COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Gager, 2020 ONCA 274
DATE: 20200430
DOCKET: C56616 & C57445

Pardu, Roberts and Thorburn JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Jermaine Gager

Appellant

AND BETWEEN

Her Majesty the Queen

Respondent

and

Corey Leonard Smelie

Appellant

Jill R. Presser and Eric Neubauer, for the appellant Jermaine Gager

Catriona Verner, for the appellant Corey Leonard Smelie

Christine Bartlett-Hughes and Amy Alyea, for the respondent

Heard: December 2, 3 and 4, 2019

On appeal from the convictions entered by Justice Robert A. Clark of the Superior Court of Justice, sitting with a jury, on March 23, 2012 (C56616 & C57445), and from the sentence imposed on May 17, 2012 (C57445).

Roberts J.A.:

A. OVERVIEW

[1] After a lengthy jury trial, the appellants were convicted of murdering Darnell Grant. The appellants do not dispute their presence in the van from which emerged the shooters who killed Mr. Grant. The main issue at trial was whether they were the shooters. The appellants appeal their convictions. Mr. Smelie also seeks leave to appeal his sentence.

[2] The appellants raise several grounds of appeal. They submit that the trial judge erred in qualifying Detective Douglas Backus as an expert witness and admitting his opinion that the appellants had characteristics of gang members for the purpose of establishing a motive for the shooting. Further, they argue the jury instructions were inadequate and incorrect, their applications for further disclosure were erroneously dismissed, the verdicts were inconsistent, and they allege a reasonable apprehension of bias on the part of the trial judge. They maintain that these errors resulted in an unfair trial and a miscarriage of justice. They ask that the convictions be set aside, and a new trial ordered.

[3] Respecting sentence, Mr. Smelie submits that the trial judge erred in fixing the length of his parole ineligibility by failing to acknowledge his youth and failing to make findings of fact that were consistent with the evidence and the verdict.

[4] I would not give effect to these submissions. As I will explain, the trial judge made no reversible error. This was a lengthy, difficult trial, complicated by numerous pre-trial and mid-trial applications. The trial judge showed patience and skill in keeping the trial on course. His rulings were clearly and fairly written. That he had to keep a firm hand on the rudder during this trial is exactly what was required of him.

[5] I would therefore dismiss the appeals.

B. BACKGROUND

[6] To properly frame the grounds of appeal, I set out a brief factual background. Later in these reasons, I detail additional facts relevant to my analysis of each ground of appeal.

(1) Circumstances of the Murder and After-the-Fact Conduct

[7] On September 22, 2008, at around 9:15 p.m., a stolen white van carrying the appellants drove into the Driftwood Court community housing area, an area of Toronto regarded as being within the territory of a gang known as the Driftwood Crips. Twice the van slowly circled the area and then stopped. Several men exited the van and immediately opened fire on a number of persons in the area including Mr. Grant and his friend Sonia Butler, discharging approximately 22 gunshots in as many seconds. They shot Mr. Grant in the back, killing him.

[8] Mr. Gager testified that he just happened to be along for the ride. He said he bumped into an acquaintance at a pizza restaurant who invited him to a party. That is where Mr. Gager said he thought he was going when he entered the van. In the van, he saw Mr. Smelie in the passenger seat and "Tevane",[1] a man he knew from his neighbourhood.

[9] Mr. Gager testified that while he did not see Mr. Smelie leave the van, he saw him and others re-enter after the shooting. After the shooters re-entered the van, it sped off. They were almost immediately spotted and pursued by police. The van was abandoned, and its occupants fled on foot and scattered. Mr. Gager and Mr. Smelie were followed and ultimately apprehended.

[10] Mr. Gager was arrested 45 minutes after the shooting while hiding behind a bush and attempting to dispose of a .45 class of firearm. He testified Tevane gave him the firearm for that purpose and told him to run. This firearm matched seven spent casings found near the shooting. One particle of gunshot residue was found on his t-shirt, which, as the Crown's ballistics expert acknowledged, was inconclusive because it could have come from Mr. Gager's proximity to the other shooters in the van.

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[1] Tevane was a co-accused who unfortunately passed away before the trial.

[11] On arrest, Mr. Smelie had six spent casings in his pocket. These casings matched and had to be ejected manually from a .357 class of firearm located not far from where Mr. Smelie was arrested.

[12] Four spent projectiles were recovered from the scene that were consistent with being fired from either a .357 class of firearm, or a .38 or 9 mm class weapon. A fifth spent projective matched the .45 calibre weapon found with Mr. Gager. The fatal projectile, recovered from Mr. Grant at autopsy, was consistent with being from a .357, .38 or 9 mm class firearm. Gunshot residue was found on Mr. Smelie's hands. The Crown's ballistic expert agreed that had he known that Mr. Smelie had handled the spent shell casings found in his pocket, he would expect to find gunshot residue on his hands.

[13] While in jail awaiting trial for Mr. Grant's murder, Mr. Gager wrote two letters to Anthony St. Louis, who was in another jail. Mr. St. Louis was connected to the Doomztown Crips, a distinct gang from the Driftwood Crips. Mr. Gager covered his letters in symbols and language characteristic of the Doomztown Crips and stated in one letter, "fuck driftwood". Mr. Gager testified that he had only pretended to be part of the Doomztown Crips to obtain protection while in custody.

[14] In one of his letters, Mr. Gager also wrote that Mr. Smelie "wants me to plead he must be smoking dope and I don't kno[w] if [Mr. Smelie] might crack on me we just gone [*sic*] have to wait and see but I'll fuck him up if he does." He confirmed

at trial that he meant that he would beat up or hurt Mr. Smelie if he said anything against him.

[15] Telephone books supplied to Mr. Gager and Mr. Smelie while they were in custody awaiting trial were seized. They contained handwritten gang symbols and language.

(2) Pre-trial and Trial Proceedings

[16] The trial judge heard lengthy pre-trial motions from November 2011 until the end of January 2012. The pre-trial motions focussed on issues including the admissibility of expert opinion evidence on street gangs and related disclosure issues, as well as addressing the appellants' request to sit at counsel's table, the admissibility of gunshot residue evidence, and the admissibility of Mr. Gager's letters.

[17] A jury was selected, and the trial commenced January 31, 2012. Trial counsel for both appellants brought a mistrial application on the second day of trial, February 1, 2012, alleging a reasonable apprehension of bias on the part of the trial judge based on his demeanour and facial expressions. The trial judge immediately dismissed the application for brief oral reasons to which I shall return in more detail below.

[18] The Crown's case depended principally on the theory that Mr. Grant was killed in a gang-style shooting, perpetrated by gang members and motivated by

gang rivalry. Specifically, the Crown submitted that the appellants were members of the Doomztown Crips, and that the shooting was part of a pattern of violence between rival gangs, the Doomztown Crips and Driftwood Crips. To support its theory, the Crown relied heavily on the expert evidence of Det. Backus concerning street gangs and gang membership and Mr. Gager's letters. Det. Backus opined that the appellants possessed characteristics of members of the Doomztown Crips.

[19] The jury convicted Mr. Gager of first degree murder and Mr. Smelie of second degree murder. Mr. Gager received a sentence of life imprisonment without parole eligibility for 25 years. The trial judge sentenced Mr. Smelie to life imprisonment without parole eligibility for 18 years.

C. ISSUES

[20] The appellants raise several common issues and additional issues particular to their respective appeals. I shall consider these issues under the following framework:

1. Did the trial judge err in qualifying Det. Backus as an expert and in admitting his expert opinion?
2. Did the trial judge err in his jury instructions?
3. Did the trial judge err by dismissing portions of the defence applications for further disclosure of information underlying Det. Backus' opinion?
4. Were the verdicts inconsistent?

5. Did the conduct of the trial judge give rise to a reasonable apprehension of bias?
6. Did the trial judge err in imposing on Mr. Smelie an 18-year period of parole ineligibility?

D. ANALYSIS

(1) Did the Trial Judge Err in Qualifying Det. Backus as an Expert and in Admitting his Expert Opinion?

[21] Det. Backus was qualified as an expert in the area of street gangs: *R. v. Gager*, 2012 ONSC 388, at para. 214. He was permitted to testify to, among other things, the general structure and organization of gangs, the use of symbols and graffiti, their territories, responses to perceived infringement of territories, and the existence of gangs in Toronto.

[22] Det. Backus was permitted to interpret Mr. Gager's letters. He was also allowed to testify about the Project XXX gang investigation in which he was involved as the lead investigator, and that Mr. Smelie had been identified on Project XXX intercepts speaking to known gang members about drugs and guns and attending a known gang meeting place known as "the Mansion". The trial judge limited Det. Backus' opinion to stating whether Mr. Gager and Mr. Smelie had characteristics of gang membership without opining that they were gang members.

[23] The appellants do not challenge the trial judge's finding that Det. Backus' expert opinion concerning gangs was necessary to assist the jury in

understanding the factual matrix of the trial. Nor did the appellants seriously challenge that Det. Backus had considerable expertise in Toronto street gangs generally and specifically regarding the Doomztown and Driftwood Crips gangs in issue in this case, gained from his police work dealing with gangs, including speaking with and debriefing confidential informants and listening to intercepts.

[24] The main thrust of the appellants' argument on appeal is that there was no reliable evidential basis for Det. Backus' opinion regarding gang membership or gang rivalry and that his opinion was tainted by impartiality because of his position as a police officer employed by Toronto Police Services.

[25] Mr. Smelie submits further that the trial judge erred in permitting Det. Backus to testify in relation to him. While it was conceded that there was evidence from the intercepts to support that Mr. Smelie was at one time a gang member, there was no evidence admissible against him concerning any animosity between the Doomztown and Driftwood Crips gangs. Without this evidence, Mr. Smelie maintains, Det. Backus' evidence that Mr. Smelie had connections to a street gang served as nothing more than hugely prejudicial propensity evidence. Without the evidence of animosity between the two relevant gangs, Mr. Smelie submits that the gang opinion evidence had no logical relevance and should have been excluded.

[26] I do not agree with these submissions.

(a) Applicable Legal Principles

[27] The admissibility of any expert opinion evidence is highly case-specific. Like many experts, Det. Backus was qualified and permitted to testify as an expert on the basis of "specialized knowledge gained through experience and specialized training in the relevant field": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 109, leave to appeal refused, [2010] S.C.C.A. No. 125.

[28] The trial judge referred to the well-settled criteria governing admissibility of expert opinion as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert: *Abbey*, at para. 75. He also applied the "two-step" approach recommended by Doherty J.A. in *Abbey*, at para. 76, a case dealing specifically with the admissibility of expert opinion on gang culture. At the first stage, the court must ensure that the basic preconditions for the admissibility of expert evidence are satisfied; if so, at the second or "gatekeeper" stage, the court must decide whether the evidence is "sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence."

[29] Deference is owed to the decision of the trial judge to admit or reject expert evidence absent error in principle, material misapprehension or an unreasonable conclusion: *Abbey*, at para. 97; *Imeson v. Maryvale (Maryvale Adolescent and*

Family Services), 2018 ONCA 888, 143 O.R. (3d) 241, at para. 53, leave to appeal refused, [2019] S.C.C.A. No. 35. I see no basis to intervene here.

(b) Reliability

[30] The appellants repeat their argument from trial that essentially Det. Backus is asking the jury to "trust him" that his opinion is correct, rather than support it with a sufficiently reliable evidential background. I agree with the trial judge's response to this argument that reliability of this kind of expert testimony "depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it" or factors like peer review and publication: *Abbey*, at para. 112, citing with approval to *U.S. v. Hankey*, 203 F. 3d 1160 (9th Cir. 2000), at p. 1169; *R. v. Mills*, 2019 ONCA 940, at paras. 52-54. I can find no error in the trial judge's finding that Det. Backus' extensive and current experience with gangs gives him the requisite expertise for qualification as an expert.

[31] The trial judge properly determined that the lack of evidential foundation was a matter that went to weight and could also be dealt with by certain limitations that he placed on Det. Backus' opinion. Although he qualified him as an expert, the trial judge refused to allow him to express his opinion that (1) the appellants were members of the Doomztown Crips; and that (2) the Doomztown Crips were in a gang war with the Driftwood Crips. He did not allow Det. Backus to rely upon

confidential informant or occurrence reports, since counsel did not have access to those documents.

[32] The trial judge determined that Mr. Gager's jailhouse letters to Mr. St. Louis were inadmissible for or against Mr. Smelie to the extent they were not adopted by Mr. Gager in his trial testimony. The trial judge permitted Det. Backus to tell the jury the aspects of the letters that, with the benefit of his expertise, he considered were characteristic of the author being a member of the gang. He was also permitted to impart to the jury, as context for the letters, his knowledge of gang hierarchy, as well as the typical interrelation between gang members themselves, and between gang members and non-gang members, including how, in his experience, such persons are likely or not likely to address one another. He was permitted to tell the jury of Anthony St. Louis's connection to Doomztown such as it emerged from the intercepts to which he personally listened and of the telephone contact between Mr. Gager and Nicholas St. Louis, Anthony St. Louis's brother, who was a known member of the Kipling Crips. He could mention any telephone intercepts he had personally listened to in which Mr. Smelie said anything that indicated he was a gang member but was not permitted to give specifics of the calls or opine that he was a Doomztown gang member.

[33] The trial judge was entitled to find that Det. Backus' evidence was grounded in his experience and was reliable on this basis, and that any residual concerns about reliability would go to weight rather than barring admissibility. This is

especially so given that he carefully circumscribed the language of the proposed expert opinion evidence to exclude those opinions that were less reliable and made clear that he would entertain question by question concerns as they arose.

(c) Logical Relevance

[34] I do not accept the appellants' submission that the trial judge failed to consider the logical relevance of the gang evidence in the absence of evidence of a gang war.

[35] The trial judge assessed the logical relevance of the gang evidence. He recognized that "without the evidence tending to show hostility between the gangs and membership of the accused in Doomztown … the jury may be unable to make any sense of the shooting." He was satisfied that the expert evidence he permitted Det. Backus to give was logically relevant even though he was not permitted to testify to the existence of a gang war, as his opinion on this point was lacking in foundation.

[36] This finding was open to the trial judge. There does not have to be a gang war for there to be logical relevance to Det. Backus' general territorial evidence regarding gangs and to the specific connection to other people in one gang that is different from the gang associated with a given location. This is relevant to motive and potential planning and deliberation of the shooting and the extent to which the appellants participated in the shooting.

[37] It is important to recall that the murder took place in core Driftwood territory. Det. Backus testified that perceived intrusion into one gang's territory by a member can lead to violent reprisals in the territory of a rival gang. Given this evidence, membership in a gang other than the Driftwood Crips was logically relevant to motive.

[38] Accordingly, the gang evidence was logically relevant even in the absence of evidence of a gang war.

(d) Impartiality

[39] Turning to the allegation of impartiality, the trial judge expressly addressed the argument that Det. Backus was too biased to be qualified as an expert. He referenced the guiding principles that the exclusion of proffered expert testimony on the basis of bias is implicit in the *Mohan* factors and a matter of the trial judge's residual discretion as gatekeeper after engaging in a costs/benefits analysis: citing *R. v. L.K.*, 2011 ONSC 2562, 86 C.R. (6th) 98, at para. 9. The Supreme Court of Canada has since recognized that being properly qualified as an expert witness includes being willing and able to fulfil one's duty to the court, which includes a duty of impartiality: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 53.

[40] The trial judge concluded, correctly in my view, that while Det. Backus may have shown stubbornness in his testimony and some of his proffered opinions

were so lacking in foundation that they were inadmissible, these shortcomings did not go to the core of his evidence nor establish a lack of partiality that required the exclusion of all his evidence. He was independent of any investigation into the offences and gave his evidence in a fair-minded fashion, including providing additional material sought by the defence at the preliminary inquiry, sometimes without being asked to do so. Any issues were attenuated by the limits placed on Det. Backus' evidence and the rigours of cross-examination. These conclusions were open to the trial judge to make.

(e) Potential Prejudice

[41] In the cost/benefit analysis conducted by the trial judge, he carefully considered the potential of moral prejudice arising against the appellants because of their immersion in or association with gang culture. Following the factors outlined by Charron J.A. in *R. v. B. (L.); R. v. G. (M.A.)* (1997), 116 C.C.C. (3d) 481 (Ont. C.A.), leave to appeal refused, [1997] S.C.C.A. No. 524, he recognized that the evidence of bad character was relevant to motive and that provided the nature and scope of the evidence was put to the jury with the proper limiting instructions, any prejudice could be overcome and the jury would be unlikely to infer guilt on bad character alone. There is no basis for appellate intervention.

[42] In summary, I see no error in the trial judge's decision to qualify Det. Backus as an expert witness nor to admit his circumscribed evidence at trial.

(2) Did the Trial Judge Err in His Jury Instructions?

[43] The appellants raise several issues with the jury instructions. As discussed below, the jury instructions were adequate.

(a) Standard of Review

[44] Appellate courts must adopt a functional approach to reviewing jury charges, asking whether the charge as a whole enabled the trier of fact to decide the case according to the law and the evidence: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 8. The purpose of such review is to ensure that juries are properly, not perfectly, instructed: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 62.

[45] The overarching question is whether the jury charge properly equipped the jury to decide the case, absent the limiting instructions that the appellants say were required: *Calnen*, at para. 9.

(b) Did the Trial Judge Err in His Instructions Concerning Det. Backus' Expert Opinion?

[46] The appellants submit that if Det. Backus' opinion regarding gang membership and gang rivalry was properly admitted, the trial judge nevertheless erred by failing to adequately caution the jury about what weight they could place on this evidence. The appellants argue that the jury was not instructed that they were required to discount the weight of Det. Backus' evidence to the extent it relied on inadmissible hearsay. The appellants focus on Mr. Gager's letters and say that

the trial judge should have instructed the jury to attribute less weight to Det. Backus' interpretation of Mr. Gager's letters and his ultimate opinion on characteristics of membership to the extent they depended on inadmissible hearsay. Further, while the trial judge properly instructed the jury that, in coming to a verdict for Mr. Smelie, they could not rely upon Mr. Gager's letters to the extent they were not adopted by Mr. Gager at trial, they were not instructed that they were required, in coming to this verdict, to put less weight on Det. Backus' opinion to the extent it relied upon portions of the letters not in evidence.

[47] I would not give effect to these submissions.

[48] There is a "practical distinction", as described by Sopinka J., concurring, in *R. v. Lavallee*, [1990] 1 S.C.R. 852, at p. 899, between "evidence that an expert obtains and acts upon within the scope of his or her expertise … and evidence that an expert obtains from a party to litigation touching a matter directly in issue".

[49] Where the expert relies on "unproven hearsay" obtained and acted upon within the scope of the expert's expertise, if otherwise admissible, the weight of the expert evidence need not be discounted: *Lavallee*, per Sopinka J. (concurring), at pp. 899-900; *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678, at para. 62. To exclude the evidence arising from the professional judgment within the scope of the expert's expertise "would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be … contrary to the approach [the

Supreme Court] has taken to the analysis of hearsay evidence in general": *Lavallee*, at p. 899.

[50] To the extent that the expert's opinion depends on evidence from a party that must be proven, as Sopinka J. observed in *Lavallee*, at p. 900, "the lack of such proof will … have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point."

[51] The appellants submit that the weight to be given to Det. Backus' opinion about the appellants' gang membership and gang rivalry, insofar as it depends on Mr. Gager's letters, directly depends on the admissibility of the contents of those letters. The appellants maintain that the jury was not properly instructed regarding the use they could make of Det. Backus' evidence as far as it referenced Mr. Gager's jailhouse letters.

[52] I disagree. In my view, the trial judge's instructions, as a whole, were adequate.

[53] After instructing the jury that "the weight, if any, to be given to an expert's evidence including his opinions", was entirely for the jury to say, the trial judge stated:

> Speaking generally, experts rely on information provided to them to formulate their opinions. Sometimes, not all the information upon which the expert relied is before the jury in evidence. To the extent that the information relied upon by the expert is not before you in evidence, you may find, but are not

> required to find, his opinion to be of less assistance to you.
>
> As for information that is before you in evidence, as I have told you, nothing becomes a fact in this trial until you decide it is a fact. So, to the extent that the facts as you find them differ from the information relied upon by the witness for his or her opinions, you may find, but are not required to, his or her evidence to be of less assistance to you.

[54] As I read it, the trial judge's general instruction relating to the use of expert evidence conveys the principle discussed by Sopinka J. in *Lavallee* that there may be circumstances in which the weight need not be discounted.

[55] Moreover, as I discuss in more detail below, the trial judge also instructed the jury that they could not rely on the portions of Mr. Gager's letters that were not proven.

[56] In my view, the trial judge's instruction was adequate. He was dealing with a number of expert opinions grounded in both inadmissible hearsay collected by the experts in the scope of their expertise and inadmissible hearsay evidence from a party. The instructions as a whole alerted the jury to the fact that they may discount the weight attributable to an expert opinion to the extent it relies on inadmissible evidence. It followed the guidance *per* Wilson J., at para. 77 of *Lavallee*, that "[w]here the factual basis of an expert's opinion is a melange of admissible and inadmissible evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the

amount and quality of admissible evidence on which it relies." The trial judge's instruction served this purpose.

[57] It is also noteworthy that this instruction was vetted and accepted by counsel. The appellants' trial counsel did not seek a separate or more particular instruction concerning Det. Backus' evidence, nor the kind of instruction that they now say was mandatory.

[58] Mr. Smelie further submits that the jury should have been specifically instructed that to the extent that Det. Backus' opinion depended on Mr. Gager's letters, the jury had to disregard it as far as Mr. Smelie was concerned.

[59] When viewed as a whole, the trial judge's charge imparted this instruction to the jury. In addition to the general instruction about experts, the trial judge strongly warned the jury about using bad character evidence in three midtrial instructions and in his final charge. As I will discuss in more detail later in these reasons, these instructions forbade the jury from relying on the portions of Mr. Gager's letters that were not adopted by Mr. Gager in his testimony in their consideration of the case against Mr. Smelie.

[60] For the reasons I have stated, the trial judge's instructions were sufficient to caution and instruct the jury regarding Det. Backus' evidence in this case.

(c) Should the Trial Judge Have Given a "No Probative Value" Instruction with Respect to Mr. Gager's Flight Following the Offence?

[61] Mr. Gager repeats his submission before the trial judge that his flight from the van following the murder had no probative value. Mr. Gager testified that he was told to run by Tevane, who placed a firearm into his hands, and that he ran out of fear. As a result, his flight was as consistent with his dread of Tevane's repercussions, and his fear of apprehension for breach of his bail conditions and the unlawful possession of a loaded handgun, as it was with guilt because of his participation in the murder. The trial judge therefore erred in failing to instruct the jury that his flight had no probative value.

[62] I disagree.

[63] It is well settled that a "no probative value" instruction will be called for only in limited circumstances: *R. v. White*, [1998] 2 S.C.R. 72, at para. 27. This reflects the exclusive fact-finding role of the jury to decide, on the basis of the evidence as a whole, whether the after-the-fact conduct of the accused is related to the crime before them rather than to some other culpable act, and how much weight, if any, such evidence should be given in the final determination of guilt or innocence. The trial judge must be careful not to interfere with or usurp that role.

[64] The determination of whether a jury should be permitted to consider evidence of after-the-fact conduct is a fact-driven exercise dependent on the circumstances of each case. The trial judge must consider the question of what the Crown seeks to prove by means of the after-the-fact conduct evidence. Although no rigid formula emerges from the jurisprudence, such an instruction generally may be warranted where the accused has admitted to participating in a criminal act but has denied a specific level of culpability for that act: *White*, at para. 28. The contrary is also generally true: a "no probative value" instruction is usually not required where the accused has denied any involvement in the facts underlying the charge at issue and has sought to explain his actions by reference to some unrelated culpable act: *White*, at para. 29.

[65] Mr. Gager denied participating in Mr. Grant's shooting and sought to explain his flight from the van as arising from fear of gang reprisals and apprehension for other criminal offences. The trial judge declined to instruct the jury that Mr. Gager's flight had no probative value.

[66] It is well established that an inference of guilt may be drawn from circumstantial evidence such as flight from the scene of a crime. It is important, however, that evidence of flight is not misused. A trial judge must take care to caution a jury against the danger of erroneously leaping from such evidence to a conclusion of guilty: see *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at p. 143.

[67] That is what the trial judge did here. He instructed the jury that they could only use Mr. Gager's flight as circumstantial evidence that he was a willing participant in the shooting, if they first considered and rejected any other rational explanation for it. This included his fear of Tevane and his anxiety of apprehension for the serious criminal offence of possession of the .45 calibre pistol. He told the jury that they had to be very careful how they would use this evidence because such conduct was often equivocal at best and that they should reserve their judgment about the meaning of Mr. Gager's flight until after considering all the evidence. The trial judge further instructed the jury that they could not use Mr. Gager's flight as probative of the issue of whether Mr. Gager possessed the requisite intent for murder.

[68] The trial judge's instructions conform to the requirements set out by the Supreme Court of Canada for after-the-fact conduct. As the Court recently instructed in *Calnen*, at para. 117:

> To meet the general concern that such evidence may be highly ambiguous and susceptible to jury error, the jury must be told to take into account alternative explanations for the accused's behaviour. In this way, jurors are instructed to avoid a mistaken leap from such evidence to a conclusion of guilt when the conduct may be motivated by and attributable to panic, embarrassment, fear of a false accusation, or some other innocent explanation. [Citations omitted.]

[69] The trial judge gave the jury a proper limiting instruction on the permissible uses of the after-the-fact conduct. There was no objection to the form of the instruction after it was given. I see no error that requires appellate intervention.

(d) Did the Trial Judge Err in Failing to Instruct the Jury that Motive Had to be Considered Separately for Each Appellant?

[70] Mr. Smelie submits that the trial judge erred in failing to instruct the jury that motive had to be considered separately for each of the appellants. Specifically, the jury should have been instructed that they could not consider their findings with respect to whether Mr. Gager had a gang-related motive in committing the murder in assessing the case against Mr. Smelie.

[71] I do not accept these submissions.

[72] In my view, the trial judge's instructions made it very clear to the jury that they had to consider separately the issue of motive in relation to each appellant.

[73] The trial judge gave a midtrial instruction concerning the use the jury could make of Det. Backus' evidence regarding the appellants' associations with gang members. When explaining that the gang evidence is relevant to only the issue of motive, he then reiterated that each of the appellants was entitled to an individual verdict and that the jury had to consider their guilt or innocence individually.

[74] In his final jury charge, the trial judge expressly instructed the jury separately on motive for each appellant. In particular, the trial judge instructed the jury that

they could not use Mr. Gager's reference in his letter "fuck driftwood" as evidence of motive against Mr. Smelie, and that this reference was applicable only to Mr. Gager in terms of establishing animosity between the two gangs.

[75] Trial counsel for Mr. Smelie did not raise any issue with this aspect of the midtrial instruction or the draft final instruction and made no objection to them after they were provided to the jury.

[76] I see no error in the trial judge's instructions.

(e) Did the Trial Judge Err in Not Permitting the Jury to Rely Upon Mr. Gager's Letters?

[77] Mr. Smelie submits that the trial judge erred in not permitting the jury to rely on Mr. Gager's letters in relation to him to the extent they were adopted by Mr. Gager in his testimony, because this undermined the reliance placed on them by Mr. Smelie's counsel in his closing address. He submits that the trial judge erred in instructing the jury that they must assess "the guilt or innocence of Mr. Smelie ... without any reference whatsoever to those letters".

[78] I do not accept this submission.

[79] The trial judge properly instructed the jury during the trial and in his final charge that they could not consider what a witness said on an earlier occasion for its truth unless, in his or her evidence in the trial, the witness expressly adopted what he or she earlier said as being the truth.

[80] Before Mr. Gager testified about his jailhouse letters, the trial judge gave three mid-trial instructions to the jury that they could not use anything in the letters as evidence against Mr. Smelie, including using the letters as evidence of animosity between the two gangs. No objection was taken to these instructions by Mr. Smelie's counsel who repeatedly expressed his approval of them.

[81] In his final charge, the trial judge explained the difference between out-of-court statements, like Mr. Gager's letters, and statements made at trial. He expressly instructed the jury that they could use Mr. Gager's testimony for or against Mr. Gager and Mr. Smelie:

> Unlike Mr. Gager's out-of-court statements to the police and his letters, which are no evidence against Mr. Smelie, you do not consider Mr. Gager's testimony only to help you decide his case. You may consider Mr. Gager's testimony in this trial to help you decide both the case respecting him and the case respecting Mr. Smelie.

[82] During his testimony, Mr. Gager adopted portions of his letters, including his statements that he would "fuck up" Mr. Smelie if he said anything about the murder. These adopted statements were part of Mr. Gager's trial testimony that the jury was instructed to consider. In accordance with the trial judge's instructions, his letters were admissible for and against Mr. Smelie to the extent they were adopted by Mr. Gager. In fact, Mr. Smelie's counsel relied on the adopted portions to argue that these should raise a doubt about his client's guilt.

[83] There was no objection to these portions of the final jury instructions by Mr. Smelie's counsel.

[84] I see no error in the trial judge's instructions.

(f) Did the Trial Judge Fail to Adequately Remedy the Prejudice Caused by the Closing Address of Mr. Smelie's Counsel?

[85] Mr. Gager submits that the trial judge erred in failing to grant a mistrial and that his jury instruction was inadequate to correct the prejudice caused by comments made by Mr. Smelie's trial counsel in his closing address to the jury.

[86] In his closing address, Mr. Smelie's counsel referred to the reference in Mr. Gager's jailhouse letters to "fuck him up" if Mr. Smelie "crack[ed]", asked the jury to consider the evidence they "did not hear" from Mr. Smelie, and suggested to the jury that his client did not testify because he was afraid to testify and suffer gang reprisals. He asked the jury to consider:

> [W]hether you would put your life and the lives of your family at risk if you cracked and told the truth? What if the truth required you to tell the world who really committed the crime? What if your only two choices were either tell the truth and risk being killed, or not say anything at all and risk being convicted for something you did not do? What would you do?

[87] Mr. Gager's trial counsel did not immediately object to the closing that day, Wednesday, March 14, nor following the Crown's closing address on the following day, Thursday, March 15. The trial was adjourned to Monday, March 19 to begin

the trial judge's final charge to the jury. When court recommenced, Mr. Gager's counsel raised objections to the closing addresses of Mr. Smelie's counsel and Crown counsel and requested the trial judge declare a mistrial. He argued that his counsel was giving evidence about why Mr. Smelie did not testify and improperly asserting that Mr. Smelie would have testified against Mr. Gager but was afraid that he would be killed by Mr. Gager if he did so. In the alternative, Mr. Gager's counsel requested that the trial judge give a corrective instruction that highlighted the impropriety of the comments made by Mr. Smelie's counsel in his closing address.

[88] The trial judge did not grant a mistrial but determined that any prejudice could be remedied by an appropriate corrective instruction: *R. v. Gager*, 2012 ONSC 2712, at para. 48. While acknowledging that the remarks made by Mr. Smelie's counsel were "close to the line", the trial judge was not convinced that he suggested that Mr. Smelie would have made those assertions had he testified. As part of his final charge to the jury, he gave a corrective instruction that was reviewed and discussed with counsel. Following a review of Mr. Smelie's counsel's comments, the core of the trial judge's instruction on this point was as follows:

> I instruct you as a matter of law that you must ignore [counsel]'s submission in this regard. Whatever the reason Mr. Smelie decided not to testify, it is entirely his affair, and apart from the one limited use I have already indicated you may make of his failure to testify, neither his failure to testify nor the reason for

> his decision in that regard is of any concern to you whatsoever.
>
> …
>
> As opposed to using the failure of Mr. Smelie to testify as a factor that may point towards Mr. Gager's innocence, which you may do if you see fit, I want to stress in the strongest possible terms that you must not use the fact that Mr. Smelie failed to testify in any way, or to any degree whatsoever, against Mr. Gager. More specifically, you must not reason that Mr. Smelie failed to testify because he feared Mr. Gager. Such reasoning suggests, albeit tacitly, that Mr. Gager must be a dangerous or violent man, or someone to be feared. To use such reasoning to assist you in deciding the case against Mr. Gager would be both improper and very unfair to Mr. Gager. So, again, as opposed to using it to raise a doubt on Mr. Gager's behalf, you must not use Mr. Smelie's failure to testify, in even the slightest degree, in deciding whether the Crown has proven the case against Mr. Gager.

[89] Mr. Gager repeats on appeal the argument made before the trial judge about the deleterious effect of the cumulative prejudice caused by counsel's remarks. There was bad character evidence concerning Mr. Gager's criminal record, his jailhouse letters, and gang membership. The remarks of Mr. Smelie's counsel exacerbated the prejudice to Mr. Gager: he spoke of Mr. Gager's violence and Mr. Smelie's fear of him. As a result, Mr. Gager submits that the remarks were so prejudicial and rendered the trial so unfair that no corrective instruction could have been adequate. The trial judge should have declared a mistrial, in his submission.

[90] I do not agree.

[91] Mistrials are a remedy of last resort only to be granted where necessary to prevent a miscarriage of justice: *R. v. Chiasson*, 2009 ONCA 789, 258 O.A.C. 50, at para. 14. Determining whether a mistrial is necessary to prevent a miscarriage of justice is a matter within the discretion of the trial judge because the trial judge is in the best position to determine whether the misconduct will affect the fair trial interests of an accused. Therefore, on appeal, deference will be shown to the trial judge's decision absent an error in principle or a decision that is clearly wrong: see *R. v. Jeanvenne*, 2010 ONCA 706, 261 C.C.C. (3d) 462, at para. 58; *R. v. John*, 2016 ONCA 615, 133 O.R. (3d) 360, at para. 82, leave to appeal refused, [2017] S.C.C.A. No. 101.

[92] I see no such error here.

[93] As the trial judge properly noted, Mr. Gager's delay in making the objection, while not fatal to his mistrial application, foreclosed other less extreme remedies, such as his counsel making submissions in reply, or asking the trial judge to give an immediate jury instruction. I agree with the trial judge's observation that the late timing of the objection belies the irreparability of the prejudice. If the remarks were so egregiously prejudicial, the sooner they were remedied the better.

[94] The trial judge carefully considered the question of cumulative prejudice. He reviewed the impugned closing remarks in the context of the bad character and gang evidence against Mr. Gager, including his letters, as well as the suggestions

made to Mr. Gager during his cross-examination by Mr. Smelie's counsel that Mr. Gager had participated in the shooting while Mr. Smelie stayed in the van. The trial judge concluded that the cumulative prejudice would be attenuated by appropriate jury instructions. His final instructions included that questions posed by counsel were not evidence unless adopted as correct by the witness and the jury was specifically instructed to disregard that line of questioning. The jury was told they could not consider evidence they did not hear, and they were cautioned against engaging in prejudicial propensity reasoning engendered by counsel's closing remarks.

[95] The trial judge expressly acknowledged and did not minimize the impropriety and potential prejudice caused by Mr. Smelie's closing remarks about Mr. Gager's threat against Mr. Smelie. However, it was open to the trial judge to conclude that it was "possible that the jury would have understood [Mr. Smelie's counsel's] remark as referable to some retribution from gang members generally, as opposed to revenge by Mr. Gager specifically", and the inference that Mr. Gager would murder Mr. Smelie if he testified against him was not the only inference to be drawn from Mr. Smelie's counsel's remarks.

[96] The trial judge properly distinguished the circumstances in *R. v. Giesecke* (1993), 82 C.C.C. (3d) 331 (Ont. C.A.), leave to appeal refused, [1993] S.C.C.A. No. 412, from the present case. Most importantly, in *Giesecke*, the trial judge's

instructions unnecessarily repeated the prejudicial remarks and failed to correct their prejudice.

[97] That is not the case here. In my view, the trial judge's instructions were adequate to address any prejudice caused by Mr. Smelie's counsel's remarks. They left the jury in no doubt that the remarks were inappropriate and that they had to be disregarded. It is even arguable that Mr. Gager obtained a benefit that he would not otherwise had obtained in that the instruction effectively neutralized the negative connotation of the threat against Mr. Smelie arising from Mr. Gager's letters and emphasized the favourable use of Mr. Smelie's failure to testify to prove Mr. Gager's innocence.

[98] Jurors are presumed to follow instructions. There is no basis here to interfere with the trial judge's conclusion that the corrective instruction was sufficient and that a mistrial was not called for in the circumstances.

(3) Did the Trial Judge Err in Dismissing Portions of the Appellants' Applications for Further Disclosure of Materials Underpinning Det. Backus' Opinion Evidence?

[99] Mr. Gager submits that the trial judge erred in dismissing the appellants' two applications for further disclosure of various materials that they argued underpinned Det. Backus' expertise and opinion. These materials included the Toronto Police Service's confidential informant ("CI") database, and intercepts and the informations to obtain ("ITOs") from projects on which Det. Backus had been

the lead investigator, namely, Projects XXX, Kryptic and Fusion. As a result, they said they were denied vital tools to challenge Det. Backus' qualifications, credibility and reliability.

[100] The first defence application, commenced at the end of November 2011, sought disclosure of three things: (1) the CI database information on which the appellants submitted Det. Backus relied to formulate his opinion, (2) debriefing notes detailing information gathered from arrestees in the projects in which Det. Backus was involved, and (3) two slideshow presentations that he uses to educate other officers about gangs. The trial judge dismissed the application respecting the CI database on the basis that the material had marginal relevance, disclosure was unnecessary, and the interest in protecting CI privilege prevailed. The Crown was ordered to produce vetted copies of the debriefing materials and the slideshow presentations.

[101] Mr. Smelie brought a second disclosure application orally on December 2, 2011 and in writing on December 5, 2011, in which Mr. Gager initially joined. The appellants sought hard-drive disclosure, in other words, the fruits of the entire investigation, including transcripts and wave files of each intercepted communication relied on by Det. Backus in Project Kryptic, as well as transcripts and wave files of the intercepted communications relied on by Det. Backus from Project XXX and Project Fusion. The appellants ultimately focused their

submissions on the Project Kryptic intercepts and ITO material relevant to the issue of rivalry between Doomztown and Driftwood.

[102] The trial judge dismissed this second application. He determined that, again, the additional material had minimal relevance to the issues at trial, and that the intercepts and ITO material were third party records, not in the possession of the prosecuting Crown, and not the fruits of the investigation in this case. He concluded that the Crown's disclosure obligation was satisfied by the Crown's voluntary disclosure of the 15-page excerpt of the ITO in Project Kryptic that summarized information and intercepted communications. Moreover, the trial judge observed that his decision not to permit Det. Backus to opine on the issues of Mr. Smelie's membership in the Doomztown Crips, as well as the gang rivalry said to exist between the Doomztown and Driftwood Crips, rendered the disclosure application effectively moot.

[103] I see no error in the trial judge's disclosure rulings.

(a) Applicable Legal Principles

[104] The Crown's well-established duty to disclose non-privileged relevant materials in its possession was helpfully summarized by Cory J. in *R. v. Dixon*, [1998] 1 S.C.R. 244, at para. 20, as follows:

> In *R. v. Stinchcombe*, it was held that the Crown has an obligation to disclose all relevant material in its possession, so long as the material is not privileged. Material is relevant if it could reasonably be used by

> the defence in meeting the case for the Crown. Relevance was described in *R. v. Egger*, in this way:
>
> > One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.
>
> [Citations omitted.]

[105] The disclosure threshold is low. The Crown's duty to disclose is triggered whenever there is a reasonable possibility of the information being useful to the accused in making full answer and defence: *Dixon*, at para. 21.

[106] On appeal, this court must engage in a two-step process to determine if the appellants' fair trial rights were breached and a new trial should be ordered as the appellants request: *Dixon*, at paras. 35 to 39. First, the court looks at the materiality of the refused material to determine whether there is a reasonable possibility that it could have impacted the verdicts. Where the remedy sought is a new trial, an accused need only persuade the appellate court of the reasonable possibility that the failure to disclose affected either the outcome at trial or the overall fairness of the trial process.

[107] Second, the court takes into account defence counsel's diligence in pursuing disclosure from the Crown in its consideration of the overall fairness of the trial process. Where the materiality of the undisclosed information is relatively low, an appellate court will have to determine whether any realistic opportunities were lost to the defence to seek and obtain disclosure. To that end, the due diligence or lack of due diligence of defence counsel in pursuing disclosure will be a very significant factor in deciding whether to order a new trial.

(b) Analysis

[108] I do not accept that the trial judge did not allow for meaningful disclosure nor that the refused disclosure would have been relevant or useful or have impacted the verdicts. I am also of the view that the lateness of the appellants' disclosure applications undercuts their allegation of trial unfairness.

[109] Det. Backus relied on CI database information and hundreds of thousands of intercepts to formulate his general expertise and opinion on all aspects of gang membership, organization, operations and coded language. The particular basis of his proposed expert opinion had been disclosed to the appellants long in advance of trial. The appellants were provided with all Project XXX disclosure materials and intercepts as part of their disclosure package. In response to their disclosure applications, the Crown provided vetted copies of debriefs and a vetted

copy of the PowerPoint presentations that Det. Backus presented in seminars to police officers, as well as the 15-page Crown summary.

[110] There is no reason to challenge the trial judge's conclusion that the disclosure of the CI database could not possibly affect the outcome of the trial. He correctly concluded that the CI database played an extremely minor role in the formation of Det. Backus' general expertise. As the trial judge found, Det. Backus' expertise came from years of experience working the wiretap rooms of several major gang investigations and listening to intercepts, in addition to his experience as lead investigator reviewing wiretap affidavits, surveillance and seeing the culmination of that work in arrests and seizures. The appellants' contention that the CI database could have provided some useful information is entirely speculative.

[111] The appellants argue that the trial judge erred by denying disclosure to protect informer privilege, when they had argued that the information was not covered by informer privilege. In my view, there is no basis to interfere with the trial judge's finding that the privilege did in fact attach to the information in the database and that it had not been waived. In any event, he denied disclosure because he found that it could not possibly affect the outcome of trial. I see no error here.

[112] Mr. Gager argues that the Project Kryptic materials were relevant first party disclosure as required under *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66.

[113] I disagree.

[114] As referenced by the trial judge in his reasons, where the records sought either fall outside the scope of the fruits of the investigation or are not in possession of the prosecuting Crown, they are third party records as a matter of first impression: *McNeil*, at paras. 13, 25; see also *R. v. Jackson*, 2015 ONCA 832, 128 O.R. (3d) 161, at paras. 91-98, leave to appeal refused, [2016] S.C.C.A. No. 38; *R. v. Gubbins*, 2018 SCC 44, [2018] 3 S.C.R. 35, at para. 33; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at paras. 11-13.

[115] In my view, the trial judge correctly concluded that the records were third party material. Although Det. Backus was the lead officer for Project Kryptic, the materials sought were “records created in the course of a different criminal investigation” and as such were third party records.

[116] In any event, with respect to the portion of the Project Kryptic materials that were ultimately pursued on the second application, they related only to the issue of gang rivalry. The trial judge’s decision not to allow Det. Backus to opine on that issue effectively foreclosed any reasonable possibility that the disclosure would have any impact on the verdicts.

[117] Respecting Project XXX, the appellants had access to some transcript and call summaries and a much larger number of audio recordings. The intercepts could be searched by certain keywords. Det. Backus was willing to provide specific

references to intercepts upon which he relied and to do whatever searches were required. Accordingly, I do not accept the appellants' argument that the Crown failed in its obligation to provide reasonably accessible disclosure with respect to those intercepts.

[118] The trial judge dealt with evolving late-breaking additional disclosure applications in a principled and fair manner. As the trial judge correctly noted, the timing of the defence applications is a significant factor in determining the impact of non-disclosure on trial fairness.

[119] In the result, there was no trial unfairness to the appellants. I would therefore dismiss this ground of appeal.

(4) Were the Verdicts Inconsistent?

[120] The appellants submit that the first degree murder verdict for Mr. Gager and the second degree murder verdict for Mr. Smelie cannot be reconciled. They suggest that the jury reached some sort of unjustifiable compromise, did not follow the trial judge's instructions, or were confused by the evidence.

[121] Specifically, the appellants say there was no difference in the evidence between them that would have justified the difference in verdicts: (1) both were in the stolen van at the time of the murder; (2) there were loaded firearms in the van; (3) the occupants of the van monitored the area in the minutes prior to the shooting; and, (4) while there was more recent evidence of Mr. Gager's gang involvement

because of his letters, there was also evidence on which the jury could infer that Mr. Smelie was still a gang member.

[122] Moreover, the appellants submit, if the jury accepted that Mr. Gager knew the murder was planned and deliberate, the jury must have accepted that he was a gang member. It is not possible to be in a stolen van with loaded firearms and knowingly and intentionally participate in the killing without knowing that the killing was planned and deliberate. On the evidence, Mr. Smelie must have had some prior awareness because he acted without hesitation. The jury's verdict necessarily meant that Mr. Smelie was found to be a gang member and they necessarily implied a gang related motive. It was therefore impossible in these circumstances to convict Mr. Gager of first degree murder and Mr. Smelie of second degree murder.

[123] Respectfully, I do not agree that the verdicts are inconsistent.

[124] Inconsistent verdicts are a subspecies of unreasonable verdicts. The test for assessing whether verdicts between co-accused are inconsistent is whether "the verdicts are supportable on any theory of the evidence consistent with the legal instructions given by the trial judge": *R. v. Pittiman*, 2006 SCC 9, [2006] 1 S.C.R. 381, at para. 7; *R. v. Catton*, 2015 ONCA 13, 319 C.C.C. (3d) 99, at para. 21.

[125] For Mr. Gager, the jury must have rejected his evidence that his presence in the van was accidental and his possession of the firearm forced, and that he

later feigned gang membership while in custody awaiting trial in order to secure protection against rival gang members who threatened him. There can be no question that based on his letters, his presence in the van, his association and communication with other known gang members, and his possession of a firearm that matched spent gun casings at the scene of the murder, it was open to the jury to find that he was a gang member at the time of the shooting.

[126] Similarly, it was open for the jury to equally infer that Mr. Smelie was still associated with the gang at the time of the shooting, based on his previous gang involvement.

[127] I do not accept that the jury's finding of gang membership for both appellants would preclude them from reaching a second degree verdict for Mr. Smelie. In my view, contrary to the appellants' assertion, it would not be impossible for the jury to conclude that Mr. Smelie did not know about the planning and deliberation for the murder and that he decided on the sudden to participate in the shooting of Mr. Grant. The distinction lies in the meaning of "planned and deliberate".

[128] The meaning of "planned and deliberate" was recently reviewed by this court in *R. v. Campbell*, 2020 ONCA 221, at para. 33:

> A murder is "planned" if it is the product of "a calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed". A murder is "deliberate" if it is "considered," "not impulsive", "slow in deciding," "cautious," implying that the

> accused must take time to weigh the advantages and disadvantages of his intended action. [Citations omitted.]

[129] The Crown here was required to prove beyond a reasonable doubt that each of the appellants had carefully thought out and calculated a scheme, considered the nature and consequences, and weighed the pros and cons of the murder, or that they aided or abetted the other participants in the shooting to commit a planned and deliberate murder. The trial judge instructed the jury accordingly:

> Not every murder is first degree murder. To prove that the murder of Mr. Grant was first degree murder, Crown counsel must prove beyond a reasonable doubt not only that the accused committed murder, but also that the murder was both planned and deliberate. It is not enough for Crown counsel to prove that the murder was planned or that the murder was deliberate. In order to establish that the murder of Mr. Grant was first degree murder, the Crown must prove both. It must be the murder itself that is planned and deliberate, not something else the accused did.
>
> The word “planned” has its common, everyday meaning, namely, a calculated scheme or design that has been carefully thought out and the consequences of which have been thought over and sized up. A plan need be neither complicated nor sensible. It may be very simple.
>
> A person may prepare a plan and carry it out immediately or he may wait some period of time to carry it out. In deciding whether an act was the result of a plan, an important factor is the time it took to develop or decide upon that course of action, not how much or how little time it took between developing it and carrying it out.

> A planned murder is one that is committed as a result of a scheme or plan that has been formulated before the doing of the act that causes death. The murder is the implementation of that previously conceived scheme or design. A murder committed on a sudden impulse and without prior consideration, even where the killer intends to kill, is not a planned murder.
>
> Turning to the concept of deliberation, unlike the word, "plan", the word "deliberate" is not used according to its everyday meaning. In common parlance, when we say something is deliberate, we usually mean that it was done intentionally or on purpose. That is not, however, what is meant by "deliberate" in this context. Rather, in this context, we use the word "deliberate" according to its dictionary definition, namely, considered, not impulsive, carefully thought-out, not hasty or rash, slow in deciding, cautious.
>
> A deliberate act is one that the actor has taken time to weigh the advantages and disadvantages of doing. Moreover, just as the planning must precede the actual killing, so, too, must the deliberation take place before the act of murder commences. As I have earlier indicated, to amount to murder, the killing must be intentional, but even with an intention to kill, a murder committed on a sudden impulse, and without prior thought and consideration, is not a deliberate murder. It is for you to say whether the murder of Mr. Grant was both planned and deliberate. To decide this issue, you should consider all the evidence.

[130] The trial judge correctly set out the governing legal principles for the jury to apply. The appellants did not object to this charge either at trial or on appeal. This instruction could have led the jury to have reasonable doubt about Mr. Smelie's knowledge of planning and deliberation.

[131] The direct evidence of Mr. Smelie's participation comes from Mr. Gager: (1) when he entered the van, Mr. Smelie was already in the front passenger seat; (2) the shooting happened as soon as the van stopped; and (3) Mr. Gager saw Mr. Smelie re-enter the van after the shooting. There is no evidence from Mr. Gager of any discussions in the van prior to the shooting. In my view, it was open to the jury to form a reasonable doubt that Mr. Smelie had concocted or been aware of a carefully thought-out scheme with time to weigh the advantages and disadvantages of the intended action. That Mr. Smelie may have become aware of an attack moments before the killing does not necessarily meet the definition of "planned and deliberate", nor does it mean that he had the requisite knowledge that the murder was "planned and deliberate" by the other participants.

[132] It was open to the jury to conclude that Mr. Smelie may have decided spontaneously to jump out and join the others. There was a wider basis for reasonable doubt as to planning and deliberation for Mr. Smelie than for Mr. Gager. There was stronger evidence of Mr. Gager's gang involvement in the form of his letters and his admitted knowledge of the others in the van. The jury could reasonably have found on this record that the others decided that they would stop and shoot, and that Mr. Smelie decided to get out and participate and therefore was guilty of second degree murder.

[133] The appellants have not met their burden to demonstrate that on any reasonable view of the evidence the verdicts are inconsistent.

(5) Did the Conduct of the Trial Judge Give Rise to a Reasonable Apprehension of Bias?

[134] The appellants are not alleging actual bias but a reasonable apprehension of bias on the part of the trial judge. They say the trial judge was an active participant in the trial who unremittingly leveled unwarranted and angry criticism and corrections throughout the pre-trial motions and the trial. The appellants allege that the trial judge's impugned conduct included non-verbal conduct related to tone and demeanour, which is not reflected in the record, that conveyed a derisive attitude by the trial judge towards the appellants and their counsel.

[135] The appellants submit that the trial judge rebuked both Crown and defence counsel, but that defence counsel was the disproportionate target of the trial judge's ire. While, according to the appellants, most of the trial judge's interventions occurred in the absence of the jury, the trial judge's treatment of defence counsel served to belittle and intimidate them which had a chilling effect on their ability to represent the appellants' interests at trial.

[136] The appellants say that the cumulative effect of the trial judge's entire conduct, including his summary treatment and dismissal of the appellant's application for a mistrial on the second day of trial, gave rise to a reasonable apprehension of bias and an unfair trial. According to the appellants, a new trial is therefore required.

[137] In support of their application, the appellants seek to file as fresh evidence affidavits from trial counsel for the appellants. The appellants also seek to file materials from previous, unrelated trials at which allegations of unreasonable apprehension of bias were made against the trial judge. The Crown opposes the appellants' application and filed evidence of the trial counsel for the Crown and the investigating officer who attended trial. Cross-examination transcripts of the affiants are also proffered.

(a) Fresh Evidence

[138] I turn first to the appellants' fresh evidence application. In my view, the affidavits proffered by the appellants, as well as the cross-examination transcripts on these affidavits, are admissible in relation to the appellants' reasonable apprehension of bias ground of appeal. They go to the issue of the fairness of the trial process and are compliant with the normal rules of evidence: *R. v. Shafia*, 2016 ONCA 812, 341 C.C.C. (3d) 354, at para. 157, leave to appeal refused, [2017] S.C.C.A. No. 17. As a result, the Crown's responding affidavits and the cross-examination transcripts on these affidavits should also be admitted.

[139] I would not admit the materials from the other proceedings over which the trial judge presided. The appellants argue that this material is relevant because it goes to the reliability of their affiants by showing that similar allegations have been made against this trial judge in other proceedings. The appellants invite us,

essentially, to use the purportedly similar allegations to support a finding that the trial judge engaged in similar conduct in this case. In other words, the evidence is effectively tendered to show a general disposition of this trial judge toward certain behaviour. While there will be cases in which evidence of a broader context may warrant admission, this is not such a case. Every trial is different. As the fresh evidence in this case is relevant only to the extent we engage in propensity reasoning, I would decline to admit it.

[140] The affidavits and the cross-examinations speak to the allegations of verbal and non-verbal misconduct by the trial judge. It is not necessary to itemize the allegations in these reasons, but they principally include allegations that the trial judge interrupted, displayed annoyance with and leveled critiques at trial counsel.

(b) Reasonable Apprehension of Bias

[141] Because of the strong presumption of judicial fairness, impartiality and integrity that is not easily displaced, there is a high burden on the party alleging bias to prove on the basis of substantial grounds that there is a real likelihood or probability of the appearance of bias: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282, at para. 25; *Miglin v. Miglin* (2001), 198 D.L.R. (4th) 385 (Ont. C.A.), at paras. 29-30, rev'd on other grounds, 2003 SCC 24, [2003] 1 S.C.R. 303. As I explain, I am of the view that the appellants have fallen far short of this stringent threshold.

[142] The well-known test for establishing a reasonable apprehension of bias, as first articulated by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting), is as follows:

> [W]hat would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the trial judge], whether consciously or unconsciously, would not decide fairly.

[143] As the Supreme Court confirmed in *Yukon Francophone School Board*, at para. 22: "The objective of the test is to ensure not only the reality, but the appearance of a fair adjudicative process" (emphasis in original).

[144] While a judge's conduct, particularly his or her interventions, can rebut the presumption of impartiality, a judge's individual comments or interventions must not be seen in isolation. Rather, the impugned conduct must be considered in the context of the circumstances and in the light of the whole proceeding. The inquiry is therefore inherently contextual and fact-specific: see *Yukon Francophone School Board*, at paras. 25 to 27.

[145] As Mr. Gager's counsel on this appeal fairly acknowledged, the appellants would not likely have raised the issue of reasonable apprehension of bias solely on the basis of the trial judge's alleged verbal interventions, as most of them were justified as being within his case management prerogative as trial judge. This is

consistent with the comments of Lamer J. in *Brouillard Also Known As Chatel v. The Queen*, [1985] 1 S.C.R. 39, at p. 44:

> [I]t is clear that judges are no longer required to be as passive as they once were; to be what I call sphinx judges. We now not only accept that a judge may intervene in the adversarial debate, but also believe that it is sometimes essential for him to do so for justice in fact to be done. Thus a judge may and sometimes must ask witnesses questions, interrupt them in their testimony and if necessary call them to order.

[146] Rather, the appellants submit that it is the cumulative effect of the verbal and non-verbal misconduct that grounds the allegation of bias, together with the way the trial judge handled the mistrial application on the second day of trial.

[147] I start with the last point – the trial judge's handling of the mistrial application. The appellants did not file affidavit evidence at trial in support of the mistrial application but made submissions without prior notice that the trial judge should declare a mistrial. The appellants alleged that the trial judge was engaging in conduct demeaning to the defence such as rolling his eyes, sighing audibly, taking off his glasses in frustration, and not taking notes during cross-examinations conducted by the defence. Moreover, they asserted that the trial judge treated the defence unfairly by criticizing counsel, intervening during cross-examinations, and yelling at them, albeit the latter not in front of the jury.

[148] The trial judge declined to hear from junior counsel for Mr. Smelie and did not hear submissions from junior counsel for Mr. Gager. The Crown declined to make submissions after being denied the opportunity to seek instructions. The trial judge immediately dismissed the application with oral reasons. He denied engaging in any of the impugned conduct. He maintained he treated the defence and Crown equally. As for his demeanour, the trial judge stated that nature gave him a “stern visage” and that the jury would understand that the trial judge was “a cranky looking fellow”. He saw no trial unfairness.

[149] I see no error in the trial judge’s handling of the mistrial application nor anything that would rise to a reasonable apprehension of bias or trial unfairness. Looked at in context, on the second day of trial, the trial judge was required during an ongoing jury trial to deal with an unexpected oral application without supporting materials and, until prompted by the trial judge, without a request for any relief. He patiently listened to counsel’s submissions. He was not required to hear from all counsel for the appellants when they confirmed their submissions would be the same nor allow the Crown time to seek instructions. He gave the appellants and the Crown an opportunity to be heard. His reasons dealt with all the issues that were raised by counsel. His response was appropriate in the circumstances.

[150] In my view, the fresh evidence fails to demonstrate anything that would rise to the high level required to substantiate a reasonable apprehension of bias on the part of the trial judge. It speaks to defence counsel’s subjective and very general

impressions of what occurred at a trial more than seven years before they swore their affidavits. Given the absence of any audio or video recording, it is not possible to assess directly the trial judge's tone or his non-verbal demeanour of which the appellants complain. Moreover, this evidence as to the trial judge's conduct is largely contradicted by Crown trial counsel. Even where this evidence is somewhat consistent, there is nothing in it that would even approach the kind of behaviour that would give rise to a reasonable apprehension of bias. Rather, the trial judge's interventions principally served to render the trial more efficient and ensure that proper procedure, court decorum and the rules of evidence were being followed.

[151] Similarly, there is nothing in the voluminous transcripts of the trial proceedings that demonstrate anything but a trial judge who was anxious to protect the appellants' fair trial rights, not to keep the jury waiting, and to keep the four-month proceeding on track. The appellants' list of interventions appears immaterial when viewed over the course and in the context of four months of proceedings. This context includes, as well, instances where the trial judge sought to assist the appellants, such as, for example, when the trial judge offered on his own initiative to give a midtrial instruction to insulate Mr. Smelie from bad character evidence. Moreover, the hundreds of transcript pages devoted to counsel's submissions not only indicate a respectful working relationship between the trial judge and counsel but serve as clear evidence of the trial judge's patience and skill in dealing with the numerous and difficult issues that sometimes arose without any or very little notice.

[152] As Mr. Gager's counsel stated in submissions during the mistrial application, a trial is not a tea party: see also *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 3. This is particularly the case in criminal proceedings where the stakes are so enormously high for the accused. Defence counsel must feel at liberty to forcefully protect their clients' interests within the bounds of their professional obligations and the rule of law. A trial judge must intervene with caution so as not to create trial unfairness. At the same time, he or she has a right and an obligation to intervene to control the process, even to intervene to rebuke and correct counsel: *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham,* 2000 CanLII 16946 (Ont. C.A.), at para. 154, leave to appeal refused, [2001] S.C.C.A. No. 66; *R. v. Ibrahim*, 2019 ONCA 631, 147 O.R. (3d) 272, at para. 97.

[153] There is no question that trial judges must endeavour to carry out their obligation to manage a trial in a courteous manner: *Mills*, at para. 234. However, we do not expect trial judges or counsel to be perfect. That is why context is so important. The test is whether the objective observer would conclude in the circumstances that the trial judge would likely not decide fairly or otherwise undermine trial fairness. The fact that the trial judge and counsel occasionally and admittedly showed some signs of impatience and frustration in the course of a very difficult four-month proceeding was entirely understandable in this case. I am satisfied in the circumstances that the trial judge's interventions, viewed in context,

come nowhere close to being discourteous, let alone establishing a reasonable apprehension of bias.

[154] The record clearly demonstrates that there was no chilling effect on the ability of trial counsel to fully and ably represent the appellants. Indeed, appellants' trial counsel had no difficulty in bringing forth applications, conducting examinations and cross-examinations, making objections, vigorously debating with the trial judge, and forcefully presenting closing argument to the jury. That the trial judge reminded counsel to stay on track and raised evidentiary and other legal and procedural issues was exactly what he was required to do as the trial judge. He had authority and discretion to manage the proceedings. He did so justly.

[155] The appellants had a fair trial and the trial judge's conduct did not raise a reasonable apprehension of bias. There is no basis for appellate intervention.

(6) Did the Trial Judge Err in Imposing on Mr. Smelie an 18-year Period of Parole Ineligibility?

[156] Mr. Smelie submits that the trial judge should have imposed a 15-year period of parole ineligibility which would have been more consistent with that imposed for similar offences by similar offenders in similar circumstances. He says that the trial judge erred: (1) by failing to acknowledge or give any weight to the highly mitigating factor of Mr. Smelie's youth – he was 20 at the time of the murder; (2) by finding that Mr. Smelie did not earn an honest wage but instead lived off gang activity, when there was no evidence to support that finding; and (3) by making findings

that were inconsistent with the jury's verdict of second degree murder – effectively sentencing Mr. Smelie for first degree murder.

[157] I do not accept these submissions.

[158] I start with the well-settled principle that a trial judge's decision on parole ineligibility is entitled to deference absent an error in law or principle, or unless it is demonstrably unfit: *R. v. Shropshire*, [1995] 4 S.C.R. 227, at paras. 43-53; *R. v. Kormendy*, 2019 ONCA 676, 147 O.R. (3d) 701, at paras. 21-23; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 11-12. I see no reversible error in the present case.

[159] The trial judge carefully considered the relevant criteria under s. 745.4 of the *Criminal Code*: the character of the offender; the nature of the offence and the circumstances surrounding its commission; and the recommendation of the jury: R.S.C. 1985, c. C-46. He also recognized that "[i]n assessing these considerations and in deciding whether to increase the period of parole ineligibility all of the objectives of sentencing are relevant": *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 9.

[160] The parole ineligibility of 18 years imposed here was well within the range of similar offences for similar offenders in similar circumstances, as demonstrated by the trial judge's review of the relevant case law. It also represented the approximate midpoint between the Crown's position of 22 years and the defence

range of 12 to 14 years of parole ineligibility. While the trial judge decried the heinous nature of the crime and placed it at the high end of moral culpability, he did not impose a sentence towards the highest possible end of the range. Moreover, it was below the majority jury recommendation on parole ineligibility: one juror recommended 15 years; eight jurors recommended 20 years; and two jurors recommended 25 years.

(a) Mr. Smelie's Youth

[161] The trial judge was aware of Mr. Smelie's youthfulness at the time of the offence, as he averted to his age in his reasons. He recognized that "rehabilitation cannot be ruled out", though he found that "Mr. Smelie's prospects in that behalf are [not] promising".

[162] The latter conclusion, as well as the trial judge's observations that "Mr. Smelie's character is deeply flawed" and that he has been engaged in "a steady pattern of criminality interrupted only by periods of incarceration" were firmly rooted in the evidence. This evidence included Mr. Smelie's criminal record of serious robbery and other offences, his gang activity, his participation in Mr. Grant's senseless murder, and his institutional misconduct while incarcerated for the present offence.

(b) Mr. Smelie's Employment

[163] The trial judge concluded that apart from one employment letter, "there is no other evidence before me that Mr. Smelie was employed in the years since he left school". Mr. Smelie's counsel did, in fact, make submissions that between 2004 and 2006, Mr. Smelie had worked for another company. The trial judge did not avert to this period of employment in his reasons; however, even if he had, it would not, in my view, have affected the appropriate period of parole eligibility. While there was some evidence before him that Mr. Smelie had been employed to some degree, the trial judge also found that he was involved in illicit drug dealing and gang activity. In the circumstances it was open to the trial judge to conclude beyond a reasonable doubt that "Mr. Smelie lived, if not entirely, certainly principally on the avails of illegal gang activity."

(c) Nature of the Offence

[164] Finally, I do not see anything improper about the findings of fact the trial judge made in characterizing the circumstances of the offence. As reflected in his reasons, the trial judge was well aware that in convicting Mr. Smelie of second degree murder, the jurors "were not satisfied beyond a reasonable doubt that he both planned and deliberated upon the murder", and the trial judge recognized that he was bound by that finding.

[165] The trial judge went on to grapple with when Mr. Smelie must have become aware of what was going to happen or when he decided to participate in it and concluded that he was unable to decide these questions on the evidence. He determined that "Mr. Smelie may not have given sufficient thought to the killing to be said to have both planned and deliberated upon it, as the jury was obviously satisfied Mr. Gager had done" but, whatever was Mr. Smelie's mindset in the period preceding the shooting, the trial judge was satisfied beyond any reasonable doubt that "at the time Mr. Smelie took part in the shooting, he was fully aware of the motive underlying it, fully intent on killing the persons at whom he shot in pursuit of that motive, and knew full well that the other shooters were of a like mind".

[166] Despite Mr. Smelie's submissions to the contrary on this appeal, this is not the same as finding that Mr. Smelie planned and deliberated or that he knew that the other shooters had planned and deliberated, findings which would have resulted in his liability for first degree murder and therefore are precluded by the verdict. I see no error in the trial judge's reasoning or conclusion, nor any inconsistency with the jury's verdict of second degree murder for Mr. Smelie.

(d) The Sentence was Fit

[167] The grounds raised on appeal do not provide a basis to interfere with the sentence imposed.

[168] In any event, the sentence was fit. As the trial judge correctly noted, the long litany of seriously aggravating circumstances surrounding the murder of Mr. Grant rendered predominant the sentencing principles of denunciation and deterrence. These circumstances included: (1) Mr. Smelie's and the other shooters' intent to kill as many people as possible who happened to be in Driftwood Court at the time of the murder; (2) the murder took place in a public area where it was only because of the shooters' ineptitude that additional killings did not occur; (3) Mr. Smelie's use of a restricted handgun in breach of the prior prohibition bans; (4) his previous criminal record including offences where an imitation firearm was used; (5) his flight from the scene and police; (6) his dangerous discarding of his firearm; and (7) the gang-related motive and circumstances in which Mr. Grant's murder occurred. As the trial judge correctly noted, it is "hard to think of a crime that would show a more depraved indifference to the sanctity of human life."

[169] As a result, there is no basis to interfere with this sentence.

E. DISPOSITION

[170] I would dismiss the conviction appeals. While I would grant leave to appeal sentence, I would dismiss Mr. Smelie's sentence appeal.

Released: April 30, 2020 ("G.P.")

"L.B. Roberts J.A."
"I agree. G. Pardu J.A."
"I agree. Thorburn J.A."