

CANADA / JUDGMENT

R. v. Russell

2020 BCCA 108

COURT

British Columbia Court of Appeal

DECIDED

9 April 2020

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2020 BCCA 108 R. v. Russell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Russell,

2020 BCCA 108

Date: 20200409

Dockets: CA45647;

CA45648; CA45649

Docket: CA45647

Between:

Regina

Respondent

And

Christopher Ryan Russell

Appellant

- and -

Docket: CA45648

Between:

Regina

Respondent

And

Kelly Michael Richet

Appellant

- and -

Docket: CA45649

Between:

Regina

Respondent

And

Meranda Leigh Dingwall

Appellant

Corrected Judgment: The text of the judgment was corrected at para. 58
on December 21, 2020.

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia,
dated July 21 2017 (conviction) and July 20, 2018 (sentence) (R. v. Dingwall,
2017 BCSC 1457, Prince George Registry File Number 44239).

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Place and Date of Hearing:

Vancouver, British Columbia

January 10, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 9, 2020

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Willcock

Dissenting Reasons by:

The Honourable Mr. Justice Butler (p. 29, para. 61)

Summary:

Three appellants were convicted of aggravated assault and firearm offences in connection with a drive-by shooting of people outside a house in Mackenzie, B.C. Appellants were arrested two hours later, driving home to Prince George; female appellant Dingwall was driving. Nearby, police found a burnt vehicle which was the vehicle used in the shooting, and the gun. Other physical evidence connected the "Burn Site" to Dingwall. Trial judge concluded defendants R. and R. had either carried out the shooting or aided in a plan to carry it out; and Ms. Dingwall had aided in the shooting and had been a principal or aider in the firearm offences. Appeal dismissed. Trial judge had applied correct test for a circumstantial case, although he erred in stating that where an alternative inference is asserted, there must be some evidence to support it. Appellants did not suggest any reasonable inference that might arise from the evidence or absence of evidence that was not considered and rejected by the trial judge. Looking at the totality of the evidence, trial judge had found the three appellants were involved in a well-organized plan to commit the shooting or assist in its commission and destroy the vehicle. Lack of physical evidence such as fingerprints and DNA did not raise a reasonable doubt. Discussion of mens rea in an "aiding" case. Further, trial judge had not erred in failing to consider each accused separately in his reasons nor in applying R. v. Thatcher in a judge-alone trial. Although his reasons might have been fuller, they did not prevent meaningful appellate review.

Dissenting (per Justice Butler): Although there is agreement with the majority regarding most grounds of appeal, the dissenting justice disagrees with the disposition of Ms. Dingwall's appeal of her conviction as a party to the offences arising from the shooting at the Crysdale address. There was a paucity of evidence about Ms. Dingwall's activities before and during the shooting offences and the judge failed to consider her potential liability as a party, rather than a principal in light of the limited evidence. The trial judge erred in concluding that the only rational inference to be drawn from the evidence was that Ms. Dingwall aided or abetted in the shooting offences and that verdict was unreasonable.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The three appellants challenge their conviction on various charges, including aggravated assault and firearms offences, arising out of a 'drive-by' shooting in Mackenzie, British Columbia in the early morning of July 7, 2016. The Crown's case was based almost entirely on circumstantial evidence and the accused did not testify or lead evidence at trial; nor did the victim or intended victim of the shooting testify at trial or co-operate with police.
- [2] On appeal, counsel for Ms. Dingwall and Mr. Richet largely adopted the able arguments made by Mr. Beatch on behalf of the appellant Mr. Russell. He asserted that the verdicts were unreasonable within the meaning of s. 686(1)(a)(i) of the Criminal Code, R.S.C. 1985, c. C-46. Defence counsel also submitted that the trial judge erred in his appreciation of the law relating to circumstantial evidence and in his application of the principles of party liability under s. 21(1) of the Code. I reproduce here for convenience s. 21(1):

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.

Factual Background

- [3] Not surprisingly, the case is fact-intensive. I will only summarize the facts, as found by the trial judge, the details of which are at paras. 10-73 of his reasons.
- [4] The narrative begins with reference to two vehicles -- a white GMC Yukon owned by the appellant Ms. Dingwall and referred to as the "Dingwall Yukon" by the trial judge; and a white GMC truck that was stolen from Ms. Debra Eagle on July 6, 2016 near her home in Prince George; it was later found, burned. At the time it was stolen, this "Eagle Truck" contained a handicapped parking pass which, during the police investigation of the shooting, was found in the Dingwall Yukon. None of the accused had had Ms. Eagle's permission to possess the parking pass. (At para 30).

- [5] Mackenzie is a small town located northwest of Prince George. B.C. Highway 39 is the only highway in and out of the town and ends in Mackenzie itself. The portion of the highway within the town boundaries is called Mackenzie Boulevard. The shooting took place in one of the first subdivisions on Mackenzie Boulevard, at 221 Crysdale Drive, at approximately 4 a.m. on July 7, 2016.
- [6] There was evidence from a few independent eyewitnesses. One was Mr. Inyallie, who was being driven by his uncle north on Highway 39 towards Mackenzie to start his early shift at a local mill. Between 4:05 a.m. and 4:10 a.m., he and his uncle came around a corner towards a dead-end logging road. About 100 feet away, across from the entrance to the logging road facing south, Mr. Inyallie saw two vehicles -- one a white older model "Suburban" type vehicle moving south, and behind it, a newer model white Ford truck with what appeared to be a double cab. Mr. Inyallie was unable to identify the occupants of either vehicle or to give any description of them. He saw the truck back up across the northbound lane in front of him, onto the logging road, and appear to reverse down that road a distance of approximately 100 feet. The trial judge found that the Suburban vehicle was the Dingwall Yukon.
- [7] Mr. Inyallie and his uncle slowed and considered stopping to see if any assistance was required, but they decided they should proceed to Mackenzie as Mr. Inyallie did not want to be late for work. He saw the Suburban "take off but very slowly" proceeding south with its brake lights on, and observed its rear lights as it crested on a hill south of the logging road. (At para. 36.)
- [8] Another witness was a Mr. Findlay, who was also driving towards Mackenzie at 4:31 a.m. He observed a truck burning on the logging road. It turned out to be the Eagle Truck. He approached to see if anyone was hurt, and took two videos and some photographs on his phone.
- [9] As mentioned, the drive-by shooting took place at about 4 a.m. At that time Mr. Troy Harju, a neighbour of the residence located at 221 Crysdale Drive, was outside his home after an evening of drinking with friends. He acknowledged that he was intoxicated at the time. He saw a white single-cab Chevrolet truck speed past his house at 7 Manson Crescent, turn onto Crysdale and stop in front of 221 Crysdale. Since Mr. Harju had owned a 1994 truck of the same type, he recognized the vehicle as an older pickup truck. Mr. Harju could see three occupants -- a driver and two passengers. The trial judge found that this truck was the Eagle Truck. (At para. 73.)
- [10] There were three people outside on the front lawn of 221 Crysdale, which is the home of Mr. Michael Matson. The trial judge described what happened next:

Mr. Harju observed the two passengers get out of the truck, with one holding the truck's passenger door open. The other passenger walked around the back of the truck, which was facing Mr. Harju, and up to the curb of 221 Crysedale. That person then raised a handgun and shot three to four times towards the residence and the three people on the front lawn.

The three people ran towards the house, but one collapsed when he was shot through the leg.

Mr. Harju could not identify the occupants of the truck that pulled up in front of 221 Crysedale, as they had "baggy clothing", wore "hoodies" and "had their faces covered with something".

Photographs of the accused taken at the RCMP detachment in Prince George on July 7, 2016, were entered into evidence. Two of the accused, one being Dingwall, were wearing a hooded garment.

On cross examination, Mr. Harju confirmed the occupants had baggy clothing. When pressed about the height of the shooter he stated that he was "a little bigger than me, I'm a small guy", being five feet four inches tall.

He was also cross examined on the variance in his description of the persons he observed at 221 Crysedale in his testimony and his 911 call. He confirmed that his description of both the shooter and the person holding the door "as between 5'6" and 6' and skinny" was more accurate than his assertion in his evidence that he could not tell because they were wearing baggy clothes.

Mr. Harju saw the shooter and the other passenger get back into the white single cab Chevrolet pickup truck. One of them entered the cab and the other jumped into the rear box of the truck which then sped off towards Pioneer Street, turned left and could be heard travelling south on Mackenzie Boulevard. [At paras. 59-65.]

Mr. Matson was later found by police on the roof of the residence "in a frightened condition" and attempting "surreptitiously" to remove himself, according to police. (At para. 43.)

[11] Notwithstanding his inebriation, Mr. Harju phoned emergency services, gave first aid to the wounded man, Mr. Lyle Suter, and drove him to the hospital. The trial judge found him to be a credible and reliable witness, with one exception: due to various physical conditions and the clothing worn by the occupants of the truck he saw, the judge did not find his physical description of the occupants to be reliable. (At para. 71.)

[12] Also in evidence was a surveillance video taken from a bar/grill located not far from the shooting. It shows inter alia a white single cab pickup truck (the Eagle Truck) travelling southbound on Mackenzie Boulevard at 3:58 a.m. The trial judge described what is seen shortly thereafter:

between 4:02:35 a.m. and 4:02:44 a.m., a white single cab pickup truck is seen travelling from Pioneer Street onto Mackenzie Boulevard heading south. There is something large in the box of this truck, the Crown submits this is a person. The Crown also submits that while the person cannot be clearly seen, the person is visible when the truck first comes into view. The person then gets down into the box of the truck and is out of sight by 4:02:41 a.m., before the truck leaves the view of the surveillance video at 4:02:44 a.m. [At para. 68.]

- [13] In terms of physical evidence, RCMP Cpl. Warwick testified that he was dispatched to 221 Crysdale and had been informed of the presence of a white vehicle at the side of the logging road off Highway 39. At 5:52 a.m., he observed a vehicle generally matching the description he had been given, proceeding south towards Prince George on Highway 97. He activated his emergency lights and pursued. Ultimately the vehicle, which turned out to be the Dingwall Yukon, stopped at the gas station at Bear Lake at 5:55. Ms. Dingwall was driving and the two other occupants were Messrs. Richet and Russell. They co-operated with police and were duly taken into custody.
- [14] Gunshot residue samples were taken from each of the detainees. An expert, Dr. Hearn, found gunshot residue ("GSR") consistent with each accused "having discharged a firearm, being present when a firearm having been discharged or with handling a firearm that was discharged within the previous two to four hours." (At para. 41.) The arresting officers had not been told that GSR samples were going to be taken from the accused and therefore failed to take the usual precautions to reduce the possibility of cross-contamination.
- [15] After attending at 221 Crysdale on the morning of July 7, Cpl. Warwick returned to the logging road, where he observed the smouldering Eagle Truck, stuck in mud and facing towards Highway 39. This was the "Burn Site." Photographs in evidence indicated that it had rained prior to the time the Eagle Truck had been set on fire. With the assistance of his police dog, Cpl. Warwick located a firearm in some brush off the logging road and approximately 75-100 metres behind the Truck. (At para. 47.) The firearm was a loaded semi-automatic handgun, which is a restricted firearm. Its serial number had been effaced. Cartridge cases located at 221 Crysdale on July 7 were found to have been discharged from this gun, as were fired bullets located by the RCMP at that location.
- [16] The trial judge found that the firearm located in the vicinity of the burnt Eagle Truck on July 7 was the firearm used in the shooting. (All three accused had been prohibited from possessing firearms at the time.) In addition, police positively matched two pieces of a broken headlight located at the Burn Site to the Dingwall Yukon. The trial judge summarized his findings:

the white truck observed at 3:58 a.m. is the Eagle Truck, as is the white truck observed at 4:02:35 a.m. to 4:02:44 a.m. Other white trucks observed on the Surveillance Video are not similar to the Eagle Truck.

I also conclude based on the totality of the evidence that:

- (a) the white truck observed by Mr. Harju to be involved in the shooting is the Eagle Truck;
- (b) the shooting occurred at approximately 4:00 a.m., that is, after the Eagle Truck is seen on the Surveillance Video at 3:58:38 a.m. and before it is observed for a second time at 4:02:35 a.m. to 4:02:44 a.m.;
- (c) the shooter fired the Firearm at the individuals described by Mr. Harju, which included Suter and Matson;
- (d) there is a person, visible on the Surveillance Video, in the box of the Eagle Truck at 4:02:35 a.m., that person is the shooter who Mr. Harju observed getting into the box of the Eagle Truck immediately after the shooting;
- (e) the white Suburban vehicle observed by Mr. Inyallie at the Burn Site was the Dingwall Yukon;
- (f) Ms. Dingwall's counsel is correct to have acknowledged in his submissions that his client was at what turned out to be the Burn Site at approximately 4:05 to 4:10 a.m.; and
- (g) the individual(s) who burned the Eagle Truck were also responsible for hiding the Firearm. [At paras. 72-3.]

[17] Charges of attempted murder were originally laid against the accused, but they were later stayed. At trial, the following charges remained:

- Counts 3 and 4 - discharging a firearm at Messrs. Matson and Suter "with intent to wound, maim or disfigure";
- Count 5 - intentionally discharging a firearm while being reckless as to the life or safety of another person;
- Count 6 - committing the aggravated assault of Mr. Suter;
- Counts 7 and 8 - possessing a loaded prohibited or restricted firearm without being the holder of an authorization or licence, and possessing a prohibited firearm, restricted firearm, or non-restricted firearm knowing [the accused] did not hold a licence or registration certificate;
- Count 9 - causing mischief to private property;
- Count 10 - intentionally or recklessly causing damage by fire to the Eagle Truck;
- Count 11 - carrying or having in their possession a weapon for a purpose dangerous to the public peace or the purpose of committing an offence;
- Count 12 - storing a firearm contrary to a regulation under the Firearms Act;
- Counts 14, 16 and 18 - possessing a firearm while prohibited from doing so.

Trial Judge's Analysis

The Parties' Positions

- [18] The trial judge began his analysis at para. 74 by describing the positions taken by the parties at trial. The Crown argued that the three accused had either taken part in the shooting as principals (i.e., by driving to the Matson residence and carrying out the shooting personally) or as parties waiting nearby, all in a scheme to assist the shooter in disposing of the evidence and escaping. In the Crown's submission, the evidence overwhelmingly pointed to only one reasonable conclusion -- that the three accused had intended to take part, and had taken part, in a planned and organized shooting. Crown counsel acknowledged that the evidence did not establish with certainty who had pulled the trigger and that it was likely there was at least one other unknown participant or accomplice.
- [19] The defence argument at trial focussed largely on the facts of who had been where at what times in the early morning of July 7 and, as the Crown observed in this court, did not include substantive submissions on the actus reus and mens rea of party liability under s.21(1)(b). The defence pointed to what they characterized as significant deficiencies or "gaps" in the Crown's case -- in particular the absence of physical evidence such as fingerprints or DNA evidence linking the accused to 221 Crysdale Drive. Counsel also relied on serious weaknesses in the GSR evidence and indeed a "real likelihood" of the contamination of that evidence. Counsel also noted the 20-minute "gap" between when the Dingwall Yukon was seen by Mr. Inyallie at the Burn Site just after 4 a.m., and when the Eagle Truck was observed burning by Mr. Findlay at about 4:30 a.m. Counsel for Ms. Dingwall also contended, and the Crown accepted, that she could have not have been at 221 Crysdale at the time of the shooting and at the Burn Site five or ten minutes later.
- [20] As well, the defence pointed to the presence of a newer model white Ford truck at the Burn Site that was not the Eagle Truck; and the fact that a similar vehicle had been observed by police parked near 221 Crysdale when they were conducting their investigations on July 7. (At para. 81.) At para. 104, the trial judge dismissed as contrary to common sense the suggestion that this vehicle had been involved in the shooting. Counsel -- wisely in my view -- did not pursue this point on appeal.

Party Liability

- [21] The trial judge discussed the law relating to parties beginning at para. 82 of his reasons. With respect to the mens rea required for party liability, he noted R. v. Briscoe 2010 SCC 13, which concerned the kidnapping, rape and murder of a young girl by one "L". L had said earlier in the day to a group of friends that he wanted to find someone to kill. The victim was located and lured into the group's car on the pretence that they were going to attend a party. Briscoe drove L and other co-defendants to the scene he selected, provided L with a pair of pliers, held on to the victim and told her to shut up, and then watched as L and others raped and beat the girl to death. At trial, Briscoe was acquitted on the basis that he had not known, much less intended, that L would kill the victim. The Court of Appeal overturned the acquittals, saying the trial judge should have considered whether Briscoe had been wilfully

blind.

[22] The Supreme Court of Canada agreed, noting that the case had "cried out for an analysis of wilful blindness." (At para. 25.) Charron J. for the Court described the mens rea required to be proven for a conviction of aiding another in the commission of a crime:

Specifically, in the words of s. 21(1)(b), the person must have rendered the assistance for the purpose of aiding the principal offender to commit the crime.

The mens rea requirement reflected in the word "purpose" under s. 21(1)(b) has two components: intent and knowledge. For the intent component, it was settled in *R. v. Hibbert*, [1995] 2 S.C.R. 973, that "purpose" in s. 21(1)(b) should be understood as essentially synonymous with "intention". The Crown must prove that the accused intended to assist the principal in the commission of the offence. The Court emphasized that "purpose" should not be interpreted as incorporating the notion of "desire" into the fault requirement for party liability. It is therefore not required that the accused desired that the offence be successfully committed (*Hibbert*, at para. 35).

As for knowledge, in order to have the intention to assist in the commission of an offence, the aider must know that the perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed. That sufficient knowledge is a prerequisite for intention is simply a matter of common sense. Doherty J.A. in *R. v. Maciel*, 2007 ONCA 196, 219 C.C.C. (3d) 516, provides the following useful explanation of the knowledge requirement which is entirely apposite to this case (at paras. 88-89):

... a person who is alleged to have aided in a murder must be shown to have known that the perpetrator had the intent required for murder under s. 229(a): *R. v. Kirkness* (1990), 60 C.C.C. (3d) 97 (S.C.C.) at 127.

...

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. [At paras. 15-8; emphasis added.]

[23] *Briscoe* demonstrates, then, that although murder is a specific intent offence, the Crown need show only that the 'aider' knew of (or was wilfully blind to) the principal offender's intent to kill and did something for the purpose of assisting him or her to carry out the crime. In the case at bar, aggravated assault (the most serious offence charged) also carries a subjective mens rea -- i.e., the mens rea of ordinary assault plus objective foresight of the risk of bodily harm: see *R. v. D.J.W.* 2011 BCCA 522, aff'd 2012 SCC 63, citing *R. v. Godin* [1994] 2 S.C.R. 484 at 485, and *R. v. Williams* 2003 SCC 41 at para. 22. To be convicted under s. 21(1)(b) in an aggravated assault, the lesson of *Briscoe* is that the Crown need only prove the 'aider' was aware of the principal's intent to assault with objective foresight of bodily harm,

and that the aider acted for the purpose of assisting in the commission of the crime.

- [24] With respect to the mens rea for possession (in this case, possession of a firearm) the trial judge observed at para. 89 that the Crown must prove the accused (principal) had both knowledge of, and some act or measure of control over, the item. He noted that knowledge and control may be inferred from the surrounding circumstances and that possession may be personal, constructive or joint and does not require any proprietary or ownership interest. (See s. 4(3) of the Code.)
- [25] The judge also noted at para. 84 that the precise role played by an accused in a crime need not be determined as long as the trier of fact is satisfied that the accused either committed the crime or aided or abetted in its commission. (Citing *R. v. Haevischer* 2014 BCSC 1863 at paras. 664-5.)

Circumstantial Evidence

- [26] The judge then turned to the application of the foregoing "legal framework" to the "totality of the circumstantial evidence" adduced in this case. Earlier in his reasons, he had reviewed the law relating to circumstantial cases (i.e., those in which one or more material issues turn on purely circumstantial evidence.) He framed the question before him as whether, as the trier of fact, he was "satisfied beyond a reasonable doubt that the only rational inference to be drawn from the evidence is the guilt of the accused in relation to the drive-by shooting and the subsequent burning of the Eagle vehicle." (At para. 7.) After referring to *R. v. Poony* 2017 BCSC 1136 and *R. v. Villaroman* 2016 SCC 33, he summarized the relevant law as follows:
- (a) in some cases, in the absence of a credible explanation, an inference of knowledge may properly be drawn from the circumstantial evidence: *R. v. To*, [1992] B.C.J. No. 1700 (B.C.C.A) [To], cited with approval in *R. v. Vu*, 2002 BCCA 659 at para. 25 [Vu];
 - (b) where an alternative inference is asserted, there needs to be some evidence to support it: *Vu* at para. 26;
 - (c) the trial judge is entitled to apply ordinary human experience and common sense in his/her assessment of the evidence. He/she should not apply speculative reasoning: *R. v. Bi*, 2011 BCCA 10, at paras. 15-16; and
 - (d) as far as competing inferences from circumstantial evidence that might be open to a trial judge are concerned, he/she is not expected to:

treat real life cases as a completely intellectual exercise where no conclusion can be reached if there is the slightest competing possibility. The criminal law requires a very high degree of proof, especially for inferences consistent with guilt, but it does not demand certainty: *To* at para. 41, *McEachern C.J.B.C.*, cited with approval in *R v. Ngo*, 2009 BCCA 301 [Ngo] at para. 55. [At para. 9; emphasis added.]

As will be discussed below, the Supreme Court of Canada in Villaroman rejected the second stated principle as tending to place an onus on accused persons to prove facts and as inconsistent with the obligation of the trier of fact to assess reasonable doubt on all the evidence. (See para. 35.)

[27] At paras. 93-4, the trial judge in the case at bar found that the Crown's case was "significantly corroborate[d]" by the following facts, namely:

- (a) the narrow timeline between the shooting at 221 Crysedale and the burning of the Eagle [T]ruck;
- (b) the link between the Eagle Truck, which was used in the shooting, and the Firearm being located a short distance away from the burnt truck at the Burn Site;
- (c) the links between the Eagle Truck and the Dingwall Yukon, including the Parking Pass being found in the Dingwall Yukon, and the two pieces of a broken head light from the Dingwall Yukon, being found near the Eagle Truck at the Burn Site;
- (d) the fact Dingwall drove to and from the vicinity of Mackenzie and the presence of both Richet and Russell in the Dingwall Yukon at the time of the arrest of all three accused;
- (e) the fact all accused were in the vicinity of Mackenzie between approximately 4:00 a.m. and 4:30 a.m. even though they all resided in Prince George, approximately 190 kilometers away;
- (f) individuals involved in the events at 221 Crysedale must have been familiar with that address or location bearing in mind the quick succession of events;
- (g) they were in possession of the stolen Eagle Truck and the Firearm;
- (h) these individuals were also present at the Burn Site and concealed the Firearm used in the shooting at that general location which could only be accessed from Highway 39. [Emphasis added.]

Unlike defence counsel (see Mr. Russell's factum at para. 57), I interpret subparas. 94 (f),(g), and (h) to mean simply that whoever was involved -- not necessarily the accused -- in the events at 221 Crysedale was familiar with the location, was in possession of the Eagle Truck and the firearm, and was present at the Burn Site.

[28] The trial judge said the real issue before him was whether the guilt of the three accused was the only rational inference to be drawn from the evidence. As mentioned earlier, the accused relied mainly on the lack of physical evidence such as DNA, footprints and tire marks either at 221 Crysedale or the Burn Site and the lack of mud on the accuseds' clothing when they were arrested, as giving rise to a rational inference other than guilt. They also emphasized the 20-minute "gap" between the shooting itself at 4 a.m. and the time when Mr. Findlay first observed the burning Eagle Truck.

[29] The trial judge did not accede to these arguments. Given the totality of the evidence, he found a "clear link" between the stolen Eagle Truck used in the shooting and the Dingwall Yukon in which the accused were found just before their arrest. This "link" included the presence of Ms. Eagle's parking pass in the Dingwall Yukon after it was stopped by police and the pieces of broken headlight from the Dingwall Yukon found at the Burn Site. As for the "gap" in time, the trial judge found that it did not support a rational inference other than the accuseds' guilt -- in fact it did the opposite. In his words:

Ms. Dingwall was clearly at what turned out to be the Burn Site at approximately 4:05 a.m. - 4:10 a.m. when her vehicle was last observed by Mr. Inyallie to be driving slowly in a southward direction toward the Junction. Had Ms. Dingwall left this location and travelled on her route to Prince George at a normal driving speed of 90-100 kilometers per hour, she would have reached Bear Lake approximately an hour later, that is at 5:05 a.m. - 05:10 a.m. She in fact reached Bear Lake 50 minutes after that time, that is, at 5:55 a.m., when she and the co-accused were arrested by Cpl. Warwick.

Accordingly, the only rational inference to draw from this evidence, when considered in the context of the totality of the evidence, is that the Dingwall Yukon stayed in the immediate vicinity of the Burn Site to assist the occupants of the Eagle Truck when they arrived at that location after the shooting. The Dingwall Yukon then departed the Burn Site with Richet and Russell before the burning Eagle Truck was observed by Mr. Findlay at approximately 4:30 a.m. This still left up to 30 minutes of additional unaccounted time from 4:05 a.m. - 4:10 a.m. before the Dingwall Yukon reached Bear Lake at 5:55 a.m. [At paras. 100-1; emphasis added.]

[30] The judge did acknowledge that it could be rationally concluded from the evidence that there was at least one other vehicle and one or more accomplices involved in the shooting and the destruction of the Eagle Truck. In his analysis, however, this did not give rise to a reasonable doubt as to the guilt of the three accused. As he had noted earlier, the Crown was not required to account for the actions of all persons involved; rather, it had only to prove beyond a reasonable doubt all the essential elements of the offences with which the accused were charged. (At para. 103.)

[31] With respect to the parking pass, the defence proffered at least three possible theories as to how it might have come to be found in the Dingwall Yukon. The judge declined to engage in "speculative reasoning" of this kind. The same was true of the suggestion that the broken headlight could have come off the Dingwall Yukon as it passed by the logging road and somehow travelled up that road towards the Burn Site. The judge found this theory defied common sense. (At para. 107.)

[32] The Court agreed with the defence argument that there were "significant frailties" in the GSR evidence, which frailties were admitted by the police who had searched the three accused when they were arrested. Despite other possible sources of contamination, however, the judge noted that the GSR expert had remained of the view that the samples from each accused were what he would expect on a person who had either discharged a firearm, was

present when a firearm was discharged or handled a firearm discharged within the previous two to four hours. This evidence formed part of the totality of the evidence and, the trial judge found, corroborated the Crown's theory of the case "to a limited extent". (At para. 114.)

- [33] At the end of the day, the judge concluded that the only rational inference to be drawn "from all the evidence in this case" was that the Crown had proven all essential elements of the charges beyond a reasonable doubt. Ms. Dingwall was found guilty as an aider or abettor to the events at 221 Crysdale and as a principal or aider or abettor to the burning of the Eagle Truck. Messrs. Richet and Russell were found guilty, either as principals or as aiders or abettors on all charges. (At para. 116.)

Later Reasons

- [34] Later, in reasons for the sentencing of Ms. Dingwall, the judge applied *R. v. Kineapple* [1975] 1 S.C.R. 729 to the charges of mischief and possession of a restricted firearm without a licence, and entered conditional stays against her on those counts. (See 2018 BCSC 1041 at para. 15.)
- [35] In the same reasons, he rejected Ms. Dingwall's argument that the fact she had been convicted only as an aider or abettor on the firearms offences should be regarded as a mitigating factor in her sentencing. He cited *inter alia* *R. v. Kalmikoff* 2016 BCSC 1050; *R. v. Hennessey* 2010 ABCA 274 and *R. v. Nouri* 2015 ONSC 116. In *Nouri*, the accused had "played a distinct role" in an armed robbery and was a first-time offender. The Court had reasoned:

Although Ms. Nouri was not present at the robbery, she played a central part in the planning and preparation that led up to it, she drove the principals to the scene, and she participated in the post-offence division of the spoils. In all of those respects, she played a greater role than Ferguson, whose role was principally to carry out the robbery itself. On balance, I regard her involvement to be somewhat lower on the spectrum of gravity than that of Mr. Ferguson, but not substantially lower. [At para. 31.]

The trial judge concluded in the case at bar that although an offender's role as an aider or abettor is a relevant consideration in sentencing, the extent to which it may be a mitigating factor is "highly contextual" and likely at most to be a minor factor in the analysis. (At para. 57.)

- [36] Ms. Dingwall also argued at sentencing that her conviction had rested on a finding of wilful blindness on her part and that it should be regarded as mitigating in terms of sentence. The judge again disagreed, at least in the circumstances of this case. He stated in part:

In any event, I do not accept that wilful blindness, as a question of law involves a lesser form of *mens rea*. It is the legal equivalent of actual knowledge. See *R. v. Briscoe*, 2010 SCC 13 at para. 21; and *R. v. Ible*, 2015 ABCA 363 at para. 8.

In the circumstances of this case it is clear that Ms. Dingwall:

- (a) was at or around the Burn Site at the relevant time the truck was set on fire and the firearm disposed of; and
- (b) was involved with the other two offenders who were linked to the firearm and the stolen truck.

A restricted weapon was also used in the drive-by shooting.

Accordingly, whether or not Ms. Dingwall actually knew of the specifics surrounding the use of the restricted firearm in the drive-by shooting or was wilfully blind in that regard, it does not affect my conclusion on what is a fit sentence. [At para. 63-6; emphasis added.]

From this it is apparent that the trial judge had found Ms. Dingwall either actually knew of someone's intention to use the gun or was wilfully blind to that intention.

[37] As for Messrs. Russell and Richet, the judge did not make any explicit findings regarding mens rea aside from the general comments at paras. 85-91 of his main reasons. However, Mr. Esson for the Crown referred us to an exchange that took place between the judge and defence counsel in the course of argument below. It appears that counsel for Mr. Russell (not counsel on appeal) was attempting to persuade the Court that no act of aiding the shooter had been 'brought home' to any of the three accused. The judge responded:

THE COURT: In paragraphs 5 and 6 of your submissions, Mr. Aartsen, you make a couple of comments regarding the -- the passenger who exited the vehicle and stood by the door. The evidence is a bit more than that, wasn't it? Mr. Harju's evidence was that, first of all, the passenger opened the door, allowed the shooter -- the person who turned out to be the shooter to get out, held the door open, and then -- until after the shooting was -- was completed, and then gets back in, and closes the door when the shooter jumps into the -- the back of the cab. That's a bit more than just standing by, isn't it? If I were to accept that evidence?

MR. AARTSEN: Well, first of all, if he's the passenger that is sitting next to the door, and that the shooter is the centre person, first of all, Mr. -- if -- that -- that individual, in my respectful submission, just because he lets a person out of the door is not aiding and abetting in law. And I say in my argument that there is no evidence that that person, that passenger even knew that the -- the middle passenger had a -- had a firearm. And he doesn't encourage him, he's really just standing idly by.

There's a lot of inferences -

THE COURT: All right, but I mean the cases are quite clear that I'm not supposed to check my common sense at -- at the door though, Mr. Aartsen, am I? I mean, four o'clock in the morning, door opens, person gets out, shoots, door remains open, person then gets back in the truck, door closes, and off they go. I mean, there are some logical common-sense inferences that can be drawn from that, can't there?

MR. AARTSEN: Well that's for Your Lordship to decide. I mean, whether or not the -- those acts are sufficient in law to form the necessary evidence of aiding and abetting, again that's a factual issue.

THE COURT: Right

MR. AARTSEN: And I -

THE COURT: We agree -- we agree on that. [Emphasis added.]

On Appeal

[38] All three accused appeal their convictions.

Standard of Review

[39] As the trial judge noted, since only circumstantial evidence was adduced on one or more material issues, it is subject to the rule in Hodge's Case -- the rule that in order to convict, the trier of fact must be satisfied beyond a reasonable doubt that guilt is the only rational inference to be drawn in the circumstances of the case. In *R. v. Robinson* 2017 BCCA 6, aff'd 2017 SCC 52, this court noted that the rule has been relaxed in Canada, especially by *R. v. Mitchell* [1964] S.C.R. 471 and *R. v. Cooper* [1978] 1 S.C.R. 860. The law has been clear for some time that the rule does not impose a higher standard of proof than the usual standard of proof beyond a reasonable doubt; nor does it require specific wording in jury instructions -- although it will be helpful to caution juries about drawing inferences too readily. (See Villaroman at para. 30.) As well, it is clear that Hodge's Case applies only to the actus reus of an offence and not to the mens rea. Thus in Mitchell the Court reasoned that the rule provided a formula to assist in applying the reasonable doubt standard in relation only to the commission of the act, as opposed to the intent that accompanied it. In the analysis of Spence J. for the majority:

The first element, assuming every circumstance could be established by evidence, would be capable of proof to a demonstration. The latter element, save perhaps out of the mouth of the accused himself, could never be so proved. The circumstances which establish the former not only can be, but must be consistent with each other, as otherwise a reasonable doubt on the issue arises. The circumstances which establish the latter, being evidence personal to one individual, will seldom, if ever, be wholly consistent with only one conclusion as to his mental state and yet the weight of evidence on the issue may be such as to satisfy the jury, beyond a reasonable doubt, as to the guilty intent of the accused. The instruction of Baron Alderson in Hodge's Case does not apply and was never intended to apply to an issue of this kind [At 479-80; emphasis added.]

(See also *R. v. Boyer* [1969] 1 C.C.C. 106 (B.C.C.A.), *R. v. Salekin* [1978] 5 W.W.R. 295 (B.C.C.A.), *R. v. Vokurka* 2013 NLCA 51, aff'd 2014 SCC 22, and Robinson at para. 25.)

[40] As this court also discussed beginning at para. 31 of Robinson, the standard of appellate review in circumstantial cases is the same as in non-circumstantial cases. Thus the well-known formulations of the standard provided in *R. v. Yebes* [1987] 2 S.C.R. 168 and *R. v. Biniaris* 2000 SCC 15 apply to the question of unreasonable verdict in circumstantial cases as well: could the trier of fact, acting judicially, reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence? (See also Villaroman at para. 55 and *R. v. Jackson* SCC 514 at para. 10.) In Robinson, we summarized this court's task in circumstantial cases as follows:

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.) [At para 38; emphasis by underlining added.]

Unreasonable Verdict

[41] With this standard in mind, I turn to the appellants' arguments on appeal. The majority of these arguments were advanced by counsel for Mr. Russell and were adopted by Mr. Richet and Ms. Dingwall in their shorter factums and oral submissions.

[42] As noted earlier, the trial judge was in error in stating at subpara. 9(b) of his reasons that where an alternative inference (i.e., an inference other than guilt) is asserted, "there needs to be some evidence to support it." This had previously been the law (see especially *R. v. McIver* [1965] 2 O.R. 475 (C.A.), *affd.* [1996] S.C.R. 254), but in Villaroman the Supreme Court ruled that an alternative inference may be drawn even in the absence of supporting evidence as long as it is reasonable and not speculative. As stated by Cromwell J. for the Court:

When assessing circumstantial evidence, the trier of fact should consider "other possible theory[ies]" and "other reasonable possibilities" which are inconsistent with guilt. I agree with the appellants 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.

Of course, the line between a "plausible theory" and "speculation" is not always easy to draw but the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty. [At paras. 37-8; emphasis added.]

- [43] Cromwell J. also stressed that although "inferences consistent with innocence do not have to arise from proven facts", they must be "reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense." (At paras. 35-6.) It is, he said, primarily the task of the trial judge to draw the line between what is "speculative" and what is reasonable doubt. (See also Robinson at paras. 29-30; R. v. Dipnarine 2014 ABCA 328 at para. 22; R. v. Frederickson 2018 BCCA 2 at para. 65; and R. v. S.B.1 2018 ONCA 807 at paras. 126-139.) Indeed, the Supreme Court in Villaroman ultimately upheld the trial judgment, despite the trial judge's misapprehension in that instance that conclusions alternative to guilt had to be "founded on proven facts." The Supreme Court found that the reasons as a whole did not support the proposition that the judge had somehow reversed the burden of proof or lost sight of the proper process of inference-drawing. (See paras. 47-53.) On the other hand, the Court of Appeal had erred in suggesting "purely speculative possible scenarios" and overlooked the "important point that it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation." It had thus gone "beyond the bounds of properly considering the impact of the gaps in the Crown evidence." (At paras. 70-1.)
- [44] The appellants in this case contend that one cannot be satisfied that the trial judge's misstatement of the law did not taint his entire reasons. However, they did not suggest any reasonable inference that might arise from the evidence or absence of evidence that was not considered and rejected by the trial judge. The first 'gap' relied on by Mr. Beatch is the lack of any evidence about the "condition" of the stolen Eagle Truck. In particular, the appellants say that as a result of the absence of evidence on this point, it was impossible for the judge as the trier of fact to determine "who amongst the occupants of the truck necessarily knew it was stolen." Conversely, it is said, the absence of evidence on the point supports an inference that the occupants of the Truck other than the driver (whoever he or she may have been) did not know the Truck was stolen.
- [45] The appellants rely on R. v. A.(I.) (1995) 65 B.C.A.C. 232, in which the two appellants had been seen fleeing from a stolen vehicle that had been involved in an accident. They were both charged with possession of stolen goods and failing to remain at the scene of an accident. The trial judge held that whoever was in the passenger's seat must have been able to see "a great hole where the ignition was" and thus would have known the car was stolen. This court, per Chief Justice McEachern, observed that an absent ignition cylinder does not create "a great hole" and that it could not be assumed beyond a reasonable doubt that a "non-driver" would see and understand that an ignition cylinder was missing and that the car was therefore stolen. (At para. 6.) The conviction of the two appellants for possession of stolen goods was therefore set aside, as was a conviction for failing to remain at the scene of an

accident, given that it was not determinable which appellant had been under the duty of the driver to remain.

- [46] In Mr. Russell's submission, A.(I.) is significant because the trial judge relied on a finding that the accused "were in possession" of the Eagle Truck to support his finding of guilt. As noted earlier, I disagree with this interpretation of subpara. 94(g) of the trial judge's reasons. In my view, he found merely that whoever was involved in the events at 221 Crysedale Drive was in possession of the stolen Eagle Truck and the firearm and was present at the Burn Site. More to the point, the appellants in this case were not charged with possession of a stolen vehicle; nor was it necessary in the circumstances for the trial judge to determine which of the accused had been aware the Eagle Truck was stolen. The charges required that the trial judge determine whether any or all of the accused had carried out the actual shooting at 221 Crysedale and/or the burning of the Eagle Truck at the Burn Site, or had aided or abetted those crimes. Looking at the "totality" of the evidence he concluded that the three accused had been involved in a well-organized plan to commit the shooting or assist in the commission of the shooting and the destruction of the Eagle Truck (which of course involved destruction of evidence that might have been used against the occupants of the Truck.) He 'connected the dots' between the eyewitness evidence provided by Mr. Inyallie and Mr. Findlay, and the evidence at the Burn Site -- the fact the Eagle Truck had been set on fire; the presence of Ms. Eagle's parking pass in the Dingwall Yukon; the headlight evidence; the location of the gun used in the shooting; the fact the three accused were found at 5:52 a.m. where they were; and, to a lesser extent, the GSR evidence. At para. 97, he found a "clear link" between the Eagle Truck used in the shooting, and the Dingwall Yukon in which all three accused were found at Bear Lake. He acknowledged the lack of physical evidence such as fingerprints and DNA but found this did not raise a reasonable doubt. In this sense, I agree with the Crown that the trial judge did consider the absence of evidence as required.
- [47] The second "gap" in evidence relied upon by the appellants was the lack of any "interaction" among the accused themselves or between them and anyone else before the shooting that could be seen as supporting planning or deliberation, the existence of a "conspiracy" or a "co-ordinated common purpose". The absence of such evidence is said to preclude any inference that the 'non-shooters' were even aware of the existence of the gun and its presence in the Eagle Truck before the shooting -- with the result that they lacked the knowledge required for party liability under s. 21(1)(b) of the Code. On this point counsel referred us to R. v. Bernier et. al. 2001 BCCA 394 in which Mr. Justice Low reasoned:

The trial judge did not provide a s.21 analysis of the evidence to support the conclusion that the appellant assisted in the commission of the two weapons offences or that he knew or ought to have known that those offences were a probable consequence of the break and entry and theft. It remains for this court to consider whether the evidence supports the conclusion as to the appellant's intention or legally imputed knowledge.

...

However, from the evidence we know very little about the appellant's associates or about what they discussed with him. There is very little evidence of planning. On the face of it, this was a simple and unsophisticated plan to go in and take the marijuana thought to be in the house. I do not think it can be said on the evidence that the appellant necessarily knew a weapon would be involved; or that he knew or ought to have known from the nature of the unlawful purpose that use of a weapon by his associates would be probable. The Crown had to bring home to the accused a physical or mental connection to the use of a weapon in the break and enter. In my opinion, the evidence falls short of accomplishing that. [At paras. 17, 19; emphasis added.]

In the result, Bernier was found guilty of participating in a "common criminal enterprise" to break into the house containing marihuana and steal it, but his conviction of robbery while using a firearm was set aside and a conviction for robbery simpliciter was substituted. (See also *R. v. Cox* 2019 BCSC 499 at para. 594.)

- [48] The case at bar did not in my view involve a "simple and unsophisticated plan" that evolved as circumstances required. To the contrary, it was well-planned and organized, involving two or three vehicles, the destruction of evidence and the use of a getaway car and driver. The Crown was able to prove a "clear link" between the Eagle Truck and the Dingwall Yukon. There was no suggestion that the objective of the three people in the Eagle Truck was anything other than to shoot at Messrs. Suter and Matson -- this was not a robbery or some other offence gone wrong; nor was it accidental.
- [49] It is simply disingenuous to suggest that two of the people in the Eagle Truck may not have been aware of the shooter's intent, that the person who let the shooter out of the truck just before the shooting was not 'aiding' him or her (and any act done for the purpose of assisting, regardless of its 'causative' role, is sufficient: see *R. v. Blackmore* 2018 BCCA 324 at paras. 28-9), or that whoever was at the Burn Site was not aware of the plan and his or her role in it. As the Crown submitted, it is implausible that criminals willing to commit and able to plan the drive-by shooting would have run the risk of including someone who was unaware of the intended objective and might therefore decide to "back out" at some inconvenient stage when he or she realized what was happening.
- [50] For the same reasons, I also conclude that it was not necessary for the trial judge to reach findings concerning whether the accused were wilfully blind or had explicit knowledge of the plan and its purpose. Again, it was enough for the Court to be satisfied that each had either participated directly in the crimes -- from which the necessary mens rea could be inferred -- or that they had known of the intention of others to commit the crimes or been wilfully blind to such intention, and assisted those persons in committing the crimes. (It also bears repeating that the rule in *Hodge's Case* does not apply to mens rea, although of course a guilty intent must be proven by the Crown beyond a reasonable doubt.)
- [51] At the end of the day, I do not say that every trier of fact would inevitably have reached the same conclusion as the trial judge did: see *Villaroman* at para 69. I am satisfied, however, that the trial judge did not reverse the onus of proof in this case or lose sight of his

obligation to assess reasonable doubt in light of all the circumstances before the Court. He considered the evidence as well as the absence of evidence relied on by the accused. He carefully addressed the 'gaps' pointed to by the defence (i.e., the absence of evidence) and explained why he rejected them. No other rational inferences arising from the absence of evidence have been suggested by counsel and I am unable to think of any that are not purely speculative.

[52] In all the circumstances, it is my view that the trial judge, acting judicially, could reasonably be satisfied beyond a reasonable doubt as to the accuseds' involvement in a common purpose to carry out the shooting by means of the Eagle Truck, travel to the Burn Site and destroy that vehicle, and leave the site in one or more other vehicles, one of which was the Dingwall Yukon. Put another way, I agree with the judge that there was no inference other than guilt "given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense."

[53] It follows that I would not accede to the appellants' submission that the verdicts were unreasonable.

Specific Errors of Law

[54] I set out below what I understand to be the remaining errors in law asserted by the appellants.

Failure to Consider each Accused Separately

[55] Counsel for the appellants submit that the trial judge was required to consider each of the accused separately in his reasons and to explain the basis on which criminal responsibility, including mens rea, was imposed on each. On this point, they cited *R. v. Josipovich* 2019 ONCA 633, a case that involved the conviction by jury of two brothers for second-degree murder. Both brothers testified at trial, "John" admitting that he had shot and killed the victim, while his brother "Mato" testified that John had killed the victim and that he, Mato, had not been party to any plan to murder her and had no involvement in the killing. Doherty J.A. for the Court suggested in the course of his reasons that the trial judge's repeated use of the phrase "John and/or Mato" gave the jury instruction "a tone which suggested at least to some extent that the cases for and against the two brothers stood or fell together." (At para. 45.) The appeal was allowed, however, not on this basis but on the basis that the trial judge had failed to articulate the difference between the mens rea required for the perpetrator of a murder and the mens rea required of an 'aider'. (See paras. 50-52.)

[56] In the case at bar, of course, Mr. Russell and Mr. Richet are legally indistinguishable, in that both were in exactly the same position on the evidence and neither of them testified. It is possible that one was the shooter or that neither was in the car at the time of the shooting, or it is possible that both or neither of them assisted the shooter -- we simply do not know, and it is not necessary to determine that issue.

"Thatcher" Principle

- [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.

This principle has been approved in many judge-alone cases since *Thatcher*, including *R. v. J.F.D.* 2005 BCCA 202 at para. 14 and *R. v. Vu* 2012 SCC 40 at para. 58.

Failure to Provide Adequate Reasons?

- [59] As far as *Sheppard* is concerned, I acknowledge the trial judge could have provided a fuller explanation of his "path to conviction" within the four corners of his main reasons. However, the reasons do, in my view, permit meaningful appellate review and indicate that the trial judge correctly understood where the onus lay and what mens rea was required for conviction under s. 21(1)(b). Again, he considered the various "gaps" in evidence relied on by the defence and explained why he rejected them. Bearing in mind the principle confirmed in *Villaroman* that the Crown need not "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused" and that it is primarily the trial judge's task to draw the line between speculation and reasonable doubt, I am satisfied that, in the words of *Sheppard*, the basis of the trial judge's conclusions is apparent from the record.

Disposition

[60] It follows that I would dismiss the appeals.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Willcock"

Reasons for Judgment of the Honourable Mr. Justice Butler:

Overview

[61] I have had the opportunity to read in draft form the reasons for judgment of Justice Newbury. For the reasons that follow, I am respectfully unable to agree with my colleague's proposed disposition of Ms. Dingwall's appeal from the convictions for the offences that occurred at 221 Crysedale Drive.

[62] I adopt my colleague's thorough summary of the factual background and the trial judge's reasons, and agree with her framing of the law. I also agree with my colleague's analysis and disposition of the appeals by Messrs. Russell and Richet, and her analysis as it applies to Ms. Dingwall's convictions for the offences that took place after the shooting.

[63] However, I am of the view the trial judge erred in concluding that the only rational inference to be drawn from the evidence was that Ms. Dingwall aided or abetted in the offences committed at the Crysedale address. As I will explain, in my view he failed to properly consider the lack of any evidence about Ms. Dingwall's activities before and during the shooting offences, and failed to consider the absence of evidence given Ms. Dingwall's potential liability solely as a party, rather than a principal, to those offences.

[64] As Ms. Dingwall's participation in these offences was not the only rational inference on the evidence, the Crown cannot be taken to have met its burden of proof. As a result, I am of the view that the trial judge's verdict on these counts was unreasonable.

Law

[65] As I have indicated, I accept Justice Newbury's statement of the law of both party liability and the onus of proof in circumstantial cases. I will however briefly expand on some of the points of law relevant to my analysis.

The Onus of Proof: The Evidence Must Foreclose Reasonable Inferences Alternative to Guilt

- [66] Special considerations exist in applying the beyond a reasonable doubt standard in the context of a case based in circumstantial evidence. Because of "the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence", the trier of fact must be satisfied that a guilty verdict is "the only reasonable inference that such evidence permits": *R. v. Villaroman*, 2016 SCC 33 at paras. 29, 30. As Cromwell J. explained in that case:
- [26] 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*. 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*, dissenting but not on this point, at p. 813.
- [67] Cromwell J. expanded: "the danger [Baron Alderson] identified so long ago -- the risk that the jury will 'fill in the blanks' or 'jump to conclusions' -- has more recently been confirmed by social science research" at para. 29, citing Benjamin L. Berger, "The Rule in *Hodge's Case*: Rumours of its Death Are Greatly Exaggerated" (2005) 84 *Can. Bar Rev.* 47 at 52-53.
- [68] Berger there refers to studies demonstrating the tendency of the human mind to fill in blanks. He discusses the concept of the "story model" as set out in Nancy Pennington and Reid Hastie, "The Story Model for Juror Decision Making" in Reid Hastie, ed., *Inside the Juror: The Psychology of Juror Decision-Making* (Cambridge: Cambridge University Press, 1993) 192. As he states, the story model
- . . . assert[s] that juries decide cases based on a process of selecting the best-fit narrative. Of course, guilt in a criminal trial ought not to be founded upon the "best" story, but upon guilt being the only reasonable story.
- [Emphasis added.]
- [69] Berger also provides a useful summary of the difference in determining guilt on circumstantial as opposed to direct evidence, which creates this danger (at 52):

The rule in *Hodge's Case* therefore addresses a particular apprehended danger latent in circumstantial evidence. Direct evidence involves only one evaluation on the part of the fact finder--a determination of whether or not the witness offering direct sensory experience of a crime having been committed is to be believed. In this decision, there is only one opportunity for error on the part of the fact finder. The danger with circumstantial evidence is that there are two potential points of error. The jury must not only decide whether to believe the truth of the

evidence proffered, but to imagine or infer what this evidence might mean. This moment of inference, it is thought, is a dangerous one that must be controlled.

[Emphasis added.]

[70] In other words, there is a human tendency to imagine potentially unrelated facts as part of a cohesive narrative, a tendency that poses a threat to the requirement that the Crown prove its case beyond a reasonable doubt -- a requirement integral to the presumption of innocence.

[71] As the burden of proof rests with the Crown, it is the accused who benefits from an absence of evidence. The Court emphasized in Villaroman that "a reasonable doubt, or theory alternative to guilt, is not rendered 'speculative' by the mere fact that it arises from a lack of evidence" (at para. 36). To the contrary, for the Crown, inferences cannot be drawn from an absence of evidence; as Cromwell J. stressed, "the Crown cannot rely on a gap in the evidence to prove an element of the offence" (at paras. 47-49).

[72] Where a guilty verdict cannot be supported by the evidence, it may be overturned as unreasonable under s. 686(1)(a)(i) of the Criminal Code, R.S.C. 1985, c. C-46. The question for the appeal court 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. As my colleague notes, this principle of circumstantial evidence applies only to the actus reus: draft reasons at para. 39, citing to R. v. Robinson, 2017 BCCA 6 at para. 24; see also R. v. Cooper, 1977 CanLII 11, [1978] 1 S.C.R. 860 at 874-78.

Party Liability: An Aider or Abettor Must Assist or Encourage Before or During the Offence

[73] My colleague has ably addressed the mens rea requirement for party liability. However, as I will discuss below, the issue with Ms. Dingwall's convictions in my view turns on the actus reus.

[74] R. v. Briscoe, 2010 SCC 13 at para. 14 sets out the actus reus for party liability:

The actus reus of aiding or abetting is doing (or, in some circumstances, omitting to do) something that assists or encourages the perpetrator to commit the offence. Broadly speaking, "[t]o aid under s. 21(1)(b) means to assist or help the actor. . . . To abet within the meaning of s. 21(1)(c) includes encouraging, instigating, promoting or procuring the crime to be committed": R. v. Greyeyes, 1997 CanLII 313, [1997] 2 S.C.R. 825 at para. 26.

[Emphasis added.]

[75] Whether the thing that is done (or omitted to be done) is enough to constitute assistance or encouragement is a case-specific assessment. As Justice Saunders explained in R. v. Blackmore, 2018 BCCA 324 at para. 28, "[t]he 'doing something' spoken of by Justice Charron

[in Briscoe] must be more than mere presence at the scene, but how much more is left to be decided case by case". In *Dunlop and Sylvester v. The Queen*, [1979] 2 S.C.R. 881 at 891, cited in *Blackmore* at para. 28, Justice Dickson, as he then was, expanded: "[s]omething more is needed: encouragement of the principal offender; an act which facilitates the commission of the offence, such as keeping watch or enticing the victim away; an act which tends to prevent or hinder interference with accomplishment of the criminal act". An omission, or failure to act, will only give rise to liability where some positive duty exists: *R. v. Rochon*, 2011 QCCA 2012 at paras. 12-28, *aff'd* 2012 SCC 50.

- [76] The standard for assisting or encouraging is not a high one. The Crown does not have to prove that the crime would not have occurred but for the aiding or abetting action: *R. v. Dooley*, 2009 ONCA 910, leave to appeal *ref'd* [2010] S.C.C.A. Nos. 83, 179; *R. v. McRae*, 2016 BCCA 19 at paras. 49-50. "Any act or omission that occurs before or during the commission of the crime, and which somehow and to some extent furthers, facilitates, promotes, assists or encourages the perpetrator in the commission of the crime will suffice, irrespective of any causative role in the commission of the crime": *Dooley* at para. 50 [emphasis added]. That an aiding or abetting action must occur before or during the crime distinguishes it from the separate liability of acting as an accessory after the fact, criminalized by s. 23 of the Code. That an act, and not simply the intention to commit an act, is required distinguishes party liability from common intention under s. 21(2) of the Code.
- [77] In summary, in the aiding and abetting context, the trier of fact must be satisfied the accused did something before or during the offence that assisted or encouraged its commission, and that no reasonable inferences alternative to this exist on the record.

Analysis

- [78] As my colleague acknowledges at paras. 26 and 42 of her draft reasons, the trial judge erred in his statement of the law of circumstantial evidence. He concluded he needed evidence of alternative inferences in order to acquit the accused (at paras. 9(b), 106), when in fact such inferences can arise from gaps in the evidence.
- [79] With respect to Ms. Dingwall's conviction as a party to the offences relating to the shooting, I am of the view that this error is reflected in convictions on an evidentiary record insufficient to prove the case beyond a reasonable doubt.
- [80] I will expand on this point as follows. First, I will discuss the evidence put forward by the Crown at trial, and gaps in the evidence. Second, I will discuss the trial judge's reasons for conviction, identifying why his analysis with respect to Ms. Dingwall's co-accused is insufficient to justify her convictions for the events on Crysdale Drive.
- [81] I will refer to the four convictions with which I am concerned as the "Assault Offences". They are as follows:

- Counts 3 and 4: discharging a firearm with intent to wound Lyle Suter and Michael Matson (respectively), contrary to s. 244(1) of the Code;
- Count 5: intentionally discharging a firearm while being reckless as to the life or safety of another person contrary to s. 244.2(1)(b) of the Code; and
- Count 6: committing aggravated assault contrary to s. 268(1) of the Code.

The Evidence at Trial

- [82] At trial, the case against Ms. Dingwall was built on admissions of fact, evidence of police who inspected the crime scene, the evidence of Mr. Harju who could describe the shooting but not provide identification evidence, surveillance video of a white truck, Mr. Findlay who observed the Eagle Truck burning, and Mr. Inyallie who saw a vehicle similar to the Dingwall Yukon (but not its occupants) near the Burn Site around the time of the shooting.
- [83] There was no testimony from any of the accused or victims of the shooting, direct evidence of identification, or DNA evidence.
- [84] The trial judge set out the key pieces of evidence he relied on to convict Ms. Dingwall and her co-accused at para. 94:
- (a) the narrow timeline between the shooting at 221 Crysedale and the burning of the Eagle truck;
 - (b) the link between the Eagle Truck, which was used in the shooting, and the Firearm being located a short distance away from the burnt truck at the Burn Site;
 - (c) the links between the Eagle Truck and the Dingwall Yukon, including the Parking Pass being found in the Dingwall Yukon, and the two pieces of a broken head light from the Dingwall Yukon, being found near the Eagle Truck at the Burn Site;
 - (d) the fact Dingwall drove to and from the vicinity of Mackenzie and the presence of both Richet and Russell in the Dingwall Yukon at the time of the arrest of all three accused;
 - (e) the fact all accused were in the vicinity of Mackenzie between approximately 4:00 a.m. and 4:30 a.m. even though they all resided in Prince George, approximately 190 kilometers away;
 - (f) individuals involved in the events at 221 Crysedale must have been familiar with that address or location bearing in mind the quick succession of events.
 - (g) they were in possession of the stolen Eagle Truck and the Firearm;
 - (h) these individuals were also present at the Burn Site and concealed the Firearm used in the shooting at that general location which could only be accessed from Highway 39.

[85] In addition, the Crown led gunshot residue (GSR) evidence. The judge stated he was not relying on this evidence to find the parties guilty (at para. 93), but that it did corroborate the Crown's case to a limited extent (at para. 114); alternatively, he would have convicted without it.

[86] Based on this evidence, the trial judge concluded:

- a) Ms. Dingwall was "clearly at what turned out to be the Burn Site at approximately 4:05 a.m.-4:10 a.m. when her vehicle was last observed by Mr. Inyallie to be driving slowly in a southward direction" (at para. 100);
- b) "[T]he Dingwall Yukon [and, presumably, Ms. Dingwall] stayed in the immediate vicinity of the Burn Site to assist the occupants of the Eagle Truck when they arrived at that location after the shooting" (at para. 101 [emphasis added]);
- c) "The Dingwall Yukon [and, presumably, Ms. Dingwall] then departed the Burn Site with Richet and Russell before the burning Eagle Truck was observed by Mr. Findlay at approximately 4:30 a.m." (at para. 101); and
- d) There was "at least one other vehicle" and "an unknown number of other accomplices involved in the shooting and the burning of the Eagle Truck" (at para. 102).

[87] In light of my view of the case against Ms. Dingwall, it is important to emphasize the absence of evidence about matters relevant to the finding of guilt for the Assault Offences. There was no evidence about the following:

- Any planning or organization leading to the shooting or burning of the Eagle Truck;
- Any meeting, communication, or discussion between Ms. Dingwall and anyone else about any of the events that form the basis for the charges;
- The nature of the relationship between Ms. Dingwall and the co-accused;
- The nature of the relationship between the co-accused and the three people at the Crysdale residence;
- The nature of the relationship between Ms. Dingwall and the three people at the Crysdale residence;
- When or how Ms. Dingwall arrived in the vicinity of Mackenzie;
- When or how Messrs. Richet and Russell arrived in Mackenzie;
- Who provided the firearm used in the shooting to the occupants of the Eagle Truck, or when and how that firearm was produced; and
- When, where or how Messrs. Richet and Russell met up with the other person in the Eagle Truck at the time of the shooting, or with the other accomplices and vehicle referred to by the trial judge at para. 102.

[88] As I will discuss, it is this absence of evidence that makes Ms. Dingwall's convictions for the Assault Offences untenable.

An Unreasonable Verdict

[89] My conclusion that Ms. Dingwall's convictions for the Assault Offences are unreasonable is bolstered by two aspects of the trial judge's reasons. First, in finding alternative inferences unavailable on the record, he addressed the actus reus for Ms. Dingwall's co-accused (who were potential principals of the offence) but did not address her liability as someone he had found was not present at the scene of the shooting. Second, there was no basis on which to conclude a plan existed that could provide an inference of Ms. Dingwall's aiding or abetting.

There Was No Evidence to Show Ms. Dingwall Committed the Actus Rei of the Assault Offences

[90] To meet the actus reus requirements for conviction, the trial judge had to determine Ms. Dingwall did something before or during the shooting to assist or encourage the shooter.

[91] A different analysis was required for Ms. Dingwall because she was found to have ancillary liability only for the Assault Offences. While Messrs. Richet and Russell were, as my colleague correctly notes, "legally indistinguishable" in terms of the analysis required to convict (draft RFJ at para. 56), Ms. Dingwall's circumstances were distinct. The trial judge concluded at para. 93:

[T]he accused Dingwall is guilty, as an aider or abettor pursuant to s. 21 of the Criminal Code of the offences with which she is charged in relation to the shooting at 221 Crysedale and as a principal or aider or abettor with respect to the burning of the Eagle Truck at the Burn Site.

[92] This conclusion aligns with key findings at paras. 100 and 101 that Ms. Dingwall was driving near the Burn Site around the time the Assault Offences were being committed, and remained there until the Eagle Truck arrived.

[93] However, the trial judge made no inferences that Ms. Dingwall did anything before or during the Assault Offences that could make her a party. Instead, despite the different bases of liability, his analysis justifying her convictions was combined with his analysis of the case against her co-accused.

[94] The trial judge considered the argument that the evidence left open reasonable alternatives to guilt and found at para. 97 that the "lack of physical evidence such as fingerprints, DNA, footprints, and tire marks either at 221 Crysedale and/or the Burn Site and the lack of mud on the accused's' clothing does not give rise to other rational inferences, or other reasonable possibilities, as to their guilt and does not raise a reasonable doubt." He reasoned that this was so because "there is a clear link between the stolen Eagle Truck, which was used in the shooting, and the Dingwall Yukon in which all three accused were present when they were arrested in Bear Lake."

- [95] I am of the view this analysis provides a basis for finding the actus rei proven for Messrs. Richet and Russell because it shows a "clear link" to the acts that form the basis of the Assault Offences. This is because the trial judge was able to conclude that the co-accused were physically present at Crysedale and thus participated in acts leading to the discharge of the firearm and the assault of Mr. Suter.
- [96] Similarly, this analysis justifies Ms. Dingwall's other convictions. Unlike with the Assault Offences, the trial judge found Ms. Dingwall was present when the Eagle Truck was set alight, and, presumably, when the firearm was discarded near the Burn Site. I agree that the case is close to the line, and that not "every trier of fact would inevitably have reached the same conclusion the trial judge did" on these offences (draft reasons at para. 42). However, given this additional evidence and Ms. Dingwall's clear link to the events at the Burn Site, the trial judge, acting judicially, could reasonably be satisfied that guilt for the firearm offences and for causing mischief and damage to the Eagle Truck was the only reasonable inference available.
- [97] However, that same reasoning does not justify Ms. Dingwall's convictions for the Assault Offences. The judge found that she was not present at the Crysedale shooting. Thus, contrary to the judge's description, there is no "clear link" between her and the Assault Offences.
- [98] As the judge noted at para. 88, referring to *R. v. Ngo*, 2009 BCCA 301 and *R. v. Carrington*, 2017 ONCA 2, the presence of an accused at the scene of an offence, while not in itself sufficient evidence of aiding and abetting, can give rise to an inference of participation. However, Ms. Dingwall was not present at the scene of the Assault Offences.
- [99] The trial judge recognized that Ms. Dingwall's assistance was only provided after, not before or during, the offences. Indeed, he specifically found that she was at the Burn Site (at para. 100) to provide assistance to the co-accused "when they arrived at that location after the shooting" (at para. 101).
- [100] Ms. Dingwall's presence at the Burn Site provided no assistance to the commission of those offences which would support a conviction as a party. The fact that she drove her co-accused towards Prince George in the Dingwall Yukon following the offences is an act that could be characterized as assisting them to escape, though it occurred well after the Assault Offences were concluded and the "escape" began some distance from where those offences took place. However, driving away from the Burn Site is not an act of assistance occurring before or at the time of the offence. In *Dooley*, at para 123, Justice Doherty described the type of actions required to satisfy the actus reus for a party, with emphasis on the timing of those actions:

The authorities take a wide view of the necessary connection between the acts of alleged aiding or abetting and the commission of the offence. Any act or omission that occurs before or during the commission of the crime, and which somehow and to some extent furthers, facilitates, promotes, assists or encourages the perpetrator in the commission of the crime will suffice, irrespective of any causative role in the commission of the crime. The necessary connection

between the accessory's conduct and the perpetrator's commission of the crime is captured by phrases such as "actual assistance or encouragement" or "assistance or encouragement in fact" or as the appellants argue, conduct that "has the effect" of aiding or abetting [citations omitted].

[Emphasis added.]

- [101] I am of the view the trial judge lost sight of the Crown's obligation to prove Ms. Dingwall committed an act of assistance or encouragement before or during the commission of the Assault Offences in order to establish her liability as a party. While the act of driving her co-accused away from the Burn Site in the Dingwall Yukon may have been sufficient to support a charge pursuant to s. 23(1) of the Code of being an accessory after the fact, such a line of argument was not advanced at trial.
- [102] It may be that this error stemmed from the thrust of the arguments at trial, and the trial judge's consequent focus, on mens rea. I agree with my colleague at para. 36 that it is apparent from the sentencing reasons that the trial judge found that Ms. Dingwall either actually knew of someone's intention to use the gun or was wilfully blind to that intention. In focusing on wilful blindness, the trial judge failed to appreciate the absence of evidence to establish facts or support inferences that could establish an actual act making Ms. Dingwall an aider or abettor.
- [103] In my view, the lack of evidence to show the actus rei of aiding or abetting is sufficient to overturn Ms. Dingwall's convictions for the Assault Offences. On the facts as the trial judge found them, Ms. Dingwall assisted in burning the Eagle Truck and driving two people who were present at the shooting away from Mackenzie. He made no finding that she did anything else.
- [104] The clear alternate possibility exists that she did only these things, and played no role in encouraging, planning, or otherwise assisting in the shooting. On the evidence adduced by the Crown, this remains a reasonable inference.
- [105] Neither the Crown nor Ms. Dingwall led evidence as to what she did before the Eagle Truck was burned. To convict Ms. Dingwall for the Assault Offences because she did not lead evidence that she was not encouraging or assisting in the shooting is a clear reversal of the burden of proof. It is also contrary to the principle established in Villaroman that a reasonable doubt is not speculative merely because it is based on an absence of evidence.
- [106] The guidance given by Villaroman regarding a "reasonable" inference is that "inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense" (at para. 36). A reasonable inference should not be "speculative", though "[o]f course, the line between a 'plausible theory' and 'speculation' is not always easy to draw" (at para. 38).

- [107] We have no insight into why Ms. Dingwall agreed to be at the Burn Site around 4:00 a.m. on July 7, 2016. It is reasonable to suppose she may have agreed to assist in burning the Eagle Truck and providing a ride to Prince George, but not have done anything further. She may have not known the shooting was happening, or may have been fully aware, but regardless have done nothing to aid or abet in it.
- [108] To the extent this possibility is speculative, the possibility she did something to help the Assault Offences come about is just as speculative. This speculation cannot be the basis for multiple serious criminal convictions.

There is No Basis On Which to Find Ms. Dingwall Committed Acts of Planning

- [109] While the above analysis is sufficient to set aside the verdict on the Assault Offences for Ms. Dingwall, I want to address the difficulty with the inference that these offences were in some way planned, and the additional inference that Ms. Dingwall's aiding or abetting action came through some role in planning.
- [110] My colleague in her draft reasons describes and accepts the inference of planning as such in relation to the *mentes rea* of the offences:
- [48] The case at bar did not in my view involve a "simple and unsophisticated plan" that evolved as circumstances required. To the contrary, it was well-planned and organized, involving two or three vehicles, the destruction of evidence and the use of a getaway car and driver. The Crown was able to prove a "clear link" between the Eagle Truck and the Dingwall Yukon. There was no suggestion that the objective of the three people in the Eagle Truck was anything other than to shoot at Messrs. Suter and Matson--this was not a robbery or some other offence gone wrong; nor was it accidental.
- [49] It is simply disingenuous to suggest . . . that whoever was at the Burn Site was not aware of the plan and his or her role in it.
- [111] One might argue, on such logic, that the trial judge's finding the *actus rei* of aiding and abetting had been committed was based on an implication Ms. Dingwall had committed acts of planning, thus supporting or encouraging the offences to come about.
- [112] On this point I must respectfully disagree. I am of the view that given the paucity of evidence, an inference of planning cannot ground liability as the inference that she was not involved in planning remains both reasonable and rational.
- [113] It must be again emphasized that there was no evidence of planning in general; Ms. Dingwall's relationship with the co-accused or the three people at the Crysedale house; or Ms. Dingwall's involvement in any discussions, communication, planning, or any other act leading up to the shooting. It is only possible to find Ms. Dingwall guilty of the Assault Offences on the basis of an act of planning if the only reasonable inference arising from all the actual evidence is that there was a plan, and she was involved in it.

- [114] My colleague accepts both the proposition that the shooting was well-planned and organized and that Ms. Dingwall was part of the planning. I cannot accept either.
- [115] In my view, the conclusions that (a) the shooting was well-planned and organized and (b) Ms. Dingwall must have been involved in some form of preparation for the shooting because someone who was not involved would not have been included in the plan involve circular reasoning.
- [116] Nothing supports the conclusion that the shooting was well-planned and organized other than that the sequence of events unfolded as it did. Yet the events themselves do not lead inevitably to the conclusion that they were well-planned. It is a reasonable possibility that Ms. Dingwall had no knowledge, before the shooting occurred, that anyone (whether the co-accused or the unidentified person in the Eagle Truck) possessed a firearm. The evidence from Mr. Harju establishes there were three individuals sitting out front of the Crysedale residence at 4:00 a.m. Did the people in the Eagle Truck know that, or did they have some other plan to confront an individual at the Crysedale house, or steal something from that house in the middle of the night, but the plan changed when they saw the group outside? With no information about the relationship between the accused and the victims (if there is one) -- and what may have motivated the shooting -- it is not possible to draw inferences about whether the shooting was premeditated as opposed to a rash or random decision. Indeed, the actions of burning the Eagle Truck (which immediately drew suspicion and police activity), throwing the firearm away close to the burning truck, and taking the parking pass at least equally suggest a poorly thought out or an unplanned sequence of events. Thus, while it would be insufficient evidence of the *actus rei* to say there was a plan and therefore Ms. Dingwall must have been part of it somehow, the record does not allow for that conclusion.
- [117] Similarly, the Crown's suggested rationale for the inference that Ms. Dingwall was involved in planning the Assault Offences relies on circular logic. To propose she must have been involved because no reasonable criminal would have someone drive them back to Prince George after committing a shooting unless that driver was fully informed about the planning does not stand up to critical analysis. It starts from an assumption that the events transpired exactly as planned, which, as I have suggested, is not the only reasonable inference. It also assumes that all persons who commit crimes only rely on the assistance of trusted deputies who are fully informed of their plans in advance. I do not accept that this is the only way crimes are carried out, nor that this is the only reasonable inference on this sparse record, considered, to quote Villaroman, "in light of human experience and common sense" (at para. 30).
- [118] In the absence of any evidence of planning, let alone planning that included Ms. Dingwall, and any evidence about the relationship between the shooters and the intended victims, it is impossible to draw safe conclusions about organization and planning and Ms. Dingwall's involvement therein.

Conclusion

[119] In summary, I am of the view that the trial judge engaged in the kind of speculative reasoning described by Cromwell J. in *Villaroman*. He filled in the gaps by choosing the "best-fit narrative". The best-fit story is not proof beyond a reasonable doubt, and is insufficient to find guilt. Ms. Dingwall's guilt was not the only reasonable inference to be drawn from the evidence and, in particular, the lack of evidence of her involvement in the Assault Offences.

[120] I would allow Ms. Dingwall's appeal with respect to the Assault Offences and, pursuant to s. 686(2), direct acquittals for those offences. I would dismiss Ms. Dingwall's appeal of her other convictions, and dismiss the appeals of Messrs. Russell and Richet.

"The Honourable Mr. Justice Butler"

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