NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Gareau*, 2012 NSCA 41

Date: 20120425
Docket: CAC 237588
Registry: Halifax

Between:

Steven Gerald Gareau

Appellant

v.

Her Majesty The Queen

Respondent

and

Christopher Manning

Intervenor

Revised judgment:	The text of the original judgment has been corrected according to this erratum dated April 25, 2012. The text of the errautm is attached to this decision.
Judges:	MacDonald, C.J.N.S.; Fichaud and Farrar, JJ.A.
Appeal Heard:	February 15, 2012, in Halifax, Nova Scotia
Held:	Appeal allowed, convictions set aside and a new trial ordered per reasons for judgment of MacDonald, C.J.N.S.; Fichaud and Farrar, JJ.A. concurring.
Counsel:	Fergus J. (Chip) O'Connor, for the appellant James A. Gumpert, Q.C. and Peter Craig for the respondent William L. Mahody for the Intervenor, not present

Reasons for judgment:

[1] This is an appeal from convictions of first degree murder and conspiracy to commit murder.

BACKGROUND (ACCORDING TO THIS RECORD)

[2] In the year 2000, the appellant Steven Gareau was a street level drug dealer in Halifax. He was also an addict. He obtained his drugs for resale from Mr. Paul Derry and Mr. Wayne James. Occasionally, he also carried drugs for them. In turn, Mr. Neil Smith from the Hells Angels supplied Derry and James.

[3] Mr. Gareau conducted much of his business at a "crack house" located on Trinity Avenue, Dartmouth ("Trinity"). Actually, it was unit # 6 in a multi-unit apartment building. There, he met a Mr. Sean Simmons who, according to Gareau, had earlier arranged to purchase a significant quantity of prescription drugs directly from Derry. In turn, Derry had asked Gareau to complete this deal.

[4] Meanwhile, back in 1994, Simmons had run afoul of the Hells Angels; allegedly having had an affair with a member's wife. This prompted him to leave the Province, only to return in 1998.

[5] So when word eventually got out that Simmons was back in town, Neil Smith ordered Derry and James to have him killed. For this, a portion of their significant drug debt to Smith would be wiped out. To complete the task, Derry asked Gareau to track Simmons down. In agreeing to do so, Gareau insists that he knew nothing about the murder plot. Instead, he thought the goal was to complete the pending drug deal. In any event, around that time Simmons had been ill and in the hospital so it took a little time to locate him.

[6] Ultimately, on October 3, 2000, Gareau happened to be at Trinity when Simmons showed up. Gareau then called Derry to let him know. James was with Derry at this time and also took the phone to speak to Gareau. They told Gareau to meet them at a parking lot, close to Trinity. Gareau obliged while James, Derry, Derry's wife, Ms. Tina Potts, and another conspirator Mr. Dean Kelsie drove together to the agreed upon location. En route, they agreed that Kelsie would do the shooting.

[7] When they arrived at the parking lot, Gareau was waiting. He would take Kelsie to Simmons who was still at Trinity. Again Gareau insists that he thought he was involved in the proposed drug deal as opposed to a murder. In any event, when they encountered Simmons at Trinity, Kelsie fired three shots, killing him. Gareau and Kelsie fled in different directions.

[8] Smith, James, Kelsie and Gareau were all charged with murder and conspiracy to commit murder. Derry and Potts became police agents, cooperating to secure a conviction against the four accused. For this, they received immunity from prosecution.

[9] Smith and James were tried together and convicted. Kelsie was convicted in a separate trial. Gareau was convicted in a third trial; the subject of this appeal. I now turn to the issues on appeal.

THE ISSUES

[10] As a self-represented litigant, Gareau filed a hand-written notice of appeal from prison, listing the following grounds:

> I ask for an appeal of my sentence and conviction on the grounds that I did not receive a fair and speedy trial because of errors in the law that have resulted in my being found guilty of crimes I did not commit and was not any part of concerning (first ground in all fairness) when Justice Hood stated "quote" that the record could only be used for credibility but did not say the record was only one aspect on the issue of credibility.
>
> A second ground was the fact that the material that was suppressed by the Corbett application, namely my previous manslaughter conviction was portrayed in the media while the jury was deliberating and even so I have no concrete evidence that they heard or saw this material, it is material that if it was made known could have resulted in affecting the verdict. How do I know that this material was not in some way shape or form disclosed to the jury.
>
> A third ground was the fact that before the preliminary hearing my lawyers then Ken Greer and Micheal Taylor did not receive disclosure they were suppose to have before the preliminary hearing until after the preliminary hearing thus leaving them somewhat handicapped to represent me properly and fairly.

> A fourth ground was the fact that during the cross examination by the Crown Peter Craig I was rudely cut off many times by the Crown when I attempted to answer his questions which resulted in the jury not hearing all the evidence in my answers relevant to proving my innocence.
>
> A fifth ground is the fact I suffered in severe, serious chronic pain with other unaddressed illnesses because Corrections Health Care refused to provide me a disabled patient with appropriate health care and proper medications over a long period of time (50 months) that resulted in my not being able to show my true emotions mentally and physically to a panel of jurors that would have clearly shown my innocence if I were healthy.
>
> The sixth ground is the fact I was not brought to trial until (50 months) after the homicide (14 months) over the allotted (36 months) waiting period for a speedy trial concerning the charges I was charged with especially since the Crown first charged me with unsafe storage of firearms and first degree believing I was a hitman all erroneous theories proven wrong by the Crowns witnesses.
>
> These are just a few of the grounds upon which I base my appeal of the sentence and conviction as well as such other grounds of appeal as may appear.

[11] Eventually, the appellant secured counsel, Mr. Fergus J. (Chip) O'Connor, to present his appeal. He, in turn, filed an amended notice of appeal with the following grounds (including an issue involving the appellant's parole eligibility):

> The grounds of appeal against conviction are as follows:
>
> 1) That the Learned Trial Judge erred in failing to warn, or failing adequately to warn the jury of the danger of relying on the testimony of Crown Witnesses Tina Potts and Paul Derry, persons of bad character; and
>
> 2) That the Learned Trial Judge erred in identifying evidence as capable of being corroborative of the evidence of Paul Derry. In this regard, the applicant respectfully submits that errors in that portion of the charge relating to the count of conspiracy would also have affected the jury in relation to the count of first degree murder; and
>
> 3) That the Learned Trial Judge erred in outlining what evidence was admissible on the threshold issue of "**his probable membership in the conspiracy**".

4) That the Learned Trial Judge erred in stating "**Paul Derry said that Steve Gareau had to know the hit**". This misstated the evidence of Mr. Derry and, or in the alternative, constituted inadmissible lay opinion evidence on the part of Mr. Derry; and

5) That the Learned trial Judge erred in her charge to the jury in suggesting that the jury could consider the guilty verdicts already rendered in relation to co-accused persons "**in assessing the knowledge and intention of Steven Gareau**".

6) That the appellant was denied a fair trial by reason of the failure of trial counsel to cross-examine Paul Derry on intercepted utterances made by him to the appellant which were consistent with the innocence of the appellant; as well as, or in the alternative, on utterances made by Mr. Derry to Mr. Greer and others.

7) That the appellant was denied a fair trial by reason of the failure of trial counsel to call to testify as a witness Mr. Kenneth Greer, previous counsel for the appellant, to testify as to statements made by Mr. Paul Derry to Mr. Greer.

8) Such further or other relief as this Honourable Court deems just.

The grounds of appeal against sentence are as follows:

1) The warrant of Committal upon Conviction provides "**recommendations: no parole eligibility for 25 years, except as set out in section 745.6 of the <u>Criminal Code</u>**"; and

2) The offences and sentences then listed in said Warrant are

1) First degree murder and life;

2) Conspiracy to commit murder and three (3) years concurrent, respectively; and

3) By reasons of *section* 120.2 of the **<u>Corrections and Conditional Release Act</u>**, the sentences as imposed, in the order imposed, result in a period of parole ineligibility of twenty six (26) years, something that is inconsistent with the intent of the sentencing judge.

[Emphasis by appellant.]

[12] Then, in his factum, Mr. O'Connor refines the issues by listing a series of alleged errors by the trial judge. He also raises disclosure issues and alleges that Mr. Gareau's trial counsel was ineffective:

1. At issue is whether the Learned Trial Judge erred in charging the jury on the test as to reasonable doubt in light of the sworn testimony of the appellant denying his guilt.

2. At issue is whether the Learned Trial Judge erred in describing to the jury the possible inferences to be drawn from the flight of Mr. Gareau from the scene. The appellant contends that the Learned Trial Judge left out the reasonable inference that the appellant may simply have fled out of shock and panic and fear.

3. At issue is whether the Learned Trial Judge misstated the evidence of Paul Derry and misled the jury as to the strength of that evidence when the Learned Trial Judge stated "Paul Derry said that Steven Gareau had to know of the hit". The evidence of Paul Derry was "I don't know how Stevie couldn't have heard it but I don't recall a specific conversation."

4. At issue is whether the Learned Trial Judge erred, in the particular facts of this case, in that portion of the charge dealing with post-offence conduct generally. The appellant submits that his post offence conduct should not be used to infer guilt on the charges laid if it can be explained by fear of being apprehended for being involved in a drug transaction or involved in a murder of which he did not have prior knowledge.

5. At issue is whether the Learned Trial Judge erred in that portion of the charge to the jury dealing with what use can be put of the evidence that others had been convicted of the murder. The Learned Trial Judge indicated that the jury "may consider this evidence in assessing the knowledge and intention of Steven Gareau". It is respectfully submitted that the Learned Trial Judge erred in this regard, and that this evidence is extremely prejudicial.

6. At issue is whether the Learned Trial Judge charged the jury adequately in terms of the "*Vetrovec* Warning" as it relates to Paul Derry. It is respectfully submitted that the primary importance of a *Vetrovec* Warning is to caution the jury about relying upon the evidence of persons of bad character. The appellant respectfully submits that the Learned Trial Judge failed completely to charge the jury in this regard or, in the alternative, that the Learned Trial Judge inadequately charged the jury in this regard.

7. It is respectfully submitted that the Learned Trial Judge erred in admitting into evidence evidence of previous misconduct by Mr. Gareau in relation to an event involving a conflict between Wayne James and Vince Ross in which Steven Gareau, according to the evidence, used a car owned by Paul and Tina Derry to block access so that Wayne James could shoot at Vince Ross' window. The appellant contends that this evidence was prejudicial and irrelevant.

> 8. At issue is whether the Learned Trial Judge erred in charging the jury on the subject of evidence capable of establishing the appellant's involvement in a conspiracy to murder. The appellant respectfully submits that the charge failed to make clear that, to be guilty on either count, the appellant would have had to be a member, not merely of a conspiracy, but a conspiracy to commit murder. It would not be enough simply to believe that there is an unlawful plan underway. It would not be enough to intend to agree to achieve an unlawful common purpose.
>
> 9. At issue is whether the Learned Trial Judge erred in listing for the jury what the Learned Trial Judge asserted was evidence that could be used to establish Mr. Gareau's membership in the conspiracy. It is respectfully submitted that the Learned Trial Judge ought to have made it clear, and did not make it clear, to the jury that evidence could only be used to establish the membership of the appellant in the murder conspiracy if that evidence was consistent with a murder conspiracy and inconsistent with the explanation offered by the appellant, namely that, from his perspective, the plan related to a drug transaction.
>
> 10. At issue is whether the Learned Trial Judge erred in describing acts or declarations of co-conspirators that could be used to establish the guilt of Steven Gareau. The appellant respectfully submits that, having regard to the particular circumstances of this case and the theory of the defence, such evidence ought not to be used to establish the guilt of Steven Gareau unless that evidence was consistent with his being involved in a murder conspiracy and inconsistent with his theory that his involvement was with the intent of engaging in a drug transaction.
>
> 11. At issue is whether the Learned Trial Judge failed adequately to present the theory of the defence to the jury and failed adequately to outline the evidence capable of supporting the theory of the defence, namely that Mr. Gareau was unaware of the murder plot when attending with Mr. Kelsie at the scene on October 3rd.

[13] To support his client's position, Mr. O'Connor also seeks to introduce fresh evidence. In essence, he suggests that these allegations, either singly or combined, have resulted in a miscarriage of justice which should result in a new trial.

[14] In my respectful view, most of these issues amount to no more than an invitation for us, with the benefit of hindsight, to hold the trial judge to a standard of perfection in both her evidentiary rulings and her charge to the jury. Yet, of course, we could never expect perfection when it comes to trials generally and jury charges specifically. Instead, we command a process that is fundamentally fair, no

more but no less. McLachlin, J. (as she then was) in **R. v. O'Connor**, [1995] 4 S.C.R. 411 put it nicely:

> ¶193 ...What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice.

See also **R. v. Jacquard**, [1997] 1 S.C.R. 314 at para. 32 and **R. v. Archer**, [2005] O.J. No. 4348 (Ont. C.A.) at paras. 46 to 48.

[15] That said, two of these allegations do cause me considerable concern. They are # 3 involving an error the judge made when summarizing Paul Derry's evidence for the jury, and more significantly #5 involving the judge's instruction to the jury on the use they could make of the fact that the other defendants had been convicted.

[16] In my analysis that follows, I will, therefore, elaborate on each of these concerns. At the outset, however, it would be helpful to review the appellant's evidence so as to place the theory of his defence in appropriate context.

ANALYSIS

The Appellant's Evidence

[17] In testifying in his own defence, the appellant offered the jury this straightforward defence theory. While the other conspirators were guilty of plotting and then murdering Sean Simmons, he was out of the loop. Instead his only guilty intention on October 3, 2000 was to deal drugs. In other words, when Kelsie approached Trinity that day, Gareau thought Kelsie was carrying the prescription drugs to sell to Simmons as opposed to a gun to kill him.

[18] Gareau began by telling the jury about his drug-dominated lifestyle. Note his familiarity with quaaludes, the drug he thought he would be selling to Simmons on the day of the murder:

Q. Would you have considered yourself an addict when you came to Nova Scotia?

A. Definitely.

Q. What was your drug of choice in that time?

A. Speed.

Q. Are you familiar with a drug by the name of quaaludes?

A. Yes, I am.

Q. What type of drug is that?

A. It's a sedative -- a relaxant, so to speak.

Q. And is it a prescription drug?

A. I would imagine you could probably get it prescribed. I don't know. I'm not sure.

Q. How do you know it?

A. I know it from what I've used of it and when I sold it.

Q. So when you say you sold it, where have you sold it?

A. I sold it wherever I was selling crack cocaine, I would sell quaaludes, I would sell marijuana, we'd sell hash.

[19] Then, turning to his relationship with Derry and Potts, he added:

A. At first it started out just as a drug dealer to an addict, and as I got to know Mr. Derry better I became close to his family and his children and I started to drive Mr. Derry around, because he had no license, and sell drugs for him and get bank cards for the bank fraud.

Q. And how did you consider him in terms of your personal relationship with him?

A. I considered him just like part of a family, he was my friend, he was like –

Q. He was your friend?

A. Yes, he was my friend.

Q. What about your relationship with Tina Potts? Did you meet her about the same time?

A. I met her after I met Mr. Derry.

Q. And what was your relationship like with her?

A. We became very close because I used to drive her and kids up to see their grandmother, and I used to do a lot of driving with Tina Potts and the kids to take her places.

[20] His relationship with James was not as close:

Q. How would you describe your relationship with Wayne James?

A. He was a business acquaintance.

Q. In what sense?

A. I would sell crack for him, and pay him the money for the crack that I sold.

Q. What about a friendship? Would you consider him to be a friend of yours?

A. Yes, I guess so, yeah, I'd consider him a friend I guess.

Q. And what about his relationship with Paul Derry? How close did they seem to be?

A. They seemed to be very close. They were very close friends, I guess they were related, from what I understand.

[21] As for Neil Smith, there was no relationship:

Q. Did you know Neil Smith?

A. I met Neil Smith once at the Corner Pocket when I drove Wayne James, and Mr. Derry, and Ms. Potts up to visit him.

Q. How long -- how much time have you spent with him in your life?

A. There was conversation at a table for about five to 10 minutes, the first time I drove Mr. Derry, and Potts, and Mr. James up there to visit him.

Q. Any other times?

A. No. I did not have a chance, ever, to talk to Mr. Neil Smith, after the first time I drove them to the Pocket.

[22] Finally, Kelsie appeared to be no more than an acquaintance and was in business with and a friend of James:

Q. Do you know Dean Kelsie?

A. Yes, I met him on the second -- yes, when we came down further, I met him.

Q. And how do you know Dean Kelsie?

A. He was introduced to me by Wayne James.

Q. And what did you understand his occupation to be?

A. He sold crack with Mr. James.

Q. Of the list of people we've discussed, Mr. Derry, Ms. Potts, Mr. James, Mr. Smith, who was Dean Kelsie closest to?

A. Wayne James.

[23] Gareau then explained meeting Simmons and the unfinished quaalude deal:

Q. And how did you come to meet Sean Simmons at Dave's?

A. Mr. Derry had taken me down to meet deaf Dave and Mary who could help me make more money, sell more crack cocaine. So I went down there with Derry to meet them, and at the time Mr.Derry had told me that he couldn't finish

the quaalude deal with Mr. Simmons that he had set up, because of conflict with him knowing Mary, and Mary being a hooker, and Derry's wife getting jealous, or upset. So I told him I would finish the quaalude deal for him, with Mr. Simmons. So I went to deaf Dave's to sell crack cocaine with Mary and deaf Dave and to see if Mr. Simmons wanted to finish the quaalude deal, that Mr. Derry couldn't finish.

[24] So, in summary, the relationships were configured this way:

Q. Now in terms of [people?] we've spoken about your relationship with these various individuals, which of these individuals did you have a business relationship with? What about, first of all, Paul Derry?

A. Yes, I sold crack for Mr. Derry.

Q. Wayne James?

A. Yes, I sold crack for him.

Q. Neil Smith?

A. No, I had no business with Mr. Smith.

Q. Dean Kelsie?

A. Dean Kelsie helped me sell crack, that would be the only relationship, I guess, I had.

Q. Could you explain that please?

A. Well, Dean Kelsie showed me, down at Uniacke Square, how to sell crack, and who to sell to, and not to. So he was kind of like my teacher, to teach me how to sell crack cocaine properly, so I didn't get into any trouble, because it's very dangerous.

Q. What about Sean Simmons? Any business relationship with him?

A. Yes, I did. Mr. Simmons and me had talked the first time that I had seen Mr. Simmons, and he had told me that he was interested in buying the quaaludes but he didn't want to take them until he had the money, which is why he gave me his phone number to stay in touch with him.

Q. Did you have any other business dealings with Mr. Simmons?

A. Yes, I sold Mr. Simmons some crack cocaine and smoked it with him.

[25] As to Derry's request to find Simmons, Gareau provided his perspective by, as noted, tying it to the quaalude deal:

> Q. What can you say as to whether or not you were ever asked to find Mr. Simmons?
>
> A. I was never asked, really, to find Mr. Simmons. I was asked that if I'd seen Mr. Simmons to ask him about the quaalude deal and to make sure that that deal was sealed.
>
> Q. And who had asked you about that?
>
> A. Mr. Derry.
>
> Q. Do remember when he would have asked you that?
>
> A. The first time when I went down there to meet Dave Grosse, and Mary, Mr. Derry asked me to make sure to get this quaalude deal done, make sure I set it up well.
>
> Q. And what steps did you take to try and do that?
>
> A. Well, when I seen Mr. Simmons I asked him if he was interested in buying the quaaludes and he said he was, but he didn't want take them unless he had the money.
>
> Q. Do remember how many quaaludes were being discussed?
>
> A. Between me and Mr. Simmons?
>
> Q. Yes.
>
> A. Yes, Mr. Simmons had stated that he could take a thousand at a time.
>
> Q. And what would you have got out of that had the quaaludes deal gone through?
>
> A. I would of made a hundred to $200.
>
> Q. By being the person in the middle?

A. Yes, I'd be the middle man.

[26] Thus Gareau justified his attempted phone calls to Simmons:

Q. Now you spoke about meeting with Mr. Simmons and then you – did you maintain contact with Mr. Simmons from the time that you met him right up to the time of his death?

A. I didn't see Mr. Simmons again after the first meeting for awhile. Until one night I came home to Derry's and Mr. Derry asked me if I had seen Mr. Simmons about the quaalude deal. And I told him, yes, I did and that he did want them, but he didn't want them until he had the money. And Mr. Derry said, well, how are you supposed to get in touch with him? And I told him that he had given me a phone number to stay in touch with him, so that was when Mr. Derry asked me if I would call Mrs. Simmons and see if Mr. Simmons wanted to buy the quaaludes.

Q. Did you follow up on that? Did you phone Mrs. Simmons?

A. Yes, I did. I phoned three or four times under Derry's direction, which got me frustrated after awhile because I didn't like bugging Mrs. Simmons, I knew that Sean had said he would take them when he had the money. So why keep phoning?

Q. And you've described your purpose in these calls was phoning on Mr. Derry's request to try and work out this quaalude deal?

A. Yes.

Q. What can you say as to whether or not there was any other purpose that Mr. Derry wanted you to phone Mr. Simmons?

A. The only purpose was to make this quaalude deal. That was it.

Q. I understand that at some point you discovered that Mr. Simmons had been involved in an accident. Is that correct?

A. Yes.

Q. Did you make any other phone calls as a result of receiving that information?

A. Yes, I did. I phoned the hospitals under Mr. Derry's direction. And I got frustrated and angry at him and I asked him why I was phoning so much to get

> this quaalude deal done. And Mr. Derry told me that he had over 10,000 quaaludes to get rid of and he was losing money. And that Mr. Simmons was the only one that could move them and take them and get rid of them quickly, so.
>
> Q. Did that seem believable to you?
>
> A. Well, yes, because Mr. Derry's obsessed with money and he was always wanting to get rid of his drugs as quick as possible, so, yes, that made sense to me but it frustrated me, because I didn't like bothering Mrs. Simmons and I didn't want to get Mr. Simmons upset with me and then lose the quaalude deal.
>
> Q. Did you follow Mr. Derry's instructions and continue to call Mr. Simmons?
>
> A. I did that night.
>
> Q. How many times would you have called Mrs. Simmons all together trying to get a hold of Sean Simmons?
>
> A. About four to six times that I remember.
>
> Q. Are you aware of any reason why you were doing this, you said why Mr. Derry was not doing this. Are you aware of any reason why Mr. James would not do this?
>
> A. Well, I had an argument with Mr. Derry about this, I said I didn't want to keep phoning and bugging these people. And Mr. Derry said that he couldn't finish this quaalude deal because of the conflict that he has with his girlfriend. And he said that Wayne James couldn't do the deal because there was bad blood between Wayne James and Sean Simmons, which left me to finish the deal. So I agreed to continue to see ... Mr. Simmons to try and get these quaaludes sold so we wouldn't end up losing any more money than we already had, and that maybe I could make some money on the side.

[27] Then, turning to the day of the murder, as noted, Gareau was hanging out at Trinity when Simmons arrived. Gareau asked if he had the money for the quaaludes. Simmons said he did and, in fact, wanted to buy some more cocaine. Gareau called Derry to report this. In this call, he spoke first to Derry and then James. They discussed completing the drug deal. They would meet at a muffler shop near Trinity:

> Q. And what arrangements were made, from that point on, in terms of your discussions with Mr. Derry and Mr. James?

A. I got into an argument with Wayne James over the phone, because I wanted him to deliver the drugs right to the front door. He said, no, he didn't want to deliver to the front door, he wanted me to meet him at Midas Muffler.

And I told him I didn't want to walk around with a lot of drugs on me far away from the apartment. And he said that he didn't want the buyer to see the supplier, which makes sense to me. If you're making a drug deal the guys that are buying the drugs doesn't see who's supplying him. That's why I'm the middleman, so I agreed to meet him at Midas Muffler.

. . .

Q. And what did you think was going to happen at the muffler shop?

A. I thought that I would meet Wayne James, and he would give the drugs, the quaaludes, and the crack cocaine, to sell to Mr. Simmons.

Q. What can you say as to whether, or not, you had any idea in your mind that there was going to be anything other than that drug deal taking place at that time?

A. None at all.

[28] Gareau walked to the muffler shop and described the meeting this way:

Q. Now you say Mr. Kelsie was in the car?

A. Yes.

Q. And where was he?

A. I believe in the back seat.

Q. And who else was in it?

A. Tina Potts, Wayne James and Paul Derry.

Q. And Mr. Derry was driving, Mr. James in the front, that's what we've heard so far, is that correct?

A. Yes, he was.

Q. Now what contact, if any, did you have with the people in the car?

A. When I approached the car, I approached it by Wayne James' side and I squatted down and put my arms on the bottom of the window. And I –

Q. Was the window up or down?

A. It was down, completely down. And I asked Paul Derry if he could give me a ride to the beer store. And Mr. Derry said he was too busy. And I asked Wayne James if he'd lend me $20 for a cab and a beer.

Q. Did he reply?

A. Yes, he did.

Q. What did he reply?

A. After he got the money out he handed it to me, and he said, "Here's $20 for a cab, and a beer, after the deal. And Dean is handling the deal."

Q. Now you said he said, "Here's $20."

A. Yes.

Q. Did he give you $20?

A. Yes, he did.

Q. A $20 bill?

A. Yes, he did.

Q. And you said he said, "This is for the cab and the beer, after the deal?"

A. Yes.

Q. What deal did you think he meant?

A. The drug deal that I was going to make.

[29] Gareau was upset that he was being squeezed out of the quaalude deal by Kelsie:

Q. And you said that he said that Deano is handling the deal?

A. Yes, he did.

Q. What did you understand that to mean?

A. That meant that I was no longer handling the quaalude deal, or the crack cocaine deal, and that Mr. Kelsie was to take over the deal.

Q. How did that make you feel?

A. I was angry, because that means I'm out maybe a hundred bucks to $200 here.

Q. Why would that be?

A. Because I'm no longer included in the deal.

[30] In any event, Gareau and Kelsie proceeded to Trinity. Simmons let them in through the main security door. They proceed up the stairs to unit # 6 with Gareau leading the way. Then Gareau heard Simmons and Kelsie talking. Apparently they knew each other; something Gareau was unaware of. In fact upon hearing them, Gareau turned back to look and observed Simmons embrace Kelsie. Gareau then explained the murder which prompted him to flee the scene:

A. That's the way Mr. Simmons was coming towards Dean Kelsie. And I had turned around to see, because I was surprised that they knew each other. I was [kind of?] understand that they didn't know each other.

Q. And did you continue to be turned around or did you walk back forward again?

A. I was continued to turn around -- was still turned around, because at that moment Dean Kelsie pulled a gun out from somewhere, and started shooting Mr. Simmons.

Q. Describe what you saw please?

A. I turned around after they said that and when the gun come out I seen the end of the gun in front of Dean Kelsie, and he shot once and Mr. Simmons fell. And at that time I was trying to run but my feet weren't moving, I was froz – I was in shock, I was in fear just from what was happening in front of me.

> And I remember looking again, and Mr. Simmons was trying to get back up and Dean Kelsie shot again, at him. And I'm still trying to run and get out of there and my feet won't move. I'm stuck there. It's like slow motion or a camera in slow motion. And Mr. Simmons was trying to get back up again and Dean Kelsie stepped down the stairs, and shoots him close to his head, and by that time my feet were starting to move and I was -- I got -- I rolled, I hit my chin on the floor and came up running, scared for my life thinking that Dean Kelsie was going to shoot me. And that's when I ran down the stairs and out the back door.
>
> Q. How many shots did you hear?
>
> A. Three, I believe -- three shots.

[31] With this backdrop, I now turn to the two issues that concern me, dealing first with what the judge told the jury about the fact that the other co-conspirators were convicted in earlier trials.

The Co-conspirators' Convictions

[32] The jury heard testimony that Smith, James and Kelsie were all convicted in separate trials. Despite being admitted without contest, this evidence had no relevance to the appellant's guilt or innocence. For example, see **R. v. Berry** (1957), 118 C.C.C. 55, [1957] O.J. No. 622 (C.A.) at para. 17; **R. v. Paquet** (1999), 219 N.B.R. (2d) 130, [1999] N.B.J. No. 493 (C.A.) at para. 23; and **R. v. Hassen**, 2008 ONCA 615, [2008] O.J. No. 3451at para. 9.

[33] In fact, the judge seemed to recognize this and cautioned the jury accordingly:

> Steven Gareau is charged with the offence of conspiring with Wayne James, Neil Smith and Dean Kelsie to murder Sean Simmons. You have heard that there have been previous trials of the co-conspirators, Neil Smith, Wayne James and Dean Kelsie, and that they have been convicted. You should not use the testimony about the verdicts in those other trials against Steven Gareau. The other verdicts form no part of the evidence against Steven Gareau.

[34] Yet, unfortunately, in the very next passage, the judge not only unravelled that instruction but told them to do the exact opposite; i.e., that they could consider this evidence against the appellant:

> And, taken alone, that testimony is not proof of Steven Gareau's intent to commit the offence of conspiracy to murder Sean Simmons or of his intent to commit the offence of aiding or abetting the murder of Sean Simmons. *However, you may consider this evidence in assessing the knowledge and intention of Steven Gareau.* [Emphasis added.]

[35] Regretfully, this error, in my respectful view, is fatal to the judge's charge. I say this because it goes to the heart of the appellant's defence.

[36] Specifically, here is my fear. The jury was told that Smith, James and Kelsie were convicted in earlier trials. Therefore, the jury would no doubt conclude that these three conspirators had knowledge of the murder plot and the intent to see it through. So far, so good because that fits nicely with the appellant's defence theory which was, in essence: *even though the others knew, I did not*; or the inevitable corollary, *just because the others knew of the plot does not mean that I did*. In other words, it was fundamental to the appellant's defence that these guilty verdicts not be used against him. In fact, it was the appellant, as opposed to the Crown, who wanted the jury to know about them, presumably because this evidence dovetailed nicely with his defence. For example, appellant's counsel drew this from his cross-examination of Cst. Perry Astephen, called by the Crown:

> Q. You eventually were a witness in the Smith trial?
>
> A. I was.
>
> Q. Mr. Smith was charged with first degree murder in regard to Sean Simmons.
>
> A. He was.
>
> Q. And Mr. Smith was convicted.
>
> A. Correct.
>
> Q. Similarly, you were a witness against Mr. James in the same trial, correct?
>
> A. Wayne James.
>
> Q. Correct.

> A. Yes.
>
> Q. And he was also convicted of first degree murder in the death of Sean Simmons.
>
> A. He was.
>
> Q. And you were also a witness in the Dean Kelsie trial.
>
> A. I was.
>
> Q. And Dean Kelsie was tried separately but also found guilty of murder Sean Simmons.

[37] Therefore, this evidence, apparently designed to support the appellant's defence, would, by this misdirection, unfortunately only serve to seriously undermine it. In this context, this error represents serious prejudice to the appellant that must be rectified.

[38] Furthermore, when I consider the broader context of this trial, my concerns are heightened. For example, to say that the people involved in this affair were of unsavoury character would be a gross understatement. They all lived lives of crime and violence. They were fraud artists and drug dealers. Their lifestyle, no doubt, would have been strange if not shocking to most jurors. In fact, Gareau's own defence concedes a crime - he thought he was there to do an illegal drug deal. In this context, I fear that, with this charge, the jury might oversimplify the matter by concluding the appellant must be just as guilty as all the rest.

[39] Finally, before leaving this issue, I would like to address what appears to be the source of the judge's error. Ironically, from my review of the record, it seems to have flowed more from an excess of caution as opposed to a lack thereof.

[40] For example, in the absence of the jury, the judge was careful to hold pre-trial meetings with counsel to discuss the contents of her charge. In one such meeting, she properly acknowledged the danger of having the jury consider this evidence:

> I will refer to the fact that they've heard some testimony about the guilty verdict in the other trials. I believe it was more than just a mention of the fact that there had been other trials. I think there was some reference to the fact that there were guilty verdicts in those trials. And I will make some mention of that and the fact that they're not to draw the conclusion from that that Mr. Gareau is, therefore, guilty.

[41] Then, in a subsequent session, the judge reiterated the need for this caution.

> Normally, in a conspiracy trial, you would have -- not normally. In some cases in a conspiracy trial, you have a co-conspirator, who has pled guilty, testifying. In that case, I mean there's a very clear thing you need to say about that witness's testimony. In this case, I mean we haven't had, obviously haven't had any of them testify and we have had, if what you say is correct, I have no reason to doubt it, that there was a reference to the conviction of at least some, if not all, of the others who are named in the conspiracy indictment. It's more like the caution you would give in the case of a re-trial where you would say something about, and I haven't got this written out yet, but you would say something about you may have heard about a previous trial or you may have heard details about that. Ignore that. Don't use it to infer guilt. Something like that. I mean I haven't got that written out but it would be a little different than the instruction that is sometimes given in a conspiracy trial where co-conspirators, who have pled guilty, testify.

[42] So it is clear that the judge well understood the dangers of using this evidence against the appellant. However, she fell into error when she appeared to turn to *pro forma* language from a well-recognized published guide containing model charges for various situations: Prof. Gerry A. Ferguson, Justice Michael R. Dambrot & Justice Elizabeth A Bennett, *Canadian Criminal Jury Instructions*, 4th ed, vol. 1 (updated November 2011), (Vancouver: The Continuing Legal Education Society of British Columbia, 2005) at 4.34-1 to 4.34-3 ("*CrimJI*").

[43] Here is the model charge that she apparently selected to adapt to her circumstance:

> CRIMJI 4.34
>
> Co-Accused Testifying - Plea of Guilty
>
> Introduction 1
>
> Warning - Use of Co-Accused's Guilty Plea and Testimony

As to Their Role in the Offence 2

Co-Accused's Testimony and Other Evidence May Be Used in

Assessing the Accused's Knowledge and Intent 3

INTRODUCTION

1. ________ [the accused] is charged with the offence of ________ [e.g., Robbery]. You heard ______ [the co-accused] plead guilty to that offence and testify about (his/her) participation in its commission.

WARNING - USE OF CO-ACCUSED'S GUILTY PLEA AND TESTIMONY AS TO THEIR ROLE IN THE OFFENCE

2. You should not use _____'s [the co-accused's] guilty plea against _____ [the accused] in any way. That guilty plea forms no part of the evidence against (Mr./Ms.) ______ [the accused]. Taken alone, the testimony of ______ [the co-accused] as to (his/her) role in the offence is not proof of ______'s [the accused's] intent to commit the offence of ______ [e.g., robbery]. [1]

CO-ACCUSED'S TESTIMONY AND OTHER EVIDENCE MAY BE USED IN ASSESSING THE ACCUSED'S KNOWLEDGE AND INTENT

3. However, you may consider the testimony of ______ [the co-accused] admitting (his/her) role and intention in respect of the offence, along with all the other evidence, in assessing the knowledge and intention of ______ [the accused].[2]

[44] However, (as is evident from its title) this charge is designed to address a situation where a co-accused testifies as to what happened and the issue becomes what to tell the jury about the use that can be made of such testimony. Of course, here the co-accuseds did not testify so there would be no need to deal with that problem. Thus, all that was needed was a charge dealing with the use the jury could make of the evidence of the convictions (covered in para. 2 of *CrimJI* above). Had the judge stopped there, there would be no problem at all. However, by attempting to then adapt the unnecessary third paragraph to her circumstances, the serious error emerged.

[45] In fact, a closer look at the source of this model charge appears to confirm my suspicions. As footnoted by the authors, it is inspired by the Ontario Court of Appeal case of **R. v. Maugey**, [2000] O.J. No. 2438 (Q.L).

[46] There, four young men were charged and, after being tried together before a jury, convicted of robbing a pizza shop. Two of them, Ally and Ecker actually entered a premises and robbed it. They were prepared to plead guilty to conspiracy to robbery but this was rejected by the Crown who sought convictions on more serious charges, including attempted murder for one of them. In any event, both men were convicted as charged and did not appeal.

[47] The remaining two men, the appellants Maugey and Prashad, did not perform the actual robbery. Instead, the Crown theorized that one was the look-out guy and the other was the get-away driver. At the same time, these two men denied any involvement.

[48] At issue both at trial and on appeal was the use, if any, the jury could make of Ally and Ecker's testimony when assessing the case against Maugey and Prashad. On this question, the court offered the following guidance (which forms the foundation of *CrimJI*'s model charge):

> ¶52 During his charge dealing with proof of intent on the robbery count against the four accused, the trial judge referred to the fact that in their own evidence Ally and Ecker said that they intended to rob the pizza store. He then went on to discuss the essential elements that the Crown must establish in order to prove that Maugey and Prashad aided and abetted the other two, including the fact that they each had to intend that some act of theirs would aid the robbery and therefore they would each have to know about the intended robbery. He did not mention the admissions of Ally and Ecker at this point and made the brief reference to the relevant evidence which I will repeat here:
>
>> In the end, you will have to consider all of the surrounding circumstances, including what each of Maugey and Prashad said and did, in order to decide whether either of them knew or intended that his conduct would aid or abet the principal offender. Please remember the question for you to decide is what did Maugey in fact intend; what did Prashad actually in fact intend.
>
> ¶53 From its question, it appears that the jury may have been confused about what use they could make of the guilty pleas and the admissions of Ally and

> Ecker about their own intent to rob, to establish that the appellants or either of them knew about those intentions or that either of them intended to aid or abet Ally and Ecker in their criminal endeavour. Once it appeared from the jury's question that they were confused about this issue, the trial judge erred by failing to clarify first, that the jury could not use the guilty pleas of Ally and Ecker against the appellants, and second, that Ally's and Ecker's testimonial admissions of their own roles in the robbery, taken alone, were not proof of the intent of the appellants. To leave it to the jury to ask for further clarification was not an adequate response because the jury did not know what or whether to ask. It was incumbent on the trial judge in answering the question, to clarify with the jury what "guilty statement" they were referring to. If it was the pleas of guilt by Ally and Ecker, those pleas formed no part of the evidence against either appellant. If it was their testimony admitting their own roles and intentions in respect of the robbery, that evidence could be considered by the jury, along with all of the other evidence, in assessing the knowledge and intentions of the appellants. The trial judge's failure to carefully instruct the jury on this issue may have resulted in the jury using the guilty pleas or the testimonial admission of Ally and Ecker viewed in isolation, as evidence against the appellants to prove that the appellants had knowledge of Ally's and Ecker's intent to rob the pizza store.

[49] Thus it is clear that **Maugey** stands for two propositions as accurately reflected in paragraphs two and three of the model charge. The first is that when one (or more) co-accused is convicted, this fact should not be used against the other accused. The second is that when a co-accused testifies, his or her evidence can be considered with all the other evidence.

[50] Of course, in our case, with the co-accuseds not testifying, **Maugey**'s only application would be to ensure that Smith's, James' and Kelsie's convictions were not used against the appellant. Unfortunately, however, this jury was invited to do just the opposite. Furthermore, because this error goes to the heart of the appellant's defence as I have detailed above, a new trial on this basis alone is, in my respectful view, unavoidable.

[51] Finally, let me add that in reaching this conclusion, I fully realize that we must review a jury charge as a whole and in light of all the evidence. See **Jacquard** and **Archer**, *supra*. In the same vein, I also acknowledge that the appellant's trial counsel did not object to this aspect of the charge and that this can be a consideration when appeal courts assess the impact of errors in jury charges. For example, see **Jacquard,** *supra* at paras. 35 to 38.

[52] However, because, as noted, this error goes to the heart of this case, it must be corrected by a new trial. In other words, it is not the type of error that can be cured by s. 686(1)(b)(iii):

> 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
>
> . . .
>
> (b) may dismiss the appeal where
>
> . . .
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

[53] Therefore, I would set aside these verdicts and order a new trial.

The Judge's Summary of Paul Derry's Evidence

[54] Even though I would order a new trial based solely on the first issue detailed above, I will also address a second troubling aspect of the judge's charge. It involves her synopsis of Paul Derry's evidence. I begin with some important context.

[55] In attempting to prove (the sole issue) that Gareau knew about the murder plot, the Crown relied primarily, if not exclusively, on the evidence of Paul Derry. Yet Derry could not recall ever directly telling Gareau about it. Here is Derry's evidence on this point:

> Q. Mr. Derry, ... was Mr. Gareau present when you were discussing with Wayne James why you were looking for Sean Simmons after you met with Mr. Smith at the Corner Pocket?

> A. Was Stevie around specifically when we talked about the murder itself?
>
> Q. Yes.
>
> A. I trusted Stevie implicitly. He was around me constantly. I talked about the murder daily. I don't know how Stevie couldn't have heard it but I don't recall a specific conversation.

[56] Here is how the judge summarized this evidence for the jury (with the impugned passage highlighted):

> The following evidence is directly admissible against Steven Gareau on the threshold issue of his probable membership in the conspiracy:
>
> > His presence at 12 Trinity and looking for Sean Simmons;
> >
> > ***Paul Derry said that Steven Gareau had to know of the hit*;**
> >
> > Steven Gareau said he was sent there to sell crack and finish the quaalude deal with Sean Simmons, he said he knew nothing of a plan to kill Sean Simmons;
> >
> > Steven Gareau asked David Grosse if Sean Simmons had been around. Steven Gareau said he only asked him that because of the quaalude deal that he was looking for Sean Simmons for;
> >
> > The calls that Steven Gareau made to Jylene Simmons. Steven Gareau said he called because Paul Derry and Wayne James wanted him to and that he was to conclude the quaalude deal;
> >
> > The calls Steven Gareau made to hospitals. Steven Gareau said he did this on the direction of Paul Derry and Wayne James and, again, he did this because of the quaalude deal;
>
> [Emphasis added.]

[57] In fact, Paul Derry did not say that Gareau "had to know of the hit", as the judge suggested. Instead, his evidence was not that forceful. Granted, Gareau's knowledge could be inferred from Derry's testimony; i.e., his references to Gareau being "around [him] constantly" and with Derry talking "about the murder daily".

[58] However, at no time did Derry say what Gareau actually knew or did not know in these circumstances. In fact, I question whether such evidence would even be admissible as it goes to Gareau's state of mind, something only he could know. In any event it certainly would not be direct evidence to be used against the appellant, as the judge suggested in the first sentence of this passage and as she later summarized:

> These are examples of the words and actions of Steven Gareau *which are directly admissible against him.*
> [Emphasis added.]

[59] Now I realize that, at first blush, this may appear to be a picky point with the distinction being very subtle. Yet when placed in context, this represented the most crucial evidence of the trial. After all, it went to the heart of Gareau's only defence - that he did not know of the plot - and Derry was the Crown's key witness on this point.

[60] Furthermore, my concern is heightened when one considers other evidence on this issue. For example, consider again Derry's assertion above that Gareau "was around me constantly" in advance of the murder. This appears to be in direct contrast to other uncontested evidence. Specifically, it appears clear that Derry had kicked Gareau out of their house in the run up to the murder and after that, their contact was quite limited. In fact, Derry acknowledged asking Gareau to leave. Here is his evidence on that point:

> Q. You didn't want him at your home anymore because you felt it was dangerous for your security.
>
> A. I think Stevie and I had just spent too much time together at that point. That's more the reason I wanted him away.
>
> Q. So from the time that he had left your home -- which would be what, two or three weeks before Sean Simmons was killed?
>
> A. I guess so, yeah.

Q. -- you never had contact with him during that time except by telephone, is that right?

A. I don't remember.

[61] On this same point, Gareau, for his part, explained to the jury:

Q. And did something happen that caused you to have to leave their home?

A. Yes, I was drinking quite heavily one night and I brought back a customer, a rich customer who had a lot of money, to buy cocaine from Mr. Derry at his house and that was the wrong thing to do. You never bring a customer back to your home, because then they know where you live and they'll bother you.

Q. And how did Mr. Derry and Ms. Potts react to that?

A. They were furious. They were very angry, and I don't blame them, because I should never have done that especially with the kids there and that.

Q. And as a result of them being furious, what happened to your living arrangements?

A. I was asked to leave.

. . .

Q. During this time that you had left the Potts/Derry household and were living between these various places, how much contact did you have with Mr. Derry during that time period?

A. I didn't see Mr. Derry very much because he was either running a bank card or he was out transferring drugs or he was busy selling crack cocaine in other places. So maybe one -- maybe twice a week maybe, it depended.

Q. What about telephone contact?

A. Only when I needed more crack cocaine and I paid my bill did I ever have any phone contact.

Q. What about Ms. Potts?

A. No.

Q. No, what? No contact?

A. I seen her periodically like for things -- whenever I see Mr. Derry I would have seen Ms. Potts.

Q. Mr. James?

A. No.

Q. Mr. Kelsie?

A. Periodically I'd see him. Once in a blue moon he'd pop in where I was at different crack houses.

Q. And Mr. Smith?

A. Not at all.

Q. Not at all?

[62] In this light, this mis-characterization of Derry's evidence on this point takes on added significance.

[63] At the same time, I acknowledge the Crown's point that these impugned remarks were offered by the judge only in relation to the conspiracy charge and not to the second murder count where the Crown says Gareau aided or abetted Kelsie. I agree. However, that does little to allay my concerns. I say this because, while the appellant faced two charges (murder and conspiracy to murder), he offered only one defence to both; i.e., that he was not aware of the murder plot. In this light, this error, so late in the charge, is, in my respectful view, damaging to Gareau's defence, whatever the count.

[64] Yet, on its own this error may not be enough to set aside the verdict. I say this in part because earlier in the charge the judge accurately reviewed Derry's testimony on this point:

> Paul Derry testified that he understood they were looking for Sean Simmons to kill him and that he discussed it daily with Wayne James because it was one of the ways he and Wayne James would make money. He said he trusted Steven Gareau implicitly and since he and Wayne James discussed it daily, he could not see how Steven Gareau could not have known about it, but he said he could not recall any specific occasion when Steven Gareau was around when he and Wayne James discussed it.

[65] So, in the end, while this error remains troubling, I cannot say that, standing alone, it would warrant our interference.

DISPOSITION

[66] In these circumstances, I would allow the appeal, set aside both convictions and order a new trial. As such, it is not necessary to consider the fresh evidence application because the outcome would be the same with or without this evidence. Nor is it now necessary to consider the suggestion of ineffective counsel or the issue surrounding parole eligibility.

[67] Before concluding, I want to state that this was a long and very complex murder trial with all of the pressures that accompany jury trials. It was nonetheless carefully and efficiently handled by a highly capable trial judge who was called upon to make dozens of difficult decisions. This should not be overlooked despite the outcome of this appeal.

MacDonald, C.J.N.S.

Concurred in:

Fichaud, J.A.
Farrar, J.A.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Gareau*, 2012 NSCA 41

Date: 20120425
Docket: CAC 237588
Registry: Halifax

Between:

Steven Gerald Gareau

Appellant

v.

Her Majesty The Queen

Respondent

and

Christopher Manning

Intervenor

Revised judgment: The text of the original judgment has been corrected according to this erratum dated **April 25, 2012**.

Judges: MacDonald, C.J.N.S.; Fichaud and Farrar, JJ.A.

Appeal Heard: February 15, 2012, in Halifax, Nova Scotia

Held: Appeal allowed, convictions set aside and a new trial ordered per reasons for judgment of MacDonald, C.J.N.S.; Fichaud and Farrar, JJ.A. concurring.

Counsel: Fergus J. (Chip) O'Connor, for the appellant
James A. Gumpert, Q.C. and Peter Craig for the respondent

William L. Mahody for the Intervenor, not present

Erratum:

[68] Page 2, para. [6], line 5 change “Susan” to read “Tina”.