COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hussein, 2023 ONCA 253
DATE: 20230414
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Paciocco, Sossin and Favreau JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Awale Hussein

Appellant

Matthew R. Gourlay and Brandon Chung, for the appellant

Kevin Rawluk, for the respondent

Heard: January 24, 2023

On appeal from the conviction entered on May 31, 2019, by Justice Kevin B. Phillips of the Superior Court of Justice, sitting with a jury, and from the sentence imposed on June 6, 2019.

Paciocco J.A.:

OVERVIEW

[1] After a long night of drinking with friends in a basement apartment Brian Boucher was fatally stabbed in the neck. Since he was alone with his friends at the time of the attack, one of them must have been the stabber. But there were no apparent witnesses to the stabbing. Suspicion fastened on the appellant, Awale Hussein, whose departure from the party coincided with the stabbing. Forensic evidence pointed to Mr. Hussein, as did other after-the-fact conduct evidence. Mr. Hussein was arrested and charged. At his trial he testified in his own defence, but his testimony was plagued with problems. A jury convicted Mr. Hussein of second-degree murder in Mr. Boucher's death, and he was sentenced to life imprisonment without eligibility for parole for 13 years.

[2] Mr. Hussein now appeals his conviction and seeks leave to appeal the parole ineligibility component of his sentence. His conviction appeal is based on alleged errors the trial judge made in dismissing Mr. Hussein's application to prevent or restrict the Crown from cross-examining him on his criminal record (the "*Corbett* application"), and in providing a jury charge that did not assist the jury in considering the inadequacies of the police investigation, which Mr. Hussein had challenged as part of his defence. Mr. Hussein's sentence appeal asserts that the trial judge erred in disregarding juror recommendations for a lower period of parole ineligibility, and in treating the absence of motive for the crime as an aggravating factor supporting a longer period of parole ineligibility.

[3] For the reasons that follow, I would deny the conviction appeal. I would grant leave to appeal the sentence, but I would also deny the sentence appeal.

MATERIAL FACTS

[4] On the night of February 1, 2017, Natasha Paquette entertained eight of her friends for a night of drinking in an Ottawa basement apartment. It was not uncommon for friends from this group to assemble and drink until they blacked out. It is clear from the evidence that heavy drinking was occurring.

[5] As the morning hours deepened, the party dwindled to six individuals: (1) Mr. Boucher, (2) Mr. Hussein, (3) Austin McEwan, and (4) Papy Ndiya, who are all males, and two females, (5) Rayven Foster, and (6) Ms. Paquette.

[6] Mr. Boucher was stabbed at around 5:00 a.m. in one of the apartment bedrooms. He sustained ten stab wounds, including “defensive wounds” to his forearms and hands. One of the wounds, which sliced his carotid artery in two, was fatal.

[7] No-one purported to have witnessed the stabbing. Mr. Ndiya and Mr. McEwan each testified to discovering Mr. Boucher, bleeding. Their accounts of finding Mr. Boucher conflicted. Both young men, who had been drinking heavily, said they were alone when they found him.

[8] Two witnesses – Mr. Ndiya and Donna White – testified to seeing someone leaving the basement coincident in time to the stabbing, but their accounts also conflicted.

[9] Mr. Ndiya, who was returning to the basement apartment after smoking a cigarette, said he saw a man at the bottom of the stairs, who ran past him as he descended. This alarmed him and he rushed downstairs to find Mr. Boucher holding his neck and bleeding.

[10] Ms. Paquette's mother, Ms. White, who lived upstairs, testified that she came downstairs when she heard girls screaming, and that when she was halfway down the basement stairs, she saw Mr. Hussein running up the stairs. She said she did not see Mr. Ndiya.

[11] Of the six people who remained at the party before the stabbing, only Mr. Hussein was not present when the police arrived.

[12] The police, having been told by two of the females who were outside the house at the time of their arrival that the suspect had left the scene, questioned the occupants but did not search them, including Mr. Ndiya and Mr. McEwan, who were covered in blood. Mr. Ndiya was permitted to wash his hands.

[13] Forensic examination of the crime scene disclosed:

- Mr. Hussein's blood was found in the living room and bathroom, including on a band-aid package. When he was later arrested, one week after the

stabbing, he was found to have a healing incise wound on his thumb that would be expected to have bled at the time it was inflicted.

- Mr. Hussein's blood was found in the bedroom, including drops on the back of the bedroom door immediately adjacent to a narrow, triangulated puncture in the wall, seemingly consistent with damage made by a knife, and with blood being expelled from a hand-wound when the knife punctured the wall.
- Mr. Hussein's DNA and Mr. Boucher's blood was found on a toque, "dropped almost on top of the spot where Mr. Boucher died". Another toque, also located in the room where Mr. Boucher was stabbed, contained Mr. Ndiya's DNA and Mr. Boucher's blood.
- Three knives, none of which proved to be the murder weapon, were located in the apartment.

[14] There was also evidence of after-the-fact conduct by Mr. Hussein. As indicated, there was the circumstantial evidence that Mr. Hussein left the basement apartment shortly after the stabbing. Security video from a car dealership depicts a person, consistent with Mr. Hussein's description, running or walking swiftly from the area of Ms. Paquette's apartment shortly after the stabbing would have occurred.

[15] After Mr. Hussein left Ms. Paquette's apartment, he went to Jordan Martineau's nearby home where Ryan Martineau also lived. Ryan Martineau noticed that Mr. Hussein had a spot of blood on his pant leg about the size of a

toonie. He testified that Mr. Hussein told him someone had been murdered at Ms. Paquette's apartment. Ryan Martineau also described Mr. Hussein as "very drunk" and "out of it", an observation consistent with some of the evidence from people who were at the party.

[16] When Mr. Hussein was returning home from the Martineau house, Ryan Martineau called a taxi on Mr. Hussein's behalf and arranged to have the taxi come to a nearby "Quickie", instead of to the Martineau house. After he returned home where he lived with his mother, Mr. Hussein did not remain at the home but left that afternoon, February 2, 2017, by taxi, which he arranged using a fake name. He returned to the Martineau house where he stayed for days, without a cellphone. He also changed his appearance by shaving his head, an act he would admit in his trial testimony that he did upon learning he was wanted in Mr. Boucher's death.

[17] The Crown brought a similar fact evidence application at the beginning of Mr. Hussein's trial, but the trial judge deferred the ruling until the end of the Crown's case. The proposed similar fact evidence would purportedly establish that:

- Mr. Hussein grabbed a steak-knife from the kitchen while in a dispute with his siblings in his family home and threatened to stab someone. On November 18, 2010, he pleaded guilty to two counts of uttering threats in connection with this incident.

- Subsequently, Mr. Hussein retrieved a breadknife while arguing with his sister, before his brother intervened. On September 13, 2013, Mr. Hussein pleaded guilty and was convicted of assault and possession of a weapon in connection with that incident.
- Mr. Hussein brandished an ice-chopper (not unlike a spade) during an argument with a neighbour. On March 29, 2016, he pleaded guilty to uttering a threat as a result of this incident.
- During a fleeting dispute with Mr. Boucher's brother at a party, Mr. Hussein picked up and brandished a knife. This incident did not result in charges.

[18] The Crown argued that this evidence was relevant in proving the identity of the stabber, by showing Mr. Hussein's specific propensity to carry a knife, or to react to interpersonal conflict by reaching for an available knife. The trial judge ruled the evidence to be inadmissible. He concluded that this evidence did not support an inference that Mr. Hussein had a propensity to carry a knife. Moreover, in the absence of evidence that the knife used to stab Mr. Boucher was obtained opportunistically, this evidence could not support a probative inference of identity on the Crown's alternative theory that he had a propensity to reach for knives during conflicts. The trial judge found this evidence to be "quite discreditable" because it would show Mr. Hussein "to be a hot-head, prone to lose his cool, taking up available weapons", and it could confuse the jury by attracting speculative

inferences that a similar pattern of behaviour explains Mr. Boucher's death. He concluded that the test for the admission of similar fact evidence was not met.

[19] Even though the Crown was not permitted to present extraneous bad character evidence as proof of his guilt, Mr. Hussein faced the prospect that if he testified, the Crown would use his criminal record to discredit his testimony as a witness, pursuant to s. 12(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. And Mr. Hussein's criminal record was appreciable. He was found guilty of four criminal offences as a youth, including the two 2010 guilty verdicts for uttering threats described above. At the time those findings of guilt where made, Mr. Hussein was also found guilty of possession of a schedule II substance, and of failure to appear in court. Mr. Hussein also had 12 adult convictions between March 2013, and March 2016, consisting of four convictions for failing to comply with court orders; three assault convictions; two robbery convictions; one uttering threats conviction; one possession of a weapon conviction, and one mischief conviction.

[20] To prevent his criminal record from being exposed to the jury should he testify, Mr. Hussein brought a *Corbett* application seeking an order prohibiting the Crown from cross-examining him on his criminal record. He submitted that, at the very least, the trial judge should not permit the Crown to cross-examine him on the assault and threatening offences on his record because they were too prejudicial, or on the findings of guilt made against him as a youth because they lacked

probative value. He also asked that the robbery conviction be "[watered] down to a theft". In other words, that the Crown refer to this offence as theft, so that it could benefit from the dishonesty component of the robbery without disclosing the prejudicial use of violence that a robbery entails.

[21] The trial judge denied the *Corbett* application, permitting the Crown to cross-examine Mr. Hussein on his entire record. When Mr. Hussein testified, the Crown did so. It will be convenient and necessary to describe the trial judge's reasoning in denying the *Corbett* application below, when analysing the grounds of appeal relating to this ruling.

[22] After the jury found Mr. Hussein guilty of second-degree murder, the trial judge canvassed jurors for recommendations on Mr. Hussein's parole ineligibility, pursuant to s. 745.2 of the *Criminal Code*, R.S.C., 1985, c. C-46. Four jurors recommended parole ineligibility of 10 years, with the remaining jurors making no recommendation. The trial judge did not accede to these recommendations, imposing instead a 13-year period of parole ineligibility. Again, I will address the material features of the trial judge's reasoning below when analysing Mr. Hussein's relevant grounds of appeal.

THE ISSUES

[23] Mr. Hussein raises three general grounds of appeal, with multiple arguments supporting two of those grounds that I will develop below. The three general grounds of appeal he raises are:

A. Did the trial judge err in dismissing the *Corbett* application?

B. Did the trial judge err by failing to instruct jurors relating to the adequacy of the police investigation?

C. Did the trial judge err in imposing a 13-year period of parole ineligibility?

[24] As indicated, I would deny grounds of appeal A and B. I would grant Mr. Hussein leave to raise ground C but dismiss this ground of appeal, as well.

ANALYSIS

A. DID THE TRIAL JUDGE ERR IN DISMISSING THE *CORBETT* APPLICATION?

[25] I will describe the applicable law before identifying Mr. Hussein's specific challenges to the *Corbett* ruling and explaining why I would dismiss those arguments and this ground of appeal.

The Applicable Law

[26] The criminal convictions of anyone who testifies, including accused persons who choose to do so, are presumptively admissible as evidence relevant in

challenging their credibility as witnesses: *R. v. King*, 2022 ONCA 665, 163 O.R. (3d) 179, at para. 139 (citations omitted); *Canada Evidence Act*, s. 12(1). Convictions for crimes of dishonesty, including offences against the administration of justice such as breaching court orders (*R. v. M.C.*, 2019 ONCA 502, 146 O.R. (3d) 493, at para. 56), and theft-based offences such as robbery (*R. v. Thompson* (2000), 146 C.C.C. (3d) 128 (Ont. C.A.), at para. 31), are of obvious relevance since they provide “particularly informative” circumstantial evidence that the accused has a dishonest character: *King*, at para. 139. Convictions for other types of criminal offences “have the potential to demonstrate a ‘[l]ack of trustworthiness’ on the part of the witness, one that is ‘evinced by [an] abiding and repeated contempt for the laws which [the accused] is legally and morally bound to obey’”: *King*, at para. 140, citing *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.), at para. 81 (other citations omitted); see also *R. v. Nagy*, 2023 ONCA 184, at paras. 55-58.

[27] When the Crown seeks to use the criminal record of an accused person as evidence of their lack of testimonial credibility in a jury trial, there is a danger that jurors will, consciously or subconsciously, use this evidence impermissibly as proof of guilt. This is because jurors learning of the bad character of the accused through their criminal record may engage in impermissible “general propensity reasoning” by inferring that “the accused is the type of person to have committed the offence for which they stand trial because of their offending past”: *King*, at paras. 141, 193. Moreover, jurors may find that the kinds of crimes the accused has been found

guilty of support more specific inferences about guilt. Although probative specific inferences about guilt may appropriately be drawn when permitted by the trial judge after a similar fact evidence ruling, they are not to be drawn based on information from a criminal record that is proved pursuant to s. 12 of the *Canada Evidence Act*, since a criminal record admitted under s. 12 has been admitted for the limited purpose of gauging the credibility of the accused as a witness.

[28] Three safeguards have been developed to reduce the risk that the criminal record of an accused person will be misused as evidence of guilt, if admitted.

[29] First, the cross-examination is limited to the fact that the conviction has occurred including its date and place, the offence of which the accused was convicted, and the sentence imposed: *M.C.*, at para. 55. This reduces the risk of jurors receiving the details required for specific propensity reasoning or of being overwhelmed with prejudicial information about the accused person's general bad character.

[30] Second, trial judges must direct jurors as to how they may or may not use the prior convictions put to an accused on cross-examination: *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 690-91.

[31] Third, trial judges have discretion, when an accused brings a *Corbett* application, to prevent the cross-examination of the accused person on all or some of their criminal convictions, where the prejudicial effect would outweigh the

probative value in doing so: *R. v. Underwood*, [1998] 1 S.C.R. 77, at p. 79, citing *Corbett*.

[32] The probative value of criminal convictions as evidence of dishonesty will vary with their nature, number, and recency: *M.C.*, at para. 57. The factors trial judges may consider in exercising this discretion is not closed, but "trial judges typically consider: (1) the nature of the convictions; (2) their remoteness or nearness to the matter under prosecution; (3) the similarity between the offences charged and the prior convictions; and (4) the risk of presenting a distorted picture to the jury": *King*, at para. 145; see also *Corbett*, at pp. 740-44.

[33] In terms of the nature of the convictions and the similarity between the offences charged and the prior convictions, courts should be wary of admitting evidence of convictions for a similar crime to avoid the possibility that jurors may convict because of the accused's disposition: *R. v. Brooks* (1998), 41 O.R. (3d) 661 (C.A.).

[34] The "risk of presenting a distorted picture to the jury" is typically engaged when a Crown witness has been subjected to an attack on their credibility "based on his or her character [for dishonesty], especially as disclosed in his or her criminal record": *R. v. McManus*, 2017 ONCA 188, 353 C.C.C. (3d) 493, at para. 82. In such cases a trial judge may consider the need to maintain a fair balance between the parties, given the potential unfairness that could arise if the

accused is able to keep their own discreditable character from jurors, after having demonstrated the discreditable character of a Crown witness.

[35] Based on these same considerations, instead of prohibiting the use of the accused's criminal record, trial judges may restrict the criminal offences that may be used or modify the description of offences to reduce the risk of prejudice: *R. v. Paul*, 2009 ONCA 443, 249 O.A.C. 200, at para. 19, leave to appeal refused, [2010] S.C.C.A. No. 33421; *R. v. Grizzle*, 2016 ONCA 190, at paras. 17-19. An important consideration is whether the excision of a conviction, in whole or in part, would leave the jury with incomplete and therefore inaccurate information: *McManus*, at para. 82.

[36] Finally, "trial judges are afforded a wide berth of discretion in making their *Corbett* determinations": *King*, at para. 201, citing *R. v. Charland*, [1997] 3 S.C.R. 1006, at pp. 481-82; *R. v. Wilson* (2006), 210 C.C.C. (3d) 23 (Ont. C.A.). "[A]n appellate court ought not to intervene [in a trial judge's *Corbett* decision] 'absent error in principle, misapprehension of material facts, or an exercise of the discretion which, in the totality of the circumstances, must be regarded as unreasonable'": *R. v. Clarke*, 2014 ONCA 777, 319 C.C.C. (3d) 127, at para. 5.

The Trial Judge's Reasoning

[37] The trial judge accurately described the *Corbett* principles that were relevant to the issues before him and provided clear reasons in dismissing the *Corbett* application.

[38] Specifically, in evaluating the probative value, he concluded that Mr. Hussein's criminal record had "considerable" or "quite high" probative value. He explained that in addition to the offences of dishonesty (which speak directly to dishonesty), the "aggregate" of the 16 convictions – their sheer number and persistent regularity – showed "an ongoing approach to the law that could be described as disregard or disdain," and evidenced "a pattern of persistent and regular disregard for the law that would … be probative of whether [Mr. Hussein] would approach his oath with proper regard or be dissuaded from the prospect of a perjury conviction." He found that the youth convictions were not "remote" because they form part of this "cohesive whole".

[39] In terms of prejudicial effect, the trial judge concluded that the "risk is low" that Mr. Hussein would be judged on the basis of his criminal record to be "a violent man or so prone to criminality that he will be judged on the basis of bad character." He explained that this risk must be assessed in the context of the case, and he addressed the risk of prejudice relating to the live issues. He said that the risk the jury would use the criminal record to determine Mr. Hussein's identity as the

stabber "pales in comparison" to the weight of the other evidence on this issue, such that the risk of prejudicial reasoning is "but a drop in a larger bucket", "attenuated to the point of being low." He reasoned, as well, that the case would likely turn, not on the issue of identity, but on the issue of whether Mr. Hussein had foreseen Mr. Boucher's death, given his intoxication. The trial judge said that even if jurors were to find a propensity for violence from the criminal record, this would not bear on the foreseeability issue: "Foreseeability of death is not made more likely if Mr. Hussein is thought by the jury to be a violent man on the basis of [his] criminal record."

[40] After commenting that "[t]he entries in the record are nowhere near to the nature of the [alleged] homicide", he concluded that, in the context of the case, the record speaks to the credibility of Mr. Hussein, and not to the central issues in the case.

[41] He therefore held that the probative value of the record outweighed the risk of prejudice it presented. In coming to that determination, the trial judge concluded that the challenge that Mr. Hussein made to Mr. Ndiya's character, including through Mr. Ndiya's own criminal record and his own convictions for robbery and assault, was "another element" supporting his conclusion. He said, "It would, in my judgment, create an unfair distortion in the evidence for Mr. Hussein to float the idea that Papy Ndiya is somehow unreliable or incredible while keeping his own criminal record out of the mix."

[42] Mr. Hussein had attempted to dissuade the trial judge from reasoning in this way by suggesting that his challenge to Mr. Ndiya's character was cursory. The trial judge disagreed, finding that although the cross-examination of Mr. Ndiya on his character was not lengthy, it was "quite direct and dramatic."

[43] The trial judge then explained why he would not exercise discretion to excise any of the convictions or otherwise edit the record. He concluded that even at its "rougher edges", including the robbery convictions, the entries in the record "pale in comparison to the severity of the charge" and have "so little to do with the key issues in this trial, that being the foreseeability of death, that the prejudicial effect is near absent." He described again the relevance of the "persistence and regularity" of offending on the issue of credibility.

[44] Finally, the trial judge expressed his confidence that a proper jury instruction will be sufficient to avoid any risk that the criminal record would be used by the jury for any improper purposes. He ultimately gave the jury a clear and appropriate limiting instruction:

> You must not use the fact that Mr. Hussein has committed an offence in the past or the number and nature of the offences he has committed, or when those offences were committed as evidence that he committed the offence charged, or is the sort of person who would commit the offence charged. You may only use the fact, nature – and the nature of those convictions to help you decide how much or little you will believe and rely upon the testimony of Mr. Hussein in deciding the case.

…

> It is very important that you understand that you must not use the fact or nature of the prior convictions to decide or help you decide that Mr. Hussein is the sort of person who would commit the offence charged or is a person of bad character and thus likely to have committed the offence charged.

[45] In addition, the trial judge explained how to assess the probative value of previous convictions on credibility.

The *Corbett* Arguments on Appeal

[46] Mr. Hussein argues that the trial judge erred in principle in his *Corbett* ruling in: (1) considering the strength of the Crown's case as diminishing the prejudicial effect of exposing Mr. Hussein's record during cross-examination; and (2) concluding Mr. Hussein's record would not bear on the jury's analysis of whether Mr. Hussein had the required intent for murder. He also argues that: (3) the trial judge's overall balancing of prejudicial effect and probative value was unreasonable; and (4) the trial judge's decision to permit the Crown to use the entire record was unreasonable. I accept none of these submissions.

(1) Did the trial judge err in considering the strength of the Crown case as diminishing prejudicial effect?

[47] In determining the risk of prejudice, the trial judge considered the strength of the Crown case on the identity issue, concluding in effect that the circumstantial evidence of identity was so strong that there was little risk the jury would rely on

character inferences arising from Mr. Hussein's record to resolve this issue. In my view, the trial judge did not err in doing so.

[48] First, the trial judge made these comments in response to a submission made by Mr. Hussein at the *Corbett voir dire*. Mr. Hussein argued, in effect, that the Crown case on identity was weak, and that this increased the risk that the jury would resort to propensity reasoning. Specifically, Mr. Hussein's trial counsel described the Crown case on identity as circumstantial and not direct, "and so there's still a very real risk that the jury will use any indication of Mr. Hussein's history of violence to conclude the ultimate issue of guilt in this case", namely identity. Mr. Hussein's trial counsel also said that the circumstantial nature of the case "heightened [the] risk that any small factor could tip the scale one way or the other and that the jury can put undue weight on evidence to help them". It is difficult, in these circumstances, for Mr. Hussein to now criticize the trial judge for responding in his reasons to a central submission that Mr. Hussein's trial lawyer made at the *voir dire*.

[49] In any event, it was not an error in principle for the trial judge to consider the strength of the Crown case when assessing the risk jurors would use Mr. Hussein's criminal record to engage in propensity reasoning. Although this is not one of the typical factors for consideration, and should perhaps be used with care, the factors relevant in assessing the risk of prejudice are not closed and this court has recognized that there may be an elevated risk of improper propensity reasoning

when the Crown case is weak "to jump the gap in the evidence": *R. v. Hall*, 2018 ONCA 185, 359 C.C.C. (3d) 300, at para. 65; *R. v. Riley*, 2017 ONCA 650, 137 O.R. (3d) 1, at para. 225. If this is so, it follows that a strong case reduces that concern.

[50] Although I do not discount Mr. Hussein's contention that jurors could supplement the evidence, even in a strong case, with impermissible reasoning, the discretionary decision whether to grant a *Corbett* application requires an assessment of the degree of risk, and the trial judge was entitled to conclude that the risk is lower where there is a clear permissible pathway to a verdict that does not engage the prohibited reasoning.

[51] In sum, I would not find that the trial judge erred in considering this factor, particularly not given the clear direction the jury was provided to avoid prohibited reasoning.

(2) Did the trial judge err in concluding Mr. Hussein's record would not bear on the jury's analysis of whether Mr. Hussein had the intention to commit murder?

[52] The trial judge discounted the risk of propensity reasoning on the key trial issue of foreseeability, explaining that "[f]oreseeability of death is not made more likely if Mr. Hussein is thought by the jury to be a violent man on the basis of [his] criminal record." Mr. Hussein contends that this reasoning is wrong, because its

logic is faulty. He argues that if jurors draw a general inference that Mr. Hussein has a propensity for violence, "it would become easier for them to reject the argument that [his] intoxication and his developmental delays negated the intent for second degree murder." Although Mr. Hussein did not put it precisely this way, I understand his submission to be that propensity reasoning provides an alternative, inculpatory inference. More specifically, a conclusion that an accused person has a tendency to act violently makes it easier to believe that the accused is the kind of person who would intentionally harm another in a fashion that creates a foreseeable risk of death and may have done so in this case.

[53] I agree, in part, with Mr. Hussein's submission but, as I will explain, I would not allow this ground of appeal.

[54] The part of Mr. Hussein's submission that I agree with is that there is risk that jurors could engage in the kind of general propensity reasoning he identifies. I am not persuaded by the counterargument that the fact that Mr. Hussein's criminal record does not include convictions for aggravated forms of violence removes the risk that jurors would conclude that he is the type to commit the kind of violence that could lead to a foreseeable risk of death. I accept that the risk of general propensity reasoning is reduced where the charged offence is more serious than the convictions on the criminal record, but it is not entirely eliminated. For one thing, jurors may lack the technical detailed understanding to appreciate the legal gradations among violence-based offences, and by design, they will not

know the actual facts underlying the convictions. Even if jurors do recognize that there is a disparity in the degree of violence between the charged offence and the criminal record, it cannot be assumed that they will not be influenced by the accused's history of violence when adjudicating the charged offence. It has to be remembered that improper propensity reasoning can be driven more by emotional reaction to prior offences than precise logical deduction. Violence is detestable, and it is seductive to believe that violent people likely committed the violent acts they are accused of committing. Improper propensity reasoning need be no more refined than this. Although murder is an act of extreme violence, I have no doubt that it is much easier for many to believe that a murder would be committed by a person prone to assaulting others, threatening others, and possessing weapons, than by someone who has no record of doing these things. The trial judge overstated things, in my view, when he said that "[f]oreseeability of death is not made more likely if Mr. Hussein is thought by the jury to be a violent man on the basis of [his] criminal record."

[55] Having said this, I do not agree with Mr. Hussein's apparent position that the trial judge's thinking is bereft of logic. It is not. I accept the more limited proposition that since by its nature foreseeability of death is a subjective state of mind that arises in the specific circumstances of a particular case, jurors would be unlikely to draw a specific inference, based on Mr. Hussein's prior criminal convictions, that he would have foreseen the risk that the attack he engaged in would be likely to

cause Mr. Boucher's death. The distinction may be subtle, but it is material, and can be put this way: although it may be safe to conclude that jurors would not draw a specific inference that, based on his criminal history, Mr. Hussein would have foreseen the risk of death, there remains a risk that jurors could draw the general prohibited inference that because he is a violent man, Mr. Hussein is more likely to act violently even when foreseeing the risk of death. If that improper reasoning was to be engaged, it could support a finding that Mr. Hussein had the requisite intention for the offence.

[56] It follows, in my view, that the trial judge understated the risk of improper propensity reasoning relating to the foreseeability issue. If that flaw in his reasoning constitutes an error, it is not, in my view, an error in legal principle or an overriding error of fact. This "error" is the difference between proceeding on the incorrect basis that there is no realistic risk of improper reasoning when there is a modest prospect that jurors could engage in improper reasoning. Put simply, the risk of prejudice the trial judge failed to note is not pronounced enough to have altered the calculus of his decision. As I will explain when I address Mr. Hussein's next argument, the trial judge gave a range of reasons for finding the probative value of the cross-examination on Mr. Hussein's record to outweigh the risk of prejudice. His decision to admit Mr. Hussein's record did not materially turn, in my view, on his understated evaluation of the risk of propensity reasoning relating to the foreseeability issue. I would dismiss this ground of appeal.

(3) Was the trial judge's overall balancing of prejudicial effect and probative value unreasonable?

[57] Mr. Hussein argues that the trial judge engaged in a "series of missteps" that resulted in an unreasonable evaluation and balancing of probative value and prejudicial effect. I am not persuaded that the trial judge took missteps, or that his decision is unreasonable.

[58] I accept Mr. Hussein's implicit position that there are compelling considerations in his case that would have supported a reasonable decision to grant the *Corbett* application, but I do not accept that the trial judge's decision is one that a judge could not reasonably have arrived at. It is a decision that warrants deference. I will address the "missteps" Mr. Hussein alleges, in turn.

[59] First, concerning the trial judge's evaluation of prejudicial effect, Mr. Hussein argues that the trial judge failed to recognize the importance of the identity issue by erroneously declaring foreseeability to be "the key issue in this trial". I reject this submission. The trial judge fully understood that Mr. Hussein was pressing the identity issue and intending to argue that the circumstantial Crown case could not prove that he was the stabber. Mr. Hussein's trial counsel made this clear during argument in the *Corbett voir dire*. As I have described above, the trial judge did not disregard this issue or fail to give it due consideration. He directly addressed the risk of prejudicial reasoning relating to the issue of identity. The fact that he

expressed his view that the case would turn on the foreseeability issue and at one point referred to it as “the key” issue does not show that he discounted the identity issue.

[60] Mr. Hussein also argues that the trial judge’s conclusion during sentencing that Mr. Hussein’s criminal record shows him to have a violent disposition demonstrates the trial judge’s error in concluding during the *Corbett* application that the risk was low that jurors would engage in such reasoning. Specifically, in explaining his decision to impose a 13-year period of parole ineligibility, the trial judge concluded that Mr. Hussein’s “criminal record shows [him] to have a violent disposition” and that he has demonstrated an “ongoing pattern of disregard for the law”. Mr. Hussein argues that this finding, made during the sentencing hearing, is incompatible with the prejudice findings the trial judge made in adjudicating the *Corbett* application.

[61] This argument has superficial attraction but lacks substance. Had the trial judge said during the *Corbett* application that the criminal record does not reveal Mr. Hussein’s violent disposition, there would be an inconsistency with what he said when sentencing Mr. Hussein. But the trial judge did not say this. What he concluded during the *Corbett* application was that there was only a “low risk” that the jury would use the criminal record to convict Mr. Hussein based on his violent disposition in a proceeding in which Mr. Hussein’s disposition was not an issue, and after being directed not to use the criminal record in this way. In contrast,

during the sentencing hearing Mr. Hussein's violent disposition was directly in issue, and the trial judge was obliged to consider whether his criminal record supported that inference. I see no inconsistency or misstep here.

[62] Mr. Hussein argues, as well, that the trial judge took a misstep by giving no weight to Mr. Hussein's acknowledged "disability and inarticulateness", information that if considered would reveal an elevated risk of prejudice because Mr. Hussein was already facing a credibility deficit. The trial judge clearly understood the submission. He recited the argument at the outset of his decision. The fact that he did not address the argument overtly does not mean that he failed to consider it or gave it no weight.

[63] More importantly, even if the trial judge had failed to consider this argument, I would not find error. In my view, the relevance of Mr. Hussein's intellectual disability to the outcome of a *Corbett* application is not immediately obvious. The prejudice of concern during a *Corbett* application relates to the risk of misuse of the criminal record. I fail to appreciate how unrelated credibility challenges bear upon that risk. It would make no sense to me for a trial judge to deny the Crown access to otherwise admissible credibility evidence because the accused has unrelated credibility issues.

[64] Mr. Hussein made an additional submission for the first time on appeal. He argued that Mr. Hussein's developmental disability, coupled with his other

challenges, suggests that Mr. Hussein may break the law because of these challenges rather than because of a dishonest character. He suggests that this reduces the probative value of his record. I would not interfere with the trial judge's decision on this basis. First, this submission was not put to the trial judge, and neither party had presented affirmative evidence about Mr. Hussein's intellectual disability during the trial. The evidentiary basis for this claim on the record is therefore weak. Moreover, although Mr. Hussein's personal circumstances may provide an understandable explanation for why he has a tendency to commit crimes of dishonesty or to break the law, this does not change the fact that he has a tendency to commit crimes of dishonesty and to breach moral and legal conventions, considerations that logically elevate the risk that he may not adhere to his oath during trial. In my view, even if Mr. Hussein's personal circumstances contribute to an understanding of his criminal record, this would not have materially altered the trial judge's assessment of the balance between probative value and prejudice.

[65] Nor do I accept Mr. Hussein's argument that the trial judge otherwise overestimated the probative value of his criminal record. Mr. Hussein's argument to this effect has two components. I will consider them, in turn.

[66] First, he argues that the trial judge failed to consider the diminished moral responsibility that he has for his youth convictions. I am not persuaded that the trial judge did so. The trial judge explained in his decision why he was permitting the

Crown to rely on Mr. Hussein's youth convictions, finding that they were not "remote", but formed a part of the "cohesive whole". There is merit in the trial judge's analysis. Mr. Hussein's youth convictions were remote in neither time nor behaviour. He was still a youthful offender during his trial, and his criminal record showed an "ongoing" "pattern of persistent and regular disregard for the law," in which Mr. Hussein continued to commit the same kinds of offences as an adult as he did as a youth. There was therefore no meaningful temporal gap or discernable change in behaviour to support the suggestion that Mr. Hussein's youth convictions do not assist in reflecting the aggregate picture of someone whose testimony may not be trustworthy. The trial judge considered those youth convictions as part of the aggregate, cohesive whole. In my view, he did not overestimate their probative value in doing so.

[67] Second, Mr. Hussein argues that the trial judge overestimated the probative value of permitting cross-examination on his record by giving outsized importance to his challenge to Mr. Ndiya's evidence. This argument challenges the trial judge's conclusion that fairness supported the admission of Mr. Hussein's record, given his character attack on Mr. Ndiya's credibility. In support of this argument, Mr. Hussein makes the same submission that was rejected by the trial judge, focusing on the "cursory nature" of the cross-examination he undertook of Mr. Ndiya on his character. It is not for us to second-guess the trial judge's evaluation of the significance of that cross-examination. He was present when it

occurred. We were not. I would defer to the trial judge's assessment of where a fair balance lay.

[68] Nor did the trial judge err in considering questions Mr. Hussein's trial counsel asked of police officers about Mr. Ndiya, when assessing the impact of Mr. Hussein's challenge to Mr. Ndiya's character. In my view, the trial judge was entitled to find that this evidence contributed to Mr. Hussein's efforts to cast Mr. Ndiya's character as discreditable and to treat it as relevant in assessing the fairness of permitting Mr. Hussein to mask his own discreditable character from the jury.

[69] Therefore, I do not find that the trial judge took material missteps in evaluating or assessing the balance between the probative value or prejudicial effect of permitting a s. 12 cross-examination. Nor would I find his *Corbett* decision to be unreasonable. The trial judge gave a legally correct and reasoned explanation for his finding that the probative value of the record was high. Even allowing for the flaw in his reasoning relating to the prejudicial impact that prior convictions could have on the foreseeability issue, he also gave a reasoned explanation for his finding that given the nature of the convictions, the issues in the case, and the jury instructions that would be given, the risk of prejudice was low. Given those findings, he struck an appropriate balance. These were the trial judge's decisions to make, and they are entitled to deference.

(4) Was the trial judge's decision to permit the Crown to use the entire record unreasonable?

[70] The trial judge's decision to permit the Crown to use the entire record was not unreasonable. Contrary to the submissions made before us, the trial judge was fully aware that not all convictions are equally probative of credibility. In his *Corbett* ruling he explained the different theories of relevance that apply to convictions for offences of dishonesty, as opposed to other offences. He then told the jury explicitly that some convictions, such as convictions for offences of dishonesty, "may be more important than others". Moreover, he gave a cogent explanation for why the entire criminal record should be admitted. Specifically, in his view, much of the probative value in the record came from the ongoing, persistent, and regular disregard for the law it exhibited over a short period of time, up to Mr. Hussein's arrest and pretrial incarceration. In order to establish the depth of Mr. Hussein's disregard for the law, the trial judge found it to be necessary to admit the "cohesive whole", including the youth convictions, the robbery convictions in their unedited whole, the threats and the assaults. That is not an unreasonable decision.

[71] I would therefore dismiss Mr. Hussein's ground of appeal that the trial judge erred in dismissing his *Corbett* application.

B. DID THE TRIAL JUDGE ERR BY FAILING TO INSTRUCT JURORS RELATING TO THE ADEQUACY OF THE POLICE INVESTIGATION?

[72] Mr. Hussein pursued evidence to show that the police failed to conduct an adequate police investigation. Specifically, he cross-examined the attending police officers about their identification of Mr. Hussein as the only suspect, before they had conducted an investigation; their failure to search Mr. Ndiya and Mr. McEwan[1]; and the permission they gave to Mr. Ndiya to wash his hands without forensic examination. Mr. Hussein also made brief submissions to the jury about how the holes in the Crown's case left by this poor investigation raise a reasonable doubt. The Crown responded briefly in its jury address, calling the issue a red herring and telling the jury, "This case is not about what the police didn't do, it's about what [Mr. Hussein] did."

[73] This ground of appeal concerns the trial judge's failure to address the inadequacy of the police investigation in the jury charge. Mr. Hussein argues that this was a legal error. I disagree. Trial judges are not required to set out all of the evidence, or all of the arguments made in a case, even by the accused: *R. v. Panovski*, 2021 ONCA 905, at paras. 92-94; *R. v. P.J.B.*, 2012 ONCA 730, 97 C.R. (6th) 195, at paras. 40-50. In my view, the inadequacy of the police investigation did not play an important enough role in the trial to require the trial

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[1] I will leave aside the question of whether the police had grounds to search these men.

judge to instruct the jury on this theory or to review the related evidence. I base this conclusion not only on the minimal attention this issue attracted during the trial, but on two events that demonstrate that not even Mr. Hussein's trial counsel saw the inadequate investigation angle as an important part of the defence.

[74] First, Mr. Hussein's trial counsel was given an opportunity to review a draft charge. After noting that nothing about the sufficiency of the investigation was included in the draft charge, Mr. Hussein's lawyer told the trial judge that there is "a specific charge, Final 68 [David Watt, *Watt's Manual of Criminal Jury Instructions*, 2d ed. (Toronto: Carswell, 2015), Final 68 at pp. 1193-4], which deal[s] with inadequate police investigation." He then said, "I don't take a strong position on it, it might be something that's helpful to include." The Crown disagreed, submitting that this issue was pursued in questions put to witnesses that did not produce evidence of an insufficient investigation. Mr. Hussein's trial counsel did not reply or otherwise pursue the issue. In my view, this tepid request by Mr. Hussein's counsel for a jury charge exposes the relative unimportance of this issue to the defence theory.

[75] Second, Mr. Hussein's trial counsel was invited to summarize the defence position for inclusion in the jury charge. They did so, and in their summary the insufficiency of the police investigation was given little attention. The sole mention was of how quickly Mr. Hussein became the only suspect, because he had left the scene.

[76] I would not find that the trial judge erred by failing to give direction to the jury on a defence issue that received such secondary attention during the trial.

C. DID THE TRIAL JUDGE ERR IN IMPOSING A 13-YEAR PERIOD OF PAROLE INELIGIBILITY?

[77] I would grant leave to Mr. Hussein to appeal the 13-year period of parole ineligibility ordered by the trial judge, but I would dismiss the appeal. Appellate courts are only to intercede where the sentence is demonstrably unfit, or the sentencing judge made an error in principle that had an impact on the sentence: *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 26, citing *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 44, 51. Mr. Hussein advances two complaints: (1) the trial judge erred in his rejection of juror recommendations for a 10-year period of parole ineligibility, and (2) the trial judge treated the absence of motive as an aggravating factor in the circumstances of this case. He claims that both “errors” are errors in principle that had an impact on the sentence. In my view, neither ground reveals an error in principle.

(1) Did the trial judge err in rejecting juror recommendations?

[78] Mr. Hussein raises two issues with the trial judge’s decision not to accede to juror recommendations. First, he argues that the trial judge erred in principle by failing to adequately consider the recommendations of the four jurors. Second, he submits that the trial judge erred in concluding that the jury would not have

considered Mr. Hussein's criminal record, which was before them. I do not accept either submission.

[79] Mr. Hussein's submission that the trial judge failed to adequately consider the parole-ineligibility recommendations is fueled by a comment the trial judge made in his reason for sentence after addressing the juror recommendations: "All of which to say I take the jury recommendation with a grain of salt, but I do consider it because the law tells me I must."

[80] It is unfortunate that the trial judge used the "grain of salt" expression, since, in isolation, it does suggest that he may not have given the recommendations due consideration. However, when his decision is read in its entirety, it is clear that the trial judge engaged in careful thought before deciding not to accede to those recommendations. In the impugned statement itself he explicitly said that he had considered the recommendations "because the law tells [him] he must". He then demonstrated that he had indeed considered the recommendations by providing three explicit reasons for not acting on them, namely, the jurors who made recommendations: (1) would not have considered Mr. Hussein's criminal record when making their recommendations because they had been directed to use the criminal record only in evaluating his credibility as a witness; (2) would have no awareness on where this case fits in the spectrum of violence contemplated in the case law; and (3) did not have the benefit of the victim impact statements which powerfully conveyed the loss. In simple terms, each of these three explanations

addressed important sentencing considerations that jurors would not have assessed when making their recommendations. Moreover, when the trial judge considered the full range of considerations in this case, he determined that 13 years was the appropriate period of parole ineligibility. His reasons for that conclusion explain why he did not accede to the juror recommendations for a shorter period of parole ineligibility. In my view, the trial judge did not fail to adequately consider the juror recommendations.

[81] In coming to this conclusion, I appreciate that when making recommendations most jurors will lack the three kinds of information the trial judge identified in rejecting the juror parole ineligibility recommendations in this case, and that such generic considerations could be used to discount juror parole eligibility recommendations in most second-degree murder cases. However, the reality is that juror recommendations relating to parole eligibility are not fully informed: *R. v. Barry*, [1991] O.J. No. 2666, (Gen. Div.), aff'd [1993] O.J. No. 3955 (C.A.); and see *R. v. Salah*, 2015 ONCA 23, 319, C.C.C. (3d) 272, at paras. 270-74. This can result in a disconnect between the recommendations and what the trial judge, responsible for sentencing, concludes to be a fit sentence. This is no doubt why judges are required to consider, as opposed to follow, juror recommendations.

[82] Mr. Hussein's argument that the trial judge erred in finding that jurors would not have considered his criminal record in coming to their recommendations when that record had been put before them after the failed *Corbett* application fares no

better. The trial judge made a factual conclusion that they would not have considered Mr. Hussein's criminal record in coming to their parole eligibility recommendations. He reasoned that when he permitted the jury to see Mr. Hussein's record, he gave them a clear direction to consider it only in evaluating Mr. Hussein's credibility. Consistent with the presumption that jurors follow jury directions, he inferred that they would not have considered the record relating to their parole recommendations. This conclusion is not unreasonable, nor does it reveal palpable error.

[83] Even if the trial judge's conclusion had been palpably erroneous, the "error" would not have been overriding. As indicated, the trial judge rejected the juror recommendations for several reasons, including his ultimate conclusion that 13 years is the appropriate period of parole eligibility.

[84] I would dismiss this ground of appeal.

(2) Did the trial judge err in treating the absence of motive as an aggravating factor, in the circumstances of this case?

[85] After noting that Mr. Hussein was described as "quiet, sitting, listening to music" while at the party, and accepting that Mr. Hussein had no memory of the attack because of alcohol-induced amnesia, the trial judge found that "for reasons that will never be known", Mr. Hussein appears to have spontaneously turned on

his friend Mr. Boucher, and engaged in a sustained and persistent knife attack, while Mr. Boucher was trying to defend himself. The trial judge then said:

> The fact that nothing can be pointed to [that] set Mr. Hussein off is worrisome, especially when I consider the other incidents of violence contained in the criminal record and the fact that other efforts by the justice system to bring that violent impulse under control proved so fruitless.

[86] Mr. Hussein argues that, in so reasoning, the trial judge was treating the absence of motive as an aggravating factor, an inference that was not available in the circumstances of this case. He concedes that a proved absence of motive can support a finding of enhanced dangerousness: *R. v. Kravchenko*, 2020 MBCA 30, 386 C.C.C. (3d) 84, at para 65., leave to appeal refused, [2020] S.C.C.A. No. 39152; *R. v. Botticelli*, 2022 BCCA 344, at para. 27; Clayton Ruby, *Sentencing*, 10th ed. (Markham: LexisNexis Canada Inc., 2020), at s. 23.76. However, he argues that in this case, an absence of motive was not proved. Instead, it is unknown whether there was a motive given the trial judge's finding that Mr. Hussein, the only person known to be present during the killing, had no memory of the killing, as well as the trial judge's acceptance that the reason for the attack will never be known.

[87] I agree with Mr. Hussein that it would have been problematic, in these circumstances, had the trial judge relied on the absence of motive as enhancing Mr. Hussein's dangerousness, but he did not do so. When read as a whole, his

reasoning is far more nuanced and, in my view, unobjectionable. As I interpret the trial judge, he found Mr. Hussein to be particularly dangerous because, despite evidence that the gathering of friends had been unremarkable, and Mr. Hussein seemed to be “quiet, sitting, listening to music”, Mr. Hussein suddenly became violent enough over some unknown issue that he killed his own friend in a persistent and sustained attack, despite that his friend was attempting to defend himself. The trial judge reasoned that given Mr. Hussein’s violent character as confirmed by his record, and the evident lack of success of rehabilitative approaches that have been taken when he was previously sentenced for his earlier crimes, coupled with this sudden, unexplained and horrific attack, Mr. Hussein presents a significant danger of future violence. I see no error of principle in that reasoning.

CONCLUSION

[88] I would dismiss Mr. Hussein’s conviction appeal, and his sentence appeal.

Released: April 14, 2023 “D.M.P”

“David M. Paciocco J.A.”
“I agree. L. Sossin J.A.”
“I agree. L. Favreau J.A.”