COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Abdulle, 2020 ONCA 106
DATE: 20200212
DOCKET: C64718, C65154 & C65173

Strathy C.J.O., Harvison Young and Jamal JJ.A.

DOCKET: C64718

BETWEEN

Her Majesty the Queen

Respondent

and

Salma Abdulle

Appellant

DOCKET: C65154

AND BETWEEN

Her Majesty the Queen

Respondent

and

Libin Jama

Appellant

DOCKET: C65173

AND BETWEEN

Her Majesty the Queen

Respondent

and

Abdulaziz Egal

Appellant

Delmar Doucette and Angela Ruffo, for the appellant Salma Abdulle

Daniel Brodsky, for the appellant Libin Jama

Dirk Derstine, for the appellant Abdulaziz Egal

Elise Nakelsky and Megan Petrie, for the respondent

Heard: November 28 and 29, 2019

On appeal from the convictions entered on December 2, 2016, and the sentences imposed on April 20, 2017, by Justice Gary T. Trotter of the Superior Court of Justice, sitting with a jury.

Strathy C.J.O.:

I. OVERVIEW

[1] On February 12, 2014, 57-year old John Maclean was found lying in a pool of his own blood in the parking lot of his apartment building at 101 Kendleton Drive, Toronto. His shirt was ripped. He was so covered in blood that paramedics had difficulty lifting his lifeless body into the ambulance. Subsequent autopsy examination disclosed a minimum of nine knife wounds, including: one to the chest, which fractured a rib and went through the diaphragm; another to the heart, which severed his pulmonary artery; and another to the thigh, which severed his femoral artery and caused massive blood loss. He also suffered a broken jaw and had bruises and abrasions all over his body, including his head.

[2] A few minutes earlier, John Maclean had been stabbed, beaten, kicked, and stomped upon by a group of young people. He had no vital signs when paramedics arrived, and he was pronounced dead at the hospital.

[3] The three appellants, Salma Abdulle, Libin Jama, and Abdulaziz Egal, together with Rogar Bryan, were charged with second-degree murder. The Crown alleged that they were co-principals in an attack on Maclean, that one or more of them inflicted the fatal stab wounds, and that all had the necessary intent for murder pursuant to s. 229(a) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[4] The jury convicted the appellants and acquitted Bryan. The appellants were subsequently sentenced to life imprisonment, with parole ineligibility fixed at 12 years.

[5] The appellants appeal their convictions on a variety of grounds. Abdulle also appeals her sentence with respect to the period of parole ineligibility. For the reasons that follow, I would dismiss both the conviction appeals and the sentence appeal.

II. BACKGROUND

[6] The following summary of the evidence will serve to put the issues in context. Additional facts will be added, where required, to address each ground of appeal.

The initial confrontation on the evening of February 12, 2014

[7] The Crown alleged that on February 12, 2014, the four accused were involved in an altercation with Maclean in the parking lot at 101 Kendleton Drive, where Maclean lived. None of the accused were residents. Security cameras recorded them entering the building together at about 7:00 p.m. After someone let them in, they split into two groups (Jama and Bryan; Abdulle and Egal). Not much is known about their activities for the next two hours. It is believed they spent most of the time “chilling” and consuming alcohol and drugs.

[8] The evidence did not establish with certainty how the confrontation with Maclean arose. However, what is known is that a verbal altercation began in the west stairwell of the building, between Maclean and one or more of the accused, which soon moved outside into the parking lot where Maclean's body was found. There are security cameras at the doors of the building, except the west stairwell door. None of the accused, or Maclean, were seen on video leaving the building, leading to the conclusion that they all left through the west stairwell door.

[9] Abdulle testified that she left the building just before 9:00 p.m., leaving Egal, who said he wanted to urinate, in the west stairwell. Egal was holding a vodka bottle he and Abdulle had been sharing. Abdulle said she was waiting outside when she saw Maclean dragging Egal out of the stairwell and into the parking lot. Maclean had somehow acquired the vodka bottle. By this time, she said, Jama and Bryan had arrived on the scene and were trying to free Egal from Maclean's grip.

[10] Abdulle claimed that she approached Maclean and demanded that he give her the vodka bottle. When he refused, she moved towards him and he hit her over the head with the bottle, cutting her head and causing her to momentarily lose consciousness.

[11] Abdulle claimed that after she got back on her feet, she gave Bryan a hug and saw him walk towards Maclean. She looked away for a few moments before

turning back, at which time she saw Maclean lying on the ground. While she denied seeing Bryan stab Maclean, her evidence arguably implicated Bryan, leading the trial judge to give an *Oliver* instruction in his charge to the jury: a warning that Abdulle's testimony should be considered with particular care and caution, because she may have been more concerned with protecting herself than with telling the truth: *R. v. Oliver* (2005), 194 C.C.C. (3d) 92 (Ont. C.A.), at paras. 50-60, leave to appeal refused, [2005] S.C.C.A. No. 458. This instruction, and the trial judge's refusal to give a similar instruction with respect to Bryan's evidence, are the basis for one of Abdulle's grounds of appeal.

Witnesses to the attack on Maclean

[12] Two witnesses, Emmalyn Redhead and Abdulcadir Elmi, observed the attack on Maclean. Redhead, a tenant at 101 Kendleton, saw parts of the events from a fourth-floor apartment that was about 80 feet (24 meters) away. She called 911. Elmi, whose relatives live in the building, was in a fifth-floor apartment 172 feet (52 meters) away. While both witnesses testified that they had seen parts of the confrontation, neither was able to definitively identify the actions of any of the accused.

[13] In her testimony at trial, Redhead said that one of the attackers was wearing a hoodie or sweater that had a line on the wrist of the garment. Redhead was inconsistent on whether it was a tall person (alleged to be Egal) or a short

person (alleged to be Bryan). Her so-called “final” answer at trial seemed to be the shorter person, but this conflicted with her evidence at the preliminary inquiry. The issue of whether Redhead adopted her evidence from the preliminary inquiry and whether the trial judge left this question to the jury forms the basis of one of Egal’s grounds of appeal.

Paramedics on the scene and the *post-mortem* examination

[14] When the paramedics arrived at the scene, there was nothing they could do for Maclean. A pathologist testified at trial that Maclean had sustained two lethal stab wounds. One, a large wound to his upper left chest, perforated his lung and penetrated his pulmonary artery, causing internal bleeding. Death would have occurred within a large number of seconds to a small number of minutes. The other was a deep, penetrating wound to his right thigh, which severed his femoral artery and vein, causing it to bleed profusely. This wound accounted for Maclean’s significant external blood loss and the large pool of blood observed at the scene. It would have led to death within the same time period as the wound to the heart.

[15] Maclean sustained seven other stab wounds. A second stab wound to the left body and chest fractured his rib and perforated his diaphragm. The evidence was that it took a considerable amount of force to fracture the rib. He also suffered additional stab wounds to his left upper back, right forearm, and left thigh. He suffered a defensive wound to his left wrist. The pathologist was unable to say how

many knives were used on Maclean that night. His jaw was also fractured, and he had other injuries to his face, including abrasions on his forehead and bruising on his face. There were also bruises on his torso, including his shoulders and chest. However, the beating did not cause, nor did it accelerate, his death.

Forensic analysis

[16] Abdulle was linked to the scene by her blood, which was found in the parking lot. There was one area containing a mixture of Maclean and Abdulle's blood, close to where Maclean was found.

[17] DNA evidence also linked Jama and Bryan to the scene. Their DNA was found in samples taken from under Maclean's fingernails. In addition, Jama's shoes, which were found in the hall closet of her mother's home, were soaked with Maclean's blood.

[18] There was no forensic evidence linking Egal to the scene.

Flight from the scene

[19] The paramedics who responded to the 911 call testified that, as they approached 101 Kendleton, they saw four or five people on the street walking away from the scene. One testified that two women and two men were about 50 feet apart, and a third man walked about 150 feet behind them. Bryan claimed that he was not with Abdulle, Jama, and Egal. Abdulle claimed that he was.

[20] Shortly after the attack, at least three of the accused (Jama, Abdulle, and Egal) went to the home of Khadra Abdi, Jama's mother. Jama and Abdulle went inside. Egal and another male, remained outside. Abdulle was bleeding and used the washroom to clean up. After about 10 minutes, Jama, Abdulle, Egal, and the other male departed. A photo of Abdulle and Egal, taken later in the night, posing together for the camera, was entered into evidence to establish their continued association afterwards.

[21] Jama's mother, Khadra Abdi, was a witness to Jama and Abdulle's visit to her home. She also saw Egal, whom she knew from the Somali community, and another black man she could not identify. She later gave three statements to police and testified at the preliminary inquiry and at trial. Her evidence became a matter of controversy at trial when counsel for Bryan was granted permission to cross-examine Abdi concerning a statement she allegedly made about Egal having a knife. The trial judge's ruling, and a statement by Bryan's counsel in closing, are the subject of one of Egal's grounds of appeal.

Subsequent events

[22] That night, and the following day, the group was at the homes of friends, drinking and consuming drugs. Abdulle would later testify that, during this time, Bryan (who did not admit to being present) acknowledged by his words and gestures that he would "take the rap" for Maclean's death.

[23] At some point prior to her arrest, Abdulle gave a false name to police who were investigating a noise complaint. After she was arrested for obstructing police, she was held in a cell alongside an undercover officer. Upon their release, they were joined by another undercover officer. After making certain incriminating statements to the officers, Abdulle was arrested. The alleged source of the information Abdulle gave to the officers was a conversation with Jama some time after the incident. The statements were not recorded, and the undercover officers did not testify at trial. Seeking to bolster her defence and credibility, Abdulle sought to discuss her conversation with Jama in her examination-in-chief. However, fearing prejudice to her co-accused, the trial judge restricted Abdulle from testifying on the point. Abdulle was, however, cross-examined by the Crown and counsel for Bryan regarding the nature of her statements to the police. The fairness of the trial judge's decision to restrict her testimony forms one of Abdulle's grounds of appeal.

III. GROUNDS OF APPEAL

[24] The appellants raise, either individually or collectively, the following grounds of appeal:

A. the trial judge erred in his instruction on the *mens rea* for murder in a case involving co-principal liability;
B. the trial judge erred by improperly restricting Abdulle's evidence, interfering with her ability to make full answer and defence;

C. the trial judge erred by failing to give the jury an *Oliver* instruction regarding Bryan's evidence, warning that they should consider his testimony with particular care and caution;

D. the trial judge erred in permitting counsel for Bryan to cross-examine Abdi on her police statement that Egal had a knife, and in failing to grant a mistrial;

E. the trial judge erred by improperly instructing the jury concerning Redhead's prior inconsistent statement; and

F. the verdict, as it pertained to Jama, was unreasonable and not supported by the evidence.

[25] In addition, Abdulle appeals the 12-year period of parole ineligibility attached to her life sentence.

IV. ANALYSIS

A. Did the trial judge err in his instruction on the state of mind for murder?

[26] The appellants submit that, in instructing the jury on the liability of co-principals, which was the only basis of liability advanced, the trial judge erred by telling them that a "non-stabber" participant could have had the intent for murder even if he or she was unaware that another participant had a knife or had stabbed the victim. Specifically, the appellants submit that the following instruction was in error:

> At this stage of your analysis, you may wish to consider which accused person or persons

> used a knife or knew that another was using a knife in the attack on Mr. Maclean. As I have already explained to you, in terms of proving participation in causing another person's death, it is not necessary for you to be satisfied beyond a reasonable doubt which accused person or persons delivered the fatal injuries. However, using a knife or knowledge that another person involved in the attack used, was using or was about to use a knife, may be helpful to you in determining whether an accused person had one of the required states of mind for second degree murder.
>
> It is not necessary to find use of or knowledge of the use by another of a knife to find an accused person guilty of murder, as long as you are satisfied, on all of the other evidence, that however that person participated in the concerted attack on Mr. Maclean, that person had one of the two intentions required for second degree murder. [Emphasis added.]

[27] As I will explain, I would not accept this submission. The trial judge properly instructed the jury on the liability of co-principals and on the *mens rea* for murder. In the circumstances of this case, the intent for murder – subjective intent to cause bodily harm, and subjective knowledge that the bodily harm was of such a nature that it was likely to result in death – could be inferred if the jury found that the appellants participated in the beating, kicking, and stomping of an incapacitated and grievously injured victim. It was not necessary for them to find that an accused knew that one of the other assailants was using a knife.

Applicable principles

[28] In circumstances involving co-principals, as is the case here, the liability of parties to an offence is addressed by s. 21 of the *Code*. In *R. v. Spackman,* 2012 ONCA 905, 295 C.C.C. (3d) 177, Watt J.A. explained that co-principals are liable where they "together form an intention to commit an offence, are present at its commission, and contribute to it, although each does not personally commit all the essential elements of the offence": at para. 181; See also *R. v. Pickton*, 2010 SCC 32, [2010] 2 S.C.R. 198, at para. 63. In order to be liable as principals, therefore, the parties must have had the requisite intention.

[29] The *mens rea* required for second-degree murder is outlined in s. 229 of the *Criminal Code*, which states that culpable homicide is murder where the person who causes the death of a human being either means to cause their death, or means to cause them bodily harm that they know is likely to cause their death and is reckless whether or not death ensues.

[30] In *R. v. Cooper,* [1993] 1 S.C.R. 146, at pp. 155-156, the Supreme Court of Canada explained the nature of this requirement:

> The intent that must be demonstrated in order to convict under [now s. 229(a)(ii)] has two aspects. There must be (a) subjective intent to cause bodily harm; (b) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death. It is only when those two elements of intent are established that a conviction can properly follow.

See also *R. v. Williams*, 2019 ONCA 846, at para. 19.

[31] It is this requirement of subjective foresight of death that gives rise to the moral blameworthiness required to support a conviction for murder: *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645.

[32] In this case, then, the ultimate questions for the jury were: (1) who were the participants in the fatal stabbing, beating, kicking, and stomping of Maclean?; and (2) can it be inferred from their conduct that they had the requisite intent for murder, namely, that (i) they intended to cause his death; or (ii) they intended to cause him bodily harm that they knew was likely to cause him death and were reckless as to whether or not death ensued?

Submissions on appeal

[33] In advancing this ground, the appellants note that the lethal injuries were caused by stabbing and the identity of the stabber or stabbers had not been established. They submit that a non-stabber could only be liable if he or she had knowledge of the lethal force that caused death and participated in the attack with that knowledge. There could be no basis for liability if the Crown failed to prove that an accused knew that at least one of the participants, or possibly more, had knives. As Mr. Derstine put it, each accused had to know that “lethal force was on the menu”. Mere participation in the blunt-force assault could not support an inference of the intent for murder.

[34] The appellants state that the correct *mens rea* was described in the trial judge's reasons on sentencing, in which he found that each of the three appellants either used a knife or knew that a knife was being used. He said:

> By its verdicts the jury found that each accused person had a murderous intent. I am unable to make precise findings as to which offender inflicted what blow, or who, or how many had a knife, and how it or they were used.
>
> However, from the jury's verdict, I am able to say that all three offenders were involved in a joint attack on Mr. Maclean, either using a knife, or knives, or being aware that at least one of the others was using a knife, or knives, all the while having one of the intents for murder in s. 229(a) of the *Criminal Code*. [Emphasis added.]

[35] The appellants argue that this language illustrates that the trial judge's original instruction was erroneous, as it highlights that guilt could only arise where each offender was found to have either used a knife or been aware of the use of a knife.

[36] In support of this argument, counsel for Abdulle cites to *R. v. Kennedy*, 2016 ONCA 879, 345 C.C.C. (3d) 530, in which this court held that the trial judge had erred by failing to include "any instruction that, to find Mr. Kennedy or Mr. Wolfe guilty of the jointly charged offences, the jury had to be satisfied either that he was the gun-wielding intruder or that he knew the other intruder had a weapon

that would be used in the course of the robbery": at para. 18. Abdulle argues that the same logic should be applied here.

[37] The Crown responds that the trial judge accurately identified and articulated that the requisite *mens rea* could be readily inferred from the vicious and concerted attack on the helpless victim.

[38] With regards to *Kennedy*, the Crown argues that the circumstances are not analogous, as the accused in that case were charged with offences that specifically included the use of an imitation handgun. It was necessary for the jury to be instructed on knowledge of the firearm in order to make out the requisite elements of the offence. Here, such knowledge was not required to make out the necessary elements for murder.

Analysis

[39] The trial judge did not err. He instructed the jury carefully and correctly on co-principal liability and on the necessary ingredients for the offence of second-degree murder. He referred them to the evidence necessary to determine the issues. He repeatedly reminded them that they were required to consider the evidence as it related to each accused individually. He explained that, in the context of party liability, the Crown need not prove which attacker inflicted the fatal blow, but rather only that each accused participated in the joint attack, with the requisite state of mind for second-degree murder. He instructed the jury as to how

they could determine an accused person's state of mind, including by considering the person's words and conduct, as well as the number, nature, and severity of the injuries suffered by Maclean. Finally, he instructed them that, if they were satisfied beyond a reasonable doubt that an accused person had both caused the death of Maclean and had either intended his death or intended to cause him bodily harm that they knew would likely result in death and were reckless whether death ensued, they were to find that accused guilty of second-degree murder.

[40] The jury could have found the appellants guilty on the basis of knowledge of the knife, or without such knowledge. The jury was entitled to infer knowledge of the knife from the nature of the victim's injuries as demonstrated by the amount of blood on the victim, on the ground, and on Jama's blood-stained shoes. While use or knowledge of the knife would have guaranteed the requisite intent, participation in the brutal attack, even without such knowledge, would also have sufficed.

[41] The trial judge's reasons on sentence do not demonstrate that the jury instruction on intent was erroneous. Under s. 724(2)(a) of the *Code*, in the case of a jury trial, the sentencing judge is required to accept as proven all facts, express or implied, that are essential to the jury's guilty verdict. However, under s. 724(2)(b), the judge may find any other relevant fact that was disclosed by evidence at the trial to be proven.

[42] It was under this authority that the trial judge found, in sentencing the appellants, that all three were involved in a joint attack on Maclean, “either using a knife, or knives, or being aware that at least one of the others was using a knife, or knives, all the while having one of the intents for murder in s. 229(a) of the *Criminal Code*.” In the two paragraphs immediately before he came to this conclusion, the trial judge described Maclean’s injuries and the brutal and violent nature of the assault, noting that, “[g]iven the viciousness and brutality of this attack, and the appalling loss of blood involved, it should have been obvious that Mr. Maclean would not survive his injuries.” It was based on this evidence that he made his finding.

[43] Finally, as the Crown points out, the decision in *Kennedy* is unhelpful to the appellants. The appellants in that case were jointly charged with three offences: stealing while armed with an imitation handgun; assault with an imitation handgun; and using an imitation handgun while committing an indictable offence. It was in that context that this court held that the instruction on party liability was incorrect and that, in order to find the non-gun-wielding intruder guilty of the offences charged, it had to be proven that he knew the other intruder had an imitation firearm.

B. Did the trial judge err by improperly restricting Abdulle's evidence?

[44] As mentioned above, Abdulle made a series of incriminating statements to two undercover police officers. According to Abdulle, the source of her knowledge of the circumstances surrounding Maclean's death was not her own memory of the incident, but a conversation she had with Jama while they were staying at a friend's house after the homicide.

[45] At trial, Abdulle testified in her own defence. During her examination-in-chief, her counsel sought to introduce evidence of the conversation. Her counsel summarized the evidence to be elicited as follows:

> I remember asking [Jama] what happened because it still wasn't clear to me how the altercation with [Maclean] started or how he ended up dead.
>
> …
>
> That's when I finally asked who stabbed him and [Jama] told me it was [Bryan]. She told me [Bryan] is an idiot, he left his hat, his phone and the knife at the scene and he has cuts on his wrist and the police have his DNA but I don't know if she was serious because she's an exaggerator and this is during a period of time when they were doing some heavy drinking.

[46] Counsel for Abdulle took the position that the statement was relevant to establish the source of her knowledge of the information she provided to the undercover officers. If she acquired that information as a result of her own

observations, it would be inculpatory. On the other hand, if she only acquired the information because Jama told her, it would support her evidence that she was uninvolved in the attack. Moreover, from Abdulle's point of view, it was preferable to explain the source of her knowledge "up front" in her evidence-in-chief, rather than in cross-examination. Her credibility would be undermined if the evidence only came from her in cross-examination. There was also no guarantee that certain evidence, important to her substantive defence, would be adduced on cross-examination such that her lawyer would be able to respond in re-examination.

[47] Bryan's counsel objected to the evidence. Jama had not testified and the attempt to introduce her evidence by way of hearsay was highly prejudicial to Bryan. He argued that there was no certainty that Abdulle would be cross-examined on her source of knowledge and, in view of the serious prejudice to Bryan, the evidence should not be adduced unless it became necessary.

[48] The Crown agreed that the issue might not arise, because it might not cross-examine Abdulle on what she had told the undercover officers. If it became relevant, the issue could be addressed at that time.

[49] The trial judge accepted the submissions made on behalf of Bryan and the Crown. His ruling was as follows:

> Okay, I am going to rule on this now. It is not art to say the least and time does not permit me to do a narrative and frame the evidence as it has come up. But on the basis of the discussions

> that we have had and how the evidence has come out so far this is my ruling. The potential for prejudice to Mr. Bryan is extremely high. The probative value of the evidence at this point is speculative. It will depend on if and how the crown's cross-examination takes place about Ms. Abdulle's source of knowledge regarding who stabbed Mr. [Maclean]. If Ms. Abdulle is probed on this issue and it is suggested that her knowledge is from first hand observation, the utterances of Ms. Jama on this point may become probative, however this has not arisen. If it does arise, I will entertain [counsel for Abdulle's] application if so advised to adduce this evidence. If he is successful, it may be appropriate to instruct the jury about the timing of the introduction of this evidence, or this line of questioning, so that Ms. Abdulle is not put at a disadvantage or prejudiced in any way.

[50] As events transpired, Abdulle testified in-chief that a few days after the incident, she asked Jama what had happened, and Jama said, "the guy [Maclean] bottled you." She elaborated:

> A. I kind of just wanted to get some clarification on exactly what happened.
>
> Q. All right. Now you remember what it was that she told you?
>
> A. Yes.
>
> Q. First of all, about had [sic] happened to you?
>
> A. Yes.
>
> Q. Go ahead.

> A. She told me that the guy struck me in the head with a bottle.

[51] Later, in cross-examination by counsel for Bryan, Abdulle was asked whether she had told the undercover officers that the “Jamaican” (i.e., Bryan) had left his hat, phone, and knife at the scene. She admitted that she had said that. In answer to subsequent cross-examination by counsel for Bryan, she said that Jama had given her this information. She told the Crown in cross-examination that Jama had told her that her friends had “lost it” on Maclean for “bottling [her]” and that, while she was “knocked out”, they had beaten him, and an unknown person had stabbed him.

[52] In his final instructions, the trial judge cautioned the jury that Abdulle’s statements to the undercover officers could be used against her, but could not be used against any other accused unless she adopted her statements as true. He also instructed them that if they found that Jama said certain things to Abdulle, which Abdulle then reported to the undercover officers, those statements could only be used against Jama, and not against anyone else. The judge added that the jury should be careful about information that Abdulle may have obtained from Jama in considering whether what she told the officers was a truth or a lie: “Whose mistake was it? Whose lie was it, Ms. Abdulle or Ms. Jama’s?”

[53] On appeal, Abdulle claims that, in restricting her evidence, the trial judge undermined both her ability to make full answer and defence and her credibility. She says that the lack of fairness mandates a new trial.

[54] For the reasons that follow, I disagree. The trial judge appropriately balanced the fair trial interests of Abdulle on the one hand, and of Bryan on the other. He did not exclude Abdulle's evidence outright, but simply held that it could not be adduced until such time as it became relevant. Her evidence, as it related to her substantive defence, was given in-chief. Her evidence concerning what Jama told her was elicited in cross-examination by counsel for Bryan and by Crown counsel. The relative insignificance of the latter is evidenced by the fact that her counsel did not see fit to re-examine her on the issue and did not request a special instruction to the jury to explain why the evidence only came out in cross-examination.

Applicable principles

[55] At issue here is the constitutionally-protected right of an accused person to make full answer and defence. As forcefully put by counsel for Abdulle, an accused is entitled to use the "evidentiary bricks" necessary to build their defence. This principle was expressed in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 608:

> The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish

> a defence and to challenge the evidence called by the prosecution. As one writer has put it:
>
> > If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.
>
> In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent. [Internal citations omitted.]

[56] In *R. v. Crawford*, [1995] 1 S.C.R. 858, the Supreme Court confirmed that this right applies in the case of joint trials of co-accused, and "extends to prevent incursions on its exercise not only by the Crown but by the co-accused": at para. 28. However, the "right to full answer and defence, as is the case with other *Charter* rights, is not absolute", and it must be applied in accordance with the rules of evidence and other rules that govern the conduct of criminal trials:

> The right to full answer and defence does not imply that an accused can have, under the rubric of the *Charter*, an overhaul of the whole law of evidence such that a statement inadmissible under, for instance, the hearsay exclusion, would be admissible if it tended to prove his or her innocence: at para. 28, quoting *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505, at p. 1515.

[57] Where the rights of co-accused are in conflict, the strong policy reasons for conducting joint trials (e.g., consistent verdicts, emergence of the full truth) mandate that the trial judge engage in an attempt to balance and reconcile the competing rights: *Crawford*, at paras. 30-32.

[58] In undertaking this balancing, the trial judge has the right to exclude defence evidence. However, as the Supreme Court observed in *Seaboyer*, "the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law": at p. 611. See also *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, at para. 19. The trial judge may also sever the trials, but this extreme remedy is only justified where any attempt to reconcile the rights will result in an injustice to an accused: *Crawford*, at para. 32.

[59] To summarize, where an accused seeks to adduce evidence in an effort to mount a full answer and defence, the trial judge must ensure a balance against the rights of any joint accused. They must determine whether the evidence sought to be adduced is technically admissible, and then whether, even if technically admissible, it should be excluded on the basis that its prejudice substantially outweighs its probative value.

Submissions on appeal

[60] Abdulle's submission is that, as the trial boiled down to a credibility contest between her and Bryan, both of whom testified, she should have been allowed to

give the evidence in-chief. The conversation with Jama had two important components. First, it went to Abdulle's substantive defence: she did not participate in the beating and knew nothing about it because she had been "bottled" and was dazed; hence her question to Jama asking what had happened. Second, it went to her credibility, because the information she told the undercover officers was based not on her own knowledge, but on what she had been told by Jama.

[61] Abdulle argues the trial judge could have mitigated the prejudice to Bryan by telling the jury that her evidence could only be used to support her substantive defence and her credibility, and not as evidence against Bryan. As events transpired, the trial judge's ruling undermined both her substantive defence and her credibility. Moreover, the trial judge's ruling was based on the "false premise" that permitting the evidence to come out in-chief would be prejudicial to Bryan. However, it was Bryan's counsel who raised the issue on cross-examination, thereby undermining Abdulle's credibility and causing her prejudice.

[62] The Crown replies that Abdulle was not prevented from leading evidence to support her defence. The only restriction on her evidence was that she was not permitted to testify that Jama told her Bryan was the stabber. Any other restriction on her testimony was inconsequential and the trial judge properly balanced the competing interests in a way that respected Abdulle's fair trial rights.

Analysis

[63] No party requested severance. While counsel for Bryan raised the possibility during submissions on this issue, he never pursued it.

[64] On the most important issue, Abdulle's substantive defence, Abdulle was able to give her own evidence, in-chief. Her evidence was, in essence, "I had to ask Jama what happened, because I had been bottled and was in a daze." This evidence was simply confirmatory of her earlier evidence that, owing to her injury, she did not participate in beating Maclean. In my view, this aspect of her conversation with Jama was self-serving and of minimal probative value: see *R. v. Rojas*, 2008 SCC 56, [2008] 3 S.C.R. 111, at para. 36.

[65] With respect to the credibility issue, and the source of Abdulle's knowledge of what she told the undercover officers, it is important to note that the trial judge did not exclude this evidence outright, but simply exercised his discretion to control when it could be admitted. Further, as counsel for the Crown points out, the exchanges on cross-examination were brief and not unduly prejudicial:

> Cross-examination by Bryan's counsel:
>
> Q. Did you also tell both undercover officers that the "Jamaican" [Bryan] left his hat, phone and knife at the scene.
>
> A. I believe I said something along those lines.
>
> Cross-examination by the Crown:

Q. Okay. So, I'm going to suggest to you that at some point in this night you must have talked directly to Mr. Bryan about what happened.

A. I did not.

Q. You never in this entire night you [spent] with Mr. Bryan after this incident at 101 Kendleton, ever ask him what happened?

A. I don't believe I asked him, no.

Q. What about Libin Jama, ever ask her what happened?

A. I asked her what happened in Brampton, I believe.

Q. Now, just going back to Mr. Bryan, didn't Mr. Bryan tell you that he had left his hat, his cellphone and the knife at the scene and he was worried about being caught?

A. No, he didn't tell me that.

Q. Well, why did you tell the undercover officers that?

A. Because I'd been told by [Jama].

…

Q. But you had no issue implicating your friends to the undercover officer, right?

A. I was telling her what I was told.

Q. You stated to them that your friends lost it on the victim for bottling you, and while you were

> knocked out, they beat him, and unknown male number one stabbed the deceased. That's what you told them.
>
> A. I told them what I'd been told.
>
> Q. But that is what you told them.
>
> A. Essentially.

[66] There are two points that are telling in relation to this evidence. First, counsel for Abdulle did not seek to re-examine in relation to this evidence, even though he would plainly have been entitled to do so, given the earlier discussions and the trial judge's ruling. Second, and more significantly, he did not ask the trial judge to give a special instruction to explain that the evidence would have been elicited in-chief, but for his earlier ruling, and that the jury could not discount the evidence simply because it came out during cross-examination. Counsel's decisions on these two points speak volumes about the absence of prejudice.

[67] The trial judge recognized the right of each accused to make full answer and defence. He attempted to strike a fair balance between their rights without injustice to either. His ruling was designed to prevent highly prejudicial hearsay ("Jama told me Bryan was the stabber") from being admitted to respond to a speculative line of inquiry. The fact that the evidence was eventually adduced by Bryan's counsel, as had been feared by Abdulle's counsel, did not make the trial judge's premise "false".

[68] Abdulle's substantive defence was properly put to the jury, as was her explanation for her statement to the undercover officer. The trial judge gave appropriate instructions concerning the use of that evidence – instructions that are not challenged in this court.

[69] I would not, therefore, give effect to this ground of appeal.

C. Did the trial judge err with regards to the *Oliver* instruction?

[70] An *Oliver* instruction, as indicated earlier in these reasons, is a warning that certain evidence should be considered with particular care and caution, because the witness who gave it may have been more concerned with protecting themselves than with telling the truth: *Oliver*, at paras. 50-60. The issue arose as follows.

[71] At trial, Abdulle testified that after Maclean hit her with the bottle, she fell unconscious to the ground. When she came to, she felt throbbing pain and blood was trickling down her face. When she was able to stand, she saw Bryan beside her and she gave him a hug. He gently pushed her away and she saw him walk towards Maclean. She turned away for a few moments, trying to figure out where she had been wounded. When she turned around again, Maclean was on the ground. She did not hear anything, and she did not recall anyone other than Bryan around him. She acknowledged in cross-examination that she did not see Bryan stab Maclean.

[72] Abdulle testified that some time after the killing, the group stayed at the house of someone called Abass. There, in the presence of both Egal and Bryan, after they heard of Maclean's death, Abass said "whoever did this, if you guys ever get arrested, you know you have to take the [rap] for it". At this point, she said, Bryan was "nodding his head, like yeah I got it, I got it." She added that when Bryan was leaving, "he did this little gesture where he put his hand over [his] heart and he looked at me, and I don't believe he said anything but that's just what he did and he left." The implication of Abdulle's evidence was that Bryan accepted responsibility for the killing and was "going to take the rap for it."

[73] During his testimony, Bryan admitted that he had been at Kendleton with the others that evening, but claimed he had become separated from them. He had a brief encounter with Maclean in the west stairwell, during which Maclean had grabbed his arm or the front of his neck. This would afford an explanation for why his DNA was found under Maclean's fingernails.

[74] Bryan claimed that after coming out of the building, he saw a "mixture" of people and saw a bottle thrown by a tall person wearing a black jacket. He was unable to identify that person and did not know whether the bottle was thrown in Maclean's direction. He denied hugging Abdulle and denied participating in beating Maclean, claiming he left the scene before it occurred. He denied leaving 101 Kendleton with the others or being at either Abdi or Abass' home. He claimed that he went on his own to a friend's house.

[75] In closing submissions, counsel for Bryan made pointed submissions about the evidence of Abdulle:

> So I'm going to talk to you about the evidence of Salma Abdulle. I suggest to you that all of her evidence has to be evaluated in the context of the overriding motive she had in this case, to absolve not only herself of wrongdoing, but also her friends, Libin Jama and Abdulaziz Egal.

[76] He went on to suggest that the evidence that Maclean was backing up, bottle in hand, as Abdulle advanced on him, demonstrated that she had stabbed him and that, "[i]f Ms. Abdulle was the stabber, it could not be Mr. Bryan."

[77] In pre-charge discussions, counsel for Egal asked the trial judge to give an instruction that amounted to an *Oliver* instruction. The trial judge indicated that he was planning to do so in relation to Abdulle's testimony, but not in relation to Bryan's, because "he doesn't implicate anybody." Counsel for Egal agreed. The trial judge subsequently provided counsel with a draft of portions of his charge, including the *Oliver* instruction. In ongoing pre-charge discussions, Abdulle's counsel asked that there be no such instruction for Abdulle, but that, if one were to be given, it should be given for Bryan as well. He agreed with the trial judge that, "on the surface", Bryan implicated no one, but argued that the overall effect of his evidence was to undermine Abdulle's case. Counsel for Bryan objected to an *Oliver* instruction for his client, because Bryan had simply taken the position that he did not commit the crime.

[78] The trial judge did not accept Abdulle's counsel's submission and gave the jury the following instruction:

> Ms. Abdulle gave evidence that suggested that Mr. Bryan was involved in killing Mr. Maclean. She also put Ms. Jama and Mr. Egal at the scene, just before the deadly attack on Mr. Maclean. Mr. Bryan's evidence implicated no one in the attack, nor did he place any of them in the parking lot. You should consider the testimony of Ms. Abdulle to the extent that it implicates Mr. Bryan, or any other accused person, with particular care and caution, because Ms. Abdulle may have been more concerned with protecting herself than telling the truth. Bear that in mind when you decide how much or little you believe or rely upon what Ms. Abdulle told you about Mr. Bryan's, or anyone else's involvement in this case. This instruction, however, does not apply when you are considering Ms. Abdulle's evidence about her own alleged involvement.

[79] On appeal, Abdulle argues that the trial judge erred by giving a caution in relation to her evidence. Alternatively, if a caution was required, one should also have been given with respect to Bryan's testimony.

[80] As I will explain, I would not accept this argument. Abdulle's evidence clearly implicated Bryan, giving rise to the need for a caution to the jury. Bryan's evidence, by contrast, did not implicate Abdulle or any other of his co-accused. The trial judge was correct not to issue a warning with respect to his evidence.

Applicable principles

[81] In *Oliver*, this court, speaking through Doherty J.A., noted that joint trials can raise special problems with jury instructions, particularly where co-accused raise conflicting defences. The instructions must balance those competing rights to a fair trial: at para. 54, citing *Crawford*. The need to balance the fair trial rights of co-accused is a case-specific exercise: at para. 56.

[82] Doherty J.A. went on to suggest, at para. 58, that because the caution is exclusively concerned with protecting a co-accused's fair trial rights, the trial judge should canvass the need for any such caution with counsel for the co-accused before instructing the jury. If counsel takes the position that no caution is required, none should be given. He also observed, at para. 60, that:

> Where a trial judge determines that the fair trial rights of a co-accused require a "caution" with respect to the testimony of the other accused, the trial judge should expressly tell the jury that the caution applies only to the case against the co-accused and has no application when considering the case against the accused who has testified.

[83] In the recent decision of this court in *R. v. Deol*, 2017 ONCA 221, 352 C.C.C. (3d) 343, Juriansz J.A. emphasized that the threshold question is whether the fair trial rights of a co-accused require such an instruction: "*Oliver* does not mandate or even encourage such a caution be routinely given", but rather "makes clear that a trial judge has the discretion to give such a caution where he or she

considers the fair trial rights of a co-accused require it": at para. 26. He continued, at para. 27:

> The case-specific exercise requires the trial judge, who has the best appreciation of all the circumstances, to determine whether the giving or refusing of such a caution achieves the soundest balance of the competing interests of the two co-accused.

Submissions on appeal

[84] Counsel for Abdulle maintains the objection that the instruction was one-sided and unfair to Abdulle. He submits that the trial judge fell into error when he told the jury to view Abdulle's evidence with caution, but that Bryan "implicated no one in the attack" and did not place any of the co-accused in the parking lot. He submits that Bryan's evidence clearly contradicted Abdulle's evidence that he had hugged her and had moved towards Maclean. His evidence created the impression that he had left the scene, leaving behind an angry "mixture", including two "girls", who were involved in Maclean's death. This set up a credibility contest between Abdulle and Bryan. It was therefore unfair to tell the jury to consider the evidence of one with caution, while giving the other a free pass. The trial judge should have given the instruction with respect to both, or neither. Further, the closing submissions of Bryan's counsel made the *Oliver* instruction imperative.

[85] In response, the Crown submits that the trial judge did not err in the exercise of his discretion with respect to the *Oliver* instruction. It was not Bryan

who put Abdulle “in the mixture”. Her own testimony, as well as DNA evidence, put her there. Bryan’s evidence was extremely vague about who was at the scene and, unlike Abdulle, he did not attempt to inculpate anyone. He went out of his way not to do so.

Analysis

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

[87] The contrast between Abdulle’s evidence and Bryan’s is striking and explains why an *Oliver* instruction was appropriate in the case of the former, but inappropriate in the case of the latter. Abdulle’s evidence plainly implicated Bryan – it put him close to Maclean before Maclean fell to the ground and attributed highly inculpatory statements to him. Bryan’s fair trial right demanded that the jury be told that Abdulle’s evidence in this regard had to be considered in light of her self-interest.

[88] In contrast, Bryan’s evidence, while exculpatory, did not expressly implicate anyone else. Indeed, Bryan’s evidence about the conduct of others was vague. He was at pains to avoid saying anything about anyone else who may have been at the scene, using vague expressions like a “mixture” of people, without pointing to anyone in particular. As noted above, Abdulle put herself in the “mixture” and there was no debate concerning her presence.

[89] Following Doherty J.A.'s suggestion in *Oliver*, the trial judge had a thorough discussion with counsel concerning the need for a special instruction after it was raised by Egal's counsel. The decision not to provide a caution with respect to Bryan's testimony fell well within his discretion.

[90] Again following the advice of Doherty J.A., the trial judge informed the jury that the instruction did not apply "when you are considering Ms. Abdulle's evidence about her own alleged involvement." The *Oliver* instruction was given shortly after the judge had instructed the jury on reasonable doubt and the presumption of innocence and gave a full *W.(D.)* instruction with respect to each accused. The jury would have understood that, in assessing Abdulle's evidence in relation to herself, they were required to acquit if her evidence alone, or in combination with other evidence, left them with reasonable doubt.

[91] Finally, I do not accept that the closing submissions of Bryan's counsel required that an *Oliver* instruction be given in relation to Bryan's evidence. The jury was instructed that the submissions of counsel are not evidence.

[92] In summary, considering Abdulle's clear and powerful evidence against Bryan, an *Oliver* instruction was necessary to protect his fair trial rights and did not prejudice Abdulle's rights. A similar instruction was not required in Bryan's case. In fact, such an instruction would have been highly prejudicial in light of the substance of Bryan's evidence.

D. Did the trial judge err in his ruling on the cross-examination of Abdi concerning a knife, and in his refusal to grant a mistrial?

[93] After leaving 101 Kendleton, some, and possibly all, of the accused went to the home of Jama's mother, Khadra Abdi. Abdi later gave three statements to police, the second of which appeared to suggest that Egal had been in possession of a knife while at her home. Although English is not Abdi's first language, only one of the statements – the last – was made with the assistance of an interpreter.

[94] Abdi's first statement was given on February 28, 2014, and described the events that took place at her home on February 12, 2014. She made no mention of seeing anyone with a knife.

[95] Abdi gave a second statement on March 5, 2014, during the photo lineup. The statement was recorded. She identified Egal, whom she had known ever since he was a child, as one of the men who came to her house. She said something that sounded like, "he's coming with a knife and I kick him". The officer conducting the lineup, who was not one of the investigating officers, did not ask any follow-up questions.

[96] The investigating officers then took a third statement on March 10, 2014, this time with an interpreter. Abdi vehemently denied that she had used the word "knife" in her previous statement and said that Egal did not have a knife.

[97] Abdi testified at both the preliminary hearing and the trial with the assistance of an interpreter. She made no mention of a knife at the preliminary hearing, nor did the Crown seek to adduce evidence about a knife in her examination-in-chief at trial.

[98] However, before the commencement of Abdi's cross-examination at trial, counsel for Bryan advised the court that he wanted to cross-examine on her use of the word "knife" in her second police statement. He indicated that, depending on her answers, he might seek to have her statement admitted for the truth of its contents pursuant to *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740. Counsel for Egal opposed this course of action, taking the position that, not only was it unlikely Abdi would adopt her prior statement, the cross-examination would be highly prejudicial because it would leave the jury with the firm impression that Egal had a knife, an impression that could not be mitigated by a cautionary instruction.

[99] Having listened to the recording of the statement, the trial judge permitted cross-examination, over the objection of counsel for Egal. He noted that while Abdi struggled with grammar, her statement was not fundamentally unintelligible.

[100] In his ruling, the trial judge stated:

> It would not be unfair to the witness to permit questioning about her assertion of a knife. She may admit that she made the statement; she may deny it, with or without an explanation; she may suggest that she misunderstood or misspoke. We just do not know at this point. I

> accept that some prejudice might result from Ms. Abdi's denial of mentioning a knife or perhaps changing her position on this issue, however, the use of a knife or knives is a critical feature of the case against all four accused persons. It is open to [counsel for Bryan] in the defence of his client, to test the proposition that Mr. Egal had a knife that night. To prohibit him from doing so would be more prejudicial than letting it play out and then providing a cautionary jury instruction, if required.
>
> This approach is not without the risk of prejudice to Mr. Bryan, in that if Mr. Egal was handling a knife in a manner such that Ms. Abdi could see it, presumably in the presence of some or all of the other co-accused, it may end up providing some evidence of prior knowledge of the knife on the part of the others, including Mr. Bryan. But that is not a factor that ought to prevent me from ruling as I have on this matter.
>
> As I have said, depending on what Ms. Abdi says, if it becomes necessary, I will provide a cautionary instruction concerning what use, if any, can be made of the prior statement that [counsel for Bryan] wishes to impute to her.

[101] During cross-examination of Abdi, Egal's counsel showed her portions of her second statement. She stated that she had not seen a knife and that she did not mean to say that she saw a knife. On cross-examination by Bryan's counsel, she categorically denied the suggestion that she had said "knife" and that Egal had arrived at her house with a knife. She attributed the misunderstanding to her limited fluency in English and the absence of an interpreter when she gave the statement.

[102] At the end of Abdi's cross-examination, counsel for Bryan sought to have her statement about the knife introduced for the truth of its contents pursuant to *B. (K.G.)*. The trial judge dismissed the application, noting that the statement had been made without the benefit of an interpreter and that this fatally undermined its reliability. As well, the prejudicial effect of the statement was extremely high for all the accused, but particularly for Egal. There was a real risk that the jury would use the statement improperly. He observed that the jury would be instructed twice that the statement had not been adopted by the witness, once during the trial and again in his charge concerning the use of a prior allegedly inconsistent statement.

[103] The trial judge accordingly gave a mid-trial limiting instruction on the use of the statement, telling the jury that it was up to them to determine whether Abdi referred to a knife. If they found that she did, they could use the evidence to assess her credibility. However, it could not be used as evidence that she saw a knife.

[104] Despite all this, counsel for Bryan referred to the "knife" statement in his jury address. He pointed out that the jury could only use the statement to assess her credibility. He went on, however, to say this:

> And I'm going to suggest to you that she clearly does use the word "knife" in her statement on March 5th. I'm suggesting that she let the truth slip out when she said that. She may have been reluctant to say it. She may have wanted to be truthful, but I'm suggesting to you that she let the truth slip out and she said the word "knife."

[105] This resulted in an application for a mistrial by all three appellants, which the trial judge dismissed. He pointed out that, in a multi-accused trial, the balancing of the fair trial rights of one accused may result in the admission of evidence that is prejudicial to a co-accused.

[106] In the context of this case, he said, it was in Bryan's interest to put a knife in Egal's hand shortly after Maclean's death. Bryan's counsel had a good faith basis on which to vigorously pursue that issue in cross-examining Abdi: "There was nothing improper in his suggestion to Ms. Abdi that she 'let the truth slip out' when she mentioned a knife", as it was "part of Mr. Bayliss' theory that Ms. Abdi changed her story out of fear of, or loyalty to, Mr. Egal, and perhaps the others."

[107] The trial judge also found that Bryan's lawyer's comment to the jury did not compromise the fairness of the trial and could be addressed by a jury instruction:

> Mr. Bayliss' use of the expression "let the truth slip out" during his jury address presented certain challenges, especially given the important distinction the jury was ultimately asked to draw. However, he was entitled to attempt to persuade the jury that Ms. Abdi mentioned a knife and that her about-face undermined her overall credibility.
>
> In all of the circumstances, Mr. Bayliss' jury address did not compromise the fairness of the trial for the others. It did not contain the type of highly inflammatory and prejudicial rhetoric from counsel for a co-accused that might warrant a mistrial if left unchecked. The impugned aspect of the address was restricted

> to a single piece of evidence. It was capable of remediation with a straightforward and commonplace instruction in the final charge. I was satisfied that the jury would be able to understand the limited use that could be made of Ms. Abdi's evidence on this issue. [Internal citations omitted.]

[108] The trial judge then cautioned the jury about the use of the statement, warning them that it could not be used as evidence, but only to assess Abdi's credibility:

> There are a couple of special instructions. One applies to Ms. Abdi, Ms. Jama's mother. When she testified, it was suggested to her that in one of her police statements she said that she saw a knife the evening of February 12, 2014, when Ms. Jama, Ms. Abdulle and Mr. Egal came to her house. It will be up to you to determine whether in her statement of March 5, 2014, she used the word "knife." After considering her evidence, in the context of all of the evidence at trial, you may find that she did refer to a knife. You may find that she did not. You may be unsure. If you do find that she said this on a previous occasion, you may use this apparent inconsistency with her trial evidence in assessing the value or worth of her evidence. However, and this is extremely important, if you do find that she referred to a knife in her previous statement, you must <u>not</u> treat it as substantive or positive evidence that Mr. Egal did have a knife that night. That is, if you find it was said, you must limit the use of that utterance to merely assessing Ms. Abdi's credibility. Nothing more.
>
> It was suggested to Ms. Abdi in cross-examination, and it came up in one of the

> closing addresses, that Ms. Abdi let the truth slip out when she mentioned the knife. You must not use or approach this evidence in that way. It cannot be used for its truth, i.e., that there was a knife. Its only potential value is as a prior inconsistent or contradictory statement that may be used to assess her credibility. I give you this warning in the strongest possible terms. [Emphasis added.]

[109] On appeal, Egal submits that both the cross-examination of Abdi and Bryan's counsel's remark to the jury were highly prejudicial, and that the trial judge erred in refusing to grant a mistrial. He asks for a new trial.

[110] For the reasons that follow, I would not give effect to this ground. The trial judge's ruling correctly recognized Bryan's legitimate interest in pursuing Abdi's statement, and his instruction was sufficient to address any potential prejudice. The decision not to grant a mistrial is entitled to deference.

Applicable principles

[111] In *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal refused, [2000] S.C.C.A. No. 583, this court observed that, while co-accused are entitled to constitutional protections inherent in the right to a fair trial, the balancing of the respective rights of co-accused in a joint trial does not necessarily mean that each accused is entitled to the same trial they would have received if tried alone. An accused may introduce evidence or make submissions that are prejudicial to a

co-accused. Where this occurs, the trial judge must balance the respective rights of the co-accused so as to preserve the overall fairness of the trial: at para. 111.

[112] In balancing the rights of co-accused, a trial judge is required to use corrective measures to address any potential prejudice, including final or mid-trial jury instructions or a mistrial. However, a mistrial should only be ordered where such less extreme measures are inadequate. It is a remedy of last resort and should only be ordered where necessary to prevent a miscarriage of justice: *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at paras. 79-80; *R. v. A.G.*, 2015 ONCA 159, 124 O.R. (3d) 758, at para. 50.

[113] Where the issue of the appropriateness of a mistrial arises, "[t]he decision of whether or not to declare a mistrial falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised": *Khan*, at para. 79. In making their determination, the trial judge must consider any lesser corrective measures that could remedy the prejudice or irregularity: *Khan*, at para. 80; *A.G.*, at para. 50.

[114] A trial judge's decision on a mistrial application is entitled to deference, as "a trial judge is best positioned to assess whether a mistrial is warranted in the circumstances": *A.G.*, at para. 52, citing *R. c. Lessard* (1992), 74 C.C.C. (3d) 552 (Que. C.A.), at p. 563, leave to appeal refused, [1992] S.C.C.A. No. 312. Appellate courts must only interfere with a decision if it is clearly wrong or based on an

erroneous principle: *A.G.*, at para. 51, citing *R. v. Chiasson*, 2009 ONCA 789, 258 O.A.C. 50, at para. 14.

Submissions on appeal

[115] Egal submits that the trial judge erred in permitting cross-examination and refusing a mistrial. As there was no reasonable basis to think that Abdi would recant her evidence and admit she used the word “knife”, the proposed cross-examination should have been prevented. Discrediting Abdi did not advance Bryan’s case and substantially undermined Egal’s defence. Counsel’s argument that Abdi “let the truth slip out” was overwhelmingly prejudicial to Egal.

[116] In response, the Crown submits that, in a complex multi-party trial such as this, the trial judge’s balancing of the fair trial rights of Bryan, on the one hand, and of Egal on the other, is entitled to deference, as is the trial judge’s refusal to grant a mistrial.

Analysis

[117] In my view, the trial judge correctly found that it was in Bryan’s interest to establish that Egal had a knife and that there was a good faith basis on which to cross-examine Abdi on her statement. I do not accept that the test is whether there was a reasonable basis to think that Abdi would change her evidence. It was enough to establish that cross-examination had a reasonable possibility of undermining the credibility of her denial. As the trial judge pointed out, it was

Bryan's counsel's theory that Abdi changed her story out of fear, or perhaps loyalty to Egal, who was a member of her Somali community and whom she had known since he was a child. In contrast, Bryan was not Somali and was a stranger to her. Bryan was entitled to challenge her credibility by suggesting that she was protecting people she knew and to suggest that she said something other than "knife" was incredible.

[118] Moreover, as the authorities suggest, an appropriate jury instruction can often assist in balancing competing fair trial interests by instructing the jury on the limits to be applied in using that evidence: *Suzack*, at para. 114; *R. v. Kendall* (1987), 35 C.C.C. (3d) 105 (Ont. C.A.), at p. 128.

[119] The instruction given by the trial judge on this evidence was thorough, detailed, and expressed "in the strongest possible terms." It would have left the jury with no doubt as to the appropriate and inappropriate uses of the evidence. In the same instruction, the trial judge dealt with the statement in counsel's closing, telling the jury that the evidence could not be used to assess the truth of Abdi's statement, but only to assess her credibility. In my view, these corrective measures struck an appropriate balance and the trial judge's decision to refuse a mistrial is entitled to deference. I would not give effect to this ground of appeal.

E. Did the trial judge err in his instruction concerning Redhead's prior inconsistent statement?

[120] There is a marked difference between Egal's height (6'1" or 185 cm) and Bryan's (5'6" or 168 cm). There was also a difference in the clothing they were wearing on the evening of Maclean's death. Egal was wearing a black, two-tone jacket, with white striping on the sleeves and on the waistband. Bryan wore a jean vest with a white "hoodie" sweatshirt underneath.

[121] At the preliminary inquiry, Redhead testified that one of the participants in the attack on Maclean was tall and wore a top with stripes at the wrist. Based on its correlation with Egal's height and clothing, Redhead's evidence implicated Egal in the attack.

[122] At trial, during Redhead's examination-in-chief by Crown counsel, she was asked about the clothing the perpetrators were wearing. She said it was dark clothing, but one of the four was wearing "off-white and it had a line on it … on their like the wrist part … It's like a sweater and then there was a line that … like the sweater, it seems to be like off-white, and then the line was on it but I couldn't tell you what colour it was, but it would stand out." She added that it seemed to be a sweater, but she could not say whether the whole sweater was off-white, or just the wrist part.

[123] Redhead was then invited by the Crown to refresh her memory using her evidence at the preliminary inquiry. She was asked whether she recalled "whether the person that you described as having something that they had a white or cream coloured wrist area, do you recall anything else they were wearing?" She replied, "Um-m, not really, no." When asked whether she recalled the height of that person, she replied, "I think they were shorter." This evidence regarding height, which was in direct contrast to her testimony at the preliminary inquiry, was important to both Egal and Bryan, as it implicated Bryan, not Egal, in the attack.

[124] In cross-examination by counsel for Egal, Redhead confirmed her description given in examination-in-chief that one of the perpetrators was a "shorter" person, with a "stripe on their wrist or sleeve" and wearing a "sweater". This description implicated Bryan.

[125] In cross-examination by counsel for Bryan, Redhead was directed to her preliminary inquiry testimony, where she had said that it was the taller person wearing the off-white garment. The key portion of the exchange was as follows:

> Q. Right. When you gave your – your evidence, you said the shorter one, correct?
>
> A. Yes.
>
> Q. And then you – at the preliminary hearing you said the taller one, right?
>
> A. Well, I believe that's what's on the transcript.

> Q. Right. Well, would you agree that when you gave your evidence at the preliminary hearing a year and a half ago, things were fresher in your mind? Would you agree with that?
>
> A. I would think so, yes.
>
> Q. Pardon?
>
> A. Yes.
>
> Q. Okay. And obviously you were under oath and you were trying to tell the truth?
>
> A. Yes.
>
> Q. And when you testified about this at the preliminary hearing, you said that it was the taller person. Is that correct?
>
> A. Yes.

[126] It is noteworthy that, although Redhead conceded that she had been trying to tell the truth and the statement about the taller person was “on the transcript”, she did not expressly acknowledge that her evidence at the preliminary hearing was true. Nor was she asked whether her memory had been refreshed by her evidence at the preliminary hearing or whether she adopted that evidence at trial. No party found it necessary to clarify her answer.

[127] In his instructions on the law, a copy of which was provided to the jury, the trial judge explained how to address prior inconsistent statements of a non-accused witness. He explained that if the jury found that a witness had given an

earlier and different version about the same thing, they were to consider the differences between the versions in determining whether or how much they could believe of or rely on the witness' testimony in deciding the case. He also explained that the jury must not use the earlier statements as evidence of what actually happened, unless they were satisfied that the witness accepted the earlier version as true, in testifying at trial.

[128] In his review of the evidence in the charge, which was not given to the jury in written form, the trial judge summarized Redhead's evidence on the issue as follows:

> In cross-examination by [counsel for Bryan], Ms. Redhead agreed that she only heard two female voices that night, and no male voices. The first one sounded Somali. She was unsure of the second. She also said that the "shorter one" had a sweater and she described it in the following way, "It looks like it was cream and then there was a stripe around the wrist part." When asked about the colour of the stripes, she said, "I couldn't tell what colour it was, but it stood out, so it had to be. It was a colour different to the off white." However, after having an opportunity to review her preliminary inquiry evidence, she agreed that she testified that it was the tall man who wore this. During her examination in chief she said it was the shorter man. She agreed that when she gave her evidence at the preliminary inquiry about the tall man, things were fresher in her mind and she was telling the truth, <u>but she did not formally adopt that evidence from the preliminary inquiry</u>." [Emphasis added.]

[129] On November 30, 2016, during deliberations, the jury asked a question:

> In the preliminary hearing Ms. Redhead said that the tall person had the striped area around the wrists; however, on the witness stand she indicated that the shorter person was the one with the stripe at the wrists. Would it be possible to listen to [counsel for Bryan's] cross-examination to obtain which version of the above she accepted[?]

[130] The judge heard submissions from counsel concerning the appropriate answer to the question. Not surprisingly, counsel for Bryan and counsel for Egal took different positions. Bryan's counsel argued that Redhead had said that her evidence at the preliminary inquiry was true, even though she was not expressly asked whether she had adopted the evidence. The issue should be left for the jury. Counsel for Egal, on the other hand, said that the trial judge had already instructed the jury that Redhead did not formally adopt the evidence and the jury should be expressly instructed that she had not adopted it. The Crown took the position that the decision on whether she had adopted her earlier testimony should be left to the jury.

[131] The judge decided to replay the portion of Redhead's evidence requested by the jury, and to repeat his summary of the evidence in which he stated that Redhead had not formally adopted the portion of her evidence from the preliminary hearing.

[132] In the meantime, the jury delivered a request to hear additional portions of Redhead's evidence. It was decided to respond to their first question, and then to hear submissions from counsel on the second.

[133] The trial judge replayed to the jury the evidence they had requested concerning Redhead's cross-examination by counsel for Bryan. He then repeated the earlier instruction concerning prior inconsistent statements of non-accused witnesses. He also reminded the jury:

> I also gave you a summary of Ms. Redhead's evidence on that point yesterday, in my overall overview of the facts. I'm not going to repeat that for you now, but I'll just remind you that at the very end of that summary, of what you just heard now, I said that she did not formally adopt that evidence about the tall man from the preliminary inquiry. [Emphasis added.]

[134] After this instruction, there were further discussions between the trial judge and counsel concerning the jury's second question. It was agreed to replay for the jury the portions of Redhead's evidence-in-chief concerning the clothing worn by the assailants, as well as her cross-examination on that issue by counsel for Egal and Bryan. This included the portion of her cross-examination by counsel for Bryan that had been read in answer to the first question.

[135] On appeal, Egal submits that the trial judge erred by failing to instruct the jury that Redhead had not adopted her prior inconsistent statement. He asserts

that the jury instruction left this determination open to the jury, despite the absence of an evidentiary basis to support a finding of adoption.

Applicable principles

[136] A witness adopts a prior inconsistent statement where they testify that they made the prior statement, and that, based on their present memory, the prior statement is true: *R. v. Toten* (1993), 14 O.R. (3d) 225 (C.A.), at p. 243. A witness may adopt none, part, or all of a prior statement by words, action, conduct, or demeanour while testifying: *Toten*, at p. 243; *R. v. J.B.*, 2019 ONCA 591, 378 C.C.C. (3d) 302, at para. 31. Where a prior statement is adopted, it is incorporated into the witness' evidence at trial such that the prior statement is to be considered part of their trial testimony and can be used as evidence to prove the truth of its contents: *Toten*, at p. 243; *R. v. McCarroll*, 2008 ONCA 715, 238 C.C.C. (3d) 404, at para. 39.

[137] The decision as to whether or not a witness has adopted all or part of a prior inconsistent statement must be made by the trier of fact. However, before this determination can be put to the trier of fact, the trial judge must be satisfied that there is an evidentiary basis upon which the trier of fact could conclude that the witness did, in fact, adopt the statement: *McCarroll*, at para. 40. In determining whether such an evidentiary basis exists, the trial judge must be alive to whether the witness had a present recollection of the details contained within the prior

statement. Where a witness does not have a present recollection of the content of their prior statement, an evidentiary basis will not exist: *McCarroll*, at paras. 38, 42; *R. v. Alvarez-Maggiani*, 2018 ONSC 4834, at paras. 29-30. This means that the mere acknowledgement by the witness that the prior statement was made or that questions were asked and answered is not sufficient to establish an evidentiary basis: David Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2019), at p. 250, § 19.07, citing *R. v. Atikian* (1990), 1 O.R. (3d) 263 (C.A.). Rather, what is necessary is evidence that could establish both that the witness made the prior statement, and that they had a present recollection of the contents of the statement such that they could accept it as true while testifying.

[138] However, regardless of the circumstances, where a prior inconsistent statement is at issue, the trial judge must instruct the jury that a prior inconsistent statement is not evidence of the truth of its contents, except where they find that it has been adopted as true by the witness. If not adopted, a prior inconsistent statement can only be used to assess the credibility of the witness: *R. v. G.H.*, 2020 ONCA 1, at paras. 32, 35-36; *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 618.

Submissions on appeal

[139] Egal submits that the trial judge left to the jury the question of whether Redhead had adopted her evidence at the preliminary inquiry. He submits this was an error, because there was an insufficient evidentiary basis on which to do so.

According to Egal, three factors indicate the absence of adoption. First, at no time were the relevant portions of her prior statement read out to her – this made it unclear exactly how she had expressed herself at the preliminary inquiry. Second, it was not clear at trial that she continued to assert the truth of her previous statement. And third, the cross-examiner failed to ask the ultimate question, namely, whether her prior statement was true. The trial judge should have exercised his gatekeeping function by instructing the jury that Redhead had not adopted her earlier statement.

[140] Egal also submits that the trial judge's response to the jury's question was confusing and conflicted with his original instruction, as the first part of the answer (the general instruction on prior inconsistent statements) seemed to leave the question of adoption open to the jury, while the second part (the specific instruction regarding whether Redhead adopted her prior statement) seemed to direct them that Redhead had not adopted her prior statement. He submits that this confusion opened the door wider to an erroneous conclusion by the jury that Redhead had adopted her prior inconsistent statement that the "taller" man with the stripe on his sleeve had been at the scene.

[141] The Crown responds that the trial judge did not leave adoption with the jury. While he gave a general instruction that it is the role of the jury to determine whether prior inconsistent statements have been adopted, he later stated that Redhead had not adopted her prior inconsistent statement. This statement was

correct, as there was no evidentiary basis to support a finding of adoption. Redhead was never asked to confirm that her prior statement was accurate, and her evidence at trial conflicted with the statement. The record was clear that Redhead had not adopted her statement and there was no plausible risk that the jury would mistakenly find otherwise. The trial judge addressed the jury's question appropriately by playing back the requested portion of Redhead's evidence, repeating the instruction he had given concerning the proper approach to that evidence, and repeating his observation that Redhead had not formally adopted her statement from the preliminary inquiry. There was no error.

Analysis

[142] I would not give effect to this ground.

[143] By the end of this trial, the jury had been instructed three times – each time accurately and plainly – on the appropriate use of prior inconsistent statements of a non-accused witness. The first occasion was the mid-trial instruction on the use of the alleged prior statement by Abdi concerning Egal having a knife. The second was during the charge itself, and the third was when the jury was re-charged following their question.

[144] On the first occasion, the judge instructed the jury that if they found the witness had given an earlier different version of the event, "you should consider the fact, nature and extent of any differences between the versions in deciding

whether or how much you will believe or rely upon the witness's testimony in deciding this case." He continued with the standard instruction:

> Most importantly you must not use the earlier statements as evidence of what actually happened unless you're satisfied that the witness accepted the earlier version as true while testifying here at trial. Even if a witness accepts the earlier version as true when testifying before you, it's for you to say, as it is with the evidence of any witness, whether or how much you will believe of and rely upon that statement he or she accepted as true, in reaching your decision.

[145] The trial judge noted that the instruction applied generally to any witness confronted with a prior statement and he noted that the jury might find that previous witnesses, notably Redhead and Elmi, had made prior inconsistent statements. In addition to the statement at issue on this appeal, Redhead had also been cross-examined in relation to two other inconsistent statements made at her preliminary inquiry. Unlike the statement at issue, however, both those statements had a basis on which the jury could have concluded that they had been adopted.

[146] In his charge to the jury, the trial judge gave a substantially identical instruction. In his review of the evidence, he instructed the jury that Redhead did not "formally" adopt her evidence from the preliminary inquiry that the taller man wore a sweater with stripes on the sleeves. Counsel for Egal did not object to the instruction, either before or after the charge.

[147] Rather, even after the jury's question, and in the face of counsel for the Crown, Bryan, and Jama asking that adoption be left to the jury, counsel for Egal asked the trial judge to reiterate his instruction that Redhead had not formally adopted the statement. The trial judge did so in his re-charge, reminding them that in her evidence at trial, Redhead "did not formally adopt that evidence about the tall man from the preliminary inquiry."

[148] I reject the submission made on behalf of Egal that the jury would have been confused by the language of the trial judge's response to their question, or that the response was in conflict with the original instruction. While there were very slight differences in phraseology, both were clear that Redhead had not adopted her earlier evidence.

[149] The trial judge's discussions with counsel concerning the jury's questions also make it clear that he did not intend to leave adoption to the jury. After the answer to the jury's first question had been provided, Bryan's counsel asked the trial judge to instruct the jury that his instruction had simply been his view of the evidence, as opposed to a direction, and that they could find that Redhead had adopted the statement. The trial judge replied that the jury did not have a choice about whether Redhead had adopted the statement, that he did not think Redhead had adopted it, and that he was not going to change his instruction.

[150] In my view, in light of the instruction that Redhead had not "formally adopted" her evidence from the preliminary inquiry, and having regard to Redhead's response when the statement was put to her in cross-examination (which the jury heard three times), there was no risk that the jury would find that Redhead adopted the statement put to her by counsel for Bryan.

[151] I acknowledge that use of the word "formally" was unnecessary, and it would have been preferable for the trial judge to have simply instructed the jury that they could not find the statement had been adopted. In my view, however, the instruction could only have been understood by the jury to mean that Redhead did not "accept" her evidence at the preliminary inquiry, to use the language of their question, and that they could not use the prior statement for its truth, but simply to assess Redhead's credibility.

[152] I would not, therefore, give effect to this ground of appeal.

F. Was the verdict unreasonable as it pertained to Jama?

[153] At the close of the Crown's case, Egal and Jama brought an application for a directed verdict. The trial judge dismissed the motion with reasons to follow, subsequently reported as *R. v. Jama*, 2017 ONSC 471.

[154] After reviewing the factual background and applicable principles, the trial judge set out the evidence on which a jury could infer that each of Egal and Jama

were participants in the concerted deadly attack on Maclean. In the case of Jama, this included:

- she entered the building with the other three accused just after 7:00 p.m. on February 12, 2014;
- she was shown on security footage moments before the attack on Maclean;
- she fit the descriptions of one of the female attackers given by both Redhead and Elmi;
- after the incident, Jama left the scene and went to her mother's home, where she left a pair of her shoes, soaked with Maclean's blood, in the hall closet; and
- her DNA was found under Maclean's fingernails, indicative of her participation at an earlier stage of the events and consistent with Redhead's evidence about four people attacking Maclean.

[155] The trial judge noted that this evidence, together with evidence that there was outdoor lighting in the vicinity of the fatal attack, left it open to the jury to find that Jama could easily have observed Maclean's massive loss of blood, and that she either inflicted the injuries or was a knowing participant in the concerted attack that caused those injuries. At para. 33, the trial judge observed with respect to both Egal and Jama:

> Given the condition that Mr. Maclean must have been in at the time, with blood everywhere

> around him, it would not be difficult for the jury to conclude that those [who] were attacking this prone man at that time wanted him dead.

[156] On appeal, Jama claimed that the verdict was unreasonable, because the evidence did not establish that she was a co-principal. There was no direct evidence that she had a prior intention to kill or that she meant to cause Maclean such egregious bodily harm that she knew was likely to kill him and was reckless whether he died or not.

[157] I do not agree. As identified by the trial judge, it was clearly open to the jury to find, on the evidence, that Jama was a co-principal in the attack on Maclean and that she had the requisite murderous intent.

G. The sentence appeal

[158] Abdulle was 19 years old at the time of the offence. She was a grade 12 student with no criminal record. She has a loving and supportive family and many letters were filed in her support. Her trial counsel argued that she had been making progress while in custody and emphasized the role of alcohol on her behaviour on the evening in question. He submitted that she should receive the minimum 10-year period of parole ineligibility.

[159] The Crown argued that, due to the brutality of the crime, the parole ineligibility period should be increased to something in the range of 15 years. Pursuant to s. 745.2 of the *Code*, four jurors recommended that she receive the

minimum 10-year period of ineligibility; the recommendations of the remaining jurors ranged from 12 (2), 13 (3), 15 (2), and 20 years (1). The trial judge noted that the jury's recommendation regarding Abdulle were "probably marginally the harshest of the collective recommendations of the jurors."

[160] In sentencing Abdulle, the trial judge described the attack on Maclean as "brutal" and "dreadful and cowardly." He noted that the appellants left the area after the attack and "partied on into the night", even after learning that he had died. As I have noted, the trial judge found as a fact that, given the brutality of the attack and the "appalling loss of blood", all three appellants either used a knife or were aware that at least one of the others was using a knife, and that all had the required intent for murder as stipulated in s. 229(a) of the *Criminal Code*. He observed the "devastating" impact of the offence on Maclean's family. He also referred to Abdulle's support from family and friends, the absence of a criminal record, and a letter from a former teacher who reported that Abdulle was "remorseful" and "contrite" for what she had done.

[161] In considering the appropriate period of parole ineligibility, the trial judge referred to what he accurately described as the leading case, *R. v. Shropshire*, [1995] 4 S.C.R. 227, and to the decision of this court in *R. v. Salah*, 2015 ONCA 23, 319 C.C.C. (3d) 373. He also noted that the majority of the jurors had recommended that Abdulle serve more than the minimum period before becoming eligible for parole.

[162] He concluded that, notwithstanding her youth and family support, which demonstrated that her actions were out of character and that she had rehabilitative potential, a denunciatory sentence was required, both for her own sake and to deter others. He therefore imposed a 12-year parole ineligibility period.

[163] On appeal, Abdulle submits that the trial judge erred in principle by failing to impose the minimum 10-year ineligibility period. She seeks to introduce fresh evidence to establish that, at the time of the offence, she had mental health issues and was "self-medicating" with alcohol. She argues that, in light of this evidence, the minimum eligibility period is warranted.

[164] As will be outlined below, I would not interfere with the sentence imposed. The fresh evidence does not reduce the appellant's moral culpability and the trial judge's assessment is entitled to deference.

Applicable principles

[165] Section 235(1) of the *Code* calls for a mandatory sentence of life imprisonment in the case of first- and second-degree murder. Section 745(c) provides that, subject to s. 745.1 (which deals with persons under the age of 18 at the time of the offence), the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be, in respect of a person convicted of second-degree murder, for life without eligibility for parole until the person has

served at least 10 years of the sentence or such greater number of years, not being more than 25 years, as has been substituted pursuant to s. 745.4.

[166] Under s. 745.2, where a jury finds an accused guilty of second-degree murder, the presiding judge is required to ask the jury whether they wish to make any recommendation with respect to parole ineligibility. The judge must instruct the jury, using the language set out in the *Code*, that, while they are not required to make a recommendation, if they do, it will be considered by the judge when determining the appropriate period of ineligibility pursuant to s. 745.4. The jury is not required to be unanimous in its opinion and each member of the jury may make their own recommendation.

[167] Section 745.4 provides that, at the time of sentencing, the sentencing judge may, "having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendations, if any" of the jury, substitute a period of ineligibility of more than 10 years and not more than 25, "as the judge deems fit in the circumstances."

[168] *Shropshire* is the leading case. Iacobucci J., writing for a unanimous court, emphasized that the determination of parole ineligibility is a fact-sensitive process, which must have regard to the factors set out in the *Code* and to the discretion conferred on the judge by that section (now s. 745.4): at para. 18. He rejected the standard articulated by the Court of Appeal for British Columbia that a period of

parole ineligibility of more than 10 years would not be justified in the absence of "unusual circumstances": at para. 26. Rather, he held that, as a "general rule", the sentencing judge shall impose a period of 10 years, unless a determination is made that, according to the criteria in s. 745.4, a longer period is required: at para. 27. In other words, the correct approach is to "view the 10-year period as a minimum contingent on what the 'judge deems fit in the circumstances', the content of this 'fitness' being informed by the criteria" in the *Code*: at para. 31. He added that, "the power to extend the period of parole ineligibility need not be sparingly used": at para. 31.

[169] As to the power of appellate courts to interfere with the period of parole ineligibility imposed, Iacobucci J. expressed a highly deferential standard of review. He said, at para. 46, that:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

Submissions on appeal

[170] Abdulle advances two primary arguments. First, she submits that, having instructed the jury that they did not have to find that any accused used a knife or were aware of a knife, the judge erred in making a finding that each participant either had a knife or was aware that a knife was being used. Second, she submits that the fresh evidence concerning her mental condition, which she seeks to introduce on appeal, is sufficient to distinguish her from the other appellants and to establish that the minimum period of parole ineligibility is warranted. As a result of the fresh evidence, she says, the court can recognize that the appellant was mentally ill at the time of the attack and was "self-medicating" with alcohol.

[171] The fresh evidence is in the form of two psychological reports. The first report dated August 3, 2018, more than a year after Abdulle's sentencing, was prepared by a psychologist, on behalf of Correctional Service of Canada and the Joliette Institution for Women, where Abdulle was incarcerated. The second is a "Psychological Evaluation Report" submitted to the Correctional Service of Canada. Among other things, it makes recommendations for treatment following a deterioration in her mental state.

[172] The reports indicate that Abdulle began to serve her sentence at the Joliette Institution for Women on April 20, 2017. On April 16, 2018, she was transferred to the mental health unit for women offenders at the Institut national de

psychiatrie légale Philippe-Pinel at the Université de Montréal (“IPPM”) for reassessment, stabilization, and treatment following a deterioration in her psychological state. The latter report indicates that she had a personality disorder, a depressive disorder, and a substance abuse disorder in a controlled environment.

[173] The former report, which was prepared following her transfer to IPPM, indicates that she had worked with staff, took part in group work, and been compliant with her treatment and medication, as well as with the rules and regulations of IPPM. It observed that her mental health needs would not interfere with her ability to adapt to a transfer to a medium security facility, which might be more supportive of her needs.

[174] Abdulle argues that the evidence establishes that, akin to the circumstances in *R. v. Stiers*, 2010 ONCA 656, 268 O.A.C. 58, leave to appeal refused, [2011] S.C.C.A. No. 150, there “was a clear link between [her] criminal behaviour and [her] abuse of alcohol”: at para. 5. She submits that, just as a 10-year ineligibility period was imposed in that case, the same should be done here.

[175] In response to the appellant’s first argument, the Crown submits that while the jury was not required to find that Abdulle had knowledge of the use of a knife in order to convict her of second-degree murder, the trial judge was entitled to conclude from the nine stab wounds, the heavy bleeding from the femoral artery,

and Abdulle's close proximity to the victim as she attacked him, that she knew that he had been stabbed. He was statutorily entitled to make that finding, it is consistent with the jury's verdict, and it was reasonable.

[176] The Crown also submits that the trial judge took account of all relevant considerations, including the appellant's rehabilitative potential, on the one hand, and the need for a denunciatory sentence, on the other. It submits that the fresh evidence is not altogether helpful to the appellant, as the reports refer to her continued use of drugs while incarcerated and raise questions as to the veracity of her reporting.

Analysis

[177] Because Abdulle was convicted of second-degree murder, the trial judge was required to impose the mandatory sentence of life imprisonment under s. 235(1) of the *Code*. He was also required to consider whether to impose a period of parole ineligibility of more than 10 years, but less than 25 years. In making that determination, he was required to consider the character of the offender, the nature of the offence, the circumstances surrounding the commission of the offence, and the recommendations of the jury. He did all of these things.

[178] For the reasons set out in paras. 41-42, above, I do not accept that the trial judge erred in concluding that Abdulle was aware that a knife had been used in the attack. He was entitled to make that finding.

[179] With regards to Abdulle's second argument, *Stiers* is distinguishable. In that case, a verdict of second-degree murder was imposed by this court on appeal. In determining the sentence, this court held that, in light of Stiers' progress and rehabilitation over the course of the seven years he had already served in custody, a 10-year parole ineligibility period was more appropriate than the 12-15-year period requested by the Crown. The court noted that he "present[ed] as a very different individual than the 23-year-old man who committed th[e] crime": at para. 6.

[180] The reports tendered as fresh evidence in this appeal were not prepared for the purpose of assisting the court with respect to sentencing or parole eligibility. They were prepared for the purpose of determining the appellant's security classification and to clarify her psychological diagnosis. More to the point, there is nothing in the reports to demonstrate that, like Stiers, the appellant has turned her life around such that she is not the person she was when the offence was committed.

[181] Nor is there any reliable evidence in the reports to support the conclusion that the appellant's emotional and psychological challenges should be a factor in determining either her culpability or her parole eligibility. Significantly, the IPPM report suggests that she may have exaggerated her symptoms.

[182] The trial judge's assessment of the factors set out in s. 745.4 is entitled to deference. Having sat through a lengthy trial, heard the evidence regarding the nature and circumstances of the offence, watched Abdulle testifying and observed her character, and having heard the submissions on parole ineligibility, he was well-equipped to make this determination and I would not disturb his conclusion.

V. DISPOSITION

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

Released: "GRS" FEB 12 2020

"George R. Strathy C.J.O."
"I agree. A. Harvison Young J.A."
"I agree. M. Jamal J.A."