See para. 57

Case Name:

R. v. Carter

Between
Her Majesty the Queen, Respondent, and
Timothy Carter, Appellant

[2015] O.J. No. 2128

2015 ONCA 287

334 O.A.C. 83

2015 CarswellOnt 6168

332 C.C.C. (3d) 220

Docket: C55594

Ontario Court of Appeal

R.J. Sharpe, J.M. Simmons and M.L. Benotto JJ.A.

Heard: March 3 and 4, 2015.
Judgment: April 27, 2015.

(76 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Homicide -- Second degree murder -- Appeal by accused from two convictions for second degree murder dismissed -- Victims last seen in accused's backyard -- Witnesses described hearing commotion involving multiple individuals -- Accused's garage and truck were burned in subsequent fire -- Physical evidence linked victims to vehicle -- Although judge erred in failing to instruct jury of party liability route to manslaughter, failure was immaterial given likelihood it could have also provided route to murder verdict -- Use of speculative inference wording and rhetorical questions did not invite impermissible speculation in context of charge as a whole -- Criminal Code, s. 686(1)(b)(iii).

Criminal law -- Procedure -- Trial judge's duties -- Charge or directions -- Defences -- Inferences of guilt -- Appeal by accused from two convictions for second degree murder dismissed -- Victims last seen in accused's backyard -- Witnesses described hearing commotion involving multiple individuals -- Accused's garage and truck were burned in subsequent fire -- Physical evidence linked victims to vehicle -- Although judge erred in failing to instruct jury of party liability route to manslaughter, failure was immaterial given likelihood it could have also provided route to murder verdict -- Use of speculative inference wording and rhetorical questions did not invite impermissible speculation in context of charge as a whole -- Criminal Code, s. 686(1)(b)(iii).

Criminal law -- Appeals -- Grounds -- Miscarriage of justice -- Unreasonable verdict -- Appeal by accused from two convictions for second degree murder dismissed -- Victims last seen in accused's backyard -- Witnesses described hearing commotion involving multiple individuals -- Accused's garage and truck were burned in subsequent fire -- Physical evidence linked victims to vehicle -- Although judge erred in failing to instruct jury of party liability route to manslaughter, failure was immaterial given likelihood it could have also provided route to murder verdict -- Use of speculative inference wording and rhetorical questions did not invite impermissible speculation in context of charge as a whole -- Criminal Code, s. 686(1)(b)(iii).

Criminal law -- Sentencing -- Criminal Code offences -- Offences against person and reputation -- Homicide -- Second degree murder -- Particular sanctions -- Imprisonment -- Parole ineligibility -- Sentencing considerations -- Sentencing precedents or starting point -- Seriousness of offence -- Procedure -- Appeals -- Appeal by accused from sentence for two counts of second degree murder dismissed -- Victims last seen in accused's backyard were found dead of blunt force trauma injuries to heads and chests -- Witnesses described hearing commotion involving multiple individuals -- Accused convicted by judge and jury and sentenced to life imprisonment without eligibility for parole for 17 years -- Sentence was well within reasonable range given nature of crimes.

Appeal by the accused, Carter, from two convictions and the accompanying sentence for second degree murder. The victims, PK and VK, were last seen alive in the presence of the accused in his backyard. They died of significant blunt force trauma to their heads and chests. PK's girlfriend and another friend attended the accused's residence 45 minutes after PK arrived due to a troubling phone call from PK. They approached the backyard and heard arguing and a commotion involving PK, but could not see into the yard. PK's girlfriend testified she could see a human body on the garage floor through a hole in the fence and the accused apparently washing something. She testified they heard VK talking to the accused in worried fashion. The accused's neighbour testified that she called 911 after she heard the commotion and a man in distress. Another neighbour testified that he heard a man pleading to stop being hit. He testified that he witnessed the assault and yelled for the accused. The accused appeared looking physically spent and indicated that they did not need help and that the altercation was over. The victims were discovered approximately one hour away from the accused's home. The accused's vehicle and his garage were destroyed in a fire after the incident when the accused was on holiday. A witness saw a friend of the accused's leaving the scene of the

fire. DNA and physical evidence linked PK to the accused's burned vehicle. An undercover officer recorded statements made by the accused to his friend while they were in custody on an unrelated matter. The accused was convicted by a judge sitting with a jury. He was sentenced to life imprisonment without eligibility for parole for 17 years. The accused appealed.

HELD: Appeal dismissed. The trial judge was incorrect in finding no air of reality to support a party liability route to a manslaughter verdict, as there was ample evidence of assaults in progress by one or more individuals without the accused's involvement. Nonetheless, the failure to leave party liability with the jury did not cause a substantial wrong or miscarriage of justice. The jury was left with the option of manslaughter if it found the accused lacked the requisite intent for murder. The jury was given a proper limiting instruction on the use of post-offence conduct evidence. No objection was taken by defence counsel to the adequacy of the manslaughter instruction or the lack of instruction on party liability, as on balance, instructing the jury on party liability could have conceivably provided an alternate route to a murder conviction. Despite unfortunate use of "speculative inference" wording and rhetorical questions, the jury charge, when fairly read as a whole, did not invite impermissible speculation. The verdict was not unreasonable given the body of circumstantial evidence supporting an inference the accused was an active participant in the assaults and had the requisite intent for murder. With respect to the sentence appeal, the period of parole ineligibility was well within the range of a reasonable sentence given the nature of the crimes. Sentence: Life imprisonment; 17-year parole ineligibility.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii)

Appeal From:

On appeal from the conviction entered on February 18, 2012, and the sentence imposed on June 8, 2012, by Justice Renee M. Pomerance of the Superior Court of Justice, sitting with a jury.

Counsel:

Richard Litkowski and Catriona Verner, for the appellant.

R. Pinnock, for the respondent.

The judgment of the Court was delivered by

1 **R.J. SHARPE J.A.**:-- The appellant appeals his convictions for second-degree murder in the

deaths of Peter Kambas and Vaois Koukousoulas. He also appeals the imposition of a 17-year period of parole ineligibility.

2 This appeal was heard together with the appeal in *R. v. Dodd*. The reasons in both appeals are being released together. I agree with and adopt the summary of the facts giving rise to these appeals in my colleague Benotto J.A.'s reasons in *Dodd*. I present here only the facts that have particular application to the case against the appellant Timothy Carter and to the issues he has raised on appeal.

FACTS

3 Carter's presence in his own backyard in the early hours of June 29, 2008, the last time and place that the two victims were seen or heard alive, was more or less admitted. The appellant also does not contest the forensic pathology evidence that both victims died of significant blunt force trauma applied to their heads and chests.

4 There was evidence that Kambas and two other men got into a taxi in front of Kambas's apartment just after 2:30 a.m. and went to Carter's address. There was conflicting evidence that one of the other men in the taxi was Koukousoulas.

5 Mary McConnell, who was dating Kambas at the time of his disappearance, testified that Kambas had called her at around 2:00 a.m. that morning. Kambas requested a ride to Carter's residence. McConnell declined, but she called Kambas later. He told her that he was at the Carter residence. She was alarmed by something Kambas said to someone else while on the phone with her. She went to Carter's residence and knocked on the front door. Carter's girlfriend Krystal Hamelin answered, but she did not know where Kambas was. McConnell tried to call Kambas's cellphone, but he did not answer and she left.

6 McConnell returned to Carter's residence with her friend Manny Pereira around 3:15 a.m. The precise times at which McConnell's car came and went from the area of Carter's residence are known from surveillance footage of a parking lot near Carter's residence where she parked her car. They approached Carter's backyard on foot from the back alley. They overheard male voices arguing in Carter's backyard but saw nothing. One of the voices was Kambas's. McConnell looked through a small hole in the back wall of Carter's garage. The garage's interior was lit. She could see to the far end of the garage, and a couple of feet on each side, but she saw no people inside. McConnell and Pereira left in her car.

7 Pereira was not available to testify at trial but his sworn statement to the police was admitted into evidence. He recounted visiting the Carter residence with McConnell and stated as follows:

> There's an alley behind the house uh that we went to. Um and there was a garage. And we, as soon as we got near we could hear commotion, "rah-rah-rah-rah-rah" [makes sound], you know and then as we got closer, it got more clear. Um and I

> heard Peter Kambas saying, "What the fuck! What the fuck!" And you know clearly a struggle, "mother fucker", this just, it was "fuck this, fuck that". And then another guy was just... I remember [pause] one voice stood out more than any cause he was just like, "Hold him! Hold him!", like real loud. And I'm going, "What the hell is going on?!" [pause] Now, behind the garage there was a hole in the wall. So we wanted to see what's going on. But we looked in this hole and the garage was lit up brightly but there was nothing to be seen. It was like, just a concrete floor. There was nothing on the floor. There was nothing we could visibly see. It's just like lookin' in at on a rough garage. Uh, well lit. No obstacle... no obstructions, but we just couldn't see anything in the backyard. In the, in the meantime we're still hearing you know a-a very violent, what I would call a very violent struggle.

8 Pereira swore that he was familiar with Kambas's voice, which he characterized as "distinctive", and that he heard at least two other voices. Kambas was not the one to say "hold him, hold him" and what he heard indicated to Pereira that Kambas was struggling with the others.

9 McConnell and Pereira left in McConnell's car around 3:18 a.m. and returned to Pereira's nearby home.

10 McConnell testified that she then returned by herself to the Carter residence. She arrived around 3:22 a.m. and again approached by foot from the back alley. She did not hear any noises in Carter's backyard. She looked through the hole into Carter's garage. She saw Carter standing on the opposite end of the garage, moving his hands as if he were washing something. She also saw the arm from a human body on the floor near her end of the garage. Her view of the rest of the body was obstructed. The body did not move or make any noises. She did not recognize the arm and on cross-examination acknowledged that, at the time, she did not think it was Kambas's arm. She heard Koukousoulas, from a different part of the garage, ask Carter if he had a problem with him. Koukousoulas sounded distraught. Carter responded: "No, I don't. Just shut up." McConnell went to her car and drove back to Pereira's home. It was around 3:26 a.m.

11 McConnell, at trial, and Pereira, in his police statement, both stated that they again returned to Carter's residence. Surveillance footage has McConnell's car returning to the area around 3:49 a.m. Both McConnell and Pereira saw that the hole in the garage wall had been boarded up with plywood.

12 Carter's next-door neighbour, Denisa Lamanna, was awakened by noises from Carter's backyard on the night of the alleged murders. It was between 3:00 and 3:30 a.m. She opened her bedroom window and listened. She heard what she described as "...groaning, very loud groaning" which she had initially thought to be the sound of vomiting. She heard one male yell, "Stop hurting me", and then a different male yell in an angry way, "Shut the fuck up." She heard this same exchange at least four to five times. She testified that she heard a third male voice in addition to the

"groaner" and the man telling the groaner to shut up. She was not able to see into Carter's backyard due to a high fence and foliage. She called 911 to report the incident at 3:33 a.m. The voices stopped and she heard an engine revving near Carter's garage or back driveway. She then saw an SUV or Jeep drive down the alley behind Carter's house. As the noise had stopped, around 3:51 a.m., she called to cancel her 911 call.

13 My colleague has reviewed in some detail the evidence of Shawn Grubb, Carter's other next-door neighbour. I summarize here Grubb's evidence as it relates particularly to Carter. Around 3:30 a.m., Grubb heard a "ruckus" taking place in Carter's backyard. He looked and listened out of an open window facing Carter's backyard. One man was pleading with another, using words to the effect of "[s]top hitting me" and "[g]et away from me". Grubb saw this man being beaten by a younger, bigger man. Grubb also heard, at the same time, three or four thuds from Carter's garage -- away from the area of the physical altercation. Alarmed by the beating he saw being inflicted, Grubb yelled at the assailant and then called for Carter several times. The assailant slowed his attack, but continued to cuff the thinner man on the head. Carter appeared about 10-15 seconds later. Grubb looked down on Carter from his window, across the fence. Grubb could not see where exactly Carter came from in the backyard, but he was not one of the two men who were fighting. When Grubb asked if he should call the police or if Carter needed any help, Carter responded, "No, no, this is done. They're done." He then saw Carter motion to the other men and heard him yell, "Stop it, you guys". Carter raised his two hands, palms up, a couple of times, saying, "No, no, we're good." The beating stopped. Carter looked and sounded like he was winded or out of breath, and was leaning on the fence with one hand for support. Grubb could see Carter's face and hands clearly but he did not notice any blood or markings.

14 There was also some evidence suggesting that Carter was using a hose in the garage, arguably to clean up blood. Grubb noticed a hose leading into the garage, which was lit on the inside. Hamelin testified that the following day she noticed puddles on the floor of the garage, although she agreed that this might have been from rain.

15 The Crown led a considerable body of post-offence conduct against Carter. Surveillance videos show a vehicle, which the Crown alleged was Carter's GMC Jimmy, leaving the area of his residence at 4:59 a.m. on the morning of June 29, 2008, and returning at 9:30 a.m. Hamelin testified that Carter returned home around 9 a.m. that morning. The bodies of the two victims were found at a location that was a one hour and 17 minute return drive from Carter's residence.

16 In the early evening of June 29, 2008, Carter left Windsor with Hamelin for a few days. According to Hamelin, Carter brought up the idea of going on a vacation that morning when he returned home. Instead of taking Carter's GMC Jimmy, they drove a vehicle provided by Carter's associate Adelino Moreira. Later that evening, a fire was reported at Carter's garage that destroyed the garage and Carter's GMC Jimmy, which was parked next to the garage. One neighbour testified that the GMC Jimmy was already ablaze when the garage went up in flames. When Hamelin learned of the fire one or two days into their vacation and told Carter, he told her that she did not

have to worry about Kambas anymore. He said that Moreira "had taken care of it" and that Kambas "won't threaten our lives again." Carter was drunk at the time. Hamelin was arrested on July 1, 2008, for driving the vehicle Moreira had provided as it was stolen.

17 A neighbour saw Moreira running from the direction of Carter's residence shortly after the fire broke out. At trial, Moreira denied setting the fire.

18 Dentures and a blood-stained shoe were found in the burned-out husk of Carter's GMC Jimmy. The Crown led DNA evidence that the dentures and blood were Kambas's.

19 An undercover police officer recorded statements indicating involvement in illegal activity and, arguably, the murders, made by Carter to Moreira while both men were in custody on unrelated matters.

ISSUES

20 Carter raises the following issues on appeal:

1. Did the trial judge err by not leaving party liability with the jury, as that instruction would have provided an alternative route to a verdict of manslaughter?

2. Did the trial judge invite the jury to speculate?

3. Did the trial judge err in failing to correct the Crown's suggestion that Carter had exclusive opportunity and in failing to instruct the jury on exclusive opportunity?

4. Was the verdict unreasonable?

5. Should the sentence be varied by reducing the period of parole ineligibility?

ANALYSIS

Issue 1. Did the trial judge err by not leaving party liability with the jury, as that instruction would have provided an alternative route to a verdict of manslaughter?

21 The trial judge instructed the jury that to find Carter guilty of second degree murder they must be satisfied that the Crown had proven three essential elements beyond a reasonable doubt: (i)

Carter caused the victim's death; (ii) Carter caused the death unlawfully; and (iii) Carter had the state of mind for murder. She also instructed the jury that if the Crown had proven the first two elements, but not the third, then Carter had committed manslaughter rather than murder.

22 On appeal, the appellant submits that the jury should have been left with another route to a manslaughter verdict, namely party liability.

23 In the pre-charge conference with counsel, the trial judge raised the question of whether she should instruct the jury on party liability. Initially, both the Crown and Carter's defence counsel favoured including an instruction on party liability. There was no question on the evidence but that Carter was present at the place where the two victims were last seen or heard alive, and it appeared likely that the jury would conclude that Carter had participated in the homicides in some way. .

24 From the Crown's perspective, party liability would provide a basis for a conviction for murder even if the jury were unable to decide the precise role played by each of the two accused.

25 From Carter's perspective, defence counsel saw party liability as providing another potential route to a manslaughter verdict. Party liability would permit the jury to conclude that while Carter played some role in the homicides, he could only be convicted of a lesser offence of manslaughter as his precise role and intention was not established on the evidence. At the same time, however, Carter's defence counsel recognized that if the jury was not satisfied that Carter was a principal in the killings, they would have to acquit Carter in the absence of a charge on party liability. .

26 In the end, the trial judge decided that there was no air of reality to party liability. She suggested during the pre-charge conference that in the absence of positive evidence of secondary involvement as a party, as opposed to active involvement as a principal, party liability should not be left with the jury. Eventually, all of the trial counsel agreed that there was no need to instruct on party liability. In all likelihood, the trial judge thought that, on balance, an instruction on party liability would benefit the Crown and disadvantage the defence, particularly as she proposed to leave manslaughter with the jury and to instruct the jury only to convict Carter of murder if they were satisfied that he was an active participant in the fatal assaults and that he had the requisite intention for murder.

27 The following exchange during the pre-charge conference indicates how and why Carter's trial counsel, Mr. Adams, altered his position. Carter's counsel agreed that if the trial judge left manslaughter with the jury on some other basis, he was content that the jury not be instructed on party liability:

> MR. ADAMS: I'm asking that manslaughter be left. The initial submission was that the evidence from several sources of the conflict, of the fight, the struggle, of wrestling, a violent conflict suggests two people involved rather than one person smiting the other, beating him down. That's fairly thin, but it doesn't take much... If it's possible that manslaughter is available there, I think it would be err[or] not

to include it.

THE COURT: Alright. Now let me ask you this: Do I need to go -- if -- I understand your position on that and if there's a -- an air of reality to manslaughter, it must be left, I agree.

MR. ADAMS: Yes.

THE COURT: But do we need to go via section 21(1) of the *Criminal Code* to get there?

MR. ADAMS: Well, that's your decision. If you don't need to go there, then I wouldn't think I'd want section 21(1) in, but if you do need to go there, I would want s. 21(1) there.

THE COURT: Do you believe I need to go there?

MR. ADAMS: No, I don't.

THE COURT: Alright.

MR. ADAMS: For the reasons that I've just stated.

THE COURT: Alright.

> MR. ADAMS: If, however, you seek to find -- to go that route, then I think I've given you two examples that you can use to do it. [Emphasis added.]

28 The trial judge proceeded to instruct the jury that they were only to convict Carter of murder if the Crown established beyond a reasonable doubt that he had actively participated in an unlawful assault; that his actions contributed to the injuries that caused death in more than a trifling way and that he did so with the intention to kill or cause grievous bodily harm that he knew was likely to cause death. She further instructed the jury that if they found that Carter had actively participated in an unlawful assault, and that his participation was a contributing cause of death, but had a reasonable doubt as to whether he acted with the intention to kill or cause grievous bodily harm that he knew was likely to cause death, they should only convict him of manslaughter.

29 After the charge was delivered, Carter's trial counsel raised no objection to the adequacy of the manslaughter instruction or the lack of instruction on party liability.

30 On appeal, Carter submits that the failure to instruct the jury on party liability was an error of law and that he was prejudiced by the error as a potential route to manslaughter was cut off. Carter's position is that the jury was almost certain to conclude that he was at the scene when the fatal beatings occurred. The jury was only left with participation as a principal as a route to conviction. Carter submits that if the jury found that he had participated as a principal, there was no realistic possibility of a manslaughter verdict. Given the nature of the injuries, the jury was almost certain to find the intent to kill. He submits that if the jury had considered party liability, they may have found that Carter was involved in the homicides, but only to the extent that he was involved in a plan to do some harm to the deceased, and knowingly assisted the actual attacker(s) in that regard. This finding, says the appellant, could have supported a verdict of manslaughter instead of murder.

31 While I agree that the trial judge erred by failing to instruct the jury on party liability, I am not persuaded that this error prejudiced Carter or that it occasioned any substantial wrong or miscarriage of justice.

32 I will deal first with the error.

33 I respectfully disagree with the trial judge's conclusion that there was no evidence to support party liability with respect to Carter. In my view, a secondary role could have been inferred from the evidence of his actions, as seen or overheard by several witnesses.

34 There was ample evidence that beatings were inflicted in Carter's backyard or garage while he was present. It was apparent from the position taken by Carter's trial counsel during the pre-charge conference and in his closing submissions to the jury that Carter more or less conceded that he was at the scene where the two victims were last seen or heard alive. There was also a considerable volume of evidence that at least one other person was present, in addition to Carter and the two

victims. The next-door neighbour Grubb witnessed assaults that Carter was not actively involved in but was clearly aware of. The other next-door neighbour Lamanna testified that she heard a third man speaking in addition to the "groaner" and the aggressor. In his sworn statement admitted into evidence at trial, Manuel Pereira stated that he heard noises from a struggle involving Kambas and that included someone saying, "Hold him! Hold him!"

35 In my view, the evidence of Carter's involvement with one or more others was sufficient to give an air of reality to party liability and to require, as a matter of law, the trial judge to leave party liability with the jury. The trial judge erred in suggesting to counsel that positive evidence of a secondary role was required. In *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443, at pp. 457-58 (Ont. C.A.), Martin J.A. wrote for the court:

> Where, on a joint trial, there is evidence that a crime was committed by two or more accused persons acting in concert, it is, of course, appropriate to charge the jury with respect to the provisions of s. 21 of the *Code* even though it is uncertain which accused was the actual perpetrator. [Citations omitted.]

36 As held by Doherty J.A. in *R. v. Portillo* (2003), 176 C.C.C. (3d) 467 (Ont. C.A.), at para. 70, if there is evidence that both accused were at the scene and "somehow involved in the death of the deceased", party liability should be left even if the jury may be "unable to determine the exact nature of each appellant's participation in the homicide."

37 The trial judge almost certainly thought that putting party liability to the jury would be to Carter's overall disadvantage, but that, of course, does not preclude this court from finding that she erred.

38 The real issue is whether the error caused any substantial wrong or miscarriage of justice in the circumstances of this case. In my view, it did not.

39 In *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 53, writing for the majority, Moldaver J. summarized the use of the curative proviso, s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46:

> [T]he curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error ... not been made"... Flowing from this principle ... there are two situations where the use of s. 686(1)(b)(iii) is appropriate: (1) where the error is harmless or trivial; or (2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict. [Citations omitted.]

40 The evidence of Carter's guilt of murder was not overwhelming. The issue is whether the error was harmless.

41 The jury's verdict of murder against Carter indicates that the jury was persuaded beyond a reasonable doubt that Carter was an active participant in the fatal beatings and that he had the requisite *mens rea* for murder.

42 At first blush, the verdict for murder would appear to answer any complaint about the lack of an adequate instruction on manslaughter. However, on appeal, Carter relies on the well-established line of cases, thoroughly reviewed by Doherty J.A. in *R. v. Sarrazin*, 2010 ONCA 577, 259 C.C.C. (3d) 293, aff'd 2011 SCC 54, [2011] 3 S.C.R. 505, holding that a conviction for a more serious offence does not overcome an error in failing to instruct the jury on a lesser, included offence. When assessing the impact of a failure to properly instruct on an included offence, an appellate court "should not assume that a jury's fact-finding process involves a mechanistic analysis of the evidence without regard to the verdict which flows from the jury's findings of fact": *Sarrazin*, at para. 76, quoting from *R. v. Jackson* (1991), 68 C.C.C. (3d) 385 (Ont. C.A.), at p. 431, aff'd [1993] 4 S.C.R. 573.

43 *Sarrazin* was a murder case where causation was at issue. The trial judge failed to leave the jury with the possibility of a verdict of attempted murder if they found that the appellants' acts did not cause the death. The jury convicted the appellants of second degree murder. This court concluded that the trial judge had erred by failing to instruct the jury that it was open to them to return verdicts of not guilty of murder (or manslaughter) but guilty of attempted murder. The Crown had argued that the convictions for murder indicated that the jury was satisfied that the accused had caused the victim's death and that the curative proviso should be applied. The majority rejected that submission. As Doherty J.A. explained, at para. 94, the "concern is that a jury's fact-finding on a specific issue such as causation could be subconsciously influenced by what it is told about the legal consequences of that fact-finding." The problem with the instruction in *Sarrazin* was that the jury was left with an all-or-nothing choice between guilt of murder or manslaughter and an outright acquittal.

44 In *Jackson*, the trial judge erred by failing to instruct the jury that Davy could be convicted as a party to manslaughter even if his co-accused was convicted of murder. The trial judge also told the jury that all parties to the offence were equally guilty and that a manslaughter verdict "may be unlikely" as regards Davy. This court and the Supreme Court refused to apply the curative proviso to save the verdict of second degree murder against Davy.

45 This case is readily distinguished from these cases. In *Sarrazin*, as a result of the trial judge's error, the jury was left with a stark choice between culpable homicide and acquittal, without the option of finding the included offence of attempted murder, when deciding a single, highly disputed issue, causation. In the case at bar, the jury was left with the option of convicting for the lesser included offence, manslaughter, even if active involvement was found. In *Jackson*, the jury was wrongly instructed on the legal elements for manslaughter. In the case at bar, the manslaughter instruction was proper.

46 In the present case, for each of the two victims, the jury was left with the option of convicting of manslaughter if they were not satisfied that Carter had the requisite intention for murder. That answers the problem identified in the *Sarrazin* line of cases, namely, that the jury may not always reason in a mechanistic, step-by-step manner, but may instead be focused on the ultimate conclusion, such that they will convict the accused of whatever charge is available, even if the elements are not made out, so as to avoid an outright acquittal. In my view, if this jury had adopted such a results-orientated mode of reasoning and wanted to convict Carter of something, even if they were left with a reasonable doubt as to causation of death or his active involvement in the assaults, they were presented with a readily available route to the lesser included offence of manslaughter. They did not choose this route. It follows that the jury did not convict Carter of second degree murder solely to avoid an outright acquittal.

47 It is also argued that the jury could have found that Carter was an active participant in the fatal assaults on the basis of the evidence of his post-offence conduct. Had party liability been left, the trial judge would have been obliged to instruct the jury that evidence of post-offence conduct could not be used to determine whether he was an active participant or a party to the homicide. An instruction along those lines, it is submitted, would have limited the use the jury could make of the evidence of post-offence conduct and made a manslaughter verdict more likely.

48 I disagree. The trial judge gave a proper limiting instruction on the use of evidence of post-offence conduct. The jury was instructed that while the evidence of Carter's post-offence conduct could be used to infer that he was involved in the homicides, it could not be used to infer whether he had the requisite *mens rea* for murder. No doubt, a more complicated instruction would have been required had party liability been left with the jury. However, from a practical and functional perspective, it was made abundantly clear to the jury that the evidence of post-offence conduct had no bearing when it came to deciding whether Carter was guilty of murder or manslaughter.

49 In assessing whether the failure to charge on party liability caused any substantial wrong or miscarriage of justice, we may consider the tactical choices made by Carter and his counsel at his trial: *R v. Austin* (2006), 214 C.C.C. (3d) 38 (Ont. C.A.), at paras. 15-16; *R. v. Kostyk*, 2014 ONCA 447, 312 C.C.C. (3d) 101, at paras. 41-42. A party liability instruction might have provided an alternative route to manslaughter, but it would also have provided an alternate route to murder. Carter's trial counsel expressly stated that if he could get a manslaughter instruction without party liability, then he did not want the trial judge to leave the jury with party liability. One can readily understand why. On balance, instructing the jury on party liability would have made a murder conviction more likely.

50 I conclude, accordingly, that while the trial judge did err in law in failing to instruct the jury on party liability, that error was harmless and not the occasion of any substantial wrong or miscarriage of justice. Accordingly this ground should be rejected pursuant to s. 686(1)(b)(iii) of the *Criminal Code*.

Issue 2. Did the trial judge invite the jury to speculate?

51 Carter's position at trial was that there was no evidence that he was an active participant in the beatings, and that the jury could only conclude that he was an active participant by engaging in speculation.

52 First, Carter argues on appeal that the trial judge invited the jury to engage in speculation. Carter takes issue with the following extract from the trial judge's jury charge:

> It is important to distinguish between a reasonable inference and a speculative inference. A reasonable inference is one that flows logically from the evidence. A speculative inference is one that is so tenuous or remote that it is not reasonable. [Emphasis added]

53 Similarly, at a later point in the charge, the trial judge instructed that "[a] speculative inference is one that is so remote or tenuous that [it] is not reasonable".

54 Second, Carter argues that when this instruction is combined with a series of rhetorical questions posed by the trial judge, she effectively invited the jury to speculate. Issue is taken with the following passage from the instruction in relation to the fatal beating of Kambas:

> It is for you to determine whether and to what extent you believe or rely upon the testimony of Shawn Grubb and Mary McConnell. If you do believe or rely upon their evidence, you must determine what if any inferences you draw from their testimony. What was Timothy Carter doing before he was seen by Mr. Grubb? What was he doing when he was seen by Mr. Grubb? Was he involved in the violence being directed by the larger man to the smaller man? Or was he trying to intervene and stop the violence that was taking place? Would he know that anything more than some slapping was going on? What was Timothy Carter doing in the garage? Was that Peter Kambas lying prone on the ground? Was it someone else? Was it Adelino Moreira? Did Timothy Carter know the extent of that person's injuries? Was his remark to Vaois Koukousoulas designed to calm Vaois Koukousoulas down and allay his fears, or was the remark designed to silence Vaois Koukousoulas in a threatening way?

55 The impugned passage relating to the fatal beating of Koukousoulas is as follows:

> Consider whether Timothy Carter was intervening to stop the assault in the backyard when he spoke to Shawn Grubb or whether he was involved in it. Consider whether Mr. Carter was trying to calm or assist Mr. Koukousoulas when he said that he did not have a problem with him, or whether he was silencing Mr. Koukousoulas in a threatening way.

> Consider what Mr. Carter was doing with his hands when Mary McConnell saw him rubbing them in a circular motion, as if washing them.

56 Carter contends that as there was an absence of evidence upon which the jury could answer these questions, and as the trial judge did not point that out to the jury, she effectively invited the jury to speculate.

57 I agree that it would have been preferable had the trial judge not made reference to a "speculative inference", as that phrase runs a risk of confusion. The jury's attention should have been focussed sharply on the difference between an inference on the one hand and speculation on the other. An inference can be "reasonably and logically drawn from a fact or group of facts established by the evidence": *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 209. As stated in *U.S.A. v. Huynh* (2005), 200 C.C.C. (3d) 305, (Ont. C.A.) at para. 7: "The process of drawing inferences from evidence is not ... the same as speculating even where the circumstances permit an educated guess", and if there is an evidentiary gap between the primary fact and the inference sought, the inference cannot be drawn. The phase "speculative inference" mingles inferences, which the jury can draw, with speculation, which the jury cannot engage in, and thus runs the risk of muddying the distinction.

58 I am not persuaded, however, that the reference to "speculative inference", whether read alone or in conjunction with the questions posed by the trial judge, amounted to an error of law in the circumstances of this case. In my view, when the charge is fairly read as a whole, the jury was properly instructed that an inference had to be logically and reasonably drawn from a fact or facts that were established, that the burden of establishing the inculpatory facts and inferences rested squarely on the Crown, and that any reasonable doubt on account of a lack of evidence had to result in an acquittal.

59 First, following the closing addresses of counsel and the judge's instructions, the jury would have certainly understood that the Crown's case was largely circumstantial and that the central issue was whether the evidence offered by the Crown amounted to proof of guilt beyond a reasonable doubt. The trial judge thoroughly reviewed the evidence and identified what Carter submitted were the gaps that should lead to an acquittal or manslaughter verdict.

60 Second, while the phrase "speculative inference" should be avoided, it is important to point out that the trial judge clearly instructed the jury not to base the verdict on "speculative inferences".

61 Third, it is also important to consider the trial judge's use of the term "speculative inference" in context. The impugned uses of the term were immediately preceded or followed by clear instructions regarding circumstantial evidence, the obligation of the Crown to prove its case beyond a reasonable doubt, and the absence of any burden whatsoever on the accused to prove anything.

62 Immediately before one of the impugned uses of "speculative inference", the trial judge instructed the jury that there was "no direct evidence to indicate that Timothy Carter or Donald

Dodd were responsible for causing" the deaths. She then instructed the jury that:

> A person may be convicted solely on the basis of circumstantial evidence. However, in such a case, you can only return a finding of guilt if the guilt of the accused is the only reasonable conclusion to be drawn from the whole of the evidence. If the evidence reasonably supports another conclusion, other than the guilt of the accused, then the guilt of the accused has not been proved beyond a reasonable doubt.

63 Immediately following this same impugned use of "speculative inference", the trial judge instructed the jury that the accused were not required to prove anything or to prove their innocence, and that, from "start to finish", it was for the Crown to prove the accused were guilty beyond a reasonable doubt. This was followed by a clear instruction on the meaning of reasonable doubt that concluded:

> If, at the end of the case, based on all of the evidence <u>or lack of evidence</u>, you are not sure that Timothy Carter or Donald Dodd committed an offence, then you should find them not guilty of that offence. [Emphasis added]

64 I do not read what Carter now characterizes as the trial judge's "rhetorical" questions as invitations to speculate. These questions were nothing more and nothing less than an explanation of the issues the jury had to confront before reaching a verdict. In my view, the jury would have understood that the trial judge was identifying and focusing their attention on the issues that arose from the evidence or lack thereof. When the questions are assessed against the background of the trial judge's careful review of the evidence, and her thorough and repeated instructions on reasonable doubt, the burden on the Crown and the lack of any burden on the accused, I cannot agree that the questions amounted to an invitation to speculate.

65 Finally, I note that the draft charge was thoroughly vetted in the pre-charge conference. The trial judge explicitly directed counsel's attention to the very passage now complained of on appeal in relation to the distinction between a "reasonable inference" and a "speculative inference". Carter's trial counsel expressly indicated that he was content with that passage. Nor did Carter's trial counsel raise any objections, before or after the charge was given, to the "rhetorical" questions now objected to on appeal. While failure to object is not fatal, "[c]ounsel's considered position after examining the proposed instruction sheds valuable light on whether that proposed instruction" ensured that the jury understood "how the evidence can and cannot be used in the context of the particular case" and "the positions taken by the defence and Crown with respect to that evidence": *R. v. Polimac*, 2010 ONCA 346, 254 C.C.C. (3d) 359, at para. 97, leave to appeal refused, [2010] S.C.C.A. No. 263.

66 Nor do I accept the submission that the trial judge failed to deal adequately with comments made in the Crown's closing that could have been taken to suggest that there was some obligation on the accused to adduce evidence. She immediately admonished Crown counsel who then apologized to the jury and corrected himself in language that, in my view, adequately removed any

prejudice his earlier remarks could have caused.

Issue 3. Did the trial judge err in failing to correct the Crown's suggestion that Carter had exclusive opportunity and in failing to instruct the jury on exclusive opportunity?

67 In closing submissions to the jury, Crown counsel took the position that in addition to the victims, the only two people in Carter's backyard that night were Carter and Dodd. Carter argues that this would have left the jury with the impression that the Crown was relying on a theory of exclusive opportunity and that an instruction was required to distinguish exclusive opportunity from mere opportunity: see *R. v. MacFarlane* (1981), 61 C.C.C. (2d) 458 (Ont. C.A.), at p. 460.

68 I disagree. While the Crown did allege that only Carter and Dodd were present at the scene with the victims, the Crown did not rest its case on a theory of exclusive opportunity. The Crown relied on a substantial body of other evidence inculpating Carter in the fatal assaults. The position that only Carter and Dodd were in the backyard with the victims was simply one piece of a larger body of circumstantial evidence which, the Crown submitted, when combined with Carter's observed conduct at the scene and his post-offence conduct made out a case for conviction for culpable homicide, either murder or manslaughter.

69 I note finally that Carter's trial counsel did not raise the need for an instruction along the lines now advanced on appeal.

Issue 4. Was the verdict unreasonable?

70 The appellant submits that, if a new trial is not warranted, this court should quash the murder convictions and replace them with convictions for manslaughter. Carter's position is that a properly instructed jury, acting judicially, could not have found that Carter had the *mens rea* for murder, particularly as there was a lack of evidence of active participation in the beatings. At most, Carter argues, the jury could conclude that he was involved in a plan to harm the deceased, and that this plan resulted -- through no intention of his own - in two deaths.

71 I am unable to agree with the submission.

72 My colleague Benotto J.A. has reviewed the legal authorities and the applicable legal test for unreasonable verdict in the companion appeal of *R. v. Dodd*. I adopt her analysis for the purpose of these reasons.

73 In my view, there was a substantial body of circumstantial evidence from which the jury could properly infer, beyond a reasonable doubt, that Carter was an active participant in the assaults and that he had the requisite *mens rea* for second degree murder. In particular, I note the forensic pathology evidence establishing the amount of force imposed on the victims' bodies; Pereira's and the neighbours' evidence that there were loud, violent attacks in Carter's backyard that occurred over a significant period of time; McConnell's and Grubb's evidence that Carter was present in his

backyard or garage at this time; McConnell's testimony as to the words spoken by Carter to a distraught Koukousoulas in the presence of an unmoving body; and Grubb's testimony that he heard loud thuds in the garage and that Carter was out-of-breath shortly thereafter.

Issue 5. Should the sentence be varied by reducing the period of parole ineligibility?

74 Carter seeks leave to appeal the period of 17 years parole ineligibility. At sentencing, his counsel submitted that the range was 12 to 15 years and, on appeal, Carter says the appropriate period was 12 to 13 years. He submits that the trial judge erred by failing to give appropriate weight to his limited criminal record, his prospects for rehabilitation and the uncertainty surrounding his precise role in the murders.

75 I would grant leave to appeal the period of parole ineligibility but dismiss the appeal. The trial judge gave careful reasons for sentence, properly considering the relevant factors. Carter's role in the murders was determined by the jury's verdict. There were two victims and the murders were savage and brutal. The period of parole ineligibility was well within the range of a reasonable sentence for these crimes.

DISPOSITION

76 For these reasons, I would dismiss the appeal from conviction, grant leave to appeal the period of parole ineligibility, but dismiss the appeal.

R.J. SHARPE J.A.
J.M. SIMMONS J.A.:-- I agree.
M.L. BENOTTO J.A.:-- I agree.