WARNING

THIS IS AN APPEAL UNDER THE

YOUTH CRIMINAL JUSTICE ACT

AND IS SUBJECT TO:

110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

(2) Subsection (1) does not apply

(a) in a case where the information relates to a young person who has received an adult sentence;

(b) in a case where the information relates to a young person who has received a youth sentence for a violent offence and the youth justice court has ordered a lifting of the publication ban under subsection 75(2); and

(c) in a case where the publication of the information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

(3) A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication.

111(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.

138(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless

authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Alexis, 2020 ONCA 334
DATE: 20200601
DOCKET: C61399 & C62320

Feldman, Gillese and Miller JJ.A.

DOCKET: C61399

BETWEEN

Her Majesty the Queen

Respondent

and

Marcus Alexis

Appellant

DOCKET: C62320

AND BETWEEN

Her Majesty the Queen

Respondent

and

Brian Funes

Appellant

Michael W. Lacy and Bryan Badali, for the appellant Marcus Alexis

Erin Dann and Sarah Weinberger, for the appellant Brian Funes

Michael Bernstein, for the respondent

Heard: November 18, 2019

On appeal from the convictions entered by Justice Joseph M. Fragomeni of the Superior Court of Justice, sitting with a jury, on March 13, 2015, and from the sentence imposed on September 23, 2015.

B.W. Miller J.A.:

[1] On April 16, 2011, two masked assailants attempted an armed robbery of a poker tournament at a banquet hall in Brampton. Just before the tournament was to begin, one of the assailants stormed into the hall, demanded the tournament registration money, and struck the tournament organizer on the head with his handgun. The gun discharged into the ceiling. Sam Parker – the tournament organizer – fell to the ground, then wrestled with the assailant for control of the gun. One of the tournament patrons – Kearn Nedd – came to Mr. Parker's aid. During the resulting fray, the second assailant opened fire from the doors of the banquet hall, spraying the hall with nine bullets. One of the shots hit Mr. Nedd, killing him. The two assailants fled in a waiting vehicle.

[2] The first assailant, G.O., was also hit by gunfire from the second assailant. G.O. was taken to hospital by his confederates. A warranted search of his cell phone, among other investigative steps, led police to Kmar Kelly, John Morrone, Nirmalan Satkunananthan, and the appellants Marcus Alexis and Brian Funes.

[3] Mr. Satkunananthan told police that he was the “inside man” at the tournament. He said that he brought the tournament to Mr. Funes’s attention, and Mr. Funes asked him to contact him from inside the tournament and tell him how many people were there and where the money was being collected. Mr. Satkunananthan did so.

[4] Mr. Morrone was initially charged with Mr. Nedd’s murder but agreed to become a Crown witness in exchange for immunity and participation in the witness protection program. Mr. Morrone testified that he was approached by Mr. Funes to plan the robbery on his behalf. At the time, Mr. Morrone was a drug dealer who also planned and executed robberies once or twice a month. According to Mr. Morrone, he recruited his associates G.O., Mr. Kelly, and Mr. Alexis. Mr. Morrone also supplied the guns. On Mr. Morrone’s account, G.O. was to run in and grab the money, Mr. Alexis would “control the situation” using his firearm, and Mr. Kelly would be the getaway driver. Neither Mr. Morrone nor Mr. Funes would be present at the scene of the robbery.

[5] Mr. Morrone told the police that the two masked assailants were G.O. and Mr. Alexis, and furthermore that Mr. Alexis had confided to him that he was the assailant who opened fire on the banquet hall.

[6] Mr. Alexis and Mr. Funes were jointly tried before a jury. Mr. Alexis was convicted of first degree murder and Mr. Funes was convicted of manslaughter.

A. ISSUES ON APPEAL

[7] On appeal, Mr. Alexis argues that the trial judge:

a. erred in his instruction on forcible confinement as a basis for constructive first degree murder;
b. failed to sufficiently relate the evidence at trial to the legal issues in his instructions to the jury; and
c. provided an unnecessarily complex jury instruction, leaving open routes of liability that were not available on the evidence.

[8] Mr. Funes argues that the trial judge erred by:

a. leaving party liability as an aider or abettor under s. 21(1) of the *Criminal Code*, R.S.C. 1985, c. C.46, with the jury; and
b. failing to relate the law to the evidence in his instructions on ss. 21(1) and 21(2) in addressing whether Mr. Funes possessed the necessary *mens rea*.

Mr. Funes also appealed from sentence. His appeal from sentence was ordered to be heard following the appeal from conviction, depending on the result.

B. ALEXIS APPEAL

(1) Introduction

[9] The main issue at trial for Mr. Alexis was whether the Crown had proven the identity of the shooter beyond a reasonable doubt. The Crown's theory was that

not only was Mr. Alexis present at the robbery, but according to Mr. Morrone, Mr. Alexis acknowledged that he was the shooter. The defence's main argument was that Mr. Morrone's identification of Mr. Alexis as the shooter was not credible. None of the eyewitnesses were able to identify Mr. Alexis.

[10] Mr. Alexis was charged with first degree murder. The Crown relied on both planning and deliberation under s. 231(2) of the *Criminal Code* and constructive murder under s. 231(5)(e) (forcible confinement) to make out first degree murder.

[11] Mr. Alexis argues that the trial judge's charge on the requisite link between the forcible confinement and the murder was inadequate, that the trial judge failed to adequately relate the evidence to the legal issues, and that the trial judge gave a charge that was overly complex. As explained below, I disagree, and would dismiss the appeal.

(2) Forcible confinement instruction

[12] The trial judge instructed the jury that there were two routes through which it could convict Mr. Alexis of first degree murder. The first was constructive murder: if Mr. Alexis was found to have committed the murder "while committing" the offence of forcible confinement, he would be guilty of first degree murder pursuant to s. 231(5)(e) of the *Criminal Code*. The second route would be if the murder was found to have been a planned and deliberate killing, pursuant to s. 231(2) of the *Criminal Code*.

[13] There is no dispute that the trial judge's charge to the jury adequately stated the law with respect to the elements of the second route, planning and deliberation. But Mr. Alexis argues that the charge did not adequately explain the necessary conceptual link between the murder and the forcible confinement for the first route – constructive first degree murder – and risked leaving the jury with a misunderstanding of what was required for a conviction on that basis.

[14] Mr. Alexis does not argue that the trial judge misstated the law with respect to constructive murder. He submits that the charge was nevertheless incomplete. More was required in the circumstances of this case to communicate to the jury that a temporal link between the offences was not in itself sufficient to establish constructive murder.

[15] As explained below, I do not agree. The form of jury charge that was given in this case was substantially the same as one that has been expressly accepted by this court on numerous occasions, including recently in *R. v. Niemi*, 2017 ONCA 720, 355 C.C.C. (3d) 344, leave to appeal refused, [2019] S.C.C.A. No. 117. Nothing in the circumstances of this case rendered the instruction misleading or inadequate. In particular, it would not have misled the jury into concluding that only a temporal link was required to establish constructive murder.

(a) "While committing" – the causal link

[16] Section 231(5) of the *Criminal Code* deems culpable homicide to be first degree murder when "the death is caused […] while committing or attempting to commit" an enumerated offence, in this case, forcible confinement. The rationale for this elevation of culpability was expressed in *R. v. Paré*, [1987] 2 S.C.R. 618, at p. 633, as "the [offender's] continuing illegal domination of the victim which gives continuity to the sequence of events culminating in the murder". The victim who has been dominated in the commission of the predicate offence need not be the same victim who was murdered: *R. v. Russell*, 2001 SCC 53, [2001] 2 S.C.R. 804, at para. 43.

[17] The salient phrase in s. 231(5) – "while committing" – has received extensive judicial commentary. This phrase has been interpreted as imposing the requirement that the murder and the predicate offence be distinct, yet part of "the same series of events": *R. v. Kimberley* (2001), 56 O.R. (3d) 18, at para. 108, leave to appeal refused, [2002] S.C.C.A. No. 29. The two offences must be "linked together […] in circumstances that make the entire course of conduct a single transaction": *R. v. Pritchard*, 2008 SCC 59, [2008] 3 S.C.R. 195, at para. 35.

[18] A temporal link is not sufficient; it is not enough that the two offences be committed in succession. There must also be a *causal* link between the two offences: *Pritchard*, at para. 35. This link may be established in various ways. One

way is where one offence was committed to facilitate the other, whether the predicate offence facilitated the commission of the murder or the murder facilitated the commission of the predicate offence: *Russell*, at paras. 43 and 48. Similarly, the causal link may be established where each offence was committed to facilitate some third offence, where the offences taken together can aptly be described as a single transaction.

(b) The jury charge

[19] The relevant portion of the jury charge reads as follows:

> In order for Marcus Alexis to be guilty of first degree murder Crown counsel must also prove beyond a reasonable doubt that Marcus Alexis murdered Kearn Nedd while he was committing the offence of unlawful confinement.
>
> This does not mean that the murder and the unlawful confinement have to happen at exactly the same time, the same moment, but it does mean that the murder and the unlawful confinement must be closely connected with one another, in the sense that they must be part of the same series of events. They must both be part of a single on-going transaction.
>
> And again, to answer this question you have to consider the entire course of conduct of Marcus Alexis' conduct. Look at the whole series of events that took place at the time of the shooting, the confinement, all of the witnesses you heard with respect to what was happening at the banquet hall. Look at the whole series of events.
>
> The evidence may show that the murder and the unlawful confinement were all part of a continuous series of events that was really a single on-going transaction. On the

> other hand, the evidence may indicate otherwise. It is for you to say. Use your good common sense.
>
> …
>
> If you are satisfied beyond a reasonable doubt that the unlawful confinement and murder of Kearn Nedd were part of the same series of events, you must find Marcus Alexis guilty of first degree murder on this basis of liability.

[20] It is readily apparent that the trial judge followed *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Thomson/Carswell, 2015), which recommends the use of the following language in explaining the meaning of "while committing":

> Were the (attempt to commit) *(specify listed offence)* and the murder of *(NOC)* part of the same series of events?
>
> In order for *(NOA)* to be guilty of first degree murder, Crown counsel must also prove beyond a reasonable doubt that *(NOA)* murdered *(NOC)* while s/he was committing (or, attempting to commit) the offence of *(specify listed offence)*. This does not mean that the murder and the (attempt to commit) *(specify listed offence)* have to happen at exactly the same moment, but it does mean that the murder and the (attempt to commit) *(specify listed offence)* must be closely connected with one another, in the sense that they must be part of the same series of events. They must both be part of a single ongoing transaction.
>
> To answer this question you have to consider the entire course of *(NOA)*'s conduct. Look at the whole series of events in order to decide whether you are satisfied beyond a reasonable doubt that the murder and the *(specify listed offence or attempt)* were part of a continuous series of events that was a single ongoing transaction. The evidence may show that the murder and the (attempt to commit) (specify listed offence) were all part of a continuous series of events. Or it may not.

[21] In *Niemi*, this court expressly approved of the above instruction, holding that it "communicates effectively that more than a temporal connection is required for the murder and underlying offence to be linked" for the purposes of s. 231(5). In *Niemi*, the trial judge went beyond the specimen instruction and added the further sentence that "a single, ongoing transaction is a sequence of events or course of conduct that is interrelated or linear, ongoing and connected through time." The appellant in that case objected to the addition on the basis that it suggested that nothing more than a temporal connection was required. This court rejected that argument, holding that the instruction had to be taken as a whole, and that even if the added sentence was read in isolation, the use of the phrase "a sequence of events or course of conduct that is interrelated" made it clear that something more than a temporal connection was required.

[22] Mr. Alexis argues that the *Niemi* charge was in fact superior to the present charge. He argues that for the jury to understand that a causal connection was required, it was not sufficient for the trial judge to tell the jury that the acts had to be part of "the same series of events". The jury ought to have been told that it needed to find that the events were "interrelated". Otherwise, the jury would be misled into thinking that all that mattered was the "serial nature" of the offences, in the sense that one happened after the other.

[23] In oral argument, Mr. Alexis advanced a different argument: that the trial judge ought to have expressly instructed the jury that it had to find that the forcible confinement *facilitated* the murder.

[24] I do not agree with either submission. For the judge to have instructed the jury that it had to find that the forcible confinement facilitated the murder would have been inaccurate. The instruction that the murder and the confinement had to be closely connected, in the sense of being part of "the same series of events" and a "single, on-going transaction" was correct. It is inherent in the concept of a *series* of events, in the context of the charge read as a whole, that there must be some unifying relation among the events. The continuing course of domination, in the language of *Paré*, is that unifying relation. Nothing more was required in the circumstances of this case.

[25] On the theory articulated by Mr. Alexis, any confinement had ended or been interrupted by the time of the murder, severing any causal link between it and the murder. Mr. Alexis says that any confinement was interrupted because by the time of the murder, the attempted robbery had failed, and the first assailant had been overpowered and was struggling with Parker over control of the gun. A necessary implication of this argument is that once the attempted robbery was abandoned, any confinement in support of the robbery must also have ended; that is, the robbery and the confinement were necessarily co-extensive.

[26] It should be noted that the predicate offence was not attempted robbery. It was confinement. It was not axiomatic that any confinement must have ended when the robbery attempt was abandoned. And, even if the confinement had ended, it does not necessarily follow that the temporal and causal link between the confinement and the murder was severed.

[27] There were several options available to the jury to find a confinement occurred that was linked to the murder both temporally and causally. The confinement, on the Crown's theory, could have been of a security guard (who had been detained at gunpoint by the second assailant, and at the time of the shooting was hiding in the bathroom), of Mr. Parker (who was struggling to get control of the gun from G.O.), of the tournament patrons (some of whom were on the floor, with tables pulled on top of them), or all of them.

[28] While arguably some of these confinements had ended by the time of the shooting, there was ample evidence upon which the jury could have found otherwise. There was evidence that all the exits from the banquet hall had been chained shut or otherwise barred by the tournament organizers in advance of the tournament. The sole exception was the entrance where Mr. Alexis had positioned himself with a gun.

[29] It was for the jury to determine whether Mr. Alexis (alone or in concert with G.O.) had confined one or more persons, when those confinements ended, and

whether, even if they had ended, they were still temporally and causally linked to the murder.

[30] The charge enabled the jury to understand what it had to decide. Much like in *Niemi*, the language of a close connection and a "single on-going transaction" would have communicated to the jury that more than a temporal connection was required.

[31] Mr. Alexis also argues that the trial judge erred by not reviewing Crown and defence positions in relation to the causal link.

[32] Again, I disagree. The relationship between the confinement and the murder was obvious. Counsel for Mr. Alexis was provided an opportunity to review the draft jury charge and made no request that it be changed to better address the issue of the causal link. She chose not to address this issue in her closing submissions, focusing instead on the central issue of the identification of the shooter. It was not an error for the trial judge not to have articulated positions that defence counsel chose not to advance.

(3) Relating evidence to the issues

[33] Mr. Alexis argues that the trial judge failed in his obligation to review the evidence and relate it to the issues in the case. Although the trial judge reviewed the evidence, Mr. Alexis argues that it was the type of *seriatim*, witness-by-witness

summary that this court has frequently criticized as ineffectual, because it fails to equip the jury to understand how the evidence relates to the issues, and to the parties' positions on those issues: see, e.g., *R. v. Newton*, 2017 ONCA 496, 349 C.C.C. (3d) 508, at paras. 15-16; *R. v. Barreira*, 2020 ONCA 218, at paras. 26-40.

[34] For example, Mr. Alexis argues that the trial judge ought to have instructed the jury that, on the question of the identity of the shooter, the primary evidence was that of Mr. Morrone. Because Mr. Morrone was a *Vetrovec* witness, the trial judge ought to have directed the jury that if it had a reasonable doubt about the truthfulness of his evidence, it was required to acquit Mr. Alexis. He ought, at the same time, to have directed the jury's attention to whether there were eyewitness descriptions of the shooter that corroborated Mr. Morrone's evidence, and by setting out the defence position that Mr. Kelly – Mr. Morrone's cousin – was the actual shooter and that Mr. Morrone was covering for him by pinning the blame on Mr. Alexis.

[35] I would not accept this argument. In my view, the trial judge's charge adequately conveyed to the jury the relationship between the evidence and the issues, particularly in light of the trial judge's detailed *Vetrovec* warning in respect of Mr. Morrone and his careful review of Mr. Morrone's evidence on cross-examination.

[36] There is a wide latitude given to trial judges in organizing and drafting their charges. As Doherty J.A. stated in *R. v. Bouchard*, 2013 ONCA 791, 305 C.C.C. (3d) 240, at para. 40, aff'd 2014 SCC 64, [2014] 3 S.C.R. 283:

> Evidence […] can be reviewed in minute detail or more generally by reference to topics or relevant areas of the evidence. Neither type of review is inherently right or wrong. If a trial judge, after full consultation with counsel, and with counsel's at least tacit approval, settles on one method, it would be a rare case where an appeal would be allowed on the basis that the other method of reviewing the evidence was essential to a proper jury instruction.

[37] Here, there was a substantial amount of evidence that related to multiple accused, each facing a different charge. The trial judge provided an extensive summary of the evidence. In the context of a four-month trial, this is neither surprising nor inappropriate. The summary was neither unfocussed nor disorganized. It followed a structure that the trial judge explained to the jury at the outset: (1) testimony as to the key events: tournament, robbery, and shooting; (2) the evidence of witnesses who saw the two men coming and leaving the banquet hall; and (3) the evidence of the two key *Vetrovec* witnesses. The charge, read as a whole, sufficiently related the evidence to the matters in issue. I also note that although defence counsel at trial initially raised this issue in response to an early draft of the charge, after the trial judge made changes to the draft charge, she did not pursue it further.

[38] With respect to the evidence of Mr. Morrone – the key witness in the trial – the trial judge gave a strong *Vetrovec* warning. He directed the jury that it would be dangerous to rely on Mr. Morrone's uncorroborated evidence. Mr. Alexis does not argue that the *Vetrovec* warning was deficient in any way.

[39] Later in the charge, the trial judge reviewed the cross-examination of Mr. Morrone in detail. That review served to remind the jury of how thoroughly Mr. Morrone's evidence was challenged on the key issue for Mr. Alexis: the identity of the shooter. It raised the defence theory that Mr. Morrone was covering for Mr. Kelly, the actual shooter. The trial judge reminded the jury of Mr. Morrone's evidence that he loved Mr. Kelly like a brother, as well as his denial in response to counsel's suggestion that Mr. Kelly was the actual shooter. Further, near the conclusion of the charge, in setting out the position of the defence, the trial judge reviewed the differing eyewitness evidence and Mr. Morrone's close relationship with Mr. Kelly.

[40] In the circumstances, it would have been clear to the jury that the key issues in the case against Mr. Alexis turned on the evidence of Mr. Morrone, that his evidence had been challenged extensively in cross-examination, and that it was essential that they take great care before relying on his evidence. It was open to the trial judge to structure the charge as he did, and his approach does not reflect error.

(4) Unnecessarily complex charge

[41] This ground of appeal was not pursued at the hearing. In any event, I would reject it. While the charge could have been more concise, it was not overly complex.

(5) Conclusion

[42] I would dismiss the appeal of Mr. Alexis.

C. FUNES APPEAL

(1) Introduction

[43] Mr. Funes was not present at the robbery. On the Crown's theory, the poker tournament heist was his project and he retained Mr. Morrone – as a general contractor – to plan and oversee it. On the defence theory, Mr. Morrone was the originating and directing mind of the robbery and Mr. Funes was at most a simple intermediary, forwarding information to Mr. Morrone that he received from Mr. Satkunananthan on the tournament floor.

[44] Mr. Funes was charged with manslaughter with a firearm under s. 236(a) of the *Criminal Code*. In the charge to the jury, the trial judge explained that there were two bases on which they could convict Mr. Funes of manslaughter: (1) under s. 21(1), a route of liability he referred to as "Unlawful Act Manslaughter"; and (2) under s. 21(2) as "Common Unlawful Purpose" manslaughter.

[45] As explained below, I agree with Mr. Funes that the first of those routes of liability was not available on the evidence. It was an error for the trial judge to have left it with the jury. As it is impossible to know which of the two routes the jury took in determining Mr. Funes to be guilty of manslaughter, there is a risk that he was found guilty based on an erroneous understanding of the law. I would set aside the conviction and order a new trial.

(2) Instruction on party liability for manslaughter

[46] Section 21 of the *Criminal Code* reads as follows:

> **Parties to offence**
>
> 21 (1) Every one is a party to an offence who
>
> (a) actually commits it;
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (c) abets any person in committing it.
>
> **Common intention**
>
> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[47] Liability under s. 21(1) is intended for offenders "who participate in the offence actually committed, whether as a principal, an aider, or an abettor": *R. v.*

Simon, 2010 ONCA 754, 104 O.R. (3d) 340, at para. 39, leave to appeal refused, [2010] S.C.C.A. No. 459. Section 21(2), on the other hand, extends liability beyond the offence "actually committed" to persons who participated in an "unlawful enterprise with others and either knew or, in most cases at least, should have known that one (or more) of the other participants in the original enterprise would likely commit the offence charged in pursuing their original purpose": *Simon*, at para. 41.

[48] In his instruction to the jury on s. 21(1), the trial judge told the jury that to convict Mr. Funes of manslaughter under this route to liability, they would have to be convinced beyond a reasonable doubt that: (a) Mr. Funes had participated in an unlawful act – the planning, organizing, and implementation of the armed robbery – as a perpetrator, aider, or abettor; (b) the unlawful act (the armed robbery) was objectively dangerous; and (c) the unlawful act caused Mr. Nedd's death.

[49] Mr. Funes is satisfied with the instruction under s. 21(2) but argues that the s. 21(1) instruction went wrong from the outset. I agree.

[50] In this case, the offence "actually committed" for the purposes of s. 21(1) was the unlawful killing of Mr. Nedd. The unlawful act which caused Mr. Nedd's death was the second assailant's firing his firearm into the crowded banquet hall.

Mr. Funes would have to have participated in this unlawful act as a principal, aider, or abettor to be liable for manslaughter under s. 21(1).

[51] At trial, both the Crown and the defence took the position that robbery was the unlawful act forming the basis for manslaughter. This led the trial judge into error. Were the relevant offence robbery for the purpose of s. 21(1), it would make s. 21(1) and s. 21(2) largely indistinguishable.

[52] In *R. v. Kelly*, 2017 ONCA 920, 138 O.R. (3d) 241, a case involving a party to the same robbery as in this case, Doherty J.A. concluded that the accused's liability for manslaughter flowed exclusively from s. 21(2). Doherty J.A.'s reasoning at paras. 25-26, applies equally here:

> On the Crown's case, the [accused] was an aider in the robbery and a party to the common unlawful purpose of committing a robbery. There was no evidence that he did anything for the purpose of aiding the robbers in harming any of the victims of the robbery. The [accused's] role in planning or executing the robbery could not make him an aider in the homicide that occurred during the robbery.
>
> I think this was quintessentially a case for the application of s. 21(2). The [accused], having allegedly agreed to the commission of one crime, the robbery, was alleged by the Crown to be responsible for the commission of a second crime committed by one of the parties to the robbery in the course of carrying out the common unlawful purpose. Section 21(2) addresses exactly that kind of criminal culpability.

[53] The respondent submits that this court should be reluctant to take too much from the decision in *Kelly* because the accused in that case played a different role

in the robbery and the evidence heard in each case was different. In my view, the differences between the accused and the evidence do not affect the applicability of the principles of party liability set out in that case by Doherty J.A.

[54] The respondent points to three aspects of the evidence to argue that the jury could have concluded that Mr. Funes assisted the assailants in harming the victims of the robbery:

1. Mr. Funes must have known that they would need force to commit the robbery;
2. Mr. Funes retained Mr. Morrone, who had a reputation for armed robbery; and
3. Mr. Funes took various steps to facilitate the robbery.

[55] In my view, all these factors speak to Mr. Funes's participation in the robbery and his knowledge or foresight about the potential consequences of the robbery. This is relevant under s. 21(2) – whether Mr. Funes knew or ought to have known that bodily harm was a probable consequence of carrying out the robbery. But in this case, this evidence does not speak to whether Mr. Funes "did anything for the purpose of aiding the robbers in harming any of the victims of the robbery": *Kelly*, at para. 25. There was no evidence, for example, that Mr. Funes had any role in procuring the firearms or providing them to the two assailants. Mr. Morrone's evidence was that Mr. Funes did not encourage or direct the use of firearms in the robbery. He testified that Mr. Funes was not involved in the detailed planning of

the robbery and that they did not discuss the use of firearms. And Mr. Funes was not present for the robbery to assist the assailants in harming the victims.

[56] As in *Kelly*, Mr. Funes's role "in planning and executing the robbery could not make him an aider in the homicide that occurred during the robbery": at para. 25.

[57] The respondent also relies on Mr. Funes's actions *after* the robbery, such as participating in the cleanup, and says that this evidence "was capable of supporting a reasonable inference of [his] knowledge and intent before the robbery". I accept that this was circumstantial evidence going to Mr. Funes's knowledge (and therefore relevant under s. 21(2)), but in the absence of any evidence that he did anything for the purpose of aiding the robbers in harming the victim, it cannot on its own support liability under s. 21(1).

(3) Prejudice

[58] The Crown argues that there was an overwhelming case for conviction under s. 21(2), and that even if it was an error to leave s. 21(1) available to the jury, no harm was done, and this court ought to apply the curative proviso under s. 686(1)(b)(iii) of the *Criminal Code*.

[59] Whatever the strength of the case under s. 21(2), it cannot be said that there was no prejudice to Mr. Funes in leaving s. 21(1) available.

[60] First, we cannot know which of the two possible routes to liability the jury took. There is a possibility that Mr. Funes was found guilty under a section of the *Criminal Code* that could not apply to his actions, and not found guilty under the section that could.

[61] Second, the level of *mens rea* required for a conviction for aiding in an offence under s. 21(1) – as explained to the jury in this case by the trial judge – is less than what is required for a conviction under s. 21(2). Section 21(2) contains an additional requirement that the Crown establish that the accused had the objective foresight that his confederate would commit the secondary offence in the course of carrying out the common purpose.

[62] By contrast, the trial judge told the jury that under s. 21(1), all they had to find was that Mr. Funes participated in planning or carrying out the robbery, that robbery was “objectively dangerous”, and that the robbery “caused” Mr. Nedd’s death. Accordingly, in this case, s. 21(1) presented an easier route to conviction than s. 21(2), which compounds the potential prejudice to Mr. Funes of the erroneous charge.

[63] This is sufficient to allow the appeal and order a new trial. It is unnecessary to address Mr. Funes’s further grounds of appeal. Mr. Funes’s appeal from sentence is, as a result, moot.

D. DISPOSITION

[64] I would dismiss the appeal of Mr. Alexis. I would allow the conviction appeal of Mr. Funes, set aside the conviction, and order a new trial.

Released: “KF” JUN 1 2020

“B.W. Miller J.A.”
“I agree. K. Feldman J.A.”
“I agree. E.E. Gillese J.A.”