

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Karen I. Simonsen
Madam Justice Lori T. Spivak

BETWEEN:

| | | |
|-------------------------------------|---|---------------------------------|
| |) | <i>D. N. Booy</i> |
| |) | <i>for the Appellant</i> |
| <i>HER MAJESTY THE QUEEN</i> |) | <i>(via videoconference)</i> |
| |) | |
| |) | <i>J. M. Mann</i> |
| |) | <i>for the Respondent</i> |
| |) | <i>(via videoconference)</i> |
| - and - |) | |
| |) | <i>Appeal heard and</i> |
| |) | <i>Decision pronounced:</i> |
| <i>MATEO ROULETTE</i> |) | <i>December 8, 2020</i> |
| |) | |
| |) | <i>Written reasons:</i> |
| <i>(Accused) Appellant</i> |) | <i>December 18, 2020</i> |

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

SPIVAK JA (for the Court):

[1] The accused appealed his conviction by a jury of three counts of aggravated assault involving the shooting of three victims. The basis of the conviction was that the accused was a party to the offence under section 21(2) of the *Criminal Code* (the *Code*) through a common intention to commit an assault.

[2] The grounds of appeal were that the trial judge inadequately instructed the jury regarding common intention liability and circumstantial evidence.

[3] At the hearing we dismissed the appeal with brief reasons to follow. These are those reasons.

[4] The accused and two other men, one of whom was visibly armed with a large firearm (the shooter), attended a small party at the accused's ex-girlfriend's residence. They entered the residence one after the other. A witness, Ashlei Orton, observed the accused angrily approach a male and become involved in an altercation with him. Shortly thereafter, the shooter said words to the effect of "[w]ho am I going to have to shoot first". He then started shooting from left to right, wounding three people at the party. Once the shooting stopped, the accused walked by the shooter out the front door and the shooter exited behind him.

[5] The Crown's theory was that the accused and the shooter came to the party together with the common intention to assault some of the occupants and the accused knew, or ought to have known, that the shooter would probably use the firearm in the course of carrying out this common unlawful purpose. The accused's position was that the Crown failed to prove that there was any agreement between him and the shooter to commit an assault or that he knew the shooter had a firearm. The accused argued it was possible that he merely arrived contemporaneously with the shooter and was unaware that the shooter had a firearm.

[6] The jury's task was to determine whether the accused was a party to the offences of aggravated assault pursuant to section 21(2) of the *Code*.

Section 21(2) of the *Code* provides that a person may become a party to an offence committed by another which he knew or ought to have known was a probable consequence of carrying out a common unlawful purpose (see *R v Simpson*, [1988] 1 SCR 3 at para 14). The accused's culpability was therefore contingent upon the Crown establishing that he formed a common intention to commit assault with the shooter. The Crown's case depended on circumstantial evidence. The accused contends that the jury was not properly instructed on the unlawful purpose component of common intention liability and the approach to circumstantial evidence.

[7] The principles governing appellate review of jury instructions are well established. Jury instructions are reviewed on a standard of adequacy not perfection. The question for the reviewing court is whether, taking a functional approach to the instructions looked at in their entirety and in the context of the trial, the overall effect of the charge was that the jury was properly and fairly instructed (see *R v Jacquard*, [1997] 1 SCR 314 at paras 32, 62; and *R v Hall*, 2018 MBCA 122 at para 143).

[8] The accused argues that the trial judge's instructions on common intention liability were insufficient as it was essential to instruct the jury on the elements of the underlying offence of assault and the evidence bearing on whether the accused, in fact, assaulted anyone at the party. He points to Orton's evidence, which he contends was ambiguous as to whether the accused punched the male or was involved in a consensual altercation.

[9] We do not agree that the trial judge's instructions on common intention liability were inadequate. In her charge, the trial judge recited the provisions of section 21(2) of the *Code*. She explained that this mode of

participation required the Crown to prove beyond a reasonable doubt the essential elements of agreement, offence and knowledge (see *R v Simon*, 2010 ONCA 754 at paras 42-43). At defence counsel's request, she told the jury that the agreement between the accused and shooter had to be to "assault the occupants of the residence without their consent and help each other to do so" (emphasis added). There was no need to elaborate on the elements of the predicate offence of assault for the jury to understand the unlawful common purpose available for them to consider (see *R v Phillips*, 2017 ONCA 752 at para 235).

[10] Further, the issue for the jury was not whether the accused actually assaulted anyone or a consensual fight ensued but rather, whether the accused formed a common intention with the shooter to commit assault prior to attending the party. In her instructions, the trial judge made clear the accused's position that the evidence did not establish any such agreement. Any ambiguities in Orton's evidence about the nature of the accused's altercation with the male, formed part of the evidence for the jury to consider in deciding whether the Crown proved an agreement. Orton's evidence was fairly reviewed in the charge, with defence counsel's input.

[11] We are also not persuaded that the trial judge's instructions regarding circumstantial evidence were insufficient. The crux of the accused's argument is that the trial judge failed to explain to the jury that reasonable inferences consistent with innocence do not have to be based on proven facts.

[12] In *R v Villaroman*, 2016 SCC 33, the Supreme Court of Canada considered the relationship between circumstantial evidence and proof

beyond a reasonable doubt and addressed the principles applicable to a case based on circumstantial evidence. When the Crown's case consists wholly or substantially of circumstantial evidence, the standard of proof requires the trier of fact to be satisfied beyond a reasonable doubt that the accused's guilt is the only reasonable inference to be drawn from the evidence as a whole. Inferences consistent with innocence need not arise from proven facts. They may arise from the lack of evidence. Accordingly, a trier of fact must consider other plausible theories and other reasonable possibilities inconsistent with guilt that are grounded in logic and experience and not speculation (see *Villaroman* at paras 20, 27, 35, 37-38; and *R v Lights*, 2020 ONCA 128 at paras 36, 38).

[13] The trial judge conveyed these key principles to the jury in her instructions.

[14] After explaining the meaning of direct and circumstantial evidence, and the difference between inference and speculation, the trial judge stated:

When assessing circumstantial evidence you must . . . consider other plausible theories and other reasonable possibilities that are inconsistent with guilt. These alternatives must be based on logic and experience applied to the evidence or the absence of evidence, not speculation.

In order to find an accused guilty of an offence on the basis of circumstantial evidence you must be satisfied beyond a reasonable doubt that his guilt is the only reasonable inference that can be drawn from the whole of the evidence.

[15] By telling the jury to consider innocent "plausible theories" and "reasonable possibilities" arising from the "absence of evidence," she made clear that alternative explanations to guilt need not be based on proven facts.

In our view, the trial judge provided the jury with adequate tools to analyse the circumstantial evidence in light of the requirement of proof beyond a reasonable doubt. On a functional review of the charge, we are not convinced that the jury was not properly instructed on the relevant law in light of the evidence and the positions of the parties (see *R v Fries*, 2017 MBCA 58 at para 9).

[16] Further, while *Villaroman* makes clear that no particular form of instruction is required, the trial judge's language in the excerpts noted above derives directly from the decision (see paras 30, 37).

[17] Additionally, before the trial judge charged the jury, defence counsel provided suggestions concerning the instructions on circumstantial evidence, some of which the trial judge incorporated. Thereafter, no further objection was made. While not determinative, the failure to object is a relevant factor to consider in the context of the functional review of the jury instructions (see *R v Green*, 2019 MBCA 53 at para 32).

[18] Finally, while not raised as a ground of appeal, the accused suggests that the verdict was unreasonable. Where the verdict depends on circumstantial evidence, the reviewing court does not draw its own inferences but considers whether the inferences drawn by the jury were reasonably open to it in light of the standard of proof. In our view, a properly instructed jury, acting judicially, could reasonably have been satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence (see *Villaroman* at para 67; and *Hall* at para 166).

[19] Therefore, for the above reasons, we dismissed the appeal.

“Cameron JA”

“Simonsen JA”

“Spivak JA”
