COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Suthakaran, 2024 ONCA 50
DATE: 20240125
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van Rensburg, Copeland and Monahan JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Aruran Suthakaran

Appellant

Geoff Haskell and Kristianne C. Anor, for the appellant

Kevin Rawluk, for the respondent

Heard: June 9, 2023

On appeal from the conviction entered on March 18, 2020 by Justice Ian MacDonnell of the Superior Court of Justice, sitting with a jury, and from the sentence imposed on July 9, 2020, with reasons reported at 2020 ONSC 4245.

van Rensburg J.A.:

A. OVERVIEW

[1] After trial by judge and jury, the appellant was convicted of second degree murder in the shooting death of his best friend Anik Stewart. He was sentenced to life in prison without eligibility for parole for 12 years. The main issue at trial was the identity of the shooter. The shooting occurred in the course of a fight between

members of two opposing groups outside a bar. The defence position was that the fatal shot was fired by Shakkil Shiyamalaraj, a member of the opposing group who was in a physical altercation with Mr. Stewart. The Crown relied on the doctrine of transferred intent, asserting that the appellant shot Mr. Stewart, while intending to shoot Mr. Shiyamalaraj.

[2] The appellant appeals his conviction on two grounds. First, he contends that the trial judge erred in instructing the jury on lawful defence of a third party, when there was no air of reality to this defence at trial, and where its inclusion in the charge undermined his primary defence that he was not the shooter. Second, the appellant asserts that, if the trial judge did not err in providing an instruction on the defence of a third party, his instruction on the law of accident was inadequate.

[3] The appellant also seeks to appeal the 12-year period of parole ineligibility, arguing for a reduced period of ten years on the basis that the trial judge misapprehended the evidence in two material respects when he concluded that the appellant arrived at the bar with a loaded handgun and that he discharged the firearm in the middle of a crowded and chaotic scene.

[4] For the reasons that follow, I would dismiss the appeal. The trial judge did not err in concluding that there was an air of reality to the defence of a third party and in providing the instructions he did both with respect to this defence and with respect to accident. The trial judge effectively left open a path to acquittal for the

appellant that was available on the evidence. The trial judge also made it clear to the jury that the appellant's defence was that he was not the shooter, and that it was only if the jury concluded beyond a reasonable doubt that he was the shooter, that they must go on to determine whether the appellant's actions were in defence of Mr. Stewart, and whether the gun was discharged accidentally, or whether the appellant had the intent for murder.

[5] I also see no reversible error in the trial judge's determination of the period of parole ineligibility. The trial judge carefully considered the relevant factors, including the appellant's rehabilitative potential, in imposing more than the minimum ten-year period. There was no material misapprehension of the evidence and no basis for interfering with his conclusion that a 12-year period of parole ineligibility was warranted by the circumstances surrounding the murder, which involved gun violence in a public place.

B. FACTS

[6] Two groups got into a fight outside a shisha bar in Scarborough shortly after 1:00 a.m. on February 15, 2018. The fight was mostly captured on the bar's security video. The video shows the deceased, Mr. Stewart, squaring off with Shakkil Shiyamalaraj. The appellant stood behind and to the left of Mr. Stewart, mostly out of the field of view of the camera. About 12 or 13 seconds after Mr. Stewart and Mr. Shiyamalaraj squared off, Mr. Stewart collapsed to the ground,

mortally wounded. He had been shot in the upper left side of his head, slightly behind the ear. At the moment when Mr. Stewart was shot, the door to the bar was open, obscuring from view the victim, the appellant and Mr. Shiyamalaraj.

[7] Just before the door obscured the view, Mr. Shiyamalaraj held up his hands. His hands were empty, but he appeared to have made the sign of a gun (which he did not deny in his evidence at trial). After Mr. Stewart collapsed, Mr. Shiyamalaraj kicked him sharply. The appellant could then be seen on the video swinging his right arm toward Mr. Shiyamalaraj. The two groups then scattered. Within 90 seconds, everyone who was present when Mr. Stewart was shot had left the scene. Only one person, a friend of Mr. Stewart, briefly stopped to check on him.

[8] Mr. Shiyamalaraj returned inside the bar with his hood up. Then he came back out and retrieved the jacket he had removed before the fight and left the scene with his friends. The appellant ran away from the scene, pulling his hood over his head, got on a TTC bus, and eventually met up with his girlfriend. Some of the clothing he was likely wearing at the time of the shooting was found a few days later in his girlfriend's room at her grandparents' house.

[9] Only one shot was fired. The gun used in the shooting was never recovered.

[10] A forensic pathologist testified that the direction of the bullet within the victim's head was from left to right and from back to front, however she was not able to say, based on the path, where the individual firing the gun was located at

the time of the shooting. There was also no evidence with respect to the direction Mr. Stewart's head was facing at the time the shot was fired.

[11] Mr. Shiyamalaraj and some other people who were present at the scene testified at the trial. None of the witnesses, including Mr. Shiyamalaraj, was forthcoming with details about what happened. The members of the two groups denied knowing each other, and there was no evidence of any interaction inside the bar. Indeed, the trial judge observed to the jury, "it may well strike you, as counsel have suggested, that we never heard a completely truthful account of what either group was up to when they encountered each other at the front door of [the bar] that morning". Mr. Shiyamalaraj acknowledged that there was a fight between the two groups and that he and Mr. Stewart were squaring off to fight. He also acknowledged seeing the appellant from the corner of his eye, however he did not testify about anyone, including the appellant, having a gun.

[12] The appellant did not testify.

C. CONVICTION APPEAL

Issue One: Did the Trial Judge Err in Instructing the Jury on the Defence of a Third Party?

1. Positions of the Parties

[13] The appellant contends that there was no air of reality to the defence of a third party, and that the trial judge's extensive instructions on this defence, over the objection of defence and Crown counsel, undermined his defence at trial that he was not the shooter.

[14] The Crown submits that the pre-charge conference reveals the trial judge's reasons for including instructions on the defence of a third party and accident, which worked together. The instruction was appropriate in the circumstances, and ultimately acceded to by the defence. In any event, there was an air of reality to the defence of a third party, and it did not prejudice the appellant.

2. Legal Principles

[15] It is an error of law to instruct the jury on a defence with no air of reality, or to fail to leave with the jury a defence that has an air of reality: *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3 at para. 55. Although there is some deference to a trial judge's inferences based on the evidence in the case, whether a defence has an air of reality is a question of law and is typically reviewed on a correctness standard: *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350 at para. 40. See also *R. v. Land*, 2019 ONCA 39, 145 O.R. (3d) 29, at para. 71 and *R. v. Paul*, 2020 ONCA 259 (suggesting that there is some "complexity" to the question of standard of review).

[16] All defences that have an air of reality are to be put to the jury, even if not raised by counsel, or opposed by counsel, and even where the defence is incompatible with the accused's primary defence: *R. v. Gauthier*, 2013 SCC 32, [2013] 2 S.C.R. 403, at para. 34; *R. v. Mathisen*, 2008 ONCA 747, 239 C.C.C. (3d) 63, at para. 93; and *R. v. Constantine*, 2015 ONCA 330, at para. 21. Any defence theory realistically available on the totality of the evidence should be left with the jury: *R. v. Ali*, 2021 ONCA 362, 156 O.R. (3d) 81, at para. 74. The air of reality test is concerned only with whether or not a putative defence should be submitted to the jury for consideration, and not the substantive merits of the defence, which is a question for the jury: *Cinous*, at paras. 52, 54.

[17] In applying the air of reality test, the trial judge considers the totality of the evidence. There is no requirement that the evidence be adduced by the accused: rather, the evidential foundation can rest on the evidence of Crown witnesses, the factual circumstances of the case, or any other evidential source on the record: *Cinous*, at para. 53.

[18] The air of reality test must be applied to each component of the defence: *Cinous*, at para, 95; *Constantine*, at para. 19. In determining whether there is an air of reality to a defence, the trial judge may engage in a limited weighing of the totality of the evidence to determine if a jury acting reasonably on that evidence

could draw the inferences necessary to have a reasonable doubt as to whether the accused is guilty on the basis of the defence: *Cinous*, at paras. 90-91.

[19] The defence of a third party is codified by s. 34 of the *Criminal Code*, which provides that a person is not guilty of an offence if (a) they believe on reasonable grounds that force is being used against … another person or that a threat of force is being made against … another person; (b) the act that constitutes the offence is committed for the purpose of defending or protecting… the other person from that use or threat of force; and (c) the act committed is reasonable in the circumstances. Section 34(2) provides that, in determining whether an act is reasonable, the court shall consider the relevant circumstances of the person, the other parties, and the act, and sets out a number of non-exhaustive factors.

[20] There are three essential elements to the defence of a third party: (1) the accused must have reasonably apprehended a threat of harm to the third party (the catalyst); (2) the force used by the accused was in response to the perceived threat or harm (the motive); and (3) the force used was reasonable in the circumstances (the response): *R. v. Khill*, 2021 SCC 37, 462 D.L.R. (4th) 389 at paras. 51-52, 59, 62.

3. The Pre-Charge Conference

[21] In determining this ground of appeal, it is helpful to have an understanding of the trial judge's reasons for leaving the defence of a third party with the jury and

for providing the instructions that he did. The trial judge did not provide formal reasons, but his rationale can be gleaned from his discussions with counsel during the pre-charge conference.

[22] The trial judge first raised the issue at the initial pre-charge conference, which occurred before the prosecution closed its case. He asked for the views of counsel on whether he should instruct the jury on the defence of a third party, that the shooting occurred when the appellant was acting in defence of his friend Mr. Stewart. Initially, both defence counsel and the Crown were opposed to the inclusion of such an instruction, on the basis that there was no air of reality to the appellant's actions in shooting at Mr. Shiyamalaraj as a reasonable response to a perceived threat to his friend.

[23] The next day, the trial judge told counsel why he thought such an instruction should be included. He explained that the defence had an air of reality in the context of the appellant's argument that, if he was the shooter, the gun had discharged accidentally. The trial judge pointed to the evidence that the appellant shot his best friend and that, after firing the shot he appeared to have physically attacked, and not shot at, Mr. Shiyamalaraj. The trial judge recognized that, while the jury might have difficulty concluding that an intentional shooting was reasonable, if they had a doubt about whether the appellant intended to pull the trigger, "then the complexion of the lawful defence issue changes because the

hurdle or the reasonableness standard is easier to meet". If the jury was not satisfied that there was an intentional pulling of the trigger, they would have to consider whether or not it was reasonable for the appellant to have brandished the gun. The trial judge then observed that, if lawful defence of a third party was going to be left in the circumstances of an accidental discharge, it seemed that it should be left in its entirety. The trial judge also indicated that he had included in his draft charge wording to say that this was not the position of the defence.

[24] While the position of defence counsel is of course not determinative when the question is whether there was an air of reality to a defence, I would observe that once the trial judge provided the explanation, defence counsel did not make any further submissions opposing the inclusion of an instruction on the defence of a third party. The various drafts of the jury charge included wording on the defence of a third party that did not attract any further comment before or after the charge was delivered.

4. The Charge

[25] I turn now to consider the content of the specific instruction on the defence of a third party, in the context of the jury charge as a whole.

[26] The trial judge instructed the jury that they could not convict the appellant of murder unless they were satisfied beyond a reasonable doubt that (i) the appellant fired the shot that killed Mr. Stewart (which the trial judge identified as the

"threshold question"); (ii) the appellant fired the shot intentionally (i.e., the gun was not discharged accidentally), and (iii) the appellant either meant to kill Mr. Shiyamalaraj or cause him bodily harm that he knew was likely to kill him and was reckless whether he died or not.

[27] The trial judge spent the bulk of his instructions on the law on the question of the identity of the shooter. He reviewed the sources of the evidence the jury could consider, the role of after-the-fact evidence, and the rules on circumstantial evidence. He gave a specific instruction with respect to third party suspect, in relation to the defence position that Mr. Shiyamalaraj was the shooter, and he referred to evidence that was relevant to this issue. The trial judge emphasized on several occasions throughout his charge that the defence position was that Mr. Shiyamalaraj, and not the appellant, was the shooter. The jury was instructed that, it was only if they concluded beyond a reasonable doubt that the appellant was the shooter, that they would move on to the remaining issues.

[28] Under the heading of "Remaining Issues", the trial judge first explained to the jury that the Crown must first prove beyond a reasonable doubt that the appellant committed a homicide: that he directly or indirectly caused the death of Mr. Stewart. He explained the difference between culpable homicide (causing the death of a person by means of an unlawful and dangerous act), and non-culpable homicide. He told the jury that, in the absence of a lawful justification, intentionally

discharging a firearm at someone is unlawful and dangerous, as is pulling out a firearm and brandishing it, which is careless use of a firearm, contrary to the *Criminal Code*. The trial judge noted that there was no dispute that, in the absence of lawful justification, whether this was an intentional discharge of the firearm or a careless production of it, the appellant's conduct caused the death of Mr. Stewart, and would therefore be culpable homicide.

[29] The trial judge then explained what he meant by "in the absence of lawful justification", while at the same time reminding the jury of the defence position that the appellant was not the shooter, and that the defence of a third party did not arise. He stated:

> I have said "in the absence of lawful justification" for a reason. Before you can decide that discharging the firearm *was* an unlawful act, you must consider whether in using the firearm as he did [the appellant] was acting in lawful defence of Mr. Stewart. To be clear, the position of the defence is that [the appellant] was not the person who shot Mr. Stewart and thus that the question of lawful defence does not arise. However, if you were to reject that position, you would be required to turn your mind to the question of justification and accordingly I will instruct you with respect to the law that applies to that question.

[30] Next, the trial judge instructed the jury on the three questions to be answered in respect of the defence of a third party: (1) whether the Crown proved that the appellant did not believe on reasonable grounds that force was being used or threatened against Mr. Stewart; (2) whether the Crown proved that the appellant's

use of the firearm was not for the purpose of defending or protecting Mr. Stewart from the use or the threat of force; and (3) whether the Crown proved that the appellant's use of the firearm was not reasonable in the circumstances.

[31] In the context of the third question the trial judge provided an instruction linking the defence of accident to the defence of a third party. He told the jury that they had to first decide whether the appellant meant to fire the gun or whether the discharge was an accident, and then to consider whether the use of the gun was reasonable. He stated:

> Before deciding whether it was reasonable for [the appellant] to use the firearm as he did, you must decide what it was that he did. Specifically, you must decide whether you are satisfied beyond a reasonable doubt that [the appellant] meant to fire the gun. If you have found, in relation to the threshold issue of identity, that he was the person who produced a gun in the course of this melee in front of [the bar] and that he shot Mr. Stewart, you must decide whether you are satisfied that the discharge of the firearm was not an accident.
>
> If you are not satisfied that [the appellant] actually meant to fire the gun, he is not necessarily entitled to be found not guilty. The question that you must consider, in that situation, is whether his conduct in producing and brandishing the gun, in the circumstances, was reasonable. If you are not satisfied that [the appellant] actually meant to fire the gun, and you are not satisfied that his conduct in pulling out a firearm was unreasonable, you must find [the appellant] not guilty of any offence. But if on the other hand, you are not satisfied that he actually meant to fire the gun, but you are satisfied beyond a reasonable doubt that his conduct in pulling it out in that situation was unreasonable, then the defence

> of lawful justification is not available. If the defence of lawful justification is not available, [the appellant] has committed culpable homicide and he is at least guilty of manslaughter.

[32] After referring to some of the evidence relevant to whether the appellant meant to fire the gun, the trial judge instructed the jury that if they were satisfied beyond a reasonable doubt that the appellant did mean to pull the trigger, they must consider whether in all the circumstances discharging the firearm for the purpose of defending Mr. Stewart was reasonable.

[33] The trial judge then instructed the jury that, whether or not they were satisfied that the discharge of the firearm was intentional, in deciding whether what the appellant did with the firearm was reasonable they must consider all of the relevant circumstances leading up to, surrounding and following the altercation between Mr. Shiyamalaraj and Mr. Stewart. This was followed by a review of some of the evidence.

[34] After summarizing his instructions on lawful defence, the trial judge provided his instructions on intent, he set out the positions of the parties, and he provided concluding remarks. Several times during the charge, including during the instruction on lawful defence, the trial judge emphasized that it was only if the jury was satisfied beyond a reasonable doubt that he was the shooter, that they could go on to consider the remaining issues.

5. Discussion

[35] The appellant's argument on this ground of appeal is twofold. First, he submits that, while there was an air of reality on the first two elements of the defence of a third party, there was no air of reality to the third element: that the force used was reasonable in the circumstances, because shooting someone could never be a reasonable response to the perceived threat in this case. As such, it was an error for the judge to have instructed the jury on this defence. Second, the appellant argues that leaving the defence with the jury in this case prejudiced his position that he was not the shooter.

[36] I will explain why I have concluded that there was an air of reality to the defence of a third party in this case, and that accordingly the trial judge had no choice but to leave the defence with the jury. Although this is determinative of this ground of appeal, I will also explain why I disagree with the appellant's submission that his defence was prejudiced when the defence of a third party was left with the jury.

[37] First, as we have seen, the issue that was left with the jury was whether the appellant's "use of the firearm" was in defence of his friend Mr. Stewart, and a reasonable response. The appellant agreed that, if the jury found he was the shooter, then whether the gun was discharged unintentionally should be left with

the jury. And it was in the context of this question that the defence of a third party was most relevant.

[38] There was no error in the trial judge leaving the defence of a third party with the jury in the circumstances of this case, where the jury might have concluded that the appellant was brandishing the gun in response to a perceived threat to his friend Mr. Stewart by Mr. Shiyamalaraj, and the gun discharged accidentally in the course of the melee. The issue in such circumstances would not be whether shooting at someone was a reasonable response, but whether brandishing the gun was a reasonable response. The way in which the instructions were structured presented the defence fairly, in particular with the trial judge tying the argument to the prospect of an accidental discharge. And, while the trial judge acknowledged that there would be less likelihood of the jury concluding that an intentional shooting was reasonable, he properly recognized that this was an issue for the jury.

[39] In *R. v. Budhoo*, 2015 ONCA 912, 343 O.A.C. 269 this court observed that defences of self-defence and accident can co-exist, and that it was an error for the trial judge not to make clear to the jury that the defence was that the appellant raised and held up a knife in self-defence and then stabbed the victim by accident: at para. 52. Similarly, in *R. v. Mulligan*, (2006), 80 O.R. (3d) 537 (C.A.), the appellant's defence was that he shot the deceased by accident while brandishing

a rifle in self-defence. Although the court concluded that the trial judge failed to adequately explain the relationship between accident and self-defence, having regard to the jury's verdict, they must have found that the appellant intentionally pulled the trigger, such that the error was not prejudicial and the appeal was dismissed.

[40] The appellant also contends that leaving the defence of a third party with the jury undermined his primary defence, that he was not the shooter. I disagree. In *R. v. Peavoy* (1997), 34 O.R. (3d) 620 (C.A.), the same argument was advanced, after the trial judge instructed the jury on provocation over the objections of defence counsel. Weiler J.A. stated at para. 37:

> A trial judge is required to leave every defence to the jury for which there is an air of reality on the evidence. In his instructions, it would have been highly preferable for the trial judge to explain to the jury that provocation was not a position being advanced by the defence but one about which he felt he was required to charge them. I am not, however, persuaded that the trial judge's failure to introduce his remarks on provocation with this preface undermined the appellant's primary defence to an appreciable extent. I would dismiss this ground of appeal.

[41] As in *Peavoy,* the trial judge was required to leave a defence with the jury once he determined, correctly, that it had an air of reality. And the trial judge here provided precisely the explanation that the court in *Peavoy* considered appropriate. He prefaced his instructions on lawful defence of a third party with these remarks:

> To be clear, the position of the defence is that [the appellant] was not the person who shot Mr. Stewart and thus that the question of lawful defence does not arise. … However, if you were to reject that position, then you would be required to turn your mind to the question of justification and accordingly I will instruct you with respect to the law that applies to that question.

[42] In summary on this issue, I have concluded that there was an air of reality to the defence of a third party, and that on that basis it was properly left with the jury. Contrary to the appellant's argument, the jury was directed to consider whether the appellant's use of the gun, and not his pointing and shooting the gun at someone, was reasonable. The defence was particularly pertinent and worked together with the trial judge's instructions on accident, as it related to the possibility that the gun had discharged accidentally while it was being brandished by the appellant. There is no reason to question the trial judge's judgment in leaving the defence with the jury, whether or not they concluded that the discharge was intentional. Nor was there any prejudice to the appellant. The instruction provided a potential route to an acquittal. And it was clear that the jury would only consider lawful defence (as well as the other instructions about accident and intent), if they had concluded beyond a reasonable doubt that the appellant was the shooter.

Issue Two: Was the Jury Adequately Instructed on the Law of Accident?

1. Positions of the Parties

[43] The appellant acknowledges that there was an air of reality to the defence of accident and that he had raised this defence and wanted it left with the jury. He submits however that, if the trial judge was right to leave the defence of a third party with the jury, then he should have given a more detailed instruction on the defence of accident, and that he was prejudiced by the inadequacy of the instructions on the law of accident, when compared to the lengthy instruction on a defence he did not want to be left with the jury. The appellant also contends that the trial judge's instructions failed to relate the facts supporting accident to the law.

[44] The Crown contends that the jury was sufficiently instructed on the defence of accident in this case. There was a specific instruction on the defence as it related to whether the gun was discharged accidentally while it was being brandished by the appellant, and the jury was properly and fully instructed on the *mens rea* for murder. Moreover, the trial judge properly related the evidence to the issues the jury had to decide.

2. Legal Principles

[45] This ground of appeal concerns the sufficiency of the trial judge's instructions on accident. In its recent decision in *R. v. Abdullahi*, 2023 SCC 19, 483 D.L.R. (4th) 1, the Supreme Court has helpfully summarized the relevant

principles for reviewing a jury charge for both accuracy and sufficiency. The sufficiency of an instruction is properly assessed in a functional manner, considering the impugned instruction in the context of the entire charge and the trial as a whole: at para. 53. The overriding question is whether the jury was properly equipped to decide the particular issues. An instruction may be insufficiently detailed in one part of the charge but can be supplemented by another part to provide the jury with a sufficient understanding of the law to decide the case. The level of detail depends on the circumstances of each case. The judge has a duty to decant and simplify the law: at paras. 54, 56.

[46] In the criminal law context the term “accident” is used to signal one or both of the following: that the act in question was involuntary, thereby negating the *actus reus* of the offence; or that the accused did not have the requisite *mens rea*: *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 186. Accident in the sense of an unintended act and accident in the sense of unintended consequences are distinct defences, and where viable both must be put to the jury: *Mathisen*, at para. 95; see also *R. v. Culliton* (2000), 128 O.A.C. 95 (C.A.), where both accidental discharge of a gun and lack of intent were viable defences: at para. 8.

3. Discussion

[47] As I will explain, the jury was properly and sufficiently charged on the defence of accident in this case, both in the sense of the shooting having been an unintended act and the victim's death an unintended consequence.

[48] First, the charge properly addressed the defence of accident as an unintended act. The trial judge instructed that, if the jurors were satisfied that the appellant was the shooter, they had to consider whether the gun discharged accidentally when the appellant was brandishing it. At the pre-charge conference the appellant's counsel acknowledged that the defence of accident in this sense was in play. It was acknowledged that, if the appellant was the shooter, and the gun had discharged, unless the brandishing of the gun was legally justified, the shooting would amount to manslaughter through the unlawful act of careless use of a firearm.

[49] It was in the context of his discussion of the third element of the lawful defence of a third party that the trial judge instructed the jury about the need to decide whether the appellant "meant to fire the gun" or whether the discharge was accidental, and the consequences, in terms of the applicable verdict, of such a determination. As we have seen in the passage set out at para. 29 above, the trial judge instructed the jury that, before deciding whether it was reasonable for the appellant to use the firearm as he did, they must decide whether he meant to fire

the gun, and that the discharge of the firearm was not an accident. The trial judge explained that, if the jurors concluded that the gun went off accidentally, they would need to consider whether producing and brandishing the gun was reasonable, and how their determination of this issue would affect the verdict.

[50] The trial judge then referred to some of the evidence relevant to whether the appellant meant to fire the gun: the fact that no gun was ever recovered so there was no evidence as to the condition of it; that none of the witnesses said they saw a gun so there was no description of it or the manner in which it came to be discharged; the fact that the appellant shot his best friend, which was conceded as not something he intended to do; and that, after the shot was fired, he did not, for whatever reason, fire again but instead engaged Mr. Shiyamalaraj physically.

[51] Later in the charge, when addressing the intent for murder the trial judge returned to the question of accident. He stated:

> It's implicit in the nature of the mental state required for murder that to prove that mental state the Crown must prove beyond a reasonable doubt that the discharge of the firearm was intentional, not accidental. That is, the Crown must prove that [the appellant] meant to fire the gun. I discussed with you earlier what you should take into account in that respect. If you are satisfied, in accordance with my earlier instructions, that [the appellant] committed culpable homicide, but you're not satisfied that he meant to fire the gun, you must find him not guilty of murder but guilty of manslaughter.

[52] I see no deficiency in the trial judge's charge as it related to the defence of "accident", meaning whether or not the appellant meant to fire the gun. As I have already explained, the trial judge carefully crafted the charge to ensure that the appellant was left with an available route to acquittal if the jury accepted that he was acting in defence of his friend when he brandished the gun and if they had a reasonable doubt as to whether his actions were not reasonable.

[53] These instructions related to the possibility that the act of shooting was unintended. "Accident" may also refer to an unintended consequence. In his factum, the appellant says that the trial judge failed to focus on the negation of *mens rea* and whether the claim of accident demonstrated the absence of one of the elements of the offence charged.

[54] As this court noted in *R. v. Groves*, 2023 ONCA 211, at para. 50, accident in the sense of an unintended consequence is best handled as part of the mental element of the offence charged. That is what happened in this case. The trial judge provided a thorough and accurate instruction on the mental elements of the offence of murder. As such, "no further instruction was required to put before the jury [the] defence of an unintended consequence": *Mathisen*, at para. 73. And, as in *Groves*, for the trial judge to have instructed the jury as to the difference between an accidental act and an accidental consequence would have been confusing: at para. 51.

[55] The trial judge did what he was required to do in respect of the defence of accident. He provided instructions relevant to the defence of accident that were appropriate to the context of the case. He "decanted and simplified", and he avoided unnecessary, inappropriate and irrelevant legal instruction that might divert the jury's attention from the disputed issues: *Groves*, at para. 46. See also *Abdullahi*, at para. 56.

D. SENTENCE APPEAL

Issue Three: Did the Trial Judge Err in Imposing a Twelve-Year Period of Parole Ineligibility?

1. Positions of the Parties

[56] The appellant contends that, after sentencing him to the mandatory sentence of life in prison, the trial judge erred in imposing a period of parole ineligibility exceeding ten years. In particular, he submits that the trial judge overemphasized aggravating features of the offence, including by making findings of fact that were not supported by the evidence. The appellant contends that, as a result of the trial judge's errors, his level of moral blameworthiness was overstated, and that this had a material effect on the period of parole ineligibility. He asks for a reduction in the period of parole ineligibility to ten years.

[57] The Crown contends that there was no reversible error in the trial judge's determination of the period of parole ineligibility. The 12-year period was within the

range proposed by defence counsel at first instance, is proportional to other cases with similar facts, and is warranted by the circumstances of the offence that involved the use of a firearm in a public place.

2. Legal Principles

[58] A conviction for second degree murder requires a life sentence without eligibility for parole for at least ten years and not exceeding 25 years: s. 745(c) of the *Criminal Code*. The period of parole ineligibility can be increased beyond ten years but not more than 25 years, pursuant to s. 745.4, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the recommendation, if any, made by the jury pursuant to s. 745.2 of the *Code.*

[59] A trial judge's determination of the period of parole ineligibility following a conviction for second degree murder must take into consideration the general sentencing principles contained in Part XXIII of the *Criminal Code*, including the principles of denunciation and deterrence: *R. v. Salah*, 2015 ONCA 23, 328 O.A.C. 333, at para. 266.

[60] The appellate standard of review in respect of sentences applies to a trial judge's determination of a period of parole ineligibility. "Variations on appellate review should be confined to cases where the appellate court is satisfied that the sentence is not fit, that is to say, clearly unreasonable": *R. v. Boukhalfa*, 2017

ONCA 660, 350 C.C.C. (3d) 29, at para. 210, citing *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089 at para. 39; and *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46.

3. Discussion

[61] At the sentencing hearing, the Crown sought a parole ineligibility period of 13 years, while the defence submitted that a period of 10 to 12 years would be appropriate. The trial judge provided detailed and thorough reasons for sentence, that were focused on whether an increase of the period of parole ineligibility beyond ten years was warranted, and if so, what period should be imposed.

[62] The trial judge reviewed the relevant evidence in respect of each of the statutory considerations: the nature of the offence and the circumstances surrounding its commission; the character of the offender; and the recommendations of the jury. He referred to factual findings that were essential to the jury's verdict, including that the appellant fired the shot that killed Mr. Stewart, with the intent to kill Mr. Shiyamalaraj or to cause him bodily harm that he knew was likely to kill him and that he fired it intentionally. Pursuant to s. 724(2) of the *Code* the trial judge found additional facts based on the evidence at the trial, noting that he was required to be satisfied beyond a reasonable doubt if finding aggravating facts. He referred to a number of aggravating facts, including that the appellant's acquisition and possession of the handgun was unlawful; that he had

armed himself with a loaded handgun, which he had concealed on his person before going to the bar; that his shooting at Mr. Shiyamalaraj in the course of a run-of-the-mill fist fight was completely unnecessary to assist Mr. Stewart and manifestly unreasonable; and that discharging a firearm in that place was very dangerous: there were seven other persons to the rear of the intended target and while the shot hit Mr. Stewart it could have hit any one of the others.

[63] The appellant says that the trial judge erred in making two findings of fact that were relied on in imposing an increased period of parole ineligibility. First, the appellant refers to the finding that the appellant had armed himself with a loaded handgun, which he concealed somewhere on his person before making his way to the bar on the evening in question and that "the only reasonable inference is that he did so anticipating that an occasion for the use of the gun might arise". The appellant contends that the gun was never found, that there was no evidence about how the appellant came to be holding the gun, and that there was an available inference that he was handed the gun, found the gun, or that he picked up the gun after it was dropped by someone else at the scene.

[64] Second, the appellant refers to the trial judge's finding that there were seven other persons to the rear of the intended target. His counsel says that, although there were others in the vicinity, the shooting occurred in an isolated area, and not in the presence of a number of other people.

[65] There is no question that there was evidence to support the first impugned finding. While the appellant contends that there was no direct evidence about how he came into possession of the gun, it was open to the trial judge to conclude that he was armed when he went to the bar. The shooting happened soon after the fight broke out, and there was no evidence of anyone else possessing, handling, or holding a gun.

[66] As for the second impugned finding, I do not agree with the appellant's contention that the shooting happened in an isolated area, and not in a place where there were "seven people behind the intended target". Whether or not there were precisely seven people behind the intended target at any given time, the events unfolded very quickly, and without question there were numerous people outside the bar when the fight broke out. As the trial judge described it, "the fact that [the appellant] hit Mr. Stewart rather than his intended target, Mr. Shiyamalaraj, illustrates the manifest danger of firing a handgun into the middle of a crowded and chaotic scene".

[67] The trial judge recognized and applied the relevant principles in imposing a period of 12 years of parole ineligibility. He referred to the appellant's prospects for rehabilitation which he described as "very strong", but he noted that the circumstances surrounding the murder engaged the need for denunciation and deterrence. He referred to authorities from this court to the effect that, with respect

to murders arising from brazen gun violence in public places, the nature of the offence and circumstances surrounding its commission will normally require a period of ineligibility beyond the statutory minimum. See e.g., *R. v. Danvers* (2005), 201 O.A.C. 138 (C.A.); *R. v. Doucette*, 2015 ONCA 583, 337 O.A.C. 109; *R. v. Paredes*, 2014 ONCA 910; and *R. v. Badiru*, 2012 ONCA 124, 289 O.A.C. 74, where the periods of parole ineligibility ranged from 12 to 15 years. Applying the principles of proportionality and parity, the trial judge carefully compared the facts of the appellant's case to these cases and other authorities referred to by the parties.

[68] The trial judge acknowledged the recommendation of ten jurors for a period of ten years' parole ineligibility, but he also observed that the jury did not have any information that would enable them to take into account the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[69] I see no reversible error in the trial judge's identification and application of the relevant principles. Accordingly, I would dismiss the sentence appeal.

E. DISPOSITION

[70] For these reasons I would dismiss the conviction appeal and although I would grant leave to appeal sentence, I would dismiss the sentence appeal.

Released: January 25, 2024 “K.M.v.R.”

“K. van Rensburg J.A.”
“I agree J. Copeland J.A.”
“I agree P.J. Monahan J.A.”