

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice Marc M. Monnin
Mr. Justice David J. Kroft

BETWEEN:

	)	<i>E. J. Roitenberg, K.C. and</i>
	)	<i>A. Fouad</i>
<i>HIS MAJESTY THE KING</i>	)	<i>for the Appellant</i>
	)	
<i>Respondent</i>	)	<i>M. E. Carlson</i>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	
	)	<i>Appeal heard:</i>
<i>ISSA PA MUSA</i>	)	<i>October 24, 2025</i>
	)	
<i>(Accused) Appellant</i>	)	<i>Judgment delivered:</i>
	)	<i>August 24, 2026</i>

On appeal from *R v Musa* (3 October 2023), Winnipeg CR22-01-39046 (MBKB)
[*reasons*]

MONNIN JA

Introduction

[1] Wendell Boulanger (the deceased) died from a knife wound to his chest. After a judge-alone trial, the accused was convicted of forcible confinement (see *Criminal Code*, RSC 1985, c C-46, s 279(2)), robbery (s 344) and, as a consequence, first degree murder (s 231(5)(e)). His co-accused girlfriend (the co-accused) was convicted of forcible confinement,

robbery and being an accessory after the fact to aggravated assault. She has not appealed her convictions or sentence.

[2] The accused appeals his convictions. The thrust of his argument is that the trial judge failed to properly assess the ultimate reliability of the testimony of the lone witness to the stabbing and that he failed to consider evidence tending to disprove that the accused had the intent sufficient to establish the charge of murder. He requests that the convictions be set aside and a new trial ordered or, in the alternative, that the conviction for first degree murder be set aside. For the reasons that follow, I would allow the appeal in part, set aside the murder conviction and order a new trial on that count.

Evidentiary Background

[3] The deceased lived at the residence (the residence) where the events occurred (the incident) with his spouse, Erica Monias (Erica); her nephew, Dakota Captain (Dakota); as well as a friend of theirs, Damien Joseph (Damien). Dakota's friend, David Watts (David), had been staying at the residence for a few weeks at the time of the incident.

[4] For a number of days prior to the incident, there had been heavy drinking at the residence by all of the tenants. Most had also been "using various drugs, including cocaine, crack, Xanax and marijuana throughout this period" (*reasons* at para 3).

[5] Each of the witnesses admitted that they were heavy users of drugs and alcohol and that this may have affected their memories of the events. As noted by the trial judge, that led him to scrutinize their evidence, where it was material, with special care in order to ensure its reliability.

[6] To set the stage, the trial judge set out a timeline taken from uncontradicted objective evidence as to what occurred on the day in question. That evidence came from text messages and/or taxi videos and exchanges. I will not review all of it save for certain salient facts that are relevant to this appeal.

[7] Early in the morning of the day of the incident, David invited his stepmother, Lana Letandre (Lana), to come over to the residence. He had done so after obtaining permission from Erica and Damien. She arrived at approximately 8:00 a.m. Shortly after 9:00 a.m., the accused arrived at the residence. While not uncontradicted, it appears that he so did at the invitation of Lana and for the purpose of selling cocaine.

[8] At approximately 11:30 a.m., Dakota and David got into a taxi at the residence and returned approximately half an hour later. Around the time of their return, Lana messaged David and said, “stay away for 30 minutes” (*ibid* at para 44). About 1:00 p.m., a Unicity taxi driver was dispatched to the residence where two females and a male entered the taxi with two televisions. These individuals were later identified as Lana, the accused and the co-accused. After their departure, David rushed out of the residence toward businesses on a nearby street to place a 911 call.

[9] David made a statement to police identifying the accused out of a photo lineup as the person who stabbed the deceased. The police attended at the residence of Lateasha Belcourt (Lateasha), a former girlfriend of the accused, looking for him. At that time, Lateasha confessed to them that she killed the deceased and produced a knife. She said that the accused was there

but did not do anything. The police seized the knife and a cellphone, the latter found to belong to Dakota.

[10] At the police station, after initially maintaining her confession, Lateasha recanted and confirmed to police that she had never been at the residence. Later that day, the police arrested the accused who, when advised of the reasons for his arrest, said, “[b]ut I didn’t do anything” and “I didn’t do it. I seen the guy bleeding. I just got into a fight because the two dudes were hitting her” (*ibid* at para 5). The accused was in possession of a backpack and cellphone belonging to David, as well as the two televisions taken from the residence.

[11] The trial judge reviewed the evidence of each of the witnesses ascribing to them various levels of credibility and reliability.

[12] Starting with Erica, he was of the view that she had testified in a straightforward manner and generally accepted her evidence. He found, however, that given her admission of having been drinking for the twelve days prior to the incident, her recollection of the incident might be problematic. Where her evidence was at odds with others, he found the differences were either not material or, where material, could be reconciled.

[13] Erica confirmed that David asked her and Damien if he could invite Lana, to which they both agreed. Around 8:30 a.m., she was introduced to Lana. She was present when Damien purchased a television and golf clubs from David and paid him by way of e-transfer. After the e-transfer took place, David and Dakota left in a taxi but returned within the hour.

[14] After the e-transfer, Erica joined the deceased, either in the living room or basement, to watch television. At some point, she went into the kitchen and saw someone sitting at the table, who was later identified as the accused. She had never seen him before and did not know his name. He offered her cocaine, which she accepted, and everyone went back downstairs except for Damien, who was passed out on the couch. While downstairs, she purchased a piece of crack cocaine to share with the deceased but, as she did not want to use the drugs offered without paying for them, she asked the deceased to go to the bank to get some money. He agreed and left the basement while she remained.

[15] Approximately forty-five minutes to an hour later, she heard a thud. When she went upstairs, she could not identify the reason for the noise. Sometime later, while in the kitchen, she saw David and the accused go into an adjacent bedroom. A few minutes later, the accused went to fetch Dakota, and went back into the bedroom with him and closed the door. She thought the deceased was still at the bank. She saw the accused enter and exit the bedroom where the deceased was later found, but she was unaware that the deceased was in that bedroom.

[16] After the accused, the co-accused and Lana left, Erica spotted a foot by the bedroom door and entered the room. That is when she saw the deceased on the floor and David by the window with his hands tied in front of him. She also noticed Dakota tied from behind lying on his stomach. She told David and Dakota to call 911. They both left the house to do so as their cellphones had been taken.

[17] The trial judge then reviewed David's testimony. Shortly after the incident, David attended police headquarters where he was interviewed by investigators and gave a two-and-one-half-hour sworn video-recorded statement in which he detailed the events, including his confinement in the bedroom and the death of the deceased. He also testified under oath by video at the accused's preliminary inquiry, giving evidence similar to the statement he had previously given to police. He was cross-examined by counsel for the accused and the co-accused.

[18] However, at the trial, David claimed not to remember the incident or providing a statement. He also claimed to have little to no memory of the circumstances surrounding his testimony at the preliminary inquiry. As a result, the Crown was granted leave to cross-examine him pursuant to section 9(2) of the *Canada Evidence Act*, RSC 1985, c C-5. As well, both defence counsel cross-examined him with respect to the circumstances of the making of his statement and his testimony at the preliminary inquiry.

[19] The Crown then sought to have his statement and his evidence from the preliminary inquiry admitted as evidence pursuant to the principled exception to the hearsay rule. After a *voir dire*, the trial judge found that the requirements of procedural reliability had been met, given that his statement was made under oath with a warning and was recorded, as was his testimony. They were both admitted as evidence at the trial.

[20] The trial judge found that David's evidence suffered from both credibility and reliability issues, in part due to his intoxication by alcohol and drugs in the days leading up to and including the day of the incident, as well as his admitted difficulty in remembering details. David's phone records

illustrated that he was a busy drug dealer and, while he told the police that he had left the residence that morning to obtain food, it was in fact to purchase drugs. The trial judge found that David lied when he testified that he did not recall any of the events.

[21] But his testimony was significant, as he was the only person who gave evidence that he saw the accused stab the deceased. Acknowledging that he was an unsavoury witness and that his evidence had to be closely scrutinized, the trial judge concluded that he could rely on David's evidence if satisfied that it was true and supported by reliable evidence that corroborated it.

[22] According to his testimony at the preliminary hearing, he approached Lana, asking her to come over, and she was the one who texted the accused to bring crack to them, which he did around 11:00 a.m. According to David, he did not know the accused before and, as far as he was concerned, the accused was at the residence to sell drugs.

[23] At some point, the accused told David and the deceased, who were both in the living room at the time, that he wanted to talk to them and he “‘kind of’ forced him into the bedroom, not pushing, but guiding with his hand on [his] shoulder” (*reasons* at para 34). Once they were in the bedroom, the accused told both David and the deceased to get down on the floor. The accused was holding a kitchen knife about a foot long in one hand and another knife in the other hand. David did as he was told, but the deceased did not follow directions and “got stabbed by [the accused] in the right side of his chest” (*ibid*). The accused then tied David's hands in front of him, rifled through his pockets taking his money, phone and bank card.

[24] The accused then brought Dakota into the room and told him to get onto the floor. The co-accused took items out of the house when leaving, including a Coach brand backpack. As previously noted, during the police interview, David identified the accused from a photo lineup.

[25] The trial judge recognized inconsistencies in David's testimony. While David testified that he did not believe he had ever met the accused before, his phone records showed that he placed a call to a phone number programmed into his phone with the name "Easy", which was the name used by Lana at the house to refer to the accused. It is unclear when this information was programmed into the phone. He denied texting the accused that day, despite what was on the phone. In his statement to the police, he said that he had met the accused previously through Lana for a couple of minutes.

[26] As to the message from Lana advising him to stay away for thirty minutes, David testified at the preliminary inquiry that when he read the message, he ignored it, returned to the house and did not ask her about it. The trial judge was of the view that Lana was trying to protect him from what was about to unfold.

[27] As for Dakota's evidence, the trial judge accepted most of it. He described the incident in a manner similar, although not identical, to David's evidence. Dakota confirmed the presence of Lana, who, according to him, "appeared to be friendly, but thought she was scoping the place out" (*ibid* at para 45). Somewhat later, the person he called "Osmosis", whom the trial judge found was the accused, appeared and handed out drugs. Dakota spent some time drinking and smoking marijuana with the accused, after which the

accused's "demeanour changed and he started looking around the house, scoping, just as Lana did" (*ibid* at para 46). Dakota was in the basement where Lana had encouraged him to smoke crack, which he believed was to keep him there.

[28] The accused called Dakota upstairs and directed him to the bedroom. Once in the bedroom, Dakota saw the deceased covered in blood and walked toward the middle of the room where knives were put to his face. He got on the floor as instructed by the accused and his hands were tied behind his back, at which time his phone, money, drugs and jewellery were taken. Once the accused and the co-accused left, he broke his ties and he and David ran to call 911.

[29] Dakota acknowledged that the combination of drugs and alcohol affected his memory. His credibility was challenged because he denied any drug dealing, despite it being clear that he was an active drug dealer. He also denied ever using drugs himself or seeing David do any drugs that day, both of which were not true. Dakota's recollection changed between direct examination and cross-examination, especially on the smaller details. He also lied to the police about leaving the house that day because he did not wish to get into trouble for buying drugs. Originally, he had told police that he was in the basement at the time of the incident.

[30] The trial judge then reviewed the evidence of Lateasha who testified that, on the day of the incident, the accused and the co-accused showed up at her house with two televisions, a designer backpack, two kitchen knives and a phone. The accused had blood on his clothes and boots, and it looked like he was in shock and "freaking out" (*ibid* at para 55). She testified that he "told

her that 'he might have did something' or something happened at a party, or a place, and that someone could be dead and he was trying to see if he was on the news" (*ibid* at para 56). She described the accused being "worried or scared that he might have hurt somebody for getting into a fight. 'Something with the knife. That person coming at him and he's self defence. Not sure'" (*ibid*). She identified the Coach bag that the accused brought in with him. She further testified they broke a phone to destroy the ability to locate it and the two televisions were put into the basement. When the police arrived, she went out to them, admitting "that she killed the guy and that the weapons were hers" because she did not want the accused "going down for that" (*ibid* at para 57). Lateasha "ultimately admitted that she did not kill anyone and that [the accused] did, but that he did not intend to do so" (*ibid* at para 58).

[31] Lateasha's trial evidence of what transpired is not clear. While Lateasha gave a statement to the police, it was never put into evidence as she testified at trial. But it is useful to confirm what she said at trial:

Q Now, you said that they told you what happened.

A She didn't really tell me a whole lot, but he did.

Q What did he say?

A And -- that he might have did something or something happened at a party, or a place, and that someone -- someone could be dead or happen -- like, something serious happened, and he was trying to see if he was on the news or online.

...

Q Okay. So how did he tell you or what did he say happen? How did this -- how did this come about that someone might die?

A Well, I heard that there was a fight, and someone got hurt, and he was worried or, like, he was scared that he might have hurt someone from getting into a fight. Something --

Q Did he say how?

A Something with a knife. That person coming at him, and he's self defence. Not sure.

Q Did he say who --

A Because he --

Q -- had the knife?

A They both.

Q They both.

THE COURT: Who's they?

A Well, victim, [the deceased], and him, [the accused]. Because [the accused]'s not a bad guy. I know he wouldn't do that intentionally. So obviously -- and I know the people that he hangs around with, and at that party, I know what it's -- those people are like, so there's obviously some beef there and someone got jealous or someone didn't like something, started a fight, and people have really bad tempers.

...

Q So at some point you told them you did not kill somebody?

A No, I told them that he did it.

Q Who did it?

A [the accused].

[32] During cross-examination, she was asked:

Q And he shared with you that there was a fight or something along those lines, right?

A Yes.

...

Q Yeah. Okay. And I think you had used the word self-defence when [the accused] was telling you what happened; is that fair?

A Yes.

...

Q Okay. But sometimes the details become less clear. I mean, you've already told us that there's some parts that are flashbacks or some parts that are blurry, right?

A Yes, because of my -- my injury.

...

Q Okay. And what -- you know, you -- you haven't really told us verbatim what -- what [the accused] told you happened, and that's because it's fair to say that you don't remember his exact words; is that fair?

A Yes.

Q Yeah. Basically, what he conveyed to you, though, is whatever happened was accidental or -- or not intentional, correct?

A Yes.

Q Yes. So, for example, [the accused] didn't come home and say that he had a plan to harm someone or kill someone and that he followed through with it. That's not the story he told you, correct?

A (INDISCERNIBLE).

Q Yes. He didn't tell you that he intentionally killed this guy. Didn't say anything like that, correct?

A Yes.

As well, Lateasha testified that, as a result of a previous fight, she was hit in the head, which affected her memory.

[33] The trial judge noted these concerns about the accuracy of her testimony in his *reasons* and accepted her evidence as to the accused's appearance at her home and having the items robbed from the residence with him.

[34] As well, Lateasha received two calls from the accused when he was an inmate at the Brandon Correctional Centre, both of which were recorded. The recordings were entered into evidence.

[35] The calls were made by the accused even though he was under a non-communication order. In the first call, the accused raised the possibility that Lateasha could advise the police that she had in fact been present at the incident and that he had not stabbed the deceased. On a later call, he appears

to have received information that she would be testifying to the effect that he told her that he had stabbed the deceased, although not intending to do so. He was concerned, correctly as it turned out, that his defence that he was not the person who stabbed the deceased would be scuppered by her evidence that he admitted doing it, although not intending to do so. During those phone calls, he does indicate that he did not stab the deceased but suggests that it was David who did so. The trial judge concluded that the accused's comments corroborated Lateasha's evidence as to his admissions to her upon arriving at her residence and that they also corroborated other evidence that he stabbed the deceased.

[36] The trial judge, based upon the evidence of David and Dakota, concluded that the accused took each of them into the bedroom, closed the door and tied their hands with cables, and threatened them with knives. While there was some discrepancy as to when the deceased was taken into the bedroom, it was clear that, according to the trial judge's findings, he was brought there by the accused as part of a scheme to rob people in the house. He was satisfied beyond a reasonable doubt that the accused confined David and Dakota for the purpose of pursuing his plan to rob them and others of valuables. He also found that the accused, when he arrived at Lateasha's, told her that he had stabbed the deceased. According to the trial judge, while the accused may have characterized the stabbing as either self-defence or occurring during a fight, Lateasha's evidence corroborated the other evidence that the accused was the person who stabbed the deceased, which he admitted in the telephone conversations with her.

[37] When reviewing the evidence of the pathologist who performed the autopsy (Dr. Rhee), the trial judge noted his testimony that the wound could

have happened during a fight where the deceased ran at the accused. However, the trial judge observed that there was no evidence of a struggle or that the deceased did anything but refuse the direction to get onto the floor. When the deceased failed to do so, the accused “did not hesitate to use one of those knives to stab [the deceased] in the chest . . . with sufficient force to in fact pierce the right ventricle of his heart” (*ibid* at para 82).

[38] The trial judge concluded that, in stabbing the deceased, the accused intended to cause bodily harm with the knowledge that a stab wound to the chest would likely cause death or was reckless whether death ensued or not. As a result, he found the accused guilty of murder. Given that there was a confinement independent of the murder, he found the accused guilty of first degree murder in addition to the forcible confinement of both David and Dakota.

[39] There is no appeal of the finding of forcible confinement. In my view, it is supported by the evidence and is not the subject of this appeal. It is noteworthy that the trial judge accepted that it was not the accused’s intention to kill the deceased when he took him into the room, but simply to confine and rob him.

Issues

[40] In his notice of appeal and in the factum filed by his trial counsel, the accused challenges the admissibility of David’s prior statements to the police, his evidence at the preliminary inquiry and its admission by the trial judge following a *voir dire*. However, the accused’s appeal counsel abandoned that ground of appeal and I, therefore, need not deal with it.

[41] The remaining issues are:

- (1) As expressed by counsel at the appeal hearing, whether the trial judge conducted a proper assessment of David's evidence for ultimate reliability, given that he was an unsavoury witness and there was a lack of confirmatory evidence relative to his narrative.
- (2) Whether the trial judge failed to properly consider all of the evidence as to how the stabbing occurred, including the statements by the accused inferring that the stabbing resulted from a fight or struggle as opposed to an attack by the accused and did that failure lead to an unreasonable verdict.

Standard of Review

[42] There is no dispute that David was an unsavoury witness and that the principles in *Vetrovec* apply (see *Vetrovec v The Queen*, 1982 CanLII 20 (SCC) [*Vetrovec*]). The question is whether the trial judge correctly applied *Vetrovec*.

[43] When a trial judge accepts certain evidence as confirmatory, an appellate court must show deference and not intervene simply because it would have drawn a different conclusion. However, when the evidence is not capable of providing such confirmation, then an appellate court is entitled to intervene because the trial judge's conclusions would amount to an error of law (see *R v Flores*, 2013 MBCA 4 at para 18 [*Flores*]; *R v Grant (IM)*, 2009 MBCA 9 at para 57).

[44] As to the second issue, unreasonableness of the verdict, an appellate court must first determine that the verdict is one that a properly instructed jury or judge could reasonably have rendered (see *Flores* at para 21). A verdict will be unreasonable if the trial judge drew an inference or made a finding of fact essential to the verdict that (a) is plainly contradicted by the evidence relied upon by the trial judge and in support of the inference or finding, or (b) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (see *ibid*, citing *R v Sinclair*, 2011 SCC 40; *R v Beaudry*, 2007 SCC 5).

Issue 1: Assessment of Ultimate Reliability

[45] In his decision on the *voir dire* (see *R v Musa and Goodwin* (11 July 2023), Winnipeg CR22-01-39046 (MBKB) [*ruling*], the trial judge recognized that his admission of the out-of-court statement to the police and the evidence at the preliminary inquiry required the Crown to establish threshold reliability. He found threshold reliability based upon procedural reliability, namely, that the statement and the testimony were given under oath with a warning as to the consequences of not being truthful and that they were, in both cases, recorded. He left issues of David's level of intoxication at the time of the recordings and inconsistencies in his versions of events to an evaluation of "ultimate reliability" (*ruling* at para 17).

[46] The thrust of the accused's argument on this issue on the appeal is that the trial judge never performed an assessment of David's evidence to establish ultimate reliability. He argues that the assessment would have required him to consider David's level of intoxication when he provided the

statement (and possibly when he testified at the preliminary inquiry). The trial judge does not refer to *Vetrovec* but says (*reasons* at para 31):

However, the significance of David's testimony is that he is the only person who says that he saw [the accused] stab [the deceased]. I agree that David is an unsavoury witness whose evidence must be *scrutinized closely*. Although I am entitled to rely on his evidence if I am satisfied that it is true, it will be important to look for reliable evidence *which corroborates David's evidence*.

[emphasis added]

[47] While not referring to *Vetrovec*, this excerpt indicates that the trial judge was alive to it.

[48] The accused's argument is that, notwithstanding the trial judge identifying the *Vetrovec* concerns, he failed to identify the specific concerns as to David's evidence and highlight what confirmatory evidence he would use to assess his overall credibility and accept all or part of his evidence. The accused submits the issue of the ultimate reliability of David's evidence was never, or never properly, canvassed.

[49] The accused points to the evidence of Erica, the one witness whom the trial judge accepted as truthful for the most part. She testified as to the sequence of events surrounding the placing of individuals in the room where the incident occurred. Her evidence was inconsistent with the description given by David to the police in his statement, both as to the timing of when he and others were taken into the room and whether they were tied up and when. At the preliminary hearing, David testified that he and the deceased were in conversation prior to being directed to the room by the accused,

whereas Erica testified that she was present when David was directed into the room by the accused and the deceased was not with him.

[50] The accused submits that, if Erica is to be believed, as she was by the trial judge, the sequence of events described by David could not be what occurred. As well, David's evidence denying being a drug dealer was not believed by the trial judge, who found him to be an active drug dealer based upon his phone records. In the same vein, in his statement, David first suggested that he left to get food from McDonald's when, in fact, as he admitted during his testimony, it was a trip to purchase drugs.

[51] The only reference in the *reasons* to the contradictions was when the trial judge stated: "That Erica did not see [the deceased] taken into the room likely means that she or David were confused as to when [the deceased] was brought into the room, but I have no doubt that he was brought there by [the accused] as part of his scheme to rob people in that house" (at para 73). He further states in the next paragraph that "Erica testified that when she went into the room, David and Dakota had their hands tied with electronic cable cords. Only [the deceased], who she did not recognize at first, did not have his hands tied" (*ibid* at para 74). In the accused's submission, there was no proper explanation of the contradictions.

[52] Finally, the trial judge found that the accused stabbed the deceased and admitted as much to Lateasha; that David saw the accused stab the deceased; and that there was no evidence of a struggle or of the deceased doing anything but refusing a direction to get onto the floor (see *ibid* at paras 75, 82). The accused argues that there was no assessment of that evidence, a critical part of the findings against him.

Vetrovec

[53] It is useful to review exactly what the *Vetrovec* caution requires. Although *Vetrovec* cautions are a form of jury instruction, a judge sitting alone also must remain alive to the frailties of such evidence. However, in their reasons, judges need not expressly articulate the principle or its application to the case before them (see *R v Newman*, 2009 NLCA 32 at para 16). Here, the trial judge made specific reference to the need to scrutinize David's evidence and to seek confirmatory evidence if possible. As stated earlier, the trial judge was alive to the frailties of David's evidence.

[54] In *R v Nelson*, 2020 BCCA 204 [*Nelson*], also a judge-alone case, the Court recognized that there may be overlap between the *Vetrovec* and overall reliability analyses, particularly where the witness' memory was impaired due to substance use. In that case, the parties disagreed about whether a particular witness was a *Vetrovec* witness. Justice Griffin, for the Court, opined as follows (*Nelson* at para 81):

On appeal the parties disagree as to whether the judge did or did not consider Mr. Vieira to be a *Vetrovec* witness. I see this debate as formalistic and missing the point. The important issue is whether the judge appreciated and considered the defence arguments going to Mr. Vieira's credibility, before accepting his evidence. In my view, he did so.

[55] In *R v Stevenson*, 2024 SKCA 40 at para 43, aff'd 2024 SCC 41, the Saskatchewan Court of Appeal recently made the following comments regarding the application of *Vetrovec* in judge-alone trials:

Vetrovec does not compel triers of fact to assess evidence in a prescribed way. It simply requires them to recognize that the evidence of certain witnesses must be approached with particular

caution, to understand why that is the case, and to be wary of accepting such testimony in the absence of confirmatory evidence. But *Vetrovec* does not impose a legal requirement that the testimony of an unsavoury witness be confirmed before it can be accepted by a trier of fact. The important question is *whether* a trier of fact's confidence in an unsavoury witness is restored, not *how*. In a judge-alone case, as long as a trial judge is mindful of the need to exercise the appropriate degree of caution, and is properly oriented to the factors that give rise to the need for such caution, they are entitled to find that an unsavoury witness's evidence is worthy of belief even if it stands on its own.

[emphasis in original]

Conclusion on Issue 1

[56] I am not of the view that the trial judge failed to consider and perform an assessment of David's evidence in relation to the other evidence that was before him when considering its ultimate reliability. While there were inconsistencies, which were not explained, between the evidence of Erica and David, they do not rise to a level of invalidating the trial judge's conclusion that he was satisfied with the reliability of David's testimony on the core issues of what occurred leading up to and including the confinement, stabbing and robbery. Given the deference that must be afforded to trial judges' determinations of credibility and use of evidence, I am of the view that there was sufficient evidence before the trial judge to reach the conclusions that he did with respect to the credibility and reliability of David's evidence.

Issue 2: Intention to Commit Murder

The Parties' Positions

[57] The accused's submissions with respect to the second ground, unreasonableness of the verdict, go primarily to the conclusion of the trial judge that the accused had the necessary intent to commit murder.

[58] It was the accused's contention at trial that, should it be found that he was the one who stabbed the deceased, it was without the required intent for murder and that he should be found guilty of manslaughter.

[59] The accused submits that there is no direct evidence of intent, such that his *mens rea* could only be inferred from his actions and the surrounding evidence. Accordingly, the trial judge had to apply the principles set out in *R v Villaroman*, 2016 SCC 33 [*Villaroman*] with respect to circumstantial evidence. Given my reasons set out below, it is not necessary to determine whether the trial judge failed to apply *Villaroman*.

[60] In the accused's submission, the evidence of the pathologist, Dr. Rhee, was not properly considered by the trial judge. The accused submits that Dr. Rhee's evidence was consistent with the accused's suggestion he was acting in self-defence or the stabbing was a result of the deceased rushing at the accused. In other words, it was evidence of a valid defence, alternatively consistent with the suggestion that the stabbing was not a deliberate act on the part of the accused as "[t]he wound could have happened during a fight in which [the deceased] ran at [the accused]" (*reasons* at para 76).

[61] The accused also argues that there is a lack of evidence showing how the stabbing actually occurred and David's evidence does not shed light on that aspect. There is no description in his evidence as to what actions the deceased took or what occurred between the parties other than the exchange as to whether or not the deceased should lie down. The trial judge's comment that the accused "did not hesitate to use one of those knives to stab [the deceased] in the chest where the heart is located, and with sufficient force to in fact pierce the right ventricle of his heart" (*reasons* at para 82) is unsupported by the evidence, other than that the stab wound occurred in that location.

[62] The evidence that there was an altercation between the accused and the deceased comes from the testimony of Lateasha regarding what the accused told her, which the trial judge accepted, as it related to the accused doing the stabbing. The trial judge used her evidence to satisfy himself that, upon the accused's arrival at Lateasha's home, he admitted to stabbing the deceased. But, as submitted by the accused, part of that exchange also raised the possibility of it being in self-defence or as the result of some kind of struggle. Part of that statement is inconsistent with the trial judge's comment that "[t]here is no evidence that there was a struggle or that [the deceased] did anything but refuse the direction to get onto the floor" (*ibid*).

[63] The accused submits that it was incumbent upon the trial judge to assess Lateasha's evidence and the exculpatory statements attributed to him in his assessment of whether a defence of self-defence did not apply and whether the Crown had proven intent. In other words, there was an obligation on the part of the trial judge to assess the accused's evidence and to explain why it was not accepted (see *R v YM*, 2004 CanLII 39045 at para 27 (ONCA)).

Failure to do so led the trial judge to come to a conclusion that was not the only reasonable conclusion available to him on the totality of the evidence and led him to an unreasonable verdict.

[64] The Crown argues that the evidence of a struggle or attempt by the deceased to overpower the accused is, at best, speculative and does not raise a defence of self-defence. It argues that the trial judge's comments as to there being no evidence are not material given the overall evidence that the accused was the one who stabbed the deceased and did so in a manner and location that was consistent with intent to cause serious bodily harm, or was at least reckless as to whether it did. Its position is that the trial judge correctly set out in the *reasons* why those conclusions were supported by the evidence.

[65] The Crown submits that the only evidence of what transpired in the room is that of David, which clearly pointed to the accused as the individual responsible for what led to the stabbing, the stabbing itself and the events thereafter. Moreover, it states that all the actions of the accused after the incident corroborate a finding of him being the individual who stabbed the deceased and his motivation for doing so.

Analysis

[66] To the extent that Lateasha's evidence includes evidence that can be considered exculpatory or favourable to the defence, it must be considered by the trial judge in his assessment of reasonable doubt. This Court expressly articulated this principle in both *R v Grant (ME)*, 2013 MBCA 95 at paras 31-32 and, more recently, in *R v Herntier*, 2020 MBCA 95 at para 307, where Beard JA stated:

While the framework as set out in *W(D)* refers to the evidence of the accused, that case was essentially a two-witness trial. The instruction has evolved since then, so that, even if the accused does not testify, it can apply to other defence evidence and even to exculpatory evidence that forms part of the Crown's case where that evidence conflicts with other evidence on a vital issue. This was explained by Blair JA in *R v BD*, 2011 ONCA 51 (at para 114):

What I take from a review of all of these authorities is that the principles underlying *W.(D.)* are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if – viewed in the context of all the evidence – the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt . . . In that event, they must acquit.

[67] This would apply to Lateasha's evidence, as well as to the in-custody telephone calls that were placed into evidence.

[68] Lateasha's testimony was to the effect that the accused told her that there was a fight in which someone was hurt and that it could have been caused by someone attacking the accused and he was defending himself. As well, during cross-examination, she stated that the accused conveyed to her that what had happened was accidental or not intentional. In the recorded telephone conversation, Lateasha explained to the accused that she told the police that he did not intend to hurt the deceased and that the deceased "started it", to which the accused replied, "Yeah, of course." As well, in two instances,

the accused indicated that he did not intend to hurt the deceased, the stabbing was an accident and it occurred during a fight. Finally, at a further point in the conversation, the accused stated: “And in fact, I didn’t mean to do it. I did it by accident.”

[69] The trial judge accepted the telephone conversations as corroborating Lateasha’s evidence that the accused admitted, upon arriving at her home, that he had done something and that someone could be dead (see *reasons* at para 63). The trial judge also used the recorded conversations to corroborate David’s evidence that the accused had stabbed the deceased. In the same paragraph, the trial judge referred to the accused telling Lateasha that there had been a fight and that a knife might have been used in self-defence.

[70] When he was setting out his conclusion that he was satisfied beyond a reasonable doubt that the accused stabbed the deceased causing his death, the trial judge explained that this was based largely on the fact that the accused’s own statements corroborated David’s evidence (*ibid* at para 75):

David testified that he saw [the accused] inflict the stab wound which killed [the deceased]. He was the only eyewitness, but his evidence is corroborated by [the accused] himself. *I am satisfied that when [the accused] went to [her home], he told Lateasha that he stabbed [the deceased]. While he characterized it as either self-defence or as occurring during a fight, it nonetheless corroborates that he is the person who stabbed him.* This is further corroborated by [the accused] in his telephone conversations from the Brandon Correctional Centre with Lateasha in which he berates her for telling the police that he didn't intend to kill [the deceased] and urged her to give a false version of the events to his lawyer. Accordingly, I am satisfied beyond a reasonable doubt that [the accused] did stab [the deceased] and cause his death.

[emphasis added]

[71] These portions of the *reasons* demonstrate that the trial judge accepted that the accused did make those statements to Lateasha, as she claimed, and that those statements were true in relation to him having stabbed the deceased. The *reasons* do not consider whether the accused's statements to Lateasha were true in relation to him having committed the murder in the course of a fight or acting in self-defence and without intent, or whether they raised a reasonable doubt in that regard. While not determinative, it should be noted that there was evidence from Dakota that the accused's demeanour changed considerably after the stabbing, suggesting that it was not anticipated. This was not considered by the trial judge either.

[72] In assessing whether the Crown had proven intent on the part of the accused to commit the murder, the trial judge did mention the evidence of Dr. Rhee and of David. As to Dr. Rhee, he noted that the doctor was unable to determine the position the accused and the deceased were in at the time the stabbing occurred and that, in fact, "[t]he wound could have happened during a fight in which [the deceased] ran at [the accused]" (*ibid* at para 76). In reviewing David's evidence, he concluded that (*ibid* at para 82):

There is no evidence that there was a struggle or that [the deceased] did anything but refuse the direction to get onto the floor. . . . When [the deceased] did not follow his direction, he did not hesitate to use one of those knives to stab [the deceased] in the chest where the heart is located, and with sufficient force to in fact pierce the right ventricle of his heart. In stabbing him as he did, he intended to cause him bodily harm, with the knowledge that a stab wound to the chest directed towards the heart would likely cause his death, and was reckless whether death ensued or not. Accordingly, I find [the accused] guilty of murder.

[73] In short, the trial judge must have been of the view that the stabbing, by its nature and its location—that is, with force and to the heart—amounted to evidence of an intent to cause death or was reckless as to whether death ensued, sufficient to satisfy the intent required for murder.

[74] The difficulty with those comments is that there is no evidence, either from the pathologist or from David, that the accused deliberately chose the location of the stab or, in fact, struck with the necessary force, as referred to by the trial judge. There is simply no evidence to confirm either of those conclusions or to allow such inferences to be drawn.

[75] It is noteworthy that, when discussing the confinement, the trial judge concluded that there was no intent to justify a murder charge at that point. He said: “I accept that it was not [the accused]’s intention to kill [the deceased] when he took him into that room. His intention was to confine him and rob him” (*ibid* at para 83).

[76] The trial judge must have concluded that, once the deceased refused to abide by the directive to lie down, the intent changed. Again, there is no evidence, other than the fact of the stabbing, that would support that conclusion.

[77] In reviewing the *reasons*, I recognize the following concerns: (a) appellate courts should not dissect parts of or microscopically examine the reasons of a trial judge; (b) appellate courts are not to interfere with a trial court’s assessment of credibility unless they establish that such an assessment cannot be supported on any reasonable view of the evidence; (c) reasons for judgment are not intended to be, and should not be read as, a verbalization of the entire reasoning process engaged in by the trial judge in reaching the

verdict; and (d) trial judges are presumed to know the law and particularly a principle as elementary as the presumption of innocence.

[78] The statement that there was no evidence of a struggle could be open to two interpretations. First, it could, in accordance with the accused's argument, be demonstrative of a failure by the trial judge to recognize that the statements that were exculpatory evidence of a struggle should be weighed according to the principles in *R v W(D)*, [1991] 1 SCR 742, 1991 CanLII 93 (SCC) on the issue of intent and that the trial judge failed to do so. Alternatively, it could, as argued by the Crown, be interpreted as demonstrating that the trial judge considered the exculpatory statements, dismissed them based on his view of the accused's credibility and the other evidence available to him, and concluded that there was no credible evidence before him of a fight that he accepted.

[79] While it can be argued that the second interpretation is the one to be preferred, as it is consistent with a trial judge's presumed knowledge of the law and the application of the presumption of innocence, the difficulty in doing so here, however, is that it is inconsistent with the *reasons* as a whole. More importantly, it arises on a crucial issue relating to an essential element of the most serious charge.

[80] While it is not necessary for a trial judge to explain in detail their reasoning or deal with every aspect of the evidence, it is necessary for a trial judge to explain their reasons sufficiently to allow appellate review on the essential matters. As the accused argued, the trial judge made a finding of intent without alluding to evidence that was exculpatory and central to both

the accused's defence and a critical element of the most serious charge the accused faced.

[81] As well, the issue was of significant importance to the accused, given that it led to a finding of first degree murder as opposed to one of manslaughter, meaning a considerably higher sentence.

[82] In my view, it is unclear whether the trial judge properly considered all of the evidence before him as to whether the intention element of the murder charge was made out. As such, the conviction cannot stand and a new trial must be ordered on that count.

Conclusion

[83] As there is no appealable issue on the convictions for forcible confinement and robbery, the appeal is dismissed as to those two counts. As to the remaining count of first degree murder, the appeal is allowed and I would set the conviction aside and order a new trial on that count alone.

Monnin JA

I agree: _____
Beard JA

I agree: _____
Kroft JA