COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *R. v. Lange*,
2011 YKCA 7

Date: 20110923
Dockets: YU0569 & YU0570

Docket: YU0569

Between:

Regina

Respondent

And

Mark Lewis Lange

Appellant

- and -

Docket: YU0570

Between:

Regina

Respondent

And

Dean Ernest Boucher
also known as Johns

Appellant

Before: The Honourable Madam Justice Rowles
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of the Yukon Territory, June 9, 2006,
(*R. v. Lange*; *R. v. Boucher*; S.C. No. 05-01508)

Counsel for the Appellant, Mark Lange:	K. Wenckebach
The Appellant, Dean Boucher	In Person
Amicus Curiae	R. Fowler J. Cunningham
Counsel for the Respondent	D. McWhinnie
Place and Date of Hearing:	Whitehorse, Yukon Territory May 16 & 17, 2011
Place and Date of Judgment:	Vancouver, British Columbia September 23, 2011

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] Robert Olson was brutally beaten to death in the early morning hours of December 24, 2004.

[2] Dean Boucher and Mark Lange were jointly tried for the murder of Mr. Olson and were convicted by a jury on June 9, 2006. They appealed their convictions. Mr. Boucher parted ways with his counsel, Ms. Cunningham, at some point prior to the hearing of the appeals. She was appointed *amicus curiae*, as was Mr. Fowler. *Amicus* raised a new point at the hearing of the appeals and, upon reflection overnight, the Crown (correctly in my view) conceded that the appeals should both be allowed and a new trial ordered. As a result of the concessions, the Court allowed the appeals of both appellants and ordered a new trial, with reasons to follow.

Overview of the Evidence and Proceedings

[3] Mr. Olson owned the Caribou Hotel in Carcross, Yukon. The hotel had a bar area on the main floor and some rooms upstairs. The hotel and bar had been closed early in December 2004 and Mr. Olson was trying to sell it. On the night of December 23 and the early morning of December 24, Mr. Boucher and Mr. Lange were drinking with Mr. Olson in the bar. A fight occurred and Mr. Olson died as a result of kicks and punches to his head and neck, which were inflicted with considerable force. At some point Mr. Boucher took some art work from the bar and put it in the back of Mr. Olson's truck.

[4] Mr. Lange and Mr. Boucher placed Mr. Olson in the back of Mr. Olson's truck and drove towards Whitehorse. They dumped Mr. Olson's body in a snow-covered ditch near a subdivision. Shortly after, they drove Mr. Olson's truck into a ditch. They walked to a gas station and called a taxi, which took them into Whitehorse.

[5] In the afternoon of December 24, neighbours reported a break-in at the Caribou Hotel to the police. A police officer attended and discovered the door to the

hotel open, a large quantity of blood in the bar area, chairs upset and Mr. Olson and his truck missing.

[6] Mr. Olson's truck was found on December 27 at 9:30 a.m. Mr. Boucher arrived at the police station in Whitehorse on December 27, in the afternoon, and gave his first of four statements to the police. He told the police that Mr. Olson was dead, but he had died accidentally. Mr. Boucher claimed that he had heard this from others, and said he was not present when the incident occurred. Later in the statement he admitted he was in the hotel, but was not present when the "other" person, (eventually identified as Mr. Lange), fought with Mr. Olson. Mr. Boucher maintained that he had tried to save Mr. Olson by performing CPR and said that he initially revived Mr. Olson.

[7] Mr. Boucher attempted to assist the police to find Mr. Olson's body. Mr. Boucher appeared confused about where they had left Mr. Olson, but that evening, Mr. Olson's body was located approximately a block from where Mr. Boucher had directed the police.

[8] Mr. Boucher gave two more statements, (one each on December 27 and 28), in which he gradually admitted being present at the beating of Mr. Olson, but maintained that he did not participate in the fight, and that Mr. Olson's death was an accident. He said that he and Mr. Lange were drinking with Mr. Olson and that he, Mr. Boucher, took Mr. Olson's truck keys. He said when Mr. Olson realized that the keys were gone, Mr. Olson said he was calling the police. Mr. Boucher said that Mr. Lange and Mr. Olson fought and Mr. Olson hit his head. He maintained he revived him, and then stole various pieces of art work from the hotel to sell. When he checked again on Mr. Olson, Mr. Olson was dead. They panicked and decided to dump the body.

[9] On December 30, Mr. Lange surrendered to the police. Mr. Lange provided two statements to the police between December 30-31. He told the police that he and Mr. Boucher were drinking with Mr. Olson. He said that Mr. Boucher wanted some of Mr. Olson's art work and Mr. Olson refused. Mr. Lange said that

Mr. Boucher kicked and punched Mr. Olson, and then told Mr. Lange to watch Mr. Olson. Mr. Lange said he intended to help Mr. Olson, but Mr. Olson scratched his face and Mr. Lange kicked and punched Mr. Olson in response. Mr. Lange said that Mr. Boucher then delivered a "football kick" to Mr. Olson. He said that Mr. Olson was still alive when they put him in the truck, but when they discovered he was dead, they dumped his body. Mr. Lange said Mr. Boucher had threatened him and he was afraid of Mr. Boucher.

[10] Mr. Lange also participated in a re-enactment of the crime with the police.

[11] The police approached Mr. Boucher on January 6 for another statement and asked if he would perform a re-enactment. Mr. Boucher told the police that Mr. Olson struck Mr. Lange first, with a piece of wood or an axe handle. He said he told Mr. Olson that he was taking Mr. Olson's truck to go to Whitehorse to buy cocaine. The police then hinted that Mr. Lange may have told them a different story, and Mr. Boucher requested to speak to a lawyer before he spoke with the police further.

[12] All of the statements were admitted into evidence at trial, by consent, without a *voir dire* and without editing.

[13] Mr. Boucher was the only accused who testified at trial. He testified that he and Mr. Lange knocked on the door of the Caribou Hotel on the night of December 23. Mr. Olson let them in and gave them drinks. At one point Mr. Olson told Mr. Lange to leave the bar because of allegations that Mr. Lange was previously involved in a sexual assault of Mr. Boucher's girlfriend. Mr. Lange returned and wanted Mr. Olson to drive them to Whitehorse. When Mr. Olson refused, Mr. Lange said he would take Mr. Olson's truck. Mr. Boucher testified that he "heard" Mr. Lange being hit with something and "the fight was on". Mr. Boucher testified that he eventually tried to help Mr. Olson and protect him from Mr. Lange.

[14] At the opening of the trial, both appellants tendered pleas of guilty to the included offence of manslaughter. The Crown did not accept the pleas. However,

by the end of the trial, the issues were: which of the accused caused the death of Mr. Olson, (or whether both caused his death), and the level of liability (if any) borne by each. Both accused had retreated from the admission of manslaughter, which necessarily included an admission of the commission of an unlawful act with the objective foresight of risk of harm. The manner in which the evidence was tendered by the Crown and defence, as well as the theories of the parties, created a very difficult task for the trial judge. He was required to craft a charge which addressed the factual causation issues, the use of multiple statements involving "cut-throat defences", the culpability of each accused depending on what evidence was accepted by the jury, whether the accused were principals or parties pursuant to the party provisions of the *Criminal Code* (ss. 21(1) and/or (2)), plus the defence of intoxication for both accused and the defence of duress for Mr. Lange. The question that needed to be addressed in the charge to the jury was, as put by Mr. Fowler, "Who did what when, with what state of mind"?

[15] On the evidence, Mr. Boucher or Mr. Lange could be acquitted, found guilty of murder as a principal or co-principal (s. 21(1)(a)) or as a party as an aider (s. 21(1)(b)) or as an abettor (s. 21(1)(c)), a party under s. 21(2) based on a common intention to commit theft of the truck or art work, manslaughter based on intoxication, or manslaughter based on lack of intent to commit murder. Mr. Lange could be acquitted based on the common law defence of duress if the jury found he was a party to the offence of murder. In addition, one could be convicted of murder and one could be convicted of manslaughter or acquitted.

[16] In addition to the many potential outcomes, the evidence almost solely rested on the statements of the two appellants and the evidence of Mr. Boucher. Thus each potential outcome needed to be carved out and related to the evidence admissible against each accused. In short, this was an extremely difficult jury charge to craft.

[17] Neither appellant applied for severance.

[18] The trial judge provided the charge to the jury in writing, along with a verdict sheet upon which they could record their verdict, and a decision tree, which was intended to provide a route of analysis to the various available verdicts.

[19] In my respectful view, the jury charge was fraught with problems. The Crown conceded that the instruction on intoxication and the instruction on modes of participation, with particular reference to the decision tree, constituted reversible error.

Issues on Appeal

[20] The issues on appeal are many:

A. Errors alleged on Mr. Boucher's behalf by *amicus curiae*:

   A. Propensity Evidence of the Appellant:

      i) The trial judge erred in his ruling by not properly analyzing whether the prejudicial effect substantially outweighed the probative value of the intended cross-examination of the appellant about his bad character.

      ii) The trial judge erred in allowing bad character evidence to be elicited about the appellant without a *voir dire*.

      iii) The trial judge erred during a mid-trial instruction on bad character of the appellant by telling the jury that the cross-examination questions themselves were evidence.

      iv) The trial judge erred by failing to include a proper instruction in the charge to the jury about all of the propensity evidence concerning the appellant and its proper use in a joint trial.

   B. The trial judge erred in misdirecting the jury on the use of the co-accused's out-of-court statements.

   C. The trial judge failed to charge the jury on the appellant's pre-trial silence.

D. The trial judge failed to instruct the jury that the post-offence conduct relied on by the Crown had no probative value on the mental state of the appellant at the time the unlawful act was committed.

E. The trial judge erred in his instructions about intoxication.

F. The trial judge failed to instruct the jury properly on the issue of intent for the state of mind for murder.

G. The trial judge failed to instruct the jury to disregard a prejudicial closing submission.

H. The trial judge erred by not conducting an inquiry to examine how closely acquainted the jurors were with Crown counsel and created a reasonable apprehension of bias.

B. Errors alleged by Mr. Lange:

A. Propensity Evidence

i. The Appellant was prejudiced through the introduction of evidence by Mr. Boucher that the Appellant had committed sexual assault.

ii. The trial judge compounded the error by not instructing the jury to disregard the bad character evidence.

B. Post-Offence Conduct

i. The trial judge erred in not giving the jury a “no probative value” instruction on the basis that the Appellant’s post-offence conduct was equally consistent with the Appellant’s involvement in a severe assault on Mr. Olson as with the Appellant’s culpability for his death.

ii. Alternatively, the judge erred in misdirecting the jury by not instructing it that post-offence conduct cannot be used to determine the Appellant's level of culpability.

iii. The trial judge further erred in not giving meaningful direction to the jury with regard to the possibility that the Appellant's post-offence conduct could have been as a result of his fear of Mr. Boucher.

C. The trial judge erred in his failure to instruct the jury that the *mens rea* for murder has to be contemporaneous with the *actus reus* of murder.

D. The judge erred in instructing the jury it could use Mr. Boucher's statements to the police to determine whether the Appellant had formed a common unlawful purpose with Mr. Boucher.

E. The trial judge erred in his instructions about intoxication.

F. There is fresh evidence consisting of sworn testimony provided by Mr. Boucher at sentencing in which he takes blame for the offence, and which could reasonably be expected to affect the outcome of the case.

G. The trial judge erred in failing to make sufficient inquiries about the independence of several jurors.

[21] The ground relating to jury selection was abandoned by both appellants at the commencement of the hearing of the appeal.

[22] In addition, Mr. Boucher raised issues regarding the competence of the counsel in the court below (who was not counsel on the appeal). However, these grounds were abandoned by Mr. Boucher at the beginning of the appeal, as he was content to rely on the grounds as argued by *amicus curiae*.

[23] As noted, the Crown conceded that a new trial is required. The concessions related to the instruction on intoxication and the misleading effect of the decision tree

provided by the judge. As a result, I propose to primarily address these two grounds. The other grounds were argued fully in the factums, but not addressed by the Crown in oral argument except with brief reference to the instructions relating to *mens rea* and parties. I need to address this point in the context of the issues relating to the decision tree. As there will be a new trial, I propose to only briefly address some of the other issues.

Relevant Legislation

[24] The appellants were charged with second degree murder:

> 222. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> (2) Homicide is culpable or not culpable.
>
> (3) Homicide that is not culpable is not an offence.
>
> (4) Culpable homicide is murder or manslaughter or infanticide.
>
> (5) A person commits culpable homicide when he causes the death of a human being,
>
> (*a*) by means of an unlawful act;
>
> ...
>
> 229. Culpable homicide is murder
>
> (*a*) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
>
> ...

[25] Included in murder is the offence of manslaughter:

> 234. Culpable homicide that is not murder or infanticide is manslaughter.

[26] The evidence disclosed that the appellants could be liable through the principal or party provisions of the *Criminal Code*:

> 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.

> (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.

Modes of Participation and the Decision Tree

[27] On the evidence tendered at trial, Mr. Lange could have been found guilty of murder (based on the evidence of Mr. Boucher, Mr. Lange's statements and Mr. Lange's DNA, which was found under Mr. Olson's fingernail) as either a principal (s. 21(1)(a)); or as a party (s. 21(1)(b), (c), or s. 21(2)). He could have been found guilty of manslaughter (based on his statement to the police admitting that he assaulted Mr. Olson, without the required intent to commit murder); or as a result of the application of the intoxication defence. He could have been acquitted on the basis of duress had the jury found that he had committed the offence of murder or manslaughter as a party.

[28] Similarly, Mr. Boucher could have been found guilty of murder as a principal (s. 21(1)(a)), based on the circumstantial evidence of blood on his shoes and hands; as a party (s. 21(b), (c) or s. 21(2)), based on his own evidence and the circumstantial evidence. He could also have been found guilty of manslaughter based on a version of his evidence or on the application of the defence of intoxication, or he could have been acquitted.

[29] The above routes to liability are not exhaustive.

[30] The following is the trial judge's instruction on the principal and party provisions in the *Criminal Code*:

> Joint Principals
>
> [132] The case for the Crown is that Mr. Boucher and Mr. Lange committed this offence together.
>
> [133] Where a criminal offence is committed by two or more persons, each may play a different part. If they are acting together, as part of a joint plan or agreement to commit the offence, each may be found guilty of it.

[134] An example may illustrate what I mean. If A and B together attack C, intending to kill him, and the combined effect of their blows is to kill him, both A and B would be guilty of murder. Each contributed to C's death. Each intended to kill him. Each has committed murder. You do not need to be unanimous as to the particular nature of each accused's participation in the offence.

[135] It is important to remember, however, that although Mr. Boucher and Mr. Lange have been charged and are being tried together, each is a separate individual who cannot be found guilty of any offence, unless the evidence relating to him proves his guilt of that offence beyond a reasonable doubt. Each accused person is entitled to separate consideration. Each is entitled to have his case decided on the basis of his own conduct and state of mind and from the evidence that may apply to him.

Aiding

[136] A person may be found guilty of an offence because he *helped* somebody else to commit it. We describe those who help others commit crimes in this way as *aiders*. An *aider* may also be referred to as a *party* to the commission of an offence by another.

[137] An *aider* may help another person commit an offence by doing something or failing to do something. It is *not* enough that what the aider does or fails to do has the *effect* of helping the other person commit the offence. The aider must *intend* to help the other person commit the offence. Actual assistance is necessary.

[138] It is not enough that a person was simply there when a crime was committed by someone else. In other words, just being there does *not* make a person guilty as an aider of any or every crime somebody else commits in the person's presence. Sometimes, people *are* in the wrong place at the wrong time.

[139] On the other hand, if a person

- knows that someone intends to commit an offence; and
- goes to or is present at a place when the offence is committed

to help the other person commit the offence, that person is an aider of the other's offence and is equally guilty of it.

[140] Aiding relates to a specific offence. An aider must intend that the offence be committed, or know that the other person intends to commit it and intend to help that person accomplish his goal.

Abetting

[141] Persons who encourage others to commit an offence may also be found guilty of the offence they encourage. We describe those who encourage as abettors. Similarly, an *abettor* may also be referred to as a *party* to the commission of an offence by another.

[142] There are two parts to abetting. First of all, there must be actual encouragement by words, conduct or both. Second, the person who offers

encouragement must intend to encourage the other person to commit the offence. It is not enough that what the abettor does or says has the *effect* of encouraging the other person to commit the offence. By what he says or does, the abettor must also *intend* to encourage the other person to commit the crime.

[143] It is not enough that a person was simply there when the crime was committed by somebody else. In other words, just being there does not make someone guilty as an abettor of any crime the other person commits. Sometimes, people just end up in the wrong place at the wrong time.

[144] On the other hand, if a person

- knows that someone intends to commit a crime; and
- goes to or is present at a place to encourage that other person to commit the crime,

that person who encourages is also guilty of the crime the other commits.

[145] Abetting relates to a specific offence. An abettor must intend that the other person commit the offence or know that the other person intends to commit it and intend to encourage that other person to do so.

Common Purpose

[146] In some circumstances, a person who has agreed with another person to do something unlawful may be found guilty of, and party to, another crime committed by the other person in carrying out their original agreement. In other words, when two persons join together in a criminal venture, each may be responsible for what the other does pursuing their original goal.

[147] This basis of establishing a person's guilt has three elements that may be briefly described as:

i. agreement;

ii. offence; and

iii. knowledge.

[148] Each must be proven beyond a reasonable doubt before you can find either accused person guilty of murder on this basis.

[149] The first element, *agreement*, requires Crown counsel to prove beyond a reasonable doubt that Mr. Boucher and Mr. Lange agreed that they would steal Robert Olson's truck, or that they agreed they would assault Mr. Olson and/or steal his art work, and help each other to do so.

[150] By 'agreement', I do *not* mean that there has to be any formal, written plan or agreement in place between the accused persons. The agreement may arise on the spur of the moment, even at the time the offence is committed or, it could have been made at some earlier time. Something may but does not have to be said about it at all. It can be made with a nod and a wink, or a knowing look. Or you may consider that it has been established because of the way in which the participants acted.

[151] To determine whether there was an agreement between Mr. Boucher and Mr. Lange and what it included, you should consider all the evidence

admissible against each accused. You should take into account, for example,

- *what* each person did or did not do;
- *how* each person did or did not do it; and
- *what* each person said or did not say.

[152] You should look at each person's words and conduct before, at the time of, and after the offence charged was committed. All these things, and the circumstances in which they happened, may shed light on the question of whether there was an agreement and, if so, what it involved. Use your good common sense.

[153] Here, you may want to refer to the evidence of Mr. Wren and Mr. Coldwell. Mr. Wren said that when he asked Mr. Boucher about the blood on his hands, Mr. Boucher said he got into an argument with his sister over getting their vehicle stuck. He said he backhanded her and she bled profusely on his hands. Mr. Coldwell said Mr. Lange said something to Mr. Wren about Dean hitting his sister and that she was tough.

[154] In deciding whether Mr. Boucher had formed an intention in common with Mr. Lange to steal Mr. Olson's truck, or to assault Mr. Olson and/or steal his art work, you must disregard the statements made by Mr. Lange to the police. In deciding whether Mr. Lange had formed an intention in common with Mr. Boucher to steal Mr. Olson's truck, or to assault Mr. Olson and/or steal his art work, you must disregard the statements made by Mr. Boucher to the police, unless Mr. Boucher adopted such statements as true during his testimony. In deciding whether there was a common intention between the accused, you need to be satisfied beyond a reasonable doubt that both of the accused had the same intention.

[155] The second element, *offence*, requires proof that one of the persons who was part of the original agreement to steal Robert Olson's truck, assault him and/or steal his art work, but not the other, committed murder or manslaughter in carrying out the original agreement.

[156] The offence committed, murder or manslaughter, must occur in the course of carrying out the original agreement or plan. It must also be a crime other than the one that those involved agreed on in the first place. The offence committed, in other words, must be one that the members of the original agreement did not set out to commit, but one that still took place in the course of carrying out their original agreement or plan.

[157] The third element, *knowledge*, may be proven as follows.

[158] Crown counsel may prove that either accused person *actually* knew that the other accused person who participated in the original agreement would probably commit murder or manslaughter in carrying out their original agreement. Probably means likely, *not* just possibly.

[159] Knowledge is a state of mind, the accused person's state of mind. To know something is to be aware of it. Did either accused person *know* that the other would probably commit murder or manslaughter in carrying out their original agreement?

> [160] To determine what either accused person actually knew about the likelihood of the other committing murder or manslaughter in carrying out the original agreement, you look at that accused person's words and conduct before, at the time and after the other accused person committed murder or manslaughter. All these things and the circumstances in which they occurred, may shed light on the first accused's knowledge or otherwise of the second accused's commission of murder or manslaughter. Use your good common sense.
>
> [161] A simple illustration may help you to understand better how this basis of proving a person's guilt works. A and B agree to rob a store. A's role is to enter the store and hold up the manager. B is to drive the getaway car. A and B drive to the store. A enters. B stays in the car outside. The motor of the car is running. A demands money from the manager. The manager resists A's demands. A picks up an ashtray and beats the manager to death. A runs out of the store. A and B drive away. Both are later charged with second degree murder.
>
> [162] A and B *agreed* to commit *robbery* and to help each other to do so. In carrying out their original agreement or plan, A has committed an *offence*: he unlawfully killed the manager.
>
> [163] A is the person who unlawfully killed the manager. A's crime will be second degree murder, if Crown counsel can prove beyond a reasonable doubt that A meant to kill the manager, or meant to cause him or her bodily harm that A knew would likely kill the manager and didn't care whether he or she died or not.
>
> [164] For B to be guilty of second degree murder in these circumstances, Crown counsel will have to prove beyond a reasonable doubt that B *actually* knew that it was *likely* that A, in carrying out their original agreement or plan to rob the manager, would intentionally kill the manager or intentionally cause the manager bodily harm that A *knew* would likely kill him and not care whether the manager died or not.
>
> [165] On the evidence you heard, you may not be able to decide whether Mr. Lange or Mr. Boucher committed the ultimate offence of murder or manslaughter. If you reach the conclusion that Mr. Lange and Mr. Boucher knew that the offence of murder or manslaughter was a probable consequence of carrying out their common unlawful purpose of stealing Mr. Olson's truck, assaulting him and/or stealing his art work, then you are justified in finding both guilty of the offence of murder.
>
> [Emphasis in original.]

[31] The trial judge instructed the jury on the party provisions in the *Criminal Code* prior to instructing the jury on the elements of the offence. As can be seen above, the party instruction in relation to common purpose under s. 21(2) conflates the offence of murder with manslaughter. The jury needed to be instructed on the route

to murder or manslaughter as a party separately, as the state of mind (or *mens rea)* is quite different for each as discussed below.

[32] In addition, he did not specifically address how one accused could be a principal in the murder offence, while the other could only have the *mens rea* for manslaughter.

[33] The intention required to commit manslaughter is set out in *R. v. Creighton*, [1993] 3 S.C.R. 3 at 42-3 by McLachlin J. (as she then was) writing for herself and L'Heureux-Dubé, Gonthier, and Cory JJ.:

> The cases establish that in addition to the *actus reus* and *mens rea* associated with the underlying act, all that is required to support a manslaughter conviction is reasonable foreseeability of the risk of bodily harm. While s. 222(5)(a) does not expressly require foreseeable bodily harm, it has been so interpreted: see *R. v. DeSousa*, *supra*. The unlawful act must be objectively dangerous, that is likely to injure another person. The law of unlawful act manslaughter has not, however, gone so far as to require foreseeability of death. The same is true for manslaughter predicated on criminal negligence; while criminal negligence, *infra*, requires a marked departure from the standards of a reasonable person in all the circumstances, it does not require foreseeability of death.

[34] The trial judge did not instruct the jury on the *mens rea* for the offence of manslaughter. *Mens rea* was particularly relevant in this case where one accused could be found guilty of murder while the other could be found guilty of manslaughter (or acquitted). There was a danger that the jury could find one or both appellants guilty of murder when one or both had only the state of mind required for manslaughter.

[35] Where death was caused by a beating (as in this case), the question of foreseeability of death (the *mens rea* for murder) versus the reasonable foreseeability of the risk of bodily harm (the *mens rea* for manslaughter), takes on some importance.

[36] In addition, the jury was not instructed on the potential liability of the accused for manslaughter through the party provisions. I will elaborate. In *R. v. Jackson*, [1993] 4 S.C.R. 573, two accused, Mr. Jackson and Mr. Davy, were charged with first degree murder of Mr. Rae. As in this case, the evidence in *Jackson* potentially

raised a number of scenarios, depending on what evidence the jury accepted and what weight was ascribed to the evidence. In Mr. Davy's case, the jury could find that he aided or abetted Jackson in the killing of Mr. Rae. If they concluded that he had the *mens rea* for murder, he could be guilty of murder. If he did not have the intent to commit murder, the Court concluded that he could be guilty of manslaughter through the application of s. 21(b) or 21(c). In reaching this conclusion, McLachlin J. said for the majority, at 583:

> I conclude that a person may be convicted of manslaughter who aids and abets another person in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken. I further conclude that Davy might fall within this rule on the evidence presented at trial.

[37] Madam Justice McLachlin then considered the potential liability of a party for manslaughter through the application of s. 21(2) when the principal was guilty of murder. She concluded that a person could be guilty of manslaughter in those circumstances. She examined the appropriate *mens rea* for the offence and found at p. 587, that it is the "objective awareness of the risk of harm". Thus, she concluded that "a conviction for manslaughter under s. 21(2) does not require foreseeability of death, but only foreseeability of harm, which in fact results in death". If, for example, Mr. Boucher formed the intention with Mr. Lange to steal Mr. Olson's truck, and did not foresee the probability that Mr. Lange would murder Mr. Olson, but a reasonable person would have foreseen at least a risk of harm to another as a result of carrying out the common intention, Mr. Boucher could be found guilty of manslaughter – as could Mr. Lange if the names were reversed.

[38] In addition, the trial judge did not leave with the jury a specific instruction that they could find one accused guilty of manslaughter and one guilty of murder. Similarly, the judge in *Jackson* did not leave these potential verdicts with the jury. Madam Justice McLachlin concluded that this compounded the error of misdirection and said, at 593:

> … I agree with the Court of Appeal that one cannot be satisfied the verdict is just, given the failure of the trial judge to set out the basis for convicting Davy

> of manslaughter under ss. 21(1) and 21(2) and the absence of any instruction that a party may be guilty of manslaughter even though the perpetrator is guilty of murder.

[39] The Crown conceded that the trial judge made the same error as was made in *Jackson*.

[40] The trial judge did leave the verdict of manslaughter with the jury for both appellants. However, he did not clearly set out what the Crown was required to prove in order to find manslaughter as a party to the offence charged. Indeed, his instructions could have led the jury to incorrectly find guilt for murder. The problem is manifested in the question from the jury. After deliberating for two days, the jury asked the following question:

> Is aiding and/or abetting and/or common purpose an indication of, or does it determine, state of mind?
>
> Concerning sections on aiding, abetting, and common purpose, as opposed to "Did Mr. X or Y have a state of mind required for murder."
>
> Is it possible to modify the decision tree to reflect this information?

[41] In answering this question, the trial judge became aware of a significant problem in his original charge (which was handed out to the jury in writing) at para. 165:

> On the evidence you heard, you may not be able to decide whether Mr. Lange or Mr. Boucher committed the ultimate offence of murder or manslaughter. If you reach the conclusion that Mr. Lange and Mr. Boucher knew that the offence of murder or manslaughter was a probable consequence of carrying out their common unlawful purpose of stealing Mr. Olson's truck, assaulting him and/or stealing his art work, <u>then you are justified in finding both guilty of the offence of murder</u>. [Emphasis added.]

[42] Not only did the trial judge conflate the two offences, and thus potentially confuse the *mens rea* required for these offences, he left only murder as a possible verdict.

[43] The jury was re-charged as follows:

> Members of the jury, the first change on page 28 -- it's small but it's important, and I didn't want to leave you with the wrong impression there. So as with everything else, the Crown here must prove that either accused

> person actually knew that the other accused person who participated in the original agreement would probably commit murder or manslaughter in carrying out their original agreement. That, of course, is in the context of the common purpose part of the charge. And then again at paragraph 165, if you reach the conclusion that either Mr. Lange or Mr. Boucher knew that the commission of the offence of murder or manslaughter by the other accused was a probable consequence of carrying out their common unlawful purpose of stealing Mr. Olson's truck, assaulting him and/or stealing his artwork, then you're justified in finding both guilty of that offence. I trust that is more or less self-explanatory.

[44] This part of the reinstruction was intended to repair the error in para. 165. However, by conflating murder and manslaughter, the instruction was not only confusing, but could lead the jury into convicting one of the accused of murder when his state of mind could only amount to manslaughter.

[45] The trial judge continued to answer the question:

> To come back to your question from yesterday, I'd ask you now to refer to the decision trees as revised, [set out below] and the reason that I have put in, in both the top two boxes on the left-hand side of each page, you'll see I've referred to each accused acting either as a principal or co-principal or as a party, and that's just to make the distinction to you that -- the reason for doing that is that under the *Criminal Code*, a party technically can include a principal, but I don't want to confuse you with that. I want you to go through the decision tree looking at each accused and say, are they acting as a principal or co-principal? if not, are they acting as a party? And by "party" in that sense I mean are they acting either as an aider, an abettor, or pursuant to the common purpose, the common intention? Okay?
>
> Now, when you get to the third box on each accused, did the accused have a state of mind for murder, there are essentially four ways that you can determine whether an accused had a state of mind for murder. The first is whether the accused was acting as a principal or co-principal, and in that sense, you would need to be satisfied beyond a reasonable doubt that the accused actually intended to kill or intended to cause bodily harm <u>which was likely</u> to kill and was reckless whether death ensued.
>
> The second way is to find that that accused was acting as an aider and that that accused had the necessary state of mind to act as an aider, and in that regard, I would refer you back to those portions of the charge which talk about the state of mind necessary for an aider. I won't repeat them to you.
>
> The third way is to find that the accused was acting as an abettor and that that accused had the necessary state of mind to act as an abettor, and again, that's in the charge and you can review that portion of the charge.
>
> The third way is that an accused may be acting pursuant to a common purpose or a common unlawful purpose, and that that accused had the

> necessary state of mind, and again, you can refer back to the charge on the mental element required for common unlawful purpose, as revised.
>
> When you're asking yourself whether an offence was committed as part of the unlawful purpose, you're now looking at accused number one and whether that person had a common unlawful purpose with accused number two, and in deciding whether accused number two committed murder or manslaughter, you can only use the evidence that's admissible against accused number one. All right? So, in that sense, it's not different from what we have told you, or what I have told you earlier.
>
> Now, with respect to these further instructions, unless I tell you otherwise, do not consider these further instructions to be any more or less important than anything else I have said about the law. All the legal instructions, whenever they may be given, are part of the same package. All right? So you may now retire to consider your verdict.
>
> [Emphasis added.]

[46] The *mens rea* requirement under s. 21(1)(b) has recently been reviewed in *R. v. Briscoe*, 2010 SCC 13. There, the Court affirmed that "for the purpose of aiding" means that the aider must intend to assist the principal in the commission of the offence and the aider knew that the principal intended to commit the crime (paras. 16-17).

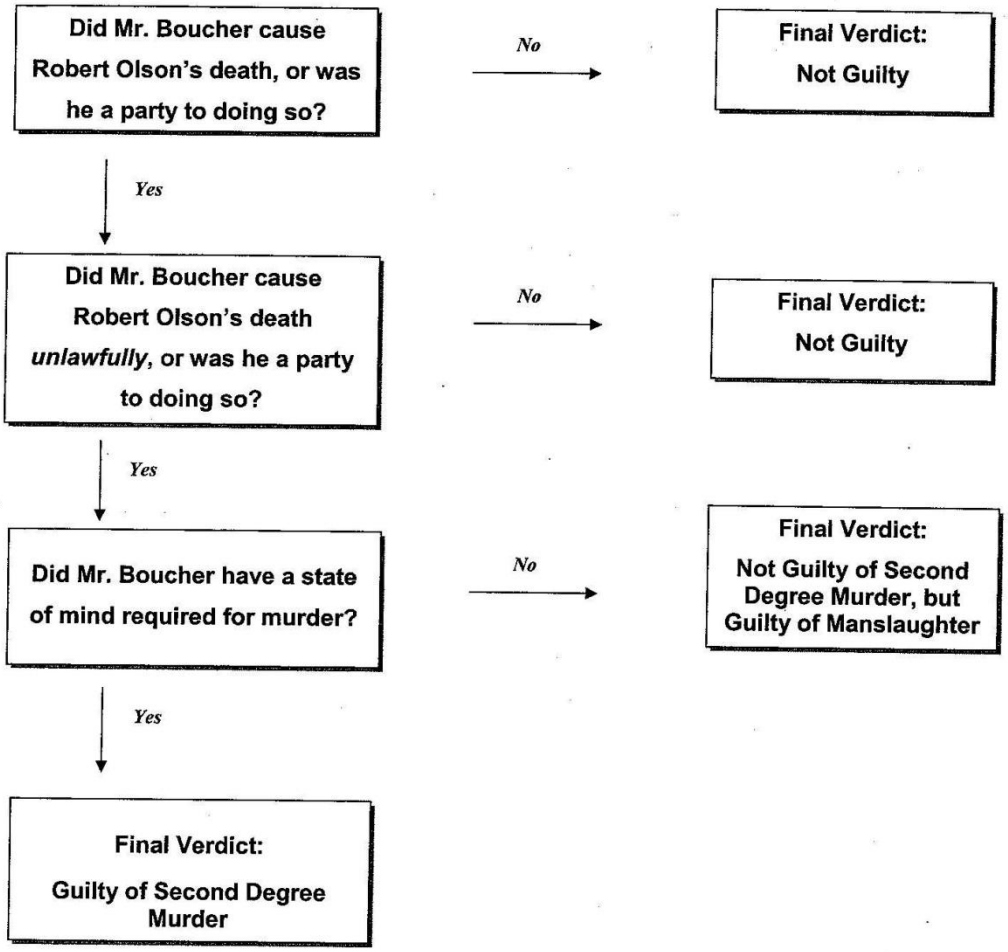
[47] The Court also discussed the *mens rea* required for an aider to be convicted of murder. At para. 18, Charron J. said:

> It is important to note that Doherty J.A., in referring to this Court's decision in *R. v. Kirkness*, [1990] 3 S.C.R. 74, rightly states that the aider to a murder must "have known that the perpetrator had the intent required for murder". While some of the language in *Kirkness* may be read as requiring that the aider share the murderer's intention to kill the victim, the case must now be read in the light of the above-noted analysis in *Hibbert*. The perpetrator's intention to kill the victim must be known to the aider or abettor; it need not be shared. *Kirkness* should not be interpreted as requiring that the aider and abettor of a murder have the same *mens rea* as the actual killer. It is sufficient that he or she, armed with *knowledge* of the perpetrator's intention to commit the crime, acts with the intention of assisting the perpetrator in its commission. It is only in this sense that it can be said that the aider and abettor must intend that the principal offence be committed.

[48] For convenience, the decision trees and amended decision trees are set out below.

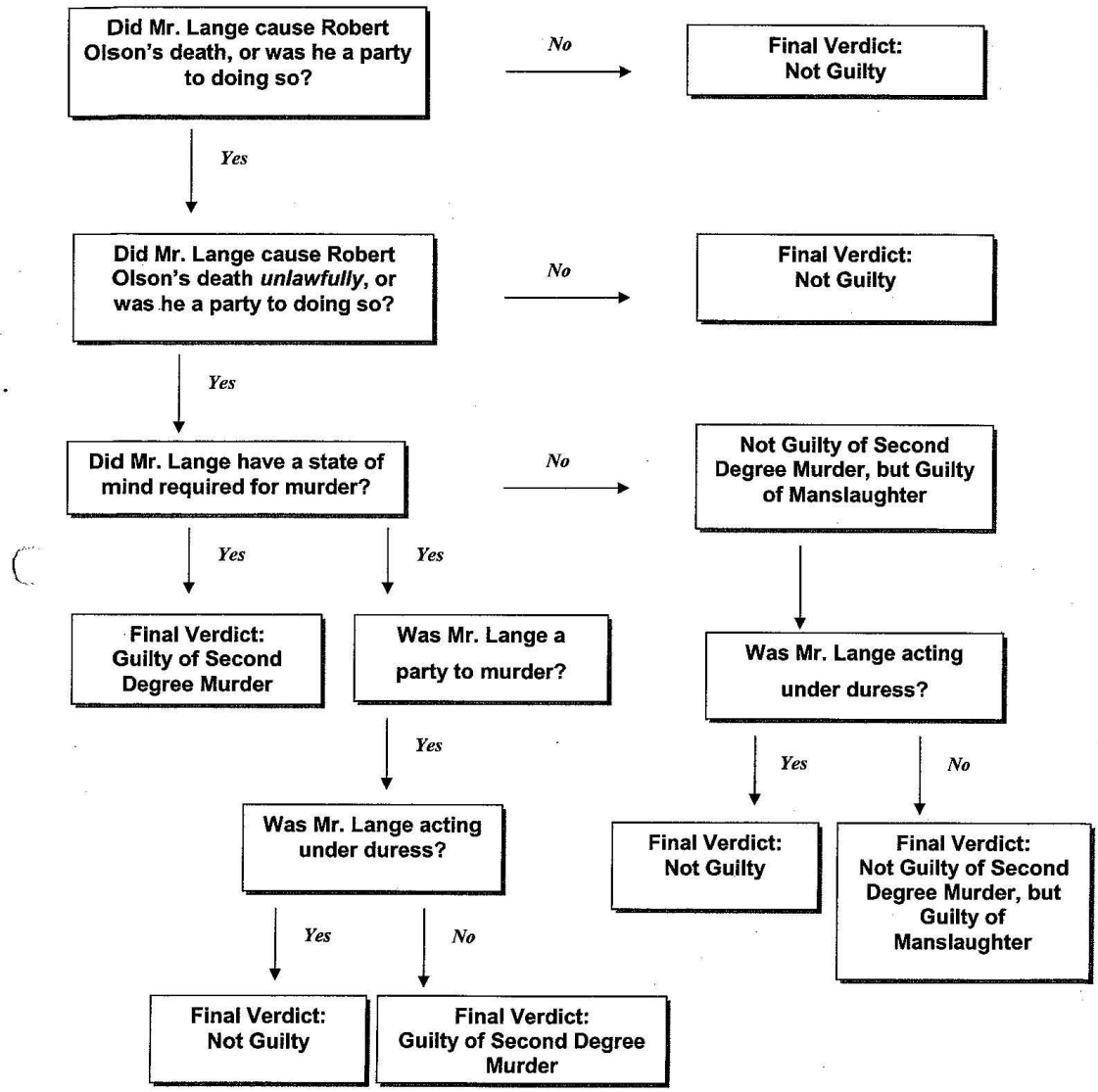
Page 70

DECISION TREE FOR DEAN ERNEST BOUCHER (a.k.a. JOHNS)

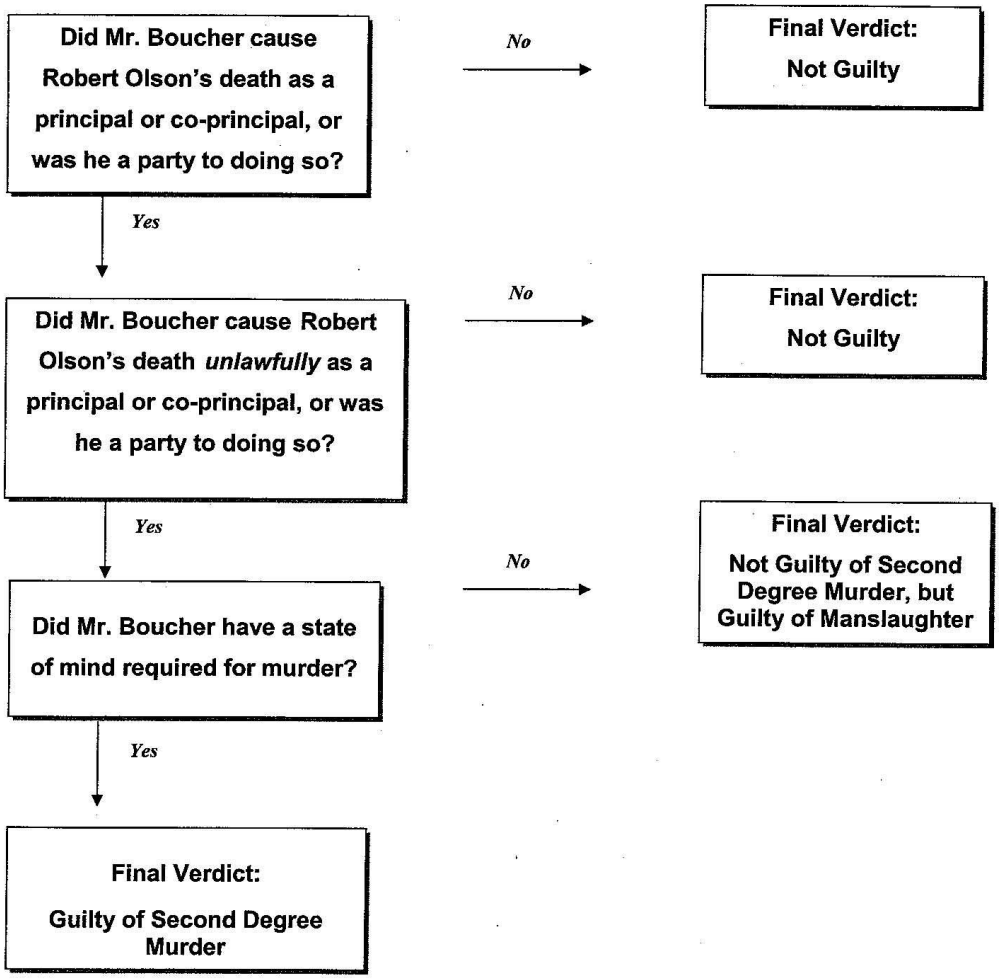


Page 71

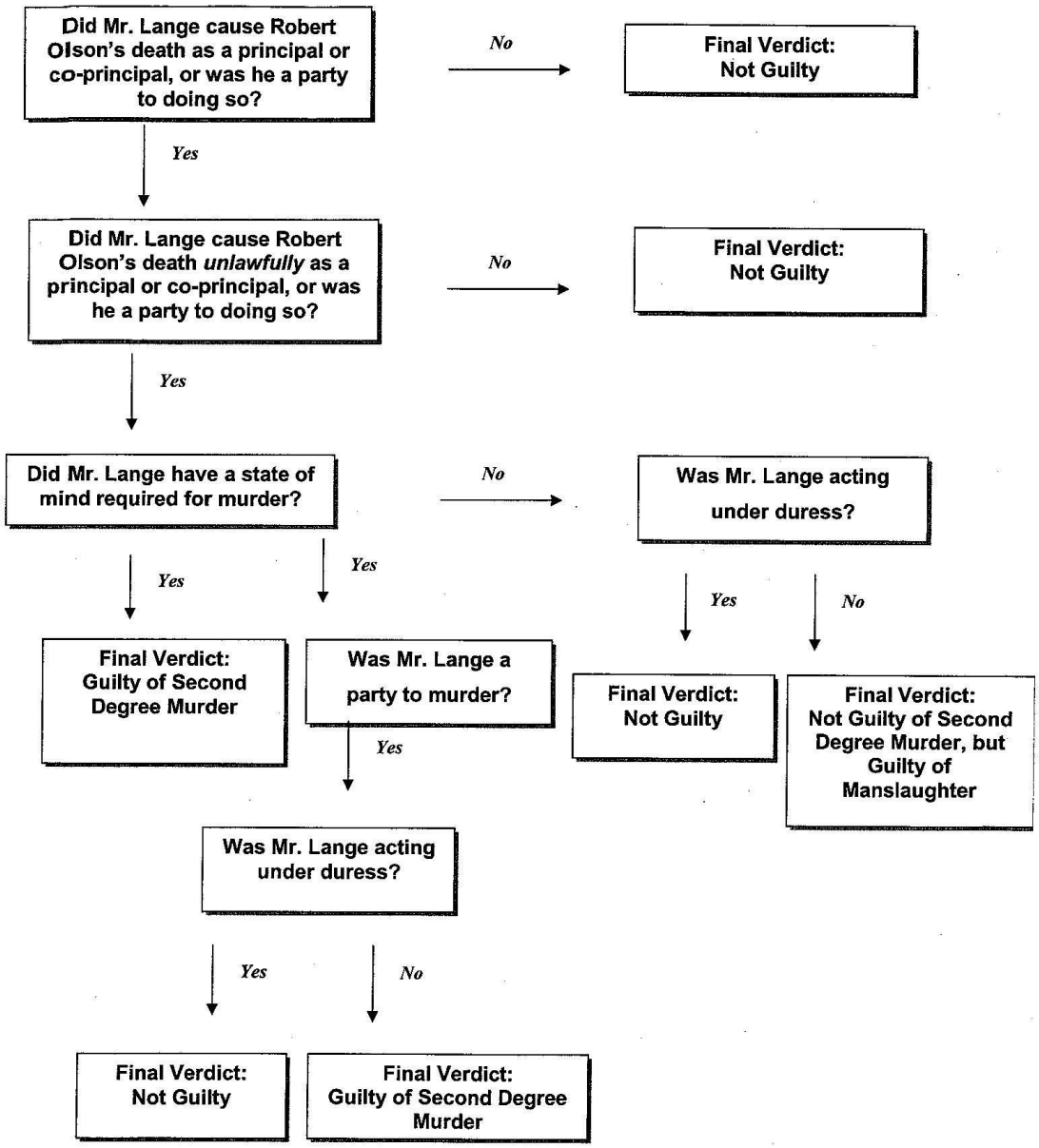
DECISION TREE FOR MARK LEWIS LANGE



DECISION TREE FOR DEAN ERNEST BOUCHER (a.k.a. JOHNS)



DECISION TREE FOR MARK LEWIS LANGE



[49] With respect, the recharge (which was done with the approval of all trial counsel, who are not counsel on the appeal) did not address the question raised by the jury: how did the provisions of s. 21(1) (b), (c), and s. 21(2) relate to the state of mind of the accused?

[50] In addition, the trial judge repeated a significant error he made in his charge on intoxication. That is, when discussing the elements for murder, he omitted the state of mind requirement, "which he knew was likely to cause death…". The word "knew" is missing from the instruction, as highlighted in para. 45 above.

[51] There was an additional error in the charge in relation to what evidence could be used by the jury when considering s. 21(2) with respect to the evidence admissible against each accused. The trial judge refers to the accused as number one and number two. In the underlined portion in para. 45 above, the trial judge appears to suggest that in considering whether accused number two is guilty, they must only consider the evidence admissible "against number one". This is clearly an error. While the judge likely misspoke, this instruction could only create more difficulties for the jury.

[52] Furthermore, the amendment to the decision tree could only have served to add confusion to the deliberations. In this complex case, the decision tree did not sufficiently reflect the different modes of participation and the available verdicts.

[53] A jury question must be "clearly, correctly and comprehensively" answered: *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 at 528. With respect, this was not done in this case.

[54] The trial judge was required to explain to the jury the various potential routes to liability or acquittal by reviewing the elements of the offence, which included manslaughter and the application of the party provisions with particular attention to the *mens rea* required to be convicted of manslaughter as party to a murder charge. A jury charge is to be read as a whole. As Cory J. said in *R. v. Cooper*, [1993] 1 S.C.R. 146 at 163:

> ... At the end of the day, the question must be whether an appellate court is satisfied that the jurors would adequately understand the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues ....

[55] In my respectful view, this instruction did not meet that standard.

Charge on Intoxication

[56] There was an evidentiary foundation to leave the defence of intoxication with the jury and the trial judge did so. However, there are, in my respectful opinion, two errors which require a new trial. As noted above, the Crown correctly conceded this point.

[57] The accused were charged with second degree murder pursuant to s. 229(a)(i) and (ii):

> 229. Culpable homicide is murder
>
> (*a*) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

[58] In *R. v. Daley*, 2007 SCC 53, the Court confirmed that the inquiry into the *mens rea* for murder under s. 229(a)(ii) is whether the accused foresaw that the likely consequence of his actions was the death of the deceased.

[59] The Court said the following in *Daley* at para. 50:

> The *Canute*-type charge underwent one further modification in *R. v. Seymour*, [1996] 2 S.C.R. 252. There, this Court held that while it is necessary for trial judges to instruct on the common sense inference for specific intent offences, where there is evidence of intoxication, there must be a direct link drawn between the effect of intoxication and the common sense inference.

and at para. 53:

> While I agree that the inquiry under s. 229(*a*)(ii) is whether the accused possessed the ability to foresee the consequences of his action and the main determination in cases involving a defence of

> intoxication to a second degree murder charge will be whether the accused's degree of intoxication affected this ability, and that it is very important for the jury to understand this, I do not think this Court's jurisprudence goes so far to require that a particular phrase expressly making this link be included in the charge, the absence of which leads to reversible error. As discussed above, appellate courts must consider whether the charge, as a whole, conveyed the necessary instruction to the jury, not whether particular words or a particular sequence was followed. In this respect, I approve the functional approach that was taken to the issue of linking of foreseeability and intoxication in *R. v. Simpson* (1999), 125 B.C.A.C. 44, 1999 BCCA 310, at para. 38:
>
> On the fifth ground of appeal, the appellant argues that no instruction was given to the jury on the issue of the foreseeability of the probable consequences of the appellant's actions due to intoxication. That submission cannot be sustained, for the trial judge did, in fact, give such an instruction. He said:
>
> > In this trial there is evidence, if you accept it, that the accused consumed a quantity of alcohol before the killing. You should know that, in order to justify a verdict of second degree murder, the Crown must, as I have said over and over, prove beyond a reasonable doubt that the accused intended to cause bodily harm and was reckless whether death ensued or not, but that despite his consumption of alcohol he knew what he was doing was likely to cause death. [Emphasis deleted.]

[60] Thus, in some form, a jury needs to be told that it must consider the effect of the consumption of alcohol by the accused in deciding whether the accused foresaw the likely consequences of his actions.

[61] In *R. v. Kahnapace*, 2010 BCCA 227 at para. 12, this Court referred to the trial judge's instructions to the jury both in the charge and the recharge:

> <u>If you are satisfied beyond a reasonable doubt that her intent was to kill Donald Wall or to cause him bodily harm that was likely to kill him and was reckless as to whether death ensued, then you must find her guilty of murder.</u> [Emphasis in original.]

[62] This instruction on intent was given to the jury several times, including in the context of the instruction on intoxication. The trial judge did not include the essential element "'knew' was likely". In other words, the trial judge overlooked the key element of foresight of consequences. This was found to be a reversible error in *Kahnapace* (para. 37).

[63] There are two elements to the *mens rea* in s. 229(a)(ii): 1) subjective intent to cause bodily harm; and 2) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death. (See: *R. v. Nygaard*, [1989] 2 S.C.R. 1074 at 1087-88 and *Cooper*, *supra*, at 154.)

[64] The trial judge in this case correctly instructed the jury on the requisite *mens rea* in his instruction relating to the elements of murder. However, in his instruction on intoxication, he committed the same error as did the trial judge in *Kahnapace*. He said the following:

> [223] Alcohol has an intoxicating effect on those who drink it. Intoxication that causes a person to cast off restraint and to act in a manner in which he would *not* act, if sober, is *no* excuse for committing an offence if he had the state of mind required to commit the offence. An intoxicated state of mind is nonetheless a state of mind.
>
> [224] Second degree murder is *not* committed if either accused person lacked the intent to kill Robert Olson or to cause him bodily harm which was likely to cause death and was reckless whether death ensued. Crown counsel must prove beyond a reasonable doubt that each accused had such an intent.
>
> [225] To decide whether Mr. Boucher had such an intent, you should take into account the evidence about his consumption of alcohol, along with the rest of the evidence that throws light on his state of mind at the time the offence was allegedly committed.
>
> ...
>
> [238] If, after taking into account the evidence of Mr. Boucher's consumption of alcohol, along with the rest of the evidence, you are not satisfied beyond a reasonable doubt that Mr. Boucher intended to kill Robert Olson or to cause him bodily harm which was likely to kill him and was reckless whether it did kill him, you must find Mr. Boucher not guilty of second degree murder but guilty of manslaughter.
>
> [239] If, on the other hand, after taking into account the same evidence, you are satisfied beyond a reasonable doubt that Mr. Boucher intended to kill Robert Olson or to cause him bodily harm which was likely to kill him and was reckless whether it did kill him, you must find him guilty of second degree murder.
>
> [Emphasis added.]

[65] In the instruction in relation to Mr. Lange, the trial judge said this:

> [249] If, after taking into account the evidence of Mr. Lange's consumption of alcohol, along with the rest of the evidence, you are *not* satisfied beyond a reasonable doubt that Mr. Lange intended to kill Robert Olson or to cause

> him bodily harm which was likely to kill him and was reckless whether it did kill him, you must find Mr. Lange *not* guilty of second degree murder but guilty of manslaughter.
>
> [250] If, on the other hand, after taking into account the same evidence, you *are* satisfied beyond a reasonable doubt that Mr. Lange intended to kill Robert Olson or to cause him bodily harm which was likely to kill him and was reckless whether it did kill him, you must find him guilty of second degree murder.
>
> [Underline emphasis added; italic emphasis in original.]

[66] In omitting the element of knowledge of the consequences, the trial judge failed to instruct the jury on the effect of alcohol on the foresight of the consequences of the acts of the accused.

[67] And, as noted above, the trial judge made the same error with respect to the *mens rea* for murder in his recharge.

[68] The other difficulty is related to the first ground of appeal. Because the trial judge did not break down the potential modes of participation by each accused, he overlooked instructing the jury with respect to the effect of intoxication on whether each accused foresaw the consequences of the acts of the other. For example, if the jury concluded that Mr. Lange struck the fatal blows to Mr. Olson, the jury needed to be instructed on how alcohol would have affected the state of mind of Mr. Boucher as a party to the offence under either s. 21(1)(b), (c), or (2) (and vice-versa). No such instruction was given.

[69] In addition, the trial judge left s. 21(2) with the jury, which is the liability of an accused as a party based on forming a common intention to commit an offence, other than the offence charged. The two offences the trial judge left with the jury were theft of Mr. Olson's vehicle and theft of his art work. Theft is a specific intent offence, and intoxication may affect the intent required for theft. The trial judge did not charge the jury on the effect of intoxication with respect to the intent on the theft charges.

[70] Although appeal courts are to apply the functional approach when assessing jury instructions and always consider the instruction as a whole, it is my view that there were fatal flaws in the charge and recharge which necessitate a new trial.

Other Grounds

Propensity Evidence of both Mr. Boucher and Mr. Lange

[71] Testimony about the bad character of both appellants was placed into evidence by both the Crown and the defence. For example, Mr. Lange's counsel led the evidence of Mr. Holstein (Caribou Hotel co-operator), who testified in cross-examination that Mr. Boucher was "enemy number one". Mr. Lange also cross-examined Mr. Boucher regarding a number of acts of bad character. Mr. Boucher testified that Mr. Lange had been a party to a sexual assault of Mr. Boucher's girlfriend. If such evidence is admitted (which will be a decision for the new trial judge), at minimum, a clear and comprehensive instruction must be given to the jury regarding the prohibited use of such evidence.

[72] A question arose as to whether Mr. Lange had to establish some basis for cross-examining Mr. Boucher on prior acts of bad character. Mr. Boucher denied these acts. His point is that Mr. Lange could falsely suggest he did anything (i.e., commit murder previously) and the jury would be poisoned. The answer is found in *R. v. Lyttle*, 2004 SCC 5. The Court was considering whether it was necessary for defence counsel to establish an evidentiary foundation before certain questions were to be asked in cross-examination. The Court affirmed the importance of cross-examination in the truth-seeking function of a trial and held that an evidentiary foundation was not required. However, it did address the concerns raised in this case with respect to asking questions which in fact have no factual foundation. The Court said this at paras. 44-52:

> The right of cross-examination must therefore be jealously protected and broadly construed. But it must not be abused. Counsel are bound by the rules of relevancy and barred from resorting to harassment, misrepresentation, repetitiousness or, more generally, from putting questions whose prejudicial effect outweighs their probative value. See *R. v. Meddoui*, [1991] 3 S.C.R.

320; *R. v. Logiacco* (1984), 11 C.C.C. (3d) 374 (Ont. C.A.); *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 (Ont. C.A.); *Osolin*, *supra*.

Just as the right of cross-examination itself is not absolute, so too are its limitations. Trial judges enjoy, in this as in other aspects of the conduct of a trial, a broad discretion to ensure fairness and to see that justice is done – and seen to be done. In the exercise of that discretion, they may sometimes think it right to relax the rules of relevancy somewhat, or to tolerate a degree of repetition that would in other circumstances be unacceptable. See *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 925.

This appeal concerns the constraint on cross-examination arising from the ethical and legal duties of counsel when they allude in their questions to disputed and unproven facts. Is a good faith basis sufficient or is counsel bound, as the trial judge held in this case, to provide an evidentiary foundation for the assertion?

Unlike the trial judge, and with respect, we believe that a question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question. It is not uncommon for counsel to believe what is in fact true, without being able to prove it otherwise than by cross-examination; nor is it uncommon for reticent witnesses to concede suggested facts – in the mistaken belief that they are already known to the cross-examiner and will therefore, in any event, emerge.

In this context, a "good faith basis" is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited.

In *Bencardino*, *supra*, at p. 347, Jessup J.A. applied the English rule to this effect:

> ... whatever may be said about the forensic impropriety of the three incidents in cross-examination, I am unable to say any illegality was involved in them. As Lord Radcliffe said in *Fox v. General Medical Council*, [1960] 1 W.L.R. 1017 at p. 1023:
>
> An advocate is entitled to use his discretion as to whether to put questions in the course of cross-examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth.

> More recently, in *R. v. Shearing*, [2002] 3 S.C.R. 33, 2002 SCC 58, while recognizing the need for exceptional restraint in sexual assault cases, Binnie J. reaffirmed, at paras. 121-22, the general rule that "in most instances the adversarial process allows wide latitude to cross-examiners to resort to unproven assumptions and innuendo in an effort to crack the untruthful witness ...". As suggested at the outset, however, wide latitude does not mean unbridled licence, and cross-examination remains subject to the requirements of good faith, professional integrity and the other limitations set out above (paras. 44-45). See also *Seaboyer*, *supra*, at p. 598; *Osolin*, *supra*, at p. 665.
>
> A trial judge must balance the rights of an accused to receive a fair trial with the need to prevent unethical cross-examination. There will thus be instances where a trial judge will want to ensure that "counsel [is] not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box". See *Michelson v. United States*, 335 U.S. 469 (1948), at p. 481, *per* Jackson J.
>
> Where a question implies the existence of a disputed factual predicate that is manifestly tenuous or suspect, a trial judge may properly take appropriate steps, by conducting a *voir dire* or otherwise, to seek and obtain counsel's assurance that a good faith basis exists for putting the question. If the judge is satisfied in this regard and the question is not otherwise prohibited, counsel should be permitted to put the question to the witness.
>
> [Emphasis in original.]

[73] While the case dealt with the cross-examination of a Crown witness, in my view, the same principles apply, with some modification, to the cross-examination of a co-accused. When there are joint trials and "cut-throat" defences, the trial judge has to weigh the fair trial rights of both accused. It may be necessary to hold a *voir dire* to determine whether the questions are proper in the sense that they are being asked in good faith and are relevant. If the questions cannot be asked without depriving the co-accused of a fair trial, despite a full and complete instruction to the jury limiting the use of the evidence, then the judge will have to consider severance of the accused.

Out-of-Court Statements by the Co-Accused

[74] The other main ground of appeal was the instruction given by the trial judge on prior out-of-court statements, and the use of the prior statements by the Crown in his closing address. Generally, the out-of-court statements by one accused are not admissible against the co-accused. This is subject to the co-conspirator's exception

to the hearsay rule, which was not invoked in this case. The trial judge correctly instructed the jury by and large on the use of the prior statements; however, at times when he was summarizing the evidence, the distinction that needed to be made between the statements was blurred. Mr. Boucher never said he assaulted Mr. Olson, yet the statement Mr. Lange gave to the police was referred to as evidence implicating Mr. Boucher – particularly when summarizing the position of the parties. This could be because the Crown incorrectly relied on the evidence in his closing address to the jury.

[75] It was necessary for both counsel and the trial judge to ensure the jury was not misled with respect to the use which may be made of the out-of-court statements.

Post-Offence Conduct

[76] There was evidence which occurred after the beating of Mr. Olson, including placing him in the truck, driving towards Whitehorse, dumping his body, and their conduct at the gas station. At the new trial, careful consideration will need to be given regarding the use which may be made of this evidence and the direction to the jury. Given there will be a new trial, and the matter will be considered afresh, I do not need to say any more about this ground.

Conclusion

[77] As stated at the outset of these reasons, the appeals are allowed and a new trial is ordered.

"The Honourable Madam Justice Bennett"

I Agree:

"The Honourable Madam Justice Rowles"

I Agree:

"The Honourable Mr. Justice Frankel"