SCC No.: 39274

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

CHRISTOPHER RYAN RUSSELL,
KELLY MICHAEL RICHET, and
MERANDA LEIGH DINGWALL

APPELLANTS
(APPELLANTS)

AND:

HER MAJESTY THE QUEEN

RESPONDENT
(RESPONDENT)

RESPONDENT'S FACTUM
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Solicitor for the appellant
Christopher Russell:

ROGER P. THIRKELL
KENNETH R. BEATCH
Thirkell & Company
202 – 2955 Gladwin Road
Abbotsford, BC V2T 5T4
Tel: (604) 814-4147
Email: roger@thirkelllaw.ca
Email: ken@notguiltybc.com

Ottawa agent for the appellant
Christopher Russell:

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, Ontario K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Solicitor for the appellant
Kelly Richet:

JASON C. LeBLOND
Third Avenue Law
201 – 1085 Third Avenue
Prince George, BC V2L 3E3
Tel: (250) 564-0564
Fax: (250) 564-0563
Email: jleblond@thirdavenuelaw.ca

Ottawa agent for the appellant
Kelly Richet:

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, Ontario K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Solicitor for the appellant
Meranda Dingwall:

BRENT V. BAGNALL
Barrister & Solicitor
1050 – 777 Hornby Street
Vancouver, BC V6Z 1S4
Tel: (778) 317-3769
Email: brent@brentbagnall.com

Ottawa agent for the appellant
Meranda Dingwall:

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, Ontario K2P 0J8
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Solicitor for the respondent:

SUSANNE ELLIOTT
GEOFFREY R. McDONALD
MINISTRY OF ATTORNEY GENERAL
Criminal Appeals and Special Prosecutions
6th Floor, 865 Hornby Street
Vancouver, BC V6Z 2G3
Tel: (604) 660-1126
Fax: (604) 660-1133
Email: susanne.elliott@gov.bc.ca
Email: geoffrey.mcdonald@gov.bc.ca

Ottawa agent for the respondent:

MATTHEW ESTABROOKS
GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-0211
Fax: (613) 788-3573
E-mail: matthew.estabrooks@gowlingwlg.com

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Introduction

1. This appeal, partly as of right, raises the reasonableness of the appellants' convictions for offences related to a drive-by shooting given their proven involvement in burning the vehicle used in that shooting - a hallmark of targeted gun violence in the province of BC.

2. The reasonableness of the trial judge's decision to convict the appellants is persuasively supported by the particular facts of this case: (a) the drive-by shooting occurred in a remote town with only one way in and out; (b) the vehicle used in the drive-by shooting was recently stolen from the appellants' hometown over 185 kilometers away; (c) the appellants travelled that distance to this remote location; and (d) at a minimum[1] the appellants were standing-by at a dirt logging road in the early morning hours while the shooting took place, at the very spot where they ultimately burned the vehicle used in the shooting and discarded the firearm and an empty magazine.

3. The respondent's position is that the standard of appellate review does not warrant intervention in this case. The majority of the BCCA, *per* Newbury JA, was correct when it found that "[the trial judge] carefully addressed the 'gaps' pointed to by 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".[2] The convictions on the impugned counts were manifestly reasonable, and the majority of the BCCA did not need to resort to the curative proviso in circumstances where the trial judge applied the correct legal framework. This Honourable Court should dismiss the appeal.

4. In the court below, Justice Butler dissented on the reasonableness of the convictions for the drive-by shooting offences, but only insofar as Ms. Dingwall was concerned. Messrs. Russell and Richet were granted leave to join the appeal as of right because the trial judge held that the

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[1] "At a minimum" because the trial judge found that at least two of the appellants – Messrs. Russell and Richet – could have been among the three perpetrators of the drive-by shooting.

[2] Appeal Record (AR) Vol. I, T, pp.66-109, *R. v, Russell,* 2020 BCCA 108 ("*BCCA Decision*"), ¶51

evidence did not disclose the extent of their individual participation in the drive-by shooting, and so convicted them on the basis that they had either been at the scene of the shooting or had waited with Ms. Dingwall at the burn site. The appellants' joint factum attempts to raise other issues than the reasonableness of the verdict but, as explained in paragraphs 34-38 below, they had no leave to do so and these portions of their factum have been struck.

B. Facts

(i) *Circumstances of the offences in the vicinity of Mackenzie, BC*

5. On July 6, 2016 at approximately 5:00 a.m. a truck belonging to Ms. Eagle (the "Eagle Truck") was stolen from outside her residence in Prince George, BC. The Eagle Truck was subsequently used in a drive-by shooting less than 24 hours later and approximately 185 kilometers away in a remote town called Mackenzie.[3]

6. Mackenzie is a quiet town with an estimated population of 4000 people. It is a working class or blue-collar community. Most people are employed at the pulp mill or with some timber-associated entity. Highway 39 is the only way in and out of Mackenzie and ends in the town itself, where it is called Mackenzie Boulevard. Highway 39 is accessed from a junction with Highway 97. That junction is approximately 22 km from Mackenzie. Highway 97 is the major highway that connects Mackenzie with the more sizable community of Prince George to the south.[4]

7. At around 4:00 a.m. on July 7, 2016, the Eagle Truck carrying three unidentified assailants sped into a residential development and stopped in front of 221 Crysdale, a residence located in one of the first subdivisions off Mackenzie Boulevard when entering Mackenzie on Highway 39.[5]

8. The two passengers exited the Eagle Truck. While one held the passenger door open, the other ran up to the curb, raised a handgun, and fired several shots towards 221 Crysdale. Three people who had been on the front lawn ran towards the house, but one collapsed when he was shot through the leg (Mr. Suter). The shooter and the passenger quickly got back into the Eagle Truck. One entered the cab and the other jumped into the rear box of the truck, which then sped off in the

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[3] AR, Vol. I, T, pp.3-28, *R. v. Dingwall*, 2017 BCSC 1457 ("*RFJ*"), ¶¶16, 24-28
[4] *RFJ*, ¶¶16, 19; AR, Vol II, T, p.21(16-36)
[5] *RFJ*, ¶18

out-of-town direction. A neighbour, Mr. Harju, estimated that it took a minute and a half or a couple minutes from the time he heard the vehicle screech around the corner to the time it was speeding away. Based on the quick succession of events, the individuals involved in the events at 221 Crysdale had familiarity with that address and location.[6]

9. At 4:02:35-4:02:44 a.m. the Eagle Truck was captured on video surveillance travelling out of town. There is a person visible in the box of the Eagle Truck.[7]

10. Michael Matson resided at 221 Crysdale. He was a known drug dealer who was bound by a curfew. The residence at 221 Crysdale was a reputed drug house under watch of the local police force.[8] Neither the victim of the shooting nor the witnesses/occupants of the residence, including Mr. Matson who emerged from a hiding place on the roof after police had cleared the residence, were cooperative.[9]

11. To gain entry to 221 Crysdale police had to kick in the front door barricaded from the inside with a two-by-six piece of lumber.[10] Inside, police retrieved four bullets that had penetrated the exterior and interior walls, which matched the four expended cartridges seized from the front lawn. Several of the bullet holes were filled with fresh plaster. Notably, the identification officer recovered the bullets by following their trajectories through the exterior wall of the home adjacent to the front door: (1) through a bathroom and basement bedroom, to the wall of a closet in that bedroom; (2) down the stairwell to the basement floor; (3) to the wall adjacent to the stairwell leading to the upper level of the residence; and (4) to the landing floor of the stairwell going up to the top floor.[11]

12. At approximately 4:05 to 4:10 a.m., Ms. Dingwall's vehicle (the "Dingwall Yukon") was observed at the entrance to a dead-end logging road off Highway 37 being followed by a newer model white Ford truck. The Ford truck backed up across the northbound lane of Highway 39 and reversed down the logging road for about 100 feet. The Dingwall Yukon slowly proceeded south

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[6] *RFJ*, ¶¶55-56, 59-60, 65, 94(f); AR, Vol II, T, pp.294(15)-303(43); T, p.307(22-27)
[7] *RFJ*, ¶¶73(b) and (d)
[8] AR, Vol II, T, p.25(1-4); T, p.46(2-19); T, pp.56(47)-57(5); T, p.112(24-46)
[9] AR, Vol II, T, pp.56(35)-57(41); T, pp.118(17)-119(17)
[10] AR, Vol II, T, p.25(13-19)
[11] AR, Vol II, T, p.25(40-44); T, p.26(9-22); T, p.61(4-10); T, pp.324(31)-345(41)

with its brake lights on.[12] The vehicles were seen by Mr. Inyallie, who was travelling to work at the time, and caught his attention because of how unusual it was for vehicles to be at this location so early in the morning.[13] It was a rural area. There were some scattered homes but not near this location. The dirt roads were only used by the logging industry and the occasional hunter.[14]

13. That is the same logging road where the Eagle Truck was spotted on fire by Mr. Findlay at 4:31 a.m. (the "Burn Site"). The Burn Site is approximately 20 kilometers from Mackenzie on Highway 39 (about 15 minutes by car) in the direction of the junction with Highway 97 to Prince George. This afforded a narrow timeline between the shooting a 221 Crysdale (~4:00 a.m.), travel to the Burn Site (~15 minutes), and the first reported sighting of the burning Eagle Truck (~4:30 a.m.).[15]

14. Police located the firearm that had been used in the shooting (the "Firearm") in some forest brush approximately 75-100 meters behind the Eagle Truck further up the logging road.[16] The Firearm was a .45 caliber semi-automatic handgun, which is a restricted firearm. The serial number of the Firearm had been effaced and it was loaded with ammunition when found by police.[17] The bag containing the Firearm also had a spare magazine that was empty, as well as several alcohol wipes.[18] The bullets and expended cartridge cases recovered by police from 221 Crysdale had been discharged from this Firearm.[19] No fingerprints were identifiable on the Firearm, giving rise to the inference that it had been wiped clean.[20]

15. Two pieces of broken headlight that positively matched the Dingwall Yukon were located at the Burn Site on the logging road between the edge of the highway and the location of the burnt Eagle Truck.[21]

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[12] *RFJ*, ¶¶33-34, 73(e) and (f)
[13] AR, Vol II, T, pp.275(38)- 283(14)
[14] AR, Vol II, T, p.78(29-34)
[15] *RFJ*, ¶¶19, 37, 94(a)
[16] *RFJ*, ¶47
[17] *RFJ*, ¶¶49-50
[18] AR, Vol II, T, pp.38(3)-40(18); T, pp.220(21)-223(40)
[19] *RFJ*, ¶50
[20] AR, Vol II, T, p.398 (7-37)
[21] *RFJ*, ¶51

16. Early that same morning (July 7), a dog tracker, dispatched to the Burn Site, was travelling north on Highway 97 towards Mackenzie. This officer was aware that the Eagle Truck had been stolen from Prince George the previous morning. He thus thought it likely that the suspects had a connection to Prince George and would be travelling southbound, and that he would encounter them along the way. At 5:52 a.m., the officer observed the Dingwall Yukon (matching the description of the vehicle Mr. Inyallie saw at the Burn Site) on Highway 97 travelling south to Prince George. Ms. Dingwall was driving the vehicle and Messrs. Russell and Richet were passengers.

17. All three were arrested near Bear Lake, which is approximately 95-100 kilometers south of the Burn Site and 75 kilometers north of Prince George. Based on the timing of arrest and distance travelled, the Dingwall Yukon must have 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.[22]

18. Police obtained gun shot residue from all three appellants' hands. An expert, Dr. Hearns, opined that the GSR was consistent with their having discharged a firearm, been present when a firearm had been discharged, or handled a firearm that was discharged within the previous two to four hours, despite the fact that the arresting officers failed to take the usual precautions to reduce the possibility of cross-contamination.[23]

19. Police found a parking pass issued to Ms. Eagle (which was inside the Eagle Truck when it was stolen) inside the Dingwall Yukon.[24]

20. All three appellants resided in Prince George, i.e. they were approximately 185 kilometers away in the vicinity of Mackenzie between approximately 4:00 am and 4:30 am on July 7, 2016 before being intercepted by police about 1.5 hours later travelling back to Prince George.[25]

21. None of the appellants testified at trial.

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[22] *RFJ,* ¶¶20, 38, 100-101
[23] *RFJ,* ¶¶40-42
[24] *RFJ,* ¶¶26, 29
[25] *RFJ,* ¶¶94(d) and (e)

(ii) *The trial judge's reasons for conviction*

22. The trial judge apprehended that the Crown's case was circumstantial and instructed himself on the leading case of *R. v. Villaroman*, 2016 SCC 33. While he did quote *R. v. Vu*, 2002 BCCA 659 for the proposition that there needs to be some evidence to support an alternative inference that is asserted – a proposition subsequently overtaken by *Villaroman* – the trial judge explained why the alternative theories advanced by the defence were not based on logic and experience applied to the evidence *or the absence of evidence*, but rather required speculation.[26]

23. Ultimately, the judge concluded that the only rational inference to draw from the evidence was that the Crown proved beyond a reasonable doubt all of the essential elements of the offences in relation to the drive-by shooting and the burning of the Eagle Truck. After instructing himself on party liability pursuant to s.21(1) of the *Criminal Code*, the judge found Ms. Dingwall guilty as an aider or abettor to the events at 221 Crysdale, and guilty as a principal or aider or abettor to the burning of the Eagle Truck. He found Messrs. Russell and Richet guilty as principals or as aiders or abettors to the events at 221 Crysdale and the burning of the Eagle Truck.[27]

24. The thrust of the judge's conclusion that the appellants were guilty was based on the following factual findings:

- the offences resulted from a coordinated plan that involved the theft of the Eagle Truck from Prince George to use in a drive-by shooting in Mackenzie, which was a remote town a great distance away;
- the Eagle Truck was driven to Mackenzie by the following morning;
- Ms. Dingwall drove to and from the vicinity of Mackenzie, and Messrs. Russell and Richet were present in the Dingwall Yukon at the time of arrest;
- all three appellants were in the vicinity of this remote town in the early hours of July 7, 2016 despite ordinarily residing 190 kilometers away;
- the quick succession of events that occurred at 221 Crysdale established that this was a pre-mediated drive-by shooting that involved prior familiarity with the address and location;

[26] *RFJ*, ¶¶7-9, 76, 79-81, 97-107
[27] *RFJ*, ¶¶82-88, 116

- only a brief period of time separated the shooting and the burning of the Eagle Truck; and
- the Eagle Truck and Dingwall Yukon were clearly linked, insofar as parts of the Dingwall Yukon were found at the Burn Site and it contained a parking pass from the Eagle Truck.[28]

25. The trial judge addressed the GSR evidence separately, placing limited weight on it because of "significant frailties". In the alternative, the judge held that if in error in placing any weight on this evidence, "what remains of the Crown's case would not change the conclusions [he reached] as to the accuseds' guilt".[29]

(iii) *On appeal to the BCCA*

26. All three appellants appealed their convictions on multiple grounds that included: (a) unreasonable verdict; (b) an alleged error in the judge's treatment of circumstantial evidence; and (c) an alleged error in the judge's application of the principles of party liability.

27. The majority and the dissent agreed that the trial judge misstated the current state of the law in his summary of the legal principles regarding circumstantial evidence when he quoted *Vu* for the proposition that an alternative inference needs to be supported by some evidence.[30] However, the majority found that the trial judge nonetheless *applied* the correct law: 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".[31]

28. On the well-established standard of appellate review on the question of unreasonable verdict - 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?[32] - Justice Newbury, for the majority, observed that it is primarily the trial judge's task to draw the line between

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[28] *RFJ*, ¶94
[29] *RFJ*, ¶¶109-115
[30] *BCCA Decision*, ¶42
[31] *BCCA Decision*, ¶51; *see also* ¶46
[32] *BCCA Decision*, ¶40 (majority) and ¶96 (dissent)

speculation and reasonable doubt,[33] and the standard of appellate review does not require every trier of fact to have inevitably reached the same conclusion as the trial judge did.[34]

29. Justice Newbury held that the crimes were well-planned and organized (consistent with the trial judge's assessment of the evidence) as follows:

> [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.

30. This reasoning culminated in the majority concluding that the standard for appellate intervention was not met as follows:

> [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."

31. In contrast, Justice Butler in dissent found that the judge's misstatement of the law on the absence of evidence was "reflected in convictions on an evidentiary record insufficient to prove the case beyond a reasonable doubt" but *only* insofar as Ms. Dingwall's conviction as a party to

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[33] *BCCA Decision*, ¶59
[34] *BCCA Decision*, ¶51

the offences related to the shooting.[35] In drawing the distinction between Ms. Dingwall and Messrs. Russell and Richet, Justice Butler said: "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".[36] In so stating, Justice Butler materially misapprehended the evidence and the reasons for judgment. Because the trial judge did not find that Messrs. Russell and Richet were physically present at 221 Crysdale, and their convictions were alternatively based on the same party liability as Ms. Dingwall, there was no logical basis upon which Justice Butler could draw a distinction between Ms. Dingwall and Messrs. Russell and Richet regarding the reasonableness of the convictions on the drive-by shooting counts (*see* procedural history on appeal to this Court set out below).

32. In any event, Justice Butler disagreed with the majority that it was open to the trial judge to find that the drive-by shooting offences were well-planned and organized. He said the evidence was equally consistent with a plan "to confront an individual at the Crysdale house" or steal something from it, and that burning the vehicle used in the drive-by shooting, thereby initiating a police investigation, suggested an unplanned sequence of events:

> [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 Crysdale 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 Crysdale 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 premediated 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.

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[35] *BCCA Decision*, ¶79
[36] *BCCA Decision*, ¶95

…

> [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.

(iv) *Procedural history on appeal to this Court*

33. Ms. Dingwall appealed as of right pursuant to a Notice of Appeal dated August 11, 2020 based on the dissent in the BCCA. After Ms. Dingwall filed her appeal as of right, Messrs. Russell and Richet applied for leave to appeal on the basis that the unreasonable verdict identified by Butler JA (in respect of some but not all the counts) applied equally to them. The respondent agreed. Messrs. Russell and Richet were convicted as principals or aiders or abettors. Justice Butler's dissent to the effect that the evidence was incapable of establishing party liability to the drive-by shooting for Ms. Dingwall logically should have applied equally to Messrs. Russell and Richet. The respondent took the position that it was only fair that Messrs. Russell and Richet be joined to Ms. Dingwall's appeal as of right.

34. All three appellants also applied for leave to expand the issues on appeal beyond the unreasonable verdict issue framed by the dissent. Specifically, the appellants sought leave to argue that the BCCA erred in its interpretation and application of *R. v. Thatcher*, [1987] 1 SCR 652. The respondent opposed expanding the inquiry because raising additional issues would only serve to complicate an otherwise straightforward, fact-driven, appeal as of right.

35. On January 14, 2021, the Court issued the following order regarding the appellants' applications for leave to appeal ("Leave Order"):

> The motion for an extension of time to serve and file the joint application for leave to appeal is granted. Leave to appeal from the judgment of the Court of Appeal for British Columbia (Vancouver), Numbers CA45647, CA45648 and CA45649, 2020 BCCA 108, dated April 9, 2020, is granted to Christopher Ryan Russell and Kelly Michael Richet only on the charges for which Meranda Leigh Dingwall can appeal as of right — counts 3 to 6 — based on Butler J.A.'s dissent at the Court of Appeal. Leave to appeal is denied to all three applicants on all of the other counts for which they were convicted and whose convictions were unanimously upheld by the Court of Appeal.

36. Messrs. Russell and Richet filed Notices of Appeal dated February 9, 2021 "pursuant to the granting of leave to appeal by the Court".

37. Despite the limited scope of the Leave Order, the appellants then filed a joint factum on March 11, 2021 which raised issues not encompassed by the Leave Order. On March 19, 2021 the respondent thus brought a motion to strike portions of the appellants' factum.

38. On May 5, 2021, Justice Abella granted the motion to strike in part: "… Paragraphs **9-12, 72-88, 99, and 103-109** are struck from the appellants' factum. All parties shall refrain from referring to the said paragraphs at the hearing of the appeal" (*emphasis added*).

PART II – QUESTION IN ISSUE

39. The sole issue on appeal, based on the dissent in the court below, is stated as: "*Did the trial judge err in law in his determination that the accuseds' guilt on Counts 3, 4, 5, and 6 was the only reasonable conclusion available on the totality of the evidence?*"

40. The respondent's position is that the verdicts at issue were not unreasonable. There was ample circumstantial evidence that this was a concerted and well-orchestrated plan to shoot-up a drug dealer's residence, which the appellants were (at a minimum) party to given their proven involvement in burning the vehicle used in the drive-by shooting and disposal of the handgun. The trial judge considered all "gaps" in the Crown's evidence and reasonably concluded that the appellants' collective guilt was the only reasonable inference available on the totality of the evidence. The majority of the BCCA had no reason to apply the curative proviso because when the reasons of the trial judge were considered as a whole, the trial judge applied the correct law.

41. Even if this Court were to accede to the appellants' argument that merely misstating a principle of law amounts to an error of law, this Court can apply the curative proviso for the reasons of the majority – that the trial judge actually *applied* the correct legal framework. Inferences *other than guilt* raised by the dissent and the appellants are speculative. The trial judge reasonably rejected the appellants' arguments at trial that "gaps" in the evidence gave rise to a reasonable doubt. The standard of appellate review dictates that there is no basis to intervene with the trial judge's verdicts.

PART III – STATEMENT OF ARGUMENT

A. The verdicts at issue were not unreasonable

42. This appeal turns on whether the trial judge could have been reasonably satisfied that the only rational inference to draw from the evidence was that the Crown proved beyond a reasonable doubt all of the essential elements of the drive-by shooting offences. This was what the trial judge found.[37] The respondent says that, as the majority held in the court below, the standard of appellate review does not warrant intervention in this case. Not only was it reasonable for the trial judge to come to this conclusion, "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'".[38]

43. To frame the question raised in this case in another way (focussed on the central dispute in the court below): was the majority correct when it held that it was open to the trial judge to find that the drive-by shooting offences were the product of a well-organized plan that would have required knowledge of all involved, or was the dissent correct in holding that there was "nothing [to support] the conclusion that the shooting was well-planned and organized" and "it is not possible to draw inferences about whether the shooting was premeditated as opposed to a rash or random decision"?[39] The respondent says the majority's holding was correct.

44. The reasonableness of the trial judge's verdicts on the counts in issue, and the correctness of the majority's finding that these verdicts were reasonable, is amply supported by three circumstances that, when taken together, properly allowed for the conclusion that this was a concerted and well-orchestrated plan to shoot-up a drug dealer's residence that required the knowledge of everyone involved, including the three appellants.

45. First, it is indisputable that the appellants participated in the burning of the Eagle Truck and disposal of the Firearm – the relevant convictions are final, not the subject of this appeal. Their actions only make sense if undertaken to dispose of evidence pertaining to the drive-by shooting. In other words, the appellants' actions were contributory to the primary goal of shooting-up 221

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[37] *RFJ*, ¶¶82-88, 116
[38] *BCCA Decision*, ¶52
[39] *BCCA Decision*, ¶116

Crysdale (which was accomplished with bullets penetrating a person and exterior and internal walls).

46. Second, this was a targeted shooting. The reasoning of the dissent, i.e. that the occupants of the Eagle Truck might have been seeking to only confront an occupant of 221 Crysdale or steal something from that residence in the middle of the night, is inconsistent with their conduct in screeching up to the residence, one person running to the curb, firing several rounds at the front door, and speeding away – all within moments. This evidence overwhelmingly established that the goal of the criminal enterprise was to spray bullets at the 221 Crysdale residence.

47. Third, the way the drive-by shooting and disposal of evidence played out, i.e. the acts undertaken in furtherance of the commission of these crimes, demonstrates planning:

- The assailants undoubtedly used a vehicle stolen from another community to avoid potential identification by using a vehicle associated to them. Stealing a vehicle in a small town would not work. So, the plan required organization to steal the vehicle from the largest community proximate to Mackenzie and drive it there.

- The individuals involved in the events at 221 Crysdale had familiarity with that address and location.[40] That required either local knowledge or reconnaissance. In either case, the sequence of events (as noted above) established that the shooting was targeted.

- The Burn Site was evidently pre-determined given the presence of the Dingwall Yukon in its vicinity around the time of the drive-by shooting. Advance arrangements were required to ensure that the Dingwall Yukon was in the right place at the right time for its occupant/s to assist with the burning of the Eagle Truck and disposal of the Firearm.

- Once the Eagle Truck was set on fire, whoever drove it to Mackenzie needed transportation back to Prince George, which came in the form of the Dingwall Yukon. Clearly, the plan was always to burn the Eagle Truck in the vicinity of Mackenzie (to destroy evidence capable of forensically identifying the perpetrators) and to return to Prince George in a

[40] *RFJ*, ¶¶55-56, 59-60, 65, 94(f); AR, Vol II, T, pp.294(15)-303(43); T, p.307(22-27)

different vehicle (to avoid detection). That required Ms. Dingwall to drive her Yukon to Mackenzie well before the drive-by shooting occurred.

48. The notion that Ms. Dingwall and Messrs. Russell and Richet potentially (if one or more were not among the three perpetrators of the drive-by shooting) were unaware of the plan to commit a drive-by shooting and only happened to assist with the clean-up is unworkable. They were about 185 kilometers away from their hometown (where the Eagle Truck was stolen from less than 24 hours before) on a logging road outside a remote community, waiting for the Eagle Truck at the Burn Site at around 4:00 a.m. when the drive-by shooting was happening.

49. As the majority observed, "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".[41] It is equally implausible that criminals would have taken the necessary preparatory steps to acquire, use, and burn the Eagle Truck if their only goal was to "confront an individual at the Crysdale house, or steal something from that house in the middle of the night" as the dissent suggested.[42]

50. The actions of burning the Eagle Truck (which drew suspicion and police activity) and throwing the firearm away close to the burning truck did not equally suggest a poorly thought out or an unplanned sequence of events.[43] Ms. Dingwall and Messrs. Russell and Richet successfully destroyed and disposed of evidence that could link them, or anyone else, to the commission of the targeted shooting. The burning of the Eagle Truck was a "textbook" method of operation to destroy evidence associated to a drive-by shooting. It would have been foolhardy to maintain possession of the Eagle Truck and the Firearm. But for the fortuitous observation of the Dingwall Yukon at the Burn Site, the appellants would not have been stopped by the officer on their return to Prince George and their proven participation in the scheme would not have been discovered.

51. What logically flows from the overwhelming evidence of a well-planned and organized targeted shooting is that those who participated in the scheme (which Ms. Dingwall and Messrs. Russell and Richet indisputably did) were aware of the master plan to shoot-up the Crysdale

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[41] *BCCA Decision*, ¶49
[42] *BCCA Decision*, ¶116
[43] *BCCA Decision*, ¶116

residence and dispose of evidence, and their role in it – thereby establishing the requisite criminal intent.[44] This case exemplifies the oft-cited principle that a web of circumstantial evidence can be sufficiently strong to ensnare an accused and cry out for explanation, which was not provided by any of the appellants in this case.[45]

52. Instead, the appellants relied on, and continue to rely on, alleged "shortcomings of the circumstantial evidence" to argue that the verdicts in respect of the drive-by shooting offences were unreasonable.[46] They endorse Justice Butler's dissent on "the inadequacies of the evidence on the issue of planning"[47] and seek to extend his reasoning to the issue of intent. But the fact that there was no evidence to establish a relationship between the appellants and the victims, or any motive for the shooting, does not detract from the ample evidence on the issue of planning outlined above. The Crown does not need to prove motive. And it is possible that there was no relationship between the appellants and the victims other than the unsavoury underworld of drug trafficking and turf wars that commonly exist (e.g., the appellants could have been enforcers, hired by someone to shoot-up the Crysdale residence, or compelled to do so to extinguish a drug debt).

53. Further, the appellants' reliance on the fact that the Crown evidence was incapable of attributing any particular act to any particular appellant does not demonstrate an unreasonable verdict.[48] Where evidence of concerted action in the commission of the offence exists, it is open to a trier of fact to convict all of the accused either as principals or as aiders or abettors pursuant to s.21 of the *Code*, even though the extent of the individual participation in the violence is unclear.[49]

54. Ultimately, the appellants' arguments amount to an improper invitation to this Court to displace the trial judge's view of the evidence in terms of where he drew the line between speculation and reasonable doubt. Their focus on an "absence of evidence" is nothing more than a

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[44] *BCCA Decision*, ¶49
[45] *R. v. Sekhon*, 2014 SCC 15, ¶56
[46] Appellants' Factum, ¶¶110-120
[47] Appellants' Factum, ¶113, citing *BCCA Decision*, ¶116
[48] Appellants' Factum, ¶115
[49] *R. v. Wood*, 1989 CanLII 7193 (ON CA), 51 C.C.C. (3d) 201 (Ont. C.A.) at 220 as quoted in *R. v. Suzack*, 2000 CanLII 5630 (ON CA), 141 C.C.C. (3d) 449 (Ont. C.A.). *See also R v Pickton*, 2010 SCC 32 at paras. 58, 68 (per concurring judgment of Lebel J.) and *Thatcher*

repetition of arguments raised before the trial judge and the BCCA, where the majority aptly observed: "[the trial judge] carefully addressed the 'gaps' pointed to by 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".[50]

B. No issue arises in respect of the curative proviso

55. The majority did not find that "the trial judge committed a legal error in his treatment of circumstantial evidence" as the appellants allege.[51] The majority found that the trial judge did not commit an error of law because he *actually* considered inferences inconsistent with guilt that could have arisen from a lack of evidence.[52] The majority undertook the same analysis as this Court did in *Villaroman*, where the trial judge made an equivalent problematic statement in the reasons. This Court allowed the appeal because the trial judge's reasons, read as a whole, did not contain any legal errors (¶3). Like in this case, the curative proviso was not engaged.

56. Even if this Court should disagree and hold, as the appellants ask it to do, that a misstep in the trial judge's legal synopsis establishes an error of law, then this Court can and should apply the curative proviso. If necessary, the respondent pleads s.686(1)(b)(iii).

PART IV – SUBMISSIONS ON COSTS

57. The applicant does not seek costs, and the respondent makes no submissions as to costs.

PART V – ORDER SOUGHT

58. The respondent seeks an order dismissing the appeal.

for:

Susanne Elliott
Geoffrey R. McDonald

June 18, 2021
Vancouver, B.C.

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[50] *BCCA Decision*, ¶51
[51] Appellants' Factum, ¶7
[52] *BCCA Decision*, ¶51; *see also* ¶46

PART VI – NO RESTRICTIONS TO ACCESS OR PUBLICATION OF INFORMATION

There is no sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file that could impact on the Court's reasons in this appeal.

PART VII – TABLE OF AUTHORITIES & STATUTORY PROVISIONS

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