NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Murphy***, 2012 NSCA 92

Date: 20120906
Docket: CAC 359739
Registry: Halifax

Between:

Matthew James Murphy

Appellant

v.

Her Majesty The Queen

Respondent

Judges:	MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A.
Appeal Heard:	May 28, 2012, in Halifax, Nova Scotia
Held:	Appeal is dismissed, per reasons for judgment of MacDonald, C.J.N.S., Saunders, J.A. concurring; Beveridge, J.A. dissenting
Counsel:	Roger A. Burrill, for the appellant William D. Delaney, Q.C., for the respondent

Reasons for judgment:

OVERVIEW

[1] Several combatants in Halifax's drug trade conspired and then attempted to murder a rival by shooting him, of all places, outside the IWK Health Centre.

[2] The appellant, Matthew James Murphy, was at the scene in a car with one of the co-conspirators. The issue for the trial judge, and now for us on appeal, is whether he was part of this plot or simply along for the ride.

BACKGROUND

The Attack

[3] On November 18, 2008, Aaron Marriott, at the direction of his friend Jeremy LeBlanc, shot and wounded Jason Hallett outside Halifax's IWK Health Centre. All three men were known to the police. In fact, earlier that very day, an integrated police task force known as "Operation Intrude" had secured a judicial authorization to tap the phones of certain individuals known to be involved in Halifax's illegal drug trade. Marriott and LeBlanc were both primary targets of this investigation. The police also knew that, although LeBlanc and Hallett had been lifetime friends, by that time Hallett was "on the wrong side of the fence of Jeremy LeBlanc". So when the wiretap monitors heard LeBlanc and Marriott talking on their cell phones about a potential encounter with Hallett at the hospital, the quick response unit was immediately dispatched. They were too late to prevent the shooting but their intercepted recordings represented powerful Crown evidence in the ensuing conspiracy to murder and attempted murder charges. Specifically, they revealed the following narrative.

[4] Around 6:00 p.m. on November 18th, LeBlanc and the appellant were driving in LeBlanc's Ford Mustang when LeBlanc's girlfriend, Jennifer Hachey, called him. She called from the IWK where she worked to report that Hallett and his friends were there. He was apparently visiting his newborn child. She told LeBlanc that Hallett's presence made her uncomfortable. As the following interception reveals, LeBlanc tried to comfort her; telling her to call him back "if he says something":

LeBlanc: (Sniffs) Yeah, so what? He ain't saying nothin' to you

Hachey: He's gonna see me all night, he's like, in a parent room right by my desk

LeBlanc: Yeah, that's all right, well, well, well, what do ya, what can ya do? If he says somethin', call me back. He ain't gonna say nothin'

Hachey: He won't say anything, eh?

LeBlanc: No, he won't say nothing to you, trust me

Hachey: What if he goes to like, my boss and says

LeBlanc: He's probably gonna leave if you see you

Hachey: Okay

LeBlanc: Thinkin' that you're gonna call me

Hachey: 'Kay, anyway. I'm goin' back up, fuck. They're staying' right in a room here. There must be somethin'

LeBlanc: I don't ____

Hachey: Wrong with the baby

LeBlanc: Hon, I don't care, just do your job, okay?

Hachey: Then bye

LeBlanc: Love you. Call me back right away if anyone says anything to you

Hachey: Okay. He's with like, five guys.

LeBlanc: Oh yeah?

Hachey: (Sighs)

LeBlanc: Okay, I love you

Hachey: Bye

[5] A couple of minutes later, LeBlanc phoned Marriott to tell him about Hallett's presence at the hospital. More calls and text messages followed, culminating in four people heading to the IWK to find Hallett - LeBlanc and the appellant in the Mustang with Marriott and another associate, Shaun Smith, in a second vehicle.

[6] LeBlanc and the appellant arrived first at approximately 6:40 p.m. After seeing Hallett outside the hospital, LeBlanc called the second car and gave driving directions to Smith:

Smith: Hello

LeBlanc: I'm watchin' Hallett, his cousin, ____

Smith: Say what?...

LeBlanc: I'm watchin' them right now, I'm lookin' at them walkin' right past me

Smith: Where at, I'm on, I'm right on Robie Street

LeBlanc: Just come down here

Smith: Say what?

LeBlanc: ____ down here

Smith: Where you at parked though, watchin' them?

LeBlanc: Right there, like around, how you go around the loop

Smith: What, they're sittin' right there?

LeBlanc: Hmm

Smith: Where you sittin' at, so we can come to you and see?

LeBlanc: You'll see me

Smith: What, so, do I, you don't wanna pull right in the hospital, do 1?

LeBlanc: Fuck, they're goin' in the underground parking lot actually

Smith: They're goin' to the underground parking lot?

LeBlanc: As if they're gonna pull out

Smith: So is there any way I can block 'em?

LeBlanc: Just ah, just sec. Just come down, you'll see me

Smith: Yeah, I won't see ya buddy, I'll stay on the phone right with ya...

LeBlanc: Hold up

[7] Then the appellant took LeBlanc's phone and continued to guide Smith and Marriott to the right location. LeBlanc can be heard in the background. Notice that when Smith and Marriott arrived, Smith says: "Gimme, gimme the gat". This is significant because, as I will later discuss, the judge concluded that this reference to the "gat" was to a gun:

Murphy: Hello

Smith: Hello

Murphy: Hey, what's up?

Smith: What's up buddy?

Murphy: Yeah. You know where we're at. Hello?

Smith: Yeah, I know where you're at, but

Murphy: Ah, well, they're right there. In that loop around

Smith: Right in the loop?

Murphy: Yeah

LeBlanc: (Background: Walking ____ underground)

Smith: But does the underground gonna come that way?

Murphy: Yeah, they're goin, that's where they're goin' now

Smith: Do they, do they gotta come out on Robie?

Murphy: They gotta come, I don't know what street they gotta come out on, but they're lookin'. We see them right now. ____

Smith: We're right around the corner bud, we're just at a

LeBlanc: (Background: You go on the straight street and just ____)

Murphy: Go on, go on the straight street and you'll pull over

LeBlanc: (Background: Like, don't pull into the hospital)

Murphy: Don't pull into the hospital

LeBlanc: (Background: Pass like, all the universities)

Murphy: Go past all the universities

Smith: So, take a left right at the. Hey, we're right at the top of the place. I see you guys right now

Murphy: ____

Smith: You're in front of me

Murphy: All right, well we're, we're stopped

(Background: Yeah, they see us right now)

Smith: What?

Murphy: Do you see us loopin' around?

Smith: Yeah

Murphy: Yeah, they're well, they're right there on the right

Smith: Right there on the right?

Murphy: Yeah

Smith: (Background: ____ right here)

Murphy: ____

Smith: (Background: Gimme, gimme the gat)

[8] A minute or so later, LeBlanc spotted Hallett near the Tim Horton's shop. LeBlanc then narrated Hallett's exact movements, which in turn were relayed to Marriott and Smith by the appellant. Among other things, he relayed that Hallett had jumped into a Jeep Cherokee:

Murphy: Yeah, they're back in front

Smith: What?

LeBlanc: (Background: ____ at Tim Horton's)

Murphy: Tim Horton's there

Smith: Turn around?

Murphy: Yeah

LeBlanc: (Background: Actually Hallett's right outside)

Murphy: Right in the loop

Smith: Stay on the phone with me

Murphy: Yeah

LeBlanc: (Background: They're talkin' to someone in a truck)

Murphy: Hello

Smith: Yo

Murphy: Yeah

LeBlanc: (Background: Hey, tell them they're jumpin' in the Cherokee)

Murphy: They're jumpin' in the Cherokee

LeBlanc: (Background: They're jumpin' in the Cherokee)

Smith: So are they going to be pullin' out on Robie, ask him

Murphy: Yeah, they're gonna be pullin' right out on that street that we were just on

Smith: They're gonna be pulling out here, on the street we were just on?

LeBlanc: (Background: Tell him to come into the hospital ____)

Murphy: Come in, come in

LeBlanc: (Background: ____ we're goin' into Tim Horton's ____)

Murphy: Come in, yeah, we're goin' in Tim Horton's, come in.

[9] Then seconds later LeBlanc gave Marriott the order to "blaze the Cherokee":

(Background noise and conversation through intercept)

Smith: (Background: ____ Cherokee)

Murphy: Hello

Smith:	Hello
Murphy:	Yeah, is that you guys pulling in or?
Smith:	Yeah, where's the Cherokee? Is that the Cherokee?
LeBlanc:	____ in the Cherokee right in front. See it over to the right?
Smith:	(Background: Here, get out and blaze the Cherokee. Get out and blaze that Cherokee)
Marriott:	(Background: That one right there?)
Smith:	(Background: Go, yeah)
Marriott:	(Background: ____)
Smith:	(Background: I don't give a fuck. Go)
LeBlanc:	Blaze the Cherokee, the Cherokee

[10] Marriott promptly complied with this order by getting out of his vehicle and firing several shots into the Cherokee. Only one hit its target, striking Hallett in the wrist. All four men then rapidly fled the scene in the same two cars.

The Trial

[11] Subsequently, all four men were charged with conspiracy to commit murder and attempted murder. Smith pleaded guilty to conspiracy to commit murder and the Crown dropped the attempted murder charge. Marriott pleaded guilty to attempted murder and the Crown dropped the conspiracy charge. The appellant and LeBlanc pleaded not guilty and were tried together before Justice Kevin Coady of the Supreme Court of Nova Scotia.

[12] At trial, these intercepts were blended with video surveillance showing the vehicles in question as events unfolded. This gave the judge an enhanced image of what was transpiring at the relevant intervals.

[13] The appellant testified in his own defence and denied any knowledge of the conspiracy. He just happened to be driving around with LeBlanc, smoking some drugs with a plan to get something to eat. He thought the trip to the hospital was simply for LeBlanc to chat with his girlfriend. The judge summarized his evidence:

> ¶53 Mr. Murphy testified in this trial. He testified that he knew nothing of a plan to kill Mr. Hallett at any time. He testified that Mr. LeBlanc invited him to get in the Mustang, smoke some weed and get something to eat. He testified that while on that drive Mr. LeBlanc gets a call but says nothing about it. Another call happens and Mr. LeBlanc tells him that he has to go to the hospital as his "woman" is concerned. Mr. Murphy stated that Mr. LeBlanc said that it would only take a second to check out his girlfriend.
>
> ¶54 Mr. Murphy testified that he took the phone from Mr. LeBlanc because Mr. LeBlanc was rolling a joint. He stated that he was told to take the call from Mr. Smith. Mr. Murphy acknowledged hearing Mr. LeBlanc say "blaze the Cherokee" but stated that at the time he understood him to say "Blazer or Cherokee." He testified he did not hear any shots. He testified that he left the scene with Mr. LeBlanc and was dropped off at a bus stop where he took a bus home.
>
> ¶55 Mr. Murphy denied hearing Mr. LeBlanc's side of the intercepted communications because he was not listening and could not care less what he was talking about. He insisted that when they got to the hospital he had no idea anything was coming and that the only reason for the stop was to check on Ms. Hachey. Mr. Murphy testified that the words he spoke to Mr. Smith were at the direction of Mr. LeBlanc. He testified that he did not hear about the shooting until three days later.

[14] The judge was having no part of that story:

> ¶57 Mr. Murphy has offered an explanation for his words and actions on November 18, 2008. Consequently I must apply the principles set forth in *R. v. W.D., supra*. I do not believe Mr. Murphy as his story is entirely inconsistent with the undisputed facts. Also, much of his evidence just does not make any sense. The totality of the evidence indicates a quickly formed, highly charged event that would be impossible to ignore. If I were to believe Mr. Murphy, I would have to find that he was sitting in the midst of a timebomb oblivious of its existence. The actions of Messrs. LeBlanc, Marriott and Smith make this highly improbable. The

> words of Mr. Murphy make this impossible to believe. I also find that Mr. Murphy's evidence does not leave me in a state of reasonable doubt.

[15] In the end, the judge convicted the appellant of conspiracy to commit murder, despite his "short" involvement in the plot:

> ¶58 I find, on all of the evidence, that it has been proven beyond a reasonable doubt that Mr. Murphy was a member of the conspiracy to kill Mr. Hallett. I find that his involvement was short and that he was swept up in the activities of Messrs. LeBlanc, Smith and Marriott. Mr. Murphy's words to Mr. Smith betray his testimony.

[16] He was also convicted of attempted murder, being a party to this offence by abetting:

> ¶68 In the case of Mr. Murphy there is ample evidence that he was an abettor. The intercepted words and his attendance at the scene, support this conclusion. I cannot find that when he got into Mr. LeBlanc's Mustang he knew what was coming. I further cannot conclude that when Mr. LeBlanc took the call from Ms. Hachey he knew what was coming. I do find that when he learned that Messrs. Smith and Marriott were on the way to the hospital that he knew something bad was going to happen to Mr. Hallett should he be located. Things changed for Mr. Murphy when, at 6:40 p.m., Mr. LeBlanc handed him the phone. The words he spoke to Mr. Smith amounted to a targeting of Mr. Hallett for either Mr. Marriott or Mr. Smith. The comments of Mr. LeBlanc prior to the phone exchange, as well as the arrival of Messrs. Smith and Marriott, were a clear indication that murder was in the air. The words of Mr. Smith saying "gimme, gimme the gat" was a clear indication to Mr. Murphy that a gun was in play. Notwithstanding, he continued to direct Mr. Smith about Mr. Hallett's location as observed and commented upon by Mr. LeBlanc. It was in these short minutes that Mr. Murphy became a party to the attempted murder of Jason Hallett.

[17] The judge sentenced the appellant to five years in jail. He now asks this court to overturn both convictions.

ISSUES

[18] The appellant lists the following ground of appeal:

> 1. That the verdict is unreasonable and cannot be supported by the evidence;

2. That the Trial Judge erred in law by improperly taking judicial notice of facts integral to the finding of guilt;

3. That the Trial Judge erred in determining on the evidence that there existed a conspiracy to commit murder;

[19] Grounds 1 and 3 essentially involve one issue attacking the reasonableness of the verdicts. Here, the appellant asserts that while there may have been sufficient evidence to infer that he was aware of a looming confrontation, there was simply not enough evidence to infer that the appellant knew murder would be the goal. In my analysis that follows, I will address that issue first. The second ground involving judicial notice will then be addressed separately.

ANALYSIS

The Reasonableness of the Verdicts

[20] I begin with this acknowledgement. To be convicted of either offence, the Crown would have to prove that the appellant knew the ultimate goal was to kill Hallett. The appellant accurately makes this point in his factum, first regarding the conspiracy charge:

> ¶31 The Crown must prove that the appellant formed an agreement with the others to murder Jason Hallett. The Ontario Court of Appeal in *R. v. Longworth* [1982] O.J. 3428 at paragraph 41 **[Tab 12]** citing from the Supreme Court in *Cotroni*, *supra*, stated:
>
> > In addition to proof of common design, it was incumbent on the Crown to establish that each accused had the intention to become a party to that common design with knowledge of its implications.
>
> ¶32 As well, where an accused is charged with conspiracy to commit a specific indictable offence, the Crown must show an intention to enter into an agreement to commit that particular offence. Mere recklessness with respect to the subject of the agreement is insufficient to ground liability: *R. v. Lessard* (1982) 10 C.C.C. (3d) 61 (Q.C.A.), p. 82 **[Tab 10]**.
>
> ¶33 Justice Romilly, in *United States of America v. Akrami*, 2001 BCSC 781, paras. 32-54 **[Tab 26]**, sets out a useful summary of law of conspiracy. His comments at paragraph 40 are particularly apt to this appeal:

> The offence of conspiracy requires there be a mutually agreed upon plan to commit a criminal offence. A unilateral decision by someone to join others in the commission of an offence is not an agreement. Neither is mere assisting in the commission of an offence. However, at some point the person assisting may join the conspiracy where his assistance is by mutual agreement of the other conspirators and he does so in furtherance of the common object.
>
> ¶34 The appellant says that even if, for a fleeting period of time, the appellant formed an intention to be part of an agreement, there was no proof of intention, on these facts, to commit murder. The facts, as found, cannot constitute a conspiracy to murder. As such, the trial Judge erred as to the legal effect of the undisputed facts: *R. v. Tran* 2000 NSCA 128, para. 13 **[Tab 21]**.

And then for attempted murder:

> ¶35 The law with respect to parties to attempted murder is clearly stated in the Judgment, as well (A.B., Vol. I, Tab 5, pp. 49-52, paras. 61-65). Attempted murder requires no less than a specific intent to kill: *R. v. Ancio* [1984] 1 S.C.R. 225 **[Tab 2]**; *R. v. Logan*, [1990] 2 S.C.R. 731 **[Tab 11]**. Mere presence at the scene of a crime cannot be enough to ground criminal liability although it may be considered with other evidence: *R. v. Dunlop and Sylvester*, [1979] 2 S.C.R. 881. **[Tab 6]**. On a charge of attempted murder, the accused must know of the principal's intention to kill. It is insufficient for the Crown to show merely that the accused knew that the principal's intent to commit some act of violence: *R. v. Adams*, [1989] O.J. 747 (C.A.) **[Tab 1]**.
>
> ¶36 The fundamental issue remains the same, however. Even if the appellant actively participated/assisted/encouraged the others for a brief period of time, on these facts, there is not enough evidence to find the specific intent to murder Mr. Hallett.

[21] Therefore, turning to our role, we must decide whether, based on the evidence presented, the judge could have reasonably inferred this knowledge (of murder) upon the appellant. See *R. v. Yebes*, [1987] 2 S.C.R. 168, *R. v. Biniaris*, 2000 SCC 15, and most recently, *R. v. R.P.*, 2012 SCC 22. For the following reasons, I believe that there was sufficient evidence for the judge to reach this conclusion.

[22] Firstly, consider this context. The appellant is one of four men in two cars heading to the hospital to track down Hallett. The appellant would have to have known that the outcome would not be positive for Hallett. Yet he helped with this endeavour by guiding the shooter.

[23] Then just as Smith and Marriott arrive at the scene, Smith is heard saying: "Gimme, gimme the gat". From this evidence, the judge concluded that: (a) the "gat" meant a gun; (b) the appellant heard Smith say that; (c) the appellant would therefore have been aware at least by that time that the goal was to shoot Hallett; and (d) despite this, the appellant continued to assist the shooter. Here again is what the judge said:

> ¶68 ...Things changed for Mr. Murphy when, at 6:40 pm, Mr. LeBlanc handed him the phone. The words he spoke to Mr. Smith amounted to a targeting of Mr. Hallett for either Mr. Marriott or Mr. Smith. The comments of Mr. LeBlanc prior to the phone exchange, as well as the arrival of Messrs. Smith and Marriott, were a clear indication that murder was in the air. The words of Mr. Smith saying "gimme, gimme the gat" was a clear indication to Mr. Murphy that a gun was in play. Notwithstanding, he continued to direct Mr. Smith about Mr. Hallett's location as observed and commented upon by Mr. LeBlanc. It was in these short minutes that Mr. Murphy became a party to the attempted murder of Jason Hallett.

[24] In my view, these are all reasonable inferences to draw from this evidence.

[25] In this light, and in light of the entire record, there was therefore sufficient evidence for the judge to reasonably reach these verdicts.

[26] Now I realize that by a separate ground of appeal, the appellant takes issue with the judge's conclusion that the reference to "the gat" was a reference to a gun. I will address this next.

Judicial Notice

[27] The appellant asserts that the judge had no right to equate the word "gat" with a gun. For the following reasons, I disagree.

[28] First of all, the appellant, in his factum, candidly acknowledges that this term has been referred to in previous cases as a firearm:

> ¶80 The term "gat" has no recognized definition within Nova Scotia jurisprudence. In Ontario, there are some cases reported where the term "gat" is given the meaning of a firearm: see *R. v. Huxford* 2010 OJ 482 (O.C.J.) **[Tab 8]** – in the context of a sentencing; *R. v. Parsons* [2009] OJ 6303 (O.C.J.) **[Tab 16]**, *R. v. Zekarias* [2008] OJ 1478 (O.S.C.J.) **[Tab 25]** – in the context of a bail hearings; *R. v. Tsai* [2002] OJ 4516 (O.S.C.J.) **[Tab 22]** – in the context of an application to exclude evidence at a trial.

[29] Then, as the Crown highlights, this reference has been made in at least two appellate level decisions. See: *Rex v. Jackson*, [1933] O.R. 522 (Ont. C.A.) at para. 3; *R. v. Dhuna*, [2008] A.J. No. 91 (Alta. C.A.) at para. 10.

[30] Even more significantly, this term is recognized as slang for a firearm in several leading dictionaries. The Crown highlights this in its factum:

> ¶70 The Concise Oxford Dictionary of Current English, 7th edition, gives the following definition of the word "gat":
>
> **gat** n (slang) Revolver or other firearm [abbreviation of Gatling]
>
> ¶71 Merriam-Webster's Collegiate Dictionary, 11th edition, gives the following definition of the word "gat":
>
> **gat** n [short of Gatling gun] (1897) slang: handgun
>
> ¶72 Funk & Wagnalls Standard College Dictionary, Canadian Edition, gives the following definition for the word "gat":
>
> **gat** n *slang* A pistol [short for Gatling gun]
>
> ¶73 The Free Online Dictionary lists as one of the definitions of the word "gat":
>
> **gat** n *slang* A pistol [short for Gatling gun]

[31] Furthermore, the Supreme Court of Canada has acknowledged that reliable dictionary meanings may be used to determine the meaning of a term without further proof. For example, in *R. v. Krymowski*, [2005] 1 S.C.R. 101, Charron, J. observed:

> ¶22 A court may accept without the requirement of proof facts that are either "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy": *R. v. Find*, [2001] 1 S.C.R. 863, 2001 SCC 32, at para. 48. The dictionary meaning of words may fall within the latter category: see J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at § 9.13 and § 19.22.

[32] All this tells me is that this term is sufficiently notorious for the judge to accept this meaning without evidence.

[33] In reaching this decision, I realize that the judge, during an exchange with counsel, offered that he would not be taking judicial notice of this fact. Of course that is exactly what he ended up doing. Yet, in my view, the fact that the judge may have misstated his intentions does not vitiate his ability to reach this rational conclusion.

[34] Related to this is the Crown's acknowledgement at trial that it would not be attempting to have its witnesses interpret the intercepts. Yet the judge allowed one of the investigating officers to do just that by opining that, in the street, a "gat" was known as a firearm. However, again in my view, this is of no consequence because, as noted, the judge reached this conclusion not on what the officer offered, but on his own judicial notice. He made this clear in his explanation for allowing this evidence:

> In relation to the opinion area of it, I don't disagree with you, sir, that it is . . . there's an element about opinion in it, but I think it's one of those things that, you know . . . as I have said before, it's a term that I've encountered many times in the last 30 years. And you know, so I'm not going to be shocked or surprised when I hear what he has to say.
>
> So I don't know that there's anything to gain by not allowing him to say what he understands that to be. So I'm going to allow him to do that.

[35] Finally, I want to also acknowledge the appellant's concerns that elsewhere in his decision, the judge concluded that a reference to "smitty" was also a reference to a firearm. Again, whether the judge was right or wrong to have done

so is of no matter to this appeal because the appellant was not privy to this utterance, nor did the judge rely on it in convicting him.

DISPOSITION

[36] For all these reasons, I would dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Dissenting Reasons for Judgment (Beveridge, J.A.)

[37] I have had the privilege of reading in draft the reasons of my colleague MacDonald C.J.N.S. I agree that the trial judge did not err in law by finding that "gat" meant a gun. While the trial judge did err in his conclusion that the references in the intercepts to "smitty" meant a firearm, like the Chief Justice, I view the issue as having no importance to this appeal.

[38] However, with great respect, I am satisfied that the trial judge erred in finding the Crown had proved beyond a reasonable doubt that the appellant was liable as a party to the offence of attempted murder, and of conspiring with Jeremy LeBlanc, Shaun Smith and Aaron Marriott to murder Jason Hallett. In my view, the verdicts reached by the trial judge were unreasonable within the meaning of s. 686(1)(a). I would therefore allow the appeal, quash the convictions and enter acquittals. My reasons are as follows:

WHAT WAS THE CROWN REQUIRED TO PROVE?

[39] The two charges in the indictment relevant to this appeal alleged that Matthew James Murphy, Shaun Ryan Smith, Jeremy Alvin LeBlanc and Aaron Gregory Marriott:

> on or about the 18th day of November, 2008, at or near Halifax, in the Halifax Regional Municipality, in the Province of Nova Scotia, did conspire together to murder Jason William Hallett, contrary to Section 465(1)(c) of the *Criminal Code*.
>
> AND FURTHER AT THE SAME TIME AND PLACE AFORESAID, that they, did attempt to murder Jason William Hallett while using a firearm by discharging a firearm at Jason William Hallett contrary to Section 239(a) of the *Criminal Code*.

Conspiracy to Commit Murder

[40] There is no dispute between the appellant and the Crown with respect to the elements of conspiracy to commit murder. Conspiracy is not actually defined in the *Criminal Code*. The elements are found in the common law. In *R. v. O'Brien*,

[1954] S.C.R. 666, the Supreme Court of Canada adopted the definition of conspiracy from the English case of *Mulcahy v. The Queen*, as follows (p. 669):

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as the design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties . . . punishable if for a criminal object . . .

Taschereau J., writing for the majority in *O'Brien* added (p. 668):

> ...Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect*. A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement. ... [Emphasis in original]

[41] The appropriate definition of conspiracy was again considered by the Supreme Court of Canada in *R. v. Cotroni*, [1979], 2 S.C.R. 256. Dickson J., as he then was, wrote (pp.276-277):

> The word "conspire" derives from two Latin words, "con" and "spirare", meaning "to breathe together." To conspire is to agree. The essence of criminal conspiracy is proof of agreement. On a charge of conspiracy the agreement itself is the gist of the offence: *Paradis v. R.* [[1934] S.C.R. 165], at p. 168. The *actus reus* is the fact of agreement: *D.D.P. v. Nock* [[1978] 3 W.L.R. 57 (H.L.)], at p. 66. The agreement reached by the co-conspirators may contemplate a number of acts or offences. Any number of persons may be privy to it. Additional persons may join the ongoing scheme while others may drop out. So long as there is a continuing overall, dominant plan there may be changes in methods of operation, personnel, or victims, without bringing the conspiracy to an end. The important inquiry is not as to the acts done in pursuance of the agreement, but whether there was, in fact, a common agreement to which the acts are referable and to which all of the alleged offenders were privy. In *R. v. Meyrick and Ribuffi* [(1929), 21 Cr. App. R. 94 (C.C.A.)], at p. 102 the question asked was whether "the acts of the accused were done in pursuance of a criminal purpose held in common between them", and in 11 Halsbury (4th ed.), at p. 44 it is said:
>
> > It is not enough that two or more persons pursued the same unlawful object at the same time or in the same place; it is necessary to show a meeting of minds, a consensus to effect an unlawful purpose.

> There must be evidence beyond reasonable doubt that the alleged conspirators acted in concert in pursuit of a common goal.

[42] These principles were emphasized by Martin J.A. in *R. v. McNamara et al. (No. 1)*, [1981] O.J. No. 3254 (C.A.); (1981) 56 C.C.C. (2d) 193, where he wrote:

> **649** With respect, we do not agree with Mr. McLeod's submission. To constitute the crime of conspiracy it is not sufficient for two or more persons to agree; they must agree to do *something*. Mere knowledge of, discussion of or passive acquiescence in a plan of criminal conduct is not, of itself, sufficient: see Goode, *Criminal Conspiracy in Canada* (1975), p. 13; Glanville Williams, *Criminal Law The General Part* 2nd ed. (1961), p. 668. "Conspiracy is more than a common intention. It cannot exist without the consent of the wrongdoers and their agreement to co-operate in the attaining of the evil end": *R. v. McCutcheon et al.* (1916), 25 C.C.C. 310 (at pp. 311-2), 28 D.L.R. 378; *Saskatchewan Farm & Land Co. v. Smith et al.*, [1923] 1 W.W.R. 1179; *R. v. Harris* (1947), 89 C.C.C. 231 at p. 235, [1947] 4 D.L.R. 796, [1947] O.R. 461 at p. 467; *R. v. Salajko*, [1970] 1 C.C.C. 352, [1970] 1 O.R. 824, 9 C.R.N.S. 145. As Dickson, J., said in *R. v. Cotroni*; *Papalia v. The Queen* (1979), 45 C.C.C. (2d) 1 at p. 18, 93 D.L.R. (3d) 161, [1979] 2 S.C.R. 256: "There must be evidence beyond reasonable doubt that the alleged conspirators acted in concert in pursuit of a common goal." That is not to say that a person may not become a party to the criminal offence of conspiracy (as opposed to a participant in the conspiracy) by virtue of s. 21 of the *Criminal Code*. ... [Emphasis in original]

[43] Finally, Doherty J.A. in *R. v. H.A.*, [2005] O.J. No. 3777 (C.A.); (2005), 206 C.C.C. (3d) 233, accurately reviews these principles:

> **46** The appellants' submissions stand on firm legal footing. The *actus reus* of the crime of conspiracy lies in the formation of an agreement, tacit or express, between two or more individuals, to act together in pursuit of a mutual criminal objective. Co-conspirators share a common goal borne out of a meeting of the minds whereby each agrees to act together with the other to achieve a common goal: G. Williams, *Criminal Law: The General Part*, 2nd ed. (London: Stevens & Sons, 1961) at 667-68; *R. v. Cotroni*, [1979] 2 S.C.R. 256, 45 C.C.C. (2d) 1 at 17-18, 23-24 (S.C.C.); *U.S.A. v. Dynar*, [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481 at 511-12 (S.C.C.); *R. v. McNamara* (1981), 56 C.C.C. (2d) 193 at 452-55 (Ont. C.A.), aff'd without reference to this point [1985] 1 S.C.R. 662, 19 C.C.C. (3d) 1 (S.C.C.); P. MacKinnon, "Developments in the Law of Criminal Conspiracy" (1981), 59 Can. Bar Rev. 301 at 308; M.R. Goode, *Criminal Conspiracy in Canada* (Toronto: Carswell Toronto, 1975) at 6-18.

> **47** It follows from the mutuality of objective requirement of the *actus reus* that a conspiracy is not established merely by proof of knowledge of the existence of a scheme to commit a crime or by the doing of acts in furtherance of that scheme. Neither knowledge of nor participation in a criminal scheme can be equated with the actus reus of a conspiracy: see *R. v. Lamontagne* (1999), 142 C.C.C. (3d) 561 at 575-76 (Que. C.A.); *R. v. Cotroni*, *supra*, at pp. 17-8. Knowledge and acts in furtherance of a criminal scheme do, however, provide evidence, particularly where they co-exist, from which the existence of an agreement may be inferred.
>
> **48** The *actus reus* of the crime emphasizes the need to establish a meeting of the minds to achieve a mutual criminal objective. This emphasis on the need for a consensus reflects the rationale justifying the existence of a separate inchoate crime of conspiracy. Confederacies bent upon the commission of criminal acts pose a powerful threat to the security of the community. The threat posed by a true agreement to jointly bring about a criminal end justifies a preemptive strike by the criminal law as soon as the agreement exists, even if it is far from fruition. However, absent a true consensus to achieve a mutual criminal objective, the rationale for the crime of conspiracy cannot justify criminalizing joint conduct that falls short of an attempt to commit the substantive crime: see I.H. Dennis, "The Rationale of Criminal Conspiracy" (1977), 93 Law Q. Rev. 39; P. Gillies, *The Law of Criminal Conspiracy* (Sydney, Australia: Law Book Co. Ltd., 1981) at 327.

[44] Based on these authorities, the Crown was required to establish beyond a reasonable doubt:

- There was an agreement between two or more persons to murder Jason Hallett;
- The accused knew that there was an agreement to murder Jason Hallett on November 18, 2008;
- The appellant intended to enter into an agreement to commit the murder of Jason Hallett;
- The appellant did enter into an agreement to commit the murder of Jason Hallett.

Attempted Murder

[45] The Crown did not allege that the appellant was a person who actually committed the offence of attempted murder. The evidence was clear. Aaron Marriott was the one who fired at least three shots into the vehicle occupied by Jason Hallett. One of those bullets struck Hallett in the wrist.

[46] However, criminal liability is not limited to only those who actually commit an offence. Principals and accessories before, and at the fact, are treated as equivalent in Canadian law. Section 21 of the *Criminal Code* provides:

> **21.** (1) Every one is a party to an offence who
>
> (*a*) actually commits it;
>
> (*b*) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (*c*) abets any person in committing it.
>
> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[47] The Crown rightly placed no reliance on s. 21(2) of the *Criminal Code*. Although the *mens rea* for murder can be satisfied where the accused subjectively means to cause death or means to cause bodily harm that he knows is likely to cause death and is reckless whether death ensues or not, the *mens rea* requirement for ***attempted murder*** is that the accused must have had a specific intent to kill (see *The Queen v. Ancio*, [1984] 1 S.C.R. 225; *R. v. Logan*, [1990] 2 S.C.R. 731). Recklessness or objective foresight of consequences are insufficient.

[48] To attract criminal liability as an aider or abettor to the offence of attempted murder, the accused must either share, or know of the specific intent of the principal to kill the victim. It is insufficient for the Crown to demonstrate that the accused knew of the principal's intent to commit some act of violence (*R. v. Adams*, [1989] O.J. No. 747 (C.A.); (1989), 49 C.C.C. (3d) 100).

[49] The potential for criminal liability as an "aider" and "abettor" are separate. To aid means to assist or help the principal offender. To abet means to encourage, instigate, promote or procure the commission of the offence (see *R. v. Greyeyes*, [1997] 2 S.C.R. 825 at para. 26).

[50] Furthermore, merely because a person does something that in fact aids a principal in committing an offence is insufficient for a finding of criminal liability. An additional mental element is specifically required. Section 21(1)(b) dictates that for criminal liability to be imposed, a person's act or omission must be "for the purpose of" aiding the principal. This means that the Crown must prove beyond a reasonable doubt that the accused intended the consequences that flowed from his assistance to the principal (*R. v. Greyeyes*, *supra*, at para. 38). Section 21(1)(c) does not include a specific requirement of purpose, but it is settled that the Crown must prove not only that the accused encouraged the principal by words or act, but also that he intended to do so (*R. v. Greyeyes*, *supra*, at para. 38).

[51] In *R. v. Maciel*, 2007 ONCA 196; [2007] O.J. No. 1034 (C.A.), Doherty J.A., for the court, explained the interplay between s. 21 and the offence of attempted murder:

> **87** The conduct requirement of liability as an aider is not in issue on this appeal. There are two components to the fault requirement: **an intention to assist the perpetrator, and knowledge of the perpetrator's intention. The intention requirement is reflected in the phrase "for the purpose of aiding" found in s. 21(1)(a). The aider must provide the assistance with the intention of helping the perpetrator commit the crime**: *R. v. Hibbert* (1995), 99 C.C.C. (3d) 193 at paras. 36-37 (S.C.C.). In this sense, it can be said that the aider must intend that the offence will be committed.
>
> **88** The knowledge component of the fault requirement flows from the intention component. **An aider can only intend to assist the perpetrator in the commission of the crime if the aider knows the crime that the perpetrator intends to commit**. While the aider must know the crime the perpetrator intends to commit, the aider need not know the details of that crime: *Dunlop and Sylvester v. The Queen* (1979), 47 C.C.C. (2d) 93 at 110 (S.C.C.); *Regina v. Yanover and Gerol* (1985), 20 C.C.C. (3d) 300 at 329-30 (Ont. C.A.); V. Gordon Rose, *Parties to an Offence* (Toronto: Carswell, 1982) at 11. **Consequently, a person who is said to have aided another in the commission of an attempted murder must know that the perpetrator intended to kill the victim**: *R. v. Adams* (1989), 49

> C.C.C. (3d) 100 at 110 (Ont. C.A.). Similarly, a person who is alleged to have aided in a murder must be shown to have known that the perpetrator had the intent required for murder under s. 229(a): *R. v. Kirkness* (1990), 60 C.C.C. (3d) 97 at 127 (S.C.C.). [Emphasis added]

[52] To summarize these requirements, the Crown was required to prove beyond a reasonable doubt the following:

- the appellant encouraged, instigated, promoted or procured the crime of attempted murder of Jason Hallett to be committed; OR did something before or during the commission of the offence which assisted or helped others commit the offence of attempted murder of Jason Hallett;

- the acts of assistance or encouragement were done by the appellant, intending that they be for the purpose of aiding another to kill Jason Hallett;

- the appellant knew that Aaron Marriott intended to kill Jason Hallett.

ROLE OF AN APPELLATE COURT

[53] An appeal is strictly a creature of statute. Section 686 of the *Criminal Code* prescribes the powers of an appellate court. It provides, in part, as follows:

> **686.** (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (*a*) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

[54] As noted earlier, the appellant's principal argument is that the convictions are unreasonable. The test for an appeal court to apply when considering whether a verdict of guilt ought to be set aside as unreasonable is explained in two leading decisions of the Supreme Court of Canada, *R. v. Yebes*, [1987] 2 S.C.R. 168 and *R. v. Biniaris*, 2000 SCC 15; [2000] 1 S.C.R. 381. In short, the test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered". The issue is not therefore whether a verdict was *possible*, but whether it was reasonably available on the evidence. The appellant does not suggest that the recently recognized path to a finding of an unreasonable verdict based on illogical or irrational reasoning has any role in this appeal (see *R. v. Sinclair,* 2011 SCC 40).

[55] Returning to the traditional test, Arbour J., writing on behalf of the court in *Biniaris* explained (para. 40):

> 40 ...[A]cting judicially means not only acting dispassionately, applying the law and adjudicating on the basis of the record and nothing else. It means, in addition, arriving at a conclusion that does not conflict with the bulk of judicial experience. This, in my view, is the assessment that must be made by the reviewing court. It requires not merely asking whether twelve properly instructed jurors, acting judicially, could reasonably have come to the same result, but doing so through the lens of judicial experience which serves as an additional protection against an unwarranted conviction.

[56] Importantly, Arbour J. also emphasized that the traditional test established in *R. v. Yebes*, *supra*, is equally applicable to the review of a judgment of a judge sitting at trial without a jury. She wrote:

> 37 The *Yebes* test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury. The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal. ...

[57] The power to review a verdict rendered by a judge or by a jury for "unreasonableness" extends to those verdicts based on assessment of credibility,

although the Court of Appeal must show great deference to findings of credibility due to the special position held by the trial court on such issues (*R. v. W.(R.)*, [1992] 2 S.C.R. 122; *R. v. Burke*, [1996] 1 S.C.R. 474). The appellant does not request this Court to review the trial judge's findings of credibility. He attacks the reasonableness of the verdicts based on the inferences apparently drawn by the trial judge.

[58] The case against the appellant Murphy was entirely circumstantial. Cromwell J.A., as he then was, in *R. v. Barrett*, 2004 NSCA 38, identified the correct approach in assessing the reasonableness of a verdict based on circumstantial evidence. He wrote:

> [15] This Court may allow an appeal in indictable offences like these if of the opinion that "... the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence.": s. 686(1)(a)(i). In applying this section, the Court is to answer the question of whether the verdict is one that a properly instructed jury (or trial judge), acting judicially, could reasonably have rendered: **Corbett v. The Queen**, [1975] 2 S.C.R. 275 at 282; **R. v. Yebes**, [1987] 2 S.C.R. 168 at 185; **R. v. Biniaris**, [2000] 1 S.C.R. 381 at para. 36.
>
> [16] The appellate court must recognize and give effect to the advantages which the trier of fact has in assessing and weighing the evidence at trial. Recognizing this appellate disadvantage, the reviewing court must not act as if it were the "thirteenth juror" or give effect to its own feelings of unease about the conviction absent an articulable basis for a finding of unreasonableness. The question is not what the Court of Appeal would have done had it been the trial court, but what a jury or judge, properly directed and acting judicially, could reasonably do: **Biniaris** at paras. 38 - 40.
>
> [17] However, the reviewing Court must go beyond merely satisfying itself that there is at least some evidence in the record, however scant, to support a conviction. While not substituting its opinion for that of the trial court, the court of appeal must "... re-examine and to some extent reweigh and consider the effect of the evidence.": **Yebes** at 186. As Arbour, J. put it in **Biniaris** at para. 36, this requires the appellate court "... to review, analyse and, within the limits of appellate disadvantage, weigh the evidence..." so as to examine the weight which the evidence could reasonably bear.
>
> [18] In this case, the evidence of the appellant's guilt in relation to the extortion and aggravated assault charges is entirely circumstantial. The question arises,

> therefore, of how the reasonable verdict test is to be applied in light of the requirement that where evidence is entirely circumstantial, the accused's guilt must be the only rational conclusion to be drawn from the circumstantial evidence.
>
> [19] **Yebes**, a leading case on the reasonable verdict test on appellate review, was a case of circumstantial evidence. One of the points argued before the Supreme Court of Canada was that the Court of Appeal had failed to apply the correct test in reviewing the reasonableness of a conviction where the evidence against the appellant was entirely circumstantial. Responding to this submission, McIntrye, J. for the Court stated that in applying the unreasonable verdict test, the appellate court must re-examine and to some extent reweigh and consider the effect of the evidence. This process, he said, will be the same whether the case is based on circumstantial or direct evidence. However, he pointed out that the Court of Appeal had "... rejected all rational inferences offering an alternative to the conclusion of guilt" and that it was "... therefore clear that the law was correctly understood and applied.": at 186. In **Yebes** , the Court acknowledged that evidence of motive and opportunity alone could not meet this standard unless the evidence reasonably supported the conclusion of exclusive opportunity: see 186 - 190.
>
> [20] I would conclude that while the test for whether a verdict is reasonable is the same in all cases, where the Crown's case is entirely circumstantial, the reasonableness of the verdict must be assessed in light of the requirement that circumstantial evidence be consistent with guilt and inconsistent with innocence: see **Yebes** at page 185 where this formulation was said to be the equivalent of the requirement that the circumstantial evidence be inconsistent with any rational conclusion other than guilt. This was summed up by Low, J.A. in **R. v. Dhillon** (2001), 158 C.C.C. (3d) 353 (B.C.C.A.). At para 102, he stated that where the Crown's case is entirely circumstantial, the appellate court applying the unreasonable verdict test must determine "... whether a properly instructed jury, acting judicially, could have reasonably concluded that the only rational conclusion to be reached from the whole of the evidence is that the appellant..." was guilty.

[59] As a practical matter, if an appeal court judge concludes that a verdict is unreasonable, he or she *a priori* has concluded that he or she would not have convicted. Such a conclusion is a necessary, but manifestly insufficient basis to intervene. What more is required? In my view, a judge must conclude that the conviction is not reasonably available on the evidence adduced, keeping in mind what the Crown was required to prove beyond a reasonable doubt in order to establish the accused's guilt.

[60] I will now turn to an application of these principles.

APPLICATION OF THE PRINCIPLES

[61] The appellant asserts three propositions. He says the trial judge erred in determining on the evidence that there existed a conspiracy to murder Jason Hallett; and alternatively, if there was such a conspiracy, it was unreasonable to conclude that the appellant was a member of it. Lastly, that it was unreasonable on this evidence to find that the appellant was a party to the attempted murder of Jason Hallett. Before addressing these contentions, I will briefly outline the evidence at trial.

[62] LeBlanc, Murphy, Smith and Marriott were charged with conspiracy to commit the murder of Jason Hallett and attempted murder. Their trial was to commence before a court composed of a judge and jury on April 26, 2011. All four re-elected to trial by judge alone. On that same day, Smith pled guilty to conspiracy to commit murder and the Crown dropped the attempted murder charge against him. Marriott pled guilty to attempted murder and the Crown dropped the conspiracy charge against him. The Crown did not seek to rely on the guilty pleas by Smith and Marriott to the offences of conspiracy and attempted murder as evidence in the appellant's trial. The trial judge accepted during submissions that the guilty pleas had no probative value in the trial of the charges against LeBlanc and the appellant.

[63] The Crown called some 17 witnesses at trial. Three were identification officers. One was a firearm's expert, five were civilian witnesses who gave various descriptions of seeing a person approach an SUV, fire multiple shots, run and get into a SUV which squealed its tires as it sped from the scene. Another civilian who was cut off by the Blazer as it fled, followed it, obtained its licence number and reported it to the police. An off-duty police officer described arriving at the scene and assisting Jason Hallett and seizing a handgun from Hallett's personal possessions.

[64] Jason Hallett testified that he and Jeremy LeBlanc used to be friends. On November 18, 2008, he saw what is described as a "Jimmy" pull up at the IWK. This aroused his suspicions as the same vehicle had followed him a few days

before. He described seeing Aaron Marriott coming towards him and shooting at him. He testified he had a gun in his possession for his own protection as he had been shot at in the face two weeks prior, causing an injury requiring stitches.

[65] Mr. Hallett said he had known Jeremy LeBlanc pretty much his whole life but on November 18, 2008, they did not have a relationship because Hallett had started hanging around with Jimmy Melvin. This made he and Jeremy LeBlanc "not friends".

[66] In relation to Aaron Marriott, Hallett said he had no relationship with Marriott because Hallett had started to "hang with" Jimmy Melvin and this would cause Aaron Marriott to want to shoot him because of who he was "hanging with".

[67] In relation to the appellant his evidence was as follows:

> **Q.** Okay. And how would you describe your relationship with Mr. Murphy on November 18, 2008?
>
> **A.** Never really had a relationship with him. Yeah, he's just a nobody, really.

[68] Mr. Hallett confirmed in cross-examination that in August 2008, he had picked Mr. Murphy up, and with others, drove around while they consumed alcohol. Hallett also confirmed the appellant's evidence that the week prior to November 18 he was present at a gathering in Spryfield where a number of individuals were giving the appellant a hard time and that Mr. Hallett interceded on Murphy's behalf.

[69] The parties agree that the key evidence in the case against Mr. Murphy were the telephone intercepts and the video surveillance of the scene at the IWK.

[70] Constable Pepler was involved with an investigation known as 'Operation Intrude'. As part of that investigation an authorization had been obtained on November 18, 2008 to intercept the private communications of Jeremy LeBlanc, Aaron Marriott and others. Constable Pepler was alerted about a call of a possible meeting between Jeremy LeBlanc and someone named 'Eyebrows' at the IWK. He says LeBlanc initially did not seem concerned, and told his girlfriend Jen Hachey to just mind her own business. Comments made revealed 'Eyebrows' was

Jason Hallett. Constable Pepler concluded that with the call to Aaron Marriott, this was not going to be a good thing for Mr. Hallett.

[71] Constable Pepler elaborated that he feared there would be a violent confrontation at the IWK Hospital and called the Quick Response Team, but while doing so the 911 call came that shots had been fired at the IWK.

[72] Constable Pepler introduced the audio recordings of the intercepted calls, the transcripts of those calls, the video surveillance of the events, and a DVD that blended the audio and visual evidence. Since the timing and content of these calls were key to the trial judge's guilty verdicts, I will later review the key intercepts.

[73] The trial judge's finding that there existed a conspiracy to commit murder is not unreasonable. There was animosity among LeBlanc, Marriott and Hallett. Smith and Marriott were known associates and friends of LeBlanc. Absent the actual events when Marriott approached Hallett's vehicle and opened fire, it is doubtful that the remaining evidence would have been sufficient to sustain a conclusion there was such a conspiracy. But the actual event that unfolded was powerful evidence. Taking into account all of the evidence I see no basis to intervene with this conclusion. In fact, I respectfully agree with the trial judge's comment that it is not a difficult conclusion to reach.

[74] The appellant makes no complaint about the finding by the trial judge that he was satisfied that the evidence directly admissible against Mr. Murphy established his probable membership in the conspiracy. It is the next and crucial step that the appellant argues was flawed: proof beyond a reasonable doubt of his criminal liability as a member of the conspiracy. It is to this issue that I turn.

Conspiracy to Commit Murder

[75] The trial judge found as a fact that there was no evidence that the appellant was a member of any conspiracy before getting into Mr. LeBlanc's Mustang or after leaving the scene. He said:

> [52] There is no evidence that Mr. Murphy was a member of this conspiracy before getting into Mr. LeBlanc's Mustang. There is no evidence that he did anything in furtherance of the conspiracy after leaving the scene with Mr.

> LeBlanc. The critical question is whether he was part of the conspiracy while he was at the scene.

[76] With respect to intercepted calls, the first was from Jen Hachey to Jeremy LeBlanc at 6:09:02. It lasted 1:41, ending at 6:10:43. Nothing is said of any planned violence let alone a murder. The last few exchanges between Ms. Hachey and Mr. LeBlanc are:

> LeBlanc: Hon, I don't care, just do your job, okay:
>
> Hachey: Then bye
>
> LeBlanc: Love you. Call me back right away if anyone says anything to you
>
> Hachey: Okay. He's with like, five guys
>
> LeBlanc: Oh yeah?
>
> Hachey: (Sighs)
>
> LeBlanc: Okay, I love you
>
> Hachey: Bye

[77] Almost three minutes later LeBlanc called Aaron Marriott. The call is interrupted by an incoming call from Shaun Smith. Other calls are made between Aaron Marriott, Shaun Smith and Dawn Bremner. Murphy was not present nor a party to those calls. He is not mentioned. Nothing is said by anyone that implicates him as a member of a conspiracy.

[78] Significantly, nothing is said by anyone in the intercepts that would suggest a violent confrontation was being planned let alone a murder. In cross-examination, Cst. Pepler acknowledged there was no plain language of guns or even of harm to anyone on any of the intercepts. He was allowed in redirect to say "gat" was a commonly used term for a firearm. The reference to a "gat" came at the very end of an intercepted call that started at 6:40. The call lasted 2 minutes and 45 seconds. LeBlanc called Shaun Smith's phone. Partway through this call, LeBlanc handed the phone to Murphy. The whole of the exchange is:

Smith: Hello

LeBlanc: I'm watchin' Hallett, his cousin, ____

Smith: Say what?

LeBlanc: ____

Smith: Say what?

LeBlanc: I'm watchin' them right now, I'm lookin' at them walkin' right past me

Smith: Where at, I'm on, I'm right on Robie Street

LeBlanc: Just come down here

Smith: Say what?

LeBlanc: ____ down here

Smith: Where you at parked though, watchin' them?

LeBlanc: Right there, like around, how you go around the loop

Smith: What, they're sittin' right there?

LeBlanc: Hmm

Smith: Where you sittin' at, so we can come to you and see?

LeBlanc: You'll see me

Smith: What, so, do I, you don't wanna pull right in the hospital, do I?

LeBlanc: Fuck, they're goin' in the underground parking lot actually

Smith: They're goin' to the underground parking lot?

LeBlanc: As if they're gonna pull out

Smith: So is there any way I can block 'em?

LeBlanc: Just ah, just sec. Just come down, you'll see me

Smith: Yeah, I won't see ya buddy, I'll stay on the phone right with ya

Murphy: (Background: ____)

LeBlanc: Hold up

Murphy: Hello

Smith: Hello

Murphy: Hey, what's up?

Smith: What's up buddy?

Murphy: Yeah, You know where we're at. Hello?

Smith: Yeah, I know where you're at, but

Murphy: Ah, well, they're right there. In that loop around

Smith: Right in the loop?

Murphy: Yeah

LeBlanc: (Background: Walking ____ underground)

Smith: But does the underground gonna come that way?

Murphy: Yeah, they're goin, that's where they're goin' now

Smith: Do they, do they gotta come out on Robie?

Murphy: They gotta come, I don't know what street they gotta come out on, but they're lookin'. We see them right now. ____

Smith: We're right around the corner bud, we're just at a

LeBlanc: (Background: You go on the straight street and just ____)

Murphy: Go on, go one the straight street and you'll pull over

LeBlanc: (Background: Like, don't pull into the hospital)

Murphy: Don't pull into the hospital

LeBlanc: (Background: Pass like, all the universities)

Murphy: Go past all the universities

Smith: So, take a left right at the. Hey, we're right at the top of the place. I see you guys right now

Murphy: ____

Smith: You're in front of me

Murphy: All right, well we're, we're stopped (Background: Yeah, they see us right now)

Smith: What?

Murphy: Do you see us loopin' around?

Smith: Yeah

Murphy: Yeah, they're well, they're right there on the right

Smith: Right there on the right?

Murphy: Yeah

Smith: (Background: ____ right here)

Murphy: ____

Smith: (Background: Gimme, gimme the gat)

[79] With respect to the comment by Smith "Gimme, gimme the gat", Cst. Pepler agreed it was, as indicated in the transcript, said in the background. The only other person in the vehicle with Shaun Smith was Aaron Marriott. There was no evidence that Mr. Murphy heard this comment. There is also no evidence that Murphy had any appreciation that "gat" meant a gun. The Crown says on appeal there was no evidence he did not hear the comment, and it would be wrong to find a reasonable doubt based on speculation. I have considerable difficulty with the notion that in a criminal case so called key facts are assumed to be in existence. Nonetheless, for the purposes of my analysis, I will take it as a given that Murphy heard this comment and understood the reference as a gun.

[80] The trial judge says four minutes after this intercept a further exchange occurred (para. 20). With respect, this is not correct. It was a scant one minute and 18 seconds later, at 6:44:03 the following exchange occurs:

LeBlanc: (Background: ____ they're back in front)

Murphy: (Background: Pick up his fuckin' phone)

Smith: Hello

Murphy: Yeah, they're back in front

Smith: What?

LeBlanc: (Background: ____ at Tim Horton's)

Murphy: Tim Horton's there

Smith: Turn around?

Murphy: Yeah

LeBlanc: (Background: Actually Hallett's right outside)

Murphy: Right in the loop

Smith: Stay on the phone with me

Murphy: Yeah

LeBlanc: (Background: They're talkin' to someone in a truck)

Murphy: Hello

Smith: Yo

Murphy: Yeah

LeBlanc: (Background: Hey, tell them they're jumpin' in the Cherokee)

Murphy: They're jumpin' in the Cherokee

LeBlanc: (Background: They're jumpin' in the Cherokee)

Smith: So, are they going to be pullin' out on Robie, ask him

Murphy: Yeah, they're gonna be pullin' right out on that street that we were just on

Smith: They're gonna be pulling out here, on the street we were just on?

LeBlanc: (Background: Tell him to come into the hospital ____

Murphy: Come in, come in

LeBlanc: (Background: ____ we're goin' into Tim Horton's ____)

Murphy: Come in, yeah we're goin' in Tim Horton's come in

[81] This call lasted one minute and twenty seconds, ending at 6:45:23. Two seconds later the last exchange at the scene is captured. It was:

Smith: (Background: ____ Cherokee)

Murphy: Hello

Smith:	Hello
Murphy:	Yeah, is that you guys pulling in or?
Smith:	Yeah, where's the Cherokee? Is that the Cherokee?
LeBlanc:	in the Cherokee right in front. See it over to the right?
Smith:	(Background: here, get out and blaze the Cherokee. Get out and blaze that Cherokee)
Marriott:	(Background: That one right there?)
Smith:	(Background: Go, yeah)
Marriott:	(Background: ____)
Smith:	(Background: I don't give a fuck. Go)
LeBlanc:	Blaze the Cherokee, the Cherokee

[82] There was no evidence that established the time at which Aaron Marriott shot Jason Hallett. The surveillance tapes establish that the white Mustang being driven by LeBlanc, with the appellant Murphy as his passenger, left before any shots were fired. This was the uncontested evidence by Cst. Pepler in direct examination. References by the trial judge to Messrs. LeBlanc and Murphy leaving the hospital after the shooting are, with respect, incorrect. However, this has no real bearing on my analysis and ultimate conclusion.

[83] My colleague quotes the reasons of the trial judge where the evidence of Mr. Murphy was subject to a "*W.(D.)*" analysis. The words of the trial judge bear repeating. He said:

> [57] Mr. Murphy has offered an explanation for his words and actions on November 18, 2008. Consequently I must apply the principles set forth in *R. v. W.D.*, *supra*. I do not believe Mr. Murphy as his story is entirely inconsistent with the undisputed facts. Also, much of his evidence just does not make any sense. The totality of the evidence indicates a quickly formed, highly charged event that would be impossible to ignore. If I were to believe Mr. Murphy, I would have to find that he was sitting in the midst of a timebomb oblivious of its existence. The

> actions of Messrs. LeBlanc, Marriott and Smith make this highly improbable. The words of Mr. Murphy make this impossible to believe. I also find that Mr. Murphy's evidence does not leave me in a state of reasonable doubt.

[84] The appellant makes no complaint about the adverse credibility finding by the trial judge. But how does disbelief of the appellant's testimony equate to a finding beyond a reasonable doubt that Murphy had actual knowledge of a plan to murder Jason Hallett and of a conscious intention to join that conspiracy and then doing so? The trial judge made no reference to these fundamental requirements. Instead, he simply said in the ensuing two paragraphs:

> [58] I find, on all of the evidence, that it has been proven beyond a reasonable doubt that Mr. Murphy was a member of the conspiracy to kill Mr. Hallett. I find that his involvement was short and that he was swept up in the activities of Messrs. LeBlanc, Smith and Marriott. Mr. Murphy's words to Mr. Smith betray his testimony.
>
> [59] In light of the above conclusions I convict Mr. LeBlanc and Mr. Murphy of count one; conspiracy to murder Jason Hallett.

[85] There was not one word uttered during the intercepted communications that spoke of or hinted at a plan to murder Jason Hallett. No threats were made. The very first time that the presence of a gun was mentioned was at 6:42:45. One minute and eighteen seconds later Murphy describes to Shaun Smith the present location of Jason Hallett. The call ends with Murphy telling Smith that he and LeBlanc are going into Tim Horton's and to come in. Within seconds, Smith says to Marriott to "get out and blaze the Cherokee". LeBlanc is then heard seconds later repeating the phrase "Blaze the Cherokee, the Cherokee".

[86] Prior to the actual unfolding of events, including the uttering of the "blaze the Cherokee" comments, it was certainly open for the trial judge to conclude that Murphy knew that LeBlanc, Smith and Marriott wanted to confront Jason Hallett and that at least Smith and/or Marriott were armed. But this reasonable inference does not, with respect, lead to a reasonable inference that Murphy knew that Smith and/or Marriott had the specific intent to kill Hallett. Not all of the knowledge possessed by LeBlanc, Smith and Marriott can be visited on Murphy. Recall that the trial judge found as a fact that prior to being in the car with LeBlanc, the appellant had no knowledge of any plot or plan to kill Hallett.

[87] The uncontested evidence of Murphy, which was not rejected by the trial judge, was that he had absolutely no animus towards Hallett. Jason Hallett confirmed this evidence, and described Murphy as a 'nobody'. Keeping in mind the requirement of the Crown to prove beyond a reasonable doubt Murphy's knowledge of a plan or agreement to murder Jason Hallett, a conscious decision to join or become a member of that conspiracy and, in fact, doing so, in my opinion, the verdict is unreasonable that the appellant was a member of a conspiracy to murder Jason Hallett.

Attempted Murder

[88] Exactly the same evidence was relied upon by the trial judge to convict the appellant of attempted murder. The trial judge's analysis and conclusion with respect to the appellant's liability is but one paragraph. It has already been quoted by my colleague. It bears repeating. The trial judge said:

> [68] In the case of Mr. Murphy there is ample evidence that he was an abettor. The intercepted words and his attendance at the scene, support this conclusion. I cannot find that when he got into Mr. LeBlanc's Mustang he knew what was coming. I further cannot conclude that when Mr. LeBlanc took the call from Ms. Hachey he knew what was coming. I do find that when he learned that Messrs. Smith and Marriott were on the way to the hospital that he knew something bad was going to happen to Mr. Hallett should he be located. Things changed for Mr. Murphy when, at 6:40 p.m., Mr. LeBlanc handed him the phone. The words he spoke to Mr. Smith amounted to a targeting of Mr. Hallett for either Mr. Marriott or Mr. Smith. The comments of Mr. LeBlanc prior to the phone exchange, as well as the arrival of Messrs. Smith and Marriott, were a clear indication that murder was in the air. The words of Mr. Smith saying "gimme, gimme the gat" was a clear indication to Mr. Murphy that a gun was in play. Notwithstanding, he continued to direct Mr. Smith about Mr. Hallett's location as observed and commented upon by Mr. LeBlanc. It was in these short minutes that Mr. Murphy became a party to the attempted murder of Jason Hallett.

[89] The trial judge was well aware of the difference between aiding and abetting. He accurately and succinctly set out the differences and requirements as defined in the *Criminal Code* and *R. v. Greyeyes*, *supra*. The trial judge found ample evidence that Mr. LeBlanc was both an aider and abettor. I have no quarrel with his statement of principles and this aspect of his analysis. However, with

respect to Mr. Murphy, his conclusion of liability as a party to the offence of the attempted murder of Jason Hallett is flawed and unreasonable.

[90] The trial judge found there was ample evidence that Murphy was an abettor. With respect, there was no evidence that Murphy encouraged, instigated, promoted or procured the attempted murder of Jason Hallett. There was evidence that Murphy did and said things that could be said to have assisted or aided Smith and/or Marriott to murder Hallett. Perhaps the reference to being an abettor was a slip and he meant to say aider. I will assume that to be the case.

[91] Nevertheless, I find the conclusion of criminal liability as an aider to attempted murder to be unreasonable. The trial judge acknowledged that the key time was after LeBlanc handed the phone to Murphy during the 6:40 intercept. During that call, Murphy relayed the information from LeBlanc to Smith about their location and how to find them and that Hallett was present. At the end of it, Smith says to Marriott "Gimme, gimme the gat". From this evidence, the trial judge says it was a clear indication "murder was in the air" and the "gat" reference a clear indication that a gun was in play. Notwithstanding these indications, Murphy continued to direct Smith about Hallett's location. It was during these short minutes that the trial judge said Murphy became a party.

[92] Nowhere does the trial judge consider whether the actions of the appellant were done with the subjective intention of aiding Aaron Marriott or Shaun Smith to murder Jason Hallett with the knowledge that he or they had the specific intent to kill Jason Hallett. Having knowledge that a gun was in play does not, without more, equate to a reasonable inference that Murphy knew that Aaron Marriott or Shaun Smith intended to kill Jason Hallett. There was nothing said about "we're going to blow his head off" or "we're going to waste him".

[93] It is a reasonable inference that Murphy knew that there was to be a confrontation, if possible. If Murphy heard the reference to a "gat", and an inference is drawn that he knew it meant a gun, then it is also a reasonable inference that it would be an armed confrontation. But, in my opinion, this does not permit a reasonable inference that the appellant knew that Marriott and/or Smith intended to kill Hallett and that his actions were done with the subjective intention of aiding them to kill Hallett.

[94] I recognize, as did the trial judge (para. 65, trial decision), that actual knowledge can be established via the doctrine of wilful blindness. Indeed, the trial judge's use of the phrase that "murder was in the air" bespeaks of a wilful blindness analysis, or at least the beginning of one.

[95] The Crown did argue at trial that actual knowledge could be imputed to Murphy on the basis of wilful blindness. Naturally, the Crown relied on the recent decision of *R. v. Briscoe*, 2010 SCC 13. In that case, Charron J., on behalf of the full court, emphasized that wilful blindness is not just a heightened form of recklessness. It cannot be relied upon to impute knowledge to an accused unless the accused's suspicion is aroused to a point where he or she sees the need for further inquiries, but deliberately chooses not to make them. Charron J. summed up her discussion on this issue as follows:

> [24] Professor Don Stuart makes the useful observation that the expression "deliberate ignorance" seems more descriptive than "wilful blindness", as it connotes "an actual process of suppressing a suspicion". Properly understood in this way, "the concept of wilful blindness is of narrow scope and involves no departure from the subjective focus on the workings of the accused's mind" *(Canadian Criminal Law: A Treatise* (5th ed. 2007), at p. 241). While a failure to inquire may be evidence of recklessness or criminal negligence, as for example, where a failure to inquire is a marked departure from the conduct expected of a reasonable person, wilful blindness is not simply a failure to inquire but, to repeat Professor Stuart's words, "deliberate ignorance".

[96] The Crown on appeal took the position in its factum:

> ...Even if the Appellant's evidence had been to some extent accepted, the question of wilful blindness would have had to be dealt with. That was not necessary in this case, since the trial Judge drew the reasonable inference that the Appellant's communications with Mr. Smith amounted to a targeting of Mr. Hallett and that the tenor of the communications amongst the parties was such that there was a clear indication "that murder was in the air." The trial Judge found as a fact that the Appellant continued to participate in the plan to kill Mr. Hallett by directing Messrs. Smith and Marriott about Mr. Hallett's location after there could be no doubt concerning their intentions with regard to Mr. Hallett.

[97] With the benefit of hindsight as to what eventually transpired, the intentions of Smith and Marriott are not open to serious question. But based on the evidence at trial, in my opinion, it is not a reasonable inference that at the time Murphy

spoke on the phone he knew Smith and/or Marriott had the specific intent to kill Jason Hallett, and his acts were done for the purpose of aiding them to do so. The Crown did not seek to uphold the conviction on the basis of wilful blindness, or seek an order for a new trial to permit a trier to carry out such an analysis. In the circumstances I would decline to consider it further. The Crown also did not suggest the appellant might be guilty of any lesser included offence.

SUMMARY AND CONCLUSION

[98] The events of November 18, 2008 were shocking. Outside a hospital specifically designated to ensure the health of mothers and babies, thugs brought their petty criminal grudges. Gunfire erupted in an attempt to kill Jason Hallett.

[99] Everyone wants those involved brought to justice and made to account for this odious behaviour. But being "involved" is a lay term. To be criminally liable, the law has always required more. Mere presence at the scene of a crime is insufficient. Providing assistance is also insufficient. If assistance is provided, it must be with knowledge that it is to assist in the commission of a specified offence, and it is provided for the purpose of assisting in the commission of that offence. If the offence is one of specific intent, the one alleged to have been a party to the offence must also have that specific intent or know of the existence of that intent by the principal.

[100] Here the Crown had the benefit of a number of intercepted private communications. The trial judge made key findings of fact. These included that there was no evidence that Murphy was a member of any conspiracy before getting into Mr. LeBlanc's Mustang on November 18, 2008, nor any evidence he did anything afterwards to demonstrate membership. The judge found that when Murphy learned that Messrs. Smith and Murphy were on their way to the hospital, the appellant then knew that something bad was going to happen to Mr. Hallett, should he be located. There was no direct evidence of this, but it is an inference that is reasonable, and hence not open to interference on appeal.

[101] Knowing something bad was going to happen to Mr. Hallett is an insufficient basis to convict the appellant of conspiracy to commit murder or as a party to attempted murder. The trial judge failed to address the key issues of had the Crown proven beyond a reasonable doubt that Murphy knew of a plan to

murder Hallett, an intention to join that plan and actually joining it; nor did he address the requirements that to be criminally liable as a party to attempted murder, the Crown had to establish beyond a reasonable doubt that the appellant knew Aaron Marriott intended to kill Jason Hallett and that the appellant's acts were done for the purpose of aiding Marriott to kill Hallett. These errors led to verdicts that are unreasonable and not supported by the evidence. As a consequence, I would quash the convictions and enter acquittals on both charges.

Beveridge, J.A.