, he was too. They got their drugs from other townhouses nearby. In February 2019, a week or a week and a half before Mr. Chiodo's murder, he moved out of Stephanie's place to get away from all the drugs. On February 23, 2019, Stephanie told him that her children had been taken from her and someone was selling drugs out of her place. He agreed to go with her "to kick them out". At the time, he was drunk and estimated his level of intoxication to be five or six out of ten. Once he and Stephanie got to 9 Trillium, Stephanie decided she wanted more drugs. She went in first and he stayed in the car and had some vodka. Later, he went in too. He met Mr. Hui who was "scaling out" drugs to customers. Together, the three of them consumed some crack and "Molly" (MDMA or ecstasy).
- [23] At trial, Mr. Hardy-Fox identified Mr. Saboon as Tony. Mr. Saboon arrived at 9 Trillium after Mr. Hardy-Fox had been there for a couple of hours. Mr. Saboon waited for people to come to the door and would assist Mr. Hui with the scales. In his examination-in chief, Mr. Hardy-Fox stated that Stephanie introduced him to Mr. Saboon. Mr. Hardy-Fox had not met him before. In cross-examination, he stated that Mr. Hui introduced him to Mr. Saboon as Stephanie's boyfriend.
- [24] According to Mr. Hardy-Fox, at some point, Mr. Saboon and Mr. Hui "started getting excited about getting a hold of someone who owed them money." They said, "We're going to meet him at Mario's Bowl." Mr. Hui asked Mr. Hardy-Fox to drive. He agreed because he knew they

usually paid their drivers with drugs. They got into a black sedan that was parked beside 9 Trillium with Mr. Hui in the front and Mr. Saboon in the back. As they sat in the vehicle in front of Mario's Bowl, Mr. Hardy-Fox testified that Mr. Saboon said that "[i]f he didn't have the money ... we were going to take him to a far place and make him walk a long distance."

- [25] Mr. Chiodo appeared and the three men got out of the vehicle. Mr. Chiodo bolted inside Mario's Bowl as soon as he saw them. Mr. Saboon told Mr. Hardy-Fox to go and watch the back of the building which he did. Mr. Hardy-Fox then saw Mr. Chiodo get into the back seat of the vehicle with Mr. Saboon. Mr. Hardy-Fox then got in and picked up Mr. Hui. They discussed where they were going to take Mr. Chiodo and Mr. Hardy-Fox decided to go to Mission Marsh, a conservation area on Mission Island.
- [26] On the drive, Mr. Hardy-Fox heard Mr. Saboon threatening Mr. Chiodo's life. Mr. Saboon said that he wanted his money. Mr. Chiodo was "begging for his life, saying he doesn't want to die." In the rearview mirror, Mr. Hardy-Fox saw that Mr. Saboon was holding a handgun and he also threatened to break Mr. Chiodo's legs. As there were too many people at the conservation area, Mr. Hui told Mr. Hardy-Fox to take the next left which was a dead-end road leading to an Ontario Power Generation station. When there, Mr. Hardy-Fox got out of the vehicle to urinate and the appellants removed Mr. Chiodo from the car. Meanwhile, Mr. Saboon told Mr. Hardy-Fox to turn the vehicle around which he did. Mr. Hardy-Fox testified at trial as follows:

And they were discussing what to do. And then that's when Hui said, "I'll do it." And then I see him grab the gun and start walking towards Lee. And that's when I, I just sat in the front seat. I went right back in the front seat because it's something like I don't want to see and, I don't know, I was just hoping that they weren't going to do it. And then the gunshot went off. And then I was just looking forward. And they got in the vehicle and Hui started talking about how when the life leaves the body, how the soul leaves the body or something. And then Saboon was telling him how they were looking for guys like him to do stuff like that. And then we just, I just made my way back to Trillium Way.

- [27] In cross-examination, Mr. Hardy-Fox acknowledged that after his testimony at the preliminary inquiry, his charge of first-degree murder was withdrawn and that he knew that his testimony would greatly affect the charges against him. The trial judge reviewed the inconsistencies between Mr. Hardy-Fox's testimony and his police statement at paras. 71 and 72 of his reasons:

He also acknowledged that he did not tell the truth to the police when he was interviewed on March 3, 2019, as he did not accuse Mr. Hui or Mr. Saboon of murdering Mr. Chiodo. He also acknowledged not telling the police about the threats to kill Mr. Chiodo or Mr. Chiodo begging for his life. He acknowledged telling the police that he did not know what was said in the car or watching "the kill". He told the police that he "didn't even think they shot him when I was driving off." At trial, he gave various explanations for not telling the police what he testified to at the preliminary inquiry, saying that he was confused, that he did not know what to do, and, at one

point, that he was intoxicated. When asked why he did not drive away when he saw what was happening at the dead-end or why he did not leave with Stephanie when he returned to 9 Trillium, he said that he was frightened for his safety and the safety of his family.

He acknowledged that the police thought that “Tony” i.e., Mr. Saboon, and not Mr. Hui, had killed Mr. Chiodo.

C. The trial judge’s Reasons for decision [28] In his reasons for decision, the trial judge commenced his analysis by reviewing the submissions of the parties and the law. He instructed himself on the principles described in *R. v. W.(D)*. He reviewed the essential elements of the charges of first-degree murder, kidnapping, and unlawful confinement and the law on party liability. He noted that given the out-of-court statements and the joint trial, anything said by one accused was only evidence concerning the person who said it. The trial judge also provided himself with a Vetrovec warning as it related to the evidence of Mr. Hardy-Fox. He cautioned himself as follows:

Mr. Hardy-Fox was a Crown witness. Although, like Mr. Hui and Mr. Saboon, Mr. Hardy-Fox was charged with kidnapping and first degree murder, the first degree murder charge against Mr. Hardy-Fox was withdrawn after he testified at the preliminary inquiry implicating Mr. Hui and Mr. Saboon in the murder of Lee Chiodo. Accordingly, there is good reason to look at Mr. Hardy-Fox’s evidence with the greatest care and caution. Although I may rely on his evidence even if not confirmed by other evidence, I caution myself that it is dangerous to do so. It is less dangerous to rely upon his testimony if his testimony is confirmed by other reliable and credible independent evidence.

[29] He stated that the danger of a wrongful conviction was “particularly acute” given that Mr. Hardy-Fox was a Vetrovec witness who, having been charged with first-degree murder, testified that the deceased was shot by Mr. Hui, which resulted in the withdrawal of the first-degree murder charge against him. The trial judge wrote at para. 108 that “[b]ut for the testimony of Mr. Hardy-Fox, there is no other direct evidence linking the accuseds to the murder. As counsel reminded me, it is ‘dangerous to rest a criminal conviction on the testimony of a single witness.’” He noted the defence submission that this is particularly so when that witness has a strong motive to lie to avoid the jeopardy of a life sentence. The trial judge acknowledged that the testimony of Mr. Hardy-Fox may have been “tainted” by disclosure and that his implication of the appellants at the preliminary inquiry occurred almost 18 months after his statement to police and after the Crown’s disclosure was completed.

[30] The trial judge was satisfied beyond a reasonable doubt that both appellants were involved in the events of February 23, 2019. Mr. Hui admitted that he attended at Mario’s Bowl on that date in a car driven by “Marshall” whom he had met that day. This was confirmed by Mr. Hardy-Fox. Ms. Shperuk testified that she saw three people enter the car parked in front of Mario’s Bowl. Ms. Leduc and Mr. Hardy-Fox’s testimony connected the appellants to the drug trade at 9 Trillium and to the black car. When Mr. Saboon was detained near 9 Trillium on

March 1, 2029, he was with Mr. Hui and a towel with Mr. Hui's blood was found in Mr. Saboon's vehicle.

- [31] As for Mr. Saboon, the trial judge reviewed Ms. Leduc's testimony that identified "Tony" as being involved in the drug trade with Mr. Hui at 9 Trillium and as being associated with the black car. The police found purple fentanyl in the car, the same kind of fentanyl that was being sold at 9 Trillium. Ms. Leduc also testified about using Tony's phone to access her Facebook messenger account and of Tony's retrieval of the phone. The Facebook messenger messages were consistent with the author being present and luring the deceased to Mario's Bowl. The videos depicted Mr. Chiodo running into Mario's Bowl and then 30 seconds later, a male resembling Mr. Saboon entering Mario's Bowl. The testimony of Mr. Hardy-Fox was consistent with those messages, the videos, and Ms. Shperuk's testimony. He also identified Mr. Saboon as associated with Mr. Hui, the drug trade at 9 Trillium, and the black car. The trial judge rejected Mr. Saboon's statement that he was in Kitchener on February 23, 2019.
- [32] The trial judge analyzed Mr. Hardy-Fox's testimony in detail. Having instructed himself on the dangers associated with his testimony, he was satisfied that it was based on Mr. Hardy-Fox's recollection and was not re-constructed based on disclosure. His testimony did not appear contrived but was based on his honest recollections of an extremely traumatic event. The trial judge acknowledged some inconsistencies in his evidence relating to the degree of his intoxication and whether he had consumed "Molly" but concluded that these inconsistencies did not mean Mr. Hardy-Fox was not being truthful. Moreover, Mr. Hardy-Fox was searching for explanations as to why he did not tell the truth to the police when first interviewed.
- [33] The trial judge reasoned that Mr. Hardy-Fox's evidence was confirmed by other independent evidence. This included the videos and Ms. Leduc's testimony. He stated at para. 120 that "based on the totality of the evidence, I find that the confirmatory evidence is capable of satisfying me, and does satisfy me, that Mr. Hardy-Fox, 'despite his frailties or shortcomings,' was truthful."
- [34] He summarized his findings based on the evidence he accepted. The deceased owed money to the appellants. Mr. Saboon posed as Ms. Leduc on Facebook messenger and sent the messages to Mr. Chiodo luring him to Mario's Bowl. Mr. Chiodo entered the car driven by Mr. Hardy-Fox accompanied by Mr. Saboon and then Mr. Hui. Mr. Saboon threatened the deceased and produced a pistol. The deceased was taken against his will to the dead-end on Mission Island and was removed from the car by the appellants who discussed what to do. Mr. Hui said he would do it and shot the deceased in the back of his head while the deceased was lying down.
- [35] The trial judge reasoned that the kidnapping crystallized with the gun reveal and the threats to the deceased en route to Mission Island. The kidnapping was connected, temporally and causally, to the killing. Mr. Saboon was the principal in the kidnapping and Mr. Hui a party as an aider. Mr. Hui was the principal in the murder of the deceased and Mr. Saboon aided

and abetted him. Accordingly, the trial judge found them both guilty of kidnapping and constructive first-degree murder. Although not advanced by the Crown, he also found them guilty of planned and deliberate first-degree murder.

D. Positions of the Appellants on the Conviction Appeals [36] Mr. Saboon raises a single ground of appeal. He asserts that the trial judge failed to assess the reliability of Mr. Hardy-Fox.

[37] Mr. Hui also attacks the trial judge's acceptance of Mr. Hardy-Fox's evidence. He highlights the danger of convicting the appellants on the evidence of a single witness who lied to the court and to the police. In oral submissions, he now also asserts that the trial judge did not appreciate that Mr. Hardy-Fox had to implicate both appellants in first-degree murder for him to secure a deal. Mr. Hui submits that other than Mr. Hardy-Fox's evidence, nothing contradicted his statement to police and it was supported by the evidence that the trial judge considered to be confirmatory of Mr. Hardy-Fox's testimony. Furthermore, the trial judge accepted Mr. Hui's evidence that he did not see Mr. Saboon kill Mr. Chiodo. Mr. Hui also asserts that there were inconsistencies in Mr. Hardy-Fox's evidence. As mentioned, additionally, Mr. Hui submits that the trial judge erred by committing an either/or approach to the assessment of credibility thereby running afoul of R. v. W (D) and also gave insufficient reasons.

E. Analysis a) Mr. Hardy-Fox's Evidence [38] Mr. Hui challenges the trial judge's credibility and reliability analysis. Mr. Saboon focuses on the trial judge's treatment of the reliability of Mr. Hardy-Fox's evidence.

[39] Mr. Hui asserts that the trial judge erred by preferring Mr. Hardy-Fox's evidence over that of Mr. Hui, who told the police that he had left the car and was not present during the murder. Mr. Hui maintains that his statement in this regard was not disproven by any other evidence.

[40] As acknowledged by the trial judge, Mr. Hardy-Fox lied when he explained his inconsistencies between his testimony and his police statement on the basis that he was intoxicated at the time he gave his police statement. Mr. Hui complains that this ought to have detracted from his overall credibility. Mr. Hardy-Fox had already testified that he was having a hard time being forthright with the police as his lawyer had instructed him not to say anything. According to Mr. Hui, the lie was therefore unnecessary.

[41] I reject these submissions. The trial judge was alive to the frailties in Mr. Hardy-Fox's evidence and considered them in some detail. He gave himself a clear, sharp warning about accepting his evidence. He expressly addressed Mr. Hardy-Fox's lie about being intoxicated, stating at para. 117 of his reasons:

His attempt to explain the inconsistencies between his testimony and his statement by saying he was intoxicated is a lie, but in my assessment, does not detract from his overall credibility. As I observed his cross-examination, Mr. Hardy-Fox was searching for explanations as to why he did not tell the truth to the police when first interviewed.

It was open to the trial judge to make this finding based on what he heard and observed. The trial judge was also alive to disclosure having been made to Mr. Hardy-Fox and that by implicating the appellants, he would receive the benefit of having the first-degree murder charge withdrawn. However, as has so often been said before, assessing credibility is not a science but a complex intermingling of impressions that emerge after watching and listening to the witnesses: *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 20.

- [42] The trial judge recognized the dangers associated with Mr. Hardy-Fox's evidence but concluded that it was supported by other independent evidence. Put differently, the evidence provided comfort that Mr. Hardy-Fox's testimony on the appellants' guilt could be trusted: see *R. v. Tubic*, 2024 ONCA 833, at para. 35. At para. 119 of his reasons, he identified eight aspects of the evidence that materially corroborated Mr. Hardy-Fox's testimony.
- [43] He started by noting Ms. Leduc's evidence on Mr. Hui's and Tony's involvement in the drug trade at 9 Trillium and the black car. To elaborate on this point made by the trial judge, there was considerable consistency in the narratives of Ms. Leduc and Mr. Hardy-Fox. As mentioned, she used Tony's cell phone which he subsequently retrieved from her. The meeting with Mr. Chiodo at Mario's Bowl was arranged using this cell phone account. Ms. Leduc said that the person who lent her his phone was known as "Tony". Tony and Dave (Mr. Hui's first name) dealt drugs out of 9 Trillium. The drugs included crack and purple fentanyl. 9 Trillium was Stephanie's residence. Tony and Dave used a black car. Mr. Chiodo was known to Tony and Dave.
- [44] Mr. Hardy-Fox's narrative was similar.
- [45] On another point mentioned by the trial judge, there was considerable overlap between the evidence of Ms. Shperuk and Mr. Hardy-Fox. She described the vehicle as being dark; Mr. Hardy-Fox described it as black or a dark coloured sedan. She saw two men get into the back seat; Mr. Hardy-Fox said that Tony and Mr. Chiodo got into the back of the vehicle. She saw someone walk to the back of the Mario's Bowl building and then get into the driver's seat of the vehicle; Mr. Hardy-Fox said that was him. Ms. Shperuk observed the driver struggle with the buttons on the vehicle; Mr. Hardy-Fox said this was the first time he had driven for Tony.
- [46] In a similar vein, the Mario's Bowl surveillance video also lent support to the trial judge's acceptance of the material testimony of Mr. Hardy-Fox. It showed Mr. Chiodo running inside Mario's Bowl, staying for less than a minute and leaving with a person who spoke to him. Mr. Hardy-Fox testified to the same observations.
- [47] Thus, when one examines the trial judge's points on corroborating evidence in greater detail, comfort was provided to him that Mr. Hardy-Fox's evidence was credible.
- [48] That said, as a matter of law, a trier of fact is entitled to accept the evidence of a Vetovec witness in the absence of confirmatory evidence, provided the trier, cautioned about the danger of accepting such evidence, is satisfied that the Vetovec witness is telling the truth: *R. v. Roks*, 2011 ONCA 526, 274 C.C.C. (3d) 1, at para. 66.

- [49] Lastly, the trial judge expressly cautioned himself that Mr. Hardy-Fox's testimony may have been tainted by disclosure but based on the totality of the evidence was satisfied beyond a reasonable doubt of the guilt of the appellants on both charges.
- [50] In conclusion, I fail to see any error in the trial judge's credibility assessment.
- [51] Turning to the submissions relating to the trial judge's treatment of the reliability of Mr. Hardy-Fox's evidence, Mr. Saboon submits that Mr. Hardy-Fox was the only witness to identify Mr. Saboon as Tony. Mr. Saboon submits that Mr. Hardy-Fox's identification was unreliable for several reasons: Tony was a stranger to Mr. Hardy-Fox; Mr. Hardy-Fox was intoxicated by alcohol, crack cocaine, and MDMA on the night of the offence; there was limited interaction between Mr. Hardy-Fox and Tony at 9 Trillium and in the vehicle; Mr. Hardy-Fox did not provide any description of Tony in his statement to the police or identify Mr. Saboon through any pre-trial procedure such as a photo-line up, and his only identification of Mr. Saboon came several years after the murder through an in-dock identification at trial when Mr. Saboon was the only Black man in the courtroom and Mr. Hardy-Fox had received full disclosure from the Crown. Mr. Hardy-Fox knew the police theory was that Tony was Mr. Saboon. Additionally, the surveillance videos were of a low quality.[4] Mr. Saboon submits that the trial judge erred in not addressing or resolving the reliability concerns arising from Mr. Hardy-Fox's identification of Mr. Saboon as Tony.
- [52] The appellants do not argue that the verdict was unreasonable but that the trial judge failed to properly assess the reliability of the Vetrovec witness's identification evidence. This could also be characterized as a failure to provide sufficient reasons, a subject to which I will return.
- [53] Again, I do not accept this submission.
- [54] The trial judge did not state that he was relying on Mr. Hardy-Fox's in-dock identification of Mr. Saboon, the only direct identification evidence at trial. At trial, no one submitted that Mr. Hardy-Fox's testimony was his first and only identification of Mr. Saboon nor was this put to Mr. Hardy-Fox in cross-examination. There was also other evidence that pointed to Tony being Mr. Saboon.
- [55] First, Ms. Leduc described Tony as a person who dealt in purple fentanyl and drove a sporty little black car and that Tony and Mr. Chiodo knew each other. Indeed, Mr. Chiodo had introduced her to Tony. The police stopped Mr. Saboon in his rental black four-door Hyundai sedan with purple fentanyl in the trunk. Mr. Hui was also in the car. Ms. Shperuk described the vehicle outside Mario's Bowl as dark in colour with an H on it. She also testified that she saw people get in the back passenger door, evidence that is consistent with it being a four-door vehicle. Daisy Darrach testified that she saw the two men exit Mario's Bowl and get into a sedan. Mr. Saboon and Mr. Hui were stopped by police in a four-door black Hyundai sedan which Mr. Saboon acknowledged he had leased. Mr. Saboon states Mr. Hui is a family friend.

- [56] Second, the Mario's Bowl customer, Mr. Osmulski, described the person who interacted with Mr. Chiodo as a tall (over 6 feet), bald, Black male weighing between 150 to 180 pounds. Neither of the appellants cross-examined this customer. Mr. Saboon himself stated that he was 5 foot 11 inches in height. The trial judge recognized that the Mario's Bowl surveillance video was insufficient on its own to make a reliable identification, however he concluded that Mr. Saboon resembled the man who interacted with Mr. Chiodo at Mario's Bowl both in the video and based on the general descriptions given by the Mario's Bowl witnesses.
- [57] Third, the evidence of Ms. Leduc was that Tony and Dave sold purple fentanyl and crack out of 9 Trillium which is Stephanie's house.
- [58] Taken together, these facts support the trial judge's conclusion that Mr. Saboon was Tony and guilty of the offences as charged.
- [59] As for Mr. Hui's challenge to the reliability of Mr. Hardy-Fox's evidence, he admitted being at Mario's Bowl with Mr. Chiodo, Mr. Saboon and Mr. Hardy-Fox. Mr. Saboon had arranged a meeting there with Mr. Chiodo by text message. Ms. Leduc identified Mr. Hui as dealing drugs out of 9 Trillium and confirmed his connection with Mr. Chiodo. She had known Mr. Hui for years. DNA evidence also connected him to Mr. Saboon's car and its contents. This evidence served to support the reliability of Mr. Hardy-Fox's testimony as it related to Mr. Hui.
- [60] I would dismiss this ground of appeal.
- b) Application of W.(D.) [61] Mr. Hui also submits that the trial judge erred by taking an either/or approach to the assessment of credibility. He argues that this error is evident from the trial judge's conclusion: "This is not a case of being unable to decide whom to believe. I accept the testimony of Mr. Hardy-Fox." In essence, Mr. Hui submits that the trial judge failed to follow R. v. W.(D.). In addition, he failed to resolve the discrepancies in the evidence of Mr. Hui and that of Mr. Hardy-Fox.
- [62] I would not give effect to this ground of appeal. First, at para. 99 of his reasons, the trial judge expressly instructed himself on the principles from R. v. W.(D.). While I accept that reciting the principles does not equate to an application of the principles in a given case, I am satisfied here that the trial judge made no error in this regard. His reasons as a whole revealed that he properly understood and applied a standard of proof beyond a reasonable doubt. As the Crown submits, triers of fact are not to treat the standard of proof as a credibility contest but W.(D.) does not prohibit a trier of fact from rejecting exculpatory evidence after having made a considered, reasoned acceptance of conflicting evidence beyond a reasonable doubt: R. v. R.D., 2016 ONCA 574, 342 C.C.C. (3d) 236, at paras. 13-20; R. v. T.S., 2012 ONCA 289, 284 C.C.C. (3d) 394, at para. 79; and R. v. J.J.R.D. (2006), 218 O.A.C. 37 (C.A.), at para. 53, leave to appeal refused, [2007] S.C.C.A. No. 69.

- [63] The evidence of Mr. Hardy-Fox was at odds with each appellant's version of what transpired, as reflected in the videotaped statements each made to the police. His evidence and theirs could not both be true. The trial judge carefully considered the testimony of Mr. Hardy-Fox including the challenges associated with this witness. He also outlined in detail Mr. Hui's statement and that of Mr. Saboon, recognizing that neither appellant's statement was admissible against the other. As in *R. v. J.J.R.D.*, in this case, once the trial judge accepted the evidence of Mr. Hardy-Fox, he necessarily rejected the contents of both appellants' videotaped statements to the police. Taken as a whole, the reasons revealed that he was satisfied of the appellants' guilt beyond a reasonable doubt after considering "the totality of the evidence".
- c) Sufficiency of Reasons [64] Next, Mr. Hui submits that the trial judge failed to explain why he rejected Mr. Hui's evidence. He asserts that the reasons of the trial judge do not show why Mr. Hui's statement could not be believed. He argues that, at a minimum, the reasons should be "considered and reasoned".
- [65] It is helpful to remind ourselves of the principles set forth in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869. A trial judge's reasons for decision justify and explain the result and a losing party then knows why it has lost. Appellate intervention is warranted if the reasons prevent meaningful appellate review. As Binnie J. stated at para. 26 of *Sheppard*, "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself." Or, as Karakatsanis J. stated in *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 70, standing alone, bad reasons are not a basis for appellate review. There must be a functional and contextual reading of the reasons. The appellate court "must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review": *G.F.*, at para. 69.
- [66] The reasons make it abundantly clear why Mr. Hui was found guilty and readily provide a basis for meaningful appellate review. As mentioned, the trial judge reasoned that Mr. Hardy-Fox's evidence had to be treated with "the greatest care and caution." However, based on the evidence before him, he concluded that Mr. Hardy-Fox's evidence was supported by other corroborative evidence and he rejected the main challenges to his evidence including his lies and that Mr. Hardy-Fox had had the benefit of disclosure. Acceptance of his evidence necessarily amounted to a rejection of the exculpatory elements of Mr. Hui's evidence. McLachlin C.J.C.'s explanation in *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 66, is apt:

[F]ailure to explain why [the trial judge] rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously

challenged”. It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. [Citations omitted.]

- [67] Moreover, trial judges are not obliged to articulate every consideration leading to guilt or innocence (*R. v. R.E.M.*, at para. 56), or to describe every factor driving their credibility findings (*R. v. R.E.M.*, at para. 56; *R. v. W.O.*, 2020 ONCA 392, 388 C.C.C. (3d) 435, at para. 15, *aff'd* 2021 SCC 8, [2021] 1 S.C.R. 99; *R. v. Wigle*, 2009 ONCA 604, 252 O.A.C. 209, at para. 37), or to reconcile every frailty in the evidence (*R. v. R.E.M.*, at para. 56; *R. v. Charron*, 2022 ONCA 394, at para. 28).
- [68] I would reject this ground of appeal.
- d) Mr. Hui's Sentence Appeal [69] On appeal, Mr. Hui initially sought to reduce his sentence for the kidnapping charge only if his first-degree murder conviction appeal was granted. However, in oral submissions, he advised that he wished to pursue his sentence appeal regardless of the outcome of the appeal of his murder conviction.
- [70] He argued that his sentence should be reduced based on the parity principle. Under s. 718.2(b) of the Criminal Code, a sentence should be “similar to sentences imposed on similar offenders for similar offences committed in similar circumstances”.
- [71] As mentioned, Mr. Hui received a 15-year sentence for kidnapping. A 5-year mandatory minimum applied due to the use of a handgun. He submits that Mr. Hardy-Fox received a sentence of 3 years, 8 months and 2 years concurrent for being an accessory after the fact, and 3 years' probation. Mr. Hui submits that his sentence for kidnapping should be 10 years.
- [72] Absent an error in principle, a failure to consider a relevant factor, or an overemphasis of an appropriate factor, an appellate court ought only to interfere if a sentence is disproportionately unfit: *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 41. Even if the sentencing judge erred in principle, an appellate court ought to defer unless that error affected the ultimate sentence or the sentence is demonstrably unfit: *Lacasse*, at paras. 43-44.
- [73] The trial judge considered Mr. Hui's personal circumstances, his criminal record, his record while in custody, and letters of support filed on his behalf. The trial judge also reviewed the victim impact statements. He addressed s. 279(1.1) of the Criminal Code which provides that the sentence for a person convicted of kidnapping, where a restricted or prohibited firearm is used, attracts a minimum punishment of imprisonment of 5 years up to a term of life imprisonment.
- [74] He stated that at the sentencing hearing, the Crown proposed a sentence of between 10 years and life imprisonment and Mr. Hui proposed a sentence of 10 years.

- [75] The trial judge expressly recognized the important principle of parity in his sentencing reasons. He noted the differences between Mr. Saboon and Mr. Hui. Mr. Saboon had been convicted of 39 offences which included robbery, armed robbery, and drug offences. In contrast, Mr. Hui's criminal record was limited. In addition, Mr. Saboon was the principal in the kidnapping and Mr. Hui a party as an aider. The trial judge considered their backgrounds and roles to be different. He gave Mr. Saboon a sentence of life imprisonment for the kidnapping charge but Mr. Hui's was limited to 15 years.
- [76] The trial judge did not expressly compare Mr. Hardy-Fox's kidnapping sentence of 3 years and 8 months plus 3 years' probation to that proposed for Mr. Hui nor was he required to do so. Their roles were very different. Indeed, Mr. Hui himself proposed a sentence of 10 years. The trial judge concluded that denunciation and deterrence had to be the leading factors to guide sentencing given that this was a kidnapping to enforce a drug debt. Mr. Hui did not provide any authority to show that his sentence was a marked and substantial departure from sentences customarily imposed for kidnapping. I see no basis on which to interfere.

Disposition

- [77] For these reasons, I would dismiss both Mr. Hui's and Mr. Saboon's appeals from conviction. I would grant Mr. Hui leave to appeal sentence, but would dismiss his sentence appeal. Mr. Saboon's appeal from sentence is dismissed as abandoned.

Released: November 7, 2025 "S.E.P."

"S.E. Pepall J.A."

"I agree. Coroza J.A."

"I agree. J. Dawe J.A."

- [1] In his notice of appeal, Mr. Saboon also sought leave to appeal his sentence. He did not pursue this appeal either in his factum or in oral argument.
- [2] At trial, it was agreed that the man from the Mario's Bowl surveillance video was Mr. Chiodo.
- [3] Mr. Hui identified Tony as the appellant, Mr. Saboon, but this evidence was only admissible against Mr. Hui.
- [4] The videos were not filed before this court.

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