

CANADA / JUDGMENT

R. v. Johnston

2021 BCCA 34

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 34 R. v. Johnston

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Johnston,

2021 BCCA 34

Date: 20210128

Dockets: CA42488; CA42490

Docket: CA42488

Between:

Regina

Respondent

And

Matthew James Johnston

Appellant

- and -

Docket: CA42490

Between:

Regina

Respondent

And

Cody Rae Haevischer

Appellant

ABBREVIATED REASONS FOR JUDGMENT

Restriction on publication: A publication ban has been imposed under s. 486.5(1) and s. 486.5(9) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify victims, or witnesses, including, without limitation, the persons referred to in this judgment as "Person X", "Person Y", "K.M." and "D.Y.". This publication ban applies indefinitely unless otherwise ordered.

These reasons for judgment have been abbreviated from sealed reasons for judgment in order to protect confidential information.

Corrected Judgment: The text of the judgment was corrected at paragraphs 2, 101, 208, 291 and at the heading above para. 61 on February 19, 2021.

Before:

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Willcock

On appeal from: Orders of the Supreme Court of British Columbia, dated October 2, 2014 and November 19, 2014 (R. v. Haevischer, 2014 BCSC 1863, 2014 BCSC 2172, and 2014 BCSC 2194, New Westminster Docket X072945-B).

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Place and Date of Hearing:

Vancouver, British Columbia

October 14-16 and 19-23, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 28, 2021

Date of Release of Abbreviated Reasons for Judgment:

February 25, 2021

Abbreviated Reasons of the Court

Summary:

At trial, the appellants were found guilty of the murder of six men inside a Surrey apartment building. The judge found they were either co-principals to the six murders or, alternatively, one was a principal as a shooter and the other an aider or abettor. As part of the pre-trial proceedings, the judge held an in camera, ex parte hearing to assess whether allowing an unindicted co-conspirator, Person X, to testify would compromise the fair trial rights of the appellants. The Amici were appointed to provide an adversarial context to this proceeding. At the same in camera, ex parte hearing, the judge upheld E5's privilege claim and precluded Person X from testifying due to trial fairness concerns. Post-trial, the appellants applied for a stay of proceedings on the grounds that their pre-trial conditions of confinement and alleged police misconduct constituted abuses of process. The Amici joined the appellants in submitting the police misconduct constituted an abuse of process. The Crown brought an application for the summary dismissal of the stay applications without an evidentiary hearing, which the judge

granted. The appellants appeal from their convictions as well as the summary dismissal of their stay applications. The Amici support the appellants in appealing the dismissal of their stay applications and in appealing their convictions to the extent they are based on inadequate disclosure.

Held: Appeal allowed in part. The judge did not err in excluding the appellants from the in camera, ex parte hearings, and this decision did not contravene s. 650 of the Criminal Code. Relatedly, she did not err in failing to address the scope of the exclusion of Person X's evidence. The judge also did not err in her assessment of the credibility of certain witnesses. Although the judge did err in her assessment of the after-the-fact-conduct of Mr. Haevischer, the curative proviso of the Criminal Code is applied to this error. The judge did not err in assessing other circumstantial evidence against Mr. Haevischer, nor did she err in applying the principles of party liability to him. The judge similarly did not err in favouring inferences urged upon her by the Crown rather than those of Mr. Johnston. The Crown did not breach its disclosure obligations. The judge did err in summarily dismissing the applications for a stay of proceedings. An evidentiary hearing was necessary to resolve factual controversies about the extent of police misconduct. Having found that the alleged abuses of process risked undermining the integrity of the judicial process and that the only acceptable remedy was a stay of proceedings, the judge could not properly balance the interests in favour of a stay against society's interests in entering the convictions without resolving those controversies. In addition, there is fresh evidence that could reasonably affect the outcome of the summary dismissal applications. While the verdicts of guilt are affirmed, the convictions are quashed and the matter is remitted for an evidentiary hearing on the applications for a stay of proceedings for abuse of process.

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Reasons for Judgment of the Court:

Introduction

- [1] On October 19, 2007, six men were shot to death while lying defenceless on the floor of suite 1505 of the Balmoral Tower, an apartment building in Surrey, British Columbia (the "Balmoral"). The victims were Corey Lal ("Mr. Lal"), three associates of Mr. Lal (Michael Lal, Edward Narong and Ryan Bartolomeo), and two unrelated bystanders (Christopher Mohan and Edward Schellenberg). These killings have become known as the "Surrey Six murders".
- [2] The appellants, Matthew James Johnston and Cody Rae Haevischer were charged with one count of conspiracy to murder Mr. Lal (contrary to s. 465(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46) and six counts of first degree murder of all six of the victims (contrary to s. 235(1) of the Criminal Code). James (Jamie) Bacon and Quang Vinh Thang (Michael) Le were also each charged with one count of conspiracy to murder Mr. Lal and one count of first degree murder of Mr. Lal. Mr. Le pleaded guilty to the conspiracy charge and testified in the trial of the charges against the appellants.
- [3] The appellants were tried separately from Mr. Bacon. A stay of proceedings was entered by Justice Ker in the case against Mr. Bacon, but a Crown appeal was allowed by this Court (R. v. Bacon, 2020 BCCA 140). Mr. Bacon subsequently pleaded guilty to the conspiracy charge and another unrelated offence.
- [4] A participant in the killings, Person X, pleaded guilty to the offences of conspiracy to murder Mr. Lal and of second degree murder of three of the victims. After an in camera proceeding conducted in the absence of the appellants, Person X was precluded by the trial judge from testifying in the trial against the appellants. [Sentence removed.]
- [5] In reasons for judgment dated October 2, 2014, and indexed as R. v. Haevischer, 2014 BCSC 1863 (the "Trial Reasons"), the appellants were each found guilty of the conspiracy charge and the six first degree murder charges following a trial by judge alone.

- [6] Prior to the issuance of the Trial Reasons, the appellants had each made an application for a judicial stay of proceedings on the basis of abuse of process relating to the conditions of their pre-trial confinement and police misconduct. The appellants sought to introduce evidence in support of their applications. Relying on the decision of *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), leave to appeal ref'd (1997), [1996] S.C.C.A. No. 461, the Crown resisted the holding of an evidentiary hearing on the basis that the facts alleged by the appellants, if assumed to be true and taken at their highest, did not support the granting of a stay of proceedings. The trial judge appointed amici curiae to deal with confidential information not known by the appellants that augmented the appellants' assertions of abusive police conduct. The lawyers who have from time to time been appointed as amici curiae will be referred to as the "Amici".
- [7] In published reasons dated November 19, 2014, and indexed as *R. v. Haevischer*, 2014 BCSC 2172 (the "Open Vukelich Ruling"), and sealed reasons dated November 20, 2014, and indexed as *R. v. Haevischer*, 2014 BCSC 2194 (the "Sealed Vukelich Ruling"), the trial judge agreed with the Crown's position and, as a result, the appellants' stay applications were dismissed and convictions were entered.
- [8] On these appeals, the appellants assert that the trial judge erred in several respects in the Trial Reasons and erred in dismissing their stay applications. They also apply to introduce fresh evidence in support of the ground of appeal that the Crown failed to meet its disclosure obligations prior to trial and thereby breached their right to make full answer and defence.
- [9] The appellants say the judge erred in the Trial Reasons in assessing circumstantial evidence and drawing improper inferences, in applying the principles of party liability in respect of Mr. Haevischer and in erroneously concluding that confirmatory evidence permitted her to rely upon the testimony of witnesses of disreputable character. They also assert that the judge contravened s. 650(1) of the Criminal Code by excluding them from the hearing in which she decided to preclude Person X's testimony, and Mr. Johnston says that the judge erred by failing to discuss the scope of the exclusion of Person X's evidence.
- [10] As they did before the trial judge, the Amici join with the appellants on the abuse of process issue on appeal. The Amici say that the stay applications should not have been summarily dismissed on the basis of the record before the judge and on the basis of fresh confidential evidence they apply to introduce that was obtained from the proceedings against Mr. Bacon. They further apply to introduce fresh confidential evidence in connection with the custodial arrangements of a witness, Person Y, who testified at trial, and they rely on this evidence in support of the appellants' ground of appeal that the Crown breached its disclosure obligations.

- [11] The portions of the hearing of the appeals dealing with the fresh confidential evidence and the submissions of the Amici (and the Crown's response) were held in camera, and these reasons will be abbreviated prior to their release to the public in order to remove confidential information. The full version of these reasons will be sealed.

Evidence of the Offences

- [12] The parties filed a joint statement of facts for the purposes of these appeals. Most of the facts describing the circumstances of the offences come from the joint statement, but they also include contested testimony at trial and some findings of the trial judge.
- [13] The Crown's case consisted of a body of circumstantial evidence and admissions made by the appellants. As Person X did not testify, there was no direct evidence of the killings themselves.
- [14] The appellants and Mr. Bacon were members of a gang called the Red Scorpions. One of the victims, Mr. Lal, was a rival drug dealer. A dispute arose between Mr. Bacon and Mr. Lal, which led to a meeting between them (and others) at a restaurant. One of the members of the Red Scorpions, Person Y, testified that Mr. Bacon imposed a "tax" of \$100,000 on Mr. Lal, which was to be paid before the end of the day on which the meeting was held. At the meeting, Person Y confiscated a 9 mm Glock gun being carried by Mr. Lal and decided to keep it as his own.
- [15] The tax was not paid, and the judge found that the Red Scorpions decided to kill Mr. Lal so that they did not look weak. Person Y testified that he initially agreed to kill Mr. Lal on his own if someone lured him into a parking lot, but that he withdrew his offer when Mr. Bacon decided to get money and drugs out of Mr. Lal before killing him, a plan that would require more than one assailant.
- [16] In the early afternoon on the day of the killings, there was a meeting at a Korean restaurant in Surrey. Cell phone records showed that Mr. Johnston's cell phone used the dominant cell-signal site for the restaurant around the time of the meeting, that a call received by Person Y was consistent with him being en route to the restaurant, that Mr. Le's cell phone used the dominant server for the restaurant and that Person X used his cell phone within the expected coverage area of the restaurant. Person Y and Mr. Le both testified that Mr. Johnston and Person X were present in or outside the restaurant. Person Y testified that Person X asked to borrow his gun at this meeting and that he gave the gun confiscated from Mr. Lal to Person X. The gun was found at the scene of the killings with the DNA of Person Y on it.
- [17] At the time of the killings, Mr. Haevischer and his girlfriend, K.M., lived in a suite in an apartment building in Surrey known as The Stanley. On the day of the killings, the Surrey Drug Section of the Royal Canadian Mounted Police ("RCMP") was conducting surveillance at The Stanley for an unrelated investigation, and one of the officers took some video of the area. In addition, The Stanley had an internal security video system that recorded various

areas of the building. The video showed that Mr. Johnston and Person X arrived at The Stanley at 1:48 p.m. on the day of the murders. Mr. Johnston was wearing a black hoodie with an intricate white design and Person X was wearing a light grey hoodie with a large black Nike "swoosh" logo on the back and a smaller one on the front, and he was carrying a black bag strapped across his chest.

- [18] K.M. testified that she and Mr. Haevischer were at their suite in the early afternoon on the day of the killings when Mr. Johnston and Person X arrived unannounced. She testified that they asked if they could clean some guns and K.M. helped them clean the guns and bullets with Windex and paper towels in the living room of the suite. She said that Mr. Haevischer changed clothes and the three men left the suite, with Mr. Johnston asking her to move his vehicle from the front visitor parking area to the rear area of The Stanley.
- [19] The video evidence showed Mr. Johnston, Mr. Haevischer and Person X leave The Stanley in K.M.'s black 745 BMW at 2:16 p.m. and K.M. moving Mr. Johnston's vehicle to the rear of the building. The video showed Mr. Johnston and Person X wearing the same clothes as before (with Mr. Johnston also wearing a baseball cap) and Mr. Haevischer wearing a black hoodie.
- [20] One of the drug dealers for the Red Scorpions, referred to as D.Y., lived in the Balmoral. It consisted of one 15-floor high-rise tower and four low-rise buildings. The complex had an underground parkade which was accessed by separate gates for vehicles and pedestrians. The residential floors could be accessed by elevator, which required a fob for the outside entrances and the parkade entrances. Mr. Lal was the occupant of suite 1505 of the Balmoral, but no one resided in the suite and it was used as a "stash" house for his group's money and drugs.
- [21] D.Y. testified that he gave his fob for the Balmoral to Mr. Johnston in the early afternoon of the day in question. The fob was used to gain access to one of the pedestrian gates in the underground parkade at 2:23 p.m. The distance between The Stanley and the Balmoral is approximately three kilometers, which would typically take four minutes or slightly longer to drive in a vehicle.
- [22] A Bible study took place in an apartment in the Balmoral on October 19, 2007; one of the participants, Ms. Lee, left the meeting at approximately 2:15 p.m. to return to her car in the underground parkade. She testified that when she was walking down a ramp towards the parkade, she saw a black 745 BMW. She watched the BMW park, and, as she was heading to the exit ramp of the parkade in her vehicle, she saw two men exit the BMW. She described the two men as Caucasian, between 18 and 22 years of age with no facial hair and wearing gloves. She said one of them was approximately 183 cm tall and was wearing a grey hoodie with a Nike "swoosh" logo on the back and the other was approximately 170 cm tall and was wearing a black hoodie.

- [23] Ms. Lee also testified that she saw a third man holding open the pedestrian gate out of the parkade. She described him as being approximately 170 cm tall and wearing black gloves and a black hoodie with white markings pulled down to cover his face. The other two men were walking in his direction. When she was out of the parkade and driving on the road, Ms. Lee phoned the hostess of the Bible study to report that there were some strange men in the parkade. Cell phone records showed that this call occurred at 2:24 p.m.
- [24] The trial judge concluded that Ms. Lee's descriptions of these three men were consistent with the video taken by The Stanley's closed-circuit television ("CCTV") of Mr. Johnston, Mr. Haevischer and Person X.
- [25] The judge found that the perpetrators of the killings entered Mr. Lal's suite in the Balmoral at 2:30 p.m. and that the victims were killed at approximately 2:40 p.m. She made these findings primarily on the basis of cell phone and fob records, supplemented by evidence of persons in contact with the victims.
- [26] The evidence indicated that Mr. Lal, Michael Lal, Mr. Bartolomeo and Mr. Schellenberg (who was servicing fireplaces in the Balmoral) were in the suite when the perpetrators entered. Mr. Mohan (who lived across the hall) and Mr. Narong subsequently came or were brought into the suite.
- [27] The crime scene established that the victims were killed by two shooters. Two guns were found at the scene, and there were two separate groupings of the victims, three by a computer near the front door and three by a fireplace. The Glock gun Person Y had given to Person X was used to kill three of the victims, and a 9 mm Ultrastar gun was used to kill the other three. The victims were all found in submissive positions and were shot in the back of the chest or head with 16 of the 19 bullets fired by the guns. The victims' pockets had been emptied and their cell phones were all taken. The bodies were discovered by one of the managers of the Balmoral, who went looking for Mr. Schellenberg.
- [28] One of the other participants of the Bible study, Ms. Kim, was leaving the Balmoral at approximately 2:45 p.m. As she was backing out of her parking stall in the underground parkade, she saw three young men in dark tops come out of the pedestrian gate and get into a black BMW parked a few stalls away. The BMW passed her vehicle on the exit ramp of the parkade travelling at a very high rate of speed. The trial judge concluded that these three men were Mr. Johnston, Mr. Haevischer and Person X.
- [29] Based on police and video surveillance, Mr. Johnston, Mr. Haevischer and Person X arrived together in the BMW at The Stanley at approximately 2:56 p.m. Mr. Johnston was observed carrying a white plastic bag. Both Mr. Johnston and Mr. Haevischer were hooded and wearing gloves. They went into The Stanley. Person X waited by Mr. Johnston's vehicle in the rear of the building.

- [30] K.M. testified that when Mr. Johnston and Mr. Haevischer returned to the suite at The Stanley approximately an hour after they had left, Mr. Johnston emptied the contents of a black plastic bag containing bundles of cash and cell phones. She saw Mr. Haevischer boiling cell phones in a pot on the stove, and, when Mr. Haevischer and his brother (who arrived before the return of the others or shortly thereafter) were writing on a whiteboard, she saw the words, "People Died".
- [31] The surveilling police observed Mr. Johnston re-emerge from the building a few minutes later. Mr. Johnston got into his vehicle and drove away with Person X in the passenger seat at 3:04 p.m.
- [32] K.M. testified that the cell phones, clothing worn by Mr. Haevischer and a pair of shoes were put into a laundry bag and that Mr. Haevischer told her to do whatever his brother told her to do. She said she and Mr. Haevischer's brother went to a location in Surrey where the laundry bag and its contents were burned. The Stanley CCTV video captured K.M. and Mr. Haevischer's brother (carrying a large cloth bag) going to the parkade at 4:34 p.m. and K.M.'s Acura Integra leaving The Stanley at 4:35 p.m. The video showed K.M.'s Acura returning at 6:41 p.m., and she and Mr. Haevischer's brother were seen a few minutes later walking from the parkade to the elevator.
- [33] K.M. testified that she and Mr. Haevischer left The Stanley shortly after 8:00 p.m. and went to stay in an associate's house for several days. K.M. said that on that evening Mr. Haevischer told his associate on a whiteboard that "six people died". The next day, she said Mr. Haevischer asked her the question, "Burnt it all, all gone[?]" on a whiteboard and K.M. nodded affirmatively. K.M. further testified that Mr. Haevischer told her that one of his associates was going to get her BMW cleaned.
- [34] Person Y testified that Mr. Johnston made admissions to him regarding the murders on three separate occasions. The first occurred on the evening of the murders, when Person Y was waiting in Mr. Bacon's car in a parking lot of a pub next to the apartment building in which Person X lived. He was waiting for Mr. Bacon to return from the building. He testified that Mr. Johnston unexpectedly climbed into the car and told him of events that had taken place earlier in the day.
- [35] Person Y testified that Mr. Johnston was animated and told him that there were lots of bodies, that he had to pull someone in from outside the suite and that they put bodies by a fireplace. He also said that Mr. Johnston used hand signals to show how many people it was.
- [36] The RCMP was conducting surveillance of Mr. Bacon at this time and saw that his vehicle had parked in the parking lot next to Person X's apartment building. The police did not see anyone get into or out of the vehicle until a male got into the vehicle before it drove off. Cell phone records of Mr. Bacon, Mr. Johnston, Person X and Person Y were consistent with them all being in the area at the time.

[37] Person Y was acting as a police agent on the other two occasions Mr. Johnston made admissions, which took place approximately four months and five months after the killings. Person Y was wearing a wire, and his testimony at trial included descriptions of hand gestures made by Mr. Johnston.

[38] On the second occasion, Person Y asked Mr. Johnston how it was that his (Person Y's) DNA was found on a gun, and Mr. Johnston replied that he never touched the gun. Mr. Johnston said he did not know where the gun was left and Person Y would have to ask Person X about it. Mr. Johnston also said that he saw Person X clean the guns with Windex.

[39] The following was said by Mr. Johnston on the third occasion (with Person Y's testimony in brackets):

- when asked if he had seen Person X boil the guns, Mr. Johnston said he was not exactly sure but clearly one of the guns was left there and the other was not;
- when asked why Person Y's gun had been left, Mr. Johnston said he did not know but it was not him;
- when asked why guns were used, Mr. Johnston said he did not know and all he knew is that he was told to do something (Person Y first testified that Mr. Johnston pointed to his eyes indicating that he was the "lookout" person and he subsequently corrected himself that Mr. Johnston rubbed his fingers together to indicate money, but he was 80 to 90 percent certain Mr. Johnston also pointed to his eyes);
- Mr. Johnston said the other person was supposed to "do this" (which Person Y testified was accompanied by a hand gun gesture with a cocked thumb and two fingers extended);
- when questioned about Person Y's gun, Mr. Johnston said there were some things he could not answer and "I watched him do this [b]oth of them" (which Person Y testified was accompanied by the same hand gun gesture);
- when asked why Person Y's gun had been left, Mr. Johnston said he was just told to get "this" (which Person Y testified was accompanied by Mr. Johnston rubbing his fingers together to indicate money) and "everybody else like" (which Person Y testified was accompanied by a hand gun gesture);
- when told that Person X claimed that \$50,000 had been taken from the suite, Mr. Johnston replied that "there was nineteen five, I swear", and Mr. Johnston denied stealing any of the money and said words to the effect that it was Mr. Haevischer who counted it;
- when asked why six people were killed and whether Person X had panicked, Mr. Johnston said he was not inside and Person Y knew that to be the case because Person X had already told him; and

· when Person Y said that Person X had not boiled the guns, Mr. Johnston replied that he never had one in his hand the whole entire time (which Person Y testified was accompanied by a hand gun gesture).

[40] There are other facts and alleged facts that are relevant to the issues relating to the alleged abuse of process and lack of disclosure. We will outline them when dealing with those issues.

[41] We will next briefly summarize the Trial Reasons, the Open Vukelich Ruling and the Sealed Vukelich Ruling. We will elaborate on the judge's reasoning when discussing the issues raised on these appeals.

The Trial Reasons

[42] The Trial Reasons were very extensive, consisting of 728 paragraphs (as well as an executive summary). After giving an overview of the Crown's case and a description of the witnesses who testified, the trial judge set out the factual narrative in great detail.

[43] During the factual narrative, the judge made a number of findings of fact. She found that there were two shooters (each of whom shot three of the victims), that the murders were execution-style shootings, and that the victims were under domination of the perpetrators at the time they were shot. She found that there was initially a plan for Person Y, acting alone, to kill Mr. Lal and that it changed to a plan in which members of the Red Scorpions would break into Mr. Lal's stash house in order to kill him and take his money and drugs.

[44] The judge made findings as to the events that took place on October 19, 2007, along the lines of the evidence set out above. She accepted the evidence of Person Y with respect to the admissions made by Mr. Johnston and found that they constituted acknowledgements that Mr. Johnston was aware of the plan to kill Mr. Lal, that he was present during the cleaning of the guns, that he was present at the scene at the time of the murders and that he provided assistance in carrying out the plan.

[45] The judge then conducted an assessment of the testimony of four witnesses of disreputable character, including Person Y and K.M. She was satisfied that it was Person Y's intention to tell the truth and she found his evidence was corroborated in many respects by independent evidence. She concluded that many key aspects of K.M.'s evidence were in accordance with the "preponderance of probabilities" and that there was other evidence tending to show that K.M. was telling the truth in the material aspects of her testimony.

[46] Finally, the judge turned to the specific charges against the appellants. She was satisfied beyond a reasonable doubt that Mr. Johnston was a member of the conspiracy to murder Mr. Lal and that the only logical inference was that Mr. Haevischer knew that the three men were on their way to kill Mr. Lal by the time they exited the BMW in the parkade of the Balmoral.

- [47] The judge found that the appellants were co-principals in the six murders or, alternatively, one of them was a principal in the murders as a shooter and the other was an aider or abettor of the shooters. She was satisfied beyond a reasonable doubt that the murders were planned and deliberate in that the perpetrators had at all times planned to kill Mr. Lal and the plan expanded to killing the other five victims because they could identify the killers. In the alternative, the judge found the appellants guilty of first degree murder of all six victims because they caused their death while committing the offence of unlawful confinement.

The Open Vukelich Ruling

- [48] The task of the trial judge on the Crown's application for the summary dismissal of the stay applications was to determine whether the appellants had demonstrated that the alleged police misconduct during the investigation into the Surrey Six murders, together with the conditions of confinement during their first 14 months of pre-trial custody, justified holding a full evidentiary hearing to determine whether a judicial stay of proceedings was warranted. She began by reviewing the principles set out in *R. v. Babos*, 2014 SCC 16, and she noted the stay was being sought under the "residual" category of conduct impinging on the integrity of the justice system, not the "main" category of conduct that compromises trial fairness.
- [49] In the first stage of the *Babos* analysis, the judge looked to whether the state had engaged in conduct that was offensive to the notions of fair play and decency so as to harm the integrity of the judicial system. She accepted for the purposes of the Crown's application that the fact that the appellants had been kept in segregated confinement for 14 months at the direction of the RCMP was offensive to notions of fair play and decency and could amount to an abuse of process.
- [50] The alleged police misconduct arose from an investigative technique referred to as the "moving witnesses strategy". The strategy involved the police targeting vulnerable members or girlfriends of members of the Red Scorpions in an attempt to bring them into new relationships with the police so that they would become witnesses against the Red Scorpions. The trial judge accepted that the effect of the strategy was to encourage an "anything goes" attitude on the part of four officers, which led to egregious misconduct involving exploitative sexual relationships with protected female witnesses, endangerment of the safety of these witnesses by revealing information about them, lying to their superiors and manipulation of overtime and expense claims to cover up their conduct. She concluded that this misconduct could also constitute an abuse of process.
- [51] In the second stage of the *Babos* analysis, the trial judge accepted that no remedy short of a stay of proceedings was capable of redressing the prejudice to the justice system from the alleged misconduct.

- [52] In the third stage of the Babos analysis, the trial judge weighed the seriousness of the state misconduct and the societal interest in having the convictions entered. It was her view that the seriousness of the charges and society's interest in seeing justice done were the factors that weighed most heavily in the balance. When she weighed the impugned state misconduct against society's interest in having the convictions entered, she concluded that this was not one of the "clearest of cases" where the exceptional remedy of a stay of proceedings was warranted.
- [53] As the trial judge concluded that the grounds advanced by the appellants would not support a stay of proceedings, an evidentiary hearing was unnecessary. She dismissed their applications and directed the entry of their convictions.

The Sealed Vukelich Ruling

- [54] In the in camera hearing before the trial judge, the Amici took the position in support of the appellants' applications for a stay of proceedings that an evidentiary hearing was necessary to deal with the abuse of process allegation on an additional ground of alleged police misconduct. [Sentence removed.]
- [55] [Paragraph removed.]
- [56] [Paragraph removed.]
- [57] In the third stage of the Babos analysis, the judge concluded that, even when the abuses were considered cumulatively, a stay of proceedings would be disproportionate in view of the seriousness of the offences and the interest of the community in having the appellants' convictions entered. She confirmed her summary dismissal of the applications for a stay of proceedings.

Issues on Appeal

- [58] The issues on appeal are as follows:
- Did the trial judge err in excluding the appellants from the hearing that led to her order prohibiting the testimony of Person X in contravention of s. 650 of the Criminal Code?
 - Did the trial judge err in her assessment of the credibility of Person Y and K.M.?
 - Did the trial judge err in her assessment of the circumstantial evidence against Mr. Haevischer?
 - Did the trial judge err in her application of the principles of party liability in finding Mr. Haevischer guilty of first degree murder?
 - Did the trial judge err in favouring inferences urged upon her by the Crown, rather than those suggested by Mr. Johnston?

- f) Did the trial judge err by failing to address the scope of the exclusion of Person X's evidence, causing particular harm to Mr. Johnston?
- g) Did the Crown fail to meet its disclosure obligations owed to the appellants?
- h) Did the trial judge err in dismissing the applications for a stay of proceedings in the absence of an evidentiary hearing dealing with the allegations of abuse of process?

[59] In addition, there are applications for the introduction of fresh evidence in relation to the last two of these issues.

[60] The Amici join the appellants on the final two issues. We will deal with each of these issues in turn.

Did the Trial Judge Err in Excluding the Appellants from the Hearing that Led to Her Excluding Person X's Testimony?

[61] In the fall of 2012, about a year prior to the commencement of the trial, the appellants filed an application challenging the Crown's position that it was entitled to withhold disclosure of certain materials from them on the basis that the materials would tend to identify persons designated as E3 and E5, who the Crown asserted were confidential informants. [Sentence removed.] On application by the appellants, the trial judge granted a consent order dated November 6, 2012, appointing the Amici to assist the court "by providing an adversarial context in the ex parte hearing to adjudicate the Respondent Crown's claim of informant privilege". The order provided, among other things, that the Amici were to ensure that the appellants and their counsel would receive disclosure of all information that did not tend to identify the confidential informant.

[62] It is important to note that the role played by the Amici in this case was different than the role described by Justice Karakatsanis in *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 [Criminal Lawyers' Association]. The Amici's initial appointment was to assist with the resolution of the privilege claims of E3 and E5, which necessarily had to proceed without the accused or their defence counsel. Once those claims were upheld, Amici's role shifted to providing an adversarial context to the ex parte portions of this proceeding, and thus took on a role similar to that of defence counsel. At the hearing of these appeals, Amici helpfully suggested that their role was more akin to that of "special counsel", and that they would not use the term Amici if the appointment were made today.

[63] We agree with Amici's submission that their role is more accurately described as that of special counsel. Amici were not truly appointed to be friends of the court, but rather to provide an adversarial context in the absence of defence counsel. They fulfilled that role ably on appeal. Nevertheless, because the appointment of Amici predates the decision in *Criminal Lawyers' Association*, and the term Amici has been used throughout this litigation, we will continue to use the term Amici.

- [64] The Crown indicated an intention to advance its privilege claims under the common law, as opposed to s. 37 of the Canada Evidence Act, R.S.C. 1985, c. C-5.
- [65] Mr. Johnston raised an objection to the Crown proceeding with in camera hearings in his absence dealing with informer privilege at common law on the basis that s. 650 of the Criminal Code bars proceedings in the absence of the accused. Section 650(1) reads as follows:

Accused to be present

650 (1) Subject to subsections (1.1) to (2) and section 650.01, an accused, other than an organization, shall be present in court during the whole of his or her trial.

Subsections (1.1) to (2) and s. 650.01 have no application to this case.

- [66] In oral reasons given on February 12, 2013, and written reasons subsequently issued on September 20, 2013, and indexed as 2013 BCSC 1735, the judge ruled that the Crown was not required to proceed under s. 37 of the Canada Evidence Act and that s. 650 of the Criminal Code was not a bar to the Crown proceeding with in camera hearings in the absence of the accused.
- [67] The judge proceeded to deal with issues of informer privilege by way of in camera hearings in the absence of the appellants. She heard the Crown's claim of informer privilege in accordance with *R. v. Basi*, 2009 SCC 52, and *Named Person v. Vancouver Sun*, 2007 SCC 43. At the first stage, the judge ruled that E5 was a confidential informant with a subsisting informer privilege. At the second stage, she dealt with the consequences of the privilege.
- [68] [Paragraph removed.]
- [69] While it was believed that the in camera proceedings were still ongoing, Mr. Johnston filed an application for an order that he be permitted to attend and participate in the hearings and that he be given a report about what was occurring in the hearings. The in camera proceedings had actually completed before this application was filed, and the trial judge released her ruling approximately two weeks later, with the result that she never dealt with the application (except indirectly by issuing her written reasons dated September 20, 2013, confirming that s. 650 did not prevent the proceedings from being held in camera in the absence of the accused).
- [70] The trial judge issued two versions of her rulings. In the published version, indexed as 2013 BCSC 1526, the judge briefly explained that Person X could not be called by the Crown due to trial fairness concerns. [Sentence removed.]
- [71] [Paragraph removed.]
- [72] [Paragraph removed.]

- [73] On appeal, the appellants do not argue that s. 650 gave them a right to be present at what was described in *Basi* as the first stage to determine whether an informer privilege exists. Rather, they argue that it was a violation of s. 650 to exclude them from the next stage, at which the judge addressed the consequences of the privilege, which in this case included a consideration of prohibiting Person X's evidence.
- [74] The appellants say the main purposes of s. 650, as articulated in *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.), leave to appeal ref'd [1982] 2 S.C.R. x, are to enable an accused to be able to make full answer and defence to the charges and to bring transparency and the appearance of fairness to the proceedings. Citing *Named Person* at paras. 50-51, the appellants contend that at the second stage they should have been given standing to present meaningful submissions on how the informer privilege could be protected with minimal effect on their vital interests. They say the approach taken by the trial judge was incompatible with s. 650 and irreconcilable with their fair trial rights. They say their vital interests are at stake, and there is no obligation on them to show prejudice.
- [75] Before turning to *Named Person* and *Basi*, it is useful to summarize the characteristics of informer privilege as discussed by the Supreme Court of Canada in *R. v. Leipert*, [1997] 1 S.C.R. 281. Informer privilege prevents the disclosure of information which would tend to identify the informant, and it was developed to protect people who assist law enforcement and to encourage others to assist: *Leipert* at para. 9. The privilege is of fundamental importance to the workings of the criminal justice system: *Leipert* at para. 10. Although the privilege belongs to the Crown, it cannot be waived without the informant's consent, who must be properly informed of the consequences of the waiver: *Leipert* at para. 15; *Named Person* at para. 25. With one exception, the privilege is absolute, and the police and courts are bound to give effect to it without balancing other interests against it: *Leipert* at paras. 12-14. The one exception, known as "innocence at stake", requires the identity of the informant to be disclosed when it is necessary to demonstrate the innocence of the accused: *Leipert* at para. 21.
- [76] Both *Named Person* and *Basi* involved a situation in which the court was determining whether informer privilege existed. In *Named Person*, after a person represented to the judge that he was a confidential police informant, the judge invited counsel for media groups to a hearing and subsequently ordered that those counsel could review documents prepared by an *amicus curiae* upon giving undertakings of confidentiality.
- [77] In allowing the appeal of the person claiming informer privilege, the Supreme Court of Canada held that the judge had made three errors. The judge should not have appointed the *amicus curiae* because the determination of the legal test was the judge's responsibility. The judge should not have given notice to selected media counsel. The judge should have proceeded in camera to determine whether the privilege applied and should not have made an order allowing media counsel to review documents which were privileged.

- [78] Other than making the point that the Amici is not a substitute for defence counsel as a result of the lack of a solicitor-client privilege, the appellants do not assert it was an error for the trial judge to appoint an amicus curiae in this case. Indeed, the appointment of the Amici was made on their application. In *Named Person*, it was found to be an error for the judge to have appointed an amicus curiae because a legal determination was delegated to the amicus, although the Court acknowledged that it may be permissible to appoint an amicus curiae in some cases. As discussed above, the function of the Amici in this case was not the traditional role of an amicus curiae to assist as a "friend of the court". The trial judge appointed the Amici to provide an adversarial context; in other words, the Amici was instructed to take an adversarial position in support of the appellants' interests. This served to ameliorate the absence of the appellants and their counsel from the in camera proceedings.
- [79] The appellants rely on passages from *Named Person* in which the Court discussed how a judge should proceed once the existence of informer privilege has been established. At para. 50, Justice Bastarache, writing for the majority, stated that, while the judge must not violate the privilege, he or she should protect and promote the values of the open court principle. At para. 51, he said the following:
- [51] Restricted disclosure will of course be necessary to protect the privileged information, but the protection of the open court principle demands that all information necessary to ensure that meaningful submissions, which can be disclosed without breaching the privilege, ought to be disclosed. Therefore, standing may be given at this stage to individuals or organizations who will make submissions regarding the importance of ensuring that the informer privilege not be overextended and the way in which that can be accomplished in the context of the case.

The appellants complain they were not given the opportunity to make meaningful submissions on how the informer privilege could be protected with minimal effect on their interest.

- [80] The appellants' point would probably be persuasive in cases where meaningful submissions could be made without breaching the informant's privilege. However, this was a very unusual case in which the trial judge took the extraordinary step of excluding the entirety of Person X's evidence in order to avoid a breach of the privilege. [Sentence removed.] The above comments of Bastarache J. about the open court principle were subject to the overriding qualification that the court cannot release information tending to identify the confidential informant. In the unique circumstances of this case, it is our view that the trial judge could not have disclosed any information to enable the appellants to have made meaningful submissions without breaching the privilege.

- [81] In *Basi*, the judge ordered that defence counsel could participate in an in camera hearing to determine the validity of a claim of informer privilege as long as they gave undertakings of confidentiality. The judge based her decision both on the common law of privilege and s. 650 of the Criminal Code. The Crown then invoked s. 37 of the Canada Evidence Act, which provides for non-disclosure where a public interest is at stake. The judge subsequently affirmed her decision. The invocation of s. 37 gave the Crown an immediate right of appeal.
- [82] In allowing an appeal from the judge's order, the Supreme Court of Canada ruled that the judge erred in permitting defence counsel to hear testimony that would tend to reveal the identity of the putative informant at the "first stage" hearing: *Basi* at para. 44. The Court held that the right to make full answer and defence does not trigger an exception to informer privilege, and the only exception to the privilege arises when innocence is at stake: *Basi* at para. 43.
- [83] The Court addressed the fact that the judge had relied upon s. 650 in making her order. It first pointed out that an application under s. 37 of the Canada Evidence Act is not caught by s. 650: *Basi* at para. 50. It then went on to point out that the Crown was not relying on the redacted portions of the documents to prove guilt of the accused: *Basi* at para. 51.
- [84] As it did in *Named Person*, the Court commented on the need for trial judges to adopt all reasonable measures to permit defence counsel to make meaningful submissions and stated that trial judges have broad discretion to craft appropriate procedures: *Basi* at para. 55. As stated above, this obligation is subject to the overriding qualification that trial judges cannot do anything that would breach the privilege.
- [85] The Court also commented that fairness may require trial judges to provide the defence with redacted or summarized versions of the evidence and that trial judges may appoint an *amicus curiae* in particularly difficult cases: *Basi* at para. 57. In this case, the trial judge did appoint an *amicus curiae*, and she could not have disclosed any information about the evidence heard during the in camera proceedings without breaching the privilege.
- [86] The submissions made by the appellants are similar to the arguments made in *R. v. Lucas*, 2014 ONCA 561, leave to appeal ref'd (2015), [2014] S.C.C.A. Nos. 460, 461. In that case, the trial judge held an ex parte, in camera hearing to deal with the Crown's claim of informer privilege in respect of statements contained in an information to obtain a wiretap authorization. The appellants argued that the judge erred in relying on *Named Person* as authority for conducting an ex parte, in camera hearing because *Named Person* did not involve the exclusion of the accused from the hearing.
- [87] Relying on *Basi*, the Ontario Court of Appeal in *Lucas* held that the appellants had no right to attend the in camera hearing. The Court pointed out that *Basi* did not turn on the Crown's invocation of s. 37 of the Canada Evidence Act because the conclusion in that case was premised on the need to protect the identity of the confidential informants: *Lucas* at para. 63.

- [88] The Court in Lucas also rejected the appellants' alternate argument that they had the right to make submissions about the procedure to be followed in the hearing. The Court pointed out that the decision in Basi provided that trial judges have broad discretion to craft procedures to safeguard the privilege and to protect the interests of the accused: Lucas at para. 66. The Court held that the provision of a redacted transcript of the hearing being provided to the appellants' counsel was sufficient to safeguard the interests of the appellants: Lucas at paras. 67, 69. In the present case, the appointment of the Amici in an adversarial role was sufficient, in our view, to safeguard the interests of the appellants.
- [89] Finally, the appellants argue in reply that Named Person and Basi both involved the first stage of determining the existence of informer privilege and that there is a balancing of competing rights at the second stage of determining the consequences of the privilege. In that regard, they point to the comment at para. 53 of Basi that the accused should be excluded "only to the necessary extent".
- [90] As discussed above, informer privilege is absolute, subject only to the "innocence at stake" exception. The absolute nature of the privilege applies as equally at the second stage of a Basi hearing as it does at the first stage. There can be no balancing of interests that results in a breach of the privilege. While protecting the privilege, the court has a broad discretion to take measures to safeguard the interests of the accused. In the present case, the trial judge appointed the Amici to safeguard the appellants' interests. We are satisfied that she could not have taken any other meaningful steps without jeopardizing the privilege.
- [91] We do not give effect to this ground of appeal.

Did the Trial Judge Err in Her Assessment of the Credibility of Person Y and K.M.?

- [92] There were four witnesses at trial who were considered to be witnesses of disreputable character (commonly referred to as "Vetrovec witnesses"), Person Y, K.M., D.Y. and Mr. Le. After the judge reviewed the evidence generally in the Trial Reasons, she turned to her assessment of the unsavoury witnesses. In the result, she accepted most of the evidence of Person Y, K.M. and D.Y., but rejected the evidence of Mr. Le in respect of admissions allegedly made to him by each of the appellants. The appellants assert that the judge erred in her application of the Vetrovec principles with respect to Person Y and K.M.
- [93] The trial judge began her discussion of the credibility of the unsavoury witnesses at para. 463 of the Trial Reasons by quoting the following summary of the applicable Vetrovec principles from R. v. Roks, 2011 ONCA 526, as adopted by this Court in R. v. Khan, 2011 BCCA 382 at para. 43:
- [63] Among the essential elements of a Vetrovec caution is an instruction about the essential characteristics of confirmatory evidence. Jurors are to be told that, in determining the veracity of the suspect evidence, they should look for evidence from another source tending to show that the untrustworthy witness is telling the truth about the guilt of the accused: [R. v. Khela, [2009] 1 S.C.R. 104], at para. 37; R. v. Kehler, [2004] 1 S.C.R. 328, at paras. 17-19; R. v.

Sauvé (2004), 182 C.C.C. (3d) 321 (Ont. C.A.), at para. 82, leave to appeal refused, [2005] 1 S.C.R. xv. The trier of fact is to look for confirmation from some other source (the independence requirement) that the suspect witness is telling the truth in some part of his story that goes to show that the accused committed the offence charged (the implicative quality or materiality requirement): Kehler, at para. 19; R. v. Vetrovec, [1982] 1 S.C.R. 811, at p. 829.

- [64] The independence requirement insists that to be confirmatory, evidence must not be "tainted" by connection to the Vetrovec witness: Khela, at para. 39.
- [65] To satisfy the materiality requirement, confirmatory evidence need not implicate the accused: Khela, at paras. 40-41; Kehler, at para. 16. The materiality requirement is met where the confirmatory evidence, in the context of the case as a whole, gives comfort to the trier of fact that the Vetrovec witness can be trusted in his or her assertion that the accused is the person who committed the offence: Khela, at para. 42; Vetrovec, at p. 833. Where the only issue in dispute is whether the accused committed the offence, to be confirmatory, evidence must comfort the trier of fact that the Vetrovec witness is telling the truth in that regard before convicting on the basis of the Vetrovec witness' evidence: Khela, at para. 43.
- [66] It is worth reminder that a trier of fact is entitled to convict on the evidence of a Vetrovec witness in the absence of confirmatory evidence where the trier of fact, cautioned about the danger of doing so, is satisfied that the witness is telling the truth: Khela, at para. 37; Kehler, at para. 22; Sauvé, at para. 82.

[Italic emphasis in original.]

The appellants do not take issue with the correctness of any of these principles, but contend that the judge did not apply them properly.

- [94] In assessing the credibility of Person Y, the trial judge began by setting out the features that Mr. Johnston asserted made Person Y an untrustworthy witness. Two of those features involved Person Y's motive to work with police: to exact revenge against Mr. Bacon; and to receive benefits from the police in an amount which ultimately exceeded \$1.3 million.
- [95] The trial judge then reviewed the evidence relating to Person Y and his testimony. At para. 478, she stated that Person Y could have easily implicated one or both of the appellants without contradiction but did not do so. At para. 479, she found that Person Y had no motive to falsify his evidence. She concluded her assessment as follows:
- [481] In my view, Person Y's actions do speak for him. His actions answer many of the issues raised by Mr. Johnston in challenging Person Y's credibility. Considering the evidence of Person Y as a whole, as well as the circumstances that have brought him before the Court, I am satisfied that his intention was to tell a true story to the Court. I would note that even Mr. Haevischer argues that Person Y's shortcomings relate more to his reliability than credibility and that the Court ought not to reject his evidence in total. Importantly, Person Y's evidence is corroborated in many respects by independent evidence, and I have

accepted it on many of its essential points.

[Emphasis added.]

[96] The trial judge then conducted a similar assessment of K.M.'s trustworthiness. At para. 504, she referred to the attempt by the defence to paint a picture of K.M. as a jilted girlfriend seeking revenge and a person trying to save her own skin by falsely implicating the accused. The judge commented that there was no apparent reason why K.M. would wish to falsely implicate Mr. Johnston.

[97] At para. 505, the judge dealt with the defence submission that K.M. was lying to protect herself, and the judge asked the rhetorical question of why K.M.'s evidence did not implicate either accused in a more direct way. The judge observed that K.M. could have significantly implicated both accused without danger of contradiction.

[98] The trial judge concluded her assessment of K.M.'s trustworthiness as follows:

[508] As with Person Y, there are areas of K.M.'s evidence with respect to which she is honestly mistaken, or where her memory was unclear. However, many key aspects of her evidence are in accordance with the "preponderance of probabilities" in this case. Further, there is evidence from other sources tending to show that K.M. is telling the truth in the material aspects of her testimony.

[Emphasis added.]

[99] The appellants concede that it is possible for a trial judge to accept the evidence of an unsavoury witness without finding confirmatory evidence: Roks at para. 66. However, they say the trial judge accepted the material aspects of the evidence of Person Y and K.M. on the basis that there was confirmatory evidence when there was none.

[100] The appellants do not assert that the judge erred because she did not identify the specific confirmatory evidence to which she referred in paras. 481 and 508 of the Trial Reasons. However, they maintain that there was no such confirmatory evidence and that this amounts to an error in law despite the fact that it was open to the judge to accept the evidence of Person Y and K.M. in the absence of confirmatory evidence. We need not decide whether this would amount to an error in law because we are satisfied that there were at least two pieces of confirmatory evidence in respect of the testimony of each of Person Y and K.M.

[101] It is not necessary for the confirmatory evidence to corroborate the witness's evidence in every respect: R. v. Chenier (2006), 205 C.C.C. (3d) 333 at 350 (Ont. C.A.). As discussed in para. 65 of Roks (quoted above), evidence need not implicate the accused in order to be confirmatory. However, it must have materiality, a concept which the Supreme Court of Canada noted at para. 40 of R. v. Khela, 2009 SCC 4, can be a difficult one. To be material, the confirmatory evidence must be capable of restoring the trier's faith in relevant aspects of the witness's account: Khela at para. 43.

- [102] The most material evidence confirming Person Y's testimony relates to his evidence that, at the meeting at the Korean restaurant on the day of the killings, he gave Person X the Glock gun he had confiscated from Mr. Lal. The independent confirmatory evidence was that the gun was found at the scene of the killings with Person Y's DNA on it. The police did not reveal this fact to Person Y until after he told them that he had given the gun to Person X: Trial Reasons at para. 236.
- [103] Other confirmatory evidence relates to the testimony of Person Y about the admissions made to him by Mr. Johnston on the evening of the killings. He testified that the conversation took place in Mr. Bacon's car outside of the apartment building in which Person X lived. The confirmatory evidence was that the RCMP surveillance placed Mr. Bacon's car in that parking lot at the time. In addition, cell phone records were consistent with Mr. Bacon, Mr. Johnston, Person X and Person Y being in the area at the time.
- [104] The appellants argue there was no confirmatory evidence of Person Y's testimony in this regard because it is not supported by independent evidence. They point to the facts that the police did not see anyone get into Mr. Bacon's car except immediately prior to its departure and that the police did not see Mr. Johnston's vehicle even though it was on their list of targeted vehicles. However, the trial judge found it was entirely possible for the exchange between Person Y and Mr. Johnston to have occurred before the police set up their surveillance, and she accepted Person Y's evidence about the encounter: Trial Reasons at paras. 419, 425. The appellants are simply repeating arguments they made at trial and, in the absence of palpable and overriding error (which is not alleged), the findings of fact of the trial judge are owed deference. These arguments do not detract from the independent confirmatory evidence that Mr. Bacon's car was in the location where Person Y testified he had the encounter with Mr. Johnston and that cell phone records are consistent with them being in the area.
- [105] There was also confirmatory evidence of at least two aspects of K.M.'s testimony. The first was her testimony that she helped Mr. Johnston and Person X clean guns and bullets with Windex and paper towels in the living room of her and Mr. Haevischer's suite at The Stanley on the day of the killings. She and Mr. Haevischer did not return to the suite after they left it on the evening of the killings, and the confirmatory evidence of K.M.'s testimony was that the police searched the suite several days after the killings and found two rolls of paper towels on the living room table and a bottle of Windex on the kitchen counter: Trial Reasons at para. 283.
- [106] The second aspect was K.M.'s testimony that, after Mr. Haevischer and Mr. Johnston returned to The Stanley suite on the afternoon of the killings, she and Mr. Haevischer's brother took a laundry bag containing cell phones, clothing and shoes to a location in Surrey and burned the laundry bag and the contents of the bag. Confirmation of this testimony was provided in part by The Stanley CCTV video, which captured K.M. and Mr. Haevischer's brother leaving with a large cloth bag at approximately 4:35 p.m. and returning at approximately 6:40 p.m. It was further confirmed by the evidence of a police

officer who accompanied K.M. in April 2009 to the location where she said the things had been burned. The officer testified that the area was charred and showed signs of burning: Trial Reasons at para. 359.

- [107] In addition to claiming that the trial judge erroneously applied the *Vetrovec* principles to the credibility of Person Y and K.M., the appellants say the judge made two other errors in assessing the credibility of Person Y and K.M. They submit the judge erroneously enhanced the credibility of both Person Y and K.M. by finding that they had no motive to lie and that they did not embellish their evidence when they could have done so without contradiction.
- [108] With respect to the lack of motive to lie, the appellants cite *R. v. R.W.B.* (1993), 24 B.C.A.C. 1, and *R. v. Batte* (2000), 145 C.C.C. (3d) 449 (Ont. C.A.). In *R.W.B.*, Justice Rowles said the following:
- [28] It does not logically follow that because there is no apparent reason for a witness to lie, the witness must be telling the truth. Whether a witness has a motive to lie is one factor which may be considered in assessing the credibility of a witness, but it is not the only factor to be considered.

Justice Doherty made similar comments in *Batte*:

- [121] What must be avoided in instructing a jury is any suggestion that the accused has an onus to demonstrate that a complainant has a motive to fabricate evidence, that the absence of a demonstrated motive to fabricate necessarily means that there was no motive, or finally, that the absence of a motive to fabricate conclusively establishes that a witness is telling the truth. The presence or absence of a motive to fabricate evidence is only one factor to be considered in assessing credibility.
- [109] In our view, the trial judge did not conclude that Person Y and K.M. were credible solely because they did not have a motive to lie. At most, it was one factor she took into account in assessing their credibility. More importantly, however, the reason that the judge addressed the issue of motive was that the appellants had taken the position at trial that Person Y and K.M. were untrustworthy because they did have a motive to lie. It was perfectly appropriate for the judge to address something that the appellants had argued was a detraction from the credibility of Person Y and K.M.
- [110] With respect to the lack of embellishment, the appellants rely on the following paragraph from *R. v. Kiss*, 2018 ONCA 184:
- [52] The trial judge would have erred if he treated the absence of embellishment as adding to the credibility of [the complainant's] testimony. It is wrong to reason that because an allegation could have been worse, it is more likely to be true: *R. v. G.(G.)* (1997), 115 C.C.C. (3d) 1, at p. 10 (Ont. C.A.), [1997] O.J. No. 1501; *R. v. L.L.*, 2014 ONCA 892, at para. 2; *R. v. R.A.G.*, 2008 ONCA 829, at para. 20. While identified exaggeration or embellishment is evidence of incredibility, the apparent absence of exaggeration or embellishment is not proof of credibility. This is because both truthful and dishonest accounts can appear to be without

exaggeration or embellishment.

- [111] The appellants say it was an error in law for the trial judge to have bolstered the credibility of Person Y and K.M. on the basis of a lack of embellishment in their testimony. Embellishment can serve as evidence of a lack of credibility, but a lack of embellishment serves no evidentiary purpose.
- [112] In our opinion, Kiss does not stand for the proposition that a trial judge necessarily errs by making a comment about lack of embellishment when discussing the credibility of a witness. This is demonstrated by the two paragraphs of Kiss following para. 52:
- [53] On the other hand, in my view, there is nothing wrong with a trial judge noting that things that might have diminished credibility are absent. As long as it is not being used as a makeweight in favour of credibility, it is no more inappropriate to note that a witness has not embellished their evidence than it is to observe that there have been no material inconsistencies in a witness' evidence, or that the evidence stood up to cross-examination. These are not factors that show credibility. They are, however, explanations for why a witness has not been found to be incredible.
- [54] Trial judges are presumed to know the law. In this case, there is no basis for apprehending that the trial judge inappropriately added weight to [the complainant's] credibility. In my view, on a fair reading of the reasons for judgment, the trial judge was simply recording that [the complainant's] evidence did not suffer from a problem of exaggeration or embellishment that would have diminished its weight. He did not err on this ground.
- [113] On a reading of the Trial Reasons as a whole, it is our view that the judge did not use the lack of embellishment as a makeweight in favour of the credibility of Person Y and K.M. There were numerous other factors that she took into account when assessing their credibility. As in Kiss, the judge was simply noting that their credibility was not diminished by the existence of embellishment in their testimony. In the case of K.M., the judge made her comments about lack of embellishment in addressing the argument of defence counsel that K.M. was falsely implicating the accused in order to save her own skin.
- [114] This ground of appeal cannot succeed because the appellants have failed to show that the trial judge made any errors in her assessment of the credibility of Person Y and K.M.

Did the Trial Judge Err in Her Assessment of the Circumstantial Evidence Against Mr. Haevischer?

(a) Standard of Review

- [115] The appellant Haevischer says the judge committed three legal errors in her treatment of circumstantial evidence:
- a) wrongly requiring that "inferences consistent with innocence" be based on proven facts, contrary to the law as described in *R. v. Villaroman*, 2016 SCC 33 at para. 35;

- b) relying on evidence of post-offence conduct to assess his degree of culpability, when the evidence did not particularly speak to culpability; and
- c) bridging gaps in the evidence rather than recognizing the circumstantial evidence fell short of supporting a finding beyond a reasonable doubt that Mr. Haevischer engaged in conspiracy to murder Mr. Lal.

[116] The Crown urges upon us the deferential standard of review described in *R. v. Paquette*, 2019 BCCA 396 at para. 23; *R. v. R.S.B.*, 2020 BCCA 33 at para. 10; *R. v. Widdifield*, 2018 BCCA 62 at para. 30; and described as follows in *R. v. Bransford*, 2019 BCCA 408:

[31] An appeal from conviction in a circumstantial case that seeks to challenge the inferences drawn (or rejected) by a trial judge attracts a deferential standard of review. It is "fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt": *Villaroman* at para. 56, citing *R. v. Dipnarine*, 2014 ABCA 328 at para. 22. As a result, the question on appeal is whether the "trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence": *Villaroman* at para. 55, citing *R. v. Yebes*, [1987] 2 S.C.R. 168.

[117] Similarly, in *R. v. O.V.*, 2015 BCCA 449, this Court set out the deferential standard of review for inferences made by trial judges:

[47] As held in *R. v. Newman*, 2015 BCCA 237, [reversed on other grounds: 2016 SCC 7] inferences made by trial judges are not to be disturbed unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable:

[65] I must keep in mind the limited scope of appellate review that applies with respect to the inference-drawing process. As Mr. Justice Fish stated in *R. v. Clark*, 2005 SCC 2 at para. 9, [2005] 1 S.C.R. 6, "Appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable." Also apt is *R. v. Damin*, 2012 BCCA 504 at para. 38, 331 B.C.A.C. 101, wherein Madam Justice Smith indicated, quoting *Housen v. Nikolaisen*, 2002 SCC 33 at para. 23, [2002] 2 S.C.R. 235, that inferences drawn by a trial judge from accepted or found facts can be interfered with on appeal "only where the inference-drawing process itself is palpably in error".

[118] The Crown notes the appellant, Mr. Haevischer, avoids any reference to the standard of review. He does not assail findings of fact, and he does not address whether the inferences drawn were reasonable. It says a reviewing court should assess inferences drawn from circumstantial evidence by considering the evidence as a whole and should refrain from taking a piecemeal approach: *R. v. Duong*, 2019 BCCA 299 at para. 64; *R. v. Tahirsylaj*, 2015 BCCA 7 at paras. 29-30, 38. A fair reading of the judge's reasons as a whole, the Crown submits, does not support the position the judge lost sight of the proper process of inference-drawing.

- [119] The Crown says the judge was fully aware of the alternative inferences proffered by the appellant, specifically the contention he was unaware the plan was to murder Mr. Lal. She clearly and emphatically rejected such inferences, and it is not open to this Court to revive them: *R. v. Robinson*, 2017 BCCA 6 at para. 38, *aff'd* 2017 SCC 52; *R. v. De Aquino*, 2017 BCCA 36 at para. 33; *Duong* at para. 65.
- [120] In *Robinson*, Justice Newbury wrote:
- [38] [T]his court's task is to determine "whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable inference available on the totality of the evidence." (*Villaroman*, at para. 55.) This does not constitute a different standard of review for circumstantial cases; but it does provide finders of fact and appellate courts with an alternate formulation by which to assess such cases—in the words of Professor Berger, a kind of "inferential litmus test." (At 71.) In circumstantial cases, as in non-circumstantial cases, the appellate court may not interfere if the verdict is one that a properly instructed jury could reasonably have rendered. (*Yebes*, at 186.) It is generally the task of the finder of fact to draw the line between reasonable doubt and speculation. (*Villaroman*, at para. 71.) It is not open to a court of appeal to conceive of inferences or explanations that are not reasonable possibilities; nor to attempt to revive evidence or inferences that the trial judge reasonably rejected. (*Grover*, at para. 2, quoting from the reasons of Jackson J.A. in the Court of Appeal.) If an appellant is to succeed, an inference other than guilt must be "reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense." (*Villaroman*, at para. 36.)
- [121] The Crown contends the words of this Court in *R. v. Vickers*, 2016 BCCA 98 at para. 22, accurately describe the appeal: "the substance of this appeal is better seen as an argument that the verdict is unreasonable because the evidence left open reasonable inferences that were inconsistent with guilt". See also *R. v. Dipnarine*, 2014 ABCA 328 at para. 2.
- [122] Further, the Crown says it is open to us to consider that Mr. Haevischer did not testify in his defence in assessing the reasonableness of the verdict: *Tahirsylaj* at para. 40; *R. v. Jir*, 2010 BCCA 497 at para. 39.
- (b) Did the Judge Err in Her Handling of Inferences Inconsistent with Guilt?
- (i) Positions of the Parties
- [123] The appellant Haevischer emphasises the trial judge's description of the inference-drawing process at paras. 588-91 of the Trial Reasons, particularly the concluding paragraph:
- [591] The line between inference and speculation can be a fine one, and where evidence is circumstantial it is critical to distinguish between the two. D. Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2006) at 95 states:

Inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be no inference without objective facts from which to infer the facts that a party seeks to establish. If there are no positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture.

[Emphasis added.]

[124] He says the passage cited from Justice Watt writing extrajudicially in the 2006 edition of Watt's Manual of Criminal Evidence cannot be reconciled with the 2016 judgment in Villaroman and, in particular, the following passage from the judgment of Justice Cromwell:

[35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.) However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4 at para. 58 ... Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[Emphasis added.]

[125] He contends Watt J.A.'s statement of principle does not distinguish between inferences consistent with guilt and inferences inconsistent with guilt; the author clearly treats them both as requiring positive proven facts. The trial judge, by adopting the statement without qualification, was misguided and erred in her assessment of the circumstantial evidence.

[126] In response, the Crown says the appellant mistakenly assumes the passage was cited in reference to inferences inconsistent with guilt. The Crown says the appellant misreads the text; the cited passage is still included in current editions of Watt J.A.'s text, together with references to Villaroman; and the rule, as stated, is inferences consistent with guilt must be based on proven facts. The Crown says the trial judge referred to the passage in question during her discussion of the Crown's burden to prove the conspiracy count beyond a reasonable doubt and in that respect, it is apt. It is a reference of the sort referred to at para. 49 of Villaroman:

[M]ost of the references to the effect that inferences must arise from evidence concern the Crown's burden to prove guilt beyond a reasonable doubt. Of course, there is no error in this regard as the Crown cannot rely on a gap in the evidence to prove an element of the offence.

[Italic emphasis in original; underline emphasis added.]

[127] In order to succeed on this ground, the Crown says the appellant must identify inferences consistent with innocence that were not drawn because of the error alleged: *R. v. Russell*, 2020 BCCA 108 at para 44 (also indexed as *R. v. Dingwall*), review by the Supreme Court of Canada pending. The Crown says the judge did not refuse to draw the inferences proposed by the appellant because they were not supported by proven facts. Rather, she failed to draw them because they were "so resoundingly negated by the facts".

(ii) Discussion

[128] Watt's text is cited in the course of the trial judge's consideration of Count 7, the conspiracy charge (Trial Reasons at paras. 576-91), where there is a summary review of the jurisprudence. The focus of the trial judge at this point in the reasons is the extent to which a concerted purpose, such as to entitle her to find the existence of the unlawful agreement, could be inferred. The case against the accused was circumstantial, but the judge noted conspiracies are often proved by circumstantial evidence. She specifically identified the following propositions in the cases to which she referred:

- a) membership in a conspiracy may be inferred from evidence of conduct that assists the unlawful object;
- b) any degree of assistance in the furtherance of the unlawful object can lead to a finding of membership;
- c) the cumulative effect of "several isolated doings" must be interpreted and their cumulative effect must be properly estimated in the light of all surrounding circumstances;
- d) evidence of association between conspirators can be some evidence;
- e) an agreement may be established by inference from the manner in which the substantive offence was committed;
- f) it is not necessary that all members of a conspiracy play, or intend to play, equal roles in the ultimate commission of the unlawful object; and
- g) members in a conspiracy need not personally commit, or intend to commit, the offence that each has agreed should be committed.

[129] All of these propositions relate to the manner in which a conspiracy may be proved. None relates to inferences inconsistent with guilt.

[130] The trial judge then turned to the basis upon which an inference in favour of the Crown could properly be drawn:

[588] Where the Crown's case against an accused is based on circumstantial evidence, the trier of fact must be satisfied that the only rational inference is the guilt of the accused. In *R. v. Griffin*, 2009 SCC 28, the Supreme Court of Canada stated the proposition this way at para. 33:

The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty.

[131] The only reference to inferences inconsistent with guilt in this discussion of the law is at para. 589 of the Trial Reasons, where the judge quoted the following passage from *R. v. Kresko*, 2013 ONSC 1159 at para. 32:

The strength of an inference to be drawn from circumstantial evidence is determined by the probative value of the underlying evidence; see *R. v. Handy*, [2002] 2 S.C.R. 908, at para. 26. When assessing the strength of an inference the trier must also consider any alternative explanation or contradiction, and the accused may submit any other plausible theory; see *Fontaine v. Loewen Estate*, [1998] 1 S.C.R. 424, at para. 33.

[Emphasis added.]

[132] That reference to the necessity to consider any other "plausible theory" submitted by the accused closely reflects what the Supreme Court of Canada says with respect to inferences inconsistent with guilt in *Villaroman*:

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[133] In our opinion, it is clear the reference to the necessity of a factual basis for inferences was adopted by the trial judge only in relation to inferences consistent with guilt in the Crown's conspiracy case. The judge correctly instructed herself in that regard. There is no indication in her discussion of the jurisprudence or the application of principles to the facts in this case that suggests she erred in her treatment of the circumstantial evidence.

[134] Further, as we note below, the trial judge discussed at length and rejected the inferences inconsistent with guilt now urged upon us by the appellants.

(c) Did the Judge Err in Her Assessment of After-the-Fact Conduct?

(i) Positions of the Parties

[135] The trial judge placed weight upon the after-the-fact conduct described at paras. 345-98 of the Trial Reasons, specifically:

- a) the destruction of evidence (cell phones belonging to the victims and clothing belonging to the accused);
- b) flight (Mr. Haevischer and K.M. abandoned their apartment); and
- c) discussions between and amongst the accused (some of which were recorded).

[136] At para. 679 of the Trial Reasons, the judge correctly observed after-the-fact conduct has no probative value where it is equally explained by, or is equally consistent with, two or more offences: *R. v. White*, 2011 SCC 13 [White (2011)].

[137] When she addressed the evidence of Mr. Haevischer's participation in the conspiracy to murder Mr. Lal, she said:

[634] The evidence of events after the murders only strengthens the logical inference that Mr. Haevischer was a participant in the conspiracy. Upon his return to his apartment with Mr. Johnston, Mr. Haevischer boiled the victims' cell phones and directed that the phones, and the clothing he and Mr. Johnston had been wearing, be destroyed. He told his brother on a whiteboard that people died. He directed K.M. to pack her things and the two left their apartment at the Stanley, never to return. Later that evening before it had been reported on the news, Mr. Haevischer told Windsor Nguyen by whiteboard that six people died. The next day he told his [Red Scorpions] associates that items connecting him to the crime scene had been burned. He arranged for the BMW that transported him and his cohorts to and from the scene to be cleaned and detailed.

[138] In addressing the probative value of this evidence in relation to the murder charge, the judge said:

[704] Mr. Haevischer arranged the immediate destruction of the victims' cell phones, as well as the clothing he had been wearing at the time of the murders. This is circumstantial evidence suggesting that Mr. Haevischer was not only present at the crime scene but actively involved in the killings. Destruction of the clothing suggests that Mr. Haevischer knew it might contain blood or other forensic evidence tying him to the murders. That, in turn, suggests that he was not standing passively some distance away from the events going on in the suite. It is a reasonable inference that Mr. Haevischer arranged the destruction of the evidence to eliminate his detection as one of the perpetrators: *White* at para 42.

[139] Mr. Haevischer contends the judge misused the evidence of after-the-fact conduct, notwithstanding her correct summary of the law. He says the conduct in issue was as consistent with his desire to avoid being placed at the scene of a violent crime as it was with involvement in the planning or execution of the murders.

[140] In *R. v. White*, [1998] 2 S.C.R. 72 [White (1998)], Justice Major, addressing the probative value of after-the-fact conduct, said:

- [32] The result will always turn on the nature of the evidence in question and its relevance to the real issue in dispute. It is possible to imagine cases in which evidence of post-offence conduct could logically support a distinction between two levels of culpability for a single act, or between two offences arising from the same set of facts. By way of illustration, where the extent of the accused's flight or concealment is out of all proportion to the level of culpability admitted, it might be found to be more consistent with the offence charged. Post-offence conduct might also be relevant in cases where the accused has admitted to committing a physical act but asserts that the act was justified in some way; in those circumstances, an act of flight or concealment might constitute some evidence from which, along with other evidence, the jury could infer that the accused was conscious that he or she had committed a culpable act and had not, for example, acted in self-defence. See Peavoy [(1997), 117 C.C.C. (3d) 226 (Ont. C.A.)], at p. 241; Jacquard, [[1997] 1 S.C.R. 314], at p. 348.
- [141] A decade later, in *White* (2011), Justice Rothstein said:
- [42] Whether or not a given instance of post-offence conduct has probative value with respect to the accused's level of culpability depends entirely on the specific nature of the conduct, its relationship to the record as a whole, and the issues raised at trial. There will undoubtedly be cases where, as a matter of logic and human experience, certain aspects of the accused's post-offence conduct support an inference regarding his level of culpability.
- [142] These judgments make it clear the probative value of evidence of after-the-fact conduct is contextual, and careful consideration must be given to how such evidence may speak to the accused's culpability. The appellant says his after-the-fact conduct did not exclusively suggest he was a party to either conspiracy to murder or murder. He says even if the evidence suggests he knew the clothing he destroyed might contain blood or other forensic evidence tying him to the murders (as the trial judge assumed), the fact he destroyed the clothing did not allow the judge to draw an inference he was a perpetrator of the murders rather than a perpetrator of manslaughter (as a party to robbery). Physical proximity to the killings reveals nothing about the intent required to support a conviction for murder rather than manslaughter. There was nothing in the post-offence conduct at issue that made it "out of all proportion" to the offence of manslaughter, and which would thereby allow it to support a conviction for murder.
- [143] The Crown agrees the proper legal treatment of after-the-fact conduct is highly context- and fact-specific. However, it says Mr. Haevischer misapprehends the use made of the evidence of after-the-fact conduct. The judge did not use the evidence to determine the degree of Mr. Haevischer's culpability but as evidence tending to establish his participation in a conspiracy, which was an issue at the trial, and as circumstantial evidence of his proximity to and active involvement in the killings.
- [144] The Trial Reasons refer to post-offence conduct in three places. The first is at para. 634, quoted above but reproduced here for ease of reference:

- [634] The evidence of events after the murders only strengthens the logical inference that Mr. Haevischer was a participant in the conspiracy. Upon his return to his apartment with Mr. Johnston, Mr. Haevischer boiled the victims' cell phones and directed that the phones, and the clothing he and Mr. Johnston had been wearing, be destroyed. He told his brother on a whiteboard that people died. He directed K.M. to pack her things and the two left their apartment at the Stanley, never to return. Later that evening before it had been reported on the news, Mr. Haevischer told Windsor Nguyen by whiteboard that six people died. The next day he told his [Red Scorpions] associates that items connecting him to the crime scene had been burned. He arranged for the BMW that transported him and his cohorts to and from the scene to be cleaned and detailed.
- [145] The Crown says this reference to post-offence conduct is used by the judge to support the inference she has drawn from other evidence. Mr. Haevischer's examination of this paragraph in isolation from this context gives it an unwarranted significance.
- [146] The second reference to the post-offence conduct is found at paras. 679-80 of the reasons:
- [679] Post-offence conduct, if admissible, can provide circumstantial evidence of the culpability of the accused. Evidence of post-offence conduct must be relevant to a live issue and not subject to any exclusionary rule. It may also be excluded where its probative value is outweighed by its prejudicial effect. Such evidence has no probative value where an accused's post-offence conduct is equally explained by, or is equally consistent with, two or more offences. That is to say, where the evidence cannot logically support an inference of guilt with respect to one crime rather than another (for example, murder as distinct from manslaughter) then it has no probative value and should not be admitted: *R. v. White*, 2011 SCC 13.
- [680] Whether or not a given instance of post-offence conduct has probative value with respect to an accused's culpability depends entirely on the specific nature of the conduct, its relationship to the evidence as a whole, and the issues raised at trial. There will be cases where, as a matter of logic and human experience, an accused's post-offence conduct will support an inference regarding his level of culpability: *White* at para. 42.
- [147] The Crown says this is an unobjectionable statement of principle that reflects the judge's awareness of the guiding principles.
- [148] The final reference is at para. 704 of the Trial Reasons:
- [704] Mr. Haevischer arranged the immediate destruction of the victims' cell phones, as well as the clothing he had been wearing at the time of the murders. This is circumstantial evidence suggesting that Mr. Haevischer was not only present at the crime scene but actively involved in the killings. Destruction of the clothing suggests that Mr. Haevischer knew it might contain blood or other forensic evidence tying him to the murders. That, in turn, suggests that he was not standing passively some distance away from the events going on in the suite. It is a reasonable inference that Mr. Haevischer arranged the destruction of

the evidence to eliminate his detection as one of the perpetrators: White at para 42.

[Emphasis added.]

[149] The Crown says this paragraph is the last piece of an analysis of Mr. Haevischer's culpability for murder, either as a co-perpetrator or an aider or abettor. Before referring to the after-the-fact conduct, the judge had rejected as implausible Mr. Haevischer's contention he was never inside suite 1505. She concluded Mr. Haevischer, Mr. Johnston and Person X were acting with a common purpose to kill Mr. Lal; the three intruders jointly and actively participated in the murders with the requisite intent; and there was a shared self-interest in killing the other five victims who were witnesses to the murder of Mr. Lal.

(ii) Discussion

[150] Consideration of Mr. Haevischer's after-the-fact conduct followed the judge's recognition, in relation to the conspiracy charge, that she was required to estimate the cumulative effect of "several isolated doings" in the light of all surrounding circumstances. At para. 610, she observed:

[610] As Moldaver J. stated in [R. v. J.F., 2013 SCC 12] at para. 52, where a person with knowledge of the unlawful object does something to further that object, with the approval of one of the existing conspirators, that is powerful circumstantial evidence from which membership in the conspiracy can be inferred. It follows, in my view, that all of the actions of an accused before, during and after the achievement of the unlawful object, must be considered -- and considered as a whole, not piecemeal -- in order to determine whether the only logical inference is the accused's membership in the conspiracy.

[151] It was in this light she first considered Mr. Haevischer's after-the-fact conduct:

[624] the jurisprudence is clear that all of the actions of an accused before, during and after the achievement of the unlawful object must be considered as a whole in determining whether the only logical inference is the accused's membership in the conspiracy.

[152] Reviewing that conduct at paras. 623-35 of the Trial Reasons, the judge placed most emphasis upon the events leading up to the day of the murders and the evidence of what occurred on October 19. We agree with the Crown's description of the limited weight placed upon the after-the-fact conduct at para. 634 of the Trial Reasons, where the trial judge says that conduct "strengthened" the inferences she had drawn.

[153] Mr. Haevischer's after-the-fact conduct was also considered in relation to the murder charge: Trial Reasons at para. 704.

[154] Again, however, the evidence of after-the-fact conduct plays a small role in the analysis. As the Crown notes, before addressing the after-the-fact conduct, the trial judge had found Mr. Haevischer was present in Mr. Lal's apartment at the time of the murders:

- [701] It is not plausible to suggest (as do both accused) that one of the three [Red Scorpions] associates could -- or would -- stand by and do nothing while the victims in the suite were being kept under control, unexpected witnesses were arriving, and the risk of yet other unsuspecting persons stumbling onto the scene remained a significant possibility.
- [702] The evidence concerning the timing of events and the scene the killers left behind leaves little doubt that the three [Red Scorpions] associates jointly and actively participated in the murders, and did so with the necessary intent.
- [155] As we have noted, the judge concluded her consideration of the after-the-fact conduct as follows:
- [704] Destruction of the clothing suggests that Mr. Haevischer knew it might contain blood or other forensic evidence tying him to the murders. That, in turn, suggests that he was not standing passively some distance away from the events going on in the suite. It is a reasonable inference that Mr. Haevischer arranged the destruction of the evidence to eliminate his detection as one of the perpetrators: White at para 42.
- [156] The concluding reference to White (2011) is to the observation in that case, previously cited by the judge, that there will be cases where, as a matter of logic and human experience, an accused's post-offence conduct will support an inference regarding his level of culpability.
- [157] The appellant, in our view, is correct in saying his destruction of his clothing does not support an inference regarding his culpability for murder. Another reasonable inference might have been drawn: he simply sought to destroy any evidence that would establish his presence at the killings, including clothing that might have been seen by those he encountered in the Balmoral parking lot or recorded on video cameras. Common sense does not suggest the only explanation for Mr. Haevischer's destruction of his clothing was that it was blood-stained. While his methodical after-the-fact conduct (like his actions leading up to and at the scene of the murders) was probative of his involvement in a conspiracy, the same cannot be said in relation to the murder charges.
- [158] The question on appeal, however, is not whether each and every inference drawn by the trial judge is the only inference that could be drawn from the evidence. It is, rather, as this Court stated in Duong, whether the critical inference essential to guilt was properly drawn:
- [64] In reviewing inferences drawn from circumstantial evidence, the evidence must be assessed cumulatively and not in a piecemeal fashion: *R. v. Tahirsylaj*, 2015 BCCA 7 at paras. 29, 38. Thus, although individual pieces of circumstantial evidence may be "reasonably or rationally explained away", the ultimate question is whether, on the whole of the evidence, the Crown has proven that the accused's guilt is the only reasonable inference: *Tahirsylaj* at para. 38. Individual items of evidence are "links in the chain of ultimate proof" and must not be examined separately and in isolation: [*R. v. Uhrig*, 2012 ONCA 470] at para. 13, citing *R. v. Morin*, [1988] 2 S.C.R. 346 at 361.

- [159] In this case, the ultimate question was whether Mr. Haevischer jointly and actively participated in the murders. The inference he destroyed evidence after the fact with a view toward concealing that participation was inessential to the chain of proof. Here, as in *R. v. Feil*, 2012 BCCA 110, and *R. v. Purchase*, 2015 BCCA 211, the trial judge's error is of the first type described in *White* (2011): it is an error that appears significant in isolation but is insignificant in context because it only related to a minor aspect of the case that could not have had any effect on the outcome. This type of error is described in *R. v. Alexander*, 2015 BCCA 484 at para. 68, as an error that is harmless on its face or in its effect.
- [160] In its factum, the Crown urges us to apply the curative proviso of s. 686(1)(b)(iii) if we find the judge erred in assessing Mr. Haevischer's after-the-fact conduct. Disregarding the evidence of after-the-fact conduct in relation to the murder charge, in our view, does not undermine any inferences crucial to Mr. Haevischer's guilt. No substantial wrong or miscarriage of justice arose from the consideration of that conduct. In our opinion the curative proviso of s. 686(1)(b)(iii) is applicable.
- (d) Did the Judge Err by "Filling in the Blanks"
- (i) Positions of the Parties
- [161] The third error alleged by the appellant Haevischer in relation to the inferences drawn by the judge is of the sort described by Cromwell J. in *Villaroman* as follows:
- [162] There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw. Baron Alderson referred to this risk in *Hodge's Case* [(1838), 2 Lewin 227, 168 E.R. 1136]. He noted the jury may "look for -- and often slightly . . . distort the facts" to make them fit the inference that they are invited to draw: p. 1137. Or, as his remarks are recorded in another report, the danger is that the mind may "take a pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form parts of one connected whole": *W. Wills, Wills' Principles of Circumstantial Evidence* (7th ed. 1937), at p. 45; cited by Laskin J. in *John v. The Queen*, [1971] S.C.R. 781, dissenting but not on this point, at p. 813.
- [162] Mr. Haevischer says the trial judge fell into error by unconsciously filling in blanks and bridging gaps in the evidence to support the inference the Crown invited her to draw: Mr. Haevischer was a member of the conspiracy to murder Mr. Lal.
- [163] The Crown argued the only rational inference from all of the evidence is that Mr. Haevischer had been informed of the plan to murder Mr. Lal by the time he arrived at suite 1505. The judge addressed that critical question by weighing the following facts at paras. 625-27 of the Trial Reasons:
- a) Mr. Haevischer was a tattooed member of the gang with all of the obligations of loyalty that entailed;

- b) he had the same interest in protecting the gang's drug turf and its reputation as did the other members of the group;
- c) he kept guns and ammunition in his apartment, and he was involved in acts of violence incidental to the drug trade;
- d) he had a significant association with Mr. Johnston, his gang mentor, with whom he was personally very close, like a brother;
- e) Mr. Johnston and Person X, key participants in the conspiracy, went to the Stanley to enlist the help of Mr. Haevischer on the day of the murders, apparently without any notice to him; and
- f) by doing so, Mr. Johnston displayed considerable confidence that he would assist without any hesitation, and Mr. Haevischer did so.

[164] Mr. Haevischer says some bridging of gaps is necessary to move from these facts to the inference he was a party to the conspiracy to murder. He says the "simple fact" he might have had the same motive to kill Mr. Lal as Mr. Johnston and Person X is not proof they told him the plan involved a murder. Proof he had a broad shared motive is not proof the plan to kill was communicated to him. His significant association with Mr. Johnston is of no help in answering the question of whether Mr. Johnston told him of the plan to commit a murder. Finally, it is only by "filling in the blanks" that the judge concluded the purpose of the visit was to "enlist the help of Haevischer" and "Mr. Johnston displayed considerable confidence that Mr. Haevischer would assist without any hesitation".

[165] The judge placed weight upon the careful cleaning of guns and bullets that occurred at Mr. Haevischer's apartment and the fact he changed his clothes and wore gloves as evidence he knew he was being enlisted to commit a crime involving violence. Mr. Haevischer says the nature of the activities of the gang was such that he could have been enlisted to commit "all manner of crimes involving guns but not necessarily violence". Only by bridging gaps and filling in blanks was it possible to conclude the prospect of violence entailed murder.

[166] The judge found Mr. Johnston and Person X turned up at Mr. Haevischer's apartment without any apparent notice. There was no evidence from K.M. about conversation in the apartment. If Mr. Haevischer entered a conspiracy to commit murder, he must have done so between the time the others arrived at his apartment and when the trio arrived at the Balmoral. However, there was no evidence of conversation in the apartment and no evidence of conversation in the car. An inference of his involvement in a conspiracy can only be drawn from his actions, and Mr. Haevischer argues they are consistent with a conspiracy to commit any number of violent offences.

- [167] The judge placed weight upon the fact the plan to rob and murder Mr. Lal in an apartment building was fraught with risks, including the risk of an "armed standoff". Mr. Haevischer says there was no basis to conclude what the men anticipated, or what they considered likely to occur. He argues the judge's comments suggest the members of the conspiracy had an agreement to deal violently with anyone they encountered in apartment 1505. Mr. Haevischer argues that was not the conspiracy the Crown alleged or attempted to prove.
- [168] The judge concluded:
- [630] [T]he question is whether Mr. Johnston would enlist his close friend and associate for such a venture without telling him what the venture entailed. The suggestion that he would keep Mr. Haevischer in ignorance of the plan begs the question why Mr. Johnston and Person X enlisted his help at all. It is difficult to think of any reason for Mr. Haevischer's enlistment other than his assistance to execute a plan involving multiple unknowns. To keep Mr. Haevischer in ignorance of the plan would surely have placed him, and the others, in harm's way. To seek Mr. Haevischer's assistance, yet keep him in ignorance of the plan to kill Mr. Lal, would be antithetical to the close personal and professional association between the two men. Had Mr. Johnston wanted, for some reason, to shield Mr. Haevischer from the full force of the plan, he would not have enlisted him at all.
- [169] Mr. Haevischer argues there are reasons why Mr. Johnston and Person X would enlist Mr. Haevischer's help without telling him the true nature of the plan. For example, the possibility that if they told him the plan he might refuse to participate. While it was necessary he understand the role he was to play, he argues he could have been enlisted to fulfill a role such as a lookout without knowing the full plan.
- [170] Mr. Haevischer claims not to understand the proposition that keeping him in ignorance of the plan would have placed him, and the others, in harm's way, arguing the suggestion imputes a level of rational forethought inconsistent with everything Mr. Johnston and Person X planned to do that day.
- [171] The appellant takes greatest exception to the judge's view that keeping him in ignorance of the plan to kill Mr. Lal would be "antithetical to the close personal and professional association between the two men". He concedes the judge's conclusion might be tenable if the Crown had managed to prove Mr. Johnston always told Mr. Haevischer the full details of his plans. That was not the evidence.
- [172] The judge observed:
- [631] On Mr. Haevischer's part, one must ask whether it is reasonable to infer that he would accompany Mr. Johnston, his close [Red Scorpions] associate, on a venture involving cleaned and loaded guns, wearing clothing designed to conceal his identity and heading to a large residential apartment complex without asking what the venture entailed and the dangers he should expect to face at the Balmoral. Mr. Haevischer was no underling of Mr. Johnston; he was a tattooed member of the [Red Scorpions] with his own guns, his own

drug lines and considerable history with the [Red Scorpions].

- [173] Mr. Haevischer says the answer to the question posed by the judge is this: the irrational thinking that would have led Mr. Haevischer to participate in the event at all is exactly the same irrational thinking that would lead him to participate without knowing the full plan.
- [174] The Crown denies the judge filled in blanks and bridged gaps in the evidence in order to conclude that Mr. Haevischer became a member of the conspiracy to murder Mr. Lal. Neither Mr. Johnston nor Mr. Haevischer challenged the existence of some sort of plan against Mr. Lal. By the time the judge came to consider the question of Mr. Haevischer's membership in the conspiracy, she had already accepted evidence that a conspiracy to murder Mr. Lal existed before October 19, 2007, and Mr. Johnston was a member of the conspiracy. Direct evidence was not necessary in order to prove Mr. Haevischer was a co-conspirator. Membership in a conspiracy may be inferred from evidence of conduct that assists the unlawful objective: Trial Reasons at para. 578, citing *R. v. J.F.*, 2013 SCC 12 at para. 53.
- [175] In drawing the inference Mr. Haevischer became a member of the conspiracy to murder Mr. Lal before he entered Mr. Lal's suite, the judge looked to Mr. Haevischer's actions as a whole, before, during and after the achievement of the unlawful objective.
- [176] The Crown says the judge rejected as implausible the notion Mr. Johnston would not have told his close friend about the plan. It made no sense that Mr. Haevischer would accompany the two others without asking what they were about to do and what dangers he should expect to face. It was not in accord with common sense to infer Mr. Haevischer was enlisted to come along without playing any active role. The gang had a reputation for using violence and intimidation to advance and expand its drug trafficking business. The group motive ascribed to the murder of Mr. Lal was to the end of advancing both the gang's business and reputational interests. Mr. Haevischer himself "was involved in acts of violence incidental to the drug trade".
- [177] The Crown says the appellant Haevischer takes a piecemeal approach to this evidence. While it is true the "simple fact" Mr. Haevischer might have had the same motive as Mr. Johnston to kill Mr. Lal is not proof they told him the plan involved a murder, it is a factor that can be weighed in determining what inferences to draw. It was not an error of law to give some weight to that evidence.
- [178] The Crown submits the fact that a piece of circumstantial evidence does not in and of itself prove the fact in issue is not the end of the question. The trial judge did not conclude Mr. Haevischer knew of and agreed to participate in the conspiracy simply because he and Mr. Johnston had a close relationship. In contrast to Mr. Haevischer's piecemeal approach, the judge properly considered as a whole the evidence concerning Mr. Haevischer's words and actions in drawing the inference Mr. Haevischer knew of the plan and agreed to participate in it. The Crown argues absence of direct evidence concerning their objective that afternoon does not detract from the availability of the inference; on the totality of the

evidence, Mr. Haevischer joined the conspiracy: Widdifield at para. 36.

[179] The Crown says the judge was not filling in gaps by referencing aspects of the evidence such as the group motive and the close association between Mr. Haevischer and Mr. Johnston. She was carrying out the task the law of circumstantial evidence imposes upon her. That is, she carried out a close analysis of all the evidence and drew inferences she was entitled to draw.

[180] In short, the Crown submits, the argument here resembles that rejected in Vickers in the following terms:

[29] Mr. Vickers' argument falls into the error of taking pieces of evidence in isolation and arguing that certain inferences should not be drawn from them. The proper approach, however, is to examine the totality of the evidence. In large measure, his argument reargues his case at trial. He contends that the judge should have found facts different from those he found or drawn inferences other than those he drew. In doing this he does not point to any palpable and overriding error. Indeed, after acknowledging that the judge was entitled to reject his evidence, he attempts to buttress his argument by impliedly arguing that the judge was wrong to do so.

(ii) Discussion

[181] Insofar as the conspiracy charge against Mr. Haevischer is concerned, it cannot be said the trial judge failed to consider inferences inconsistent with guilt. She clearly addressed and discounted both the inference Mr. Haevischer was told nothing of the plan and the inference he was told only of the plan to rob Mr. Lal of his drugs and money.

[182] In our view, the Crown correctly asserts the allegation the judge "bridged the gaps" or "filled in the blanks" is essentially a challenge to the inferences drawn (or rejected) by the trial judge. It requires us to ask whether the trier of fact, acting judicially, could reasonably be satisfied the accused's guilt was the only reasonable conclusion available on the totality of the evidence.

[183] There was evidence in support of all of the findings set out at paras. 625-27 of the Trial Reasons upon which the inference Mr. Haevischer was a party to the conspiracy was based. None of those findings is challenged. They include findings with respect to Mr. Haevischer's membership in and fealty to the gang, his interest in the gang's objectives, his regular involvement in violence, and his close association with Mr. Johnston. All were reasonably relied upon by the trial judge in inferring Mr. Johnston went to Mr. Haevischer's apartment with a view toward enlisting him in a conspiracy and did so successfully. The judge, in our opinion, could reasonably be satisfied his commission of the offence charged on Count 7 was the only reasonable conclusion available on the totality of the evidence.

[184] We do not accede to the argument the judge erred by overlooking or misapprehending the evidence Mr. Johnston was an inveterate liar when she concluded he must have been forthright with Mr. Haevischer about the plan to murder Mr. Lal. The evidence was that

there was a particularly close relationship between Mr. Haevischer and Mr. Johnston; they were "like brothers". Evidence Mr. Johnston lied to others and that gang members are generally treacherous does not detract from the evidence upon which the judge relied in finding Mr. Johnston would not have enlisted Mr. Haevischer on this particularly dangerous job without telling him what was planned. We see no error in the judge's application of common sense and reason in addressing the question of Mr. Haevischer's knowing participation in the murder conspiracy.

[185] In particular, we do not accede to the argument that the judge ought not to have drawn inferences consistent with reason and common sense because those who commit mass murder are not amenable to reason. It is an argument, in effect, that no inferences can be drawn in relation to horrific crimes. It is at odds with the extensive record of the purposive and intentional (although violent and criminal) conduct of the gang implicated in these murders.

Did the Trial Judge Err in Her Application of the Principles of Party Liability in Finding Mr. Haevischer Guilty of First Degree Murder?

(a) Did the Judge Err in Law in Relation to Party Liability?

(i) Positions of the Parties

[186] The appellant contends the trial judge erred in finding him guilty as a principal to the offence of murder pursuant to s. 21(1)(a) of the Criminal Code and submits her conclusion, in the alternative, he was guilty as an aider or abettor pursuant to s. 21(1)(b) or (c) of the Criminal Code, was equally faulty.

[187] The relevant provision reads as follows:

21. (1) Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

[188] The appellant contends the trial judge was required to set out in her reasons the basis upon which she found the Crown had proved all elements of each of the six separate counts of murder. He says she did not do so and, in particular, she failed to explain how she found the Crown proved the critical element of intent.

[189] Further, he says the judge erred in law in considering the law to be indifferent to whether the accused personally committed the offence as a principal or aided or abetted another in committing the offence, and in seeing no need to distinguish between the possible routes to a conviction under s. 21(1). The judge wrote:

- [665] Section 21(1) is designed to prevent the acquittal of an accused who was either a principal or an aider/abettor, but whose precise role in the killings is unclear. Both forms of participation are not only equally culpable, but are to be treated as one single mode of incurring criminal liability: *Thatcher*, at para. 72. Thus, where evidence of concerted action in the commission of the offence exists, it is open to the Court to convict all of the accused either as principals or as aiders or abettors pursuant to s. 21(1), even though the extent of the individual participation in the violence is unclear: *R. v. Wood* (1989), 51 C.C.C. (3d) 201 (Ont. C.A.) at 220; see also *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.) at para. 152.
- [190] The trial judge began her analysis of party liability by stating the Crown's theory of liability, and by offering a general statement about the nature of party liability:
- [663] The Crown in the present case submits that the circumstantial evidence establishes that Mr. Haevischer and Mr. Johnston, along with Person X, pursuing the objective of the conspiracy to murder Corey Lal, forced their way into suite 1505 and jointly participated in confining and killing the six victims.
- [664] It is the Crown's primary position that Mr. Haevischer and Mr. Johnston are liable for the six counts of first degree murder as co-principals under s. 21(1)(a). However, as observed by Dickson C.J.C. in *R. v. Thatcher*, [1987] 1 S.C.R. 652 at para. 73, the law is indifferent whether the accused personally committed the offence as a principal or aided or abetted another in committing the offence, so long as the Court is satisfied beyond a reasonable doubt that the accused did one or the other.
- [191] The appellant says this analysis of *Thatcher* is not entirely accurate. He says the focus in *Thatcher* was on the question of whether s. 21 precludes a requirement of jury unanimity as to the particular nature of the accused's participation in the offence charged. The Court held jurors should not be required to make a choice on "a subject which is a matter of legal indifference". However, when an accused is tried by a judge alone, the appellant submits, the matter is not one of indifference; the judge has an obligation to deliver reasons that "justify and explain the result ... and enhance meaningful appellate review": *R. v. Sheppard*, 2002 SCC 26 at paras. 24-25.

(ii) Discussion

- [192] In our view, the criticism of the judge on this ground is unfounded. First, as the Crown points out, the judge gave extensive reasons for finding Mr. Haevischer and Mr. Johnston guilty of first-degree murder of all six victims. The plan to kill one became a plan to kill six in order to eliminate witnesses. The killings were considered and deliberate, if only for a brief period before they were carried out.
- [193] Further, however, the legal proposition upon which the appellant's claim is founded has been recently advanced in very similar terms and rejected by this Court. In *Russell, Newbury J.A.*, writing for the Court, said at paras. 57-58:

[57] The appellants say the trial judge erred in adopting the principle expressed in *R. v. Haevischer* to the effect that "the law is indifferent whether the accused personally committed the offence as a principal or aided or abetted another in committing the offence, so long as the court is satisfied beyond a reasonable doubt that the accused did one or the other." (At para. 664, citing *R. v. Thatcher* [1987] 1 S.C.R. 652 at 694.) Counsel contends that the issue addressed in *Thatcher* was jury unanimity. The Supreme Court of Canada decided that it was open to a jury to be divided as to whether an accused committed the crime personally or aided another in committing it. In the appellants' submission, however, the same rule does not apply in a trial before a judge alone.

[58] Counsel say this distinction is significant in a judge-alone trial because the judge has an obligation to deliver reasons which "justify and explain the result ... and enhance meaningful appellate review". (See *R. v. Sheppard* 2002 SCC 26 at paras. 24-5.) With respect, I do not read *Thatcher* as being limited to jury trials. To the contrary, I read Chief Justice Dickson's comments at 694 as establishing a more general principle:

... s. 21 has been designed to alleviate the necessity for the Crown choosing between two different forms of participation in a criminal offence. The law stipulates that both forms of participation are not [only] equally culpable, but should be treated as one single mode of incurring criminal liability. The Crown is not under a duty to separate the different forms of participation in a criminal offence into different counts. Obviously, if the charge against *Thatcher* had been separated into different counts, he might well have been acquitted on each count notwithstanding that each and every juror was certain beyond a reasonable doubt either that *Thatcher* personally killed his ex-wife or that he aided and abetted someone else who killed his ex-wife. This is precisely what s. 21 is designed to prevent.

[194] Similarly, in *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.), which was cited by the trial judge, Doherty J.A. wrote at para. 152:

It is beyond question that where two persons, each with the requisite intent, act in concert in the commission of a crime, they are both guilty of that crime. Their liability may fall under one or more of the provisions of s. 21(1) of the Criminal Code: *R. v. Sparrow*, (1979), 51 C.C.C. (2d) 443 (Ont. C.A.) at 457-58.

[195] The judge did not misinterpret *Thatcher* or misapprehend the principle of law stated therein. She correctly stated the law and correctly applied it to find each appellant guilty either as a co-principal or as an aider or abettor even though the extent of the individual participation of each is unclear.

[196] In short, in our view there is no basis upon which we can conclude the trial judge erroneously described the law with respect to liability as a principal or as an aider or abettor.

(b) Did the Judge Err in Finding Mr. Haevischer Liable as a Principal Under s. 21(1)(a)?

(i) Positions of the Parties

- [197] The appellant Haevischer, relying on this Court's decision in *R. v. Podolski*, 2018 BCCA 96 (which, in turn, cites *R. v. Martineau*, [1990] 2 S.C.R. 633), says the onus upon the Crown in the murder case requires it to prove beyond a reasonable doubt he had the subjective foresight that his participation in the events of October 19 would cause the death of six separate victims. He contends the Crown did not allege or tender any evidence to prove any broader intent than the conspiracy to commit the murder of one person, Mr. Lal. That intent was described by the judge as follows:
- [690] Mr. Johnston and Mr. Haevischer, together with Person X, were members of a conspiracy to murder Mr. Lal. The common purpose of the three men was to gain access to suite 1505 and kill Mr. Lal. They achieved that purpose.
- [198] He submits the Crown failed to prove his intent to kill Mr. Lal survived the change in circumstances encountered upon entering the suite. (He cautions that the fact Mr. Lal was killed some time after the men entered the apartment is not such proof).
- [199] The critical findings of intent are in the following passages:
- [702] The evidence concerning the timing of events and the scene the killers left behind leaves little doubt that the three [Red Scorpions] associates jointly and actively participated in the murders, and did so with the necessary intent.
- [703] Although there need only be evidence of joint participation, there is also strong evidence of common purpose. The two accused and Person X were acting in concert to kill Mr. Lal as members of a conspiracy to that end. They arrived at the suite with that common purpose. Both Mr. Haevischer and Mr. Johnston had the subjective intent to murder Mr. Lal, and they achieved that objective. They had the same self-interest in killing the other five victims to eliminate witnesses to their involvement in the murder of Mr. Lal.
- [200] In the final sentence of this passage, the judge finds Mr. Haevischer and Mr. Johnston had a motive for the killings: to eliminate witnesses. The appellant suggests the judge did not address the basis on which she concluded Mr. Haevischer acted pursuant to that motive; having a motive and acting on it are different things.
- [201] Mr. Haevischer argues nothing done in the apartment was necessarily done for the sole purpose of the killings, except the killings. For example, he says, making everyone present lie down on the floor is as consistent with a robbery as it is with a plan to murder. If all Mr. Haevischer did was make the victims lie on the floor to facilitate a robbery, while the other two men decided to shoot them, he is not a co-principal to a murder. The appellant submits the Crown did not prove how "Mr. Haevischer's intent expanded from the alleged agreement to kill one person, to an actual intent to kill six".

- [202] In response, the Crown says the judge explained in detail her reasons for finding the three men were acting in concert guided by a group motive to achieve the goals of the gang. Her conclusions were largely drawn from a careful and thorough examination of all the evidence available with respect to what happened in suite 1505 from 2:30 p.m. until 2:45 p.m. on October 19, 2007.
- [203] The trial judge expressly rejected the contention Mr. Haevischer did not enter the suite. She found when Mr. Haevischer, Mr. Johnston and Person X arrived at the suite, they took and maintained control of four individuals then present, and they must have done so for the 10-minute interval preceding the arrival of Mr. Narong and the ensnarement of Mr. Mohan. The victims were separated into two groups, and they were in submissive positions prior to their deaths: face down with their arms by or above their heads. She inferred the victims had been commanded by the perpetrators to assume these positions. The apartment and victims were searched, and money and cell phones were taken. The number and direction of the shots fired, the fact two weapons were used, and the positions of the victims suggested all six victims were shot at the same time and there were two shooters. The judge concluded it defied common sense to say the non-shooter would have stood around and done nothing while his two companions took control of a situation that began with four victims and expanded to include six victims over a ten-minute period.
- [204] In the circumstances, she concluded the only reasonable inference was the non-shooter actively participated in the confinement of the six victims and their subsequent murders. She explained how she found Mr. Haevischer to have the mens rea for murder under s. 21(1)(a):
- [701] It is not plausible to suggest (as do both accused) that one of the three [Red Scorpions] associates could -- or would -- stand by and do nothing while the victims in the suite were being kept under control, unexpected witnesses were arriving, and the risk of yet other unsuspecting persons stumbling onto the scene remained a significant possibility.
- [702] The evidence concerning the timing of events and the scene the killers left behind leaves little doubt that the three [Red Scorpions] associates jointly and actively participated in the murders, and did so with the necessary intent.
- [205] The Crown places some weight upon the judge's analysis of "planning and deliberation" and whether first degree murder had been made out under s. 231(2). She concluded once Mr. Haevischer and his companions entered suite 1505 and encountered individuals other than Mr. Lal, they "were immediately faced with a stark choice: either abandon the plan to kill Mr. Lal or proceed with that plan and deal with the other three persons who would become eyewitnesses to the killing": Trial Reasons at para. 712.
- [206] The Crown notes the judge explicitly found the crime scene evidence to be consistent with a plan to kill and inconsistent with a plan to commit robbery or some other offence. She drew what she considered to be an "inescapable inference" from this physical evidence:

- [714] None of the victims was a physical threat to the perpetrators; all six were lying defenceless on the floor. Once the victims were in submissive positions, the perpetrators could easily have left the suite without killing them. They decided against that option. Instead, they shot each of the victims. The crime scene evidence indicates that the shootings were calculated and deliberate executions, carried out after real consideration, not the random or scattered shots of a panicked shooter reacting impulsively to an unexpected situation.
- [715] The inescapable inference is that the other five persons in the suite were killed because they could identify the killers of Mr. Lal.
- [716] The decision was one based on necessity and self-preservation, taken in order to achieve the original plan -- one conceived with thought and deliberation - of killing Mr. Lal. The decision to kill all six was not the original plan, but it became the plan. The perpetrators made a decision, with time to assess their situation, to proceed with the plan to kill Mr. Lal, and to execute the other five people in the suite to avoid getting caught.

(ii) Discussion

- [207] We can see no error in the trial judge's conclusion the physical evidence in this case was consistent only with the domination and execution of six victims carried out in concert by individuals who had conspired to kill one person and then shared a group motive in killing the witnesses to that murder. In the words this Court used in *Robinson*, it is not open to us to conceive of inferences or explanations that are not reasonable possibilities, nor to attempt to revive evidence or inferences the trial judge reasonably rejected. If the appellant is to succeed, an inference other than guilt must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. That standard is not met in this appeal.

(c) Did the Judge Err in Finding Mr. Haevischer Liable as an Aider or Abettor?

(i) Positions of the Parties

- [208] Mr. Haevischer submits, to support a conviction as an aider or abettor, the Crown must prove the accused actually did something for the purpose of aiding or abetting; it is not enough to show the accused's actions only had the effect of aiding or abetting. In *R. v. Helsdon*, 2007 ONCA 54, Associate Chief Justice O'Connor described the mens rea needed to support a conviction as an aider:
- [28] The starting point for determining the mens rea required for s. 21(b) is the language of the paragraph. The language of para. (b) is very specific. It requires that an accused do or omit to do something for the purpose of aiding another to commit an offence. On the face of it, a requirement that an accused do something for the purpose of achieving a prohibited result imposes a very high degree of subjective mens rea. "Purpose" under s. 21(b) is synonymous with "intention": *R. v. Hibbert* (1995), 99 C.C.C. (3d) 193 (S.C.C.). While the Criminal Code does not contain a definition of either "purpose" or "intention", the normal meaning of those words suggests that a person must subjectively advert to a specific objective and that he or

she, therefore, must have knowledge of the facts that constitute that objective.

[Emphasis in original.]

[209] In her review of the principles relating to aiding and abetting, the trial judge referred to the judgment of Justice Charron in *R. v. Briscoe*, 2010 SCC 13, in which, at paras. 14-17, Charron J. identified key considerations where the Crown alleges either aiding or abetting. Certain elements of the offence of aiding and abetting murder were described as follows:

[18] Doherty J.A., in referring to this Court's decision in *R. v. Kirkness*, [1990] 3 S.C.R. 74, rightly states that the aider to a murder must "have known that the perpetrator had the intent required for murder". While some of the language in *Kirkness* may be read as requiring that the aider share the murderer's intention to kill the victim, the case must now be read in the light of the analysis in *Hibbert*. The perpetrator's intention to kill the victim must be known to the aider or abettor; it need not be shared. *Kirkness* should not be interpreted as requiring that the aider and abettor of a murder have the same mens rea as the actual killer. It is sufficient that he or she, armed with knowledge of the perpetrator's intention to commit the crime, acts with the intention of assisting the perpetrator in its commission. It is only in this sense that it can be said that the aider and abettor must intend that the principal offence be committed.

[210] In order to secure a conviction against Mr. Haevischer as an aider, the Crown had to prove he did something for the purpose of assisting the shooters, knowing they intended to kill the six victims. The appellant says the trial judge did not adequately address these questions.

[211] The judge's analysis on the application of s. 21(1)(a) and (b) is set out in this extract from the Trial Reasons:

[706] [I]f I am wrong in my conclusion that each of Mr. Johnston and Mr. Haevischer was a principal in the murders, I am satisfied that the evidence outlined above amply establishes that one of them was a principal in the murders as a shooter, and that the other was at the very least an aider or abettor to the shooters. The non-shooter, as aider or abettor, possessed the requisite intent and actively assisted the shooters from the time the first victims were confined until all six were executed. As such, he was a significant contributing cause of the six deaths as required for second degree murder.

[707] To be clear, my alternative conclusion does not rest on a different characterization of the facts relating to the non-shooter. I do not suggest that the conduct of the non-shooter as an aider or abettor is any different factually from the conduct I have concluded renders him a co-principal. If I am wrong in law to conclude that the conduct of the non-shooter renders him a principal under subsection (a) of s. 21(1), then, in the alternative, it renders him an aider or abettor under subsection (b) or (c). As discussed, s. 21(1) is designed to prevent the acquittal of an accused who is either a perpetrator or an aider/abettor, but whose precise role in the killings is unclear. Both forms of participation are treated as one single mode of

criminal liability: Thatcher, at para. 72; [R. v. Rojas, 2006 BCCA 193], at para. 65.

- [212] The appellant contends the judge's analysis of his liability as an aider or abettor suffers the same flaw as the analysis of his liability as a co-principal: there is no analysis of the basis on which it can be safely concluded he knew the shooters intended to kill the victims. He says it is not enough that something he did assisted the shooters; the Crown had to prove he did so for the purpose of aiding them, knowing they intended to shoot the six victims.
- [213] The Crown says the judge explained the same factual matrix that grounded the conviction as a principal grounded her finding of liability for the non-shooter (whoever he was) as an aider or abettor. A "stark choice" was made to kill all of the victims once the perpetrators were inside suite 1505. It is not plausible the non-shooter simply stood by and did nothing. The only plausible explanation, inferred from all of the evidence, is the three men, acting in concert, were co-principals or the non-shooter assisted by corralling and confining the victims.
- [214] In response to the argument the Crown failed to prove the appellant assisted the shooters knowing they intended to shoot the victims, the Crown says it is reasonable to infer when the victims are lined up in prone positions such that they can be shot execution-style in the back of their heads, the person assisting is well aware of what is about to happen. In Podolski, this Court approved the judge's instruction the jurors could rely on the common sense inference - a sane and sober person intends the natural and probable consequences of his voluntary actions - to find the conduct of an accused would naturally aid and abet the principal offender and the accused therefore knew and intended that his conduct would aid or abet the principal offender: at para. 237. The Court further held:
- [258] If the jurors accepted some or all of this evidence, it would have been open to them to find the requisite murderous intent was proved. In this regard, we note that direct evidence is not required to establish intent; indeed, it is rarely available. As a result, the "common sense inference" is a standard jury instruction on the element of intent in most jury charges. Absent evidence to the contrary, intent may be inferred from an accused's conduct by an application of the common sense inference: R. v. Oluwa (1996), 107 C.C.C. (3d) 236 at paras. 87-88 (B.C.C.A.).

(ii) Discussion

- [215] Given our conclusion with respect to the finding Mr. Haevischer was a principal to the offence, it is unnecessary to address the argument the judge erred when she concluded, in the alternative, he was "at the very least" an aider or abettor. We can see no cause to interfere with the judge's conclusion Mr. Haevischer, Mr. Johnston and Person X dominated the victims and collectively put them in the positions in which they were murdered. As the conclusion Mr. Haevischer was an aider and abettor did not rest upon "conduct of the non-shooter as an aider or abettor [that] is any different factually from the conduct [that] renders him a co-principal", no distinct ground of appeal can succeed under this head.

Did the Trial Judge Err in Favouring Inferences Urged by the Crown, Rather Than Those Suggested by Mr. Johnston?

(a) Positions of the Parties

[216] Mr. Johnston raises two distinct arguments on appeal. First, he contends the trial judge erred in preferring inferences sought by the Crown over competing inferences of equal strength. His second argument, which relates to the manner in which the judge addressed the scope of the exclusion of Person X's evidence, is addressed below.

[217] Mr. Johnston takes issue primarily with one key inference drawn by the trial judge: he was in suite 1505 when the shootings occurred. He argues this was an inference drawn from Person Y's evidence regarding two intercepted conversations that occurred while Person Y was acting as a police agent: one on February 17, 2008, and another on March 23, 2008. He says his statements in the intercepts, taken at their highest, supported an inference he was aware of a plan to rob Mr. Lal, but not a plan to murder him, and the statements do not support the inference he was in the room at the time of the offences.

[218] Appreciation of this submission requires a brief review of the evidence with respect to the intercepts. As we have noted, recordings and transcripts of intercepted conversations between Person Y and Mr. Johnston were introduced at trial. Person Y testified with respect to the recorded conversations to the effect Mr. Johnston used gestures to answer some of the questions put to him, evidently reluctant to speak openly with respect to the killings. The evidence is reviewed in detail at paras. 426-62 of the Trial Reasons and summarized at para. 39 above. We repeat the material evidence below.

[219] On March 23, 2008, Mr. Johnston is recorded as saying, in response to the question why guns were used in Mr. Lal's apartment:

I don't know. I don't know the whole story. I don't know the plan. All I know is I was told to do somethin', and this person was supposed to do this, and like I did what I had to do.

[220] Person Y testified to the hand gestures Mr. Johnston used during the above exchange. When Mr. Johnston said he was told to "do somethin'", he pointed toward his eyes. Person Y said this meant Mr. Johnston's job had been to "keep point" or be on the lookout. When Mr. Johnston referred to the other person doing "this", he made a gun gesture with cocked thumb and forefinger and middle fingers extended.

[221] In the face of persistent questions by Person Y, angry his gun had been left in the apartment, Mr. Johnston is recorded saying:

I watched - I watched him do this on. Both of them.

[222] Person Y testified when Mr. Johnston said he watched them do "this", he made a gun gesture shooting downwards with thumb cocked and forefinger and middle finger extended.

[223] Still later in the intercepted discussion, Mr. Johnston is recorded saying:

I was just told to get this and everybody else like -

[224] Person Y testified when Mr. Johnston said he was told to get "this", he rubbed his fingers together to indicate money. When he said "everybody else like", Mr. Johnston again made the gun gesture.

[225] The trial judge held the recorded statements and the accompanying gestures "support[] the inference Mr. Johnston saw the killings as they occurred, and was therefore present at the scene at that time". The trial judge also took from these comments that Mr. Johnston "was aware the plan involved the shooting of someone".

[226] Mr. Johnston says when the judge found he, Mr. Haevischer and Person X "jointly and actively participated in the murders", she was clearly placing considerable weight on the inference Mr. Johnston was in the suite at the time the shooting occurred. Specifically, given her view the decision to kill witnesses was not the original plan, but "became the plan" at some point, Mr. Johnston says the trial judge must have inferred he was in the room when the plan changed.

[227] Similarly, her conclusion, in the alternative, with respect to aiding and abetting, was founded upon the inference whichever of the three perpetrators was not a shooter "actively assisted the shooters from the time the first victims were confined until all six were executed".

[228] In closing submissions, counsel for Mr. Johnston argued an alternate inference could be drawn from the evidence as a whole: Mr. Johnston was part of a plan to rob, not kill, Mr. Lal; and the gesture described by Person Y was open to an alternate interpretation - Mr. Johnston was describing the use of Windex to clean the firearms in Mr. Haevischer's apartment in the hours before the killing. The cleaning of the guns had been discussed in the prior intercepted discussion on February 17, 2008.

[229] The judge rejected this argument because a gesture had not been used when cleaning guns with Windex had been discussed in February: Trial Reasons at para. 461. Mr. Johnston was apparently less reticent to discuss that topic than the circumstances surrounding the killings. Further, Person Y's interpretation of the gesture as a gun firing downward was not challenged in cross-examination.

[230] Mr. Johnston says rejection of the argument the gesture in question was intended to describe cleaning the guns should not have led to the inference Mr. Johnston was in the room at the time of the killings. He says the "downward gun" hand gesture was as consistent with a description of confinement at gunpoint as it was with Mr. Johnston having observed the shooting, and he was recorded as telling Person Y more than once he was not in the room.

- [231] He contends the judge did not address possibilities other than the interpretations of the gestures described by Person Y consistent with his guilt. Further, he says the judge erred in focusing upon what Mr. Johnston did not say (it was a robbery that went horribly wrong), rather than what he did say, specifically his numerous denials he was in the room. In effect, he contends, the judge fell into the error identified in Villaroman by "filling in the gaps" in the evidence and preferring the inference invited by the Crown to other plausible theories.
- [232] Mr. Johnston says there was ample evidence before the Court, in the intercepts, to support the alternate plausible inference he was not in the room at the time of the shooting, and was not aware of all of the details of the plan. He says this plausible theory grounded in the evidence was not addressed by the judge.
- [233] The clearest reference to Mr. Johnston not being present at the time of the shootings came in the second recorded conversation between Mr. Johnston and Person Y, on March 23, 2018, reproduced, in part, above. Person Y pressed Mr. Johnston about details of the shootings. Mr. Johnston said unequivocally he did not have a firearm, and he did not know who used which of the two firearms used in the killings. He also told Person Y, in response to a question about why guns were used at all: "I don't know. I don't know the whole story. I don't know the plan."
- [234] In response to Person Y asking him why Person X asked him for his firearm, Mr. Johnston said he had no answers to Person Y's questions. Finally, Person Y pointedly asked Mr. Johnston why the shooting happened at all, and whether it was because Person X panicked:

Y Like, dude, how did it end up--end up being six people? Did--did--did--did--Did [Person X] panic? Is that what happened?

MJ I wasn't inside (ph), man. The--You know that. You--and [Person X] has already told you

- [235] This last statement, "Person X has already told you", suggests Person X had previously advised Person Y that Mr. Johnston was not inside the suite at the time of the killings. Mr. Johnston says this statement is consistent with a willsay statement of October 24, 2011, describing Person X's evidence.
- [236] Mr. Johnston also implied in a conversation on February 17, 2008, that he was not in the suite at the time of the shootings. At several points, Person Y expressed outrage over the fact his DNA was recovered from one of the firearms used in the offence. Mr. Johnston denied knowing what happened to the firearms after the offence:

Y Okay but where what where was the gun left? Did you see okay [Person X].

MJ I don't know. I really don't know. You have to talk to him.

Y Okay but he told me they boiled them dude. Did you see him boil my the gun?

MJ No. I don't know anything about it man.

Y Okay this is the thing though man. That mother-fucker got a gun from me man right before he went, alright? I I didn't know he was gonna use the fuckin thing number one. Number two fuckin uh uh he told me he it was bur [sic] that he that he boiled. I I never even heard of that shit in the first fuckin place, man, you were with him. If you didn't see fuckin uh how's that gonna make sense man. They want to get my DNA man, to put it on (indiscernable). Don't fuckin lie to me then alright. Would he have told his girlfriend about that shit?

MJ I don't think so. Last thing I want to do is talk about something I know nothing about whatsoever.

[237] Person Y agreed in cross-examination Person X told him he had boiled the guns in the suite. There was some physical evidence this had occurred. In light of this evidence, Mr. Johnston argues his professed ignorance of what happened inside the suite (in the recorded February conversation) is supportive of the inference he was not inside the suite at the time of the shootings.

[238] He says the trial judge failed to resolve these contradictions in the intercepts. He argues the trial judge was obliged to consider the evidence as a whole, and in particular, whether the Crown had disproven other rational inferences that were, in this case, clearly before her in the form of his own recorded statements. Mr. Johnston's words "I don't know the plan" in particular were supportive of the theory he did not know of the plan to murder Mr. Lal.

[239] In response, the Crown says this ground of appeal amounts to a disagreement with the judge over two specific inferences she drew. In advancing the argument, the Crown submits, the appellant engages in a piecemeal examination of the circumstantial evidence (looking at particular responses to questions asked of him by Person Y), contrary to law: Vickers at para. 29; Bransford at para. 56. Further, he wrongly seeks to have inferences inconsistent with guilt (his absence from the room at the time of the killings) drawn from evidence the trial judge implicitly, but necessarily, rejected in making her findings of fact.

(b) Discussion

[240] We do not accede to the argument the trial judge did not consider inferences other than those consistent with the guilt of Mr. Johnston. In light of all of the evidence consistent with Mr. Johnston being a party to the conspiracy to murder Mr. Lal, it was open to the judge to conclude there was no logical inference other than that which she drew. There was evidence Mr. Johnston was conscripted by Mr. Bacon to murder Mr. Lal, and at the time he was conscripted the plan was to go to Mr. Lal's stash house, take all his money and drugs, and kill him. The planning, preparation and execution of the plan, described in detail by the trial judge, was consistent with the existence of such a conspiracy.

- [241] Mr. Johnston's statements "I don't know the whole story" and "I don't know the plan" when asked why Mr. Lal was shot in his apartment rather than being strangled, were followed immediately by a confession of what Mr. Johnston did know: "All I know is I was told to do somethin', and this person was supposed to do this, and like I did what I had to do."
- [242] Person Y testified these words were accompanied by gestures: first, Mr. Johnston pointed to his eyes, indication he was supposed to keep watch, and, then, when he referred to the others doing "this", he made a gesture indicating the use of a gun.
- [243] Taken as a whole, the statement does not undermine the conclusion the only reasonable inference that could be drawn was Mr. Johnston was part of the conspiracy to murder Mr. Lal.
- [244] While we do not agree with the appellant's argument that the conclusion he was in the room at the time of the murders was essential to his murder conviction, we see no reason to disturb the trial judge's conclusion he was, in fact, in the room. First, her inference Mr. Johnston and Person X recruited Mr. Haevischer to assist because this was a three-person job was reasonable. It was consistent with the common sense assumption three individuals would not prepare as these three did, only to have one remain outside the apartment when their presence inside might be necessary.
- [245] Further, and more importantly in our view, there is no basis to disturb the trial judge's conclusion Mr. Johnston told Person Y he saw the victims executed. The trial judge gave cogent reasons for dismissing the argument the words and gestures described by Person Y were in reference to the guns being cleaned in Mr. Haevischer's apartment. That theory was not suggested to Person Y.
- [246] The suggestion Mr. Johnston's statement to Person Y was only an admission to having seen guns used to intimidate and dominate the victims was neither put to Person Y nor argued at trial. It is inconsistent with the evidence of Person Y, who described the gesture made by Mr. Johnston as depicting persons "shooting downward". He did not describe the guns simply being brandished to threaten the victims. He testified that as Mr. Johnston said "I watched them do this" he made a gesture. Crown counsel asked, "Okay. What's the gesture that you just showed?" He answered, "Like shooting down".
- [247] That expression was repeated later, in the following exchange:

Q. And then over on the top of page 167 [of the transcript of the intercept], he says: I watched -- I watched him do this on both of them. Which --

A "I watched them do this", like this. And he says "both of them" and he was referring to Blake and [Person X].

Q Okay. What's the gesture that you just showed?

A Like shooting down.

Q Okay. Can -- can you stand up and show that? Because I don't think anyone could see. So the --

A Like this.

Q -- the thumb cocked with the forefinger -- sorry, the pointer finger and the middle finger --

A Yeah, like -- like --

Q -- in a gun gesture?

A -- like shooting --

Q Downwards?

A Yes.

[248] The trial judge noted of Person Y's testimony with respect to the gestures, at para. 457:

He was precise and clear in the demonstrations he gave of them, particularly with respect to the gun gestures. Person Y was adamant that what he saw in the stairwell was Mr. Johnston on each of the three occasions mimicking the shooting of a gun as he spoke of what was to occur, and had occurred, at the murder scene. I accept his evidence about the gestures.

[Emphasis added.]

[249] Having accepted the testimony that Mr. Johnston admitted to Person Y he saw the shootings, it was unnecessary for the judge to discount expressly the possibility Mr. Johnston might not have entered the room and might not have been present when the decision was made to kill all of the witnesses.

[250] While the conclusion Mr. Johnston was aware of the plan and participated in the conspiracy was an inference, the finding he was in the room when the killings occurred was a finding of fact founded upon the acceptance of the evidence of Person Y that Mr. Johnston made admissions clearly establishing his presence when the killings occurred. The trial judge concluded:

[462] Considered as a whole, Mr. Johnston's comments to Person Y on the night of the murders and during the scenarios are an acknowledgment that he was aware of a plan, one which involved a shooting, and that he had a specific role to play in it; that he was present for the cleaning of the guns in preparation of carrying out the plan; that he was present at the crime scene during the murders; and that he provided assistance in the carrying out of the plan.

[251] In our view, there is no palpable and overriding error or misapprehension of the evidence that would permit us to interfere with the judge's fact-finding. The finding Mr. Johnston was in the apartment at the time of the killings is a complete answer to the argument some inference other than that should have been drawn from his statements to Person Y.

Did the Trial Judge Err by Failing to Address the Scope of the Exclusion of Person X's Evidence, Causing Particular Harm to Mr. Johnston?

[252] As his second individual ground of appeal, Mr. Johnston expands upon the joint argument the appellants were wrongly excluded from part of the proceedings, arguing he suffered particular prejudice as a result of the order excluding the evidence of Person X without an opportunity to make submissions on the order. We have dealt earlier with the argument of both appellants that their exclusion was a breach of their right, protected by s. 650 of the Criminal Code, to be present in court during the whole of the trial. Here, Mr. Johnston focuses in particular on the detrimental impact of his exclusion on fair trial interests

(a) Positions of the Parties

[253] Mr. Johnston says the trial judge failed to adequately safeguard his fair trial rights because his counsel had no opportunity to make submissions on the scope of the exclusion of Person X's evidence.

[254] The judge held Mr. Johnston was present in the room, actively participating either as a co-perpetrator, or as an aider and abettor, at the time of the shootings. The judge made this finding despite the fact she was aware, based on materials filed by Crown in open court (and presumably based on her knowledge of Person X's anticipated evidence at the Basi hearing), that Person X was expected to testify that Mr. Johnston was outside of the room at the time the shootings occurred. While acknowledging Person X's anticipated evidence would have hurt his case on key issues, Mr. Johnston argues that Person X's evidence that he was not present at the time of the shootings would have been helpful.

[255] Mr. Johnston was excluded from all stages of the hearing leading to the exclusion of Person X's evidence. He was not privy to the arguments made, if any, in relation to the scope of the judge's exclusionary order. He is unaware of the reasons for the judge's finding that Person X's evidence was inadmissible at trial. He now says certain material questions were not addressed when the order was made excluding the evidence of Person X:

- a) What uses could be put to Person X's evidence?
- b) Should defence counsel be permitted to refer to the evidence in cross-examination?
- c) Could the evidence be put to any potential use by the defence?

[256] Mr. Johnston now contends he should have been given the opportunity to know about, and express a position on, any proposed remedies flowing from the findings that led to the exclusion of the evidence of Person X. It is of note that he did not express concerns with respect to the blanket exclusion of the evidence of Person X at trial.

[257] In response, the Crown says:

- a) the trial judge fully and fairly considered Mr. Johnston's interests in a fair trial in the course of the in camera hearings, where Amici spoke to the interests of the accused;

- b) the evidence of Person X would have unequivocally implicated Mr. Johnston; and
- c) the fact his counsel did not take issue with the exclusion of Person X's testimony at trial reflects the fact the exclusion was a windfall rather than prejudicial to Mr. Johnston.

[258] Insofar as Person X's anticipated evidence is concerned, the Crown says:

- [73] Person X was expected to testify that Bacon directed him to kill Corey Lal, and that part of Johnston's role was to make sure that happened. While Haevischer, Johnston and Person X waited for the door-knocker in a suite on the 12th floor of the Balmoral, Johnston and Person X discussed stealing from and killing Lal. All three entered the suite for that purpose. All three rushed into suite 1505 and forced the occupants to the ground. Johnston ransacked the apartment and collected money and phones from the victims and put them in bags. Johnston chased Mr. Narong after Narong tried to escape, and forced Mr. Narong down beside the two other people whom Haevischer was holding at gunpoint. They decided to kill all five people - Johnston told Person X and Haevischer to "do it" and that Johnston would have the elevator waiting for them. Johnston returned with Christopher Mohan, a neighbour, accusing him of being "their friend" despite Mr. Mohan's pleas otherwise. Johnston forced Mr. Mohan down beside the other two people Person X was holding at gunpoint. Johnston then left the room to assist escape by calling the elevator, while the other two men shot the victims in the back of the head.
- [74] Person X would have confirmed what mattered for culpability. What mattered to the judge in finding culpability for second-degree murder was active participation in the murders with the requisite intent and a common purpose, up until all six victims were executed, as shown by the timing and crime scene: RJ, 701-706. What mattered to the judge in finding culpability for first-degree murder was that: either the perpetrators had time in the suite to decide, and did decide, to proceed with the plan to kill Mr. Lal and to kill the other five people to avoid getting caught: RJ, 711-716; or alternatively, the nonshooter caused the deaths in the course of an unlawful confinement by being "instrumental in managing the scene dealing with unexpected arrivals and preventing eyewitnesses from escaping the scene": RJ, 723-726.
- [75] Accepting that Person X would likely have given evidence that Johnston did not see "the killings as they occurred" (RJ, 459), it could not have assisted the appellant. Whether Johnston was in the room at the exact moment of the shootings or left just before the trigger was pulled is a factual distinction that could not have made a legal difference.

[Internal citations omitted.]

(b) Discussion

- [259] The submission the appellant should have been afforded an opportunity to address the second stage of the Basi hearing at which the court addressed the consequences arising from threatened breach of informer privilege is addressed elsewhere in these reasons. That argument focuses upon the fact the appellant was unaware of evidence that might have usefully been used to cross-examine witnesses other than Person X. In our view, the Crown

is correct to say the appellant, knowing the evidence of Person X was likely to implicate him in the conspiracy and murders, properly regarded its exclusion as a windfall and for that reason was content to have it excluded. Mr. Johnston did not raise any issue with the trial judge in respect of the exclusion of the entirety of the evidence of Person X, and, in our view, trial fairness was not adversely affected by its exclusion for all purposes.

Did the Crown Fail to Meet Its Disclosure Obligations to the Appellants?

(a) Background

[260] The appellants and the Amici apply to adduce fresh evidence on appeal that consists of material they say the Crown failed to disclose at trial. The appellants and Amici submit this was in breach of the Crown's duty to disclose all relevant, non-privileged material in its possession or control: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. The applications relate to two categories of information: (a) information that a former police officer who was involved in the Surrey Six investigation, Derek Brassington, provided in an interview with the Ontario Provincial Police ("OPP") as part of a plea agreement to criminal charges resulting from his conduct during the investigation (the "Brassington Interview"); and (b) information relating to the application and acceptance of Person Y into the witness protection program ("WPP"). The Amici's sealed application relates only to the information in category (b), as they had access to less redacted documents relating to Person Y that were not available to the appellants.

[261] In response to both applications, the Crown applies to adduce supplemental fresh evidence attached as exhibits to affidavit #1 of Laura Munday. The sole purpose of adducing this evidence is to assist the Court in determining whether the appellants' fresh evidence should be admitted. The Crown also seeks to supplement the Amici's sealed fresh evidence application with its own fresh evidence, attached as exhibits to affidavit #2 of Laura Munday (filed under seal).

[262] We will first set out the legal principles governing the applications to adduce fresh evidence on appeal, the Crown's duty to disclose, and the remedy for a breach of that duty. Then, we will address the appellants' arguments on whether the Crown breached its disclosure obligation regarding the Brassington Interview. Finally, we will address both the appellants' and the Amici's submissions on the Crown's failure to disclose WPP documents relating to Person Y.

(b) Legal Principles

[263] The Court's statutory authority to admit fresh evidence on appeal is found in s. 683(1) of the Criminal Code, which permits a court of appeal to receive evidence for the purposes of an appeal "where it considers it in the interests of justice" to do so.

[264] Courts assess whether it is in the interests of justice to admit fresh evidence on appeal differently depending on the circumstances in which the information was obtained and the issue to which the information relates. Where the issue is the admission of fresh evidence

discovered after the Crown has breached its duty to disclose, the principles applied are those established in *R. v. Dixon*, [1998] 1 S.C.R. 244; otherwise, the evidence is assessed under the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775; *R. v. Taillefer*, 2003 SCC 70 at paras. 73-77.

[265] The *Palmer* test sets out four principles to guide the court's discretion as to whether to admit fresh evidence on appeal:

- a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial. This general principle will not be applied as strictly in a criminal case as in civil cases, particularly where the evidence is compelling and it is in the interests of justice to admit it: *R. v. Lévesque*, 2000 SCC 47 at paras. 14-15;
- b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
- c) the evidence must be credible in the sense that it is reasonably capable of belief; and,
- d) the evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The overriding consideration for the court, in accordance with the language in the Criminal Code, is "the interests of justice": *Lévesque* at para. 14.

[266] The *Dixon* test applies when the information on which the defence relies was improperly withheld from them at trial in breach of the Crown's *Stinchcombe* duty to disclose all relevant, non-privileged material in its possession or control. "Relevance" means the material could reasonably be of some use to the defence in meeting the Crown's case, advancing a defence, or otherwise making a decision that may affect the conduct of the defence: *R. v. Egger*, [1993] 2 S.C.R. 451 at 467.

[267] Where the defence is successful in showing a breach of *Stinchcombe* disclosure obligations, a new trial does not necessarily follow. To obtain a new trial as a remedy under s. 24(1) of the Canadian Charter of Rights and Freedoms, the defence must show that the non-disclosure impaired the accused's right to make full answer and defence, a principle of fundamental justice under s. 7 of the Charter. The defence can discharge this burden by demonstrating there is a reasonable possibility the non-disclosure affected the outcome at trial or the overall fairness of the trial process: *Dixon* at para. 34.

[268] Under the first prong of the test, a new trial will be ordered where there is a reasonable possibility that the evidence could have made a difference to the trial outcome, not whether it would have: *R. v. Illes*, 2008 SCC 57 at para. 25. The accused is not required to demonstrate that it is probable or certain that the undisclosed evidence would have affected the result: *Taillefer* at para. 81. To answer this question, the court must assess whether the trier of fact might have had a reasonable doubt as to the accused's guilt had the undisclosed information been available, having regard to the evidence in its entirety but

without conducting an item-by-item assessment of the undisclosed evidence: Taillefer at para. 82.

[269] If the undisclosed information does not affect the reliability of the verdict, the court will move on to consider the second prong of the Dixon test: whether there is a reasonable possibility that the overall fairness of the trial was impaired as a result of the non-disclosure. This stage considers whether realistic - not speculative - opportunities to explore possible uses of the undisclosed information were closed to the defence as a result of the non-disclosure: Dixon at paras. 34, 36. The defence can meet this burden by showing that the evidence could reasonably have been used to impeach the credibility of a Crown witness, to assist the defence in pre trial investigations and preparations, or in its tactical decisions at trial: Illes at para. 27. The diligence of defence counsel in pursuing disclosure from the Crown is a relevant consideration in assessing the overall fairness of the trial process and whether the remedy of a new trial is warranted: Dixon at paras. 37-38.

(c) The Brassington Interview

[270] The appellants base their arguments with respect to this category of information on the following fresh evidence, which was disclosed to them following the entry of their convictions:

- a) a "Memorandum of Agreement" dated January 15, 2019, between Mr. Brassington and the special prosecutor in charge of his prosecution in the Supreme Court of British Columbia agreeing, among other things, that Mr. Brassington "will provide a truthful statement under oath to members of the [OPP] concerning his knowledge of all matters pertaining to the [charges, including breach of trust and obstruction of justice, in the indictment under which he was charged in the Supreme Court of British Columbia]." (The content of this statement would become the Brassington Interview.) In essence, Mr. Brassington agreed to be truthful in his statement as a term of the Crown's agreement to a joint submission on sentence; and
- b) a transcript of the Brassington Interview, which Mr. Brassington gave under affirmation in January 2019 to members of the OPP as a condition of his plea agreement.

[271] In response, the Crown relies on exhibits "K" and "L" of affidavit #1 of Laura Munday, which contain statements K.M. gave to the OPP on June 13, 2011 and April 26, 2010, respectively.

[272] It is important context for the appellants' arguments to note that Mr. Brassington's charges related in part to a relationship he had with a protected witness in the Surrey Six investigation. The relationship was sexual, but also involved an emotional connection as Mr. Brassington felt he had "fallen in love" with the protected witness. During this relationship, Mr. Brassington was an RCMP sergeant in charge of managing her as a witness (see R. v. Brassington, 2019 BCSC 265 at paras. 5-8).

[273] The particular portions of the Brassington Interview on which the appellants rely include a statement by Mr. Brassington that he had "no doubt that shady stuff happened with [K.M. and her police handlers]", in part because of what Cpl. Paul Dadwal, who was K.M.'s primary handler for some time, had told him when they met at a Cactus Club restaurant in South Surrey after Mr. Brassington had been suspended from duty. He elaborated on the content of the "shady stuff":

And so whatever the hell they did with [K.M.], and I suspect that it was just a massive amount of drinking and partying and things like this truth or dare, because at some point I was told, and I don't know if it was by [the protected witness] or by [Sgt. Dave Attew] or by--I believe it was by Paul Dadwal though, that they had done the truth or dare game with [K.M.] [redacted] as well.

[274] Later in his Interview, Mr. Brassington explained that Cpl. Dadwal had contacted him to meet at the Cactus Club to support him after he had been suspended or was on medical leave. He said Cpl. Dadwal explained that:

the same thing happened to him with [K.M.] that happened to me and [the protected witness], that she was falling for him. He recognized that she was falling for him. Some shady stuff happened he says [redacted] with her, and she was calling him at all hours of the night and it got to the point where his wife eventually said Paul, it's either me or [K.M.], what's it going to be. So Paul Dadwal then went to [Supt.] John Robin and said you got to get me out. I can't deal with this. But Ross Joaquin was involved with that, Paul Johnston was involved in that. And John Robin certainly had knowledge of that. Despite all of that they still rolled me into [handling the protected witness] after all of that had occurred.

That pisses me off that that was exploited, if you will. And especially on the heels of what happened with Paul Dadwal and [K.M.], that John Robin knew about--Paul told him point blank, he went to John Robin and told him that she is falling for me and I need to get out because it's wrecking my house life.

(i) The Appellants' Arguments

[275] The appellants argue the information in the Brassington Interview is relevant and should have been disclosed before trial because it relates to misconduct by the three police officers who were in charge of handling K.M., who was one of the Crown's key witnesses at trial. In particular, the appellants urge us to infer from Mr. Brassington's statement that "the same thing happened to [Cpl. Dadwal] with [K.M.] that happened to [Mr. Brassington] and [the protected witness]" that Cpl. Dadwal confessed to a "relationship at some 'shady' level", namely, a sexual relationship, with K.M. Further, senior RCMP officers were aware of this misconduct but failed to act. The appellants also interpret the reference to playing "truth or dare" to refer to a sexual game K.M. played with her police handlers.

[276] The appellants argue both prongs of the Dixon test are engaged as a result of this non-disclosure. With respect to the first prong, the appellants submit the trial outcome could have been affected had this information been known because it was relevant to the

credibility of K.M., who was key to the Crown's case. K.M.'s evidence linked the appellants to guns and to the events that occurred in the hours before and after the killings. Had the defence possessed information about K.M.'s alleged relationship with Cpl. Dadwal, they would have used it in their cross-examination, and, depending on her response, the judge may not have given much (or any) weight to K.M.'s evidence or may have been less willing to overlook inconsistencies in her evidence. This, they say, puts the verdicts in question.

- [277] At the second prong of the Dixon test, the appellants argue the undisclosed information impacted trial fairness because they would have used the information in the Brassington Interview to impeach K.M.'s credibility. They may also have asked the judge to exercise her inherent jurisdiction to call witnesses such as Cpl. Dadwal or Supt. Robin if the Crown declined to call them. With respect to pre-trial investigations and preparations, the appellants say they would have ensured they had received sufficient information to identify all occasions on which K.M. and Cpl. Dadwal had any sort of interaction.
- [278] Finally, the appellants argue the new information in the Brassington Interview was relevant to the Vukelich hearing on the abuse of process applications because it reveals further police misconduct.

(ii) The Respondent's Arguments

- [279] The Crown argues that because the Brassington Interview did not exist until 2019, several years after the trial had ended, the question of its admissibility must be resolved under the Palmer test, rather than the Dixon test. In any event, the Crown submits the information in the Brassington Interview is not admissible under either test because it cannot reasonably be expected to have affected the result at trial (failing to satisfy the Palmer test), and there is no reasonable possibility that the non-disclosure could have affected the trial outcome or the fairness of the trial process (failing to satisfy the Dixon test).
- [280] The Crown raises the following points in support of its position:
- a) the Brassington Interview is inadmissible hearsay evidence;
 - b) the allegations the appellants rely on are unreliable and vague;
 - c) the appellants had disclosure at trial showing K.M. repeatedly denied witnessing inappropriate police conduct;
 - d) the appellants cross-examined K.M. about late night phone calls with Cpl. Dadwal, drinking and dancing with police, and sexual text and phone conversations between K.M. and police;
 - e) the judge had many reasons for accepting K.M.'s evidence, including the fact it was corroborated by independent evidence, and she rejected the defence argument that K.M. was too close to the police; and
 - f) the judge convicted the appellants on the basis of a broad spectrum of circumstantial evidence of which K.M.'s testimony formed only one part.

(iii) Discussion

- [281] We begin with two preliminary matters raised by the Crown. First, in our view, the information in the Brassington Interview properly falls to be analyzed under the Dixon test, not the Palmer test. The relevant time to consider in determining which test applies is when the police (or the Crown, as the case may be) came into possession of the information the appellants say ought to have been disclosed.
- [282] In this case, the information the appellants say ought to have been disclosed is the alleged "shady" relationship between K.M. and her police handlers, particularly Cpl. Dadwal, and the knowledge of senior RCMP officers of this "shady" activity. It is the information discussed in the Brassington Interview, rather than the statement itself, that is the subject of the alleged non-disclosure. This information relates to the handling of K.M. as a witness before trial. At the latest, it would have been in the hands of the police when the conversation between Mr. Brassington and Cpl. Dadwal occurred. Although the exact timing of the conversation is uncertain, Mr. Brassington says it took place around the time he was suspended from the RCMP. His suspension occurred in the spring of 2010, well before the trial.
- [283] Second, we note the Crown objects to the admission of the Brassington Interview as fresh evidence on the basis it is inadmissible hearsay when tendered through the affidavit of Ms. Ma, a legal assistant to the appellants' counsel. Ms. Ma does not have personal knowledge of the truth of the contents of the Interview. The Crown relies on *R. v. O'Brien*, [1978] 1 S.C.R. 591 at 602; *R. v. Teneycke* (1996), 108 C.C.C. (3d) 53 at para. 18 (B.C.C.A.); and *R. v. Dell* (2005), 194 C.C.C. (3d) 321 (Ont. C.A.) at paras. 85-86, leave to appeal ref'd [2005] S.C.C.A. No. 524, in support of this argument. However, these cases refer to evidence that was required to meet the Palmer test for admissibility as fresh evidence, not to information not disclosed to the defence.
- [284] The appellants did not address this issue in their factums or their oral submissions. We find it unnecessary to resolve this admissibility question because even if the Brassington Interview were admissible, we conclude the appellants have failed to demonstrate a breach of the Crown's disclosure obligations or that the Dixon test is met.

Have the Appellants Demonstrated a Breach of the Duty to Disclose?

- [285] The onus is on the appellants to demonstrate on a balance of probabilities that the Crown breached its disclosure obligations. As already noted, they rely on the Brassington Interview as evidence of the existence of a "shady" relationship between K.M. and her police handlers, particularly Cpl. Dadwal, and as evidence that senior RCMP officers had knowledge of this "shady" activity.
- [286] It is common ground the police have a duty to provide to the Crown all relevant material in their possession: *R. v. McNeil*, 2009 SCC 3 at paras. 23-24. This relevant material includes the "fruits of the investigation", meaning the information in the police investigative files,

and any other information that is "obviously relevant to the accused's case": R. v. Gubbins, 2018 SCC 44 at paras. 21-23. For example, records of serious misconduct by police officers involved in the investigation of the accused are "obviously relevant" when the misconduct is related to the investigation or could reasonably impact the case against the accused: McNeil at paras. 15, 54-59.

- [287] We agree that police misconduct in the handling of a witness is "obviously relevant" to the accused's case. Accordingly, the police are required to disclose any such information to the Crown, and the Crown in turn to the defence. However, we do not agree that the Brassington Interview establishes the police had information about misconduct in the handling of K.M. that was improperly withheld from the Crown, and in turn, improperly withheld from the defence.
- [288] First, we do not accept that the Brassington Interview establishes a "confession" by Cpl. Dadwal that he had a sexual relationship with K.M. Read in isolation, and with knowledge of the sexual relationship Mr. Brassington had with the protected witness, his statement, "the same thing happened to [Cpl. Dadwal] with [K.M.] that happened to me and [the protected witness]", could imply a sexual relationship between K.M. and Cpl. Dadwal. However, when this statement is read in context, the more reasonable interpretation is that Mr. Brassington was describing an emotional dependence on the part of K.M. as a result of the investigation's "moving witnesses" strategy. This is supported by Mr. Brassington's repeated statement that K.M. was "falling for" Cpl. Dadwal and was "calling him at all hours". In any event, Mr. Brassington's understanding or belief about the nature of the relationship between K.M. and Cpl. Dadwal as discussed in his Interview is hearsay.
- [289] Even absent a sexual relationship, a witness's close personal relationship with or emotional dependence on an investigating officer may well be relevant to the accused's case, as it may impact the witness's credibility and motive to testify. However, the defence received - and relied on at trial - significant disclosure about the nature of the relationship between K.M. and her police handlers, including Cpl. Dadwal. This will be discussed later in these reasons when considering whether the appellants have demonstrated a reasonable possibility that either the verdict or trial fairness could have been impacted by the alleged non-disclosure.
- [290] Given our findings with respect to the "confession" Cpl. Dadwal allegedly made to Mr. Brassington, we also conclude the appellants have not proved that senior RCMP officers knew of misconduct in the nature of a sexual relationship between K.M. and Cpl. Dadwal and failed to address it. Any allegations of this nature in the Brassington Interview are hearsay, as Mr. Brassington did not have personal knowledge of what Cpl. Dadwal said to Supt. Robin, or of what Supt. Robin understood from that conversation.
- [291] The appellants also rely on the Brassington Interview as evidence of "shady" behaviour by the police in their handling of K.M. as a witness generally. In particular, Mr. Brassington stated that he believed the "shady stuff" was likely "just a massive amount of drinking and

partying and things like this truth or dare". Earlier in his statement, Mr. Brassington confirmed that another officer, who was also criminally charged in relation to his misconduct in the handling of the protected witness (but the charge was subsequently stayed), asked the protected witness to masturbate in front of him during "truth or dare". Mr. Brassington did not recall who told him officers had played truth or dare with K.M. - first he said it could have been the protected witness or Dave Attew, then he said he believed it was Cpl. Dadwal.

- [292] The information Mr. Brassington related is not sufficiently clear and reliable to support a finding on a balance of probabilities that undisclosed misconduct occurred in the handling of K.M. The words he used to discuss the "shady stuff" indicate he was speculating about what may have occurred, using language like "whatever the hell they did with [K.M.]" and stating he "suspect[s]" it involved drinking, partying, and "things like" the truth or dare game. Mr. Brassington could not recall who told him about the truth or dare game, but it is clear that he did not have personal knowledge of it, or any of what occurred in the handling of K.M. Mr. Brassington and K.M. had never met.
- [293] Furthermore, the appellants did receive disclosure from the Crown about K.M. drinking and partying with police officers. There is no indication that the "shady stuff" Mr. Brassington suspected occurred with K.M. was anything different than the conduct disclosed to the appellants. Again, this disclosed information will be discussed below.
- [294] We conclude the appellants have not established that the Crown breached its Stinchcombe disclosure obligations. Mr. Brassington did not have personal knowledge of any of the information he related, and in any event, the language he used in the Brassington Interview, read in context, does not give rise to a compelling enough inference that undisclosed misconduct occurred in the handling of K.M. The Interview contains second-hand information discussed almost a decade after it allegedly took place. This information does not prove a breach of disclosure on a balance of probabilities.
- [295] Although we need not address whether the Dixon test is satisfied given this conclusion, we will do so as we received full submissions on the issue and it is an important aspect of the appellants' arguments.

Is There a Reasonable Possibility That Non-disclosure Could Have Affected the Trial Outcome or the Fairness of the Trial Process?

- [296] Even if the appellants had succeeded in establishing a breach of their right to disclosure of the Brassington Interview, they have not persuaded us that a new trial would be an appropriate remedy under s. 24(1) of the Charter. Before addressing the trial fairness branch, the Dixon test typically considers whether the undisclosed information could have affected the verdict. But because the appellants' argument about the validity of the verdict relates to K.M.'s credibility, we consider it appropriate to first consider the trial fairness branch. In assessing the trial fairness branch of Dixon, we will canvas the ways the defence attacked K.M.'s evidence at trial, which informs whether the undisclosed information could

have raised a reasonable doubt in the circumstances before the trial judge.

- [297] For two reasons, we do not accept the appellants' argument that there is a reasonable possibility the information in the Brassington Interview could have impacted trial fairness. First, as we alluded to above, the appellants received disclosure about the nature of the relationship between K.M. and her police handlers, including Cpl. Dadwal, in which she repeatedly denied witnessing inappropriate police conduct and denied having a relationship with Cpl. Dadwal. Second, the appellants cross-examined K.M. at trial about her relationship with her police handlers.
- [298] The two statements K.M. gave to OPP officers in 2010 and 2011 during their investigation of the police misconduct in the Surrey Six investigation were disclosed to the appellants. In her first statement, K.M. informed the interviewer that her initial contact with the RCMP was through Cpl. Dadwal. He was the primary officer who spoke to her about becoming involved with the RCMP after she was arrested by the RCMP for unrelated offences. K.M. also named a number of other officers who assisted in her handling once she "signed on", and explained that Cpl. Dadwal mostly "did interviews and stuff" during the Surrey Six investigation.
- [299] When K.M. was explicitly asked whether anything "inappropriate" had happened between her and any of the RCMP members as had happened between Mr. Brassington and the protected witness, or that would be inappropriate given her position as a witness, she said, "No". When she was asked about a blog post that indicated she may have been involved with Cpl. Dadwal, she explained that people had assumed she was the girlfriend of a member of the Red Scorpions who had been involved with an officer. K.M. was angry that people were talking about her that way and said, "there's never been anything weird or fucked up". She added that she did not "want to fuck up this case" and that she was "not a dumb ass like that other girl."
- [300] In her second interview with the OPP, K.M. was specifically asked to discuss her experiences with Cpl. Paul Johnston and Cst. Danny Michaud. At some points in the interview, K.M. used the initials "PJ" to refer to Cpl. Johnston. At other points, she used the first name "Paul", which is also the first name of Cpl. Dadwal.
- [301] K.M. was asked how many times she was looked after by "Paul and Danny and just them", and she responded that it was two to three times. When asked when those times were, she was not sure of the exact dates, but noted she had not "seen Paul since all that stuff came out about the other cops fucking that girl."
- [302] The OPP interviewer asked K.M. about her activities with the officers. She mentioned going to a hockey game in another city. She was asked whether she went to a hockey game with Danny and Paul more than once, and she replied, "No". When asked about the weekend they went to the hockey game, K.M. said the officers had come out to visit because she was having a "rough time". Somebody would come out to see her every three or four months. After the hockey game, she went out for drinks with "PJ and Danny" but the officers did not

stay long and left before she did. She could not remember details, and it was "kind of a blackout night".

- [303] K.M. could not remember many other details of the trip because she had "an issue with drinking". She was asked about a text message she sent to "Paul" the day after the game that said, "I knew I was fucked up but I didn't realize how really fucked up I am. It was good to see you, thank you so much. Danny's pretty cool too ha ha." She said the text was about her mental state in general and not about what had happened the night before.
- [304] K.M. was asked yet again about whether anything inappropriate had happened with any of the officers, and she said "No". She elaborated, saying she did not think she would "even be half as good as [she is] right now if it wasn't for them", that she missed "Paul" a lot because he was "really kind" and made her feel like she "could do this", and that they were her "only support team" because she "lost everything".
- [305] The Crown disclosed these statements to the defence (in December 2011 and April 2013) before the trial. K.M.'s interviews with the OPP came up during her cross-examination, but the defence did not make much use of them other than to question her about the night of the hockey game she discussed in her second OPP statement.
- [306] We have considered the appellants' submission that cross-examination is unpredictable and one can never know what witnesses will say when questions are put to them in different ways. However, given K.M.'s repeated denial of any inappropriate relationship between herself and Cpl. Dadwal or any of the other officers in her interviews with the OPP (and the non-specific suggestion of impropriety in the fresh evidence), there is no reasonable possibility that putting those suggestions to her in cross-examination at trial could have resulted in any different answer.
- [307] During the extensive cross-examination of K.M. at trial, she was questioned about late night phone calls with Cpl. Dadwal, drinking and dancing with the police, and text and telephone communications between K.M. and the police that contained some sexual banter. Counsel put to her a 15-tabbed volume of transcripts of text messages and phone conversations she had with various police officers. While the appellants say the police lost some of the text messages and/or telephone records, K.M.'s testimony on the topic of texts and calls did not reflect a sexual relationship with Cpl. Dadwal. In addition, given the close relationship K.M. had with the police, counsel submitted to the trial judge that she should view K.M.'s evidence "with extreme skepticism as she stands firmly in the corner of the prosecution": Trial Reasons at para. 498.

- [308] With all this in mind, there is no reasonable possibility that the overall fairness of the trial process could have been impacted by the information in the Brassington Interview. The appellants were provided disclosure about "shady stuff" that occurred and the close relationship between K.M. and the police. They thoroughly pursued this line of inquiry in her cross-examination. No realistic opportunities to explore uses of the information were closed to the defence as a result of non-disclosure.
- [309] Finally, having regard to the evidence in its entirety, we conclude there is no reasonable possibility that the non-disclosure could have affected the outcome at trial. We agree K.M.'s evidence, and therefore her credibility, was very important to the Crown's case. However, the trial judge accepted K.M.'s evidence despite the appellants' thorough attack on her credibility, rejecting the argument that she was too close to the police and noting that material aspects of her testimony were confirmed by independent evidence: Trial Reasons at paras. 482-508.
- [310] Accordingly, even had we found the Crown breached its duty to disclose the information discussed in the Brassington Interview, we would not have ordered a new trial: the appellants have not persuaded us that any such non-disclosure could have impaired their right to make full answer and defence.
- [311] In light of our conclusion, as explained later in these reasons, that a hearing of the stay applications is required, it is unnecessary to address the appellants' further argument that the information in the Brassington Interview was directly relevant to the Vukelich hearing as being further evidence of police misconduct.
- (d) Person Y's WPP Status
- [312] As we explain earlier in these reasons, Person Y is a former member of the Red Scorpions who acted as a police agent during the Surrey Six investigation. He subsequently pleaded guilty to two unrelated first degree murders in April 2010, for which he is serving a life sentence with no parole eligibility until 2035. His evidence at trial, given between March 10 and April 1, 2014, was important in implicating the appellants in the murders. He was treated as an "unsavoury" witness by the trial judge, who conducted a careful review of his credibility and reliability: Trial Reasons at paras. 466-81.
- [313] In the fall of 2018, this Court heard a disclosure application made by the appellant Johnston, and supported by the appellant Haevischer, for Person Y's WPP records. Although the Crown disputed the relevance of the documents, it disclosed the information in its possession relating to Person Y seeking and being afforded entry into the WPP, redacted for privilege, in response to the applications. Those materials are the subject of this part of the appellants' fresh evidence application. The Court dismissed the appellants' application for further disclosure in reasons indexed as R. v. Johnston, 2019 BCCA 107.
- [314] The appellants' proposed fresh evidence relating to Person Y's WPP status is the following:

- a) evidence described as "correspondence" of Supt. Robin between May 2013 and April 2014 relating to Person Y, disclosed to the appellants in October 2018; and
- b) email exchanges between the Integrated Witness Protection Section of the RCMP and the Correctional Service of Canada ("CSC") regarding Person Y's entry into the WPP shortly after his testimony at the appellants' trial, disclosed to the appellants in December 2017.

[315] In response, the Crown relies on various exhibits appended to affidavit #1 of Laura Munday. The exhibits include redacted documents disclosed to the appellants on dates ranging from September 2010 to February 2016 and various letters between counsel. The information is intended to provide the Court with an understanding of what had been disclosed to the appellants before and during the trial.

[316] Also relevant to this issue is "Category 5" of the fresh evidence filed by the Amici and the Crown's responsive evidence, which is contained in the sealed affidavit #2 of Laura Munday.

[317] We will provide an overview of this evidence and refer to it as required in our analysis.

(i) Information Disclosed to the Appellants Before or During the Trial

[318] As a justice system collaborator, Person Y faces heightened security concerns in prison: Johnston at para. 114. Information disclosed in April 2012 shows that Person Y had been moved between the custody of the CSC and the RCMP due to difficulties with being recognized and threatened while in CSC custody. For his safety, Person Y had been required to enter segregation in CSC custody. Through his counsel, he expressed concerns about returning to segregation upon his return to CSC custody and its effects on his health.

[319] Information disclosed on March 7, 2014, before Person Y testified, reveals his cooperation depended on having placement in CSC that did not require him to be in worse conditions than the average inmate due to his cooperation.

(ii) Newly Disclosed Information Provided to the Appellants

[320] The newly disclosed information indicates that in July 2010, Person Y told CSC officials and the police he would "become an uncooperative witness" if he were involuntarily transferred to another institution or placed in segregation for protective purposes. The information further shows that in October 2010, Crown counsel responsible for the prosecution believed that if Person Y were placed in segregation, his ability to provide meaningful evidence as a witness would be jeopardized by the deterioration of his mental state.

[321] Correspondence from Supt. Robin indicates he had begun the process of applying for a witness's admission to some sort of program in May 2013. Although the document is heavily redacted, the appellants suggest the correspondence related to the admission of Person Y to the WPP, and the Crown appears to accept this suggestion. Further correspondence from Supt. Robin in September 2013 indicates he had been told by Person Y and his counsel that Person Y's cooperation would be "unlikely to continue" if segregation were considered as a protection option.

[322] Finally, the affidavit of Cpl. Eric Boucher, sworn on February 6, 2014, was provided to the appellants in a redacted form on February 11, 2016, and is appended to affidavit #1 of Laura Munday. The Boucher affidavit was sworn in support of an application for a Transfer of Prisoner Order for Person Y (also referred to as a "spring order") to allow him to be kept in RCMP custody until the end of his testimony in April 2014, at which point he would be transferred to a new institution. The affidavit reflects that, as a result of two previous spring orders, Person Y had been held in the custody of the RCMP from August 2013 to February 2014 in conditions reasonably close to the conditions he would experience with CSC. These orders were obtained because Person Y's physical and mental health were deteriorating in CSC custody, where he had been living in "virtual segregation".

[323] Person Y ultimately obtained WPP status for his safety and protection shortly after he finished testifying.

[324] We will refer to this body of proposed fresh evidence as "the WPP information".

(iii) Sealed Information Adduced by the Amici and the Crown

[325] The Amici's fresh evidence contains less-redacted versions of the documents than those relied on by the appellants, disclosed to the Amici in March 2020.

[326] The unredacted Boucher affidavit indicates that when he testified, Person Y was in the process of entering the WPP. [Sentence removed.]

[327] [Paragraph removed.]

[328] [Paragraph removed.]

[329] [Paragraph removed.]

(iv) The Appellants' Arguments

[330] The appellants argue Person Y's entry to the WPP constituted an undisclosed benefit to Person Y, and therefore should have been disclosed. They submit his consideration for entry to the WPP tended to contradict his evidence and provided a motive for Person Y to gain favour with the police, who were working to place him in the WPP, and was therefore relevant to his credibility.

[331] The appellants submit there is a reasonable possibility the undisclosed WPP information could have impacted the trial outcome or the overall fairness of the trial process. Person Y's evidence was crucial to the Crown's case and his credibility was squarely at issue, particularly as a Vetrovec witness. Therefore, the appellants say, "[a]nything that called into question his credibility [has] the potential to affect the outcome of the trial". The WPP information contradicts Person Y's evidence about his future in the correctional system. This and the benefit he received from entry to the WPP both call into question his credibility, and thus the trial outcome.

[332] Under the second prong of Dixon, the appellants say the failure to disclose the WPP information prevented them from attempting to impeach Person Y's credibility by confronting him with that information. In addition, it limited their ability to apply for further information or challenge the Crown's privilege claims in the documents.

(v) The Amici's Arguments

[333] The Amici's arguments are similar to those of the appellants. They submit the protective measures and custodial arrangements available to Person Y through his entry to the WPP may be considered benefits, which may bear on the witness's motives and state of mind while testifying. In particular, Person Y may have been motivated to ingratiate himself with the police and prosecution by providing favourable evidence: *R. v. Pascal*, 2020 ONCA 287, leave to appeal ref'd [2020] S.C.C.A. No. 214.

[334] The Amici submit these benefits could have left a reasonable doubt with the judge due to their relevance to Person Y's credibility, which was central to the verdict. Further, the undisclosed information could have been used to impeach Person Y on his evidence about his conditions of confinement. Finally, the Amici support the appellants' argument that the non-disclosure prevented them from challenging the Crown's privilege claims.

(vi) The Respondent's Arguments

[335] The Crown submits this Court's decision in Johnston is determinative of these issues. In dismissing the disclosure application, the Court in Johnston found there was no reasonable possibility the WPP information could have affected the trial outcome or the fairness of the trial process: Johnston at para. 125. The Crown urges us to adopt the same analysis with respect to the non-disclosure of the WPP information on these appeals.

[336] The Crown says Johnston also disposes of the Amici's arguments. [Sentence removed.]

(vii) Discussion

[337] The Crown accepts the appellants and the Amici have established a breach of Stinchcombe disclosure from its failure to disclose the steps taken and decisions made respecting Person Y's future custodial arrangements (subject to privilege claims). The Crown accepts this Court's conclusion in Johnston that, due to the possibility of Person Y viewing his enrollment in the WPP as a benefit (even if the Crown did not), WPP information "dealing with promises made to Person Y about the WPP, and any of his demands regarding the same", came within the scope of the Crown's disclosure obligations under Stinchcombe: at paras. 103-04.

[338] Accordingly, the issue on these appeals is whether the appellants and the Amici have established that this breach of the appellants' right to disclosure also breached their s. 7 right to make full answer and defence. Although Johnston dealt with a somewhat different issue, we agree with the Crown that the Court's reasons for dismissing the appellants' disclosure application apply equally to the non-disclosure issue raised on these appeals.

- [339] The Court in Johnston had to decide whether to order disclosure of all materials and information relating to Person Y and the WPP. As we noted above, the Crown disclosed the disputed information, subject to privilege claims, during the course of that application. Although challenges to those privilege claims were also before this Court, the division found it unnecessary to address that issue because of its conclusion that the documents failed to meet the threshold relevance test necessary to order disclosure in the course of an appeal.
- [340] To assess relevance, Justice Griffin, writing for the Court in Johnston, considered whether there was "a reasonable possibility the records might assist the appellant in prosecuting an appeal": at para. 80. This question is to be assessed in the context of the possible uses of the information to support the grounds of appeal in that particular proceeding. Given that the proposed use of the information was to support a fresh evidence application under the Dixon test, the question before the division in Johnston was whether there was a reasonable possibility the disclosure would assist the appellants in arguing the Dixon test was met: at paras. 81-82.
- [341] As we have already noted, Griffin J.A. concluded there was a reasonable possibility the records would assist the appellants in showing a breach of the Crown's duty to disclose at trial, which the Crown now accepts on this appeal. However, this was "only the first step in the necessary analysis" since, to be successful on the Dixon test, the appellants would also have to show the non-disclosure could have affected the trial outcome or trial fairness: at para. 105. It is the Court's conclusions in this respect that are particularly relevant to the issues before us on these appeals.
- [342] As in their disclosure application, the appellants focus on the following paragraphs of the trial judge's assessment of Person Y's credibility in which she discussed the relevance of Person Y's evidence regarding his conditions of confinement to his motives to testify to (a) earn a profit and (b) have revenge on his former Red Scorpions associates:
- [477] While [the amount the RCMP paid to Person Y is] unquestionably a very significant total sum, whether these financial benefits would influence or shape Person Y's evidence in favour of the Crown must be considered in context. First, none of it was paid to him as an incentive to tell the police about his involvement in the murders. Much of the payment was for his work as a police agent following his own decision to cooperate. Second, Person Y acknowledged earning substantial sums as a criminal in the drug business so the benefits must be considered comparatively. Third, and most importantly, it is unlikely that even the amount of money Person Y received can be considered a substantial benefit when serving 25 years to life of hard time. When it was put to Person Y in cross-examination that his cooperation was motivated at least in part by profit, his response was as follows:

Let me tell you this, there is no money that can pay me for the -- for -- for the -- the difference and from the time, and I have the -- the situation of being an agent in prison. I'm sentenced to 25-to-life and I'm -- my time compared to any -- any gangster going in for 25-to-life, is apples and

oranges now. I'm not sentenced to be -- to be subject to 24-hours verbal abuse and attacks and having this living -- living with the end of the -- in the -- in segregation at the very end alone because I can't go anywhere else because I'm less than a child molester so I'm -- so if -- if you're talking about that type of paid for, you can't pay for those things. Money doesn't come into it.

[Transcript, March 27, 2014, p. 28]

[479] Person Y had no motive to falsify his evidence. He freely acknowledged his disdain for Mr. Johnston as a person, but he had nothing to gain by implicating either accused. Counsel for Mr. Haevischer observed in his final submissions that Person Y did not appear to have a bias in favour of the Crown's case; and that if he had any bias, it was against his former boss, Mr. Bacon. It was suggested to Person Y in cross-examination that his cooperation was driven by his hatred for Mr. Bacon, and that the accused were simply "collateral damage" in his desire to seek revenge against Mr. Bacon. Person Y's response put that suggestion in perspective:

Q Your motive is not justice, your motive is revenge.

A Revenge?

Q Just like you --

A You think -- what would revenge mean for me, man? I'm in prison. I'm never leaving solitary confinement or protective -- super-duper protective custody. Revenge?

Q Yeah.

A Revenge is nothing man. You think I care about revenge? That's -- what does that get me? Nothing. I care about just dealing with my conscience, man. I could care less about your little revenge. Oh, I -- I hate more -- I get more intense about politics, about what is going on with the -- what's going on in the U.S. in politics than I do worried about Jamie Bacon or Matt Johnston or Blake Cody Haevischer, believe -- they -- they don't even make my list. I don't care. This is justice, but revenge, sorry, sir, I -- I don't carry that in my heart and that means nothing to me. Revenge -- the revenge -- technically they have the last laugh, even when they get found guilty, because they get -- they get to go into a system with open arms, so they're gangsters for six homicides, they're big tough gangsters and they didn't rat, so what's revenge? And then I will sit in a hole for the rest of my life. No, I'm doing this because I made a commitment to do this and this is the one right thing I'm doing in my life, period.

[Transcript, April 1, 2014, pp. 60-61]

[Emphasis added.]

- [343] Like the division of this Court in Johnston, we conclude there is no reasonable possibility the undisclosed WPP information could have affected the trial verdict. A fair reading of Person Y's evidence, considered in the context of all the other evidence before the trial judge and her reasons for accepting Person Y's evidence, leads us to this conclusion.
- [344] First, we agree with this Court's conclusion in Johnston that the undisclosed WPP information does not directly contradict Person Y's evidence in the manner the appellants suggest. As Griffin J.A. explained, Person Y's testimony was not a bare assertion that he would spend the rest of his life in solitary confinement due to his cooperation with the RCMP: at para. 113. Instead, his evidence spoke to the fact it was against his interests to cooperate with the police because he would be labelled a "rat" by other inmates and require extra protection. Had he refused to cooperate, he would not face those threats or require additional protection.
- [345] In our view, Person Y's evidence that he would be serving his sentence "in a hole" or placed in solitary confinement or "super-duper protective custody" was consistent with his experience at that time in serving his sentence. By April 2014, he had spent much of his placement in CSC in solitary confinement or had been in RCMP custody. At times he lacked companionship and basic amenities like daylight and exercise for at least one hour per day. Further, his application to the WPP, which was in the works, was not complete at the time of his testimony.
- [346] Second, even if Person Y's evidence could be read in the manner the appellants suggest, the newly disclosed WPP information does not materially change the reason the judge relied on the impugned testimony in her assessment of Person Y's credibility. She concluded it was unrealistic to contend the money Person Y received or the potential for revenge against the Red Scorpions motivated his decision to testify against the appellants given that he was serving "25 years to life of hard time" made worse by his cooperation. The undisclosed information does not undermine the judge's conclusion that the financial incentives or opportunity for revenge would be outweighed by the "hard time" Person Y knew he would face in order to keep him safe as a result of his cooperation. As Griffin J.A. explained in Johnston, there is no reasonable basis to suggest "a promise that Person Y would be enrolled in the WPP, as a means of trying to keep him safe in prison, would have provided him with an expectation that he would be better off in custody than he would have been if he had not been a cooperating witness": at para. 117.
- [347] Third, the trial judge explained the multiple factors she considered in assessing Person Y's credibility. The paragraphs on which the appellants rely form only a part of that assessment. Justice Griffin summarized the factors the trial judge took into account in assessing Person Y's credibility and reliability at paragraph 24 of Johnston as follows:

- a) Person Y had a history of serious and horrific violent criminal behaviour which led him to describe himself as a "monster" and a "despicable human being". The trial judge also found this to make him somewhat unique as a Vetrovec witness, in terms of his degree of self-awareness;
 - b) he went to police of his own volition, and his cooperation was not the result of an arrest for his part in the offences. Notably, he volunteered that he gave his Glock semi-automatic handgun to Person X prior to the police telling him that they discovered a Glock bearing his DNA at the crime scene;
 - c) he had the opportunity to evade Canadian law enforcement as he spent periods of time in South America in 2009. When he returned to Canada from South America in April 2010, he had been living free in Brazil and beyond the reach of Canadian law enforcement. He could have walked away from any commitments made to the police about his guilty pleas and testimony;
 - d) he provided information with the understanding that, as a consequence of providing his statements, he would be charged with two counts of first degree murder for crimes separate from the Surrey Six murders;
 - e) Person Y made no plea agreement with the Crown that would, in return for his testimony, affect his period of imprisonment. He entered his guilty pleas knowing that, as a former police agent and current justice system cooperator, he was facing "25 years of very hard time" in prison;
 - f) the RCMP paid significant monies to Person Y for his work as an agent, including over \$475,000 plus an ongoing payment for incidental and canteen expenses in jail, as well as his legal expenses of \$472,627. However, the trial judge did not find these payments to influence or shape Person Y's evidence in favour of the Crown because: (i) none of it was paid as an incentive to tell police about his involvement in the murders; (ii) one must consider the benefits comparatively, as Person Y acknowledged earning substantial sums as a criminal in the drug business; and (iii) it was unlikely the money constituted a substantial benefit when serving 25 years to life of hard time;
 - g) during his nearly ten days under cross-examination, Person Y did not attempt to minimize his past criminal activities or his role in the conspiracy to kill Mr. Lal;
 - h) when uncertain about aspects of his evidence, Person Y declined to implicate the appellants;
 - i) Person Y had no motive to falsify his evidence; and
 - j) independent evidence corroborated Person Y's evidence in many respects.
- [348] Considering all the evidence before her, the trial judge concluded Person Y's actions spoke for him and answered many of the credibility concerns raised by the appellants: Trial Reasons at para. 481. Of particular note is the fact Person Y made his decision to cooperate with the police on the Surrey Six investigation before any issues about his custodial

conditions arose, as he was not in custody at the time and had not pleaded guilty to, or been charged with, any offences. In this context, there is no reasonable possibility that if the trial judge had the undisclosed WPP information before her, the result at trial could have been different. This conclusion applies with respect to the fresh evidence adduced by both the appellants and the Amici.

- [349] Under the second prong of Dixon, we are not persuaded there is a reasonable possibility the failure to disclose the WPP information could have affected the overall fairness of the trial.
- [350] We agree with the conclusion in Johnston that the undisclosed WPP information could not reasonably be expected to have made a difference to the appellants' ability to impeach Person Y's credibility. This is in part because of our conclusion above that Person Y's evidence was not necessarily inconsistent with the undisclosed WPP information, and in part because - as Griffin J.A. explained in Johnston - Person Y was testifying to his belief or expectation about his future prison conditions, which would be difficult to impeach: at para. 115. This is particularly so as correspondence from Person Y's counsel indicates he believed the RCMP had failed on multiple occasions to respect their promises with respect to Person Y's confinement conditions.
- [351] We also agree with the Court in Johnston that if the appellants had wished to challenge Person Y's evidence about his custodial conditions, they could have done so using information disclosed to them, including the fact he had been promised similar treatment and privileges as other inmates as a condition of cooperation: at para. 118. [Sentence removed.]
- [352] We further disagree that the lack of disclosure prevented the appellants from applying for further information about Person Y's custodial circumstances or challenging the Crown's privilege claims. Although we accept that in some circumstances, later disclosure can shed light on areas that seemed less important without knowledge of that additional information, this is not such a case. The appellants knew Person Y had been promised a certain standard of care within the RCMP and the CSC as a condition of testifying. They also knew Person Y had gone between RCMP and CSC custody and that the Crown viewed these movements as being irrelevant and privileged. The appellants were not prevented from cross-examining Person Y about this information. The WPP information does not meaningfully change any of the information available to the appellants before Person Y's testimony.
- [353] Even if the appellants had applied for further disclosure or challenged the privilege claims on the basis of the WPP information and the sealed evidence before us on this application, we conclude it would not have made a difference to the appellants' conduct at trial. [Two sentences removed.]

- [354] We agree with Griffin J.A.'s finding that the information was "at best minor and tangential" to Person Y's credibility: Johnston at para. 123.
- [355] Finally, the circumstances of this case are unlike those in Pascal. In Pascal, the appellant applied to adduce fresh evidence showing that one of the Crown's witnesses had an undisclosed criminal record and outstanding criminal charges when she testified at his trial. Her evidence changed significantly between her initial police statement and her second police statement given over a year later, which she adopted in her testimony at the appellant's trial. The criminal charges were laid in the time between her first and second statements. The trial judge relied on the change in her statement to accept the complainant's testimony over the appellant's.
- [356] In the case at bar, Person Y had already pleaded guilty to the two murders in question and was serving his sentence when he testified at the appellants' trial. Before his evidence began, the appellants had disclosure showing Person Y was promised, as a condition of his testimony, custodial conditions similar to those provided to the average inmate. [Sentence removed.] In these circumstances, and given all the other reasons the trial judge gave in assessing his credibility, there is no reasonable possibility that the suggestion Person Y altered his evidence to "curry favour with the prosecution" to assist him in gaining entry to the WPP could have raised a reasonable doubt or affected the fairness of the trial.
- [357] We note the standard applied in Johnston was an even lower standard than the already low "reasonable possibility" standard set out in Dixon, since the question in Johnston was whether there was a reasonable possibility the information would assist in meeting the Dixon test, not whether Dixon itself was met: Johnston at para. 83. In the opinion of the Court in Johnston, there was no reasonable possibility the undisclosed information would assist in meeting the Dixon test. For similar reasons, we conclude the appellants have failed to demonstrate a reasonable possibility that the WPP information, sealed and unsealed, could have affected the trial verdict or trial fairness.

(e) Conclusion on Non-Disclosure Issues

- [358] For the reasons explained in this part, we do not give effect to either ground five of Johnston's amended notice of appeal that the defence was denied basic disclosure, or to the fresh evidence application in which the appellants seek to adduce evidence of the content of the Brassington Interview and the WPP information. We also dismiss the Amici's application to adduce the fresh evidence contained in "Category 5" of its fresh evidence application. The Crown's fresh evidence is admitted to the extent it was considered in addressing the appellants' fresh evidence and the Amici's fresh evidence in Category 5.

Did the Trial Judge Err in Dismissing the Applications for a Stay of Proceedings in the Absence of an Evidentiary Hearing on the Allegations of Abuse of Process?

(a) Background

- [359] The appellants assert the judge erred in summarily dismissing their applications for a stay of proceedings for abuse of process without holding an evidentiary hearing. The Amici support the appellants' position, relying on confidential information not known to the appellants.
- [360] The Amici also apply to adduce fresh evidence, being Categories 1-4 of the Amici's fresh evidence application, to supplement their submissions on this issue. In response, the Crown adduces additional fresh evidence attached as exhibits to the sealed affidavit #2 of Laura Munday, solely for the purpose of determining the admissibility of the fresh evidence sought to be adduced by the Amici.
- [361] It will be recalled from the introductory section of these reasons that the trial judge, in her Open Vukelich Ruling and Sealed Vukelich Ruling, granted the Crown's application to summarily dismiss the appellants' applications for a stay of proceedings as a result of abuse of process. In her rulings, the judge found police misconduct in the investigation, and the inhumane conditions in which the appellants were kept while on remand, amounted to abuses of process. Although she found that stages one and two of the Babos test were met, she concluded a stay would be a disproportionate remedy in light of the seriousness of the offences and the community's interest in the entry of the appellants' convictions.
- [362] The appellants and the Amici challenge the judge's Open and Sealed Vukelich Rulings, respectively. Before addressing the arguments, we will set out the applicable legal principles.
- (b) Legal Principles
- (i) Abuse of Process
- [363] The appellants claimed abuse of process under both the common law and s. 7 of the Charter. Unless the impugned conduct does not engage the Charter, common law abuse of process is subsumed by the Charter: *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 70-71.
- [364] In *R. v. Jewitt*, [1985] 2 S.C.R. 128, the Supreme Court of Canada affirmed the authority of trial judges to enter a stay of proceedings as a remedy for abuse of process. Chief Justice Dickson adopted the test in *R. v. Young*, [1984] 40 C.R. (3d) 289 (Ont. C.A.), holding that judges have the discretion to stay proceedings "where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings", with the caveat that this power may only be exercised in the "clearest of cases": *Jewitt* at 136-37.
- [365] The abuse of process doctrine has developed as a means by which to dissociate the courts from unacceptable conduct of investigatory and prosecutorial agencies in a variety of contexts where the conduct may offend the community's sense of fair play and decency. It recognizes that while society depends on police "to actively protect us from the immense social and personal cost of crime", there are "inherent limits" on the state's power to

"manipulate people and events for the purpose of obtaining convictions": R. v. Mack, [1988] 2 S.C.R. 903 at 940-41. As Justice Lamer (as he then was) explained in Mack at 938-39:

[C]entral to our judicial system is the belief that the integrity of the court must be maintained. This is a basic principle upon which many other principles and rules depend. If the court is unable to preserve its own dignity by upholding values that our society views as essential, we will not long have a legal system which can pride itself on its commitment to justice and truth and which commands the respect of the community it serves. It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price. This proposition explains why as a society we insist on respect for individual rights and procedural guarantees in the criminal justice system.

[366] In Babos, the Supreme Court of Canada set out the legal principles pertaining to the abuse of process doctrine, and when a judicial stay of proceedings may be ordered as a remedy for such abuse. Justice Moldaver, for the majority, affirmed the two categories of abuse of process cases in which a stay of proceedings may be warranted. The first relates to state conduct compromising the accused's trial fairness (the "main category"); the second relates to state conduct that does not threaten trial fairness, but nonetheless risks undermining the integrity of the judicial process by engaging in conduct that offends societal notions of fair play and decency (the "residual category"). It was common ground at trial that the abuse in question fell into the residual category.

[367] Regardless of the category into which the conduct falls, the test for determining whether a stay of proceedings is warranted involves assessing the following criteria:

- a) there must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated, or aggravated through the conduct of the trial or by its outcome;
- b) there must be no alternative remedy capable of redressing the prejudice; and
- c) where the first two criteria are not determinative, the court must balance the interests in favour of granting a stay (including denouncing misconduct and preserving the integrity of the justice system) against the societal interest in having a final decision on the merits.

(Babos at para. 32.)

[368] Justice Moldaver emphasized the need in "residual category" cases to assess these criteria in relation to the impact on the integrity of the justice system, rather than as redress for past harm done to the specific accused before the court: Babos at paras. 38-39. In this category of cases, the balancing stage is particularly important as either option is likely to result in some form of prejudice to the integrity of the justice system, either by staying the proceedings or continuing them despite the misconduct. The elements the court must consider in the balancing exercise are:

- a) the nature and seriousness of the impugned conduct;

- b) whether the conduct is isolated or systemic and ongoing;
- c) the circumstances of the accused;
- d) the charges the accused faces; and
- e) the interests of society in having the charges disposed of on the merits.

(Babos at para. 41.)

[369] The drastic nature of the remedy of a stay of proceedings - which permanently halts the prosecution, frustrates the truth-seeking function of the trial, and deprives the public of the opportunity to see justice done on the merits - means that it will be ordered rarely and only in the "clearest of cases": Babos at paras. 30-31, 44. Nevertheless, the more egregious the conduct in question and the more it shocks the community's conscience and/or offends the community's sense of fair play and decency, the more likely a stay of proceedings will be required to avoid judicial condonation of the impugned conduct: Babos at para. 41.

(ii) [Heading Removed]

[370] [Paragraph removed.]

[371] [Paragraph removed.]

(iii) The Vukelich Threshold

[372] The "Vukelich application", as it has come to be known, allows a party to apply to the court to dismiss, on a summary basis, an application for an evidentiary hearing. This process is grounded in the fact there is no automatic right to a voir dire in a criminal trial. Rather, the appropriate procedure to follow in a particular case is a matter to be decided by the trial judge in accordance with their trial management powers.

[373] Vukelich described the applicable threshold as being a question of whether a full hearing would "assist the proper trial of the real issues" or whether the grounds put forward in the application disclose any basis for the judge to issue the remedy sought: at para. 26. More recently, the Supreme Court of Canada has articulated this standard as requiring an application to have a "reasonable prospect" of success or of assisting in determining the issues before the court: R. v. Pires, 2005 SCC 66 at para. 35; R. v. Cody, 2017 SCC 31 at para. 38. This assessment is based on an assumption that the allegations advanced in the proposed application could be proven: R. v. Frederickson, 2018 BCCA 2 at para. 26.

[374] The Crown and the appellants agree the "fundamental question" before the judge on a Vukelich application concerning abuse of process is whether a hearing would "assist in determining the issues before the court", namely, whether there has been an abuse of process warranting a stay.

(iv) Standard of Review of the Vukelich Rulings

[375] The decision to decline to order a full evidentiary hearing is discretionary and is owed deference unless the discretion has not been exercised judicially. This is a high threshold, but may be met, for example, where the discretion is exercised on the basis of an incorrect legal conclusion: *R. v. M.B.*, 2016 BCCA 476 at paras. 46-48, 107; *R. v. Vickerson*, 2018 BCCA 39 at para. 60.

(c) Positions of the Parties on the Open Vukelich Ruling

(i) The Appellants' Arguments

[376] The appellants' essential argument or "basic complaint", as they set out in their joint factum, is the judge applied too strict a test under Vukelich in assessing whether an evidentiary hearing should be ordered. They develop this argument with reference to errors they allege regarding the judge's application of the test for abuse of process set out in *Babos*.

[377] The appellants argue the trial judge should have ended her Vukelich inquiry and ordered a full hearing upon determining the appellants' conditions of confinement and the misconduct of the investigating officers could amount to abuses of process. They submit an evidentiary hearing should follow in any circumstance where the accused shows a basis for demonstrating that the impugned conduct is offensive to societal notions of fair play and decency. This is because the full extent and impact of the conduct, which cannot be known without a full hearing, is relevant to assessing each of the remaining stages of the *Babos* test, which involves a weighing and balancing exercise. To carry out that balancing exercise without providing the appellants an opportunity to demonstrate the full scope of the abuse is not only fundamentally unfair, but an error in principle.

[378] The appellants contend the judge erred in failing to take their case at its highest because she could not have truly done so without considering their entire case as presented by evidence. Absent a full hearing, the appellants were prejudiced in meeting stage one of *Babos* because the Crown controlled information about the extent of the police misconduct and they were precluded from presenting their own evidence or expert evidence about the impact of their mistreatment in custody.

[379] At stage three of *Babos*, the appellants argue the court cannot balance the factors outlined by Moldaver J. absent determinative factual findings with respect to the true seriousness of the conduct, whether the conduct is systemic, and the circumstances of the accused. The full impact of these criteria--and in particular, the ongoing impacts on the appellants of the conditions of confinement--could not be understood merely by accepting the appellants' submissions at their highest; the judge needed to hear evidence to properly assess the weight of these factors.

(ii) The Respondent's Arguments

[380] The Crown submits the appellants have failed to discharge their onus of demonstrating a reasonable basis on which their stay applications could be granted, or that an evidentiary hearing would assist the judge in assessing the merits of their application. The judge had a comprehensive understanding of the proposed facts and arguments and took them at their highest. However, she determined the circumstances of the crimes the appellants committed were so serious that the factors militating against a stay outweighed the factors in favour of granting one. She exercised her discretion judicially in dismissing their application, so this Court has no reason to intervene.

[381] Further, the Crown submits, a stay of proceedings could never reasonably be granted for the alleged abuse of process in the circumstances of this case given the horrific nature of the offences.

[382] As indicated earlier in these reasons, we conclude that errors made in the Sealed Vukelich Ruling require a new abuse of process hearing. It is therefore unnecessary to discretely address the appellants' arguments on the open hearing. We will address the appellants' submissions on whether the judge applied too strict a test on the Vukelich application together with our analysis of the Amici's submissions on the Sealed Vukelich Ruling.

(d) Positions of the Parties on the Sealed Vukelich Ruling and Sealed Fresh Evidence

(i) The Amici's Arguments

[383] The Amici present arguments on two separate records: one on the record before the judge on the closed Vukelich application; and the other based on an "enhanced" record that includes fresh evidence obtained from the Bacon proceedings, assuming its admission on appeal.

[384] The Amici argue that even without the fresh evidence, the errors in the judge's Sealed Vukelich Ruling, considered separately or cumulatively with the errors in her Open Vukelich Ruling, require an evidentiary hearing to determine whether this is one of those rarest of cases where a stay of proceedings is the only appropriate remedy for the abuse of process in question. In summarily dismissing the applications for a stay of proceedings for abuse of process, the Amici allege the judge erred by:

- a) drawing inferences in favour of the Crown rather than inferences available to support the stay application;
- b) [clause removed]; and
- c) concluding there was no reasonable possibility a stay would be entered in the circumstances.

[385] The Amici submit the judge erred by engaging in a fact-finding exercise based on the record before her on the Vukelich application. Rather than taking the case at its highest by accepting the inferences most favourable to the appellants, she preferred inferences that favoured the Crown's position. The Amici submit the judge imposed too high a burden by

effectively requiring them to demonstrate that the inferences they put forward were the only inferences available. Instead, she should have ordered a hearing to resolve the conflicts in the evidence.

[386] [Paragraph removed.]

[387] Finally, the Amici argue the judge's balancing analysis at stage three of Babos was based on impermissible factual findings that led her to conclude the misconduct was based on isolated events and not part of a larger investigative strategy. [Sentence removed.] Accordingly, the judge erred in concluding the balance favoured entering the convictions because of the gravity of the offences and the applications had no reasonable prospect of success.

[388] The Amici submit the "enhanced record" supports the need for an evidentiary hearing. [Two sentences removed.] This conduct is relevant to stage three of Babos, and there must be an evidentiary hearing to determine the issue.

(ii) The Respondent's Arguments

[389] The Crown submits the judge did not engage in an impermissible fact-finding exercise. Instead, she took the facts alleged by the Amici at their highest, and properly determined what inferences could and could not reasonably be drawn from them. The Crown says it is not the law that the judge had to draw the inferences most favourable to the Amici. Accepting this proposition would render the Vukelich hearing ineffective as a filtering mechanism. A judge is not required to draw inferences unavailable on the underlying facts.

[390] Further, the Crown contends the Amici do not argue that the inferences the judge drew were unreasonable or not reasonably supported by the facts. It is for the trial judge to assess whether alternative inferences are merely possible or whether they rise to the level of being reasonable: *R. v. Nguyen*, 2020 BCCA 166 at paras. 23-24.

[391] [Paragraph removed.]

[392] Finally, the Crown argues that even if the judge erred as contended, there is still no reasonable likelihood that a stay of proceedings would be granted after a full evidentiary hearing given the horrific nature of the crimes. [Sentence removed.]

[393] [Paragraph removed.]

(e) Discussion

[394] We disagree with the appellants that the judge failed to take their case at its highest in her Open Vukelich Ruling. She properly took the facts advanced by the appellants to be true, and proceeded with her analysis on that basis. This differs from her conclusion on the Amici's arguments. As explained below, we conclude the trial judge erred in her analysis in the Sealed Vukelich Ruling, and ultimately in her conclusion that it was unnecessary to have a hearing on whether a stay of proceedings should be granted as a remedy for abuse

of process. Accordingly, a new hearing is required on this issue.

- (i) The Trial Judge Erred by Engaging in a Fact-finding Exercise Instead of Taking the Amici's Submissions at Their Highest

[395] In our view, the trial judge erred by weighing the evidence, drawing inferences, and finding facts on the limited record before her - an exercise that demonstrates the applications were not appropriately decided on a Vukelich application. As a result, she made a related error in finding that an evidentiary hearing would not assist in resolving the issues before the court.

[396] [Paragraph removed.]

[397] Although she purported to take the Amici's arguments at their highest, the trial judge accepted the Crown's argument that the materials available on the Vukelich hearing did not support the Amici's theory. [Two sentences removed.]

[398] We agree with the Amici's submission that the trial judge erred in her application of the Vukelich test by failing to assume the truth of the facts sought to be proved and instead, without a complete evidentiary record, interpreted evidence in favour of the Crown's position. In so doing, she failed to take the Amici's submissions at their highest. [One sentence and five clauses removed.]

[399] [Paragraph removed.]

[400] [Paragraph removed.]

[401] This error is not, as the Crown submits, a palpable and overriding factual error, but a failure by the judge to judicially exercise her discretion under Vukelich. The gatekeeping function of the trial judge in this case was not meant to determine factual controversies without an evidentiary hearing. The judge had thousands of pages of documents before her on the Vukelich application. Indeed, in this case, the application could properly be characterized as a modified evidentiary hearing based on documentary evidence and submissions, but without viva voce evidence.

[402] We disagree that the circumstances of this case are analogous to those in *Nguyen*. *Nguyen* was an appeal from an order made after trial, where the judge's findings of the facts, and the inferences to be drawn from them, were based on a full evidentiary record. Here, the judge's error was in making findings about the appropriate inferences to be drawn on the limited record before her on the Vukelich application, rather than permitting the defence to develop their case by adducing all the relevant evidence. Only then could the factual controversies be properly resolved.

[403] On a Vukelich application, the judge should assume the facts the applicant seeks to prove as true and assess whether those facts, assuming they are ultimately proven, are legally capable of supporting the remedy sought. If the remedy could not flow from the facts alleged, the judge may exercise their discretion not to hold an evidentiary hearing: *R. v.*

Armstrong, 2010 BCSC 1041 at para. 29, aff'd 2012 BCCA 242, leave to appeal ref'd [2012] S.C.C.A. No. 352. Here, the judge did not assume the facts the appellants sought to prove as true. Instead, she made findings of fact at a preliminary stage using an incomplete evidentiary record. She did what Justice Schultes warned against in *R. v. Gill*, 2018 BCSC 661 at para. 24, by deciding the merits of the proposed application:

- [24] One thing the court must be careful not to do when deciding a Vukelich hearing is to inadvertently decide the actual merits of the proposed application. The only question for me at this stage is whether there are facts alleged, either in the notice or counsel's submissions, that if found in the defence's favour could support one of the remedies being sought. If there are such facts, the application should proceed to the next stage of a full hearing.
- [404] In sum, where there are factual controversies (and the facts the defence seeks to prove could support the remedy sought), the refusal to hold an evidentiary hearing is an error as it prematurely denies the defence the opportunity to demonstrate why their interpretation of the evidence should be preferred. This is particularly so when the defence allegations are such that they can likely only be established through cross-examination. This does not mean the defence is entitled to put forward entirely speculative allegations of abuse and claim that they can only be proven in cross-examination. However, where there is a reasonable basis for the allegation, the judge should permit the defence to pursue it. In our view, the Amici identified sufficiently reasonable interpretations and plausible inferences to justify an inquiry, and the trial judge erred by refusing to permit that inquiry.

(ii) The Trial Judge Erred by Imposing Too High a Threshold on the Vukelich Application

- [405] In light of the cumulative bases advanced by the appellants and the Amici for a stay of proceedings, we conclude the judge erred by requiring too high a standard to permit an evidentiary hearing. We emphasize that the applicable threshold is a low one: *Frederickson* at para. 33. The appellants and the Amici had provided, with reasonable particularity, the serious grounds upon which the stay applications were made -- namely, the police misconduct in the investigation (systemic or otherwise) and the abuse relating to the appellants' time in remand. Based on the record before the judge and in light of the required balancing at stage three of *Babos*, together with inferences available on the documents and submissions put before the judge, taken at their highest, we conclude the appellants and the Amici met the threshold of showing a full hearing would assist in determining whether the abuse of process warranted a stay.
- [406] The Vukelich hearing was introduced as an expedient process designed to prevent undue delay or potential abuse arising from frivolous applications for voir dres in circumstances where the applicant is unable to demonstrate that the results of the hearing could affect the admissibility of the impugned evidence at trial: *R. v. Tse*, 2008 BCSC 867 at para. 18. Similarly, Vukelich applications have been used to screen other applications that have no reasonable prospect of success, including applications for a stay of proceedings based on an alleged abuse of process: *Trans Mountain Pipeline ULC v. Mivasair*, 2020 BCCA 255 at

paras. 50-52.

- [407] Vukelich applications were "never intended as a tool by which to prevent legitimate investigation of alleged Charter breaches" or to be a "protracted pre-hearing examination of the minutiae of the accused's application": Tse at paras. 21-22. Extensive submissions concerning the ultimate merits of an application at the Vukelich hearing stage without the full evidentiary foundation have the potential to unduly limit the ambit of the inquiry that should be undertaken, resulting in an injustice: Tse at para. 24. Ironically, this can sometimes lead to circumstances in which Vukelich applications unnecessarily extend the length of the court's inquiry into the issue, contrary to the goal of minimizing delay and improving efficiency in the conduct of legitimate applications and motions.
- [408] The Vukelich application is a type of "shortcut" sanctioned by the court where the circumstances clearly show the inquiry will not assist the court in resolving the issues before it. For example, Vukelich itself dealt with a Garofoli application, named after *R. v. Garofoli*, [1990] 2 S.C.R. 1421, challenging the validity of a wiretap authorization under s. 8 of the Charter. In applying the Garofoli test, the court can consider facts that are deleted from or added to the relevant material in support of the wiretap authorization. If the impugned information is removed from the material and there is still sufficient information to support the issuance of the wiretap, then it is clear that embarking on a hearing to determine whether to remove the offending information does not assist in the trial of the "real issues".
- [409] Here, the circumstances were not so clear. In our view, the judge's determination that the applications stood to be resolved by a balancing of factors at stage three of Babos supports the conclusion that the low Vukelich threshold was met. By this point, the judge had determined that stages one and two of the Babos test were made out on the face of the proposed defence application--namely, that the police misconduct would shock the community's conscience and/or was offensive to societal notions of fair play and decency, the integrity of the justice system would be prejudiced by continuing the proceedings, and no remedy short of a stay was capable of redressing the prejudice. Clearly, these applications were not frivolous, and there was a reasonable basis on which to find that a stay of proceedings could be warranted. As noted, the balancing undertaken by the trial judge at stage three purported to determine the ultimate issue, but without all of the evidence. In the circumstances of this case, the appellants were, in fairness, entitled to present evidence to allow the court to fully weigh the relevant factors at each stage of the Babos test to determine the appropriate disposition.
- [410] As the judge failed to exercise her discretion judicially by misapplying the Vukelich principles, no deference is owed to her decision not to hold an evidentiary hearing. We conclude, on the record before the trial judge and the submissions of counsel, there is a reasonable likelihood that an evidentiary hearing would assist in determining whether a stay of proceedings is an appropriate remedy for the state misconduct in question.

(iii) [Heading Removed]

[411] [Paragraph removed.]

[412] [Paragraph removed.]

[413] [Paragraph removed.]

(iv) The Amici's Fresh Evidence Application

[414] The Amici's proposed fresh evidence (as it relates to this issue) falls into the following four categories:

- a) Category 1 - [clause removed];
- b) Category 2 - [clause removed];
- c) Category 3 - [clause removed]; and
- d) Category 4 - [clause removed].

[415] Given our conclusion that a new hearing is required, it is not strictly necessary to consider the fresh evidence adduced on this issue. That evidence, if counsel so chooses, may be put before the judge who hears the appellants' applications. However, a few examples from Categories 1 and 2 suffice to show it could be open to a judge to make different findings about the extent of the misconduct. The findings would depend on the judge's assessment of the evidence and the credibility and reliability of the witnesses. The Crown concedes the relevance of all the fresh evidence and does not dispute due diligence with respect to certain evidence in Categories 1 and 2. In our view, the fresh evidence in Categories 1 and 2 establishes there was conflicting evidence about key facts relevant to the Amici's argument, the resolution of which requires an evidentiary hearing.

[416] [Paragraph removed.]

[417] [Paragraph removed.]

[418] [Paragraph removed.]

[419] [Paragraph removed.]

[420] [Paragraph removed.]

[421] For these reasons, the evidence discussed from Categories 1 and 2 is, under the Palmer test, reasonably capable of affecting the result of the Vukelich application. This supports our conclusion that an evidentiary hearing is required to determine the seriousness of the abuse of process and whether a stay would be an appropriate remedy. Further, even had the judge not erred as described, the fresh evidence alone justifies an evidentiary hearing.

(v) There Are No Categories of Offences for Which a Stay of Proceedings Can Never Be an Appropriate Remedy for an Abuse of Process

- [422] We must also reject the Crown's repeated submission that a stay of proceedings could never be an appropriate remedy given the seriousness of the offences. Regardless of the nature of the offences being investigated, the police have a duty to conduct themselves in accordance with the law and in a manner that gives the public confidence in their methods. To repeat Lamer J.'s comment in *Mack*, while society depends on police "to actively protect us from the immense social and personal cost of crime", there are "inherent limits" on the state's power to "manipulate people and events for the purpose of obtaining convictions": at 940-41.
- [423] It is in precisely this sort of high-profile case where the police may be tempted to act contrary to their duties on the basis that "the ends justify the means". This is contrary to the rule of law on which our system of government is founded. The court must always retain the ability to dissociate itself from disreputable state conduct by staying the proceedings, no matter how serious the offence. Accordingly, there is no category of offence that is beyond the ambit of the abuse of process doctrine.
- [424] In any event, we do not see the outcome of the balancing in the third stage of *Babos* as inevitable. The abuses of process accepted by the judge in her *Vukelich* Rulings included very serious allegations of police misconduct and improper cooperation between the RCMP and CSC to keep the appellants in horrific pretrial conditions to attempt to weaken their state of mind and get them to "crack". The horrific nature of the offences does not preclude a stay of proceedings regardless of the severity of the abuse ultimately established on the evidence.

(vi) [Heading Removed]

[425] [Paragraph removed.]

[426] [Paragraph removed.]

[427] [Paragraph removed.]

(vii) Conclusion

- [428] It follows from this analysis that we sustain the argument that the judge erred by concluding there was no reasonable prospect an evidentiary hearing would assist in the determination of the issue. Having weighed the evidence and drawn inferences that favoured the Crown, the judge's application of the *Babos* test was flawed. Having found in favour of the *Amici* at stages one and two of *Babos*, her finding at stage three was distorted by the absence of an evidentiary record demonstrating the true nature and scope of the police misconduct alleged. The balancing could not properly be carried out without having resolved factual controversies about the full extent of the misconduct in question. In any event, the appellants' applications were supported by sufficient information to show a reasonable prospect of success, and it should not have been decided using a summary procedure. Even if the judge had not erred, the fresh evidence tendered by the *Amici* would justify holding an evidentiary hearing.

[429] We conclude the judge erred in granting the Crown's Vukelich application and summarily dismissing the applications for a stay of proceedings.

This Court's Jurisdiction to Remit the Matter for a Hearing on the Issue of Abuse of Process

[430] Having concluded the trial judge erred in granting the Crown's Vukelich application, the question arises as to our jurisdiction to remit the matter to the trial court for a hearing to determine whether a stay of proceedings should issue as a remedy for abuse of process. *R. v. Pearson*, [1998] 3 S.C.R. 620, provides authority for our jurisdiction to make such an order under s. 686(1), (2), and (8) of the Criminal Code, which provides, in relevant part:

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(b) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

(c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court; or

- (d) may set aside a conviction and find the appellant unfit to stand trial or not criminally responsible on account of mental disorder and may exercise any of the powers of the trial court conferred by or referred to in section 672.45 in any manner deemed appropriate to the court of appeal in the circumstances.
- (2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
 - (a) direct a judgment or verdict of acquittal to be entered; or
 - (b) order a new trial.
- (8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

[431] Pearson also involved an application for a stay of proceedings following a finding of guilt based on an abuse of process, but in the context of entrapment which affected the appellants' trial fairness rights rather than the residual abuse of process category. Mr. Pearson was convicted of drug trafficking offences after the trial judge rejected his entrapment argument. The Quebec Court of Appeal allowed his appeal in part, ordering a new trial limited to the issue of entrapment on the basis that the Crown failed to disclose information relevant only to that aspect of his case. The Supreme Court of Canada agreed the appeal court had the authority to make such an order under s. 686(8) of the Code:

13 In such circumstances [where the guilt of the accused is not in question], it is unnecessary and wasteful to reopen the issue of the appellant's guilt or innocence on the substantive charges in a new trial. Such a result is not mandated by any fundamental right protected by the Canadian Charter of Rights and Freedoms. Under s. 686(8) of the Criminal Code of Canada, a court of appeal has the power to make an ancillary order limiting the scope of a new trial under s. 686(2) when "justice requires" that order. In our view, given the unique nature of an entrapment proceeding after a verdict of guilty, s. 686(8) provides broad enough statutory authority on which to rest the direction by an appeal court of an entrapment proceeding.

16 A court of appeal which orders a new trial limited to the issue of entrapment exercises its statutory jurisdiction under s. 686 of the Criminal Code in the following manner: where an accused successfully impugns the finding of no entrapment at his or her first entrapment hearing, the court of appeal "allows an appeal against conviction", in accordance with the wording of s. 686(1). Then, pursuant to s. 686(2), the court of appeal "quashes the conviction" and "orders a new trial". However, the quashing of the formal order of conviction does not, without more, entail the quashing of the underlying verdict of guilt. In most successful appeals against conviction, the court of appeal which quashes the conviction will also overturn the finding of guilt; however, the latter is not a legally necessary consequence of the former. Under s. 686(8), the court of appeal retains the jurisdiction to make an "additional order" to the effect that, although the formal order of conviction is quashed, the verdict of guilt is affirmed, and the new trial is to be limited to the post-verdict entrapment motion.

[Emphasis added.]

[432] The jurisdictional issue in this case is very similar to that in *Pearson*, as entrapment is also a form of abuse of process for which a stay of proceedings is an appropriate remedy: see also *R. v. Imola*, 2019 ONCA 556. Accordingly, we apply the reasoning in that case to the circumstances before us.

Disposition

[433] The appellants' application to adduce fresh evidence is dismissed. The Amici's application to adduce the evidence contained in Category 5 of its fresh evidence application is dismissed. The Amici's fresh evidence application is granted to the extent of the indicated portions of Categories 1 and 2. As stated earlier in these reasons, it is unnecessary to address the remainder of the Amici's fresh evidence application. The Crown's application to adduce fresh evidence is allowed to the extent it is used to address the appellants' and the Amici's fresh evidence applications.

[434] Pursuant to s. 686(1), (2), and (8) of the Code, we allow the appeals against the convictions and quash the convictions, but we affirm the verdicts of guilt. We give no effect to any of the grounds of appeal that would have resulted in a new trial. We remit the matter to the trial court for an evidentiary hearing on the applications for a stay of proceedings for abuse of process.

"The Honourable Mr. Justice Tysoe"

"The Honourable Madam Justice MacKenzie"

"The Honourable Mr. Justice Willcock"

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