# IN THE COURT OF APPEAL OF MANITOBA

*Coram:* Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner
Madam Justice Lori T. Spivak

***B E T W E E N :***

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| ***HER MAJESTY THE QUEEN*** | ) | ***E. A. Wach*** *and* |
| | ) | ***K. Advent*** |
| | ) | *for the Appellant* |
| *Respondent* | ) | |
| | ) | ***J. A. Hyman*** |
| *- and -* | ) | *for the Respondent* |
| | ) | |
| | ) | *Appeal heard:* |
| ***JARED ROMEO DEVLOO*** | ) | ***September 9, 2019*** |
| | ) | |
| | ) | *Judgment delivered:* |
| *(Accused) Appellant* | ) | ***January 14, 2020*** |

On appeal from *R v Devloo and Ong*, 2017 MBQB 180; and 2018 MBQB 140

## CAMERON JA

### Introduction

[1] The accused appeals his convictions for trafficking (section 5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 (the *CDSA*)) and conspiracy to traffic in cocaine (section 465(1)(c) of the *Criminal Code* (the *Code*)) resulting from a year-long police investigation into major drug operations in Winnipeg. He also applies for leave to appeal and, if granted, appeals his sentence of 10 years' imprisonment to be served concurrently on both charges as well as a fine in lieu of forfeiture in the amount of $212,000 (section 462.37 of the *Code*). The fine is to be paid within five years of his

release from prison. In default, he is to serve three years' imprisonment, consecutive.

[2] For the reasons that follow, I would dismiss his appeal and dismiss his application for leave to appeal his sentence.

Background and Issues

[3] The investigation was named Project Distress (the project) and targeted approximately a dozen individuals. It involved the use of a civilian agent (the agent), the interception of numerous conversations and text and email messages, as well as police surveillance.

[4] The project was conceived as a result of the agent contacting the RCMP and indicating a willingness to work with them. He had a history of drug trafficking and gang involvement in Manitoba, which included a prior association with the accused.

[5] The conspiracy in this case was alleged to have included the accused, Jason Ong (Ong), two other named individuals who were alleged to be couriers, as well as persons unknown. The accused and Ong were tried jointly.

[6] On March 11, 2014, the agent had his first, staged, in-person encounter with the accused. At that time, the agent told the accused that he wanted to purchase cocaine. After a number of face-to-face meetings, phone conversations and cell phone text messages, the accused arranged for the agent to purchase a Blackberry that was encrypted with PGP (pretty good privacy) software (PGP device). Thereafter, communications between the two, save for in-person meetings, were conducted via PGP devices. The accused

connected the agent with Ong via PGP messaging as well. Through a series of PGP messages and meetings with the accused, the agent was able to negotiate three transactions for the purchase of cocaine from Ong. The transactions occurred on March 31, 2014 (two kilograms), April 24, 2014 (one kilogram) and May 9, 2014 (one kilogram) for proceeds totalling $212,000.

[7] At the trial, the Crown's theory was that the accused sold cocaine to the agent, that he was in a conspiracy to do so and that it was for this reason that he put the agent in contact with Ong. The Crown asserted that the accused remained involved in the transactions between Ong and the agent and intervened when necessary to ensure that they occurred. The accused's position was that he was not part of any conspiracy to traffic drugs. He maintained that he simply acted as an agent for the purchaser by introducing the agent to Ong.

[8] The trial judge rejected the accused's position. She found that he trafficked cocaine in the first transaction on March 31, 2014 and that he was a member of the conspiracy alleged until June 4, 2014, when he withdrew from it.

[9] The accused lists 15 grounds in support of his conviction appeal. I have summarised and reframed them as seven overall issues. The accused contends that the trial judge:

1) erred in her assessment of the credibility of the agent;

2) erred in relying on impermissible opinion and hearsay evidence;

3) erred by refusing to admit hearsay comments made by Ong to the agent after June 4, 2014;

4) misapprehended the evidence;

5) erred by misapplying the law of co-principals pursuant to section 21(2) of the *Code*;

6) reversed the burden of proof in finding the accused guilty; and

7) provided insufficient reasons.

[10] In support of his application for leave to appeal his sentence, the accused claims that the trial judge failed to give the appropriate weight to the mitigating factors. He also maintains that she erred in finding him to be a high-level drug dealer who fit within the eight to 12-year sentencing range established in *R v Grant (IM)*, 2009 MBCA 9 at paras 107-108. In his view, the resulting sentence was unfit. He also argues that the trial judge erred in imposing the fine in lieu of forfeiture as it was not proven that the accused had control over the full $212,000.

Analysis

*The Conviction Appeal of the Accused*

Ground 1) Did the Trial Judge Err in Her Assessment of the Credibility of the Agent?

[11] It was an agreed fact at trial that the agent had been involved in criminal activity and entrenched in organised crime circles for more than 20 years prior to becoming involved in the project. It was also agreed that, during

the course of the project, the agent engaged in "[m]isconduct". Specifically, he i) tested positive for THC, the active ingredient in marihuana, on seven occasions; ii) failed to disclose that he received a payment of $800 from one of the targets of the project; iii) uttered threats to his sister's boyfriend; and iv) hid eight grams of marihuana in his luggage when he was being relocated.

[12] As well, the agent was paid for his involvement in the project. He signed a letter of acknowledgement agreeing to act for the police in exchange for a weekly stipend of $1,250 (plus eligible expenses) and an award not to exceed $500,000. Following the culmination of the investigative stage of the project, there remained $225,000 to be paid to the agent upon the conclusion of the prosecutions.

[13] In considering the evidence of the agent, the trial judge commented that "the Agent's involvement in the investigation was directed, controlled and his activities surveilled by a police cover team at all times" (2017 MBQB 180 at para 4). She further observed that all of his conversations were audio recorded, with the exception of one. Finally, she stated that the cover team took a sworn videotaped statement from the agent following every encounter with anyone involved in the project.

[14] The issue of the agent's credibility arises because portions of the audio-recorded conversations between the agent and the accused were inaudible. Further, a meeting between the agent and the accused that occurred in a steam room on May 5, 2014 could not be recorded. The agent testified about what was said by the accused at these times. The accused argues that, based on the agent's unsavoury character, independent evidence was required to confirm his testimony. Relying on *R v Khela*, 2009 SCC 4 at paras 37 and 39, he asserts that the confirmatory evidence relied on by the trial judge in her

assessment of the agent's evidence emanated from the agent himself and was not independent of the agent. In his view, this constituted an error in law.

[15] The Crown argues that the trial judge found that the agent's evidence was confirmed in many ways. Relying on *R v Kehler*, 2004 SCC 11, it argues that, even if disputed facts are not otherwise confirmed, the trier of fact is entitled to believe the evidence of a disreputable witness if satisfied that the witness is truthful (see *Kehler* at para 22). Contrary to the accused, the Crown says that the examples provided by the trial judge as illustrative instances of confirmation did not emanate from the agent or depend on his reliability.

[16] Absent a palpable and overriding error, an appellate court must show deference to a trial judge's assessment on issues of credibility (see *R v NS*, 2012 SCC 72 at para 25). In situations where the law dictates that an untrustworthy witness's evidence must be approached with caution, such as those outlined in *Vetrovec v The Queen*, [1982] 1 SCR 811 at 831, the trier of fact should look for evidence from another source that tends to show that the untrustworthy witness is telling the truth (*Khela* at para 37). In order to be confirmatory, the evidence must be independent (at para 39). The various applicable standards of review regarding witnesses subject to a *Vetrovec* caution are found in *R v Kakeeway*, 2017 MBCA 40 at paras 4-5.

[17] In this case, the trial judge recognised that some of the recorded conversations were inaudible and none of the conversation in the steam room on May 5, 2014 was recorded. She noted that it was the accused's position that these conversations were essential to the Crown's case. While she did not agree that the agent's credibility was as important as the accused asserted, she affirmed that, "wherever the Agent's testimony is the only evidence regarding an issue, it is important to look for confirmation of the material

aspects of the Agent's story in the rest of the evidence" (reasons for conviction at para 26).

[18] The trial judge acknowledged the accused's argument that the agent was untruthful with his handlers and had a career of illegal activity which included the use of threats and violence. However, in rejecting the accused's position regarding the agent's general credibility, the trial judge remarked that the agent demonstrated himself to be an "intelligent, clear-thinking individual" with good recall (at para 52). While she observed that there were some instances where the agent was "less than completely forthright with the police", she found that these were not related to the scope of the project (at para 53). In her view, when it came to "events within the scope of the project" there was no item of "significance where the Agent's testimony was contradicted by other evidence concerning the same point" (at para 56).

[19] Regarding the inaudible portions of the conversations, she provided one example of an audio recording of the first meeting on March 11, 2014, between the accused and the agent, wherein she found the agent's evidence to have been confirmed. She stated (at para 57):

> The first meeting between the Agent and [the accused] at [the restaurant] was audio recorded. However, many portions, particularly [the accused's] part of the conversation, are inaudible. The Agent testified that [the accused] used hand gestures to indicate the restaurant was wired; he also said he gave [the accused] his cell phone number; also that [the accused] told him not to talk on the phone about drugs. None of this was captured on the recording. However, all of these details were confirmed in different ways after – both [the accused], in a subsequent audio recorded conversation, and one of the police officers during his testimony confirmed the circumstances suggesting the restaurant was being surveilled; a text message from [the accused] was received on the Agent's cell phone during

> the time he was in the restaurant; [the accused] subsequently reminded the Agent not to talk on his cell phone.
>
> [emphasis added]

[20] The accused argues, and I agree, that the trial judge misspoke regarding some of the facts as she stated them. For example, the fact that the agent gave the accused his cell phone number during the first meeting was indeed audible. However, I disagree with him that this error was of any consequence. It is undisputed that the agent received a text message from the accused during that meeting. That text is confirmatory of the agent's evidence that, after he gave the accused his phone number, the accused immediately responded by entering the agent's phone number into his phone and texting the agent, thereby giving the agent his phone number. The significance of the confirmatory text is that the accused was engaging with the agent in the manner that the agent described. According to the agent, the police made it clear to him that the objective of the first meeting was to engage with the accused and obtain his phone number and that he completed that task.

[21] As well, the accused argues that the trial judge erred when she found that it was inaudible that the accused told the agent not to talk on the phone during the initial meeting. It is true that there is one portion of the audio recording, during which time the agent was speaking about a drug debt owed to him by an associate, when the accused stated, "don't talk." However, that was not the portion of the conversation referred to by the trial judge. Rather, during the latter part of the same conversation, the agent's phone rang. While the discussion that immediately ensued is inaudible on the recording, the agent testified that the accused told him not to have conversations about illegal business on his phone. In my view, it was this latter portion of the

conversation that the trial judge was referring to and not the audible comment as alleged by the accused.

[22] Furthermore, the trial judge did not err when she found independent evidence confirming the agent's testimony regarding the suspicious behaviour of the accused at the March 11, 2014 meeting in a subsequent recorded conversation that occurred on April 4, 2014. In the latter conversation, the accused advised the agent that he had security concerns about the restaurant at the time of the March 11, 2014 meeting. He explained that he believed that he had been under police surveillance at that restaurant on a date prior to that meeting. He said that the police had been asking the owner of the restaurant questions about him and that, two days later, a number of his associates were arrested.

[23] I disagree with the accused that the comments that he made during the April 4, 2014 meeting were not independent evidence confirming the agent's testimony regarding statements made by the accused during the March 11, 2014 conversation simply because he was a party to the subsequent conversation. The statements by the accused in that conversation constitute independent evidence confirming the agent's testimony that the accused was concerned about being wiretapped at the restaurant and that he warned the agent not to talk about illegal business on his cell phone. Neither of those pieces of evidence emanated from the agent, nor did they depend on his credibility. In fact, the audible admonition "don't talk" by the accused to the agent during the March 11, 2014 conversation is, itself, independent evidence which is capable of confirming the agent's testimony in this regard.

[24] Similarly, I would reject the accused's argument that the trial judge refused to consider the inconsistencies in the agent's testimony in assessing

his credibility. In my view, in light of the totality of the evidence, any inconsistencies were minor. The agent testified for five days. He was intensively cross-examined. I agree with the Crown that there were many areas where his testimony was independently confirmed and the trial judge was capable of making this observation without listing every consistency. Likewise, she did not have to address every inconsistency asserted by the accused. Her decision regarding the credibility of the agent is supported by the record and entitled to deference.

[25] For the above reasons, I am not persuaded that the trial judge erred in any material fashion in her assessment of the agent's credibility.

Ground 2) Did the Trial Judge Err in Relying on Impermissible Opinion and Hearsay Evidence?

[26] While the accused alleges a number of occasions wherein he states that the agent was impermissibly allowed to give opinion evidence, for the most part, his argument relies on two examples.

[27] The first allegation stems from a portion of a conversation between the accused and the agent that occurred on March 27, 2014. At that time, the agent met with the accused to obtain the password for the PGP device that the accused had arranged for the agent to buy. During that conversation, the two discussed a number of other drug dealers that they knew. At one point, the accused told the agent which drug dealers he did not like. He immediately thereafter asked if the agent knew Saray Sem (Sem). The agent confirmed that he knew Sem. The agent testified that the accused responded by stating "that's my boy."

[28] The agent testified that he was aware that Sem was a high-level drug trafficker in Winnipeg. He said that, when the accused stated that Sem was "my boy", the accused was indicating that Sem worked for him in his drug business. Although the trial judge could not make out whether the audio recording of the conversation reflected the words "my boy" or "my buddy" as alleged by the accused, she accepted the agent's testimony that either word would have the same meaning. The accused argues that the agent's interpretation of the accused's statement that Sem was his "boy" constituted opinion evidence.

[29] Next, the accused argues that the agent gave impermissible opinion evidence when he provided his understanding of messages that were exchanged between May 13 and 14, 2014. The May 13, 2014 message was from Ong to the agent. It stated, "Bro do you need to re up? Got new 2014 bro and #'s went up just talk to [the accused] regards to it". On May 14, 2014, the agent sent a message to Ong asking what the price was and, again, Ong told him to contact the accused.

[30] The agent testified that, in his view, Ong was telling him to talk to the "boss", being the accused, who was in charge of the price. After the agent advised the accused about the content of the messages that he received from Ong, the accused sent a message to the agent stating, "Pls send me [Ong's] email bro". The agent then forwarded the messages that he received from Ong in this regard to the accused. Within half an hour after that, Ong sent a message to the agent giving him a price.

[31] The accused argues that the interpretations that the agent placed on the above conversations constituted impermissible opinion evidence that should have been given by a qualified expert. I disagree.

[32] While it is true that police officers are often qualified to testify as drug experts regarding the meaning of terms of reference and actions employed by drug dealers, this does not of necessity lead to the conclusion that the agent was prohibited from providing his interpretation of the conversation. The argument of the accused confuses opinion evidence with inferences that may be drawn by a witness based on observed facts (see *R v Fedyck*, 2018 MBCA 74 at paras 19-20). I agree with the Crown that the agent was entitled to testify about his own understanding of the conversation. The agent was an experienced drug dealer. He was well-versed in the language of that world. He was entitled to draw inferences from the context of the conversations that he had with the accused as well as to put his own replies or actions into context.

[33] I also agree with the Crown that, if there was some aspect of opinion in the agent's evidence, it was admissible as lay opinion (see *Graat v The Queen*, [1982] 2 SCR 819 at 834). Contrary to the accused's submission, its admissibility did not require that the agent be qualified as an expert in the context of *R v Mohan*, [1994] 2 SCR 9.

Ground 3) Did the Trial Judge Err by Refusing to Admit Hearsay Comments Made by Ong to the Agent After June 4, 2014?

[34] In late May or early June of 2014, a suspicion arose that the agent was acting on behalf of the police and, on June 4, 2014, the accused sent the agent a message indicating that he was throwing away his PGP device. After that, despite repeated efforts, the agent was unable to contact the accused.

[35] On the other hand, on June 18, 2014, the agent was able to contact Ong. During the course of the next couple of days, Ong explained to the agent

that there was suspicion that undercover police officers were following the people with whom the agent used to make the actual drug purchases. Ong later explained that his people had "intel from a crooked rcmp" that the agent was acting as an agent. Between June 20 and July 3, 2014, the agent sent a number of messages to Ong denying any police involvement. Then on July 3, 2014, the agent sent a message to Ong telling him that he brought in someone from Toronto to "figure this shit out" as the agent claimed that his drug business was being affected. He told Ong that this person wanted to talk to the accused, who he had been unable to locate. In return, Ong sent a message saying that he would "try to get a hold of [the accused]".

[36] Later that day, Ong sent a message to the agent stating that he did not speak to the accused directly and did not personally know him. Ong explained that he was "put on indefinite leave" until his "company" figured out where the leak came from. On July 4, 2014, Ong sent the agent an email which included, among other things, a comment stating, "[The accused] is not part of our day to day transactions. [He] referred you to my superiors due to the fact that he knew you back in the day." On November 30, 2014, in response to the agent's question as to whether the accused was still supplying Ong, Ong responded:

> It is a different store bro. [The accused.] I haven't heard from him from my superiors. They said he has been quiet and don't talk to anyone on my superior's end. U know how he is already. I don't know him personally. But based from previous convos. My read. He very cautious person.

[37] The accused argues that the above statements by Ong were exculpatory in nature and supported his assertion that he was not part of the conspiracy to traffic cocaine but merely an agent for the purchaser. He

maintains that the comments should have been admitted by the trial judge when she conducted her analysis of the co-conspirators' exception to the hearsay rule pursuant to *R v Carter*, [1982] 1 SCR 938. Alternatively, he argues that the exculpatory comments should have been admitted pursuant to the principled exception to the hearsay rule.

[38] The Crown maintains that the comments made by Ong are inadmissible hearsay. It says that the accused left the conspiracy on June 4, 2014 and, therefore, *Carter* no longer applied to the comments made by Ong. It asserts that the evidence is inadmissible pursuant to the principled exception to the hearsay rule as it is unreliable.

*The Carter Analysis*

[39] The *Carter* analysis is the test used by trial judges to determine whether the co-conspirators' exception to the hearsay rule applies to make admissible the acts and declarations of co-conspirators against each other. In *Carter*, McIntyre J specified that the trier of fact must be satisfied i) that the conspiracy existed; and ii) that, on the basis of the evidence directly receivable against the accused, a probability is raised that he or she was a member of the conspiracy. If these two conditions are met, the co-conspirators' exception may be applied, thereby allowing the trier of fact to "consider evidence of the acts and declarations performed and made by the co-conspirators in furtherance of the objects of the conspiracy as evidence against the accused on the issue of his guilt" (*Carter* at p 947).

[40] The accused maintains that, if there was any conspiracy in this case, it consisted of Ong and his superiors and did not include him. Relying on an essay written by Doherty J (as he then was), "Conspiracies and Attempts"

*Substantive Criminal Law*, vol 1, (Edmonton: National Criminal Law Program, 1990), he argues that Ong's comments about the accused's involvement should have been considered in the trial judge's *Carter* analysis on the basis that they were admissible pursuant to the principles of trial fairness and *res gestae*. He argues that the comments should have been admitted in the trial proper with respect to the conspiracy charge.

[41] These arguments were put before the trial judge. She declined to consider the post-June 4 comments. The trial record indicates that she considered that the accused was no longer a member of the conspiracy after that date and that the comments were not made in furtherance of the conspiracy.

[42] In my view, regardless of whether one accepts the accused's argument that he was never in the conspiracy that resulted in the sale of drugs to the agent, or the Crown's argument that the accused had left the conspiracy at the time the comments were made, the comments are inadmissible pursuant to the *Carter* analysis. The accused has not offered any case law, nor am I aware of any, wherein an accused has sought admission pursuant to the co-conspirators' exception to the hearsay rule of an exculpatory conversation made by a co-conspirator in either circumstance. Nor am I aware of any case wherein Doherty J's essay has been relied on insofar as it discusses possible circumstances under which an accused may argue that hearsay statements of a co-conspirator would be admissible where an accused denies membership in the conspiracy. This makes sense when one considers the rationale of the co-conspirators' exception to the hearsay rule.

[43] The co-conspirators' exception to the hearsay rule is founded on principles related to admissions and agency. In *R v Chang* (2003), 173 CCC (3d) 397 (Ont CA), the Court explained (at paras 55, 84):

> Historically, the rule allowing for the admissibility against an accused of acts or declarations of alleged co-conspirators was commonly grounded in principles relating to the admissibility of admissions and agency. Out-of-court admissions by a party have traditionally been admissible against that party. Admissions by others having a relationship to a party have also long been admissible against that party in certain circumstances: see J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed., (Markham, Ont.: Butterworths, 1999) at 298 *ff*. In cases of conspiracy, specifically, it was accepted that each party to the conspiracy implicitly authorized the others to act and speak on his or her behalf in furtherance of the conspiracy; acts and declarations of one party could therefore be admitted as evidence against the others: see *R. v. Blake and Tye* (1844), 6 Q.B. 126 at 135; *R. v. Connolly and McGreevy* (1894), 1 C.C.C. 468 (Ont. H.C.) at 491; *R. v. Baker and Sowash* (1925), [1926] S.C.R. 92 at 103-104, 45 C.C.C. 19.
>
> The co-conspirators' rule is based on the notion that the declarant co-conspirator who speaks <u>in furtherance of a conspiracy</u> to which the accused is shown to be a party should be considered to speak as an agent of the accused. <u>The combination of the principles relating to admissions and agency leads to admissibility.</u>
>
> [emphasis added]

See also *R v Mapara*, 2005 SCC 23 at para 21.

[44] With the roots of the co-conspirators' exception being grounded in the principles of admission and agency, it is difficult to understand how co-conspirators' conversations about the accused could be used in favour of the accused in circumstances where the accused claims that he was never part of the conspiracy. In such a scenario, the accused denies any agency between him and the members of the conspiracy, but is attempting to use the co-

conspirators' exception, which relies upon agency principles for its application, to have the conversations admitted in his favour.

[45] Even if, as in this case, the court was satisfied on a balance of probabilities that an accused was a member of a conspiracy, but withdrew from the conspiracy before the co-conspirators' conversations about him or her, the conversations likewise would not have been made as agent of that accused, since that accused had ended his or her agency with the co-conspirators upon his or her withdrawal.

[46] Additionally, in such a situation, the argument made by the accused cannot survive the scrutiny of the last stage of *Carter* as he is unable to demonstrate that the statements made by the co-conspirator were made in furtherance of a conspiracy in which he was a member (see *Chang* at para 56; and *Mapara* at paras 8, 24).

[47] In *R v Bogiatzis*, 2010 ONCA 902, Rosenberg JA tied the agency roots and the "in furtherance" requirement of the co-conspirators' exception together, stating (at para 34):

> The theory of agency only makes sense in the context of the actual conspiracy to which the accused is alleged to be a member, not some other conspiracy. The co-conspirator is not the accused's agent for all possible purposes, but in relation to a specific agreement.
>
> [emphasis added]

See also *R v Fimognairi*, 1983 CarswellBC 1116 (CA) at para 11.

[48] For the above reasons, I am of the view that the co-conspirators' exception to the hearsay rule is inapplicable in the circumstances of this case.

*The Principled Exception to the Hearsay Rule*

[49] The principled exception regarding hearsay evidence was recently considered in *R v Bradshaw*, 2017 SCC 35. In that case, Karakatsanis J, writing for the majority, reiterated that, in order for hearsay to be admitted under the principled exception, the applicant must prove that the twin criteria of necessity and threshold reliability are met on a balance of probabilities. She stated that threshold reliability can be met by establishing procedural reliability (i.e., videotaped statements made under warning and oath, and subject to cross-examination), by establishing substantive reliability (circumstances exist such that the statements are inherently trustworthy or can be corroborated, and substantially negate the possibility that the declarant was untruthful or mistaken), or by a combination of procedural and substantive reliability (see para 32).

[50] The parties agree, as do I, that the standard of review regarding the admissibility of the comments in issue is correctness (see *R v Youvarajah*, 2013 SCC 41 at para 31).

[51] As earlier stated, the principles of trial fairness and *res gestae* referred to by the accused in his reliance on Doherty J's article in support of the admissibility of Ong's post-June 4 comments have not been considered in a *Carter* application. However, those principles have been considered in the context of the principled exception to the hearsay rule in one case of which I am aware. In *R v Feeney*, 2014 ONSC 7268, that accused (Feeney) successfully argued for the admission of a hearsay statement made by one conspirator to another for the purpose of supporting his defence that he was never a part of the conspiracy.

[52] Feeney was charged with conspiring with Mirian to traffic in cocaine. The Crown alleged that Feeney supplied cocaine to Mirian, who in turn sold it to others, including one Kharizfar. Although it was beyond doubt that Kharizfar purchased cocaine from Mirian, the Crown did not allege that Kharizfar was a member of the alleged Feeney/Mirian conspiracy. Feeney denied any involvement in a conspiracy to traffic cocaine with Mirian, and sought the admission of a conversation between Mirian and Kharizfar in which Mirian told Kharizfar that a police officer was his cocaine supplier. The defence application to admit Mirian's hearsay statement for its truth was made on the basis of the principled exception to hearsay evidence.

[53] With respect to the reliability of Mirian's statement to Kharizfar that his supplier was a police officer, the defence argued Mirian's statements were reliable as they were made in furtherance of the common criminal enterprise in which Mirian and Kharizifar were engaged (see para 64). Defence further relied on *Mapara*, wherein McLachlin CJC commented that statements made by co-conspirators can meet the substantive reliability requirements under the principled approach. She stated (at paras 24, 26):

> Proof that a conspiracy existed beyond a reasonable doubt and that the accused probably participated in it . . . attests to a common enterprise that enhances the general reliability of what was said in the course of pursuing that enterprise. It is similar in its effect to the *res gestae* exception to the hearsay rule, where surrounding context furnishes circumstantial indicators of reliability.
>
> In addition to these preliminary conditions, the final *Carter* requirement, i.e., only those hearsay statements made in furtherance of the conspiracy can be considered, provides guarantees of reliability in the more immediate circumstances under which the statement is made. "In furtherance" statements "have the reliability-enhancing qualities of spontaneity and contemporaneity to the events to which they relate" (*Chang*, at

> paras. 122-23). They have *res gestae*-type qualities, being "the very acts by which the conspiracy is formulated or implemented and are made in the course of the commission of the offence" (*Chang*, at para. 123). This "minimizes the motive and opportunity for contrivance" (*Chang*, at para. 124).

[54] The Crown argued that the co-conspirators' exception was inapplicable as Kharizfar was not alleged to be a member of the conspiracy involving Feeney and Mirian (see para 66).

[55] *Feeney* was decided before *Bradshaw*. Nonetheless, the trial judge in *Feeney* applied the then-leading case of *R v Khelawon*, 2006 SCC 57 regarding the general principles for the admissibility of hearsay statements.

[56] The trial judge noted that Kharizfar was available to be cross-examined regarding the circumstances under which Mirian's statement was made to him, and also noted that a conversation that Kharizfar had with his common-law wife, about what Mirian had told him, had been intercepted and recorded by the police (see para 58). She admitted the evidence, stating that:

- Even though the Crown did not allege that Kharizfar was an unindicted co-conspirator with Feeney, *Mapara* was still of assistance in assessing whether the threshold reliability requirement had been met (see para 67);

- Mirian and Kharizfar were involved in the common enterprise of trafficking in cocaine, which enhanced the general reliability of what they said in the course of pursuing that enterprise and, even though Feeney was not involved in it, was similar in its effect to the *res gestae* exception to the hearsay rule (see para 68);

- The statements were made by Mirian "in furtherance" of the conspiracy, in that they assuaged Kharizfar's concerns as well as had "reliability-enhancing qualities of spontaneity and contemporaneity to the event" (at para 69).

[57] After stating that she found the evidence to be admissible, she said, "In coming to this conclusion, I bear in mind that this is an application by the defence for the admission of hearsay statements. Fairness concerns tip the reliability analysis in favour of [Feeney]" (at para 71).

[58] In the present case, neither party raised *Feeney*. Therefore, as it has not been fully argued, I would not draw any conclusions regarding the trial judge's application of the principled exception to the hearsay rule in *Feeney*.

[59] Nonetheless, in my view, the circumstances of this case are distinguishable from *Feeney.* In this case, it is clear that the surreptitiously recorded conversations between Ong and the agent would not meet the requirements for procedural reliability as they were not given under affirmation or oath and Ong was not available for cross-examination.

[60] Even more importantly, Ong's conversations with the agent are not substantively reliable. The reliability of Ong's statements suffers, firstly, because he was aware of doubt as to whether the agent was engaged in the "common enterprise" with the other members of the conspiracy. Doubt that the agent shared in the pursuit of the common enterprise means that "the general reliability of what was said in the course of pursuing that enterprise" will not be enhanced (*Mapara* at para 24). Secondly, Ong's awareness of suspicions about the agent means that Ong's statements lack the "reliability-enhancing qualities of spontaneity and contemporaneity to the events to which

they relate", such that the motive and opportunity for contrivance will not be minimised (*Mapara* at para 26). There was a clear reason why Ong may not have been truthful with the agent when discussing the accused's role.

[61] Furthermore, there was no evidence that corroborated the material aspect of Ong's statements such that the only likely explanation for them was that they were true. Given the accused's own acts and statements, it was equally likely, if not more likely, that the accused was actively involved in the conspiracy, and that Ong, either on his own initiative or as directed by the accused, was attempting to negate any involvement by the accused.

[62] Thus, in the present case, I am not convinced that the trial judge made an error in law in refusing to admit Ong's post-June 4 comments regarding the accused's involvement in the conspiracy pursuant to the principled exception to the hearsay rule.

Ground 4) Did the Trial Judge Misapprehend the Evidence?

[63] The accused lists six instances where he alleges that the trial judge misapprehended the evidence. The Crown states that, for the most part, the alleged misapprehensions are simply areas where the accused disagrees with the trial judge's interpretation of the evidence or the conclusions that she drew from it.

[64] Where a trial judge is mistaken regarding material parts of evidence which are essential to the reasoning process resulting in a conviction, an accused will not have received a fair trial and a miscarriage of justice will have occurred within the meaning of section 686(1)(a)(iii) of the *Code* (see *R v Lohrer*, 2004 SCC 80 at paras 1-2). For a court to order a new trial, the misapprehension must be more than an "apparent" mistake (*R v Sinclair*, 2011

SCC 40 at para 53). In *R v Whiteway (BDT) et al*, 2015 MBCA 24, Mainella JA confirmed that "[a] misapprehension of the evidence is not to be confused with a different interpretation of the evidence than the one adopted by the trial judge" (at para 32; see also *R v Scott*, 2016 MBCA 30 at para 11). Further, when reviewing the reasons of the trial judge, the appellate court must not "dissect, parse, or microscopically examine" them (*R v CLY*, 2008 SCC 2 at para 11 paraphrasing *R v Morrissey* (1995), 97 CCC (3d) 193 at 203-205 (Ont CA), with approval; and *Sinclair* at para 54).

[65] Regarding the six instances of misapprehension alleged by the accused, most of them simply suggest different interpretations of the evidence than those accepted by the trial judge. They are not material to the reasoning process that led to the conviction and do not require further analysis. However, I will examine two of the accused's concerns as they require some comment.

[66] First, he contends that the trial judge misapprehended the circumstances of an unrecorded conversation held between the accused and the agent in a steam room on May 5, 2014.

[67] To place the conversation in context, the Crown entered into evidence messages that were exchanged between Ong and the agent between April 26 and May 1, 2014, which showed that, while Ong was asking the agent if he wanted to buy more cocaine, the agent was not committing to do so. The agent testified that, on May 4, the accused sent a message to him stating that "his friends" were waiting for a response and had been for a couple of days (at para 101). While the agent responded to that message, he did not commit to buying more cocaine from Ong.

[68] The agent stated that, when he met with the accused in the steam room on May 5, 2014, the accused told him that he should be buying more cocaine from Ong.

[69] Regarding this conversation, the trial judge stated (at para 101):

> On May 5, the Agent and [the accused] met in the steam room at the [agreed location], at [the accused]'s suggestion. The Agent testified [the accused] urged him to buy more cocaine from [Ong]. This is one of the conversations not recorded. I consider it an admission by [the accused] that he was part of the conspiracy, so it needs to be considered carefully. Ultimately I accept the Agent's testimony on this point based in part on his overall reliability, but also because the surrounding events before and after the meeting support the statement. [Ong] had been pursuing the Agent to purchase more cocaine for several weeks. [The accused] had subtly intervened, but the Agent still did not act. Such a conversation is an obvious next step to get the Agent to make another purchase.
>
> [emphasis added]

[70] The accused contends that the trial judge erred in that it was the agent's and not the accused's suggestion to have a steam bath. He also argues that the trial judge erred in finding that the conversation was an obvious next step to get the agent to make another purchase because, in his view, the original suggestion for the meeting was to discuss a marihuana grow operation that the accused wanted to establish with the agent.

[71] Neither of these alleged errors amount to material misapprehensions of the evidence. While it is true that the suggestion to have a steam bath on May 5, 2014 was that of the agent's, it must be remembered that it was the accused's statement in the initial meeting that he used steam baths as a secure manner in which to talk about matters involving drugs. Further, in light of the

context of the messages between the agent, Ong and the accused, the finding that a meeting between the accused and the agent was the obvious next step in trying to persuade the agent to buy more drugs from Ong cannot be said to be an error at all. This finding of fact was certainly within the purview of the trial judge in light of the context of all of the evidence surrounding the meeting.

[72] The second alleged misapprehension constitutes what I would consider a minor error made by the trial judge regarding the timing and context of a contact that Ong made with Sem.

[73] As earlier indicated, by June 4, 2014 there was a suspicion that the agent was working for the police and the accused terminated all contact with the agent. However, the agent did continue exchanging messages with Ong. In an attempt to clear his name, the agent sent a message to Ong describing his theory about who was helping police. At the time the message was sent, the police, who were conducting surveillance of Ong, observed him to view his PGP device. Shortly thereafter, Ong met with Sem, pulled out his PGP device and showed it to him. Later that day, the agent sent a message to Ong asking him to pass the message to the accused. In response, Ong told the agent that he had contacted a "common friend" and that the accused would be in touch with the agent.

[74] In her reasons, the trial judge said that Ong went to meet Sem after the agent had requested him to contact the accused when, in reality, he contacted Sem before the agent asked him to do so. She relied on this evidence as a further link between the accused and Sem as confirmatory of the agent's earlier testimony that Sem was his "boy" (at para 110).

[75] In my view, this error did not constitute a material error essential to the trial judge's reasoning process. While she may have stated the sequence of events slightly out of order, when the evidence is considered in the context of all of the evidence, it is capable of confirming a further connection between Ong, Sem and the accused.

[76] Furthermore, the trial judge only considered this evidence in the third stage of the *Carter* process, which allows statements and actions made in furtherance of the conspiracy by all the probable members of a conspiracy to be admissible against the other members in determining guilt. In that regard, she stated (at para 108):

> While the evidence concerning each of Ong and [the accused] certainly strengthens the case against the other, I actually find this step unnecessary, as the direct evidence against each of them is sufficient for me to conclude that the Crown has proved beyond a reasonable doubt that they were both part of the conspiracy to traffic cocaine.

[77] Therefore, the conclusion was not essential to her reasoning process.

Ground 5) Did the Trial Judge Err by Misapplying the Law of Co-Principals Pursuant to Section 21(2) of the *Code*?

[78] This ground of appeal relates to the accused's conviction for trafficking in cocaine on March 31, 2014. Regarding this transaction, the trial judge made the following findings of fact:

- At their meeting on March 15, 2014 the agent told the accused that he wanted to purchase two kilograms of cocaine and asked the accused the price;

- Although the agent was inconsistent about the amount to be charged for the cocaine, he and the accused clearly discussed the price for it;

- That, later in the same conversation, the agent stated that he was interested in buying cocaine and that he would pay cash. Although the accused's response was inaudible, the trial judge accepted the agent's testimony that the accused responded that he was interested and said that "they would use couriers on both sides, only cash and all communication had to be by PGP – he would get the Agent one" (at para 66);

- The accused arranged for the agent to obtain a PGP device from one of his associates and later provided the agent with the password to the device;

- The accused sent the agent a PGP message saying what type of cocaine was available, but that there was no true high-quality cocaine available;

- On March 29, 2014, Ong sent a PGP message to the agent. When the agent did not respond, the accused contacted the agent and told him to contact Ong;

- The agent contacted Ong and, on March 31, 2014, he was able to purchase cocaine by way of cash through couriers as discussed with the accused.

[79] In her written reasons for conviction, the trial judge stated that the Crown's position was that the accused was a party either as a co-principal, or

as an aider to the transaction. In convicting the accused, the trial judge rejected his submission that he was a mere agent for the purchaser of drugs. She said (at para 78):

> I am satisfied that quite apart from the Agent's claim that [the accused] agreed to supply him with cocaine, the balance of the evidence readily establishes [the accused] was directly involved in the transaction. In fact, the evidence paints so clear a picture of this that the Agent's testimony is unnecessary.
>
> [emphasis added]

[80] She concluded that the accused met "the requirements of a co-principal under s. 21(2) of the ***Code***, although he was also a party under s. 21(1)(b)" and that "[t]he evidence does not raise a reasonable doubt that he was acting as an agent for the purchase" (at para 82).

[81] Sections 21(1) and 21(2) of the *Code* state:

> **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**
> **21(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.

[82] In this case, section 21(2) is not applicable. The unlawful purpose in question was trafficking in cocaine. There was no allegation that a further offence was committed as a probable consequence of carrying out that offence as is contemplated in section 21(2). The unlawful purpose in section 21(2) must be different from the offence charged (see *R v Simpson*, [1988] 1 SCR 3 at para 14).

[83] The trial judge held that the accused was directly involved in the transaction that led to the charge of trafficking in cocaine. That finding is sufficient to convict him as a principal or as a co-principal (with Ong) of that offence pursuant to section 21(1)(a) of the *Code*. In *R v Ball*, 2011 BCCA 11, leave to appeal to SCC refused, 34363 (24 November 2011), Ryan JA explained (at para 23):

> Two persons may both be actual committers for the purposes of s. 21(1)(a) (referred to in the case law variously as "co-principals", "joint-principals", "co-perpetrators" or "joint-perpetrators") even though each has not performed every act which makes up the *actus reus* of the offence.

[84] In my view, the trial judge simply misspoke on the occasions that she cited section 21(2) of the *Code*. Rather, she was making findings pursuant to section 21(1)(a). I find support for this conclusion based on the language she used to describe the position of the Crown and the culpability of the accused, as well as in her reasons for conviction. In her reasons, she described the position of the Crown that the accused was a "co-principal" and that the offence was "a joint venture between Ong and [the accused]" (at para 11). She observed, "an accused may be liable under both sections" (*ibid*). As I earlier stated, she found that the accused in this case was liable on the basis that he was directly involved in the March 31, 2014 transaction and that he

met the requirements of a co-principal. She alternatively found him guilty as a party pursuant to section 21(1)(b). Overall, the language that she employed and the order in which she made her findings is consistent with the language of section 21(1) of the *Code* and not section 21(2).

[85] Even if it could be said the trial judge erred in law by purporting to apply section 21(2), it is of no consequence as she clearly found the accused guilty of the offence pursuant to section 21(1)(b) of the *Code*. As stated in *R v Thatcher*, [1987] 1 SCR 652, "The whole point of s. 21(1) is to put an aider or abettor on the same footing as the principal" (at para 66).

[86] Finally, if I am wrong in the above, I would apply the curative proviso in section 686(1)(b)(iii) of the *Code* on the basis that no substantial wrong or miscarriage of justice occurred. In this case, the error was harmless.

Ground 6) Did the Trial Judge Reverse the Burden of Proof in Finding the Accused Guilty?

Ground 7) Did the Trial Judge Provide Insufficient Reasons?

[87] In my view, grounds 6 and 7 can be disposed of summarily. The trial judge considered the accused's argument that he was merely an agent for the purchaser. She assessed the potentially exculpatory remarks that he made on the wiretaps and many of the favourable inferences that the accused asked her to make. She rejected them. In her view, many of the remarks that he relied on as exculpatory were inculpatory. While she did not repeat, step-by-step, the test in *R v W(D)*, [1991] 1 SCR 742, her reasons are clear that she did not accept the accused's interpretation of the evidence and that it did not raise a reasonable doubt. After having considered all of the evidence, she was

convinced beyond a reasonable doubt of the accused's guilt. She did not reverse the burden of proof (see *R v Vuradin*, 2013 SCC 38 at para 21).

[88] Moreover, the trial judge's reasons for convicting the accused are not insufficient. When read in their entirety, it is apparent that they inform the parties of the basis of the verdict, provide public accountability and permit meaningful review (see *R v Oddleifson (JN)*, 2010 MBCA 44 at para 30, leave to appeal to SCC refused, 33756 (28 October 2010)).

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[89] In sentencing the accused, the trial judge held that he was effectively in charge of the three transactions and that Ong provided him with an additional layer of insulation. Relying on the range of sentencing established for a high-level drug dealer, she sentenced him to 10 years' incarceration. Noting that the undercover officers paid a total of $212,000 to couriers in exchange for the four kilograms of cocaine and that the money was not recovered, she made an order of forfeiture in that amount.

[90] The period of imprisonment imposed falls squarely within the range of eight to 12 years for high-level trafficking of cocaine established by this Court in *Grant* (see paras 107-108). The accused has not shown an arguable case that the trial judge made a palpable and overriding error in finding him to be a high-level drug trafficker or that the period of imprisonment was unfit. I would deny leave to appeal his sentence in this regard.

[91] Similarly, regarding forfeiture, the accused claims that the Crown has not shown that he profited by receiving the entire amount of the $212,000 paid for the cocaine. He argues that, based on the intercepted conversations, the most he received would have been $1,000 per kilogram.

[92] Given the trial judge's findings about the accused's role as being "effectively in charge of the transactions that formed the basis for these charges" (2018 MBQB 140 at para 13), there is no basis to conclude that the trial judge erred in inferring that the accused received the full amount paid. Also, the degree of personal benefit the accused had over the total amount he possessed or controlled is not for consideration under section 462.37(3) of the *Code*. In *R v Banayos and Banayos*, 2018 MBCA 86, leave to appeal to SCC refused, 38296; 38389 (14 February 2019), this Court stated (at paras 63-64):

> The decision to order the fine in lieu of forfeiture is discretionary in nature and is owed significant deference. The brother argues that there was no evidence confirming that the money flowed directly to him. The sentencing judge found as a fact that the brother received proceeds of crime on six different occasions. On the evidentiary record before him, that finding was open to him.
>
> The decision with respect to the value assigned to the fine was in line with the conclusion reached in *R v Lavigne*, 2006 SCC 10 at para 16, that the purpose of the forfeiture provision is to deprive offenders of the proceeds of their crime and to deter them from committing future crimes. In my view, limiting the value of the fine to the profit made would undermine the intent of the legislation. The Ontario Court of Appeal also took this view in *R v Piccinini*, 2015 ONCA 446 at paras 17-19. Appellate intervention is not warranted.

See also *R v Rafilovich*, 2019 SCC 51 at para 33.

[93] Based on the above I would also deny leave to appeal the order of the fine in lieu of forfeiture.

[94] In the result, I would dismiss the accused's conviction appeal and dismiss his application for leave to appeal sentence.

Cameron JA

I agree: Pfuetzner JA

I agree: Spivak JA