IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Phillips*, 2021 NLCA 51
Date: October 27, 2021
Docket Number: 201801H0024 and 202001H0076

BETWEEN:

BRANDON PHILLIPS	APPELLANT/RESPONDENT BY CROSS-APPEAL

AND:

HER MAJESTY THE QUEEN	RESPONDENT/APPELLANT BY CROSS-APPEAL

Coram: Fry C.J.N.L., Hoegg and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201601G6760

Appeal Heard: March 17, 2021
Judgment Rendered: October 27, 2021

Reasons for Judgment by: Hoegg J.A.
Concurred in by: Fry C.J.N.L. and Goodridge J.A.

Counsel for the Appellant/Respondent by Cross-Appeal: Mark J. Gruchy
Counsel for the Respondent/Appellant by Cross-Appeal: Mark Scott Q.C.

Authorities Cited:

CASES CITED: *R. v. Soobrian*, [1994] O.J. No. 2836, 21 O.R. (3d) 603 (Ont. C.A); *Boucher v. The Queen*, [1955] S.C.R. 16 (S.C.C.); *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 (S.C.C.); *R. v. Evans*, [1993] 2 S.C.R. 629 (S.C.C.); *R. v. Stiers*, 2010 ONCA 382; *R. v. Candir*, 2009 ONCA 915; *R. v. Ellard*, 2009 SCC 27, [2009] 2 S.C.R. 19; *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272; *R. v. Yebes*, [1987] 2 S.C.R. 168 (S.C.C.); *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000; *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180; *R. v. George-Nurse*, 2019 SCC 12, [2019] 1 S.C.R. 570; *R. v. O'Brien*, 2010 NSCA 61; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *Lewis v. The Queen*, [1979] 2 S.C.R. 821 (S.C.C.); *R. v. McDonald*, 2017 ONCA 568.

STATUTES CONSIDERED: *Criminal Code*, R.S.C. 1985, c. C-46, section 231(5); *Canada Evidence Act*, R.S.C. 1985, c. C-5.

OTHER: Jonathan W. Hak Q.C., *Frame Rate: Understanding the Impact of Frame Rate on Video Interpretation* (March 3, 2018).

Hoegg J.A.:

INTRODUCTION

[1] Brandon Phillips appeals to this Court to set aside his jury conviction for second degree murder and order a new trial. Mr. Phillips argues the Judge made errors in her treatment of the evidence of a Crown witness and that the jury verdict of guilty was unreasonable.

[2] In the event this Court were to allow Mr. Phillips' appeal and order a new trial, the Crown cross-appeals, arguing that the Judge erred in refusing to leave section 231(5) of the *Criminal Code* with the jury as a pathway to finding first degree murder.

BACKGROUND

[3] On October 3, 2015, a masked man entered the bar at the Captain's Quarters Hotel in St. John's and demanded cash from bartender, Janet Hutchings. The masked man was carrying a loaded shotgun, which he cocked and pointed at Ms. Hutchings while making his demand. The gunman moved

into the pool table room and was followed by a patron of the bar, Lawrence Wellman, who was shouting at him to leave. The gunman moved into an adjacent room known as the table restaurant room, and Mr. Wellman picked up a table and threw it into the room at him. The gunman continued to verbally threaten Mr. Wellman, and Mr. Wellman, standing along side of the pool table in the pool table room, picked up another table, a small one, and prepared to throw it at the gunman who was just inside the table restaurant room.

[4] Before the small table left Mr. Wellman's grasp, the gunman shot Mr. Wellman. The small table fell backwards from Mr. Wellman's grasp and landed on the pool table located behind him, and Mr. Wellman collapsed on the floor. The gunman walked into the pool table room and past Mr. Wellman to the bar, continuing to demand money. He eventually fled the scene empty handed. Mr. Wellman died from his wounds shortly thereafter.

[5] The incident was captured on an audio/video recording from the bar. The audio recording captured the continuous sound from the entire incident, and the video recording captured the incident without interruption at the slower than usual speed of one frame per second.

[6] At trial, Ms. Hutchings, Mr. Wellman's partner Linda McBay, another patron Shawn Deeley, along with expert witnesses in firearms and DNA, and police officers involved in investigating the crime, testified for the Crown.

[7] A dark-coloured toque-like hat with two holes cut out, described at trial as a makeshift balaclava, found near the hotel the following day, pieces of broken gunstock found in the bar, and a 12-gauge shotgun with a broken gunstock, an unexpended shotgun shell, and a pair of sneakers found in the search of 30A Quidi Vidi Road, the residence where Mr. Phillips either lived or frequented, were entered into evidence.

[8] The live issues at trial were the gunman's identity — whether the Crown established that Mr. Phillips was the gunman, and intent — whether the Crown established the intent required for first or second degree murder. The issue of intent was tied to Mr. Phillips' defence that the gun malfunctioned and discharged accidently.

[9] At the close of the Crown's case, Mr. Phillips sought a directed verdict of acquittal respecting the offence of first degree murder but made no argument for a directed verdict respecting second degree murder. He did not testify, and he tendered no defence evidence.

[10] The jury deliberated for two days and returned a verdict of guilty to second degree murder.

ISSUES

[11] Mr. Phillips' primary focus on appeal was the Judge's handling of Shawn Deeley's evidence. Mr. Phillips argues that the Crown called Mr. Deeley to impeach him, and did so by tendering a video recording of the incident which contradicted some of Mr. Deeley's evidence. As part of his argument respecting this issue, Mr. Phillips says the slow video recording did not accurately depict the shooting. Mr. Phillips also argues that the Judge erred in permitting the Crown to conduct a redirect examination of Mr. Deeley, and in failing to provide limiting instructions to the jury respecting their use of the evidence respecting Mr. Deeley's prior consistent statements adduced during the redirect examination.

[12] As well, Mr. Phillips argues that the verdict was unreasonable. He maintains that the evidence supporting his identity as the gunman was circumstantial and not such as to foreclose the rational interpretation that someone else was the gunman.

MR. DEELEY'S EVIDENCE

Background

[13] Mr. Deeley was a patron of the Captain's Quarters bar when Mr. Wellman was murdered on October 3, 2015. As such, Mr. Deeley was an eyewitness to much of what happened, and he testified at trial for the Crown.

[14] During his direct examination, Mr. Deeley testified that he was in the room of the bar where the VLT machine was located when he heard the shot that felled Mr. Wellman. He said that he could see into the pool table room, which was adjacent to the VLT room, but that he could not see into the table restaurant room, which was located to the right of the pool table room. The pool table room was accessible from the VLT room through an open doorway; the restaurant table room was accessible from the pool table room through an open doorway. Mr. Deeley's evidence was that Mr. Wellman and the gunman were to the right of the pool table in the pool table room, that Mr. Wellman was swinging a small table at the gunman and the gunman was swinging his gun at Mr. Wellman, and that the small table and the gun connected two or three times before the gun fired the shot that killed Mr. Wellman. Mr. Deeley said he was not looking at them when the gun fired because he was looking down at his

phone, but when he looked up he saw the gunman step backwards, and then walk around Mr. Wellman, who fell to the floor holding his groin.

[15] Mr. Deeley was shown the floor plan of the bar and he marked his locations in the VLT room and the location of the gunman in the pool table room on the floor plan.

[16] At trial, Mr. Deeley was shown the video recording of the incident. He acknowledged that the video did not depict his description of the shooting. In particular, the video did not show that the gunman was in the pool table room when he shot Mr. Wellman, or that the gunman stepped back after the shooting. More importantly, it did not show that the small table Mr. Wellman was holding connected with the gun at any time. Mr. Deeley explained that "it might have been a perception thing" (Transcript, Vol. IV, at 36).

[17] On cross-examination, defence counsel immediately focused on Mr. Deeley's evidence that he saw the small table Mr. Wellman was holding connect with the gun. Counsel drew Mr. Deeley's attention to his police statement given directly after the incident, and his evidence at the preliminary inquiry, given under oath, in which he had said the same thing. This evidence was important to Mr. Phillips, because his defence was that the small table did hit the gun and cause it to fire accidentally. From the start of his cross-examination of Mr. Deeley and repeatedly thereafter, counsel referred Mr. Deeley to his police statement and his testimony at the preliminary inquiry and emphasized the consistency of Mr. Deeley's evidence that the small table and the gun connected. Mr. Deeley confirmed and elaborated on the swinging and connecting of the small table and the gun. Defence counsel emphasized that Mr. Deeley's trial evidence was consistent with what he had said in his police statement and at the preliminary inquiry, and extracted Mr. Deeley's agreement that his statement and his preliminary inquiry evidence were truthful accounts given closer in time to the incident (Transcript, Vol. IV, at 49, 51 and 82). In fact counsel explained to the Court that his cross-examination in this regard was to show that Mr. Deeley's memory was accurate and that he was truthful at the times he made his prior consistent statements about the gun and small table connecting (Transcript, Vol. V, at 14).

[18] After cross-examination, the Crown was of the view that Mr. Deeley's evidence was unclear respecting his location in the bar and his vantage point from which he saw what he said he saw in his prior statements. Defence counsel had not questioned Mr. Deeley about his location in the bar or what his vantage point was when he said in his prior statements that he saw Mr. Wellman and the

gunman sparring. In the Crown's view, this lack of clarity respecting Mr. Deeley's location and vantage point left the impression that Mr. Deeley might have been able to see Mr. Wellman and the gunman from a better or different location when he said what he saw in prior statements.

[19] Accordingly, Crown counsel requested permission to redirect Mr. Deeley in order to clear up the confusion and confirm Mr. Deeley's location in the bar and vantage point when he saw what he said he saw in his prior statements. Defence counsel objected. Defence counsel argued that the Crown was trying to impeach its own witness by redirecting Mr. Deeley respecting where he was located in the bar and his vantage point when he saw what he said he saw. The Crown insisted that Mr. Deeley's evidence on cross-examination with respect to his vantage point and where he was standing when the gun was fired was left uncertain, and that the Crown had a right to redirect Mr. Deeley on this point to clear up the confusion.

[20] After argument and discussion among the parties and the Judge, the Judge permitted the Crown to redirect Mr. Deeley so as to clarify his evidence. She ordered the Crown's redirect examination to proceed in accordance with specific questions. On redirect examination, Mr. Deeley confirmed that he was located in the bar room near the VLT machine when he saw what he said he saw in his prior statements, and that he was unable to see into the restaurant table room from there. His evidence was consistent with his testimony on direct examination.

[21] The Judge's final instructions to the jury were provided to counsel in draft for review and comment before the jury was charged. No objection was taken to them. The record discloses that no offence was taken to the Judge's instructions after the jury was charged, and that defence counsel specifically commented that the Judge's instructions respecting Mr. Deeley's evidence were clear and balanced.

Mr. Phillips' Impeachment Argument

[22] Although not characterized as judicial error, Mr. Phillips' began his argument on appeal by asserting that the Crown called Mr. Deeley for the purpose of impeaching him. He relies on *R. v. Soobrian*, [1994] O.J. No. 2836, 21 O.R. (3d) 603 (Ont. C.A.), to support his position.

[23] Mr. Deeley was present in the bar when Mr. Wellman was shot, and gave a statement to police shortly thereafter. Accordingly, he was a material witness

to the incident and had considerable relevant evidence to give respecting what happened.

[24] While the Crown is not obliged to call every single witness whose evidence might be of relevance, it has the duty to tender all credible evidence that is relevant and admissible that bears on the central matters in dispute. In *Boucher v. The Queen*, [1955] S.C.R. 16, at 23-24, Rand J., of the Supreme Court of Canada put it this way:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly …

This does not mean that the Crown can cherry-pick which parts of a witness's evidence to tender and which to ignore or suppress. Nor does it mean that the Crown can excise parts of its witness's evidence it does not accept. Fairness requires that the witness's evidence be tendered intact, regardless of whether it is for or against the Crown.

[25] It is important to appreciate that any party which calls a witness, including the Crown, does not have to accept or endorse everything its witness says. At times a credible witness will have much relevant and reliable evidence to give, but may be mistaken on some details. Furthermore, a trier of fact makes a decision on the whole of the evidence and can accept all, some, or none of what any given witness says. In this case, that means that the Crown did not have to endorse or accept all Mr. Deeley's evidence, in particular that he saw the gunman's gun and the small table that Mr. Wellman was holding connect. Clearly the Crown did not accept that part of Mr. Deeley's evidence, because it tendered evidence that the small table and gun did not connect, and argued that the aspect of Mr. Deeley's evidence that the gun and small table connected was not reliable because it was refuted by the video recording.

[26] As well, there is no property in a witness. In a criminal trial, the Crown's disclosure obligations ensure that the defence knows of the witnesses that are involved in an investigation and what they are expected to say. If the Crown elects not to tender evidence from a particular witness, the defence would be free and able to do so. In this case, the Crown tendered Mr. Deeley at trial without interfering with what he said in his police statement and at the preliminary inquiry. Aside from being the fair and proper course of action, this approach arguably was to Mr. Phillips' advantage, in that it afforded him the

opportunity to cross-examine Mr. Deeley rather than to have to directly examine him.

[27] A word about Mr. Phillips' reliance on *Soobrian*. In *Soobrian* the Crown made a tactical decision to call a witness who was not credible and whose evidence was entirely unreliable so as to undermine the accused's case from the get-go. Such a tactical decision is not in accordance with the duty of the Crown as stated in *Boucher*. *Soobrian* does not meaningfully compare to this case.

[28] In the above circumstances, there is no merit to Mr. Phillips' argument that the Crown called Mr. Deeley to impeach him.

Mr. Phillips' Argument about the Video

[29] Related to Mr. Phillips' impeachment assertion, and also not framed as a ground of appeal, Mr. Phillips argues that in any event the video did not accurately depict what happened. He submits that the video operated at the slower than usual rate of one frame per second, and that this slower than usual recording did not capture the entire event; in particular, the video recording did not capture the table and the gun connecting.

[30] The possibility that a slower than usual video recording could miss crucial evidence was addressed by Jonathan W. Hak, Q.C. in *Frame Rate: Understanding the Impact of Frame Rate on Video Interpretation* (March 3, 2018). In essence, he explains that a video recording that captures an event at the rate of one frame per second could in theory miss something that happens between any two consecutive seconds of the recording. The time between two consecutive seconds is very short – something less than a second. Accordingly, in order for the missing time between any of two consecutive seconds of the video recording to be meaningful to Mr. Phillips' argument, the small table Mr. Wellman was holding would have had to have hit the gun two or three times and ultimately fall backward from Mr. Wellman's grasp onto the pool table in something less than a second. Such a scenario does not accord with logic or common sense. In any event, the uninterrupted video recording and the sequential still photographs of each second of the relevant part of the incident clearly show that when Mr. Wellman picked up the small table and lifted it to throw at the gunman, he was in the pool table room and the gunman was inside the table restaurant room some feet away from Mr. Wellman and into which Mr. Deeley was unable to see. Mr. Wellman was shot before the table left his hand and fell behind him onto the pool table. As Cory J. stated in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197, at para. 21 (S.C.C.), the video camera is a silent and

unbiased witness that accurately and dispassionately records what comes before it. In these circumstances it cannot be said that the video recording was unreliable evidence on which the jury could not rely.

[31] In any event, Mr. Deeley's evidence, the video recording, and Mr. Phillips' argument that the video recording at one frame per second did not accurately capture the shooting of Mr. Wellman were before the jury. It was for the jury to decide what evidence to accept and what to reject.

Did the Judge Err in Permitting the Crown to Redirect Mr. Deeley?

[32] In this case, the Judge agreed with the Crown that it should be able to clarify Mr. Deeley's evidence and she permitted the Crown to do so for the purpose of clearing up the confusion respecting his location in the bar and his vantage point when the shot that felled Mr. Wellman was fired.

[33] It is well established that redirect examination, or re-examination as it is often called, must relate to matters arising out of cross-examination which deal with new matters or with matters raised in examination-in-chief which require clarification or explanation as to questions put and answers given in cross-examination (*R. v. Evans*, [1993] 2 S.C.R. 629, at 644 (S.C.C.)). The principle was elaborated on by the Ontario Court of Appeal in *R. v. Stiers*, 2010 ONCA 382, at para. 38, where the Court quoted Watt J.A. in *R. v. Candir*, 2009 ONCA 915, at para. 148, saying:

> It is fundamental that the permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness has been cross-examined. The purpose of re-examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, …
>
> (Emphasis added.)

[34] In this case, the Crown's purpose in redirecting Mr. Deeley was to clarify his location in the bar and vantage point from which he saw what he said he saw in his prior statements. The redirect examination was to rehabilitate and explain Mr. Deeley's evidence of location and vantage point at all times material to his evidence, lest a different impression of his location and vantage point was left with the jury after cross-exanimation. Such redirect examination was entirely in order, and would have been even if Mr. Deeley's prior consistent statements had not been raised. But the prior consistent statements having been raised in cross-

examination is another reason why the Crown's redirect was appropriate. Mr. Phillips raised Mr. Deeley's prior consistent evidence in cross-examination, and the Crown was therefore entitled to examine Mr. Deeley regarding matters raised in cross-examination that are new. Accordingly, the Judge did not err in permitting the Crown to do so.

Did the Judge Err in Failing to Provide Limiting Instructions respecting Mr. Deeley's Evidence on Redirect Examination?

[35] Mr. Phillips argues that the Judge ought to have given the jury limiting instructions respecting the use it could make of Mr. Deeley's evidence on redirect respecting his location and vantage point from which he said what he saw in his statement to the police and his preliminary inquiry evidence.

[36] In a criminal investigation police statements are used to support the laying of charges and proceeding to trial. The statements are disclosed by the Crown to the defence, and both parties proceed to trial on the basis that the trial evidence of the witnesses who gave statements will be consistent with what they said in their statements. A witness's evidence at a preliminary inquiry is relied on by the preliminary inquiry judge in determining whether the Crown's case should proceed to trial. If an inquiry judge commits an accused for trial, the parties proceed to trial assuming that the evidence given by a witness at the preliminary inquiry will be consistent with the witness's trial evidence.

[37] A witness's police statement and preliminary inquiry evidence are both prior statements respecting that witness's evidence. If the witness's evidence at trial is consistent with what the witness said in the prior statements, then the prior statements are considered to be prior consistent statements. If the witness's evidence at trial differs from what the witness said in the prior statements, then the prior statements are considered to be prior inconsistent statements. There is a big difference between prior consistent statements and prior inconsistent statements when it comes to their use and admissibility at trial. Simply put, prior consistent statements are presumptively inadmissible and unable to be used to bolster a witness's credibility or the reliability of the witness's evidence, whereas prior inconsistent statements are admissible and can be used to challenge the credibility of a witness or the reliability of the witness's evidence.

[38] Prior consistent statements are inadmissible for the truth of their contents. They are considered to be self-serving, and are inadmissible for the purpose of bootstrapping a witness's evidence by enhancing the witness's credibility or the

reliability of the witness's evidence. The rationales for this exclusionary rule are that no witness should be able to create evidence by repetition, and more importantly, repeating evidence does not make it more truthful, reliable or credible (*R. v. Ellard*, 2009 SCC 27, [2009] 2 S.C.R. 19, at para. 31). Some exceptions to the exclusionary rule apply. When a witness is alleged to have recently fabricated evidence, prior consistent statements can be admitted to rebut the allegations of recent fabrication. As well, a prior statement is sometimes adduced as part of the trial narrative. While admissible, the prior statements are not able to be relied on for the truth of their contents. The exclusionary rule is applicable to any witness's evidence. It does not matter whether the witness is a Crown or defence witness; any witness's trial evidence does not become more truthful, credible or reliable by virtue of the witness's prior statements being consistent with the witness's trial evidence. (See *R. v. Stirling*, 2008 SCC 10, [2008] 1 S.C.R. 272, for a comprehensive discussion of the use of prior consistent statements.)

[39] Both the Crown and defence are able to refer to prior inconsistent statements at trial and question a witness about inconsistency with the witness's trial evidence. In particular, the defence has a wide latitude to plumb a Crown witness's prior inconsistent statements to get to the truth of an issue or expose a witness's untruthful, unreliable or incredible evidence. Such cross-examination is part of an accused's right to make full answer and defence. Prior inconsistent statements can also be admissible *per se* if adopted or proven, and if not adopted or proven, if in compliance with provisions of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

[40] In this case, on cross-examination, defence counsel repeatedly emphasized Mr. Deeley's prior consistent statements respecting the gun and the small table connecting. It is clear from counsel's persistent references to Mr. Deeley's prior statement and preliminary inquiry evidence, and that they were given closer in time to the actual incident, that counsel's objective was to underscore and bolster the reliability of Mr. Deeley's evidence that the small table and the gun connected. This emphasis would give greater effect to Mr. Phillips' defence that the small table hit the gun and caused it to discharge accidentally. Curiously, the Crown did not object to defence counsel's persistent questioning respecting Mr. Deeley's prior consistent statements. Neither did the Judge intervene. She could have, for it was obvious that the defence was emphasizing the consistency of Mr. Deeley's prior statements with his trial evidence that the gun and small table connected, and no inconsistency between his prior statements and his trial evidence was identified.

[41] When evidence of prior consistent statements is adduced in a trial, limiting instructions as to the use the jury can make of it are usually given. As the Supreme Court of Canada explained in *Ellard*, these instructions are generally that the previous statements are not to be used as evidence of the truth of their contents or for the purpose of bolstering the witness's credibility or reliability:

> [42] As previously noted, because there is a danger that the repetition of prior consistent statement may bolster a witness's reliability, a limiting instruction will almost always be required where such statements are admitted. The purpose of such an instruction is to tell the jury that consistency is not the same as accuracy, and that the statements can only be used to rebut the allegation of recent fabrication, not to support the fact at issue or the general reliability of the witness. [citations omitted]

[42] Mr. Phillips argues that the Crown redirected Mr. Deeley about where he was in the bar and his vantage point from which he saw what he said he saw in his police statement and at the preliminary inquiry, and that the Judge ought to have instructed the jury to disregard that redirected evidence. He did not ask for limiting instruction at trial, and in fact complimented the Judge on her balanced charge. Nevertheless the argument is a peculiar one for Mr. Phillips to make. It is peculiar because limiting instructions would have defeated the effect of the evidence respecting Mr. Deeley's prior consistent statements which Mr. Phillips adduced on cross-examination. Any limiting instructions would apply equally to the Crown and the defence. Mr. Phillips cannot adduce evidence respecting Mr. Deeley's prior consistent statements on cross-examination and then prevent the Crown from redirecting on it. Mr. Phillips raised the issue, and ought to know if he raises a new issue during cross-examination, the Crown has the right to redirect the witness on it (*Candir*, at para. 148).

[43] As noted above, the better place for addressing issues respecting Mr. Deeley's prior consistent statements was when defence counsel was cross-examining Mr. Deeley about them. Had that occurred, it may have prevented Mr. Deeley's prior consistent statements from being used in cross-examination, and may have prevented the need for redirect examination. It is not as if Mr. Phillips was denied his right to make full answer and defence without reference to Mr. Deeley's prior consistent statements. He had ample opportunity to emphasize Mr. Deeley's direct evidence that the table and gun connected without reference to his prior consistent statements.

[44] In the result, Mr. Phillips has not shown that the Judge erred in failing to give limiting instructions respecting the jury's use of Mr. Deeley's prior consistent statements adduced during his redirect examination.

WAS THE JURY VERDICT UNREASONABLE?

[45] The law respecting whether a jury verdict of guilt is unreasonable is well-established. The test was set out in *R. v. Yebes*, [1987] 2 S.C.R. 168 (S.C.C.), clarified in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, and further explained in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000. The test is whether the verdict is one which a properly instructed jury, acting judicially, could reasonably have rendered. Application of the test involves an appellate court's consideration of the totality of the evidence available to the jury. The test is highly deferential to the fact-finding role of the jury (*R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180, at paras. 2 and 25-29; and *Villaroman*, at paras. 55-56).

[46] In *Villaroman*, Cromwell J. explained how the test for unreasonable verdict is applied when a conviction is based on circumstantial evidence. He said:

> [55] A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381. Applying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence: *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 186. This limited weighing of the evidence on appeal must be done in light of the standard of proof in a criminal case. Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence: *Yebes* , at p. 186; *R. v. Mars* (2006), 205 C.C.C. (3d) 376 (Ont. C.A.), at para. 4; *R. v. Liu* (1989), 95 A.R. 201 (Alta. C.A.), at para. 13; *R. v. S.L.R.*, 2003 ABCA 148 (CanLII); *R. v. Cardinal* (1990), 106 A.R. 91 (C.A.); *R. v. Kaysaywaysemat* (1992), 97 Sask. R. 66 (C.A.), at paras. 28 and 31.
>
> [56] The governing principle was nicely summarized by the Alberta Court of Appeal in *Dipnarine*, [2014 ABCA 328,] at para. 22. The court noted that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences" and that a verdict is not unreasonable simply because "the alternatives do not raise a doubt" in the jury's mind. Most importantly, "[i]t is still fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt."

[47] In a criminal trial the Crown must prove identity, that is, that the person charged with the crime is the person who committed the crime. In this case, the gunman's face was masked, and the evidence tendered to support that Mr. Phillips was the gunman was circumstantial. Accordingly, the jury had to be

reasonably satisfied, on the whole of the evidence, that the only reasonable conclusion available to them was that Mr. Phillips was the gunman.

[48] A word about circumstantial evidence. The fact that the evidence supporting the jury's conclusion that Mr. Phillips was the gunman was circumstantial does not mean that every piece of circumstantial evidence implicating Mr. Phillips must be proved beyond a reasonable doubt. What it means is that the whole of the evidence — all of the evidence taken together — proved to the jury beyond a reasonable doubt that Mr. Phillips was the gunman.

[49] Accordingly, on appeal, this Court's role is to determine whether there was evidence upon which the jury, acting judicially, could reasonably be satisfied that the only conclusion available to them was that Mr. Phillips was the gunman. If so, the jury's verdict must stand. If not, the verdict would be unreasonable. It is not this Court's role to substitute the jury's verdict with a verdict it believes is more reasonable, or better (*W.H.*, at para. 27).

[50] The Crown has the burden to prove its case beyond a reasonable doubt regardless of whether the accused has testified or called other defence evidence. A jury is not permitted to use an accused's failure to testify to support a finding of guilt. However, an appellate court is entitled to consider whether an accused testified in his own defence when determining whether a jury verdict is reasonable (*R. v. George-Nurse*, 2019 SCC 12, [2019] 1 S.C.R. 570, at para. 2).

Analysis

[51] As noted above, Mr. Phillips did not request a directed verdict of acquittal respecting second degree murder at the close of the Crown's case. The Crown argues that his failure to request this directed verdict weakens his argument that the jury verdict was unreasonable.

[52] The tests for directed verdict and unreasonable verdict are similar but not identical. They both require a determination of whether the evidence could support a finding of guilt. However, the test for a directed verdict is based on the evidence adduced in the Crown's case only, whereas the test for unreasonable verdict is based on all of the trial evidence, and generally involves considerations of credibility and the traditional dangers to which the lens of judicial experience must be applied (*W.H.*, at paras. 28-29 and 32).

[53] The only evidence in this case was adduced by the Crown. The Crown maintains that Mr. Phillips' argument that the Crown's evidence did not establish his identity could have been made at the close of the Crown's case,

because it does not rest on credibility concerns or traditional dangers which warrant judicial scrutiny. While that may be so, it does not preclude him from making his unreasonable verdict argument on appeal.

[54] Mr. Phillips argues that the jury verdict was unreasonable because the evidence showed that another person could have been the gunman. Mr. Phillips says that the DNA belonging to others found on the sneaker that also contained Mr. Wellman's DNA, and the DNA belonging to others found on the gun taken in the search of 30A Quidi Vidi Road, support a rational inference that another person, unknown and unidentified, could have been the gunman. This means, in Mr. Phillips' submission, that his guilt was not the only reasonable conclusion available to the jury, so accordingly, the jury verdict cannot stand. Mr. Phillips supports his position by arguing that there was no evidence that he had a motive to commit the crime.

[55] Mr. Phillips made his identity argument at trial, so the jury's task was to consider Mr. Phillips' contention that the existence of DNA belonging to others on some of the exhibits raised a reasonable doubt about Mr. Phillips being the gunman. The jury was not convinced.

[56] In my view, the jury verdict of guilt was not unreasonable. It was not unreasonable because there was ample evidence supporting the decision that Mr. Phillips was the gunman, and the jury did not have to totally exclude other conceivable inferences from the evidence, like the inference that the unidentified DNA on some exhibits gave rise to a reasonable doubt about Mr. Phillips' identity as the gunman.

[57] The audio and visual recordings, as well as the testifying witnesses, established what happened at the bar. The audio recording captured the sound of the incident completely, including the words uttered by the gunman, and the video recording captured the event, which depicted the location and actions of the gunman, Mr. Wellman, and some other witnesses, as well as the gun used by the gunman.

[58] The evidence respecting Mr. Phillips' identity was plenty. The evidence from the eye witnesses in the bar was that the gunman's face was covered by a makeshift balaclava, which was a toque-like knit hat with holes cut in it. The makeshift balaclava, found near the hotel shortly after the murder, contained Mr. Phillips' DNA and gunshot reside. The balaclava alone is compelling evidence implicating Mr. Phillips (see *R. v. O'Brien*, 2010 NSCA 61, wherein the appellate court ruled that the accused's DNA found on the mask used in the

robbery was sufficient to support the reasonableness of the jury's verdict of guilt). Both Mr. Wellman's DNA (from a blood spot) and Mr. Phillips' DNA were found on one of a pair of sneakers taken by police in their search of 30A Quidi Vidi Road. The broken shotgun found hidden at 30A Quidi Vidi Road resembled the gun depicted in the video of the incident, and the evidence showed that its broken wooden stock matched the pieces of wooden gunstock left behind at the bar. As well, a shotgun shell found at 30A Quidi Vidi Road bore Mr. Phillips' DNA and contained the same size shot as the shot taken from Mr. Wellman's body.

[59] Mr. Phillips did not provide any evidence respecting how the sneaker found at 30A Quidi Vidi Road came to contain his DNA and that of another along with the blood of Mr. Wellman, or how the shotgun shell came to contain his DNA. There was no evidence respecting who might own the unidentified DNA found on the gun, nor was there evidence respecting how another's DNA came to be found with that of Mr. Phillips and Mr. Wellman on the sneaker.

[60] Mr. Phillips' contention that the DNA evidence suggests that another person could have been the gunman is based on a strained view of the evidence. While the contention might be conceivable, it loses force in light of the totality of the evidence and especially in light of the fact that the DNA on the balaclava was only that of Mr. Phillips.

[61] This case falls squarely within the reasoning of the Supreme Court of Canada in *Villaroman*, that the circumstantial evidence adduced does not have to "totally exclude other conceivable inferences" or that "a verdict is not unreasonable simply because 'the alternatives do not raise a reasonable doubt' in the jury's mind" (*Villaroman*, at para. 56). It is for the jury to decide whether an alternate inference from the evidence is sufficient to raise a reasonable doubt (*Villaroman*, at para. 56). Mr. Phillips' argument respecting the DNA and an alternate gunman was argued before the jury, and the jury rejected it because it did not raise a reasonable doubt about Mr. Phillips being the gunman.

[62] Mr. Phillips supports his identity argument by saying that the Crown did not adduce any evidence of motivation, which he submitted is an important factor in a circumstantial case.

[63] Motive to rob or murder is not an element of the offence of murder. Rather, motive is evidence of ulterior intention (*R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579). It is often advanced as the reason why a crime is committed. While motive may support intent, it does not prove intent (*Lewis v.*

The Queen, [1979] 2 S.C.R. 821, at 831-35 (S.C.C.)). The Court in *R. v. McDonald*, 2017 ONCA 568, at para. 72, put it nicely: "evidence of motive is a species of circumstantial evidence used to prove, or assist in proving, a human act". It goes to the state of mind of an accused.

[64] Evidence of proved motivation or lack of proved motivation may be relevant to any criminal case, including a case based on circumstantial evidence, but the fact that the Crown did not adduce evidence that Mr. Phillips was motivated to rob or murder does not assist Mr. Phillips in this case. The Crown did not seek to prove that Mr. Phillips had a motive to commit the crime, like a particular need for money, and the defence did not seek to prove that Mr. Phillips did not have any motive to commit the crime, like he did not need or want money. Nor was there evidence that anyone else had a motive to rob the Captain's Quarters bar. Although the gunman appeared desperate for the money, motive played no role in this case. Having played no role, it is not a relevant factor in this Court's analysis of whether the jury verdict is reasonable (see *Lewis*, at 841).

[65] In summary, there was ample circumstantial evidence on which the jury could judicially conclude that Mr. Phillips' guilt was the only reasonable verdict available to them. Accordingly, I would not give effect to Mr. Phillips' argument that the jury verdict was unreasonable.

DISPOSITION

[66] In the result, Mr. Phillips has not demonstrated that the Judge erred in her handling of Mr. Deeley's evidence, or that the jury verdict was unreasonable. Accordingly, I would dismiss Mr. Phillips' appeal. In these circumstances it is not necessary to deal with the Crown's cross-appeal.

L.R. Hoegg J.A.

I concur:
D.E. Fry, C.J.N.L.

I concur:
W.H. Goodridge J.A.