COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Figliola, 2018 ONCA 578
DATE: 20180625
DOCKET: C58139

Doherty, Epstein and Pepall JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Maria Figliola

Appellant

Michael Lacy and Deepa Negandhi, for the appellant

Rosella Cornaviera and Susan L. Reid, for the respondent

Heard: May 7 and 8, 2018

On appeal from the conviction entered by Justice Alan C.R. Whitten of the Superior Court of Justice, sitting with a jury, on September 28, 2013 for first degree murder.

Doherty J.A.:

OVERVIEW

[1] The appellant was convicted of first degree murder in May 2006. On appeal, this court ordered a new trial: *R. v. Figliola*, 2011 ONCA 457 ("*Figliola #1*"). At her re-trial, the appellant was again convicted of first degree murder. She appeals.

[2] The Crown alleged that the appellant murdered her husband. The Crown contended that the appellant had a new love interest in her life, and her marriage was a very unhappy one. She had also come to the conclusion that her husband was worth much more financially to her dead than alive. On the Crown's theory, the appellant arranged for someone, likely Daniel Di Trapani, to murder her husband.

[3] The appellant and Mr. Di Trapani were tried together at the first trial. On appeal, this court ordered a new trial for both. Mr. Di Trapani was not retried, but pled guilty to being an accessory after-the-fact to murder. He did not testify at the appellant's retrial.

[4] The evidence heard at the first trial was substantially the same as the evidence heard on the retrial, although the appellant did not testify on the retrial. That evidence is summarized in *Figliola #1* and I need not repeat that exercise here.

[5] While the evidence was lengthy, the issues the jury needed to resolve were few and straightforward. Mr. Figliola was murdered. No one suggested otherwise. There were only two possible verdicts. Either the appellant was guilty of first degree murder or she was not guilty. The appellant was guilty of first degree murder only if the Crown could prove, beyond a reasonable doubt, both that she arranged for the murder of her husband and that her husband was murdered

pursuant to that arrangement. If the Crown failed to prove either, the appellant was entitled to an acquittal.

[6] On appeal, the appellant submits that the trial judge made various errors in his instructions to the jury. She also argues that a series of rulings made in the course of the trial relating to the evidence of Teresa Mascia rendered the trial unfair and effectively recreated the same problem that had led to the order for a new trial at the first appeal.

[7] I would dismiss the appeal.

The Grounds of Appeal

A. Did the trial judge adequately relate the evidence to the issues in his instructions to the jury?

[8] The appellant submits that the trial judge's lengthy summary of the testimony of the witnesses provided to the jury in the course of his instructions failed to adequately connect that evidence to the legal issues and positions of the parties. The appellant stresses the distinction between simply reviewing the evidence to assist the jury in recalling the substance of the evidence and relating the important evidence to the issues and the positions of the parties, an essential step in the jury's reasoning process: see *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at paras. 54-58; *R. v. Newton*, 2017 ONCA 496, 349 C.C.C. (3d) 508, at paras. 15-18; *R. v. Jack* (1993), 88 Man. R. (2d) 93, at 102 (C.A.), aff'd [1994] 2 S.C.R. 310.

[9] The appellant further argues that by simply reviewing the mass of evidence without relating the evidence to the issues, the trial judge unfairly tilted the instruction in favour of the Crown, since, as almost always happens, the bulk of the evidence being reviewed was Crown evidence led in support of the Crown's position. The appellant argues that a detailed review of the testimony without connecting the evidence to the issues or the positions of the parties created a misleading impression of the respective strengths of the Crown and defence cases.

[10] To demonstrate her point, the appellant focused on the evidence relating to Mr. Figliola's gambling habits. The defence claimed that Mr. Figliola was a gambling addict who spent thousands of dollars, including money he did not have, on both legal and illegal gambling. The defence alleged, and there was evidence to support this claim, that Mr. Figliola's death may have been the result of unpaid gambling debts owed to violent persons who did not tolerate the non-payment of gambling debts. The appellant submits that the evidence supporting this theory came from the testimony of many witnesses heard over the course of the several months of evidence. She argues that the force of this evidence could only have been properly appreciated by the jury if the trial judge had assembled at least a summary of that evidence and related it directly to the defence position that Mr. Figliola's murder was related to his many gambling debts. The appellant submits that the trial judge failed to do so.

[11] Courts have repeatedly emphasized that an assessment of the adequacy of jury instructions relating the evidence to the issues requires a functional and contextual analysis: *e.g.* see *R. v. P.J.B.*, 2012 ONCA 730, 97 C.R. (6th) 195, at paras. 46-50. There are essentially two questions:

- Would the jury appreciate the potential significance of the evidence to the issues from both the Crown and defence perspective?
- Was the instruction fair, in the sense that it represented an even-handed treatment of the evidence as it related to the issues the jury had to decide?

[12] The nature of the trial is an important feature of the contextual analysis required in assessing the adequacy of a jury instruction. This was a lengthy trial. The evidence occupied five months and there was a six-week delay between the end of the evidence and the jury instruction. It was open to the trial judge, given the length of the trial and the long delay between the evidence and the jury instruction, to conclude that a thorough review of the evidence would assist the jury in discharging its duties. Other trial judges might have approached the evidence in a different way. In this court, however, the question is not whether the trial judge chose the most effective method of instruction, but whether his instructions, as given, adequately related the evidence to the issues.

[13] While the appellant is undoubtedly correct in drawing a distinction between the reviewing of evidence and the relating of that evidence to the issues and the

positions of the parties, the former can play an important role in the latter. The entire charge must be examined. For example, in relating evidence to an issue, the trial judge may refer to certain evidence in a general way. However, when the trial judge summarizes the evidence for the jury, he may refer to that evidence in considerably more detail. When deciding whether the trial judge adequately related the evidence to the issues, the appellate court is entitled, as no doubt the jury would, to draw a connection between the reference to a part of the evidence in one part of the jury instruction, and the detailed summary of that same evidence in another part of the jury instruction. Indeed, this is what occurred in this case.

[14] This trial judge's instructions can be broken down into three parts. The first part included instructions on the applicable legal principles and various evidentiary topics. In the second part, the trial judge reviewed the evidence of the witnesses at great length. In the third part, the trial judge read to the jury the positions of the Crown and defence as provided to him by counsel. Those positions included references to parts of the evidence.

[15] Ms. Cornaviera, for the Crown, in her able submissions, stressed that the adequacy of the trial judge's relating of the evidence to the issues does not depend exclusively on what the trial judge said in the part of his instructions in which he reviewed the evidence. The merit of her submission is demonstrated by considering the jury instruction as it related to the defence position that Mr. Figliola was killed because of outstanding gambling debts.

[16] The trial judge addressed this issue in the first part of his instructions under the heading “Frank Figliola’s Gambling”. The trial judge reviewed, in some detail and in a balanced fashion, the evidence about Mr. Figliola’s gambling activities and the evidence about possible implications of owing significant gambling debts to the wrong people. In this part of his instruction, the trial judge did not specifically tell the jury that he was reviewing this evidence in relation to the defence claim that Mr. Figliola was murdered because of those gambling debts. However, that connection could not have been lost on the jury, particularly as they had heard lengthy submissions from defence counsel stressing Mr. Figliola’s gambling debts and their possible connection to his murder.

[17] In any event, when the trial judge came to the defence position in the third part of his charge, he expressly told the jury that it was the defence position that Mr. Figliola was murdered because of his gambling debts. He discussed the same evidence he had highlighted in the first part of his instruction. He also referred to much of that evidence in the course of his witness-by-witness review of the testimony in the second part of the instruction.

[18] Considering the charge as a whole, the trial judge drew a clear connection between the evidence of Mr. Figliola’s gambling and the defence position that his death was connected to the gambling debts. The review of the evidence in the second part of the trial judge’s instructions did not detract from what the trial judge said in other parts of his instructions. To the contrary, the detailed review of the

evidence would have assisted the jury in recalling the substance of the evidence when assessing the merits of the defence position.

[19] The trial judge dealt with other parts of the evidence in a similar fashion. One more example will suffice. The jury heard a great deal of evidence about things the appellant did and said after the murder. The Crown relied on much of that evidence as circumstantial evidence of the appellant's guilt.

[20] In the first part of his instructions, the trial judge explained to the jury how they could use evidence of the appellant's acts and statements after the murder as evidence that she had arranged the murder. He properly instructed the jury that before they could use the evidence to draw the inferences urged by the Crown, they had to consider and reject the "innocent" explanations for the statements and conduct put forward by the defence. He told the jury that unless those explanations were rejected, the acts and conduct of the appellant could not further the Crown's case.

[21] In the course of the first part of his instructions, the trial judge referred to parts of this testimony by reference to the subject matter, *e.g.* "Ms. Figliola's lies to the police". He briefly summarized the relevant evidence, including the explanations proffered by the defence. In the second part of his instructions, when reviewing the evidence of each witness, the trial judge referred to the substance

of much of the evidence concerning the appellant's statements and conduct after the murder.

[22] I am satisfied that the charge as a whole left the jury fully informed of the substance of the evidence concerning the appellant's conduct and statements after her husband's murder, the potential relevance of that evidence to the Crown's case, and the defence position that the appellant's conduct and statements were explained by things that had no connection to the death of her husband. The jury was properly equipped to consider the impact of this evidence on the relevant issues in the case.

[23] I would also reject the argument that the instructions presented the evidence in an unbalanced fashion and led to an unfair trial. This was a strong Crown case. A large body of circumstantial evidence pointed toward the appellant's involvement in her husband's murder. An accurate and full treatment of the evidence in the charge to the jury inevitably revealed the strength of the Crown's case. While this was unfortunate from the appellant's perspective, it was not unfair.

B. Did the trial judge err in instructing the jury that it could convict on the basis that the appellant arranged for someone other than Mr. Di Trapani to murder her husband?

[24] At trial, it was the Crown's primary position that the appellant arranged with Mr. Di Trapani, a friend of the appellant's best friend, Teresa Mascia, to murder

her husband. Mr. Di Trapani had connections with individuals suspected to be involved in organized crime.

[25] There was a significant body of evidence to support the Crown's contention that the appellant hired Mr. Di Trapani. She provided him with a cellphone they used to communicate with each other up until the time of the murder. They did not use that phone after the murder. One Crown witness testified that on the night of the murder, he drove Mr. Di Trapani to the location of the murder and then to a house in the appellant's neighbourhood. There was also evidence of payments made to Mr. Di Trapani by the appellant in the weeks after the murder.

[26] At trial, the Crown submitted that the jury could convict the appellant of first degree murder, even if it was not satisfied that she had hired Mr. Di Trapani to commit the murder. The Crown argued that the jury could conclude, beyond a reasonable doubt, that the appellant had hired somebody, although perhaps not Mr. Di Trapani, to commit the murder and that her husband had been murdered pursuant to that arrangement.

[27] The defence argued that on any reasonable view of the evidence, the Crown's case depended on establishing that Mr. Di Trapani had been hired by the appellant to actually kill her husband, or to arrange for the killing of her husband. The defence maintained that there was no "air of reality" to the Crown's "unknown

killer" theory and that leaving that theory with the jury would invite improper speculation: see *R. v. Morales* (2006), 81 O.R. (3d) 161, at paras. 21-22.

[28] The Crown can advance alternative theories of liability. However, like defences advanced by an accused, a theory of liability can be left with the jury only if there is "an air of reality" in the evidence to that theory. Subject to fairness concerns peculiar to individual cases, a theory of liability should be left with a jury if a properly instructed jury, acting reasonably, could convict based on that theory: *R. v. Largie*, 2010 ONCA 548, 101 O.R. (3d) 561, at para. 141.

[29] The reasonableness component of the "air of reality" test incorporates a limited weighing of the evidence by the trial judge. The trial judge must determine whether there is a sufficient evidentiary basis for a properly instructed jury, acting reasonably, to render a conviction based on that theory of liability: *R. v. Cairney*, 2013 SCC 55, [2013] 3 S.C.R. 420, at paras. 19-23; *R. v. Pappas*, 2013 SCC 56, [2013] 3 S.C.R. 452, at paras. 21-26.

[30] I am satisfied that there was "an air of reality" to the Crown's alternative theory of liability. Some of the evidence implicating the appellant in the murder plot also implicated Mr. Di Trapani in the murder. There was, however, a body of evidence implicating the appellant in the murder that did not connect Mr. Di Trapani to the murder. The evidence of the appellant's motive to murder her husband, incriminating statements she made before the murder, statements she made after

the murder, including what could be construed as a written confession provided to her boyfriend, and various lies she told the police, all implicated the appellant in her husband's murder without necessarily pointing to Mr. Di Trapani as the person with whom she arranged the murder.

[31] While it was not likely, there was a realistic possibility on this evidence that the jury could be satisfied, beyond a reasonable doubt, that the appellant had arranged for the murder of her husband, but not necessarily be satisfied that she made the arrangement with Mr. Di Trapani. The Crown's alternate theory was directed at this specific possibility. If the jury were satisfied that the appellant arranged for her husband's murder, and that he was killed pursuant to that arrangement, she was guilty of first degree murder, regardless of whether the jury could identify her partner or partners in crime. The "unknown person" alternative theory provided for that possibility.

C: Were there errors in the treatment of the evidence of Teresa Mascia that rendered the trial unfair and the verdict a miscarriage of justice?

[32] Teresa Mascia was a close friend of the appellant. She was also a friend of Mr. Di Trapani. He often did various chores at her request. Mr. Di Trapani also knew the appellant, although not as well as he knew Ms. Mascia. There was also evidence that the appellant had paid Ms. Mascia $23,000 several months after the murder.

[33] Ms. Mascia testified as a Crown witness at the first trial. She was declared an adverse witness and cross-examined by the Crown. In *Figliola #1*, the court held that her cross-examination went beyond the proper limits of cross-examination of adverse witnesses under s. 9(1) of the *Evidence Act*, R.S.C. 1985, c. C-5 (the "Evidence Act"). The court further held that the failure to tell the jury that it could not use any finding it made with respect to Ms. Mascia's credibility as evidence against the accused constituted reversible error: *Figliola #1*, at paras. 61-63.

[34] The Crown decided to call Ms. Mascia on the retrial. Counsel argued that the Crown should not be permitted to call her and, alternatively, that the Crown should not be permitted to cross-examine Ms. Mascia under s. 9(1) of the *Evidence Act*. The reasons of this court in *Figliola #1*, and *R. v. Soobrian* (1994), 21 O.R. (3d) 603, 96 C.C.C. (3d) 208 figured prominently in the arguments put to the trial judge. The trial judge allowed Ms. Mascia to testify for the Crown, and allowed the Crown to cross-examine her on prior inconsistent statements relating to certain specific topics. The appellant argues that the trial judge's rulings are inconsistent with the *ratio* of both *Figliola #1* and *Soobrian*.

(i) The Alleged Errors

[35] The appellant submits that the trial judge made four errors relating to the evidence of Ms. Mascia. She contends that these four errors, taken together,

rendered the trial unfair and resulted in a miscarriage of justice, necessitating the quashing of the conviction.[1]

[36] First, the appellant contends that the trial judge should not have allowed the Crown to call Ms. Mascia as a witness. The appellant argues that the Crown called her in bad faith with a view to cross-examining her to demonstrate that she was lying to protect the appellant, hoping that the jury would use that finding as evidence of the appellant's guilt.

[37] Next, the appellant submits that the trial judge should not have allowed the Crown to cross-examine Ms. Mascia under s. 9(1) of the *Evidence Act*. The appellant argues that even though the Crown satisfied the technical requirements for a finding that Ms. Mascia was an adverse witness, there was no probative value in her cross-examination and that her cross-examination created a real risk that the jury would improperly use the Crown's attack on Ms. Mascia's credibility as evidence of the appellant's guilt. The appellant submits that balancing the very real potential prejudice of the evidence against the minimal probative value, the trial

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[1] During oral argument, counsel for the appellant suggested that if any of the alleged errors amounted to an error in law, the appellant was also entitled to a new trial. Counsel contended that the Crown could not rely on the curative proviso and the court could not invoke the proviso, as it had not been raised by the Crown in its factum.

Without in any way accepting the merits of this submission, I think the appeal should be decided on the basis of the arguments presented in the appellant's factum – were there errors in the treatment of Ms. Mascia's evidence that rendered the trial unfair and the verdict a miscarriage of justice?

judge should have exercised his discretion and refused to allow the Crown to cross-examine Ms. Mascia.

[38] Third, the appellant submits that the Crown was improperly allowed to re-examine Ms. Mascia about an alleged attempt to intimidate a Crown witness. Once again, the appellant submits that this re-examination could only have been intended to blacken Ms. Mascia's character in the hope that the jury would paint the defence with the same brush.

[39] Fourth, the appellant contends that Crown counsel, in his closing address made an improper use of the evidence that had been wrongly admitted on re-examination of Ms. Mascia. The appellant submits that Crown counsel's comment also increased the likelihood that the jury would misuse Ms. Mascia's evidence to discredit the defence.

(ii) *Soobrian* and *Figliola #1*

[40] Much of the argument on this ground of appeal centers around the reasons in *Figliola #1* and *Soobrian*. I begin with an examination of those cases.

[41] In *Soobrian*, the Crown called a witness named Williams. Williams had given a statement to the police that contained an account of the relevant events that assisted the Crown. At the preliminary inquiry, Williams testified as a defence witness and gave a different account of events, helpful to the defence.

[42] At trial, the Crown called Williams knowing he would maintain the position he took at the preliminary inquiry. During his examination-in-chief, Crown counsel questioned Williams on the contents of his written statement without first obtaining a ruling permitting cross-examination under either s. 9(1) or s. 9(2) of the *Evidence Act*. The Crown next sought a declaration that Williams was adverse under s. 9(1) of the *Evidence Act*, and therefore subject to cross-examination on any prior inconsistent statements. The trial judge declined to make that finding but permitted the Crown to pursue further cross-examination on statements that fell within s. 9(2) of the *Evidence Act*.

[43] The Crown at trial made its strategy very clear. It had called Williams intending to cross-examine him on his prior statement to lay the groundwork for an argument to the jury that Mr. Williams' obvious dishonesty provided evidence that the accused was not telling the truth and the complainant was being truthful: *Soobrian* at, p. 610.

[44] This court emphatically rejected the argument that Williams' dishonesty as a witness could constitute evidence against the accused. The court indicated that without evidence showing collusion between Williams and the accused, Williams' lies on the witness stand were not evidence against the accused, and had no connection to the complainant's credibility: see also *R. v. Walker* (1994), 18 O.R. (3d) 184, at p. 197. The cross-examination of Williams might cause the jury to

reject his evidence as incredible, but it could not advance the Crown's case against the accused: *Soobrian*, at p. 611. The court said, at p. 612:

> It is plain that the witness Williams did not adopt his prior statement as true and the only use the jury could properly make of his evidence that he saw the things he testified to was either to accept it, reject it or give it little weight having regard to the view they took of his initial statement to police and his explanation for having made it. But, on the facts of this case, the thing for which the jury could not use a finding of credibility against Williams, if based on his statement to the police, was to support a finding that either or both of the appellants were not credible. Nor could it support the truth of the complainant's evidence that either of the appellants had sexually assaulted her. A finding against the credibility of Williams on these grounds would simply neutralize his evidence under oath.

[45] The court next considered s. 9(1) of the *Evidence Act*. The court confirmed that a trial judge has a discretion to refuse to permit cross-examination even though the witness was adverse: see also *R. v. Dooley*, 2009 ONCA 910, 249 C.C.C. (3d) 449, at para. 158, leave to appeal refused, [2010] 258 C.C.C. (3d) vi (note); D. Paciocco, "Confronting Disappointing, Hostile and Adverse Witnesses in Criminal Cases", (2012) 59 Crim. L.Q. 301, at 347-51. The court ruled that the trial judge had properly refused to allow cross-examination, as the Crown had proffered no purpose for the cross-examination other than to discredit the defence by discrediting the witness: *Soobrian*, at p. 611.

[46] Lastly, the court held that in the face of the very real risk that the jury would misuse their rejection of Williams' evidence in the manner urged by the Crown, the

trial judge should have given a limiting instruction. The court described the required instruction, at p. 613:

> The true purport of Williams' evidence, including his cross-examination by the Crown, was to show that the appellants were not credible because Williams was not. The trial judge should have made clear to the jury that there was no basis upon which they [could] use Williams' evidence to support that conclusion.

[47] In *Figliola #1*, the Crown called Ms. Mascia as a witness.[2] She had given several statements to the police that were inconsistent with parts of her testimony. The Crown sought a ruling that Ms. Mascia was adverse under s. 9(1) of the *Evidence Act*. The trial judge declared her adverse, and the Crown cross-examined her. However, the Crown's cross-examination went well beyond inconsistencies in Ms. Mascia's prior statements and grew into a cross-examination at large. The Crown suggested to Ms. Mascia that she was lying to cover up for her good friend, the appellant, and that she was prepared to say anything to protect the appellant. On the appeal in *Figliola #1*, counsel argued that the cross-examination led to exactly the error identified in *Soobrian*: *Figliola #1*, at para. 37. The Crown had invited the jury to convict the appellant, in part, because her friend, Ms. Mascia, was lying for her.

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[2] At the time of the first trial, Ms. Mascia was married and using her husband's surname Pignatelli. By the time of the second trial, she was divorced and was using her own surname.

[48] This court accepted the appellant's argument in part. The court began by holding that the Crown had properly called Ms. Mascia, noting that the Crown had "little choice but to call" Ms. Mascia. She had potentially important evidence to give: *R. v. Figliola*, at para. 45. The court next determined that the trial judge had not erred in declaring Ms. Mascia adverse and permitting cross-examination on her prior statements under s. 9(1) of the *Evidence Act*: *Figliola #1*, at paras. 47-48.

[49] The court, however, found two errors. The Crown's cross-examination of Ms. Mascia went far beyond the cross-examination on prior inconsistent statements permitted under s. 9(1). The Crown had, without bringing any application to do so, treated Ms. Mascia as a hostile witness and cross-examined her at large. During that cross-examination, the Crown set out its "cover up" theory, contending that Ms. Mascia was lying to protect the accused. There was no evidence to support that allegation.

[50] The court concluded, at para. 61:

> In our view, by taking the tack it did, the Crown -- inadvertently or otherwise -- strayed into impermissible Soobrian territory. Even without any initial intent to do so, the ultimate effect of the cross-examination was to create the very scenario that Soobrian envisages: *the effect of the cross-examination was to shred the credibility of the Crown's own witness and to create a factual matrix in which the jury might well conclude that Ms. Pignatelli [Mascia] was not only a liar, but was a witness lying for the very purpose of covering up for the appellants' wrongful deeds and that the appellants were therefore liars themselves, and guilty too.* [Emphasis added.]

[51] The court held that in light of the improper cross-examination of Ms. Mascia, the jury should have been strongly and immediately instructed that any finding it made concerning Ms. Mascia's credibility could not be used, either in assessing the credibility of the accused, or as evidence of guilt: *Figliola #1*, at paras. 62-63.

[52] Three propositions emerge from *Soobrian* and *Figliola #1*:

- If a witness has relevant evidence to give, the Crown may call that witness, even if the Crown expects that the witness will give evidence that is inconsistent with a prior statement made by the witness and the Crown anticipates bringing an application to cross-examine the witness under s. 9 of the *Evidence Act*.
- A trial judge may refuse to permit cross-examination under s. 9(1), even if the technical requirements for a finding of adversity are met. The trial judge should not permit cross-examination if that cross-examination would undermine the fairness of the trial. Trial fairness will be undermined if there is a real risk that the jury, despite an appropriate limiting instruction, could misuse the cross-examination of the Crown witness in the manner described in *Soobrian*.
- If the Crown is allowed to cross-examine its own witness under s. 9, the trial judge should caution the jury that the cross-examination may be used in assessing that witness's credibility, but that it cannot assist in assessing the credibility of the accused, or in proving the Crown's case against the

accused unless the witness adopts the prior statements as true or there is evidence of collusion between the witness and the accused.

(iii) The Appellant's Arguments

(a) Should the Crown have been allowed to call Ms. Mascia?

[53] The appellant argues that the Crown called Ms. Mascia in "bad faith", intending to demonstrate by cross-examining her that she was a liar in the hope that the jury would paint the defence with the same brush and reject the defence position at trial. The appellant goes so far as to argue that the Crown cannot call a witness with a view to attacking the credibility of that witness.

[54] There is no merit to this submission. As pointed out in *Figliola #1*, at para. 45, Ms. Mascia had relevant evidence to give in several areas. Indeed, I think it is fair to describe her as a central character in the narrative, as it relates to events after the murder. The Crown had to call Ms. Mascia or risk leaving gaps in the evidence that could have been exploited by the defence.

[55] The appellant was concerned that the Crown called Ms. Mascia with a view to making the argument foreclosed in *Soobrian*. That concern is properly addressed by carefully controlling the questioning of the witness, not by keeping relevant evidence from the jury: see D. Paciocco, at pp. 350, footnote 173; *R. v. Mariani*, 2007 ONCA 329, 220 C.C.C. (3d) 74, at para. 41.

[56] When the Crown seeks to cross-examine its own witness, the Crown must clearly set out the justification for that claim and the nature of the cross-examination sought. A trial judge may allow cross-examination on a statement in writing or reduced to writing under s. 9(2) of the *Evidence Act*. The trial judge may allow cross-examination on all prior statements of a witness if the witness is found to be adverse under s. 9(1). The trial judge may also allow cross-examination at large if the witness is found to be hostile. No matter the level of cross-examination, the Crown must demonstrate that the proposed cross-examination has some probative value. This exercise ensures that the Crown will identify the specific lines of questioning it seeks to pursue with the witness.

[57] The importance of the trial judge properly limiting cross-examination of the Crown's own witnesses under s. 9 of the *Evidence Act* is apparent from *Figliola #1*. The failure to limit cross-examination generated the reversible error.

[58] If the Crown applies to cross-examine its own witness and the trial judge is satisfied that the cross-examination will create a real risk that the jury will fall into the *Soobrian* error, the trial judge may prohibit cross-examination, even though the witness is adverse. In the same vein, if the trial judge is satisfied that the cross-examination would do no more than put a version of events before the jury, in the form of a prior statement, which the witness will deny and with respect to which there will be no other evidence, the trial judge may decline to allow cross-examination: *R. v. Fraser* (1990), 55 C.C.C. (3d) 551, at 558-59 (BCCA).

[59] Even when the Crown is allowed to cross-examine its own witness on prior inconsistent statements, the trial judge should carefully limit cross-examination to specific inconsistencies that have some potential probative value. In some instances, it will be necessary to fully vet the proposed cross-examination on a *voir dire* before determining what part of the cross-examination the jury should be allowed to hear.

[60] The appellant's argument that the Crown should be prohibited from calling a witness who has relevant evidence to give because the Crown anticipates the witness will give evidence inconsistent with a prior statement and the Crown will seek to cross-examine the witness and challenge the witness's credibility, has significant negative policy implications for the criminal trial process. It is not uncommon in certain kinds of prosecutions that persons who have relevant evidence to give do not want to testify for the Crown, perhaps because they are friends with the accused, or because they are afraid of the accused. If the appellant's argument were to be accepted, a witness could effectively secure immunity from testifying for the Crown by advising the Crown and the defence that he or she would give testimony at trial favourable to the defence and inconsistent with prior statements made by the witness. A blanket rule against requiring a witness in those circumstances to testify would not further the search for the truth and would lead some to believe that witness intimidation works.

[61] In my view, if the Crown has a good faith basis for believing that a witness has relevant evidence to give, the Crown may call that witness even though the Crown expects that the witness will give evidence inconsistent with the Crown's position and evidence that contradicts the witness's prior statements. The Crown may call that witness even though it anticipates applying for leave to cross-examine that witness and challenging the credibility of that witness in certain respects: see D. Paciocco, at pp. 358-59. In choosing to call that witness, however, the Crown must realize that the trial judge has a discretion to both prohibit and limit cross-examination of the witness. In some circumstances, the Crown may call the witness only to find itself stuck with the answers given in-chief by that witness.

(b) Did the trial judge err in declaring Ms. Mascia an adverse witness?

[62] The trial judge declared Ms. Mascia adverse pursuant to s. 9(1) of the *Evidence Act*. However, he limited her cross-examination to questions about inconsistencies in various statements Ms. Mascia had given concerning when and where she had seen a man named Louis Latorre in a car with Mr. Di Trapani on the night of the murder. Mr. Latorre had been called by the Crown and had testified that he was with Mr. Di Trapani on that evening. According to Mr. Latorre's evidence, he had driven Mr. Di Trapani to the scene of the murder at approximately 10:30 p.m., and later to a house in the appellant's neighbourhood. Ms. Mascia had testified that she had seen the two drive by earlier, at approximately 9:30 p.m.

[63] In allowing cross-examination in that area, the trial judge reasoned that nothing in the record before him warranted a departure from this court's decision in *Figliola #1*, that Ms. Mascia was properly ruled an adverse witness. By strictly limiting the scope of the cross-examination, the trial judge indicated he hoped to avoid "any potential morphing of the cross-examination into a cross-examination at large": see *R. v. Figliola*, 2013 ONSC 4825, at para. 81.

[64] The trial judge specifically turned his mind to both the potential probative value of the cross-examination and any potential prejudice flowing from it. He concluded there was some probative value to the cross-examination on the inconsistencies, and that any potential prejudice flowing from a limited cross-examination could be neutralized by a mid-trial limiting instruction as set out in *Soobrian* and *Figliola #1*.

[65] As it turned out, the trial judge did not give a limiting instruction after Ms. Mascia's cross-examination, but only because defence counsel strongly objected to any limiting instruction. Defence counsel also resisted any limiting instruction in the final jury instructions. The trial judge did, however, give a limiting instruction like that described in *Soobrian* and *Figliola #1*. In the first part of the charge, in the context of referring to prior inconsistent statements, he told the jury:

> I must also instruct you that if you do find Ms. Mascia not to be credible, you cannot use that finding to draw an inference adverse to Maria Figliola. In other words, if you

> conclude that Ms. Mascia is not credible, you cannot use that finding to conclude that Maria Figliola is guilty.

[66] The appellant does not take issue with the determination that Ms. Mascia was an adverse witness. She contends, however, that the trial judge improperly exercised his discretion in allowing the Crown to cross-examine Ms. Mascia. The appellant maintains that the probative value/prejudicial effect analysis strongly favoured prohibiting cross-examination.

[67] In support of this position, the appellant argues that the Crown was not taken by surprise by Ms. Mascia's testimony. The Crown knew that Ms. Mascia would give evidence inconsistent with prior statements and in conflict with evidence given by Latorre. The Crown also had no reason to think that Ms. Mascia would adopt any of her prior statements as true, thereby making them substantive evidence in the case.

[68] As I understand the thrust of this submission, the appellant contends that cross-examination under s. 9(1) of Crown witnesses is limited to situations in which the inconsistent evidence is unexpected and/or there is some real likelihood that cross-examination will cause the witness to adopt the earlier inconsistent statement.

[69] The law is firmly against this submission: see *Dooley*, at para. 161. The Crown on the retrial was in no different position than the Crown in *Figliola #1*. At the first trial, the Crown knew full well that Ms. Mascia would give evidence

inconsistent with prior statements and that she was unlikely to provide helpful evidence for the Crown in respect of some issues. In *Figliola #1*, the court did not suggest that the Crown should not have been allowed to cross-examine Ms. Mascia because it knew she would give evidence inconsistent with her statements, or because there was no real prospect that she would adopt her earlier statements. To the contrary, the court implicitly accepted that she was properly cross-examined on those statements. The court's concern was that the cross-examination went well beyond the limits of s. 9(1). The appellant's submission would unduly limit the scope of cross-examination permitted under s. 9(1) of the *Evidence Act* and is contrary to the holding in *Figliola #1*.

[70] The appellant next submits that Ms. Mascia's evidence, was, by the time the Crown called her, of little importance to the Crown's case. The appellant also contends that defence counsel's offer at trial to present Ms. Mascia's evidence by way of an Agreed Statement of Facts further diminished the evidentiary value of her testimony for the Crown. In effect, the appellant contends that Ms. Mascia's testimony had so little probative value to the Crown's case that any cross-examination on statements inconsistent with her testimony must have been outweighed by the potential prejudice it presented.

[71] I do not accept the appellant's evaluation of Ms. Mascia's evidence. It was for the jury to determine the importance of her evidence to the Crown's case. A jury could reasonably find some of her evidence, particularly as it related to her

interactions with the appellant after the murder, significantly probative. More importantly, I see no connection between the jury's assessment of the ultimate importance of Ms. Mascia's evidence to the Crown's case and the trial judge's decision, made in the course of her evidence, to permit cross-examination on certain specific prior inconsistent statements. The trial judge's decision was aimed at ensuring the jury was fully equipped to assess Ms. Mascia's credibility, regardless of the ultimate significance they chose to give to all or part of her evidence.

[72] The suggestion that the defence offer to present Ms. Mascia's evidence by way of an Agreed Statement of Facts was relevant to the trial judge's exercise of his discretion under s. 9(1) is without substance on this record. First, defence counsel did not offer any proposed Agreed Statement of Facts and specifically did not indicate that it was prepared to agree to anything acceptable to the Crown in terms of Ms. Mascia's evidence as to when she saw Mr. Latorre and Mr. Di Trapani in the vehicle. The defence counsel at trial merely stated he would "consider" an Agreed Statement of Facts. There was nothing before the trial judge by way of a proposed Agreed Statement of Facts that was sufficiently concrete to potentially have any influence on the exercise of his discretion under s. 9(1) of the *Evidence Act*.

[73] Ms. Mascia's evidence about when she saw Mr. Latorre and Mr. Di Trapani together on the evening of August 6 was directly relevant to the Crown's case. The

Crown had a good faith basis to believe that she had relevant evidence to give on that issue. The evidence she chose to give was inconsistent with prior statements she had made and inconsistent with Mr. Latorre's evidence. A jury could reasonably have been assisted in its assessment of the credibility of those answers and her overall credibility by cross-examination on her prior inconsistent statements.

[74] The appellant's argument that the trial judge undervalued the prejudice component of the analysis comes down to the assertion that the trial judge should have recognized that the cross-examination would inevitably slide into "*Soobrian* territory". The appellant submits that the inevitability flowed from the Crown's realization, both that its witness would give inconsistent evidence and that no amount of cross-examination would yield any evidence of substantive value to the Crown.

[75] This submission is best answered by examining what happened at trial. The limited cross-examination of Ms. Mascia by the Crown was viewed by defence counsel as so ineffective that he urged the trial judge to refrain from a mid-trial or final instruction cautioning the jury against the improper use of that cross-examination. According to defence counsel's submissions, the Crown's cross-examination had fallen "flat" and did not give rise to the risk that the jury would engage in the improper reasoning prohibited by *Soobria*n. Defence counsel believed that an instruction cautioning against the misuse of the evidence might

well lead the jury down a reasoning path that otherwise would not have occurred to the jury.

[76] I agree with trial counsel's description of the effect of the cross-examination of Ms. Mascia. That cross-examination did not give rise to any *Soobrian* concerns. I view the result of the cross-examination as a strong indication that the trial judge correctly weighed the probative value and prejudicial effect of the potential cross-examination. He further minimized any possible prejudice by telling the jury that Ms. Mascia's prior inconsistent statements were relevant only to her credibility and could not be used "to draw an inference adverse to Maria Figliola". The appellant has not demonstrated that the trial judge erred in his probative value/prejudicial effect analysis.

(c) Did the trial judge err in allowing the Crown to re-examine Ms. Mascia?

[77] At trial, the Crown sought to lead evidence of an interaction between Mr. Latorre, Ms. Mascia and her husband at a club in 2004. The incident occurred after the appellant had been charged, but before the first trial.

[78] According to the Crown, Ms. Mascia and her husband confronted Mr. Latorre about testifying for the Crown. A tense incident ended with Ms. Mascia's husband offering to shake Mr. Latorre's hand. When Mr. Latorre refused, Ms. Mascia's husband spat in his face. Mr. Latorre walked away. Ms. Mascia and her husband

were charged with intimidating a witness. The charge was later withdrawn against Ms. Mascia.

[79] The trial judge initially refused to allow the Crown to lead this evidence through Mr. Latorre. After the cross-examination of Ms. Mascia, the Crown sought leave to re-examine her about the encounter. The Crown maintained that Ms. Mascia's cross-examination had created a potentially misleading impression that Ms. Mascia had attempted to co-operate with the police throughout their investigation, and had made it appear as though Ms. Mascia had been badly treated by the authorities.

[80] The trial judge accepted the Crown's argument and allowed re-examination. After having her memory refreshed, Ms. Mascia gave a relatively benign account of the event. She testified that she had been charged and that the charge had been withdrawn.

[81] The trial judge gave the jury an instruction on this evidence immediately after Ms. Mascia testified. He told them that the evidence of the incident involving Mr. Latorre was admissible only for the purpose of assessing Ms. Mascia's credibility and that the jury should bear in mind the charge was withdrawn. The trial judge gave that direction again in his final instructions, adding that the evidence relevant to the incident in the club should not be considered by the jury as part of the totality

of the evidence to be considered in determining the guilt or innocence of Ms. Figliola.

[82] The Crown should not have been allowed to re-examine Ms. Mascia about the incident at the club involving Mr. Latorre. I agree with the appellant that defence counsel's cross-examination of her did not create a misleading picture. Ms. Mascia was cross-examined at length about various inconsistent statements. Defence counsel was entitled to bring out in his cross-examination of Ms. Mascia that whatever problems there may have been with her prior statements and her veracity, they never reached the point where the police saw fit to charge her with anything in relation to those statements. That line of questioning did not open the door to questions about other conduct totally unrelated to anything she said to the police.

[83] I also do not see how Ms. Mascia's evidence about her encounter with Mr. Latorre could have any positive or negative impact on her credibility. On the evidence the jury heard, Ms. Mascia did not do anything that could reasonably have had any negative impact on her credibility as a witness. Clearly, the fact that she was charged, when those charges were later withdrawn, cannot support the inference that she intimidated or threatened Mr. Latorre. I do not see how this line of re-examination could have assisted the jury in evaluating Ms. Mascia's credibility.

[84] Although I am satisfied that the questions should not have been asked, I am equally satisfied they worked no unfairness on the appellant. I see virtually no possibility that the jury used this evidence for anything. Further, the trial judge's twice-given, strong admonition that the evidence could not assist in proving the case against the appellant was a strong and effective prophylactic.

D: The Crown's closing

[85] Mr. Latorre testified that initially he did not voluntarily come forward to tell the police what he knew because he was afraid. Crown counsel, in his closing, referred to evidence that the Crown alleged gave credence to Mr. Latorre's assertion that he was afraid. The evidence identified by the Crown included Ms. Mascia's evidence about the incident at the club involving her, her husband and Mr. Latorre. The Crown argued that Ms. Mascia and her husband had intended to frighten and intimidate Mr. Latorre and that this gave some validity to his assertion about being afraid.

[86] Defence counsel at trial argued that the Crown had improperly suggested to the jury that it could use Ms. Mascia's evidence about her encounter with Mr. Latorre to buttress Mr. Latorre's credibility. Counsel submitted that the trial judge had made it clear that the evidence of the encounter was relevant only to Ms. Mascia's credibility and that the Crown's argument directly contravened that ruling. Defence counsel asked for a mistrial, or alternatively an immediate and strong

instruction to the jury telling them that Crown counsel's comment was improper and should be ignored.

[87] The trial judge described the Crown's submission tying Mr. Latorre's fear of testifying to Ms. Mascia's evidence about the encounter in the club as "problematic" since Mr. Latorre had not testified about the incident or suggested that he was in any way intimidated by Ms. Mascia. The trial judge declined to order a mistrial or provide an immediate curative instruction. He indicated he would deal with the issue in his final instructions.

[88] In his final instructions, the trial judge pointed out to the jury that the evidence of the encounter between Mr. Latorre and Ms. Mascia was relevant only to her credibility. He told the jury that there was no evidence that the incident frightened Mr. Latorre or had any impact on him. Finally, the trial judge repeated his instruction that the evidence had nothing to do with "the guilt or innocence of Ms. Figliola".

[89] I agree with the appellant that Ms. Mascia's evidence about her interaction in the club with Mr. Latorre could not support Mr. Latorre's evidence that he did not initially come forward because he was afraid. As pointed out by the trial judge, there was simply no evidence of Mr. Latorre's reaction, if any, to the events described by Ms. Mascia.

[90] I am also satisfied that the Crown's single misstep in a lengthy closing argument had no impact on the fairness of the trial. A declaration of a mistrial would have been a gross overreaction. The trial judge's comments in his closing instructions to the jury effectively neutered any possible harm the Crown's comment may have caused.

CONCLUSION

[91] The appellant's trial was not perfect. No trial is. The minor errors described above had no impact on the fairness of the trial and give no cause to doubt the verdict.

[92] I would dismiss the appeal.

Released: "DD" "JUN 25 2018"

"Doherty J.A."
"I agree Gloria Epstein J.A."
"I agree S.E. Pepall J.A."