File No. 39274

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for the Province of British Columbia)

BETWEEN:

MERANDA LEIGH DINGWALL

APPELLANT
(APPELLANT)

AND

HER MAJESTY THE QUEEN

RESPONDENT
(RESPONDENT)

and

BETWEEN:

CHRISTOPHER RYAN RUSSELL

APPELLANT
(APPELLANT)

AND:

HER MAJESTY THE QUEEN

RESPONDENT
(RESPONDENT)

BETWEEN:

KELLY MICHAEL RICHET

APPELLANT
(APPELLANT)

AND:

HER MAJESTY THE QUEEN

RESPONDENT
(RESPONDENT)

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OVERVIEW

1) Christopher Russell, Kelly Michael Richet, and Meranda Leigh Dingwall were prosecuted on an Indictment alleging a variety of offences said to have been committed in connection with a shooting in MacKenzie, British Columbia in the early-morning hours of July 7, 2016. The most serious offences alleged against them required the Crown to prove that they acted with the particularized specific intent to wound or maim two named complainants. As the trial judge notes in his Reasons for Judgment, the Crown's case on all counts was "based entirely on circumstantial evidence"[1]. All three were convicted of all counts.

2) On appeal to the British Columbia Court of Appeal, the three advanced common arguments relating to the trial judge's treatment of circumstantial evidence and his treatment of the party liability provisions in s.21(1) of the *Criminal Code*. All three appeals were dismissed (Newbury, Willcock J.J.A., concurring, Butler J.A. dissenting in part). Justice Butler would have allowed the appeal by Ms. Dingwall on the offences related to the shooting (Counts 3, 4, 5, and 6). The question of law on which he dissented is this:

> Did the trial judge err in law in his determination that the accused's guilt on Counts 3, 4, 5 and 6 was the only reasonable conclusion available on the totality of the evidence?

3) Ms Dingwall appeals as of right on this question of law. Christopher Russell, and Kelly Michael Richet were granted leave to appeal on the same question of law on the same counts as Ms Dingwall.[2]

4) The appellants submit that the trial judge did "err in law" as contemplated by the question in issue. More particularly, he committed a clear legal error in his legal analysis of the law that applies to circumstantial evidence, and he arrived at verdicts that are unreasonable.

5) Dealing first with the legal error in his analysis of circumstantial evidence, the trial

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[1] Reasons for Judgment on Conviction at para 6 [Appellants' Record at Tab 1]

[2] Order granting Leave to Appeal, 2021 CanLII 1100 (S.C.C.) [Appellants' Record at Tab 8]

judge wrongly held that "where an alternative inference [alternative to knowledge/guilt] is asserted, there needs to be some evidence to support it".[3] The Court will immediately recognize that this proposition of law is contrary to the clear statement of principle described by the Court in ***Villaroman***[4]. As Justice Cromwell made clear in ***Villaroman***, inferences consistent with innocence do not need to be based on proven facts.

6) All three judges in the Court of Appeal accepted that the trial judge's statement was a legal error. Notwithstanding the error, the majority, per Justice Newbury, dismissed the appeal because the 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." [emphasis Justice Newbury's][5]. Importantly, the majority did not refer to the so-called "curative proviso" in s.686(1)(b)(iii) to dismiss this ground of appeal. And to be clear, the Crown did not rely on the proviso in its argument. In his dissent in relation to Ms Dingwall's conviction on the four counts at issue, Justice Butler not only accepted that the judge committed the error, but he also found that the "error [was] reflected in [the] convictions [of Ms Dingwall]"[6].

7) The appellants respectfully submit that, exactly as the Court of Appeal found, the trial judge committed a legal error in his treatment of circumstantial evidence. He erred by requiring that inferences consistent with innocence had to be based on proven facts. The appellants submit that the error ought to result in a new trial, and it can not be cured by an application of the curative proviso (assuming the Crown attempts to rely on the proviso in this court).

8) Turning to the reasonableness of the verdict, the appellants submit that the Crown's entirely circumstantial case fell far short of providing an evidentiary basis

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[3] Reasons for Judgment on Conviction at para 9 [Appellants' Record at Tab 1]

[4] ***R. v. Villaroman***, 2016 SCC 33 (CanLII), [2016] 1 SCR 1000, at para 35

[5] Reasons for Judgment of BCCA at para 44, [Appellants' Record at Tab 3]

[6] Reasons for Judgment of BCCA at para 69, [Appellants' Record at Tab 3]

on which a properly instructed jury could ever conclude that the appellants' guilt was the only reasonable inference.

9) In addition to the two issues noted above, there are three further legal issues embedded in this case that the Court may find it necessary to address in resolving this appeal. The first additional issue arises from the Court of Appeal's dismissal of the appeals notwithstanding the finding that the trial judge committed a clear error of law, and notwithstanding the failure of the Crown to invoke the curative proviso. The appellants submit that the Court of Appeal wrongly imposed a burden on the appellants, one that went beyond demonstrating error of law, and in doing so the Court of Appeal improperly exercised its limited appellate jurisdiction.

10) The second additional issue requires the Court to consider whether a legal principle dealing with the treatment of circumstantial evidence described 55 years ago in ***The Queen v. Mitchell*** 1964 CanLII 42 (SCC), [1964] S.C.R. 471, remains good law in light of ***Villaroman***. In ***Mitchell***, the Court noted that the rule in ***Hodge's Case*** did not apply to the *mens rea* of an offence. In the instant case, all three judges in the Court of Appeal relied on ***Mitchell***. As an example, Justice Butler held in his partially dissenting reasons that the question of "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 ... applies only to the *actus reus*"[7]. The Court of Appeal did not consider the reasonableness of the verdict from the point of view of whether the circumstantial evidence supported the verdicts on the element of intent.

11) The appellants respectfully submit that, in this entirely circumstantial case, the Court will have to determine whether the principle described in ***Mitchell*** survives. They submit that the principle described in ***Mitchell*** has been entirely displaced by subsequent cases, most notably, ***Villaroman***.

12) The final additional issue embedded in this appeal flows from the trial judge's

[7] Reasons for Judgment of BCCA at para 72, [Appellants' Record at Tab 3]

reliance on ***R. v. Thatcher***, [1987] 1 SCR 652. As is well understood, ***Thatcher*** is authority for the broad proposition that the law is indifferent as to which of the various routes to liability for a party set out in s.21(1) of the *Criminal Code* supports a conviction; they all ultimately represent "one single mode of incurring criminal liability"[8]. Accordingly, there is no need for jury unanimity on which route applies. The appellants take no issue with ***Thatcher***. Their complaint is that the trial judge wrongly treated the principle described in ***Thatcher*** as an evidentiary and intellectual shortcut. Taking that shortcut effectively caused him to lose sight of the fact that, "although the ultimate legal liability is the same for a principal or for an aider or abettor, the findings of fact necessary and the specific legal principles which apply to each are different"[9]. By interpreting ***Thatcher*** as he did, the trial judge failed to address the separate elements of the offences and the various potential routes to conviction. The Court of Appeal in the instant case approved of the trial judge's reliance on ***Thatcher***. When this Court considers the reasonableness of the verdict from the perspective of a "properly instructed jury", it will have to address whether the trial judge's approach is the correct one.

13) The final introductory point to note is that, while the appellants' arguments apply to <u>all</u> counts on which convictions were entered, the dismissal of their applications for leave to appeal all convictions means that this factum will address the trial judge's errors in the limited context of Counts 3, 4, 5, and 6.

PART I ~ STATEMENT OF FACTS

<u>A. The Events</u>

14) The appellants were tried on a 19 count Indictment before Justice Abrioux (as he then was), sitting without a jury. The Crown directed stays of proceedings on several of the counts, both before, and during the trial; other counts were

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[8] ***Thatcher*** at para 72.

[9] Per Justice LeBel in his concurring reasons in ***R. v. Pickton***, [2010] 2 SCR 198

judicially stayed on an application of the principles set out in ***R. v. Kineapple***[10]. The most serious charges the appellants faced, and the only counts at issue on this appeal, were these:

a) Counts 3 and 4 – discharging a firearm at named complainants with the intent to wound two named complainants,

b) Count 5 – intentionally discharging a firearm while being reckless as to the safety of others, and

c) Count – 6 aggravated assault (the shooting).

15) For the purposes of this appeal, the facts are uncontroversial, and they may be addressed in narrative fashion based on the reasons of the trial judge and the Court of Appeal and with only limited reference to the transcript.

16) The narrative begins with the theft of a white pickup truck belonging to Ms. Debra Eagle in Prince George on July 06, 2016, approximately 24 hours before the shooting. There was no evidence linking any of the appellants to the theft of that truck.

17) To get from Prince George to the site of the shooting in MacKenzie, one travels approximately 160 kilometers north on Highway 97, and then a further 25 kilometers north-west on Highway 39. As the trial judge notes in his reasons, Highway 39 terminates at MacKenzie, and is the only road in or out of the town. There was no evidence about who drove the stolen white pickup from Prince George to MacKenzie.

18) Between 4:05 a.m. and 4:10 a.m. on July 07, 2016, Mr. Cheyenne Inyallie, who was driving to work at a mill in MacKenzie, saw a GMC Yukon (a full-size SUV), owned by the appellant Meranda Dingwall (the (Dingwall Yukon"), at the junction of a logging road and Highway 39[11]. That junction with the logging road is approximately 20 km from MacKenzie[12]. Mr. Inyallie also saw a "newer" Ford

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[10] ***R. v. Kineapple,*** 1974 CanLII 14 (SCC), [1975] 1 S.C.R. 729

[11] Reasons for Judgment on Conviction at paras 33-36; 73(e) and (f)) [Appellants' Record at Tab 1]

[12] Reasons for Judgment on Conviction at para 19 [Appellants' Record at Tab 1]

F150 pickup, with what he "believed to be a double cab" (which would be potentially capable of carrying as many as six people). Mr. Inyallie "was unable to identify any individuals or give any descriptions of the occupants of either vehicle".[13]

19) The trial judge made a point of noting that trial counsel for Ms Dingwall was "correct to have acknowledged in his submissions that his client was at what turned out to be the Burn Site [where the Yukon was first seen] at approximately 4:05 to 4:10 a.m.".[14] The point is significant as it means that Ms Dingwall could not have been at the scene of the shooting that was unfolding at approximately the same time 20 kilometres away.

20) Turning to the shooting itself, it happened in a small subdivision in MacKenzie near a 90-degree corner where Manson Crescent, which runs east-west, turns north, and becomes Crysdale Drive. The house at issue, 221 Crysdale, is on the left as one heads north on Crysdale; it is 3 houses north of the corner where Manson changes to Crysdale. According to Cst. Hawco, one of the investigators, the house on Crysdale was a "known drug house"[15]. There is a small cul-de-sac on south-west part of the corner where Manson changes to Crysdale. The only eyewitness to the shooting who testified, Mr. Troy Harju, lives in one of the four houses in that cul-de-sac.

21) The trial judge summarized the evidence about the shooting this way:

> [59] 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 Crysdale. That person then raised a handgun and shot three to four times towards the residence and the three people on the front lawn.
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[13] Reasons for Judgment on Conviction at paragraphs 33-36 [Appellants' Record at Tab 1]

[14] Reasons for Judgment on Conviction at para 73(f) [Appellants' Record at Tab 1]

[15] Trial transcript, pg. 45, ll 32-45 [Appellants' Record Vol. II]

> [65] 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.[16]

22) The only additional evidence from Mr. Harju which deserves mention relates to his testimony about what the two people who got out of the truck were wearing. In his reasons, the judge describes Mr. Harju's testimony on the point:

> [61] Mr. Harju could not identify the occupants of the truck that pulled up in front of 221 Crysdale, as they had "baggy clothing", wore "hoodies" and "had their faces covered with something".
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> • • •
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> [63] 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.[17]

23) In cross-examination Mr. Harju also gave this evidence:

> Q Okay. Now, the people that got out, were you in a position to see their faces?
> A No, no.
> Q Was it -- was there any particular reason for that, or --
> A They were -- they were covered up. They had hoodies on, and they had stuff over their face.
> Q Did both have hoodies on, or --
> A I can't say for sure. I just -- I know they had stuff over their -- they were covered up to the point that I couldn't -- I couldn't recognize anybody.
> Q Do you have a clear recollection of any items of clothing that were on either person that got out?
> A No.[18]

24) While Mr. Harju did offer a limited description of the three people in the truck, the trial judge found, for a variety of reasons, that he "[did] not find Mr. Harju's

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[16] Reasons for Judgment on Conviction at pars 59 & 65 [Appellants' Record at Tab 1]

[17] Reasons for Judgment on Conviction at paragraphs 61-63 [Appellants' Record at Tab 1]

[18] Trial transcript, pg. 301, ll. 21-35 [Appellants' Record at Vol. II]

physical description of the occupants as being reliable"[19].

25) Mr. Lyle Suter, one of the three people on the front lawn outside the house on Crysdale, was shot in the leg (and later taken to hospital by Mr. Harju). The other two people ran into the house[20]. The three people who were on the lawn outside the house on Crysdale at the time of the shooting did not cooperate with the police, and none testified at trial.

26) After leaving the scene of the shooting, the stolen white truck, with a person riding in the back, was recorded on the external security video system of a bar near the center of MacKenzie. The truck was heading south – i.e. out of town.[21]

27) The next sighting of the stolen truck was at approximately 4:31 a.m. when it was spotted, in flames, by Mr. Nathan Findlay at the same place where Ms. Dingwall's Yukon and the newer Ford 150 were seen between 4:05 a.m. and 4:10 a.m.[22] Mr. Findlay approached the burning truck but did not "see anyone around"[23].

28) At 5:52 a.m. RCMP Cpl. Warwick, who had been dispatched from Prince George in response to the shooting, was heading north on Highway 97 when he spotted the Dingwall Yukon heading south. Corporal Warwick stopped the Yukon at Bear Lake, "approximately 75 kilometers north of Prince George and approximately 110 kilometers south of Mackenzie. Bear Lake is approximately 95- 100 kilometers from the Burn Site".[24] Ms Dingwall was driving the Yukon, with Mr. Russell and Mr. Richet as the only passengers. Corporal Warwick arrested all three appellants.

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[19] Reasons for Judgment on Conviction at para 71 [Appellants' Record at Tab 1]

[20] Reasons for Judgment on Conviction at para 66-67 [Appellants' Record at Tab 1]

[21] Reasons for Judgment on Conviction at para 73 [Appellants' Record at Tab 1]

[22] Reasons for Judgment on Conviction at para 37 [Appellants' Record at Tab 1]

[23] Admissions of Fact #2 [Appellants' Record at Tab 12]

[24] Reasons for Judgment on Conviction at para 20 [Appellants' Record at Tab 1]

29) A “handicap pass” issued to the owner of the stolen pickup truck was found in the Yukon when the three accused were arrested. It was not clear on the evidence where the pass was located in the Dingwall Yukon when it was stopped by the police – the pass was only discovered after the Dingwall Yukon was loaded on a truck and taken to a police garage to be searched.

30) Following the arrest of the appellants, other officers arrived in Bear Lake to deal with them. The three were each placed in separate police cars at the request of Cpl. Murray, who wanted to collect gun-shot-residue (“GSR") from them. Corporal Murray attended and collected samples from the accused. As the trial judge notes, the tests revealed the presence of gun-shot-residue at “very low to minute levels”[25].

31) While the judge acknowledged that the amounts of gun-shot-residue were “very low to minute levels”, it might be helpful to understand just how low the levels actually were. Dr. Hearns gave this testimony about the amounts of gun-shot-residue one would expect to find on someone within 30 minutes of a shooting:

> A But we would expect to find literally thousands, if not not [sic] tens of thousands, if not more, particles on the hands and face and clothing of a person immediately having fired a firearm, meaning within the next -- within the first 30 minutes. [26]

32) Turning to what was actually found, the results can be found in tables presented in Dr. Hearn’s “Particle Summary Sheet”[27] . Dr. Hearn described the important part of the tables this way:

> In particular, in the fourth column from the left, there is a column entitled by the letters "Pb Ba Sb". That is the shorthand notation for lead, barium and antimony that I presented yesterday. It is these -- this chemical composition which is characteristic of gunshot residue having come from a firearm, and in that column is summarized a number of particles which were identified and accepted on each of the – or a combination thereof of the four

[25] Reasons for Judgment on Conviction at para 111 [Appellants’ Record at Tab 1]

[26] Trial transcript, pg. 540, ll. 26-30 [Appellants’ Record Vol. III]

[27] Ex. 43 at trial, “Particle Summary Sheet” [Appellants’ Record at Tab 15]

stubs which were analyzed.[28]

33) Importantly, Dr. Hearns testified that, ordinarily, he would expect to see "literally thousands, if not not [sic] tens of thousands, if not more, particles on the hands and face and clothing of a person" within 30 minutes of being in the proximity of a gunshot. The particles he would expect to see were of a particular composition that serves as a marker for the presence of GSR. What the evidence revealed, however, was that the applicants each had just a few particles of GSR on them.

34) In Mr. Russell's case, there were only 2 particles on his left hand and 1 on his right hand; there were no particles on his face. In other words, there were exactly three "micron sized" particles of gun-shot-residue on Mr. Russell. There were six of the particles on Mr. Richet, and five on Ms. Dingwall.

B. The Position of the Crown at trial:

35) In closing argument, the Crown's described its overarching theory of the case:

> The strength in the Crown's case is based on the ample, uncontroverted evidence that ties all three accused back to the burning stolen truck, combined with extensive evidence, including the firearm used in the shooting found nearby that ties the stolen truck to the shooting itself. This evidence is bolstered by the positive gunshot residue samples collected from all three, the tight timeline of the shooting, 0400 hours approximately for the time of the shooting, the discovery of the burning truck at 0431 hours, and the arrest of the accused with incriminating evidence at 0555 hours leaves the only reasonable conclusion being that the same people who committed the shooting and stashed the gun were the same people who abandoned and burned Debra Eagle's stolen pickup truck. [29]

36) The Crown's reliance on s.21(1) was set out in these terms:

> MS. NORLUND: Yes, so it is the Crown's position with respect to party liability that Mr. Russell, Mr. Richet, and Ms. Dingwall took active part in the shooting at 221 Crysdale Drive, and that they participated either as co-principals in the shooting or alternatively as parties pursuant to s.

[28] Trial transcript, pg. 524, ll. 1-21 [Appellants' Record Vol. III]

[29] Trial transcript, pg. 567, ll. 5-21 [Appellants' Record Vol. III]

> 21(b) or (c) of the *Criminal Code* by assisting or actively encouraging either a named or unnamed party.[30]

37) Crown counsel made these concessions about the involvement of other people in the crimes at issue:

> Now, that there is a Ford F150 at this scene, and it is seen backing down a road is an interesting oddity, but it's clear that vehicle doesn't match Mr. Harju's account, and from a timing perspective could not be one used for the shooting.
>
> Now, it may well be, and the Crown -- and the Crown's submissions, if you accept the timelines the Crown is putting forward, it is necessary that there is at least one more unknown person involved in this. Mr. Inyallie observes what he takes to be a white Suburban type vehicle moving, he sees brake lights on, he can tell that there's people in it, and it's doing things at the logging road. So there are -- there must be, on the Crown's theory, other unknown people involved in this escapade. I don't believe that we have all of the perpetrators of this shooting present before you for trial.[31]

38) The Crown's submissions did not address the specific intent elements of each of the charges in the Indictment.

C. The Trial Judge's Reasons for Judgment

39) Distilled to their essence, the trial judge's reasons amount to a general recitation of the evidence, a broad statement of some of the relevant legal principles, and his ultimate finding of guilt which he expressed this way:

> [116] For the reasons I have outlined, I have concluded that the only rational inference to draw from the evidence in this case is that the Crown has proven beyond a reasonable doubt all of the essential elements with respect to each count with which the accused remain charged, both in relation to the shooting and the burning of the Eagle Truck. **Ms. Dingwall's guilt is 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. Mr. Richet and Mr. Russell's guilt is either as principals or as aiders or abettors** as to the events at 221 Crysdale and/or the burning of the Eagle Truck. (emphasis added)

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[30] Trial transcript, pg. 573, ll. 35-33 [Appellants' Record at Vol. III]

[31] Trial transcript, pg. 586 ll. 11-24 [Appellants' Record at Vol. III]

40) It is fair to say that the trial judge's reasons do not include any analysis linking the evidence to each of the accused; nor is there any analysis relating to the elements of the various offences or the separate pathways to conviction under the party liability provisions in s.21 of the *Criminal Code*. As Justice Newbury put it in her reasons for the majority in the Court of Appeal, "the trial judge could have provided a fuller explanation of his "path to conviction" within the four corners of his main reasons"[32] – this point will be addressed in greater detail in the argument that follows.

41) For the purposes of this appeal, one of the key passages in the trial judge's reasons is found in his exposition on the legal principles relating to circumstantial evidence:

> [9] The following principles also apply:
>
> (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 CanLII 913 (BC CA), [1992] B.C.J. No. 1700 (B.C.C.A) [*To*], cited with approval in *R. v. Vu*, 2002 BCCA 659 (CanLII) at para. 25 [*Vu*];
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> (b) **where an alternative inference is asserted, there needs to be some evidence to support it**: *Vu* at para. 26; (emphasis added)
>
> • • •[33]

42) The appellants' basic proposition on this appeal is that the highlighted portions of the passage from the trial judge's reasons quoted above represents a clear legal error as it is inconsistent with the principles set out by this Court in ***Villaroman***.

D. Court of Appeal for British Columbia

43) The appellants advanced five related (intertwined) arguments in the Court of Appeal. The overall thrust of the arguments was that the trial judge erred in his analysis and application of the principles of party liability, and that he erred in his

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[32] Reasons for Judgment of BCCA at para 59, [Appellants' Record at Tab 3]

[33] Reasons for Judgment on Conviction at para 9 [Appellants' Record at Tab 1]

analysis and use of circumstantial evidence in finding the appellants were guilty as parties. The appellants ultimately argued that, when properly analyzed, the circumstantial evidence did not support convictions and the verdicts were therefore unreasonable.

i. The Majority:

44) The first point to note about the reasons of the majority in the Court of Appeal is that they accepted the appellants' argument that the trial judge committed legal error in his treatment of circumstantial evidence. Justice Newbury made the point this way for the majority:

> [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 CanLII 26 (ON CA), [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.* ... [emphasis Justice Newbury's]
>
> (and see also para 26 of Justice Newbury's ruling)

45) Notwithstanding the acceptance of the appellants' argument that the trial judge committed legal error, the majority dismissed the appellants' arguments with this conclusion:

> [44] The appellants in this case contend that one cannot be satisfied that the trial judge's mis-statement 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. ... [emphasis Justice Newbury's]

46) Justice Newbury went on her reasons to address, and reject, two examples of "gaps in the evidence" that the appellants had suggested were capable of supporting inferences inconsistent with guilt. The first suggested gap dealt with the trial judge's conclusion that "they were in possession of the stolen Eagle Truck and the Firearm" that was part of his explanation for why he the accused

guilty as parties[34]. The appellants argued that there was no evidentiary basis on which to conclude that the appellants knew the truck was stolen.

47) Justice Newbury rejected the appellants' argument on this point, largely on the basis that "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."[35] Justice Newbury did not address the fact that the trial judge clearly made a finding of fact that the truck was stolen, and that finding of fact was obviously important to his reasoning process.

48) The second gap in the evidence noted by the appellants was the absence of any evidence of planning. Very broadly, the appellants argued that the lack of any evidence of panning made it impossible to conclude that anyone other than the shooter knew the following things in advance of the shooting: that a gun was present, that it was going to be discharged at anyone, or that it would be discharged with the intent to wound. Justice Newbury rejected those arguments with these comments:

> [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-

[34] Reasons for Judgment on Conviction at para 94(g) [Appellants' Record at Tab 1]

[35] Reasons for Judgment of BCCA at para 46 [Appellants' Record at Tab 3]

> 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.[36]

49) Having addressed the two examples of gaps in the evidence advanced by the appellants, and notwithstanding her acceptance of the appellants' argument that the trial judge committed a clear legal error, Justice Newbury dismissed the appeal. As noted earlier, she did so without reference to the curative proviso in s.686(1)(b)(iii), and the Crown did not rely on the proviso.

50) One further point of note about the reasons of the majority is that Justice Newbury made a point of twice noting "that ***Hodge's Case*** applies only to the *actus reus* of an offence and not to the *mens rea*." The significance of this lies in the fact that her review of the reasonableness of the verdicts was limited to an assessment of the evidence relating to the *actus reus*. The first occasion on which Justice Newbury mentions the limited reach of the rule (the passage just quoted) was in the introductory portion of her analysis where she addressed the standard of review for reasonableness in a purely circumstantial case[37]. The second occasion came after she rejected the appellants' arguments about the lack of evidence of planning being a significant gap in the evidence. She said this:

> [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 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.) (emphasis added)

51) Justice Newbury went on to very briefly consider and reject other arguments

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[36] Reasons for Judgment of BCCA at paragraphs 48-49 [Appellants' Record at Tab 3]

[37] Reasons for Judgment of BCCA at para 39 [Appellants' Record at Tab 3]

advanced by the appellants (paragraphs 52- 59).

ii. Justice Butler in dissent:

52) As with the majority, Justice Butler accepted the appellants' argument that the trial judge committed legal error by requiring that inferences inconsistent with guilt need to be based on evidence[38]. Unlike the majority however, Justice Butler accepted that the trial judge's legal error was reflected in the wrongful conviction of Ms. Dingwall in relation to what he called the "Assault Offences" – the counts at issue on this appeal[39]. In Justice Butler's words, "[the trial judge] 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" [emphasis Justice Butler's][40].

53) Justice Butler's focus on Ms. Dingwall's potential liability solely as a party reflected the nature of the case led by the Crown; Ms Dingwall was approximately 20 km away when the shooting occurred and could therefore only be convicted as a party. Justice Butler took a different view in respect of the two male accused, noting:

> [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 Crysdale 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."

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[38] Reasons for Judgment of BCCA at para 78 [Appellants' Record at Tab 3]

[39] Reasons for Judgment of BCCA at para 81 [Appellants' Record at Tab 3]

[40] Reasons for Judgment of BCCA at para 63 [Appellants' Record at Tab 3]

> [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 Crysdale and thus participated in acts leading to the discharge of the firearm and the assault of Mr. Suter. (emphasis added)

54) The words "*actus rei*" are underlined in the quotation above to emphasize that Justice Butler confined his analysis of the adequacy of the circumstantial evidence against all three appellants to just the actus reus of the offences; he expressly excluded any consideration of the *mens rea*. Justice Butler's basis for excluding consideration of the circumstantial evidence in relation to the *mens rea* of the offences was based on Justice Newbury's comments about the reach of the rule in ***Hodges*** case (as quoted above). Justice Butler said this:

> [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. (emphasis added)

55) Turning to Justice Butler's consideration of the case against Ms. Dingwall on just the element of the *actus reus*, he provided two alternate bases on which her appeal of the convictions on Counts 3, 4, 5, and 6 could be allowed. First, he found that there was insufficient evidence of any acts of aiding or abetting committed by Ms. Dingwall. In the absence of any such acts, he held that she could not be convicted as a party to the counts in issue, even if she knew they were being committed[41].

56) Justice Butler's alternate basis for setting aside Ms. Dingwall's convictions on the counts in issue focused on the absence of any evidence of planning. As noted earlier, the majority completely rejected the argument that the absence of any

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[41] Reasons for Judgment of BCCA at paragraphs 101-108 [Appellants' Record at Tab 3]

evidence of planning was a significant gap in the evidence that would support an inference of innocence. The majority went so far as to suggest it was a "disingenuous" argument[42]. Justice Butler, in contrast, fully embraced the idea that there was no evidence of planning, and he went so far as to suggest that the basis on which the majority accepted that there was evidence of planning involved "circular reasoning"[43]. After addressing the issue of planning,[44] Justice Butler came to this conclusion:

> [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.

57) The final point to note about Justice Butler's reasons is this passage from his "Summary",

> [119] ... 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.

58) It will come as no surprise that the appellants will argue that this conclusion applies to all three appellants on all of the counts before the court (as well as the ones on which leave to appeal was dismissed).

PART II ~ QUESTION IN ISSUE

A. Did the trial judge err in law in his determination that the accused's guilt on Counts 3, 4, 5 and 6 was the only reasonable conclusion available on the totality of the evidence?

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[42] Reasons for Judgment of BCCA at para 49 [Appellants' Record at Tab 3]

[43] Reasons for Judgment of BCCA at para 115 [Appellants' Record at Tab 3]

[44] Reasons for Judgment of BCCA at paragraphs 110-117 [Appellants' Record at Tab 3]

PART III ~ ARGUMENT

59) As noted at the outset, the appellants submit that the trial judge erred in at least two ways "in his determination that the accused's guilt on Counts 3, 4, 5 and 6 was the only reasonable conclusion available on the totality of the evidence". First, he erred in law by requiring that inferences consistent with innocence be based on proven facts. Second, he erred in reaching verdicts that were unreasonable.

A. Inferences consistent with innocence do not need to be based on proven facts:

60) The appellants' basic proposition is that the trial judge committed clear legal error within his exposition of the legal principles that he was relying on in his consideration of circumstantial evidence. Again, the offending passage was this:

> [9] The following principles also apply:
>
> (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 CanLII 913 (BC CA), [1992] B.C.J. No. 1700 (B.C.C.A) [*To*], cited with approval in *R. v. Vu*, 2002 BCCA 659 (CanLII) at para. 25 [*Vu*];
>
> (b) **where an alternative inference is asserted, there needs to be some evidence to support it**: *Vu* at para. 26; (all emphasis added)
>
> • • •[45]

61) The emphasized portion of sub-paragraph 9 is inconsistent with ***Villaroman***. More particularly, there is no requirement that inferences other than guilt must be supported by evidence. Justice Cromwell made these comments on this issue in his reasons for the Court:

> [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 CanLII 26 (ON CA), [1965] 2 O.R. 475 (C.A.), at p. 479,

[45] Reasons for Judgment on Conviction at para 9 [Appellants' Record at Tab 1]

> aff'd without discussion of this point 1966 CanLII 6 (SCC), [1966] S.C.R. 254. 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 (CanLII), [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370 (CanLII), 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614 (CanLII), 14 C.R. (7th) 149, at para. 28. 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.
>
> [36] **I agree with the respondent's position 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**. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). **A certain gap in the evidence may result in inferences other than guilt.** But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. (bold emphasis added, underlining Justice Cromwell's)

62) As already noted, both the majority and the minority in the British Columbia Court of Appeal agreed that the trial judge did commit this error of law.[46] The appellants anticipate that this Court will come to the same conclusion; the Court will accept that the trial judge committed legal error.

63) As also noted, however, while all judges in the Court of Appeal accepted that the judge committed legal error, only Justice Butler would have given any effect to the error, and even then, only to the limited extent of allowing Ms Dingwall's appeals on four of the counts. Importantly, in dismissing the appeals, none of the judges made any reference to the fact that the Crown did not invoke the curative proviso in s.686(1)(b)(iii). The appellants submit that the dismissal of their

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[46] Reasons for Judgment of British Columbia Court of Appeal, per Justice Newbury for the majority at paras 26 and 42, and per Justice Butler in partial dissent at para 78 [Appellants' Record at Tab 3]

appeals when the Crown did not invoke curative proviso was itself an error of law.

64) For three decades the law on this point has been settled; if a Court of Appeal finds that a trial judge committed legal error, it must either enter an acquittal or order a new trial unless the curative proviso applies. Justice Sopinka put it this way in his reasons for the majority in ***R. v. S. (P.L.),*** [1991] 1 S.C.R. 909 (at 915-916):

> On the other hand, **if the Court of Appeal finds an error of law with the result that the accused has not had a trial in which the legal rules have been observed, then the accused is entitled to an acquittal or a new trial in accordance with the law**. The latter result will obtain if there is legally admissible evidence on which a conviction could reasonably be based. The court cannot substitute its opinion for that of the trial court that the evidence proves guilt beyond a reasonable doubt because the accused is entitled to that decision from a trial judge or jury who have all the advantages that have been so often conceded to belong to the trier of fact. If the Court of Appeal were to make that decision the accused would be deprived of a trial to which he or she is entitled, first, by reason of the abortive initial trial and second by the Court of Appeal. There is, however, an exception to this rule in a case in which the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction. These limitations on the powers of the Court of Appeal are the result of the combined effect of s. 686(1)(*a*)(ii), (*b*)(ii) and (iii) and s. 686(2). By virtue of s. 686(1)(*b*)(ii) **the Court of Appeal cannot dismiss the appeal if it has found an error of law unless the curative provision embodied in s. 686(1)(*b*)(iii) applies. If the appeal is not dismissed it must be allowed, and pursuant to the provisions of s. 686(2) either an acquittal or a new trial must be ordered**. (emphasis added)

65) Before moving on, it is worth taking a moment to remember that it is not open to an appeal court to invoke the proviso of its own motion – see for example ***R. v. P.G.***, 2017 ONCA 351 (at para 13), per Justice MacFarland for the Ontario Court of Appeal. It is also worth remembering that when it does invoke the proviso, it is the Crown that bears the burden of justifying its application, the appellant has no burden - per Justice Cartwright in his concurring reasons in ***Colpits v. The Queen***, [1965] S.C.R. 739. The appellants will provide further argument on the

application of the proviso should the Crown seek to invoke it in this court.

66) Returning to the instant case, and keeping in mind that the Crown did not invoke the curative proviso[47], once the Court of Appeal found that the trial judge committed the error of requiring that inferences consistent with innocence had to be based on evidence, the court had to allow the appeal and either enter acquittals or order a new trial. But that is not what the court did.

67) Instead of allowing the appeal once it found legal error, the majority in the Court of Appeal wrongly focused on the question of whether the appellants had demonstrated that the trial judge's clear legal error had an impact on the verdict. In other words, the majority imposed a burden on the appellants to demonstrate more than legal error; the majority effectively added the additional burden of demonstrating a concrete, causal link between the error and the verdict.

68) Instead of allowing the appeal after acknowledging the error, Justice Newbury noted that the appellants "did not [however] suggest any reasonable inference that might arise from the evidence *or absence* of evidence that was not considered and rejected by the trial judge (emphasis Justice Newbury's)[48]. On a proper application of the provisions in s.686 of the *Criminal Code*, the appellants were not required to meet that burden. All they were required to do, in the words of Justice Sopinka in ***S. (P.L.),*** was demonstrate that they "had not had a trial in which the legal rules have been observed", after which it would be for the Crown to invoke and satisfy the curative proviso. The appellants in this case demonstrated that the trial judge's clear language meant that "the legal rules" relating to the use of circumstantial evidence had not been properly applied, but

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[47] To be clear, the Crown did not expressly invoke the proviso, nor can it be suggested that the Crown inferentially resorted to "the substance of the proviso" as contemplated in the reasons of Justice Rowe for the Court in ***R. v. Ajise***, 2018 SCC 51 (CanLII), [2018] 3 SCR 301. The Crown's arguments on the appeal focused on only the question of whether the trial judge committed legal error.

[48] Reasons for Judgment of BCCA at para 44 [Appellants' Record at Tab 3]

the Crown chose not to invoke or satisfy the curative proviso. In the circumstances, the Court of Appeal was required to allow the appeals.

69) In summary to this point, the appellants have demonstrated that the trial judge committed clear legal error in his treatment of circumstantial evidence, and they have demonstrated that the Court of Appeal erred in failing to give effect to that error.

70) On a practical level, the appellants recognize that it is often easier to appreciate the nature of a legal error if examples of its impact are available. In the instant case, in addition to particularizing the trial judge's legal error, the appellants presented the Court of Appeal with functional examples of how the error could have impacted the verdict. They began with the broad statement that "one cannot be satisfied that the trial judge's mis-statement of the law did not taint his entire reasons"[49]. The appellants then offered two focused examples of gaps in the evidence that were capable of supporting an inference of innocence (the examples were the lack of evidence that the appellants knew the truck was stolen, and the lack of any evidence of planning capable of supporting an inference that the accused were aware of what the shooter intended to do).

71) The court will recognize that the two functional examples offered by the appellants addressed the *mens rea* of the offences – whether the gaps in the evidence meant that the Crown's case was consistent with the accused not knowing what the shooter planned. In other words, the gap in the evidence was consistent with the accused not having the necessary specific intents. While Justice Butler accepted that the lack of evidence of planning was relevant to whether the Crown proved that Ms Dingwall committed *actus reus* of the "assault offences", all three judges rejected the appellants arguments on the issue of *mens rea*.

72) The appellants respectfully submit that the Court of Appeal's rejection of their arguments in relation to the issue of *mens rea* reflects that court's view that the

[49] Reasons for Judgment of BCCA at para 44 [Appellants' Record at Tab 3]

principles relating to the treatment of circumstantial evidence do not apply equally to the separate elements of *actus reus* and *mens rea*. As noted earlier, Justice Newbury twice noted that "the rule in ***Hodge's Case*** does not apply to *mens rea*"[50]. The second time was within her analysis of the appellant's argument that the absence of any evidence of a plan could support an inference that the accused were unaware of the shooter's intent. Repeated here for ease of reference, she said this:

> [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 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.)

73) On Justice Newbury's approach, the trial judge's failure to consider gaps in the evidence capable of supporting an inference that the appellants lacked the necessary *mens rea* was not an error for the simple reason that the rule in ***Hodge's Case*** meant that he did not have to.

74) As also noted, Justice Butler relied on Justice Newbury's comments for the majority on this point and he said this:

> [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. (emphasis added)

75) On Justice Butler's approach, as with Justice Newbury's, a trial judge could

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[50] Reasons for Judgment of BCCA at paragraphs 39 & 50 [Appellants' Record at Tab 3]

convict an accused even where the circumstantial evidence is consistent with the absence of *mens rea*. The appellants submit that this obviously explains why he did not consider any arguments related to the trial judge's assessment of the circumstantial evidence on the issue of *mens rea*.

76) The purpose of raising this issue is to illustrate that the question of law on which Justice Butler dissented might not be a simple as it seems at first glance. Repeated here for ease of reference, the question on which Justice Butler dissented was whether the trial judge "err[ed] in law in his determination that the accused's guilt on Counts 3, 4, 5 and 6 was the only reasonable conclusion available on the totality of the evidence". In light of the approach taken by the Court of Appeal, before answering this question, the Court will have to decide whether circumstantial evidence is treated differently depending on whether it relates to the *actus reus* or *mens rea* of an offence.

77) The question of whether the *actus reus* and *mens rea* are treated differently has its roots in this Court's decisions in ***The Queen v. Mitchell*** 1964 CanLII 42 (SCC), [1964] S.C.R. 471 and ***R. v. Cooper*** 1977 CanLII 11 (SCC), [1978] 1 S.C.R. 860. As Justice Newbury noted in the court below, in ***Mitchell***, the Court "relaxed" the rule in ***Hodge's Case*** such that juries no longer needed to receive what until then had been a mandatory form of instruction on the treatment of circumstantial evidence[51]. In addition to relaxing the rule in ***Hodge's Case***, Justice Spence said this on behalf of the majority in ***Mitchell*** (pp-479-480):

> ... The direction in *Hodge's* case did not add to or subtract from the requirement that proof of guilt in a criminal case must be beyond a reasonable doubt. It provided a formula to assist in applying the accepted standard of proof in relation to the first only of the two essential elements in a crime; i.e., the commission of the act as distinct from the intent which accompanied that act. 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

[51] Reasons for Judgment of BCCA at para 39 [Appellants' Record at Tab 3]

> 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**. (emphasis added)

78) In his reasons for the majority in ***Cooper***, Justice Ritchie approved of the proposition that "*Hodge's* case was concerned only with the identification of the accused as being the person who had committed the crime and *that it had no application to a case turning upon the intention of the accused.*" (emphasis Justice Ritchie's) (***Cooper*** at pg. 875).

79) In the instant case, Justice Newbury relied on both ***Mitchell*** and ***Cooper*** as the foundation for her statement that "the rule in ***Hodge's Case*** does not apply to *mens rea"*;[52] and that statement underpinned Justice Butler's similar statement of principle[53]. The question now is whether the statement of principle in ***Mitchell*** remains unchanged as Justice Newbury's reasons suggest. The appellants respectfully submit that ***Mitchell*** has been completely attenuated or eclipsed by subsequent developments in the law.

80) It is unnecessary for the appellants to set out a long argument tracing all the cases that have either followed or drifted away from ***Mitchell*** over the past 55 years. It is unnecessary because the question of whether the principle in ***Mitchell*** survives was squarely before the Court in ***Villaroman***, and while Justice Cromwell did not expressly address the issue, his analysis of both the law and the facts in that case leave no doubt that the ***Mitchell*** principle has been put to rest.

81) Dealing first with what was at issue in ***Villaroman***, and as Justice Cromwell noted at para 57, "the real question [was] whether it was reasonable for the judge to find that the respondent **knew** that he had physical possession of the [child]

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[52] Reasons for Judgment of BCCA at paragraphs 39 & 50 [Appellants' Record at Tab 3]

[53] Reasons for Judgment of BCCA at para 72 [Appellants' Record at Tab 3]

pornography that was in fact in his computer's memory" (emphasis added). In other words, the only issue for the Court was the treatment of circumstantial evidence on the question of whether the Crown had proved *mens rea*.

82) Turning next to the arguments before the Court in ***Villaroman***, the parties all addressed the question of whether the principle laid down in ***Mitchell*** survived. As an example, much of the Crown's factum in ***Villaroman*** was premised on the assertion that the rule in ***Hodges Case*** "does not apply to *mens rea* issues"[54]. As an intervenor, the Criminal Lawyers' Association (Ontario) argued that the Court's decision in ***R. v. Griffin***, 2009 SCC 28 (CanLII), [2009] 2 SCR 42 "signalled a departure from any suggested limitation of the rule to a particular type of evidence"[55]. In short, the continued survival of the principle in ***Mitchell*** was very much at the forefront of the argument in ***Villaroman***.

83) Moving on to Justice Cromwell's analysis of the principles relating to circumstantial evidence, two key elements of his ruling in ***Villaroman*** support the conclusion that circumstantial evidence is treated the same way regardless of whether it is relevant to the *actus reus* or *mens rea*. The first is his discussion of the circumstances under which it would be appropriate to instruct a jury on the use of circumstantial evidence. At the risk of oversimplification, Justice Cromwell's analysis traced the relaxation of the rule in ***Hodges Case*****,** after which he said this:

> [22] ... However, **where proof of one or more elements** of the offence depends solely or largely on circumstantial evidence, it may be helpful for the jury to receive instructions that will assist them to understand the nature of circumstantial evidence and the relationship between proof by circumstantial evidence and the requirement of proof beyond reasonable doubt. ...

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[54] ***R. v. Villaroman***, Factum of the Appellant at paras 52-63; https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36435/FM010_Appellant_Her-Majesty-The-Queen.pdf

[55] ***R. v. Villaroman***, Factum of the Intervener Criminal Lawyers Association of Ontario at para 21, and see paras 20-30; https://www.scc-csc.ca/WebDocuments-DocumentsWeb/36435/FM040_Intervener_Criminal-Lawyers-Association-Ontario.pdf

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>
> [30] It follows that **in a case in which proof of one or more elements of the offence** depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. ...
>
> (emphasis added)

84) Keeping in mind the arguments that were before the Court in ***Villaroman***, the appellants submit that Justice Cromwell's use of the phrase "one or more elements of the offence" was intentional, and it leaves no room for a distinction between proof of the *actus reus* and the *mens rea*.

85) The second key element of Justice Cromwell's legal analysis is his consideration of whether inferences had to be based on proven facts. Again at the risk of oversimplification, Justice Cromwell's focus throughout his analysis of the question was on the prospect that gaps in the evidence might support inferences other than "guilt" – see paragraphs 35, 36, 37, and 38. Taken in context, Justice Cromwell's reference to "guilt" cannot be seen as limited to only guilt in relation to the *actus reus* of the offence.

86) Turning finally to Justice Cromwell's ultimate analysis of the facts of the case, he restored the conviction because "it was reasonable for the judge to conclude that the evidence as a whole excluded all reasonable alternatives to guilt"[56]. Keeping in mind that the sole factual issue before the court was *mens rea*, Justice Cromwell applied a test that is inconsistent with the principle in ***Mitchell***. If the principle in ***Mitchell*** survives, the correct question would have been simply whether an inference of guilt was one of the inferences available on the evidence; there would have been no need to ask whether guilt was the only reasonable inference.

87) In summary, ***Villaroman*** leaves no doubt that the principle in ***Mitchell*** has been put to rest. It is no longer accurate to say, as the court below did, that the rules relating to the treatment of circumstantial evidence are different for the *actus reus*

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[56] ***Villaroman*** at para 71

and the *mens rea*. With the greatest of respect, if the appellants are wrong, and if ***Mitchell*** survives ***Villaroman***, the Court needs to make that clear when it considers whether the trial judge in the instant case erred in his assessment of circumstantial evidence.

88) Returning to a consideration of the trial judge's treatment of circumstantial evidence in the instant case, the appellants repeat the arguments they made in the court below. The first branch of the appellants' argument is that it is impossible for the Court to separate the legal error from the verdict; it is impossible to review the judge's reasons and tease out an untainted analysis which properly applied the law relating to the treatment of circumstantial evidence. Once again, however, that is ultimately an exercise that will follow an invocation of the curative proviso by the Crown.

89) The second branch of the appellants' arguments presents two functional examples of gaps in the evidence that were capable of supporting inferences consistent with innocence.

90) The first example of a gap in the evidence is the lack of any evidence that the appellants knew the truck involved in the shooting was stolen. While the appellants were not charged with offences relating to the theft of the truck, the fact that the truck was stolen featured prominently in the trial judge's conclusion that they were guilty. In paragraphs 93 of his reasons, the trial judge states his conclusions that Ms. Dingwall was "guilty, as an aider or abettor", and "Richet and Russell [were] guilty either as principals or aiders or abettors"[57]. In paragraph 94, the judge says that the appellants' guilt is "shown" by a list of eight facts. The list included these facts:

> (f) individuals involved in the events at 221 Crysdale 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;

[57] Reasons for Judgment on Conviction at para 93 [Appellants' Record at Tab 1]

91) Regardless of whether the judge's use of the word "they" referred to the appellants, or to the "individuals involved in the events", the fact that the truck was stolen was important to the judge's ultimate conclusions - but there was a complete lack of any evidence to support a finding that any of the three appellants knew it was stolen. The absence of evidence on the condition of the truck supports the inference that everyone other than perhaps the driver of the stolen truck did not know it was stolen.

92) It is worth pausing at this point to recall that, apart from the three appellants before the Court, there was at least one other person involved in the events at issue and, given that the "newer" Ford F150 pickup, observed by Mr. Inyallie was "believed to be a double cab", there may have been as many as six other people involved in the events (or perhaps even more given that Ms Dingwall's Yukon was also a large multi-passenger vehicle). If, as the trial judge found, the fact that the appellants (or anyone else) was in possession of the stolen truck is important in determining guilt, there needs to be some evidentiary support for that conclusion. Quite obviously, the importance of the need for an evidentiary foundation regarding knowledge that the truck was stolen rises with the potential number of people who have to be considered as potentially being aware the truck was stolen.

93) The second functional example of a gap in the evidence is the lack of any evidence about who, other than the shooter, was involved in, or aware of any planning of the shooting. The appellants emphasis on the absence of evidence of planning is tied to the nature of the offences at issue and the fact that the Crown was forced to rely on the party liability provisions in s.21 of the *Criminal Code*. Stated briefly, the Crown had to prove that each accused knew that a gun would be used to shoot named complainants with the intent to wound them. Had there been any evidence of planning, it would have gone a long way in helping the Crown meet that burden.

94) As they did in the court below, the appellants rely on the decision of Justice Low in his reasons for the court in ***R. v. Bernier***, 2001 BCCA 394 to emphasize the

complexity of the evidentiary burden on the Crown. In ***Bernier***, the accused was convicted as a party to a so-called "home invasion". The trial judge was unable to find that Mr. Bernier was one of the people who entered the house, but he did convict him as a party to firearms related offences committed inside the house. It was in that context that Justice Low made these comments in his ruling allowing the appeal from the firearms offences:

> [19] 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**. (all emphasis added)

95) In the instant case, as in ***Bernier***, the "Crown had to bring home to the accused a physical or mental connection to the use of a weapon" - at a point before the weapon was used. The absence of any evidence about what the appellants knew before the shooting supports the inference that they were actually unaware that a gun would be involved in the events that night (this is simply the presumption of innocence in action).

96) The Court will recognize that the question of whether the crimes at issue in the instant case were planned led to something of a significant division in the court below. Justice Newbury for the majority suggested it was "simply disingenuous" to argue that the evidence precluded a finding that anyone other than the shooter knew of his specific intent to commit the shooting. That statement was undoubtedly based on her conclusion that, unlike in ***Bernier***, "[t]he case at bar did not in ... involve a "simple and unsophisticated plan" that evolved as circumstances required." She, held, instead, that "it was well-planned and organized, involving two or three vehicles, the destruction of evidence and the

use of a getaway car and driver."[58] Justice Newbury held further that "[a]s 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."[59]

97) In his dissenting reasons, Justice Butler expressed exactly the opposite view. In his view, "there was no evidence of planning in general", there was a "paucity of evidence" of planning.[60] He expressly rejected the "the proposition that the shooting was well-planned and organized"[61]. Justice Butler went on to say this:

> [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. ... 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**. (all emphasis added)

98) The appellants respectfully submit that Justice Butler's approach is the correct one. The complete absence of any evidence of planning represents a gap in the evidence capable of supporting an inference of innocence. The trial judge erred in failing to consider that gap in the evidence.

99) To summarize on the first branch of the appellants' argument, they have

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[58] Reasons for Judgment of BCCA at para 48 [Appellants' Record at Tab 3]

[59] Reasons for Judgment of BCCA at para 49 [Appellants' Record at Tab 3]

[60] Reasons for Judgment of BCCA at paras 112-113 [Appellants' Record at Tab 3]

[61] Reasons for Judgment of BCCA at para 114 [Appellants' Record at Tab 3]

demonstrated that the trial judge committed reversible legal error. The trial judge made it clear that he would render judgment on the basis that inferences consistent with innocence had to be based on proven fact. That approach was expressly rejected by the Court in ***Villaroman***. The appellants have also demonstrated that the British Columbia Court of Appeal erred in failing to allow the appeals once it accepted that the trial judge committed this error. Finally, the appellants have demonstrated that the British Columbia Court of Appeal approached its task believing that circumstantial evidence is treated differently depending on whether it is relevant to the *actus reus* or *mens rea* of the offence. That approach reflects no longer reflects the law, and in particular, it does not reflect this Court's ruling in ***Villaroman***.

B. The verdicts are unreasonable:

100) The appellants submit that, quite apart from any legal errors committed by the trial judge in his treatment of the circumstantial evidence, the verdicts are unreasonable.

1. Standard of Review:

101) In his reasons in ***Villaroman***, Justice Cromwell's made these comments about the standard of review:

> [55] A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381. Applying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence: *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 186. This limited weighing of the evidence on appeal must be done in light of the standard of proof in a criminal case. **Where the Crown's case depends on circumstantial evidence, the question becomes 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**: *Yebes*, at p. 186; *R. v. Mars* (2006), 205 C.C.C. (3d) 376 (Ont. C.A.), at para. 4; *R. v. Liu* (1989) 95 A.R. 201 (C.A.), at para. 13; *R. v. S.L.R.*, 2003 ABCA 148 (CanLII); *R. v. Cardinal* (1990), 106 A.R.

91 (C.A.); *R. v. Kaysaywaysemat* (1992), 97 Sask. R. 66 (C.A.), at paras. 28 and 31. (emphasis added)

102) The appellants submit that on all of the counts, including the ones not before the Court on this appeal, guilt was not the only reasonable conclusion.

2. The relationship between party liability, circumstantial evidence and the reasonableness of the verdict:

103) When the court undertakes its limited re-weighing and consideration of the evidence it does so from the perspective of "a properly instructed jury". In the instant case, that would be from the perspective of a jury properly instructed on the application of the party liability provisions in s.21 of the *Criminal Code*. One of the grounds of appeal advanced in the court below was that the trial judge erred in law in his analysis and application of the principles of party liability. The appellants argued that the trial judge erred in his application of ***R. v. Thatcher*****, 1987 CanLII 53 (SCC), [1987] 1 S.C.R. 652**. The majority dismissed that ground of appeal, and Justice Butler did not address it. While the question of whether the trial judge committed legal error in his application of s.21 is not directly engaged by the question of law now before the Court, the appellants anticipate that when the Court considers the reasonableness of the verdict it will, at least inferentially, address the appellants' complaints about the trial judge's application of ***Thatcher***. Accordingly, the appellants' argument on this ground of appeal will briefly address their concerns with the trial judge's application of the principles of party liability.

104) The appellants' concerns on the issue of party liability arise from the trial judge's purported reliance on the principles related to party liability set out in ***Thatcher***. In para 84 of his reasons, the trial judge addressed liability as co-principals under s.21(1)(a). In doing so, he referred to the decision of Justice Wedge in ***R. v. Haevischer***, 2014 BCSC 1863 (CanLII)[62], who had relied on the decision of

[62] The British Columbia Court of Appeal dismissed appeals against conviction in ***Haevischer***,

Chief Justice Dickson in ***Thatcher***. Justice Wedge made these comments (as reproduced by the judge in the instant case at para 84 of his reasons):

> [664] … However, as observed by Dickson C.J.C. in *R. v. Thatcher*, 1987 CanLII 53 (SCC), [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. (emphasis added)

105) Justice Wedge's analysis of ***Thatcher*** is not entirely accurate. The focus on ***Thatcher*** was on the jury, not on "the Court". In his ruling in ***Thatcher***, Chief Justice Dickson said this:

> 73 In sum, this Court has held that it is **no longer necessary to specify in the charge the nature of an accused's participation** in the offence: *Harder*. Moreover, **if there is evidence before a jury** that points to an accused either committing a crime personally or, alternatively, aiding and abetting another to commit the offence, **provided the jury is satisfied** beyond a reasonable doubt that the accused did one or the other, it is "a matter of indifference" which alternative actually occurred: *Chow Bew*. It follows, in my view, that **s. 21 precludes a requirement of jury unanimity as to the particular nature of the accused's participation** in the offence. **Why should the juror be compelled to make a choice on a subject which is a matter of legal indifference**? (all emphasis added)

106) The key point to note is that the issue addressed in ***Thatcher*** was one of juror unanimity; the question was whether all jurors had to agree that the accused was either a principal or a party. Chief Justice Dickson held that it was open to a jury to be divided on the question but still enter a conviction.

107) The appellants' complaint in the instant case is that the trial judge treated ***Thatcher*** as if it provided a sort of factual and intellectual shortcut in a judge-alone trial that made it unnecessary to undertake a detailed analysis linking the circumstantial evidence to either the elements of the offences or the various routes to conviction in s.21. Their complaint is borne out by the fact that there is

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but it returned the case to the trial court for an evidentiary hearing on the issue of whether there ought to be a judicial stay of proceeding as a remedy for an abuse of process - **R. v. Johnston**, 2021 BCCA 34 (CanLII) https://canlii.ca/t/jddxh

nothing in the reasons for judgment that provides any analysis of the relationship between the evidence, the elements of the offences, and the party liability provisions.

108) The appellants submit that the correct interpretation of ***Thatcher***, and the correct approach to its application, are found in the concurring reasons of Justice LeBel in ***R. v. Pickton,*** 2010 SCC 32, [2010] 2 SCR 198, as quoted in the following passage from the reasons of Justice Brown for the Ontario Court of Appeal in ***R. v. Saleh***, 2019 ONCA 819.

> [97] The trial judge left with the jury multiple paths to liability for first degree murder. As noted by LeBel J. in his concurring reasons in *Pickton*, "**although the ultimate legal liability is the same for a principal or for an aider or abettor, the findings of fact necessary and the specific legal principles which apply to each are different**": at para. 73. Accordingly, **a trial judge's instructions must ensure that the jurors understand, for each route of liability, the issues of fact that require their decision, as well as the legal principles that govern and the essential features of the evidence that inform that decision**: *R. v. Almarales*, 2008 ONCA 692, 237 C.C.C. (3d) 148, at para. 60. (all emphasis added)

109) The appellants of course recognize that the obligations of a trial judge in a jury trial are different than those in a judge-alone trial. Their simple proposition, however, is that the analysis embedded in the instructions to a jury should, at the very least, be apparent in reasons for judgment even if they are not spelled out in minute detail. That did not happen in the instant case. The appellants' arguments on the reasonableness of the verdict are premised on an expectation that the Court will address each separate route to liability and the issues of fact each presents.

3. Reasonableness of the verdict ~ party liability and the shortcomings of the circumstantial evidence:

i. specific intent

110) As always, the starting point for a consideration of what the Crown must prove is the nature of the charges in the indictment. In the instant case, three of the four

offences at issue required proof of specific intent. Counts 3 and 4 require proof of: an intent to discharge a firearm, intent to shoot named complainants, and the intent to wound. Count 5 required proof of the intent to discharge a firearm, and Count 6 required proof of the general intent to apply uninvited force.

ii. s.21(1)(a) ~ liability of co-principals

111) A helpful description of the test for a conviction as a co-principal under s.21(1)(a) was set out by Justice Ryan in ***R. v. Ball***, 2011 BCCA 11, where the accused were prosecuted on a charge of manslaughter for a death that occurred during an assault perpetrated by several people:

> [28] It follows that where co-perpetrators engage in a deadly assault, the Crown need not prove which of the attackers struck the fatal blow or blows. As aptly stated in *E.G. Ewaschuk Criminal Pleadings & Practice in Canada*, 2d ed. (Toronto: Canada Law Book 2010) at 15-81:
>
> > Where several persons act together toward a common criminal object, **with the "requisite intent",** and any of them jointly or severally achieve the common object, all who are present at the commission of the crime commit the crime as *joint principal offenders*. This principle has been pithily stated in concrete terms that "the blow of one is, in law, the blow of all of them." [*R. v. Macklin Murphy* (1838), 2 Lewin 225; *R. v. Chow Bew*, 1955 CanLII 47 (SCC), [1956] S.C.R. 124 at pp. 126-7*; R. v. Thatcher*, 1987 CanLII 53 (SCC), [1987] 1 S.C.R. 652, at pp. 689-99 (bold emphasis added, italics Justice Ryan's)

112) The appellants emphasize that the key passage in the above quote is the phrase "with the requisite intent", it is a phrase that appears in virtually all cases that consider the application of s.21(1)(a). The point is important because the question of whether the accused had the "requisite intent" is a distinct inquiry from the question of whether they acted together. And that really gets to the nub of the problem for the Crown in this case; to paraphrase Justice Butler, there was "a paucity" of evidence the Crown could rely on to prove that they acted "with the requisite intent".

113) Justice Butler's comments about the inadequacies of the evidence on the issue

of planning apply with equal force to the issue of intent more broadly (even though he did not consider the issue of intent), and they need not be repeated here[63]. It is enough to note that Justice Butler details a list of considerations in respect of which there was no evidence – and the absence of evidence is of course capable of supporting inferences consistent with innocence. The appellants submit that a proper consideration of the inadequacies of the evidence identified by Justice Butler, and the inadequacies of the evidence generally, leads inevitably to the conclusion that the guilt of the appellants was not the only reasonable conclusion on the critical issue of intent. A reasonable conclusion is that nobody other than the shooter knew that he had a gun, or how he intended to use it.

iii. s.21(1)(b) ~ aiding

114) To justify convictions of the appellants as aiders or abettors, the Crown had to prove that the accused actually did something, that they committed some act, for the purpose of aiding or abetting; it was not enough to show only that their actions had the effect of aiding or abetting – see for example the reasons of Justice Charron for the court in ***R. v. Briscoe***, [2010] 1 SCR 411 at paras 14-17. It is also worth noting that in reasons on behalf of the Ontario Court of Appeal in ***R. v. Helsdon***, 2007 ONCA 54 (at para 28), Justice O'Connor emphasized that the "requirement that an accused do something for the purpose of achieving a prohibited result imposes a very high degree of subjective *mens rea*."

115) Once again, the problem for the Crown in the instant case was the paucity of evidence capable of bringing home any particular act to any particular accused, let alone with proof that the act was done with the necessary intent to aid another in the commission of a specific intent offence.

[63] Reasons for Judgment of BCCA at para 116 [Appellants' Record at Tab 3]

iv. s.21(1)(c) ~ abetting

116) While the Crown theorized that the appellants were guilty as abettors, and while the trial judge convicted the appellants as abettors, there was, in reality, no evidence that anyone involved in the events was "encouraging, instigating, promoting or procuring the crime[s] ... committed" (***Briscoe*** at para 14). Convictions of the appellants as abettors are manifestly unreasonable.

v. Wilful blindness:

117) Although the trial judge did not expressly rely on wilful blindness to convict the appellants, he did refer to the doctrine in his general overview of the law. Accordingly, it deserves at least a brief mention.

118) Justice Charron described the elements of the doctrine in ***Briscoe*** (paragraphs 21-24). In summary the appellants submit that ***Briscoe*** supports these propositions:

a) The Crown could only resort to wilful blindness if the appellants <u>actually suspected</u> that the principal intended to commit the firearms and other offences, and they saw "the need for further inquiries, but [they] *deliberately [chose]* not to make those inquiries"; the evidence must reveal "an actual process of suppressing a suspicion",

b) The Crown could only resort to wilful blindness if "it can almost be said that the [appellants] actually knew" the principal intended to, for example, discharge a firearm at either named complainant with intent to wound, and

c) "a failure to inquire" is <u>not</u> enough to establish willful blindness.

119) Additionally, as Justice Doherty noted in ***R. v. Tyrell***, 2014 ONCA 617 (at para 30), when applying the doctrine of wilful blindness, "the question is "what did the accused know" and **not** "what ought he to have known" (emphasis added).

120) It will come as no surprise that the appellants submit that there was no evidentiary basis for an application of the doctrine of wilful blindness. To the extent the conviction in the instant case were based on the doctrine they would undoubtedly be manifestly unreasonable.

4. Summary:

121) The appellants submit that no properly instructed jury could conclude that the appellants' guilt was the only reasonable inference in this case. There were insurmountable shortcomings in the evidence on every material point the Crown was required to prove. The Crown's entirely circumstantial case was not up to the task of proving that the appellants acted with the requisite intent, and the Crown's entirely circumstantial case was not up to the task of supporting convictions under any of the separate routes to conviction provided for in s.21. The verdicts were unreasonable.

PART IV ~ SUBMISSIONS ON COSTS

122) The Appellants do not seek an order for costs and ask that no costs be awarded against them.

PART V ~ NATURE OF ORDER SOUGHT

123) That this Appeal be granted, that the conviction be quashed or, alternatively, that a new trial be ordered.

March 11, 2021

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PART VI ~ AUTHORITIES