Regina v. MacKinnon
[Indexed as: R. v. MacKinnon]

43 O.R. (3d) 378
[1999] O.J. No. 346
Docket Nos. C26883 and C27410

Court of Appeal for Ontario
Carthy, Doherty and Laskin JJ.A.
February 9, 1999

Criminal law -- Trial -- Charge to jury -- Consciousness of guilt (after-the-fact conduct) -- Evidence of accused's after- the-fact conduct may sometimes have probative value in determining level of liability -- M and C charged with first degree murder arising from killing during robbery -- Evidence of after-the-fact conduct capable of supporting theory that killing was planned and deliberate murder -- Trial judge not required to instruct jury that after-the-fact conduct had no probative value when determining level of accused's culpability -- Even if charge to jury in error, case against M was overwhelming and verdict would necessarily have been the same -- M's appeal against conviction dismissed.

Criminal law -- Trial -- Charge to jury -- Theory of defence -- Accused charged with first degree murder as aider and abettor -- Accused claiming that he had not known that co- accused intended to steal firearm and murder victim and that he had accompanied co-accused on what he thought was to be illegal purchase of firearm -- Trial judge not adequately relating evidence to theory of M's defence -- Trial judge erring in curtailing his review of evidence because he was satisfied that jury had sufficient apprehension of evidence based on defence counsel's effective closing address -- Non- direction regarding C's defence requiring new trial -- C's appeal allowed.

The accused were both charged with first degree murder in the killing of a gun club employee. It was the theory of the Crown that the accused M, a member of the gun club, planned to steal guns from the club and knew he would have to kill whoever was working there at the time, and that he enlisted the assistance of the accused C. R drove the accused to the club and remained outside while they entered. The victim was shot and the accused stole a gun and some money and fled the scene, driven by R. According to R, both accused were excited and laughing when they returned to the car. R drove the accused to a schoolyard where they disposed of certain material in a dumpster. The Crown argued that the killing was a planned and deliberate murder. According to the Crown theory, M was the shooter and C was guilty of first degree murder as an aider and abettor. C, unlike M, testified. It was C's position that he went to the club with M believing that they were going to make an illegal purchase of a firearm. C claimed that there had been no discussion of any robbery and that M, acting entirely on his own and without any prior knowledge on C's part, shot and killed the victim.

M was convicted of first degree murder. C was convicted of manslaughter. Both accused appealed. M submitted that the trial judge erred in failing to instruct the jury that evidence of after-the-fact conduct could not assist them in determining M's level of culpability should they find that he was party to a culpable homicide. C claimed that the trial judge failed to relate the evidence capable of supporting his defence in a way which would ensure that the jury appreciated the significance of the issues raised by the defence.

Held, M's appeal should be dismissed; C's appeal should be allowed.

Evidence of after-the-fact conduct is a type of circumstantial evidence. Often, evidence of after-the-fact conduct will be probative of the accused's participation in the crime alleged, but will have no probative value in determining the level of the accused's culpability. Sometimes, however, as a matter of common sense and human experience, the evidence will be capable of supporting an inference that an accused had a particular state of mind. The conduct of the accused, as described by R, from the time they fled the club until they disposed of evidence, could, when viewed in its entirety, support the inference that they had done exactly what they had planned to do, that is, enter the club, commit a robbery and shoot the victim. This inference would lend considerable support to the Crown's claim that the murder was planned and deliberate. As the evidence had some probative value on the question of whether the accused had engaged in a planned and deliberate murder as opposed to a robbery or some other illegal activity which had gone awry, the trial judge need not have instructed the jury that the evidence had no value in determining the level of culpability of the accused. Even if there was some non-direction in relation to this evidence, the case against M was overwhelming. The evidence of his after-the- fact conduct paled in comparison to the evidence against him.

A functional approach must be taken when assessing the adequacy of jury instructions. By the end of the instructions, the jury must understand the factual issues which had to be resolved, the law to be applied to those issues and the evidence, the position of the parties, and the evidence relevant to the positions taken by the parties on the various issues. In this case, the trial judge ably fulfilled the first, second and third requirements of a proper jury instruction. The fourth requirement, that is the relating of the evidence relevant to the position of the parties on the contested issues, is most often achieved by a review of the evidence in the context of the various issues and an indication of what parts of the evidence may support the respective positions of the parties. While the trial judge summarized the position of C, he did not relate any of the evidence to C's position as summarized. He did not review any of the evidence relating to C's position that he was not a party with M to a plan to rob the victim. He also did not review the evidence relied on by the Crown to demonstrate that C was a party to the robbery. The absence of that review took on particular significance in the light of the jury's verdict. Their manslaughter verdict clearly indicated that they had decided that C was a party to a robbery, but they had at least a reasonable doubt as to his participation in the murder either under s. 21(1) or s. 21(2) of the *Criminal Code*, R.S.C. 1985, c. C-46.

The trial judge's failure to relate any of the evidence to C's position that he was not a party to any robbery was not inadvertent. He was clearly satisfied, based on defence counsel's effective closing address, that the jury had a sufficient appreciation of the evidence relevant to that issue. Counsel's closing address cannot relieve the trial judge of his obligation to ensure that the jury understands the significance of the evidence to the issues in the case. C had testified in support of his position that he was not a party to the robbery and thought that they were going to the gun club to buy an illegal gun. The trial judge did not incorporate by reference defence counsel's submissions of the evidence supporting C's defence. Without such an instruction, it is not clear that the jury would have accepted defence counsel's submissions as to the relevance of the evidence to C's assertion that he was not a party to the robbery.

Although the Crown's case against C that he was a party to the robbery was powerful, the evidence could give rise to a reasonable doubt on that issue. A new trial on the charge of manslaughter was allowed.

APPEAL by the accused M from a conviction for first degree murder; appeal by the accused C from a conviction for manslaughter.

R. v. Ambrose, 1976 CanLII 201 (SCC), [1977] 2 S.C.R. 717, 14 N.B.R. (2d) 452, 69 D.L.R. (3d) 673, 9 N.R. 431, 30 C.C.C. (3d) 97 (sub nom. *R. v. Hutchison*), distd

Other cases referred to *Azoulay v. R.*, 1952 CanLII 4 (SCC), [1952] 2 S.C.R. 495, 104 C.C.C. 97, 15 C.R. 181; *R. v. Cipolla*, 1965 CanLII 168 (ON CA), [1965] 2 O.R. 673, [1966] 1 C.C.C. 179, 46 C.R. 78 (C.A.), affd [1965] 2 O.R. 673n, [1966] 1 C.C.C. 205n, 46 C.R. 197 (S.C.C.); *R. v. Cooper*, 1993 CanLII 147 (SCC), [1993] 1 S.C.R. 146, 103 Nfld. & P.E.I.R. 209, 146 N.R. 367, 326 A.P.R. 209, 78 C.C.C. (3d) 289, 18 C.R. (4th) 1; *R. v. Court* (1995), 1995 CanLII 1741 (ON CA), 23 O.R. (3d) 321, 29 C.R.R. (2d) D-1, 99 C.C.C. (3d) 237 (C.A.); *R. v. Dwyer* (1977), 1977 CanLII 1995 (ON CA), 35 C.C.C. (2d) 400 (Ont. C.A.); *R. v. Guyatt* (1997), 1997 CanLII 12525 (BC CA), 119 C.C.C. (3d) 304 (B.C.C.A.) [leave to appeal refused (1998), 228 N.R. 196n (S.C.C.)]; *R. v. Jacquard*, 1997 CanLII 374 (SCC), [1997] 1 S.C.R. 314, 157 N.S.R. (2d) 161, 143 D.L.R. (4th) 433, 207 N.R. 246, 462 A.P.R. 161, 113 C.C.C. (3d) 1, 4 C.R. (5th) 280; *R. v. John*, 1970 CanLII 199 (SCC), [1971] S.C.R. 781, 15 D.L.R. (3d) 692, 2 C.C.C. (2d) 157, 15 C.R.N.S. 257, [1971] 3 W.W.R. 401; *R. v. White*, 1998 CanLII 789 (SCC), [1998] 2 S.C.R. 72, 39 O.R. (3d) 223n, 161 D.L.R. (4th) 590, 227 N.R. 326, 125 C.C.C. (3d) 385, 16 C.R. (5th) 199

Statutes referred to *Criminal Code*, R.S.C. 1985, c. C-46, ss. 21, 683(1)(b)(iii)

Clayton C. Ruby, for appellant, Tyrell Nathan MacKinnon.
Leonard Miller, for appellant, Garfield St. Mark Crooks.
Ken L. Campbell, for the Crown, respondent.

The judgment of the court was delivered by

DOHERTY J.A.: --

I.

The appellants were charged with first degree murder. After a lengthy trial, MacKinnon was convicted of first degree murder. Crooks was convicted of manslaughter and sentenced to eight years' imprisonment. The trial judge ordered that Crooks serve at least one-half of his sentence before being eligible for parole. MacKinnon appeals his conviction. Crooks appeals both conviction and sentence.

I would affirm MacKinnon's conviction and order a new trial for Crooks on the charge of manslaughter.

II.

I will set out the evidence only to the extent needed to understand the issues raised on the conviction appeals. Mr. Norman Chow worked at the Durham Sports Shooters Gun Club (the club). Mr. Chow knew MacKinnon who was a member of the gun club. Mr. Chow was shot and killed while working at the club. Both appellants were present when Mr. Chow was shot. They fled the scene with some money and a gun belonging to the club.

It was the theory of the Crown that MacKinnon had decided to steal guns from the club some time prior to Mr. Chow's death. MacKinnon was known to the employees at the club, including Mr. Chow, and knew he would have to kill whomever was working when he stole the guns. MacKinnon unsuccessfully tried to enlist the assistance of various friends until he eventually approached Crooks who agreed to participate in the plan.

Dewayne Ransome drove the appellants to the club. He insisted that he knew nothing about the planned robbery. The appellants entered the club and Ransome remained in the car. A short time later Mr. Chow was shot. The appellants stole a gun and some money and fled the scene in the car driven by Ransome. According to Ransome, both appellants were excited and laughing when they returned to the car. They said that they had sent the deceased "back to China". Ransome drove the two appellants to a schoolyard where they disposed of certain material in a dumpster.

The Crown argued that Mr. Chow's killing was a planned and deliberate murder. According to the Crown's theory, MacKinnon was the shooter and Crooks was guilty of first degree murder as an aider and abettor.

Counsel for MacKinnon maintained that MacKinnon was not a party to any agreement to robbery and that Crooks shot and killed Mr. Chow on his own. MacKinnon did not testify. It was Crooks' position that he went to the club with MacKinnon believing that they were going to make an illegal purchase of a firearm. Crooks claimed that there had been no discussion of any robbery and that MacKinnon, acting entirely on his own and without any prior knowledge on Crooks' part, shot and killed Mr. Chow. Crooks testified.

There was some evidence that Crooks was the shooter, but significantly more evidence pointing to MacKinnon as the shooter. There was also a considerable body of evidence implicating Crooks in the robbery, including evidence that he stole a gun from the club in the course of the shooting and later sold that weapon. There was, however, some evidence capable of supporting Crooks' contention that he was not a party to the robbery. There were several weapons in the open safe of the club when Mr. Chow was shot. These weapons were not taken by MacKinnon and Crooks. It could be argued that had robbery been the motive, the guns would have been taken from the club. In addition, Crooks' first comment to Ransome when he returned to the car after the shooting could be understood as being consistent with his claim that he did not anticipate any violence when he went into the club with MacKinnon. Crooks also denied laughing about the shooting in the car. He said he was terrified and afraid that MacKinnon might kill him.

The jury's verdict against MacKinnon indicates that it was satisfied beyond a reasonable doubt that he was the shooter and had planned to kill Mr. Chow. The verdict of manslaughter against Crooks indicates

that the jury was satisfied that he was an aider and abettor in MacKinnon's plan to rob and that he knew or ought to have known that the plan involved the risk of bodily harm to Mr. Chow or someone else.

III.

MacKinnon contends that the trial judge erred in failing to instruct the jury that evidence of after-the-fact conduct could not assist them in determining MacKinnon's level of culpability should they find that he was party to a culpable homicide.

At the time of trial, there was considerable uncertainty in the law as to how a jury should be instructed concerning after- the-fact evidence. The trial judge wisely decided to canvass counsels' views on the matter. After extensive discussion, the trial judge delivered an instruction which was entirely consistent with that requested by all counsel.

The trial judge commenced his instruction with reference to the evidence which could constitute "consciousness of guilt". He said:

> The Crown alleges that the following conduct on the part of the two accused is evidence of consciousness of guilt for the offence charged and inconsistent with their protestations of innocence. For the two accused this consists of the following: 1, their flight from the shooting scene; 2, their laughing about the incident in the car; and 3, their disposing of evidence in the dumpster once they returned to school.

The judge carefully instructed the jury that before the evidence had any value they had to determine whether or not the alleged conduct had occurred. He reviewed the relevant evidence and the positions of the parties on this issue. The trial judge continued his instruction:

> In order for you to reach the conclusion that these items of conduct constitute consciousness of guilt the Crown must satisfy you beyond a reasonable doubt that they acted in the manner alleged and that the accused so acted either to conceal their complicity in this murder, not any other offence such as dealing in firearms, or in a manner totally inconsistent with having been a mere witness to this fatal shooting. Having concluded that, you may use the conduct as evidence of consciousness of guilt. You must then decide whether or not you will use it for that purpose. In this regard consider all of the evidence and the surrounding circumstances.
>
> You will recall that Mr. Crooks testified that he panicked and did not want to have any connection with this incident because he did not expect the police would believe his story. To my mind this was basically Mr. Ransome's response to his involvement as well. If, having considered all of the evidence and surrounding circumstances you decide to use the evidence, you may proceed to do that and draw an inference that the conduct of the accused shows a consciousness of guilt on his part respecting this offence. By itself, this conduct is only evidence of the consciousness of guilt. But from that finding you are asked by the Crown to infer that both accused are guilty of the offence with which they are charged. If you have drawn an inference that the conduct of the accused shows a consciousness of guilt on the part of the accused respecting the offence before the court then you may go on to consider that inference

> and to draw the further inference that the accused is guilty of offence with which he is charged. This is an inference which may be drawn, but not one which must be drawn, by you.
>
> By itself, a consciousness of guilt is not proof of guilt itself. It is only a circumstance from which you may draw an inference of guilt. Before such an inference can be drawn against Mr. Crooks for the conduct related to flight and disposal of the items in the dumpster, you must be able to foreclose the illegal gun deal as a possible explanation beyond a reasonable doubt. Only then does this shooting become potentially referrable to that conduct. As well, you would have to foreclose panic on the part of Mr. Crooks as being a potential explanation beyond a reasonable doubt before you could refer the alleged conduct to his complicity in this shooting. It is to be remembered that totally innocent individuals may respond in a superficially incriminating manner because of the emotion of the moment.
>
> (Emphasis added)

Evidence of after-the-fact conduct is a type of circumstantial evidence. Its potential probative value will depend upon the nature of the evidence, the issues in the case and the positions of the parties. Often, evidence of after-the- fact conduct will be probative of the accused's participation in the crime alleged, but will have no probative value in determining the level of the accused's culpability. Sometimes, however, as a matter of common sense and human experience, the evidence will be capable of supporting an inference that an accused had a particular state of mind: *R. v. White*, 1998 CanLII 789 (SCC), [1998] 2 S.C.R. 72 at pp. 88-92, 125 C.C.C. (3d) 385 at pp. 400-03.

The appellants' conduct as described by Ransome, from the time they fled the club until they disposed of evidence in the dumpster could, when viewed in its entirety, support the inference that they had done exactly what they had planned to do, that is, enter the club, commit a robbery and shoot Mr. Chow. This inference would lend considerable support to the Crown's claim that the murder was planned and deliberate. As the evidence had some probative value on the question of whether the appellants had engaged in a planned and deliberate murder as opposed to a robbery or some other illegal activity which had gone awry, the trial judge could not have instructed the jury that the evidence had no value in determining the appellants' level of culpability. The alleged non-direction does not constitute misdirection on the evidence adduced in this case.

The "consciousness of guilt" instruction given by the trial judge was overly favourable to the appellants in two ways. First, the trial judge did not make it as clear as he might have how the evidence could be probative on the charge of first degree murder. Second, the trial judge, applying since overruled authority from this court (*R. v. Court* (1995), 1995 CanLII 1741 (ON CA), 23 O.R. (3d) 321, 99 C.C.C. (3d) 237), told the jury that they must be satisfied beyond a reasonable doubt that the evidence supported the inference of consciousness of guilt before the evidence could be used against the appellants. It is now established that the reasonable doubt standard is not applied when determining what inferences should be drawn from after- the-fact conduct: *R. v. White*, supra, at pp. 94-101 S.C.R., pp. 405-10 C.C.C.

If I am wrong and the non-direction could amount to an error in law, I would apply the curative proviso to preserve MacKinnon's conviction. The case against MacKinnon was overwhelming. The consciousness of guilt evidence paled in value beside the other direct evidence of MacKinnon's plan to commit a robbery and murder. Furthermore, considered in its entirety, the consciousness of guilt instruction was far from prejudicial. I am completely satisfied that had the jury been told they could use the

consciousness of guilt evidence only to implicate MacKinnon in the culpable homicide, their verdict would inevitably have been the same.

IV.

Crooks claims that the trial judge failed to relate the evidence capable of supporting his defence in a way which would ensure that the jury appreciated the significance of the evidence to the issues raised by the defence.

The trial judge correctly instructed the jury on the many evidentiary matters which arose in this lengthy and complex trial. He effectively related the evidence to those evidentiary instructions. The trial judge also correctly instructed the jury as to the applicable law of homicide and liability as a party. He summarized Crooks' position in these words:

> The position of Mr. Crooks is equally straightforward. He had absolutely nothing to do with the murder of Norman Chow which was committed independently and suddenly by Nathan MacKinnon. The extent of his criminality . . . was in an illegal firearms deal and nothing more.

The trial judge did not, however, relate any of the evidence to the position of Mr. Crooks as he had summarized it. Counsel for Mr. Crooks objected to the trial judge's failure to do so. He said:

> . . . because the key element for Crooks' defence is: 1. He is not the shooter but; 2. He is not a party . . . but you made no reference to any of the evidence that Crooks relies on to demonstrate he is not a party . . .

(Emphasis added)

The trial judge responded by indicating that he had set out Crooks' position to the jury. Counsel replied:

> Yes you did. But, what you didn't do is refer to any evidence of any witness that, any piece of evidence that Crooks relied upon in support of that . . .

Counsel also argued that the trial judge had reviewed the evidence relevant to the positions of the Crown and MacKinnon and that in failing to accord equal treatment to Crooks, he had diminished the defence of Crooks.

The trial judge refused to recharge the jury, saying:

> I'm not with you on this one at all Mr. Miller [counsel for Crooks]. I can recall your very able submissions to the jury and the items in the evidence that supported Mr. Crooks' position and I am satisfied beyond the point of absolute certainty that the jury is sensitive to that being your position.

The responsibility of the trial judge to relate the evidence to the issues raised by the defence is well established. In *Azoulay v. R.*, 1952 CanLII 4 (SCC), [1952] 2 S.C.R. 495 at p. 497, 104 C.C.C. 97, it was said:

> The rule which has been laid down, and consistently followed, is that in a jury trial the presiding judge must. except in rare cases where it would be needless to do so, review the substantial parts of the evidence and give the jury the theory of the defence, so that they may appreciate

> the value and effect of that evidence, and how the law is to be applied to the facts as they find them.

(Emphasis added)

In *R. v. Jacquard*, 1997 CanLII 374 (SCC), [1997] 1 S.C.R. 314, 113 C.C.C. (3d) 1, the court reiterated the obligation set out in *Azoulay*. Lamer C.J.C. cautioned against a standard of perfection when reviewing trial judges' instructions and said, at p. 326 S.C.R., p. 11 C.C.C.:

> As long as an appellate court, when looking at the trial judge's charge to the jury as a whole, concludes that the jury was left with a sufficient understanding of the facts as they relate to the relevant issues, the charge is proper.

(Emphasis added)

Cory J., in *R. v. Cooper*, 1993 CanLII 147 (SCC), [1993] 1 S.C.R. 146 at p. 163, 78 C.C.C. (3d) 289 at p. 301, made the same point when he observed:

> At the end of the day, the question must be whether an appellate court is satisfied that the jurors would adequately understand the issues involved, the law relating to the charge the accused is facing, and the evidence they should consider in resolving the issues.

In *Jacquard*, Lamer C.J.C. stressed that a functional approach must be taken when assessing the adequacy of jury instructions. I take this to mean that instructions must be tested against their ability to fulfil the purposes for which they are given and not by reference to whether any particular approach or formula has been used. By the end of the instructions, whatever approach is used, the jury must understand:

> -- the factual issues which had to be resolved;
>
> -- the law to be applied to those issues and the evidence;
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> -- the positions of the parties; and
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> -- the evidence relevant to the positions taken by the parties on the various issues.

That is not to say that the approach taken to the task of instructing a jury is unimportant. A sound approach will go a long way to producing a satisfactory result. The current effort to develop specimen jury instructions, headed by the Honourable Mr. Justice D. Watt, reflects the need to develop a more systematic approach to the formulation of jury instructions in this province.

In this case, the trial judge ably fulfilled the first, second and third requirements of a proper jury instruction. The fourth requirement, that is the relating of the evidence relevant to the positions of the parties on the contested issues, is most often achieved by a review of the evidence in the context of the various issues and an indication of what parts of the evidence may support the respective positions of the parties. By a review of the evidence, I do not mean a lengthy regurgitation of large parts of the trial judge's notes of the testimony of various witnesses. I mean references to the evidence which are sufficient in the context of the case and the entirety of the charge to alert the jury to the particular parts of the evidence which are significant to particular issues and to the positions taken by the parties on those issues. A good example of an effective review of evidence relevant to positions taken by the

parties is found in the trial judge's instructions on the issue of the identity of t he shooter. In the space of about three pages of transcript, the trial judge effectively put the positions of the appellants and the Crown and highlighted the evidence relied on by each in support of their positions.

It must also be stressed that the review described need not be exhaustive: *R. v. John*, 1970 CanLII 199 (SCC), [1971] S.C.R. 781 at p. 792, 2 C.C.C. (2d) 157 at p. 166. The trial judge is not expected to rehash each and every argument made by counsel. The charge is proper if it leaves the jury with a sufficient understanding of the evidence relating to the positions taken by the parties on the various issues.

The trial judge did not review any of the evidence relating to Crooks' position that he was not a party with MacKinnon to a plan to rob Mr. Chow. He also did not review the evidence relied on by the Crown to demonstrate that Crooks was a party to the robbery. The absence of that review takes on particular significance in the light of the jury's verdict. Their manslaughter verdict clearly indicates that they had decided that Crooks was a party to a robbery, but they had at least a reasonable doubt as to his participation in the murder either under s. 21(1) or (2) of the *Criminal Code*, R.S.C. 1985, c. C- 46.

The trial judge's failure to relate any of the evidence to Crooks' position that he was not a party to any robbery was not inadvertent. As the trial judge's response to counsel's objection indicates, he was satisfied, based on counsel's effective closing address, that the jury had a sufficient appreciation of the evidence relevant to that issue. Counsel's closing cannot relieve the trial judge of his obligation to ensure that the jury understands the significance of the evidence to the issues in the case. Certainly, the trial judge can consider counsel's closing arguments in deciding how to discharge his or her obligation. Reference to, or incorporation by reference to, counsel's submissions are techniques which may be used by a trial judge to assist in relating the evidence to the positions of the parties on the contested issues.

Mr. Campbell, for the Crown, quite correctly contends that a failure to review the evidence relevant to the positions taken by the parties on contested issues is not necessarily fatal. He acknowledges that the situations in which no review is necessary will be "rare", but submits that this is one of those rare situations. He referred to several cases, in which instructions were found to be adequate despite the absence of any review of the evidence relevant to the contentious issues, e.g., see *R. v. Cipolla*, 1965 CanLII 168 (ON CA), [1965] 2 O.R. 673, [1966] 1 C.C.C. 179 (Ont. C.A.), affirmed [1965] 2 O.R. 673n, [1966] 1 C.C.C. 205n (S.C.C.); *R. v. Dwyer* (1977), 1977 CanLII 1995 (ON CA), 35 C.C.C. (2d) 400 (Ont. C.A.); *R. v. Ambrose*, 1976 CanLII 201 (SCC), [1977] 2 S.C.R. 717, 30 C.C.C. (3d) 97; *R. v. Guyatt* (1997), 1997 CanLII 12525 (BC CA), 119 C.C.C. (3d) 304 at p. 336 (B.C.C.A.).

Each of these cases turns on its own facts and demonstrates the functional approach to the adequacy of jury instructions. I will refer only to *R. v. Ambrose*, *supra*. The accused were charged with the capital murder of two police officers. The circumstantial evidence against them was overwhelming. Neither testified. It was their position that gaps in the circumstantial evidence led by the Crown should leave the jury with a reasonable doubt as to whether Ambrose and Hutchison had committed the murders. In instructing the jury, the trial judge outlined that theory and then said:

> That, in a nutshell, is the theory of the defence and, Mr. Bell, [counsel for the accused] I don't feel it is necessary to go into the evidence there, the theory has been put forward, Mr. Bell has done that most adequately and has pointed out what undoubtedly are some discrepancies, whether material or not is up to you to decide, in the evidence of the witnesses.

In rejecting the argument that the trial judge had failed to adequately relate the evidence relied on by the defence to the position of the defence, Spence J., for a unanimous court, said at pp. 725-26 S.C.R., p. 104 C.C.C.:

> If counsel for the defence based the theory of the defence upon discrepancies in 1,371 printed pages of evidence given by Crown witnesses, then it was his duty in his address to outline those discrepancies. The learned trial Judge was of the opinion that counsel for the defence had done so most adequately and was, therefore, I think properly of the opinion that it was neither necessary nor desirable that he should repeat the outline of those discrepancies in his charge. . . . To have burdened the jury with a recital of discrepancies which had already been outlined in the very long and most complete address of counsel for the accused would not have served any useful purpose and might well have so confused the jury as to distract from their efficient discharge of their sworn duty.

There are at least three important differences between Ambrose and this case. Crooks did testify and denied any involvement in a plan to rob Mr. Chow. Crooks relied not primarily on "gaps" in the Crown's case, but on evidence, including his own testimony, which could be viewed as inconsistent with the Crown's contention that he was a party to a robbery. Finally, this trial judge did not incorporate by reference into his instructions counsel's submissions as to the evidence said to support the position of the defence. Absent any such reference to counsel's submissions, it cannot be assumed that the jury would accept as accurate counsel's contention as to the relevance of certain evidence to his submission that Crooks was not a party to the robbery.

Having read and re-read the instructions, I have come to the conclusion that the absence of any review of the evidence capable of supporting the defence position that Crooks was not a party to the robbery constituted non-direction amounting to an error in law in the circumstances of this case. It cannot be said that, without any review, the jury had a sufficient understanding of the evidence as it related to the defence position on that issue. I come to that conclusion reluctantly. In all other respects, the trial judge's charge and his answers to the questions posed by the jury were marked with a clarity and balance reflective of extensive preparation and a determination to deliver a helpful and fair instruction.

I have given anxious consideration to the application of s. 683(1)(b)(iii). The Crown's case was a formidable one and, in my opinion, the weight of the evidence pointed towards Crooks' willing participation in the robbery. It is doubtful that Crooks could do better than a manslaughter conviction. There was, however, evidence which could leave the jury with a reasonable doubt as to Crooks' participation in the robbery. The jury obviously had difficulty with this case as their deliberations spanned some 20 hours. I cannot say that a reasonable jury, properly instructed would necessarily have reached the conclusion that Crooks was a party to the robbery and, therefore, on the facts of this case, guilty of at least manslaughter.

V.

I would dismiss MacKinnon's appeal. I would allow Crooks' appeal, quash the conviction and direct a new trial on the charge of manslaughter.

M's appeal dismissed; C's appeal allowed.