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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,		)	Patrice Miniely
		)	Marnie E. Evans
		)	for the Crown
- and -		)	
		)	
AARON WAYNE AZURE,		)	Scott B. Newman
		)	Gagandeep S. Kahlon
- and -		)	for Azure
		)	
KEITH MICHAEL MCKAY,		)	Gerri F. Wiebe, K.C.
	accused.	)	Jason D. Poettcker
		)	for McKay
		)	
		)	Judgment Delivered
		)	April 29, 2025

MARTIN J.

INTRODUCTION

[1] Aaron Azure and Keith McKay are jointly charged with second-degree murder for the stabbing death of Vincent Kipling on May 10, 2023, in Winnipeg's notorious north Main Street area.

[2] This decision has two main parts: the verdict, and brief reasons why I did not grant Mr. Azure's *Bradshaw/KGB* application to have Mr. McKay's statement to police, which was proffered by the Crown against Mr. McKay during the trial, admitted as hearsay evidence to be considered in assessing Mr. Azure's culpability.

PART I: THE VERDICT

THE FACTS

[3] I will be fairly brief, setting out the material facts rather than every detail.

[4] This tragedy started as a fight. The main combatants were Mr. Kipling and Mr. Azure, although Mr. McKay partook in a dangerous way. Two other men briefly joined the fighting against Mr. Kipling; however, they were charged with lesser offences and were not defendants or witnesses in this trial. Almost all of the event, except the critical final moments, were caught on good quality video, taken from various security cameras on Main Street.

[5] The backdrop appears to be that Mr. Kipling had been in a relationship with Mr. Azure's sister. They have a child together. It is unclear whether that relationship was strained on May 10, 2023.

[6] That evening, just after 10:35 p.m., Mr. Kipling, Mr. Azure and Mr. McKay happened to be on Main Street near the Northern Hotel. For some unexplained reason, Mr. Kipling approached Mr. Azure from behind and sucker-punched him in the head. That action started a 10-minute multi-part fracas, mostly occurring northbound on Main Street toward Stella Avenue.

[7] The first part of the fracas happened after the initial punch. For the next minute, Mr. Kipling and Mr. Azure fought. Mr. Kipling's jacket and backpack were pulled off him. No one appeared to have been injured. As the fight disengaged, Mr. Kipling moved north on Main Street, gesturing. Mr. Azure picked up his hat and followed. Mr. McKay was on a bicycle and followed Mr. Kipling.

[8] Of note, at the same time and location Mr. Kipling first punched Mr. Azure, a knife appeared on the sidewalk. It is not clear whose knife it was. Nevertheless, Mr. McKay retrieved it and carried it with him as he rode toward Mr. Kipling and Mr. Azure.

[9] Although Mr. Kipling and Mr. Azure had separated, they squared off and fought a second time. Mr. McKay watched while sitting on his bike. As the fight moved towards him, Mr. McKay reached out with the knife, poking or stabbing Mr. Kipling in his left side torso, below his left arm. This caused a superficial injury. From the video, it appeared that Mr. Azure may have seen this. Mr. Kipling and Mr. Azure continued fighting and then separated.

[10] Mr. Kipling walked south down Main Street before trekking back northbound. Mr. Azure retrieved his bicycle and followed Mr. Kipling.

[11] At this point another man, who exited a taxi, joined in chasing and attempting to fight Mr. Kipling. Mr. Azure followed them and is seen with a knife in his right hand. He chased Mr. Kipling and threw the knife at him. It missed. As the melee continued, a woman picked up the knife and gave it to Mr. McKay.

[12] The fracas moved north and onto Main Street itself. Another man joined in against Mr. Kipling. All four men chased Mr. Kipling north. Mr. Azure separated and went

southbound to his bike. When he retrieved his bike, he moved northward to join the other three men, then all four men separately returned southbound while Mr. Kipling was further north on Main Street.

[13] Despite the earlier stabbing and various fights, it does not appear that Mr. Kipling was seriously hurt; he was holding his own. Seemingly, it appeared this was the end of the fight, except it was not.

[14] Mr. Azure and Mr. McKay lingered for almost two minutes in front of the Yale Hotel. Other people were milling around. Mr. Kipling continued to gesture and yell toward them. Mr. McKay later told the police Mr. Kipling wanted to fight. Shortly, Mr. Azure and Mr. McKay rode their bikes toward Mr. Kipling, who was near a bus stop on the northwest corner of Main Street and Stella Avenue. It was about 10:43 p.m. Immediately, the three men started fighting again.

[15] This final brief fight was the only part of the event that was not captured on good quality video. Rather, this video evidence is difficult to dissect, to see who did what. Certain things are clear, while other things are not. The Crown and Mr. Azure's counsel each point to aspects of the video to assert it shows Mr. Azure or Mr. McKay, respectively, inflicting the fatal stab. After studying the video and considering other surrounding circumstances, I cannot determine which man inflicted the fatal stab.

[16] Clearly, Mr. McKay rode toward the area with a knife in his hand. Mr. Azure was on his left, without any obvious weapon. It appears Mr. Kipling engaged both Mr. Azure and Mr. McKay in this very short fight. Near the end, he picked up a bicycle to either defend himself or throw it at Mr. Azure. Then, almost immediately, Mr. Kipling ran west

on Stella Avenue, somewhat hunched over. He appeared hurt. Mr. Azure followed. The video quality became progressively poor.

[17] Mr. Kipling collapsed to the street. Despite the Crown's submission, it is not obvious Mr. Azure then stomped Mr. Kipling's head into the road. The injuries he sustained to his hands and face, including losing a tooth, could equally have occurred from collapsing on the pavement, striking his face.

[18] Mr. Kipling died shortly after. According to the pathologist, although Mr. Kipling had numerous other superficial injuries, he died from a single stab to his center-left chest that pierced his heart, causing massive internal and external bleeding. The time between the stabbing and his death would have been a matter of moments. He also had a minor stab wound on his left side, below his armpit (inflicted earlier by Mr. McKay), and a cut injury to his right leg, which could have been caused by a sharp-edged instrument such as a knife or from a part of a bicycle, like the one he handled at the end.

[19] In addition to this evidence, the testimony of two peripheral witnesses and Mr. McKay's police statement requires very brief comment.

[20] A female friend of Mr. Azure testified that he showed up at her place later that night. She let him in. During their conversation, he told her that he had been in a fight, it went too far and "the guy passed". He had beat him up and stabbed him. She testified that Mr. Azure had a hunting knife with him. This witness has a long and sad history of drug abuse.

[21] Another acquaintance of Mr. Azure and Mr. McKay testified that they came to her apartment, a meth den, a few days later. She overheard them talking - - Mr. Azure told

Mr. McKay he "would go down for it" because he was wanted for it, that he "would take the charge". This witness also had substantial drug addiction issues.

[22] The credibility and reliability of both these witnesses was hotly contested. A *Vetrovec* type of caution is prudent when considering their testimony.

[23] Mr. Azure was arrested on May 29, 2023. On arrest he stated "It was just a fight; I didn't mean to kill him. He's my brother, man." No other statements from him to the police were tendered.

[24] Later, on July 5, 2023, Mr. McKay was arrested. He gave a statement which appears to be an admission that he inflicted the fatal stab, and the other earlier so-called "warning poke" to Mr. Kipling's side.

THE PARTIES' POSITIONS

[25] Part of what makes this case unusual is the Crown's legal theory and views on evidence.

[26] Their theory of liability for both accused rests on the "parties to an offence" law, set out in s. 21(1)(a) and 21(2) of the ***Criminal Code***:

> 21(1) Every one is a party to an offence who
>
> (a) actually commits it;
>
> …
>
> 21(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.

First and primarily, the Crown's relies on s. 21(1)(a) in asserting Mr. McKay and Mr. Azure are guilty of murder as co-principals in committing the fatal stab. Alternately, they assert

s. 21(2) applies because Mr. McKay and Mr. Azure formed a common intention to attack Mr. Kipling, which they knew was likely to kill him.

[27] In support, the Crown points to evidence, and suggests inferences, that their joint murderous intent "crystallized" when they kept attacking Mr. Kipling, after Mr. McKay stabbed him in the side. And they point to Mr. Azure as the person who likely inflicted the fatal stab, primarily, but not solely, based on their interpretation of the video evidence of the final fight at Main Street and Stella Avenue, and other evidence including his comments to his female friend and to police.

[28] They take this position despite what appears to be a direct admission by Mr. McKay to police of fatally stabbing Mr. Kipling in the chest. The Crown says his statement cannot be trusted because, in their view, it is both internally inconsistent and at odds with other evidence. Particularly, at points he says he only stabbed Mr. Kipling once, which the Crown says is the earlier "warning" stab as seen on video, not the fatal stab. However, the Crown acknowledges the statement plainly implies two different stabs by Mr. McKay, at two distinct times. They say this is due to confusion by both the interviewing police officers and Mr. McKay.

[29] Finally, the Crown says if the court is not satisfied beyond a reasonable doubt that Mr. McKay's and Mr. Azure's actions amount in law to murder, then manslaughter convictions are warranted.

[30] Mr. Azure says Mr. McKay is the person who inflicted the fatal stab because he admitted it and plainly had the knife on the way to the final fight. In any event, there is no evidence of a subjective intention to kill by Mr. Azure, which is necessary to meet the

evidentiary and legal onus for an offence of murder. They say he is not the principal stabber, nor is he a party. At best, they say he is a party to a general intent offence of assault with weapon.

[31] Mr. McKay offered a plea of manslaughter at the outset of trial, which was rejected by the Crown. In closing submissions, noting the Crown's position that Mr. Azure was the stabber, and the Crown's theory of legal liability for murder (which Mr. McKay says is flawed), his counsel asserts he is guilty as a party to manslaughter. Further, a number of features such as evidence of his intoxication by drugs, being invited or provoked to fight by Mr. Kipling and the overall nature of his admissions to police that he did not want to kill Mr. Kipling, combine to raise a rolled-up plea defence, sufficient to raise reasonable doubt as to his intention to kill.

ANALYSIS

Legal Principles

[32] The crime of murder under s. 229(a)(i) or (ii) is a specific intent offence. That means that a person cannot be convicted of murder unless they intended to cause the death (s. 229(a)(i)), or they meant to cause bodily harm that they knew was likely to cause death and was reckless whether death ensued or not (s. 229(a)(ii)). Thus, the Crown must prove an accused possessed subjective or actual knowledge of death or likelihood of death. Similarly, to be convicted of murder as a party, the Crown must prove an accused possessed the relevant subjective foreseeability of death. It is not enough, that someone else might believe that death was a foreseeable outcome of the accused's actions.

[33] To establish the Crown's proposition that Mr. Azure and Mr. McKay were co-principals (s. 21(1)(a)) to murder, they must establish each accused had the requisite intent for murder and each contributed to the unlawful act leading to the death. Thus, if each had the requisite intent to kill Mr. Kipling, and both participated to do so, even though only one is the stabber, they are both liable for murder as co-principals.

[34] The other route for party liability is by common intention (s. 21(2)). To prove murder, the Crown must establish that Mr. Azure and Mr. McKay formed a common intention to assault Mr. Kipling, and during the assault, one of them stabbed Mr. Kipling causing his death, such that (i) the stabber may be guilty of murder if he had the requisite intent, and (ii) the other may be guilty of murder only if he knew that killing Mr. Kipling was a probable consequence of the intended assault. The Ontario Court of Appeal explained the fault element for s. 21(2) as follows in ***R. v. Srun***, 2019 ONCA 453:

> [63] … when the offence committed is murder, the knowledge or foresight element may only be satisfied by proof that the accused *actually* foresaw or actually knew that another participant in the common unlawful purpose would kill another with either state of mind necessary to make the killing murder: …

[35] A lesser included offence of a murder charge is the offence of manslaughter. A key distinction from murder is that the fault element in manslaughter is the commission of the unlawful act, which is objectively dangerous in the sense that a reasonable person, in the same circumstances as the accused, would recognize that the unlawful act would subject the other person to the risk of bodily harm, which was neither trivial nor transitory. Foreseeability of death is not an element. In a group assault situation, it is the common participation in the assault that attracts manslaughter liability; proof of who inflicted the fatal blow or stab is not necessary.

[36] Thus, for murder, the Crown must prove the requisite subjective intent to cause death, while in manslaughter, an objective standard is sufficient.

[37] Also, in any case, the fact that two accused are charged with the same crime does not mean they must be convicted or acquitted together or of the same offence. The culpability of each accused must be considered independently, based on the admissible evidence against him.

[38] Evidence of what Mr. McKay or Mr. Azure meant or intended to do to Mr. Kipling when they fought him, comprises their actions and statements to police or others of what they did and what they intended, essentially that neither intended to cause Mr. Kipling's death. Any admissible evidence is part of the trial evidence; a trier of fact is free to accept or reject all or part of it.

[39] To analyze the requisite intent for murder as a party, I also draw inferences from circumstantial evidence. In a circumstantial evidence case, to prove an essential element of an offence, such as the subjective intent to kill, requires that the inference drawn be the only reasonable inference the evidence allows. As explained by the Supreme Court of Canada in the headnote of ***R. v. Villaroman***, 2016 SCC 33:

> … Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. …
>
> … In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the proof beyond the reasonable doubt standard. A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. When assessing circumstantial

> evidence, the trier of fact should consider other plausible theories and other reasonable possibilities which are inconsistent with guilt. The Crown thus may need to negative these reasonable possibilities, but certainly does not need to disprove every possible conjecture which might be consistent with innocence. Other plausible theories or other reasonable possibilities must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[40] In addition, there is one other important legal nuance applicable in this case. Here, only one man inflicted the fatal blow. Assuming for illustration purposes only, that a trier of fact determines the stabber had the mental state for murder (perhaps based on the commonsense inference), while the evidence does not establish the co-accused had the mental state for murder as a co-principal or by other party liability, what is the trier of fact to do? Only one is guilty of murder; the other conceivably of manslaughter (depending on the facts).

[41] In ***R v. Waite***, 2013 ABCA 257, the Alberta Court of Appeal set out the general principle this way:

> [129] Having recognized the possibility that a jury might find only one person committed the murder, the trial judge should have made clear to the jury that if it reached this point in its deliberations, and it could not decide which of the co-accused committed the murder, it must acquit them both of murder. This was the situation in *R. v. Schell*, 1977 CanLII 1939 (ON CA), …
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> [130] The need for such an instruction stems from the natural inclination of a trier of fact to find someone guilty where the evidence is clear that one of two co-accused has committed murder but it cannot be determined on the evidence which one. The fear is that it will then convict them both.
>
> [131] … At the end of the day, however, even considering the case against each accused separately, it was still possible for the jury to be faced with the conundrum of what to do if the evidence was insufficient to support the conviction of both accused, either as joint principals or aiders or abettors, and it was not satisfied, beyond a reasonable doubt, as to which of the co-accused individually committed the murder. It needed to be assured, in such a case, that the acquittal of both accused was the only option open. …

Obviously, where lesser included offences may be available, such as manslaughter, that must be considered as well, even though both accused may be entitled to acquittals on the main charge.

[42] Finally, it is basic that the Crown must prove each essential element of the crime charged to a standard of proof beyond a reasonable doubt (see ***R. v. Lifchus*** [1997] 3 SCR 20). In other words, I must be *sure* the Crown has proven all the elements of an offence to order to make a guilty finding. Proof of probable or likely guilt is not enough.

Key Findings of Fact

[43] While all the circumstances are important, clearly some are more so. Given the parties' positions, I note the following key findings of fact:

- as should be obvious, Mr. Kipling started this fracas with Mr. Azure. Moreover, even though up to four men were against him at one point, he continued to taunt and want to fight Mr. Azure right to the final fight;
- it would be speculation to find, as defence counsel suggests, that Mr. Kipling brought the knife to the fight. It appears on the sidewalk where and when the first fight starts. I cannot say whose knife it was, but Mr. McKay picked it up;
- it has not been established Mr. McKay and Mr. Azure each possessed separate knives. The video evidence shows one knife possessed by one or the other;
- at the point when he stabbed Mr. Kipling in the side, Mr. McKay chose to involve himself in what was a consensual fight between Mr. Kipling and Mr. Azure. Just as with the other two men who independently and

unexpectantly went after Mr. Kipling, there is no evidence Mr. Azure asked Mr. McKay to participate;

- there is no evidence that Mr. Azure could have known Mr. McKay would stab Mr. Kipling in the side, or at all, when he did;
- after the first stab, clearly Mr. McKay and Mr. Azure were aware that each were going after Mr. Kipling, in effect it was two-on-one;
- subsequently, Mr. McKay gave the knife to Mr. Azure. Shortly, he threw it at Mr. Kipling as he moved away; it missed him entirely. Thus, Mr. Azure was aware of this weapon in this fracas;
- although Mr. McKay stabbed Mr. Kipling in the side, and he had several clashes with the four men, the evidence does not show that Mr. Kipling was physically compromised as the melee continued;
- at the point Mr. McKay and Mr. Azure stopped going after Mr. Kipling, when they lingered at the Yale Hotel for almost two minutes, the fracas was essentially over. Mr. McKay and Mr. Azure had stopped pursuing Mr. Kipling;
- unfortunately, Mr. Kipling kept taunting them to fight. At first, neither reacted. Shortly though, they went to fight again. However, there is nothing in the evidence to suggest they went, as Crown asserts, to kill him; that either or both possessed a murderous state of mind;
- during the short final fight, one of them fatally stabbed Mr. McKay in the heart. The video evidence does not establish who it was; other evidence is not

determinative on this point. Notably:

- the evidence points to Mr. McKay as the person possessing the knife on the way to the fight, and he seemingly admits the stabbing to police;
- yet, critically, the Crown points to Mr. Azure as the actual killer, saying Mr. McKay's statement on the point is not reliable. In other words, any evidence pointing to Mr. McKay as the fatal stabber is dangerous to rely on;
- as to other evidence, the two men's actions immediately after, and in the days following, including comments attributed to them, contribute little to the assessment of any essential element to be proven by the Crown. This evidence, or inferences to be drawn from it, is mostly general, ambiguous and of questionable reliability; particularly of the two witnesses mentioned earlier.

All in, I cannot find who in fact inflicted the fatal stab. As will be seen, this is the critical finding respecting the murder charge.

Available Verdicts in This Case

[44] As will be seen, after considering all the evidence and legal principles, the available verdicts include both accused guilty of murder, one guilty of murder and the other of manslaughter, or both guilty of manslaughter. An outright acquittal for this unlawful killing is beyond the weight of the evidence.

[45] I will deal first with the Crown's theory that they are co-principals to murder, and then with each accused in the order in which they appear on the indictment.

Co-Principals To Murder

[46] The Crown's theory for co-principals to murder relies on finding proof beyond a reasonable doubt that Mr. Azure and Mr. McKay each possessed a subjective intention to kill (relative to either s. 229(a)(i) or (ii)), and jointly acted to commit the fatal stabbing, albeit with only one person actually stabbing Mr. Kipling.

[47] Briefly, the fact findings and any required inferences do not support either essential element of this theory. There is insufficient evidence of co-principal parties, either direct or circumstantial (in a way that would survive a fulsome *Villaroman* analysis). Especially respecting *mens rea* for murder, I disagree that the evidence shows they "crystallized" a common intention to kill Mr. Kipling when Mr. McKay inflicted the first stab, or that they thereafter jointly decided to "finish him off", as the Crown asserts.

[48] As will be seen below, properly construed, the available evidence points to a different legal conclusion.

Mr. Azure

[49] For the totality of the reasons that follow, I find Mr. Azure not guilty of murder, but guilty of the lesser included offence of manslaughter. In reaching this verdict, I am relying primarily on the video evidence, as it is the clearest and most reliable evidence of what happened, and his role in it.

[50] First, the Crown has not shown that Mr. Azure inflicted the fatal stab. Thus, to assess his culpability, I proceed on assumption he did not.

[51] Second, while there is no doubt that Mr. Azure was a willing participant in all aspects this fight, it is far from clear that he intended, at any point, alone or with Mr. McKay, to kill Mr. Kipling.

[52] Rather, a reasonable inference from the totality of his actions is that he was upset at Mr. Kipling for sucker-punching him, and for goading him to brawl further. From the video, there is a noticeable absence of intensity, urgency or ferocity by Mr. Azure to any of this. Even when he briefly possessed the knife, he chose to throw it at Mr. Kipling rather than chase after him and use it directly. Further, particularly when he stopped at the Yale Hotel, it appeared that he was done with the fight, otherwise he could have easily ridden after Mr. Kipling and caught up to him. It was only because Mr. Kipling kept prodding that Mr. Azure and Mr. McKay casually went where Mr. Kipling waited for them.

[53] Third, the fact that he went to the Stella Avenue location with Mr. McKay, who was holding a knife, also does not lead to the only reasonable inference that Mr. Azure knew that Mr. McKay would use it to kill Mr. Kipling. There is no evidence as to how the fight would unfold once they arrived at Stella Avenue, or how Mr. McKay would re-engage. To that point, Mr. McKay was clearly involved with fighting against Mr. Kipling, but it appeared to be a support role to Mr. Azure rather than a direct confrontation on his own. For example, earlier he never got off his bike to directly fight Mr. Kipling. Even when he first stabbed him, he remained on his bike, waiting for the fight to come to him, and did not exert force in stabbing. It was as though he was seemingly not trying to hurt Mr. Kipling, but to annoy or unsettle him. Without more evidence of Mr. McKay's role or

intent at the final fight, the context of evidence against Mr. Azure as a party to murder is weak.

[54] Fourth, that Mr. Azure likely knew Mr. McKay stabbed Mr. Kipling earlier, and thus might stab again, is not sufficient proof beyond a reasonable doubt of the required foresight for murder. Rather, the inference from the totality of the fracas is that, in going to Mr. Kipling, another fight would happen, and Mr. McKay may engage against Mr. Kipling. That Mr. McKay went along and had a knife meant it was objectively a dangerous situation, bodily harm could result that may lead to death - - on the evidence and absence of evidence, *vis-à-vis* Mr. Azure, this is a classic party to manslaughter scenario.

[55] Finally, as the facts do not support a murder conviction but leave me satisfied Mr. Azure is guilty of the included offence of manslaughter, I need not consider his counsel's alternate position of assault with a weapon, which on the specific wording of this indictment, is not an available verdict regardless.

Mr. McKay

[56] For the totality of the reasons that follow, and the fact findings, I also find Mr. McKay not guilty of murder, but guilty of the lesser included offence of manslaughter. In reaching this verdict, I am relying primarily on the video evidence, as it is the clearest and most reliable evidence of what happened. Many of the reasons are similar to those mentioned respecting Mr. Azure, particularly as they participated together.

[57] First, the Crown has not attempted to show Mr. McKay inflicted the fatal stab. Rather, they say such evidence is unreliable. Thus, to assess his culpability, I must proceed on the assumption he was not the stabber.

[58] I pause to note that for a lay person, this must be a difficult concept to grasp. It comes from the evidence, or absence of evidence, and the Crown's position. Even though one of these men inflicted the fatal stab, if the trier of fact cannot find beyond a reasonable doubt which one did so, then each is entitled to the benefit of the doubt that he was not proven to be the stabber. Each man's culpability is determined accordingly and separately.

[59] Second, for many of the reasons explained, I find that leading up to the final fatal stab, which I cannot determine who did what, Mr. McKay's role is seemingly lesser than Mr. Azure's. He was not Mr. Kipling's initial target; there is no evidence they had any prior dealings at all and, while he is actively helping Mr. Azure fight Mr. Kipling, it was a secondary, albeit dangerous, role. Without finding he is the stabber, from which a commonsense inference of an intention to kill and murder verdict may be available, the evidence falls short of showing he intended to kill Mr. Kipling when they engaged him the final time.

[60] Third, assuming for this analysis Mr. Azure was the stabber, I am unable to determine how Mr. Azure acquired the knife. Mr. McKay carried it as he rode to the last fight. Perhaps he handed it to Mr. Azure, which would be more damning to Mr. McKay's state of mind and participation, or perhaps Mr. Azure retrieved it some other way, which

would be less damning to Mr. McKay. Regardless, I would have to speculate about this; that is not allowed.

[61] Fourth, as he admitted when he offered a guilty plea to manslaughter, he was, at minimum, a participant in Mr. Kipling's death and liable as such.

[62] Given these points, I need not consider the rolled-up plea defence, which might reduce culpability from murder to manslaughter; it applies under this scenario of Mr. McKay not being the stabber, but more so, in the event I found Mr. McKay to be the fatal stabber.

VERDICT

[63] In the end result, each Mr. Azure and Mr. McKay are guilty as parties of manslaughter for causing the death of Mr. Kipling.

[64] Finally, I wish to be clear that while Mr. Kipling started the fight and continued to goad Mr. Azure, even as he was aware a knife had been used against him, this tragedy should never have happened. A two-on-one fight is bad enough; bringing and using the knife in the final fight was a serious escalation. Mr. McKay did nothing to trigger such an escalation.

PART II: MR. AZURE'S BRADSHAW/KGB APPLICATION

[65] I will be brief.

[66] As mentioned, Mr. McKay's statement to the police was introduced in evidence by the Crown. His counsel conceded it met the voluntariness test and was *Charter* compliant. As such, an admissibility *voir dire* was not necessary. However, Mr. Azure also wanted

the statement to be part of his case, as evidence that he did not stab Mr. Kipling, rather Mr. McKay did.

[67] As I have commented earlier, which I will not repeat in detail, part of what makes this case unique is the Crown's position and theory. Despite Mr. McKay seemingly admitting to causing the fatal stab, the Crown submitted his admission/his statement is unreliable and pointed to Mr. Azure as inflicting the fatal stab. However, the Crown rightly submitted that the court need not determine who actually fatally stabbed Mr. Kipling because it was relying on the parties to an offence theory of liability, whether as co-principals (s. 21(1)(a)), or as parties by common intent (s. 21(2)). This approach is important.

[68] An apt and recent summary of legal principles, for the motion Mr. Azure brings, is set out by the Ontario Court of Appeal in ***Srun***. There, as here, the Crown tendered a statement to use as evidence in connection with the maker of the statement, and his co-accused at trial sought to use the exculpatory parts of the statement for his defence. The court acknowledged (para. 114) that the Supreme Court of Canada "allowed for the possibility that an accused could seek to have the out-of-court statements of a co-accused admitted for their truth under the principled exception to the hearsay rule". (***R. v. Waite***, 2014 SCC 17, [2014] 1 S.C.R.).

[69] In ***Srun***, the Ontario Court of Appeal explained the core governing principles:

> [121] A statement made by an accused to police, which is not made in furtherance of any common unlawful design, is evidence for and against only its maker and it cannot be considered in determining the co-accused's culpability: … Thus, where the Crown tenders such a statement of one accused in a joint trial of several, the statement is not evidence for or against any accused other than its maker. The jury should be instructed accordingly:…

> [122] In some circumstances, an accused in a joint trial other than the maker of a statement tendered in evidence at trial by the Crown may be able to rely on the statement. In order to do this, the accused who seeks to rely on the co-accused's out-of-court statement must establish its admissibility for this purpose under the principled exception to the hearsay rule: *Waite*, at para. 4. A failure to advance the statement on this basis, or an unsuccessful attempt to do so, results in the application of the general rule.
>
> [citations omitted]

[70] At paras. 123 to 127, the court reviewed the necessity and reliability requirements, including procedural and substantive reliability. The court concluded its review of general principles specific to this type of motion as follows:

> [128] Even where the proponent of hearsay evidence satisfies the necessity and reliability requirements of the principled approach to hearsay, it does not follow that the hearsay statement will be admitted. The trial judge retains a discretion to exclude otherwise admissible hearsay where its probative value is outweighed by its prejudicial effect: … But where the proponent of the evidence is an accused, this exclusionary discretion becomes engaged only where the probative value of the statement is substantially outweighed by its prejudicial effect: …
>
> [129] The final point concerns the availability of a judicial discretion to admit hearsay evidence under the principled exception despite the proponent's failure to satisfy the requirements of that exception. This discretion may be exercised when the proponent of the evidence is an accused and the admission of the evidence is necessary to prevent a miscarriage of justice: …. But this inclusionary discretion is not so expansive as to countenance an abandonment of the inquiry into threshold reliability: ….
>
> [citations omitted]

[71] Further, as part of the judge's gatekeeper function, and to help guide its admissibility analysis, it is important that the purpose for which the statement is sought to be admitted, be identified and delineated. In ***R. v. Foreman***, 2002 CanLII 6305, the court stated:

> [34] In the above passage and earlier in his reasons (R. v. Starr, supra, at p. 230 S.C.R., p. 516 C.C.C.), Iacobucci J. makes the important point that the admissibility of hearsay is tied to the purpose for which the evidence is tendered. The requirements for admissibility, whether under an established common law exception or under the principled approach, have to be examined in the context of the purpose for which the evidence is tendered. Hearsay evidence offered for

> one purpose may clear all admissibility hurdles, but the same evidence offered for a different purpose may not.

[72] Further, in addressing the role of potentially corroborative evidence as indicia of substantive reliability (in a threshold reliability assessment) the court, in ***R. v. Bradshaw***, 2017 SCC 35, stated:

> [45] … Hearsay is tendered for the truth of its contents and corroborative evidence must go to the truthfulness or accuracy of the content of the hearsay statement that the moving party seeks to rely on. Because threshold reliability is about admissibility of evidence, the focus must be on the aspect of the statement that is tendered for its truth. The function of corroborative evidence at the threshold reliability stage is to mitigate the need for cross-examination, not generally, but *on the point* that the hearsay is tendered to prove.

[73] Mr. Azure says Mr. McKay's statement exculpates him as the person who fatally stabbed Mr. Kipling; it evidences he cannot be the principal where Mr. McKay supposedly admitted he stabbed Mr. Kipling in the chest before he ran a short distance and fell. If Mr. McKay made the fatal stab, Mr. Azure could not have. With that much I agree.

[74] Yet, Mr. McKay's statement does not address or relieve Mr. Azure in terms of being a party to murder or manslaughter, which is the thrust of the Crown's theory. The statement speaks to the *actus reus* of the principal, for either murder or manslaughter. As noted, culpability may follow even if an accused did not actually commit the fatal act, i.e. make the fatal stab. Importantly here, Mr. McKay's statement does not assist Mr. Azure, respecting the *mens rea* for murder or as a party to murder. Nor does it assist in addressing his liability as a party to manslaughter. Depending on the totality and weight given to all the evidence, the statement is of no probative value to Mr. Azure's defence that he was not a party.

[75] Otherwise, very briefly, I agree that necessity has been made out in that Mr. McKay cannot be compelled to testify in this trial by either the Crown or Mr. Azure. Indeed, he called no evidence and elected not to testify.

[76] As to reliability, there are some indicia of procedural liability, such as giving a videotaped statement to persons in authority, in which he makes admissions against his interest. However, the statement was given not under oath and, as with many such statements, it changed or evolved over time. In terms of substantive reliability, there is no material evidence to either address or, more so, support or corroborate the issue of who inflicted the fatal stab, other than Mr. McKay was the person last seen with the knife. On the other hand, if accepted, there is contrary evidence from Mr. Azure's female friend that he stabbed Mr. Kipling. All in, critically, there would be no opportunity to cross-examine Mr. McKay as the maker of the statement.

[77] Given this analysis, I refused to admit Mr. McKay's police statement as a principled exception to the hearsay rule for Mr. Azure's case.

CONCLUSION

[78] Mr. McKay and Mr. Azure are guilty of manslaughter as parties to Mr. Kipling's death.

_____ J.