COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Ranglin, 2018 ONCA 1050
DATE: 20181218
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Doherty, Brown and Trotter JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Sheldon Ranglin

Appellant

Delmar Doucette, Andrew Furgiuele and Janelle Belton, for the appellant

Michael Bernstein, for the respondent

Heard: October 25, 2018

On appeal from the conviction entered on June 29, 2016 by Justice Leonard Ricchetti of the Superior Court of Justice, sitting with a jury.

Trotter J.A.:

A. INTRODUCTION

[1] The appellant was convicted of first degree murder. After oral argument, his appeal was dismissed with reasons to follow. These reasons explain why the appeal was dismissed.

B. OVERVIEW OF THE FACTS

[2] On June 7, 2011, Keith Brissett was murdered while sitting in a car parked behind an apartment building in Mississauga. A man walked up to the car and shot Brissett six times. The identity of the shooter was the only issue at trial.

[3] There were a number of people around the building at the time. The police identified Anthony Borden, Junior Moy-Lingomba, Curtis Murray, and the appellant (also known as “Juice”) as persons of interest. In October 2012, Borden and Moy-Lingomba were charged with first degree murder. Following a preliminary inquiry, both were committed to stand trial.

[4] Borden entered into an agreement with the Crown. He implicated the appellant as the shooter and eventually pled guilty to accessory after the fact to murder. Borden testified for the Crown and claimed to have seen the appellant shoot Brissett. Borden testified that he then drove the appellant away from the scene.

[5] Moy-Lingomba refused to cooperate. However, the Crown eventually stayed the murder charge against him and substituted a charge of accessory after the fact. That charge was also stayed. The Crown called Moy-Lingomba as a witness at the appellant’s trial. He admitted to being in and out of the apartment building that night but claimed that he did not see who shot Brissett. Moy-Lingomba testified that he saw Murray around the building that night and said he was wearing green

clothing. This description was consistent with the evidence of Taniesha Wisdom, who witnessed the shooting. She said the shooter wore green and had very dark skin (the appellant did not). The appellant went to the jury with the theory that Murray was the shooter.

C. THE ISSUES ON APPEAL

[6] The appellant argues that the trial judge erred in his instructions to the jury in the following ways: (1) by failing to direct the jury on the proper use they could make of utterances made by Moy-Lingomba in a *KGB* statement; (2) by giving *Vetrovec*[1] warnings concerning the evidence of Borden and Moy-Lingomba over the objection of defence counsel; (3) by failing to properly instruct the jury on the third party suspect evidence in relation to Murray; and (4) by dealing unfairly with the evidence of Taniesha Wisdom.

D. ANALYSIS

(1) Instruction on the *KGB* Statement

[7] About a year after Brissett was killed, the police were still investigating who was involved in the killing. On June 21, 2012 they recorded a conversation between Moy-Lingomba and a police informant, Darren Watts, at the Brampton Courthouse. This was before Moy-Lingomba was charged with the murder. The

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[1] *R. v. Vetrovec*, [1982] 1 S.C.R. 811.

statement was admitted for its truth under *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 ("*KGB*").

[8] At the time, both men were in custody for other offences. Mr. Watts was facing firearms charges. He made a deal with the police whereby he would be paid $30,000 to provide them with information. On June 21, 2012, Watts was placed in the holding cells of the courthouse. He was wearing a wire. His instructions were to get Moy-Lingomba to say that he saw the appellant shoot Brissett. Moy-Lingomba never uttered these words. However, he attributed words to the appellant that provided powerful evidence of motive to kill Brissett.

[9] Moy-Lingomba, who was also facing firearms charges, was brought to the courthouse the same day. He was interviewed by the police. The police allegedly threatened to charge him with the murder, and to implicate his father and girlfriend. Moy-Lingomba was then lodged in the holding cells with Watts.

[10] During a recorded conversation, Moy-Lingomba told Watts that the appellant told him that he wanted to kill Brissett to avenge the murder of his cousin, Demar Ranglin. Many years earlier, Brissett had been charged with this murder but acquitted.

[11] The portion of their recorded conversation that was ultimately admitted under *KGB* is as follows:

> Watts: Juice. Fucking stupid.

> Moy-Lingomba: Juice stupid? How?
>
> Watts: Cause he should have just dealt with that by himself.
>
> Moy-Lingomba: You know long Juice has been looking for that guy [Brissett]. Juice has been looking for that guy since 06-07. That's the first time Juice seen him, I don't know how long. Juice is like, you homey, if I see this guy anywhere he's getting it. He's like yo, bro, if I see him in front of boydem [police] he's getting it. If anywhere I see this guy, on demand.
>
> Watts: On sight thing then?
>
> Moy-Lingomba: On sight.
>
> Watts: It wasn't even premeditated or nothing.
>
> Moy-Lingomba: No.
>
> Watts: Like accident basically.
>
> Moy-Lingomba: Just ran into the nigga you know.
>
> Watts: Oh coincidence.
>
> Moy-Lingomba: It was just a coincidence that he was there and it was a coincidence that me and Tones [Borden] at Rexwood that day.

[12] At the appellant's trial, Moy-Lingomba was a hostile witness in every sense of the word. He had previously refused to be sworn at the appellant's preliminary inquiry (which was held separately from the earlier preliminary inquiry of Borden and Moy-Lingomba). He expressed a willingness to lie under oath. He was abusive and profane when responding to questions posed by the Crown.

[13] Moy-Lingomba admitted making the utterances reproduced above; he had little choice, since the conversation had been recorded. However, Moy-Lingomba denied that he received this information directly from the appellant; he insisted that his knowledge was derived from rumour and gossip in the community, but could not remember from whom. He agreed with defence counsel's suggestions that it was all "scuttlebutt", "rumour" and "just word on the street, type of thing."

[14] No issue is taken with the decision to admit Moy-Lingomba's utterances. The appellant challenges the manner in which the trial judge instructed the jury on this evidence.

[15] The only contentious issue concerning this evidence was the source of Moy-Lingomba's information. That is, did the appellant actually tell him that he wanted to kill Brissett, or did Moy-Lingomba acquire this information through rumour or gossip? If it were the former, the utterances were admissible and provided cogent evidence of a motive; if it were the latter, the utterances were inadmissible for their truth and would have no value at all.

[16] It would have been preferable had the trial judge instructed the jury along the following lines:

> The contents of Moy-Lingomba's statement is evidence against Mr. Ranglin and may provide evidence of a motive for the murder only if you are satisfied that the information in Moy-Lingomba's statement came directly from Mr. Ranglin and not from someone else or gossip on the street.

[17] The trial judge did not give such an instruction. However, I am satisfied that the trial judge's instructions on the use of hearsay evidence, together with his instructions on the *KGB* statement, were sufficient to convey this straightforward issue to the jury. It would have been clear to the jury that Moy-Lingomba's *KGB* utterances could not be used for *any* purpose unless they were satisfied that he was repeating what the appellant told him.

[18] The trial judge correctly explained hearsay evidence to the jury, as well as the hearsay exception engaged by the *KGB* statement:

> There is an exception to the hearsay rule. Anything that you find that the accused said to a witness may be used by you as proof of what the accused said in deciding this case. This, of course, requires you to make a determination that the statement to the witness was made by the accused and determine what statement was made by the accused. If you so determine for any statement made by the accused to the witness, you may use that statement made by the accused to the witness as proof of what the accused said to the witness when considering and deciding whether the Crown has proven the guilt of the accused beyond a reasonable doubt. [Emphasis added.]

[19] Later in his charge, the trial judge addressed the exchange between Watts and Moy-Lingomba:

> With respect to statements made by Mr. Moy-Lingomba during this specific portion of the conversation only, in addition to these statements to assess his testimony like any other witness, Mr. Moy-Lingomba's testimony and these statements can be used as evidence of what actually happened. In other words, you may consider any statements made by Mr. Moy-Lingomba during this

> specific portion of the conversation, and only this portion of the conversation, as part of the testimony of Mr. Moy-Lingomba at this trial. [Emphasis added.]

It is plain that the phrase "what actually happened" refers to whether Moy-Lingomba received this information from the appellant or from other sources.

[20] The trial judge followed up this instruction with a review of the factors that might shed light on whether Moy-Lingomba was telling the truth about the source of his information. He clearly framed for the jury the tension between what Mr. Moy-Lingomba said to Watts (i.e., "Ranglin told me") and his testimony at trial (i.e., "it was from gossip in the community").

[21] After completing his review of the *KGB* statement and Moy-Lingomba's testimony in general, the trial judge said, "It is important that you keep in mind all of my instructions including the hearsay and the way in which the conversations between Mr. Moy-Lingomba and Mr. Watts can and cannot be used by you in deciding this case."

[22] Near the end of his instructions, the trial judge summarized the defence position on this issue as follows:

> The defence submitted that the portion of the conversation with Mr. Watts was only a small segment of the conversation, that it was made after threats, Mr. Moy-Lingomba was high, talking to someone who he had no respect for, was protecting him and his crew and was based entirely on rumour and gossip. [Emphasis added.]

This was the last fact-specific reference in the trial judge's charge.

[23] Defence counsel had input into the trial judge's instructions to the jury. The trial judge incorporated a suggestion made by defence counsel on this very issue. No objection was taken to the charge after it was delivered, which is a telling indication that the jury was properly equipped to deal with this straightforward evidentiary issue: see *R. v. Sinobert*, 2015 ONCA 691, at para. 82. In the context of the trial judge's instructions as a whole, and in light of the issues framed by counsel, it cannot be said that the jury was misled about the proper use it could make of the *KGB* statement.

[24] I would dismiss this ground of appeal.

(2) The *Vetrovec* Warning

[25] The Crown relied on the evidence of two disreputable witnesses – Borden and Moy-Lingomba. Borden's evidence was central to the Crown's case. He testified that he saw the appellant shoot Brissett and then immediately drove him away from the scene.

[26] Moy-Lingomba's evidence may have played a lesser role. Previously charged with the murder, and being palpably hostile to the Crown, he tried to assist the appellant during his testimony. Nevertheless, his *KGB* utterances provided the most compelling evidence of planning and deliberation.

(a) The Trial Judge's Ruling

[27] During the pre-charge conference, the Crown requested that *Vetrovec* cautions be given with respect to both witnesses. Defence counsel requested that *Vetrovec* cautions *not* be given. The trial judge decided to give the instruction in relation to both Borden and Moy-Lingomba: *R. v. Ranglin*, 2016 ONSC 4310.

[28] With Borden, it was anticipated throughout the trial that he was the type of unsavoury witness whose evidence would require a *Vetrovec* caution. The trial judge appreciated that his evidence was central to the Crown's case.

[29] The trial judge recognized that he had discretion on the *Vetrovec* issue. After considering this court's decision in *R. v. A.W.B.*, 2015 ONCA 185, he determined that, because Borden's evidence was essential to the Crown's case, and in light of his "overwhelming credibility problems", a *Vetrovec* caution was "both necessary and mandatory in the circumstances of this case:" *Ranglin*, at para. 40.

[30] In relation to Moy-Lingomba, the trial judge concluded that he too had "overwhelming credibility issues." He also recognized that Moy-Lingomba was a "mixed" *Vetrovec* witness, in the sense that he gave evidence that was helpful to the Crown and the defence. The trial judge concluded that it was "mandatory" that a *Vetrovec* caution be given for Moy-Lingomba: *Ranglin*, at para. 47.

[31] The appellant submits that the trial judge erred in considering that these instructions were mandatory in this case. In the alternative, he argues that, having

decided to give *Vetrovec* warnings, the trial judge ought to have exercised his discretion to not catalogue potentially confirmatory evidence for the jury's assistance. Lastly, the appellant says that the trial was rendered unfair by virtue of the repetition of the confirmatory evidence in the Crown's closing address and the trial judge's final instructions.

(b) Discussion

[32] Trial judges enjoy considerable discretion in charging juries on unsavoury witnesses: see *Vetrovec*, pp. 823, 831; *R. v. Potvin*, [1989] 1 S.C.R. 525, at p. 557; *R. v. Bevan*, [1993] 2 S.C.R. 599, at pp. 610-611; and *R. v. Brooks*, [2000] 1 S.C.R. 237, at pp. 243-244. Consequently, these decisions are afforded substantial deference on appeal: *Brooks*, at pp. 253-254; *Bevan*, at p. 614; *R. v. Carroll*, 2014 ONCA 2, at para. 67, leave to appeal refused, [2014] S.C.C.A. No. 193; *R. v. Rafferty*, 2016 ONCA 816, at paras. 30-31; and *R. v. Moore*, 2017 ONCA 947, at para. 20.

[33] Because of the high level of discretion inherent in *Vetrovec* warnings, they are not usually spoken of in mandatory terms. However, in *Bevan*, Major J. held, at p. 614:

> While under *Vetrovec* a caution to the jury is a matter of the trial judge's discretion and is not required in all cases involving testimony of accomplices or accessories after the fact, there are some cases in which the circumstances may be such that a *Vetrovec* caution must be given. The trial judge's discretion whether to give

> a *Vetrovec* warning should generally be given wide latitude by appellate courts. [Emphasis added.]

[34] In that case, the caution was mandated because the two jailhouse informant witnesses had lengthy criminal records, strong motivations to lie, and approached the police looking for a "deal" in exchange for their testimony.

[35] Similarly, in *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, Fish J. held, at para. 5, that while trial judges usually enjoy a discretion in this regard, they sometimes must give such an instruction. As he observed at para. 4, "[w]e know from recent experience that unsavoury witnesses, especially but not only 'jailhouse informants', can be convincing liars and can effectively conceal their true motives for testifying as they have".

[36] In this case, irrespective of whether the warnings were truly mandatory, realistically, it was necessary that the jury be warned about, and equipped to deal with, the dangers inherent in the evidence of Borden and Moy-Lingomba.

[37] The case for a warning was most compelling for Borden. He was the paradigmatic *Vetrovec* witness. Borden was an admitted drug dealer and a self-styled gangster who accepted "gifts" from his girlfriend who was employed as a sex-trade worker. He habitually carried a firearm and was prepared to use it. Moreover, Borden was arguably an accomplice to this murder. He admitted to driving the appellant away from the scene after the shooting, as well as taking steps to conceal his own involvement.

[38] It was only after Borden was committed to stand trial for Brissett's murder that he entered into a deal with the Crown to implicate the appellant in exchange for the opportunity to plead guilty to a far less serious charge. As the trial judge told the jury, "[t]his might provide Mr. Borden with a motive to minimize his involvement in the shooting and implicate others."

[39] The trial judge was correct to conclude that Borden had "overwhelming" credibility issues and that his evidence was essential to the Crown's case. The trial judge considered the objections of defence counsel, which were based largely on tactical considerations; however, he was right to reject the argument that counsel enjoyed the power of "veto" on the *Vetrovec* issue. Clearly, he did not. In all of the circumstances, and despite the objection of defence counsel, it was not an error to give the warning in this case. It was necessary.

[40] I am doubtful that a *Vetrovec* caution was "mandatory" in the case of Moy-Lingomba. Nevertheless, there were good reasons to provide this warning.

[41] Moy-Lingomba was involved in drug dealing. He regularly carried a gun. When he testified, he was serving a sentence for firearms offences. Like Borden, Moy-Lingomba was initially charged with murdering Brissett. Eventually, all charges in relation to the murder were discontinued. As the trial judge told the jury, "[t]his might have provided Mr. Moy-Lingomba with a motive to minimize his involvement in the shooting and implicate others."

[42] I accept that Moy-Lingomba did not stand in the exact same position as Borden. However, having been instructed on the dangers with Borden's evidence, the jury may well have been puzzled had they not been instructed to approach the evidence of Moy-Lingomba, Borden's associate, in the same careful way.

[43] The appellant argues that the case for a *Vetrovec* caution for Moy-Lingomba was weakened by the fact that his evidence was important to the defence in its third party suspect claim. The trial judge acknowledged that Moy-Lingomba was a "mixed" *Vetrovec* witness. As he said at para. 46 of his ruling on the issue: "Without the *Vetrovec* caution, the jury will not be told, understand or apply the appropriate legal assessment to Mr. Moy-Lingomba's inculpatory evidence and the less stringent assessment of his exculpatory evidence." The trial judge provided a "mixed" *Vetrovec* caution in which he conveyed the complexity of the situation to the jury. No objection is taken to the correctness of this instruction: see *R. v. Rowe*, 2011 ONCA 753, at para. 32; and *R. v. Gelle*, 2009 ONCA 262, at para. 16.

[44] I am not persuaded that the trial judge erred in providing the warning that he did in relation to Moy-Lingomba's testimony.

[45] The appellant further argues that, having decided to warn the jury about the dangers of Borden's evidence and Moy-Lingomba's inculpatory evidence, he should have mitigated any prejudicial impact of these warnings by declining to identify potentially confirmatory evidence for the jury.

[46] Trial judges are afforded leeway in the manner in which they choose to deal with confirmatory evidence. However, in this case, defence counsel did not ask the trial judge to forego giving the second part of the *Vetrovec* instruction. On this basis alone, I would decline to intervene. I also note that, at trial, the defence argued that Borden could not be trusted because he heard all of the Crown's evidence that was led at his preliminary inquiry. It was argued that Borden's testimony was built upon this acquired knowledge. The trial judge's itemization of the confirmatory evidence played well with this position.

[47] Lastly, the appellant argues that, overall, the *Vetrovec* instructions were unfair because they had the effect of unduly bolstering the Crown's case. The appellant argues that there was too much correspondence between the Crown's closing address and the confirmatory evidence portion of the trial judge's instructions.

[48] The potential for unfairness to the defence in having confirmatory evidence repeated by the trial judge has been recognized in prior cases: see *Brooks*, at pp. 249-250; *Carroll*, at para. 79. It is a factor to be considered in deciding whether to give the caution in the first place. However, I am not persuaded that the fairness of the trial was undermined in this case.

[49] The trial judge thoroughly canvassed the issues for the jury in the pre-charge phase of the proceedings. Various drafts of the final instructions were generated

and discussed. By the end of this process, both the Crown and the defence were equipped with the final version of the instructions that the trial judge intended to provide to the jury. Both knew in advance what the trial judge would refer to in explaining why special cautions were warranted for both witnesses, as well as the potentially confirmatory evidence that might restore the jury's faith in the evidence of both witnesses. Forearmed with this knowledge, both counsel were entitled to tailor their closing addresses accordingly.

[50] There is no suggestion that the trial judge identified evidence that was not confirmatory. Just because the Crown chose to emphasize the same evidence in its closing address did not render the *Vetrovec* cautions unfair. The defence stood in the same position. As the trial judge said at para. 39 of his *Vetrovec* ruling: "The defence will have the benefit of a long list of reasons why the jury should be extremely cautious of Mr. Borden's evidence when the jury is assessing it." The defence emphasized these factors in its closing address.

[51] As it related to Borden, the trial judge's itemization of the many pieces of confirmatory evidence simply reflected the state of the record. To a certain extent it was off-set by the 11 points that the trial judge identified as supplying the need for a special caution in the first place.

[52] There is no basis to the claim that there was unfairness in relation to Moy-Lingomba. The trial judge's instructions helpfully distinguished between the inculpatory and exculpatory portions of his evidence.

[53] I would dismiss this ground of appeal.

(3) Third Party Suspect Evidence

(a) Introduction

[54] At trial, the defence alleged that Murray killed Brissett. Early on in the trial, there was a dispute as to whether the threshold for advancing this theory had been met. However, after Moy-Lingomba's evidence had been presented, it was agreed that the issue was clearly in play. The appellant submits that the trial judge erred in the manner in which he left the issue with the jury.

[55] In its closing address to the jury, the Crown chose to combat the third party suspect claim by relying heavily on the body of evidence that pointed to the appellant as the shooter. The trial judge's instructions had a similar focus. The appellant argues that the trial judge erred by allowing the issue to be dealt with in this fashion. He submits that the trial judge was required to limit the jury's focus to evidence that specifically went to whether Murray was the shooter or not. He argues that evidence that pointed to the appellant as the shooter was irrelevant to the issue and the trial judge erred in failing to elucidate that distinction for the jury.

Essentially, the appellant contends that evidence capable of rebutting the third party suspect claim must be independent of the appellant's guilt.

[56] The appellant also submits that the trial judge further erred in the manner in which he reviewed the evidence on this issue. He argues that the trial judge essentially set up a credibility contest between Borden and Moy-Lingomba.

[57] I would reject both arguments.

(b) Third Party Suspects

[58] The assertion that a third party committed the offence in question is a denial of authorship. In *R. v. McMillan* (1975), 7 O.R. (2d) 750 (C.A.), aff'd [1977] 2 S.C.R. 824, at p. 757, Martin J.A. said:

> I take it to be self-evident that if A is charged with the murder of X, then A is entitled, by way of defence, to adduce evidence that B, not A, murdered X…

Martin J.A. further observed that, before being permitted to adduce evidence of a third party suspect, the evidence must "meet the test of relevancy and must have sufficient probative value to justify its reception:" p. 757.

[59] In *Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27, Abella J. linked the criteria in *McMillan* to the "air of reality" cases (citing *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702 and *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3), holding, at para. 48: "The defence must show that there is some basis upon which a reasonable, properly instructed jury could acquit based on the defence." See also *R. v. Grant*,

2015 SCC 9, [2015] 1 S.C.R. 475, at paras. 24-25. As counsel for the appellant rightly submitted, once the third party suspect issue is in play, all this evidence needs to do is raise a reasonable doubt about the accused as perpetrator of the offence.

[60] As important as third party suspect evidence may be, it does not warrant a protective shield that may only be penetrated by evidence that directly contradicts it. No authority was offered for this position. There is none. Evidence that another person committed the offence in question must be considered in the context of all of the evidence to determine whether guilt has been proved beyond a reasonable doubt: *R. v. Tomlinson*, 2014 ONCA 158, at para. 78. The Crown is entitled to argue that the evidence of a third party perpetrator does not raise a reasonable doubt because the claim is overwhelmingly defeated by the evidence pointing to the accused as the perpetrator.

(c) The Trial Judge's Instructions

[61] The trial judge followed the formula recommended in David Watt, *Watt's Manual of Criminal Jury Instructions,* 2nd ed. (Toronto: Carswell, 2015) (Final 75 – Third Party Suspect) and addressed the issue while outlining the elements of first degree murder. He posed the threshold question of identity, instructing the jury that their first task is "to determine whether the Crown has proven beyond a reasonable doubt that Mr. Ranglin was the person who shot Mr. Brissett on June

7, 2011." The trial judge then gave the following instructions (which I have numbered to correspond with *Watt's Criminal Jury Instructions*):

> 1. Anyone charged with an offence may introduce or rely on evidence that shows or tends to show that somebody else, not the person charged, committed the offence. The evidence may be direct. It may be circumstantial. It may be both.
>
> 2. In this case, Mr. Ranglin is saying that Curtis Murray may be the person who shot Mr. Brissett on June 7, 2011. Evidence that shows or tends to show that Mr. Murray shot Mr. Brissett, taken together with the rest of the evidence, may cause you to have a reasonable doubt about whether it was Mr. Ranglin who shot Mr. Brissett on June 7, 2011.
>
> 3. In this case, Mr. Ranglin points to the following evidence that Mr. Murray was the person who shot Mr. Brissett…..

[62] As Justice Watt says in his commentary to this instruction, at p. 1257:

> The instruction itself is unremarkable. It begins by pointing out the general rule that permits introduction of evidence of third party participation, then becomes more specific in the following paragraph. <u>The second paragraph underscores the jury's obligation to consider the third party suspect evidence, along with the rest of the evidence, in deciding whether the case against D has been proven beyond a reasonable doubt</u>.
>
> <u>The third paragraph identifies the supportive evidence by subject-matter, then suggests it be followed by a review of the relevant evidence on both sides of the participation issue</u>. The instruction should be folded into a discussion of the appropriate essential element, as for example in Final 229-A, *Second Degree Murder*, "Did *(NOA) cause (NOC)'s* death?". [Emphasis added.]

[63] The trial judge followed this sensible approach. After identifying the evidence that may have pointed to Murray as the shooter, he then reviewed the evidence the Crown relied upon to rebut this assertion. Not surprisingly, the evidence of Borden and Moy-Lingomba figured prominently in this review. But it was not the only evidence to which he referred in this context. The trial judge referenced all of the evidence adduced at trial that was connected to the issue of identity. He did not unfairly pit the testimony of the two *Vetrovec* witnesses against each other in a manner that created a credibility contest.

[64] After the trial judge completed his review of the evidence bearing on the identity of the shooter, he delivered the final part of the recommended third party suspect instructions. These instructions adhere closely to the framework in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. This is surely the correct approach for, once the third party suspect issue is properly in play, it need only raise a reasonable doubt on the issue of identity: see *Tomlinson*, para. 78; and *R. v. Khan*, 2011 BCCA 382, at paras. 90-91. This was clearly brought home to the jury in this case.

[65] I would dismiss this ground of appeal.

(4) Taniesha Wisdom's Evidence

[66] The appellant argues that the trial judge dealt with the evidence of Taniesha Wisdom in an unfair manner. First, he argues that the trial judge commented adversely on the fact that her evidence was presented in a video format. Second,

the appellant submits that her evidence, especially as it related to the skin colour of the shooter, was not properly incorporated into the trial judge's review of the evidence pointing to Murray.

[67] Ms. Wisdom was unable to testify in person. A videotape of her evidence from the preliminary inquiry was played for the jury. In a nutshell, Ms. Wisdom testified that she had witnessed the shooting when she was returning to the building with a friend and their children. She recognized Mr. Borden from the building. However, she did not recognize the shooter. She described him as a man who wore green clothing, and who had very dark skin. The appellant's skin was much lighter.

[68] The appellant argues that the following instruction concerning Ms. Wisdom's evidence was unfair:

> Just like any witness, it is for you to decide how much or little you believe of or rely upon her evidence. You may believe some, none or all of it. In deciding how much of little you will believe of or rely upon this evidence, remember that while you saw her videotaped evidence in its entirety, you did not have the opportunity to watch and listen to Ms. Wisdom give evidence live in front of you, as you did with other witnesses. This may or may not affect your assessment of her evidence. It is for you to say how much or little you will believe of and rely upon Ms. Wisdom's evidence in deciding this case. [Emphasis added.]

[69] Unfortunately, the videotape of Ms. Wisdom's evidence was not made an exhibit at trial and was not available for viewing on appeal. It ought to have been

made a lettered exhibit at trial: see *R. v. MacIsaac*, 2017 ONCA 172, leave to appeal refused, [2017] S.C.C.A. No. 152, at para. 57. Without the videotape, it is difficult to fully evaluate this ground of appeal, in the sense of knowing if the trial judge's comments were tailored to a specific shortcoming of the recording.

[70] Nevertheless, I am of the view that there was nothing objectionable in the trial judge's direction. No objection was taken. The trial judge's remarks were benign and did not undermine the exculpatory force of Ms. Wisdom's evidence. His instructions reflected the obvious fact that, unlike all of the other witnesses at trial, the jury was left to assess her credibility from a videotape, and not from in-court testimony. It cannot be said that this testimonial factor was irrelevant. Indeed, it would have been improper for the trial judge to tell the jury that they could not consider this factor in assessing her evidence. I see no error.

[71] The appellant also complains that, in his third party suspect instructions, the trial judge did not specifically refer to the fact that Ms. Wisdom provided a description of the shooter's skin that supported the defence position that Murray killed Brissett. Although the trial judge could have included this point in his third party suspect instructions, his failure to do so was not an error.

[72] The importance of this aspect of Ms. Wisdom's evidence was squarely before the jury. When summarizing the evidence of various witnesses, the trial judge included the following summary of Ms. Wisdom's description of the shooter:

> She saw a car by the back door to the building, between the back doors and the garbage bins. She described the shooter as a very dark black man (darker than Mr. Borden), dark skin, African black and very dark skinned. The shooter shot the person in the car from the driver's side. The shooter was wearing a green hat and green t-shirt.

[73] When dealing with the exculpatory aspects of Moy-Lingomba's evidence, the trial judge referenced aspects of Ms. Wisdom's evidence in the following passage:

> Some of Mr. Moy-Lingomba's evidence is exculpatory, that is may assist or help Mr. Ranglin in his defence, at least it could, depending on your view of some of his evidence. For example, Mr. Moy-Lingomba testified that Murray was at the Rexwood apartment that night wearing a green shirt and a green cap, which is evidence, if accepted by you, is consistent with the description of the shooter's clothing by Ms. Wisdom.

This was repeated in the third-party suspect instructions.

[74] In his closing address, defence counsel emphasized Ms. Wisdom's description of the shooter's skin colour. This was repeated by the trial judge when he summarized the position of the defence. The significance of this aspect of Ms. Wisdom's evidence would not have been lost on the jury.

[75] I would dismiss this ground of appeal.

E. CONCLUSION AND DISPOSITION

[76] As explained above, the appeal was dismissed at the end of the oral hearing.

Released: “DD” DEC 18 2018

“Gary Trotter J.A.”
“I agree. Doherty J.A.”
“I agree. David Brown J.A.”