COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Taylor, 2015 ONCA 448
DATE: 20150619
DOCKET: C54096

Watt, Tulloch and Benotto JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Daine Taylor

Appellant

John Rosen and Paul Alexander, for the appellant

Amy Alyea, for the respondent

Heard: November 3, 2014

On appeal from the conviction entered by Justice David Salmers of the Superior Court of Justice, sitting with a jury, on March 11, 2009.

Watt J.A.:

[1] Fidel Palacios went to a party. So did his friend, Kethees Nagarajah.

[2] Palacios got beaten up at the party. At least twice. Nagarajah had nothing to do with any beating.

[3] After the second beating, Palacios made a telephone call. He called Daine Taylor who lived with and was engaged to Palacios's sister.

[4] Soon after the call, Taylor and several others drove onto the street where the party was held. Palacios joined them. Within minutes, Nagarajah was dead. Somebody had stabbed him through the heart.

[5] A jury, satisfied beyond a reasonable doubt that Taylor stabbed Nagarajah to death, found him guilty of second degree murder.

[6] Taylor appeals. He advances several grounds of appeal which he says require a new trial. These reasons explain why I disagree with his complaints and would dismiss his appeal.

THE BACKGROUND FACTS

[7] The evidence adduced at trial, which was circumstantial, is at best imprecise. A brief summary of its essential features is sufficient with greater detail provided where necessary in connection with specific grounds of appeal.

The Party

[8] Pameela Bisram, a grade 12 student, hosted a birthday party in her parents' basement. Her parents were home. Among those invited were Nagarajah, Palacios and Pameela's boyfriend Atiq Alli, who invited Ameer Mohammed and Majid Baig.

The First Fight

[9] Alli learned that Pameela had been in the washroom with Palacios. Alli was furious and confronted Palacios outside the house. He easily bested Palacios in the fight.

The Ejection of Palacios

[10] The partygoers who had seen the fight between Alli and Palacios returned to the basement. Palacios was very upset. He yelled. He cursed. He caused a scene. He picked up a steak knife and brandished it. Somebody took the knife away from him.

[11] Several partygoers, including Palacios's friend, Nagarajah, escorted Palacios from the party and offered to drive him home. Palacios refused the offer. He walked down the street away from the party. The other guests returned to the basement.

Palacios's Return and the Second Fight

[12] As several party guests stood smoking outside the Bisram home, Palacios walked back towards the house. He was talking on a cellphone. He asked for a cigarette. No one offered him one.

[13] Palacios said something that angered Mohammed. Another fight began. Nagarajah and two others broke it up. Palacios got up from the ground and walked towards the street. He was angry at first, then remorseful.

[14] Palacios's friends followed him as he walked away from the Bisram home. They offered to walk him home. Once again, he declined and walked towards Highgate Public School.

The Smoke Break

[15] Several other guests, including Alli, left the basement and stood around outside the Bisram home smoking.

The Phone Call to Taylor

[16] Taylor lived with Palacios's sister in an apartment in the same building in which Palacios lived with his mother. On the evening of the party at the Bisram home, Taylor was at home with his friend, Dion Clarke, and some of Clarke's friends – Kirk Gomez, Kristian Rajroop and Ryan Resaul.

[17] Palacios telephoned Taylor. He told Taylor that he had been in a fight and asked Taylor to pick him up near Highgate Public School. Clarke told Taylor that he knew the area around the school. Taylor agreed to pick up Palacios.

[18] Taylor did not go alone. Taylor and Rajroop went in one car. Rajroop took a golf club with him. Gomez drove another car, with Clarke and Resaul as passengers. Resaul brought a bottle.

[19] Gomez, Rajroop and Clarke denied any plans beyond picking up Palacios. Despite the items brought by Resaul and Rajroop, the witnesses claimed they were not looking for a fight. Resaul died in an unrelated accident prior to trial.

The Pick Up

[20] When the two vehicles approached Highgate Public School, Palacios was standing with Ryan James, one of the partygoers. Palacios ran to Taylor's car and got in the rear seat. His face was bruised and he was crying.

The Cars Arrive on Upton Crescent

[21] The Bisram home is on Upton Crescent, a street that curves to the south of that residence. The two cars pulled over with Taylor in the lead. The partygoers, who were standing on a lawn near the Bisram residence, saw the vehicle stop and their occupants, including Palacios, get out together.

[22] Palacios pointed at Alli and said "it was that guy over there". Palacios picked up a cricket bat that was lying on the ground and ran towards the Bisram house. Taylor ran after Palacios.

[23] When the partygoers saw the occupants piling out of the cars, they headed back towards the Bisram residence, at first walking, then running. Some went back into the house, others fled elsewhere.

The Attack on Alli

[24] A man wearing a black hooded sweatshirt and swinging a sword, like a Katana, attacked Alli. The sword appeared to be about 18 inches long, the length of Alli's forearm. The blow slashed Alli's sweater but did not strike his body. The

nature of the blow caused Alli to think that his assailant could well have cut his own leg with the sword.

[25] Taylor owned a ceremonial sword, a Katana. He wore a black hooded sweatshirt the night Alli was attacked. Shortly thereafter he went to a hospital where he received sutures for a cut to his leg.

The Death of the Deceased

[26] When the cars arrived at Upton Crescent, Nagarajah was outside the Bisram home with Alli and several others. The partygoers, including Nagarajah, scattered as the occupants emerged from the vehicles. Within minutes, Nagarajah collapsed in a pool of blood on the basement stair landing. He had been slashed across the face and stabbed in the chest. The chest wound, which penetrated his heart, was 11 centimetres deep.

The Whereabouts of Taylor

[27] Apart from the circumstantial evidence that tends to show that it was Taylor who swung the sword at Alli, there was no evidence that tended to show Taylor's whereabouts after the attack on Alli until, minutes after their arrival at the Bisram house, Taylor was seen limping back to his car.

Palacios's Third Fight

[28] After Nagarajah had collapsed on the landing, Bisram hurried upstairs to the porch where she saw Palacios. She shook Palacios and demanded to know

what had happened. He responded by striking her in the stomach with a bat. Palacios then got into a fight on the lawn with Baig. Rajroop broke up the fight. Palacios was put in one of the cars, which drove away.

The Subsequent Conduct and Findings

[29] Taylor enlisted his friend, Craig Chung, to drive him home after his wound had been sutured. By then, the police had arrived at the apartment building where Taylor lived. The men took a detour to Chung's house where they stayed the remainder of the night.

[30] The day after Nagarajah had been stabbed to death, Chung drove the appellant and Resaul to a pond near the appellant's parents' home. A knife was removed from a glass case and thrown into the water. Police later recovered the knife with Chung's assistance. A glass case, empty, was found in the glove compartment of the appellant's car.

[31] Police also recovered seat covers for the appellant's car and a golf club from the appellant's bedroom at his parents' home.

The Positions of the Parties at Trial

[32] Nobody testified that they saw Taylor stab Nagarajah to death. The case for the Crown was entirely circumstantial. The trial Crown contended that the appellant attacked both Alli and the deceased who were standing next to each other outside the Bisram home. The appellant had the opportunity and means to

kill the deceased and the motive to do so – to avenge the treatment Palacios had received. The appellant confessed his participation to both Gomez and Chung and directed the disposal of the knife, only to be frustrated by Chung's disclosure of it to the police.

[33] Counsel for the appellant at trial submitted that the case for the Crown fell short of the required standard of proof. No eyewitness saw the stabbing. The evidence of opportunity was scanty and did not even establish that the appellant swung the sword at Alli. Chung and Gomez were unworthy of belief insofar as their evidence or prior statements implicated the appellant. Trial counsel for the appellant did not advance a third party suspect defence but did suggest that the location of the blood stains inside the Bisram home tended to support the conclusion that the deceased was killed there and not outside. There was no evidence that the appellant was ever inside the Bisram home.

THE GROUNDS OF APPEAL

[34] The appellant advances several complaints about the manner in which the Crown and trial judge conducted the proceedings. The seven grounds of appeal can be reduced to three broad categories:

> i. the manner in which the trial Crown cross-examined her own witnesses under s. 9(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("*CEA*") and in what she said in her closing address to the jury;

ii. the admissibility and jury use of evidence admitted as an exception to the hearsay rule; and

iii. the correctness and adequacy of the trial judge's charge to the jury on circumstantial evidence and, more specifically, on evidence of post-offence conduct.

Ground #1: The Cross-examination under s. 9(2)

[35] The first ground of appeal relates to the trial Crown's cross-examination of Gomez and Chung after receiving leave under s. 9(2) of the *CEA*. Later, the Crown sought to have both witnesses declared "adverse". The trial judge dismissed both applications. Subsequently, the trial judge permitted the Crown to introduce the pre-trial recorded statements of both Gomez and Chung as an exception to the hearsay rule. That ruling and the manner in which evidence of the statements was left to the jury are also grounds of appeal.

The Ruling of the Trial Judge

[36] Trial counsel acknowledged that there were inconsistencies between the witnesses' out-of-court statements and their in-court testimony. The principal inconsistency had to do with an alleged admission by the appellant of having stabbed another person. Counsel contended that several factors relating to the circumstances in which the out-of-court statements were made rendered them unreliable and thus the trial judge should exercise his discretion to refuse leave to cross-examine under s. 9(2).

[37] The trial judge disagreed with this position and granted leave to the Crown to cross-examine both Gomez and Chung “as to the statement”. He concluded that neither the manner in which the interviews were conducted nor the condition of the witnesses compromised the voluntary character of their responses or the reliability of their prior statements.

The Cross-examinations

[38] The principal inconsistencies between the out-of-court statements of Gomez and Chung and their testimony at trial related to admissions by the appellant about stabbing another person. Each resiled from his pre-trial statement. Gomez claimed it was Resaul, rather than the appellant, who told him that the appellant had said he had stabbed somebody. Chung testified that the appellant was in the car when Resaul threw the knife into the pond, but that the appellant did not participate in the discussion because he was drifting in and out of consciousness. Neither adopted their out-of-court statement as true at trial.

[39] The trial Crown’s s. 9(2) cross-examination of each witness extended beyond the inconsistencies between the out-of-court statements and the trial testimony. In large measure, Crown counsel confirmed the truthfulness of the other statement details that coincided with each witness’s testimony at trial.

[40] Trial counsel did not object to Crown counsel’s cross-examination of either witness after the s. 9(2) rulings.

The Arguments on Appeal

[41] The appellant says the trial Crown's cross-examination of Gomez and Chung far exceeded what s. 9(2) permits in that it constituted a cross-examination on the statement as a whole. In effect, the Crown adduced evidence of a prior consistent statement and confirmed its truth, later inviting the jury to make improper use of it.

[42] The respondent disagrees. Under s. 9(2), the Crown was entitled to ask *why* each witness departed from what he had said in his statement and, in particular, whether the discrepancy was a result of collusion with the appellant to fabricate evidence. Further, the complaint about the cross-examination is irrelevant since the statements were admitted as evidence of the truth of their contents.

The Governing Principles

[43] Section 9(2) authorizes a limited exception to the general rule about the manner in which a party may elicit evidence from a witness the party has called.

[44] To invoke s. 9(2), the party calling the witness must make an allegation that the witness made a statement, at another time and in a particular form, inconsistent with his or her testimony in the proceeding. The remedy under s. 9(2) is discretionary: *R. v. Rouse*, [1979] 1 S.C.R. 588, at p. 604. These prerequisites permit, but do not require, the presiding judge to grant leave to the

party who has called the witness to cross-examine him or her “as to the statement”.

[45] Some additional features about the operation of s. 9(2) warrant brief mention.

[46] First, as we have already seen, the remedy is discretionary. Thus, absent an error in principle, a failure to consider a relevant factor, consideration of an irrelevant factor, or a decision that is plainly unreasonable, the trial judge’s decision is entitled to deference.

[47] Second, despite the absence of a defined standard in s. 9(2), this court has previously decided that the judge should determine whether to grant leave to cross-examine by asking whether the ends of justice are best attained by permitting it: *R. v. Carpenter* (No. 2) (1982), 1 C.C.C. (3d) 149 (Ont. C.A.), at p. 155.

[48] Third, the scope of cross-examination under s. 9(2) is confined by the words: “as to the statement”. This language excludes cross-examination at large: *R. v. Cooper*, [1970] 3 C.C.C. 136 (Ont. C.A.), at p. 136. The scope of cross-examination under s. 9(2) is also informed by the statutory language “without proof that the witness is adverse”. It would be incongruous to find that s. 9(2) (which restricts cross-examination to “as to the *statement*” (emphasis added))

permitted cross-examination at large and thus provided the same remedy as under s. 9(1), where a declaration of adversity is required.

[49] Fourth, examining counsel is entitled to know whether the witness's departure in their trial testimony from a previous out-of-court statement was to protect the accused: *R. v. Dayes*, 2013 ONCA 614, 301 C.C.C. (3d) 337, at para. 31. Thus, questions that attempt to unearth why the witness has changed his evidence at trial from what he had said in a previous, more contemporaneous out-of-court statement are allowed under s. 9(2). In addition, s. 9(2) applications are often used to set the groundwork for a declaration that the witness is adverse. The factors relevant to such a declaration include bias and collusion: *Dayes*, at para. 30.

[50] Further, the prior statement is not admissible as proof of the truth of its contents. Rather, it is available as a factor for consideration in assessing the weight to be assigned to its author's trial testimony. The prior statement, even if adopted at trial, has no intrinsic evidentiary value and should not be made an exhibit available to the jury during their deliberations: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), at pp. 53-54; and *R. v. McShannock* (1980), 55 C.C.C. (2d) 53 (Ont. C.A.), at p. 56.

[51] A final point. Reliability is not an essential component of a prior statement under s. 9(2), at least not in the same sense reliability is used in connection with

prior statements admissible as substantive evidence under the principled exception to the hearsay rule: *R. v. Tran*, 2010 ONCA 471, 257 C.C.C. (3d) 18, at para. 38.

The Principles Applied

[52] I would not give effect to this ground of appeal.

[53] First, the trial judge's decision to grant leave under s. 9(2) was discretionary and entitled to deference: *Rouse*, at p. 604. The inconsistencies were acknowledged and patent. Each statement was recorded in a manner described in s. 9(2) and of uncontested accuracy.

[54] Second, the manner of questioning here, while not the most direct route, was available to the trial Crown. Crown counsel was permitted to ask questions to determine why the witnesses departed from their earlier statements, in particular whether this was to protect the appellant: *Dayes*, at para. 31. Thus, Crown counsel was allowed to ask questions which would attempt to show that the only portions of the statements recanted by the witnesses were those in which the appellant admitted complicity. Further, it was clear that the Crown was attempting to lay a foundation for an application to declare the witness adverse, a recognized purpose of cross-examination under s. 9(2): *Dayes*, at para. 30.

[55] Third, trial counsel for the appellant did not object to the manner in which the cross-examination proceeded after leave had been given under s. 9(2). While

failing to object is not dispositive, it affords some evidence that counsel did not think it improper or prejudicial.

[56] Finally, the appellant's complaint lacks cogency when the prior statements were admitted as proof of their contents under the principled exception to the hearsay rule. This is the subject of the next ground of appeal.

Ground #2: The Admissibility of the Out-of-court Statements of Gomez and Chung

[57] The appellant also alleges error in the trial judge's decision to admit the out-of-court statements of Gomez and Chung as substantive evidence and in what the judge said or failed to say in instructing the jury about their use of the evidence in deciding the case. I begin with a consideration of the claim that the evidence was wrongly admitted.

The Rulings of the Trial Judge

[58] At trial, counsel for the appellant conceded that the necessity requirement had been met for each witness. The controversial ground was whether the Crown had established threshold reliability and, if so, whether each statement should be excluded because its prejudicial effect exceeded its probative value.

[59] The trial judge reviewed the circumstance of Gomez's arrest and of the statement he made after that arrest. The interview took place at a police station after Gomez had been arrested on a charge of second degree murder, advised

of his *Charter* rights and had spoken to duty counsel. Gomez demonstrated an awareness of his rights to counsel and silence. As the interview began, he was told and confirmed his knowledge of the importance of telling the truth and the consequences of lying. The events of which he was asked were hours old, his memory of them fresh. The interview was videotaped in its entirety and, most significantly, Gomez was available for cross-examination before the jury. Despite the absence of an oath, or a declaration to tell the truth, threshold reliability had been established.

[60] Chung's police interview was audio and video recorded. Chung was under oath and warned about the consequences of lying to investigators. Chung was not charged with an offence. He was voluntarily at the station with his father. The relevant events and the interview were closely connected. The interview and its surrounding circumstances, including anything said to Chung, were entirely free from oppression. Chung was available for cross-examination at trial. He later showed the police where the knife had been discarded.

[61] The trial judge was also satisfied that the probative value of each statement exceeded its prejudicial effect. The jury was well able to evaluate the reliability of the evidence with the tools it had at its disposal.

The Arguments on Appeal

[62] The appellant says that neither out-of-court statement satisfied the more stringent standard of threshold reliability required for prior inconsistent statements by recanting witnesses. In the alternative, the statements, if otherwise admissible, should have been excluded because their minimal probative value was overborne by their profound prejudicial impact.

[63] The appellant contends that Gomez's statement, made to a person in authority, was induced by a hope of advantage held out by the interviewer. The trial judge found that the statement was not obtained by oppression but never considered the promise of leniency as an inducement. The appellant lists a number of factors supporting a finding of inducement. Gomez was under arrest for murder. He was denied access to counsel for seven hours. For nearly the entire interview, he said nothing about any incriminating admission by the appellant. He was vulnerable and readily acceded to a suggestion of self-exoneration by putting the blame on the appellant.

[64] The appellant also submits additional reasons for why the statements were unreliable. Gomez was a co-accused, making his statement inherently unreliable. The statement was not under oath. Further, the telephone call in which Gomez claimed the appellant admitted complicity could not have occurred. The trial judge also misapprehended or failed to consider that Chung had a motive to lie.

[65] The respondent points out that the only live controversy at trial was whether Crown counsel had established the threshold reliability of each statement. The trial judge's conclusions, which considered the governing principles and were free of error, are entitled to deference. The same deference is warranted in his balancing of probative value and prejudicial effect.

[66] The respondent submits that the absence of an oath did not preclude the admission of Gomez's statement, which displayed sufficient circumstantial guarantees of trustworthiness and provided adequate substitutes for testing its truth and accuracy. The trial judge rejected the argument that Gomez was inherently untrustworthy because of his repeated falsehoods in the statement. He also rejected the circumstances in which the statement was made as affecting the voluntariness and threshold reliability of the statement. He rejected the same factors, now advanced as inducements, when they were argued as demonstrating oppression at trial. Additionally, Gomez was aware of his right to silence and of the importance of telling the truth to those investigating the murder. He had spoken to duty counsel and received legal advice. He was available for cross-examination.

[67] The respondent reminds us that Chung was not charged with murder, or any other offence, and thus not a person whose statement was inherently unreliable. At best, as a potential accessory after the fact, his interest was in exculpating not implicating the appellant as a principal. No *per se* rule of

exclusion arises in the case of accessories after the fact, unlike with *particeps criminis*. Further, Chung was under oath and warned about the consequences of lying under oath. His statement was videotaped in its entirety. He was available for cross-examination. The appellant's complaints about untrustworthiness are about things that are relevant to ultimate not threshold reliability, thus not capable of exclusionary influence.

The Governing Principles

[68] The out-of-court statements of Gomez and Chung were relevant and material. However, they engaged the hearsay rule. Crown counsel, who sought to proffer the statements, had to establish on a balance of probabilities that the evidence of the statements was necessary and reliable, and further that their probative value outweighed their prejudicial effect.

[69] The authorities regard recantation as satisfaction of the necessity requirement: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 78; and *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 22.

[70] The reliability requirement refers to threshold reliability, not ultimate reliability, and thus reflects the distinction between the admission of evidence and reliance upon it: *Khelawon*, at para. 2; and *Youvarajah*, at paras. 23-24. It is for the trial judge to determine whether the proponent of the evidence has established threshold reliability. Where the evidence is admitted, it is for the jury

to determine how much or little they will believe of it and rely upon it in reaching their conclusion about the adequacy of the case for the Crown.

[71] A prior inconsistent statement of a non-accused witness may be admitted as substantive evidence if the proponent satisfies the reliability requirements established in *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740. The reliability requirement insists:

> i. that the statement be under oath or its equivalent after a warning about the consequences of an untruthful statement;
>
> ii. that the statement be videotaped in its entirety; and
>
> iii. that the opposite party has a full opportunity to cross-examine the declarant.

See *B. (K.G.)*, at pp. 795-796; *Youvarajah*, at para. 29; and *R. v. Chretien*, 2014 ONCA 403, 309 C.C.C. (3d) 418, at para. 51.

[72] The prerequisites imposed in *B. (K.G.)* are not preclusive. A party may establish threshold reliability by two methods, which are not mutually exclusive:

> i. the presence of adequate substitutes for testing truth and accuracy (procedural reliability); or
>
> ii. sufficient circumstantial guarantees of reliability or an inherent trustworthiness (substantive reliability).

See *Khelawon*, at paras. 49 and 61-63; *Youvarajah*, at para. 30; *Chretien*, at para. 52; and *R. v. Devine*, 2008 SCC 36, [2008] 2 S.C.R. 283, at para. 22.

[73] Under the *B. (K.G.)* regimen, an oath is not an absolute requirement for a finding of reliability: *B. (K.G.)*, at p. 792. Other circumstances may be sufficient to impress upon the declarant/witness the importance of telling the truth: *B. (K.G.)*, at pp. 792 and 796. Evidence from which it can reasonably be inferred that, when the statement was made, the declarant appreciated the solemnity of the occasion and the importance of telling the truth may serve as a proxy for an oath: *R. v. Trieu* (2005), 195 C.C.C. (3d) 373 (Ont. C.A.), at para. 85; and *R. v. Adjei*, 2013 ONCA 512, 309 O.A.C. 328, leave to appeal to S.C.C. refused, [2014] S.C.C.A. No. 74, at para. 39. In addition, external evidence, which is at once itself reliable and tends to confirm, in a meaningful way, the reliability of the out-of-court statements, may compensate for the absence of an oath: *Trieu*, at para. 85; and *Adjei*, at para. 39.

[74] The most important factor in the procedural reliability analysis is the availability of the declarant as a witness in the proceedings so that the opposite party has a full opportunity to cross-examine him or her before the trier of fact: *Youvarajah*, at para. 35; *Chretien*, at para. 53; and *R. v. Couture*, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95. The opportunity to cross-examine the declarant/witness before the trier of fact must be a meaningful one, however, not limited, for example, because the witness urges privilege, refuses to answer the cross-examiner’s questions or claims lack of memory: *Chretien*, at para. 53.

[75] Satisfaction of the necessity and reliability requirements does not guarantee admission of a prior statement as substantive evidence. The trial judge retains the discretion to exclude a statement because its prejudicial effect outweighs its probative value: *Chretien*, at para. 45. The factual findings that underpin this analysis and the result of the balancing process attract deference from reviewing courts: *Chretien*, at para. 45.

The Principles Applied

[76] As I will explain, I would not accede to this ground of appeal.

[77] First, deference is due to both decisions the trial judge made, which involved fact-sensitive inquiries that required consideration and analysis of all the relevant circumstances: *Youvarajah*, at para. 31; *Couture*, at para. 81; and *Chretien*, at para. 57.

[78] Second, necessity was not in issue here. Trial counsel for the appellant correctly conceded that the necessity requirement had been met by the witnesses' recantation of the part of their statements in which the appellant admitted liability: *Youvarajah*, at para. 22; and *Khelawon*, at para. 78. What remained was whether the Crown had established reliability, and, if so, whether the probative value of the statements as substantive evidence predominated over their prejudicial effect. As mentioned before, threshold reliability can be

established by showing procedural reliability or substantive reliability. In this case, as the trial judge found, there were elements of both at work.

[79] Chung's statement was under oath, accompanied by a warning about the consequences of telling lies and recorded in its entirety. Chung was not charged with any offence and attended the police station voluntarily with his father. An essential feature of his statement – the disposal of a knife at the appellant's direction – was confirmed by the finding of a knife in the pond described by Chung near the home of the appellant's parents.

[80] Gomez's statement was not made under oath. It was videotaped in its entirety and preceded by the primary and secondary police cautions and *Charter* advice. Gomez spoke to duty counsel. He was charged with murder and advised of the consequences of lying to the police and the importance of telling the truth. It is a reasonable inference that Gomez appreciated the solemnity of the occasion and the importance of speaking the truth: *Trieu*, at para. 85; and *Adjei*, at para. 39.

[81] The most important factor in the reliability analysis, a factor that on its own goes a long way to establishing procedural reliability in the absence of an oath, is that both declarants were witnesses at trial and subject to full cross-examination on their statements and their evidence as a whole: *Youvarajah*, at para. 35; *Couture*, at paras. 92 and 95; and *Chretien*, at para. 53. Here there were no

impediments to full cross-examination. No assertion of privilege. Or claim of memory lapse. And each declarant was more aligned in support of the appellant than at odds with him.

[82] Finally, the appellant has not established any basis upon which to interfere with the trial judge's discretionary determination that the probative value of this evidence exceeds its prejudicial effect.

Ground #3: Jury Instructions on the Hearsay Statements

[83] The appellant questions the adequacy of the trial judge's instructions to the jury about the manner in which they should assess the evidence provided by the out-of-court statements.

The Trial Judge's Instructions

[84] The trial judge vetted his final instructions, which were delivered orally and provided in writing to the jury, with counsel. Three separate parts of the charge relate to the out-of-court statements admitted as substantive evidence.

[85] In a section entitled "Out-of-court Utterances and Statements of Accused", which made express reference to Gomez and Chung, the trial judge explained that the jurors' first task was to decide whether the appellant actually made the statement a witness attributed to him. After describing several circumstances the jurors could consider in making this threshold decision, the trial judge expressly instructed the jury: "Unless you decide that Mr. Taylor made a particular remark

or statement, you must *not* consider it in deciding this case" (emphasis in original).

[86] The next section dealt with the use of prior inconsistent statements of non-accused witnesses for impeachment purposes only. The third section, entitled "Prior Inconsistent Statement of Non-accused Witness as Substantive Evidence", applied only to Chung and Gomez. Here, the trial judge explained to the jury the factors they should consider in evaluating the out-of-court statement as substantive evidence.

[87] Finally, in his review of the position of the defence, the trial judge pointed out the reasons advanced by trial counsel why the jurors should not accept as truthful the incriminating parts of the out-of-court statements.

The Arguments on Appeal

[88] The appellant acknowledges that the trial judge properly instructed the jury on the general principles that apply in an assessment of the weight to be assigned to an out-of-court statement received as substantive evidence and its relationship to the in-trial testimony of the same witness. But the trial judge failed, according to the appellant, to draw to the jury's attention the specific frailties in the out-of-court statements that eroded their probative value.

[89] The appellant says the trial judge should have expressly instructed the jury to disregard the appellant's admissions if they were not satisfied that he made

them. The judge should have pointed out as well that each had a motive to lie – self-protection – especially Gomez who was himself charged with murder. Gomez's statement was not under oath or affirmation and he misled the police in order to protect his friend, Resaul. Chung could not recall whether the person who told him about the appellant's admission was the appellant himself or Resaul.

[90] The respondent takes the position that the jury received adequate instructions about how to assess the evidence of the out-of-court statements of Gomez and Chung, as well as their in-court testimony. The deficiencies of which the appellant complains are not legal principles upon which express instructions were required to equip the jury to handle this evidence. These were points of argument made by trial counsel and did not need to be included in the judicial instructions.

[91] The respondent points out that the trial judge expressly instructed the jury that their first task was to decide whether they were satisfied that the appellant made the incriminating admissions described in the statements. Without that finding, the instructions continued, they were not to consider the admissions. This made it clear, at least by necessary implication, that if someone else made the comment – say Resaul – the evidence could not be considered.

The Governing Principles

[92] The complaint here is that the trial judge failed to include in his final instructions a catalogue of factors or circumstances the appellant wanted the jury to consider in the assessment of the weight they would assign to the incriminating aspects of the out-of-court statements admitted as substantive evidence. Each factor or circumstance was apparent at trial, either in the statement itself or in the testimony given at cross-examination. In other words, these were obvious factors or circumstances which did not require judicial instructions to become apparent.

[93] Several basic principles inform an assessment of the validity of this complaint.

[94] First, we adopt a functional approach in our assessment of the adequacy of jury instructions. We examine the instructions as a whole, in the context of the evidence adduced and the positions advanced at trial, and test them against their ability to fulfil their purpose of equipping the jury to perform its task: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 14; *R. v. Cooper*, [1993] 1 S.C.R. 146, at pp. 163-164; and *R. v. Cudjoe*, 2009 ONCA 543, 68 C.R. (6th) 86, at para. 154.

[95] Second, provided a jury instruction fulfils its purpose, it does not become inadequate because more could have been said, or what was said could have

been more felicitously phrased, or located in another place in the instructions: *Cudjoe*, at para. 154.

[96] Third, at least for complaints involving non-direction, some significance should be assigned to the nature of the alleged deficiency. Non-direction on matters of evidence stands on a different legal footing than non-direction on principles of law. Non-direction about a governing legal principle may well amount to misdirection. Not so with respect to an item of evidence or an inference available from an item of evidence. Failure to tell the jury everything which they might have been told is not misdirection. Misdirection occurs when the judge has told the jury something wrong or where what the judge has told them would make wrong what he or she has left them to understand: *Cudjoe*, at para. 154; *R. v. Demeter* (1975), 25 C.C.C. (2d) 417 (Ont. C.A.), aff'd on other grounds, [1978] 1 S.C.R. 538, at pp. 436-437.

[97] Finally, we expect counsel to assist the trial judge by offering constructive submissions about the content of jury instructions, especially final instructions. Pre-charge conferences provide an appropriate venue for those discussions including the extent to which evidence may be reviewed and its strengths and weaknesses pointed out: *Cudjoe*, at para. 155; *Jacquard*, at para. 38; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 58; and *R. v. Royz*, 2009 SCC 13, [2009] 1 S.C.R. 423, at para. 3. It is all the more so when final instructions are vetted with counsel in advance of delivery: *R. v. Polimac*, 2010

ONCA 346, 254 C.C.C. (3d) 359, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 263, at paras. 89 and 96-97.

The Principles Applied

[98] For several reasons, I would not give effect to this ground of appeal.

[99] I begin with consideration of the nature of the complaint. This submission involves a claim of non-direction, a failure to instruct on a subject-matter. But the subject-matter is not a legal principle, for example, that explains the essential elements of the offence or a mode of participation or explains the limited use the jury may make of a particular item of evidence. The substance of the complaint has to do with the failure to recite certain factors or circumstances that may affect the weight the jury might assign to the out-of-court statements. No misdirection occurred here. Non-direction on matters of evidence does not amount to misdirection except where the relevant item of evidence mentioned is the foundation of the defence, which was not the case here: *Demeter*, at pp. 436-437.

[100] Second, the jury received proper instructions on how they were to evaluate the out-of-court statements of Gomez and Chung. Included in those instructions was a specific reference to suggestions made and leading questions asked by the interviewing officer.

[101] Third, the trial judge expressly instructed the jury that they were only entitled to consider the alleged admissions of complicity if they were satisfied that the appellant was the person who made them to Gomez and Chung. From this instruction, the jurors would understand that, if they were not satisfied that the appellant made the admissions to Chung and Gomez, they were not entitled to use them in assessing the adequacy of the Crown's proof. It would have been better had the trial judge expressly instructed the jury that, if they found it was Resaul who told either Chung or Gomez about the appellant's admission, they were not entitled to consider that evidence in reaching their conclusion. But, in light of what was said, I am not persuaded that the omission was prejudicial to the appellant.

[102] Fourth, the trial judge instructed the jury fully on the position of the defence, in particular, on the reasons why the defence said the jury should not rely on the statements of Gomez and Chung about the appellant's admissions. The language used in this instruction was what trial counsel for the appellant had provided as a summary of his position.

[103] Finally, the standard to be applied in assessing this claim of error is one of fairness, not perfection. The instructions, with modest effort, could have been better. But that is not the test. The instructions were fair. They attracted no objection from trial counsel in whose words they were composed.

Ground #4: The Chung and Gomez Statements as Exhibits

[104] The final ground of appeal relating to the out-of-court statements of Chung and Gomez, which were filed as exhibits at trial, has two aspects:

i. the trial judge erred in permitting the recordings and transcripts of the out-of-court statements to go to the jury; and

ii. the trial judge erred in failing to send transcripts of relevant portions of the cross-examination of Gomez and Chung on their statements to the jury along with the exhibits or, at the very least, to remind the jurors in his final instructions about the same qualifications.

The Additional Background

[105] Trial counsel for the appellant agreed explicitly that the recordings and transcripts of the out-of-court statements should be filed as exhibits and sent to the jury room for jury review during deliberations. He did not ask that transcripts or recordings of relevant parts of the cross-examination of Gomez and Chung on their statements be sent to the jury room. Nor did trial counsel seek additional or more specific instructions about jury use of the statements.

[106] The trial judge provided mid-trial and final instructions about recordings and transcripts as evidence, the impeachment value of prior statements, and the assessment of prior statements as substantive evidence. He also reiterated the defence position that the parts of each statement that reported the appellant's

admissions were untruthful. The instructions repeatedly reminded the jurors to consider and decide the case on the evidence as a whole.

The Arguments on Appeal

[107] In a reversal of the position advanced by trial counsel, the appellant now complains about permitting the recordings and transcripts to accompany the jury for use during deliberations. The appellant argues this had the effect of sending the most incriminating parts of the statement to the jury without their in-court recantation or any cross-examination on the issue. This imbalance caused an unfair trial.

[108] The respondent says the decision to permit the exhibits to go to the jury room involves the exercise of judicial discretion. Absent an error in principle, the decision, supported by trial counsel, should be accorded substantial deference. Further, trial counsel did not seek a more specific instruction about jury use of the recordings or transcripts, or suggest, as here, that other material should accompany the exhibits. The trial judge's instructions, which attracted no objection from trial counsel, ensured that the jury only used the inculpatory admissions if they were satisfied the appellant had made them. The instructions also reminded the jury of the defence position in connection with the inculpatory admissions. The procedure followed did not compromise trial fairness.

The Governing Principles

[109] As a general rule, things filed as exhibits go to the jury room during deliberations, even though the jurors see and hear them during the trial. These things are real evidence. Written confessions. Photographs. Exculpatory statements. Video surveillance showing the commission of an offence. Real evidence includes any evidence that conveys a relevant first-hand sense impression to the trier of fact.

[110] Witnesses give evidence about various aspects of things filed as exhibits at trial. Their evidence is subject to cross-examination, which may qualify or diminish the weight to be assigned to the exhibit, the real evidence. Yet it is rare that the cross-examination would also accompany the real evidence to the jury room. In other words, no bright line rule requires the qualifying testimony to accompany the real evidence to the jury room. How qualifications on the real evidence are handled is left to the good sense and sound discretion of the trial judge.

[111] This point is well-illustrated by prosecutions for sexual offences where an essential component in the prosecution's case is often a videotaped statement tendered and received under s. 715.1 of the *Criminal Code*, R.S.C. 1985, c. C-46. The videotape, as well as a transcript of it, but not of the cross-examination at trial, are routinely filed as exhibits. The complainant or witness is cross-examined

at trial. Frequently, the cross-examination focuses on the videotaped complaint adopted by the witness at trial.

[112] In such cases, a trial judge has the discretion to permit the jury to view the videotaped statement in the jury room: *R. v. T. (W.P.)* (1993), 14 O.R. (3d) 225 (C.A.), at p. 268. The trial judge also has the discretion to further instruct the jury about the videotape, as for example, to caution the jurors against giving the statement undue weight simply because it was in the form of a videotape: *T. (W.P.)*, at p. 268. It is for the trial judge to decide how best to facilitate the jury's deliberations while maintaining the fairness of the process: *R. v. Noftall* (2004), 181 C.C.C. (3d) 470 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 297, at para. 15; and *T. (W.P.)*, at p. 268.

[113] The exercise of the trial judge's discretion to permit the jury to review a videotape in their jury room during deliberations is reviewable on appeal: *Noftall*, at para. 18. But an appellate court should only interfere with the exercise of that discretion where an appellant can demonstrate that his or her right to a fair trial was compromised by allowing the jury to take the videotape with them during deliberations: *R. v. Archer* (2005), 202 C.C.C. (3d) 60 (Ont. C.A.), at para. 78.

The Principles Applied

[114] As I will explain, I would reject this ground of appeal.

[115] First, as a general rule, things filed as exhibits at trial go to the jury room. Exhibits are evidence with a permanence that outlives oral testimony. As mentioned, at the very least, a trial judge has the discretion to permit videotaped statements filed as exhibits to go to the jury room: *T. (W.P.)*, at p. 268. This is so even if the videotape represents the evidence in-chief of the witness and is subject to qualification in cross-examination: *T. (W.P.)*, at p. 268.

[116] Second, the trial judge's exercise of discretion is entitled to deference unless the appellant demonstrates that his right to a fair trial was compromised by allowing the jury to take the recordings with them to the jury room: *Archer*, at para. 78. Any impact on trial fairness turns on the instructions to the jury about the recordings: *Archer*, at para. 79.

[117] The principal attack on the recordings here was that their recital of inculpatory admissions by the appellant was untruthful and their recantation of them at trial was truthful. The trial judge instructed the jury fully on the position of the defence, not only the denial of liability but also the reasons why the jury should reject as untruthful the alleged admissions contained in the statements of Gomez and Chung. Considered in this light, the failure to more fully review the cross-examination or say more about the statements does not amount to misdirection or compromise the fairness of the trial.

[118] Third, too much should not be made about the risk of juror overemphasis on parts of the evidence, in this case the recordings, because of the form in which the evidence is adduced. Exhibits are part of the evidence that jurors are entitled to consider, just like testimony and admissions (which are often reduced to writing and filed as exhibits). Jurors are told to consider *all* the evidence. It is for them to say what is important and deserving of emphasis. Taken to its logical conclusion, the appellant's argument would exclude any exhibits, including those that may be exculpatory, from going to the jury room. This does not sit well with the confidence we justifiably repose in jurors: *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 692-693.

[119] A final point. It passes strange how the appellant can now advance an argument that the statements should not have gone to the jury room when trial counsel expressly agreed that the statements should go: *Archer*, at para. 79. After all, the statements were evidence both for and against the appellant. Trial counsel did not object to the instructions or suggest that what was said was inadequate to ensure a fair trial for the appellant. While want of objection is not fatal, it tells heavily against the claim later advanced, for the first time, that the instructions resulted in unfairness.

Ground #5: The Crown's Jury Address

[120] The appellant alleges several improprieties in Crown counsel's closing address at trial. In general, the appellant's complaints relate to:

i. misstatements of evidence adduced at trial;

ii. invitations to the jury to engage in prohibited reasoning; and

iii. unfair allegations of collusion among the prosecution witnesses to protect the appellant from a finding of guilt.

[121] The legitimacy of the complaints may be determined without reference to the specific passages of the closing address to which exception is taken.

The Arguments on Appeal

[122] The appellant contends that Crown counsel improperly accused two Crown witnesses, Clarke and Rajroop, of lying to protect the appellant. The Crown never made any such suggestion to the witnesses when they gave evidence and this offended the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). Further, there was no evidentiary basis to ground any submission that they planned to lie.

[123] The appellant also submits the Crown misstated or mischaracterized:

i. the evidence about Resaul's whereabouts;

ii. the alleged admissions by the appellant to Gomez and Chung; and

iii. the evidence of Gomez's recantation and Palacios's testimony.

Further, Crown counsel's address on the evidence of post-offence conduct was misleading in that it misrepresented the evidence about the hidden seat covers from the appellant's car and invited the jury to engage in circular reasoning.

[124] The respondent denies any suggestion of impropriety in the trial Crown's closing address. She submits that the absence of any complaint by trial counsel when presented with multiple opportunities to do so during and after delivery of the address is proof that what Crown said did not exceed the boundaries.

[125] The respondent says the Crown made closing submissions that invited jurors to draw reasonable inferences from the evidence adduced at trial. The Crown did not call Clarke and Rajroop to attack their credibility and suggest collusive activity. Each had relevant evidence to give as members of the group who drove to the scene of the party to rescue Palacios, yet, surprisingly in light of their purpose, neither saw what the appellant did or where he went after they arrived.

[126] The respondent also adds that the Crown, who addressed the jury first, was entitled to offer an anticipatory response to the defence's claim that these same witnesses gave evidence in the service of exculpating Resaul with whom they were more clearly affiliated than with the appellant. Further, nothing the

Crown said about the evidence of post-offence conduct mischaracterized the evidence or misled the jury about the use the jurors could make of it.

The Governing Principles

[127] In conducting a prosecution and in addressing a jury, counsel for the Crown is to be accurate, fair and dispassionate: *R. v. Pisani*, [1971] S.C.R. 738, at p. 740. Over-enthusiasm for the strength of the case for the Crown, manifested in a closing address, may be forgivable where it relates to matters properly adduced in evidence. All the more so when the enthusiasm is modulated by a proper caution in the charge to the jury: *Pisani*, at p. 740. The situation is different, however, where the enthusiasm is coupled with or consists of putting before the jury, as facts to be considered in support of the case for the Crown, matters of which there is no evidence or that invite speculation rather than inference: *Pisani*, at p. 740.

[128] No unyielding general rule mandates that an improper jury address by Crown counsel results in an unfair trial and that a conviction must be set aside on appeal: *Pisani*, at pp. 740-741. Each case falls to be decided on its peculiar facts. Factors to consider include:

i. the seriousness of the improper comments;

ii. the context in which the comments were made;

iii. the presence or absence of objection by defence counsel; and

iv. any remedial steps taken by the trial judge following the address or in final instructions to the jury.

These factors are illustrative, not exhaustive, of the circumstances that a trial judge may consider: *R. v. B. (R.B.)*, 2001 BCCA 14, 152 C.C.C. (3d) 437, at para. 26.

The Principles Applied

[129] For several reasons, I would reject this ground of appeal.

[130] First, this is not a case in which the Crown called witnesses in its case-in-chief, not for the purpose of adducing evidence to prove facts material to the case for the Crown, but rather to discredit them and their evidence as a basis to allege collusion with the defence. See, for example, *R. v. Soobrian* (1994), 96 C.C.C. (3d) 208 (Ont. C.A.) and *R. v. Figliola*, 2011 ONCA 457, 272 C.C.C. (3d) 518.

[131] Rajroop and Clarke were not peripheral witnesses. They were members of the group that responded to Palacios's telephone call. As posse members, they had material evidence to give about the intentions of the group as they headed towards Upton Crescent and their activities on and after arrival, including the whereabouts of the appellant. The nature of their relationship with the appellant and whether it coloured their evidence about the appellant's conduct after arrival

was a subject upon which the Crown was entitled to make submissions to the jury.

[132] Second, Crown counsel's final address did not invite the jury to rely on anything that was not in evidence or on anything that was in evidence for an improper purpose. Unlike in *Pisani*, the closing address did not create evidence or invite the jury to make findings on evidence woven from the fabric of Crown counsel's submissions.

[133] Third, the final address of Crown counsel consisted principally of inviting jurors to draw inferences supportive of the Crown's case and to reject inferences advanced by the defence. In a circumstantial case, this is neither surprising nor improper.

[134] Fourth, Crown counsel's statements about the evidence of post-offence conduct of the removal of the seat covers and their deposit in the appellant's parents' home were not misleading. The location of the seat covers and golf club gave rise to a reasonable inference that they were hidden and that the appellant was connected with them since they were from his car and found in his bedroom. That no blood was found on them was pointed out to the jury by the trial judge. However, the absence of blood does not negate an inference that hiding the items was to ensure that any link to the stabbing that may be revealed by their examination was not found.

[135] Finally, trial counsel for the appellant did not object to anything said or implied in Crown counsel's closing address. While not fatal, this gives some indication that counsel did not consider the address as misleading, inviting speculation, or unfaithful to the evidence adduced at trial.

Ground #6: The Charge on Post-offence Conduct

[136] This ground alleges error in the trial judge's instruction on evidence of post-offence conduct. The passage to which exception is taken attracted no objection at trial.

The Charge to the Jury

[137] In his instructions on post-offence conduct, the trial judge told the jury to approach the evidence in two steps. The first step required jurors to decide whether the appellant actually did or said what he was alleged to have said or done after the offence was committed. An affirmative finding was necessary before jurors could proceed to the second step.

[138] The instruction to which exception is taken explains to the jurors the potential use of the evidence depending on their initial finding about whether the conduct occurred or words were spoken. The instruction is this:

> If you do *not* or cannot find that Mr. Taylor did or said those things *because* he was conscious of having done what is alleged against him, you *must not* use this evidence in deciding or in helping you decide that Mr. Taylor committed the offence charged.

> On the other hand, if you find that anything Mr. Taylor did or said afterwards was *because* he was conscious of having done what is alleged against him, you may consider that evidence, together with all the other evidence, in reaching your verdict. [Emphasis in original.]

The Arguments on Appeal

[139] The appellant says the instruction given here repeats an error identified in *R. v. Hall*, 2010 ONCA 724, 263 C.C.C. (3d) 5, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 499. It invited the jury to engage in tautological reasoning and to jump directly to the issue of guilt as a precondition of the use they would make of evidence of post-offence conduct: *Hall*, at paras. 142-143. The error was compounded by the trial judge's failure to itemize for the jury other explanations for the conduct that emerged from the evidence adduced at trial. The appellant submits the errors require a new trial.

[140] The respondent acknowledges the so called "*Hall* error", but points out that the *Hall* court did not consider the error to be fatal to the validity of the conviction. Besides, the respondent says, the other charge deficits present in *Hall* are absent here. In the end, the trial judge's instructions made it clear that jurors should reserve their final judgment on their use of evidence of post-offence conduct until they had considered the balance of the evidence and rejected any explanation of the conduct other than the appellant's involvement in the murder.

The Governing Principles

[141] In *Hall*, this court decided that the language used there, and repeated here, reflects error because it invites the jury to jump directly to the issue of guilt as a pre-condition to the use of the evidence of post-offence conduct in determining whether guilt has been established. This, the court said, is "conducting the deliberation process backwards": *Hall*, at para. 143. Despite the finding of error, the court also held that, on its own, such an error was not fatal: *Hall*, at para. 146.

[142] The decision in *Hall* preceded that of the Supreme Court in *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433 which characterizes evidence of post-offence conduct as circumstantial evidence to be left to the jury to consider, along with the rest of the evidence, in the determination of guilt. The point has been made elsewhere that the need for a preliminary finding of fact as a condition precedent to jury use of an item of evidence is not unique to evidence of post-offence conduct. Nor does it turn the decision-making process on its head. The principle of reasonable doubt and the incidence of the burden of proof remain in play.

The Principles Applied

[143] I would not give effect to this ground of appeal. As I said before, a *Hall* error, on its own, is not fatal. In this case, there are a number of considerations that short circuit the appellant's claim for a new trial on the basis of such an error.

[144] First, the instructions thoroughly canvassed the defence position in connection with this evidence in the language of trial counsel's choosing. That position included a denial of participation in any discussion about the disposal of the knife and of any connection with the removal and hiding of the seat covers and golf club on which no evidence of blood was detected.

[145] Second, trial counsel did not object to any aspect of the final instructions on evidence of post-offence conduct. The failure to object is not fatal to appellate success, especially since neither counsel nor the trial judge had the benefit of the reasons in *Hall* or *White* to assist them in the composition of the final instructions. The lack of objection does suggest, however, that the "error", if it remains an error after *White*, was neither serious nor significant in the mind of counsel who sat through the trial and was better situated than this court to assess its impact: *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 44.

[146] Finally, despite the circumstantial nature of the evidence adduced by the Crown at trial, the evidence of post-offence conduct did not occupy a prominent place in proving guilt. Centre stage was occupied by opportunity, motive, possession of the instruments of crime and the admissions contained in the prior statements of Gomez and Chung received as substantive evidence.

Ground #7: The Instructions on Circumstantial Evidence

[147] The final ground of appeal alleges inadequacy in the trial judge's final instructions on the standard of proof to be met to establish guilt exclusively on the basis of circumstantial evidence.

The Charge to the Jury

[148] In the charge to the jury, the trial judge distinguished between direct and circumstantial evidence in the same language he had used in preliminary instructions to the jury in advance of Crown counsel's opening and the introduction of evidence. He illustrated the inference-drawing process inherent in circumstantial evidence by an uncontroversial example unrelated to the evidence adduced at trial. The trial judge's instructions on the standard of proof tracked the language suggested by Cory J. in *R. v. Lifchus*, [1997] 3 S.C.R. 320, at para. 39. In connection with each essential element of the offence charged, he reminded the jury that proof beyond a reasonable doubt of each element was required before a finding of guilt could be made.

The Arguments on Appeal

[149] The appellant argues that the trial judge erred in failing to instruct the jury that they were required to find the appellant not guilty unless they were satisfied that the appellant's guilt was the sole rational inference that could be drawn from the evidence as a whole. The appellant sought such an instruction at trial but was

denied it. As a result, the appellant says the jury received no guidance on the core element of the reasonable doubt standard.

[150] The respondent says the appellant seeks a special instruction on the standard of proof required in cases in which the prosecution's proof consists of circumstantial evidence. That ship has sailed, the respondent contends, having left port in 1977 and not returned since. The *Hodge's* formula has been replaced by a flexible approach to explanation of the standard. In this case, the trial judge explained the difference between direct and circumstantial evidence and illustrated, by an uncontroversial example, the inference-drawing process. The trial judge repeatedly emphasized the need for the jurors to consider the evidence as a whole and to be satisfied beyond a reasonable doubt by the evidence on each essential element of the offence before reaching a guilty verdict. These instructions well equipped the jurors to perform their task.

The Governing Principles

[151] Several basic principles inform consideration of this claim of non-direction amounting to misdirection.

[152] First, the controlling authorities do not require a "special instruction" on the standard of proof required where the case for the Crown consists entirely of circumstantial evidence: *R. v. Cooper*, [1978] 1 S.C.R. 860, at pp. 865-866 and

881; and *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 33. This is so even where the issue is one of identification: *Griffin*, at para. 33.

[153] Second, the essential component of an instruction on circumstantial evidence is to instill in the jury that, in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence, considered as a whole, is that an accused is guilty of the offence: *Griffin*, at para. 33.

[154] Third, the central message to the jury about the standard of proof in cases consisting exclusively of circumstantial evidence may be conveyed in different ways: *Griffin*, at para. 33. Trial judges are not required to adopt any specific language, provided the charge conveys to the jury in a clear way the central point, that is to say, the need to find the guilt of the accused established on the evidence as a whole beyond a reasonable doubt: *R. v. Tombran* (2000), 142 C.C.C. (3d) 380 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 294, at para. 29; and *R. v. Fleet* (1997), 120 C.C.C. (3d) 457 (Ont. C.A.), at pp. 464-465.

[155] Fourth, what is important in cases where the prosecution relies entirely on circumstantial evidence is that the jury understand how they can use that evidence to establish guilt beyond a reasonable doubt: *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at para. 38. The trial judge may satisfy this standard by

explaining the nature of circumstantial evidence, the inferences that can properly be drawn from that evidence and the burden of proof beyond a reasonable doubt: *Mayuran*, at para. 38.

The Principles Applied

[156] I would not give effect to this claim of error, which seeks to reclaim ground lost nearly four decades ago in *Cooper* and resurrect the *Hodge's* formula as the single correct expression of the reasonable doubt standard in connection with cases that consist entirely of circumstantial evidence. That ship has sailed. And sunk.

[157] As I have said earlier, the authoritative jurisprudence eschews a "special instruction" or prefabricated formula to explain the standard of proof required in cases entirely dependent on circumstantial evidence: *Mayuran*, at para. 38. It follows logically that the failure to do so in this case does not constitute misdirection or non-direction amounting to misdirection.

[158] Second, in both the preliminary and final instructions, the trial judge described without error the nature of circumstantial evidence, explained and illustrated the inference-drawing process and repeatedly instructed the jury about the requirement that they be satisfied beyond a reasonable doubt of each essential element of the offence charged. These instructions fulfilled the trial judge's obligations on this issue.

CONCLUSION

[159] For these reasons, I would dismiss the appeal.

Released: June 19, 2015 (DW)

"David Watt J.A."
"I agree M. Tulloch J.A."
"I agree M.L. Benotto J.A."