NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Riley*, 2019 NSCA 94

Date: 20191205
Docket: CAC 475857
Registry: Halifax

Between:

Randy Desmond Riley

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Duncan R. Beveridge; The Honourable Justice J. Edward Scanlan dissenting;

Appeal Heard: May 28, 2019, in Halifax, Nova Scotia

Subject: Criminal Law: *Vetrovec* warning; test for whether a verdict is unreasonable or not supported by the evidence; applicability of the curative *proviso*.

Summary: The Crown called the appellant's former co-accused, Nathan Johnson, as a Crown witness. Nathan Johnson had made highly incriminating admissions to his former girlfriend Kaitlin Fuller. The admissions detailed his and the appellant's involvement in the murder of one Chad Smith. But Nathan Johnson testified that he alone had been involved in the homicide, which he described as accidental. He was cross-examined as an adverse witness about his detailed account he had given to Ms. Fuller. He insisted that account was untrue. The appellant's former friend, Paul Smith, testified about the appellant's involvement in the plan and intended execution of Chad Smith. Circumstantial evidence tended to confirm Paul Smith's evidence and many of the details of what Nathan Johnson had told Kaitlin Fuller. Despite the facially exculpatory nature of Nathan Johnson's evidence, the trial judge decided it was appropriate to warn the jury in a mid-

trial and final instruction that it was dangerous to rely on the evidence of Paul Smith and Nathan Johnson unless it was confirmed by other evidence (a *Vetrovec* warning). The appellant did not testify. Defence and Crown counsel were actively engaged with the trial judge in the process of crafting an appropriate jury charge. The jury convicted the appellant of second degree murder. The appellant now complains that no *Vetrovec* warning should have been given in relation to Nathan Johnson and the error was critical. He also contends other aspects of the jury charge were flawed and the verdict is unreasonable or not supported by the evidence.

Issues:

(1) Did the trial judge err in giving a *Vetrovec* caution for Nathan Johnson?
(2) If it was an error, can the appeal be dismissed by reliance on the curative *proviso*?
(3) Is the verdict unreasonable or not supported by the evidence?

Result:

Even if the trial judge erred in giving a *Vetrovec* warning with respect to Nathan Johnson, appellant's counsel agreed with the mid-trial and final warning, and the jury was properly instructed that if they believed his evidence or if it raised a reasonable doubt they must acquit. In the circumstances, if the instructions were flawed the error was harmless and the curative *proviso* applied. The verdicts were not unreasonable and the other complaints are without merit.

The dissent would allow the appeal on the basis that the trial judge erred in giving the *Vetrovec* warning, and it would be inappropriate to apply the *proviso*.

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Judges:	Beveridge, Scanlan and Bourgeois, JJ.A.
Appeal Heard:	May 28, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Bourgeois, J.A. concurring; Scanlan, J.A. dissenting
Counsel:	Trevor McGuigan, for the appellant James A. Gumpert, Q.C. and Melanie Perry, for the respondent

INTRODUCTION

[1] A lengthy introduction is necessary to provide context to understand the issues presented by what, for a number of reasons, was an unusual trial.

[2] A jury convicted the appellant, Randy Riley, of second degree murder. Chad Smith was the victim. Originally, the appellant had been jointly charged with Nathan Johnson for the first degree murder of Mr. Smith.

[3] The appellant successfully applied for severance. The evidence directly admissible against Mr. Johnson was significantly different than that against the appellant. Mr. Johnson's trial preceded the appellant's. A jury convicted Mr. Johnson of first degree murder. He unsuccessfully appealed (2017 NSCA 64).

[4] At Mr. Johnson's trial, his former girlfriend, Kaitlin Fuller, described Mr. Johnson's admissions he had made to her about his active role in the first degree murder of Chad Smith. I will set out further details of those admissions later.

[5] In addition, at Mr. Johnson's trial there was an impressive body of circumstantial and other evidence that confirmed or tended to confirm the details of Mr. Johnson's admissions to Ms. Fuller.

[6] At the appellant's trial, the Crown did not have the benefit of Mr. Johnson's admissions to Kaitlin Fuller as evidence admissible against the appellant. *Prima facie*, those admissions were hearsay and hence not admissible to prove the truth of their contents.

[7] In an apparent attempt to overcome what they perceived to be a lacuna in their case of first degree murder, the Crown decided it would call Nathan Johnson as a Crown witness. The fallout from that decision and the trial judge's jury instructions about his evidence are the primary focus of this appeal.

[8] Later, I will set out in more detail Mr. Johnson's evidence, but in a nutshell, Nathan Johnson testified that he alone was responsible for the death of Chad Smith. Johnson admitted he had said many things to Kaitlin Fuller that could be taken to be inculpatory of the appellant, but he did not adopt them as true.

[9] The Crown sought to have Nathan Johnson declared adverse pursuant to s. 9(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. The Crown did not seek to have Johnson declared a hostile witness pursuant to the common law.

[10] At the end of the evidentiary portion of the s. 9(1) *voir dire* to determine adversity, the trial judge, the Honourable Justice James L. Chipman, announced his intention to give to the jury what has become known as a *Vetrovec* warning in relation to Nathan Johnson. I will discuss in more detail later the origin and nuances of a *Vetrovec* warning. In capsule, if the Crown calls a witness of unsavoury character, the judge may, and in some circumstances must, caution the jury against relying on the unsavoury witness's testimony to convict the accused absent independent evidence that confirms or supports that testimony.

[11] Defence counsel said he was "in agreement entirely" with the proposed *Vetrovec* warning, despite the fact that Nathan Johnson testified that the appellant had nothing to do with the death of the victim. The defence position remained unchanged throughout the trial—Nathan Johnson was an unsavoury witness, and the trial judge was right to warn the jury about reliance on his evidence.

[12] Nonetheless, the trial judge gave a specific direction to the jury that given Nathan Johnson's claim he shot the victim without the knowledge or participation of the appellant they were required to acquit if they were left in a state of doubt by his evidence.

[13] I am satisfied that if the trial judge erred by giving a *Vetrovec* warning in relation to Nathan Johnson the error was harmless. There is no reasonable possibility a jury could believe or have a reasonable doubt based on Nathan Johnson's evidence.

[14] I would, if it were necessary, apply the curative *proviso* and dismiss the appeal. I would also dismiss the appellant's complaints that: the trial judge failed to instruct the jury on manslaughter and relate the evidence to the issues; and, the verdicts are unreasonable and cannot be supported by the evidence.

[15] Before setting out the principles that underpin a *Vetrovec* warning and why the trial judge's charge was arguably problematic, I will first set out the gist of the Crown's case and how it unfolded.

THE CROWN'S CASE

[16] Paul Smith (no relation to Chad) testified that his good friend, the appellant, called him around 7:00 p.m. on October 23, 2010 to come and pick him up. This was not unusual. They had been good friends for 10 to 15 years. He would see or speak with the appellant every other day. But October 23 was no ordinary day.

[17] When Paul Smith arrived, the appellant got in the front seat, Nathan Johnson in the rear. The appellant told Paul that he had "a problem with a white guy". Chad Smith was white. The appellant, Paul Smith, and Nathan Johnson are African-Nova Scotian.

[18] Once in the car, directions were given. Paul Smith drove to an apartment building. The appellant said he "had to get a gun or whatever". He knew where the guy was working and "he was going to deal with it". The appellant said that the guy worked delivering pizza.

[19] At the apartment building, the appellant got out. Nathan Johnson remained in the vehicle. The appellant returned five to ten minutes later with what Paul Smith surmised was a gun in his pants and "doctor gloves". The appellant handed a pair of the gloves to Nathan Johnson and told Paul Smith that he was "taking care of this tonight".

[20] Paul Smith dropped them off by the bus terminal on Highfield Park Drive in the North end of Dartmouth. Paul Smith went home. Later that night, he went out for cigarettes. He noticed a lot of police cars in the Highfield Park area.

[21] The next day, the appellant called Paul Smith and wanted to see him to make sure that everything "was good" between them. The appellant told Smith that he had made a call to a pizza place and used a phony address to set it up. When Smith commented they were crazy, the appellant responded, "It had to be done, he had to deal with it".

[22] A gas station attendant across the street from 15 Highfield Park saw a car pull in around 9:00 p.m. on October 23. He saw two men. They were at the right-hand pay phone booth. They did not stay long. He did not see them leave, but half-an-hour later police cars with lights and sirens showed up in the area. The phone number for the right-hand phone booth was 465-9696.

[23] David Bryant worked for Panada Pizza. He took a call at 8:45 p.m. for a 16-inch pepperoni pizza and a two-litre bottle of orange pop. The call display showed the phone number to be 465-9696, an Aliant pay phone. Documentary evidence confirmed the phone number and location of the pay phone to be 14 Highfield Park Avenue.

[24] The caller also gave another number, 292-6753. Mr. Bryant recalled that the caller initially asked for the order to be delivered to 15 Highfield Park Avenue,

Apartment 3. Mr. Bryant knew that there was no Apartment 3 in 15 Highfield. He suggested to the caller he must have meant the adjacent building, 15 Joseph Young, Apartment 3. The caller agreed.

[25] The numbers and the address were written on the pizza box. When the order was ready, Mr. Bryant gave it to Chad Smith to deliver. Mr. Smith had worked at Panada Pizza for less than a week. Mr. Smith left with the order just before 9:15 p.m. He never returned.

[26] David Manning lived at Apartment 3, 15 Joseph Young Street. His apartment opens directly to the outside. He is unsure of the time, but it was dark. He heard a loud bang. When he opened the door, he found Chad Smith on his back with the Panada pizza delivery box beside him. Mr. Smith died from a single shotgun blast to his chest.

[27] There were no witnesses. A police K-9 unit picked up a scent trail from behind the apartment building into the woods. That night, no suspects could be located, nor physical evidence. The next day, the police retraced the trail and discovered a sawed-off shotgun in a drainpipe. A subsequent search turned up two pairs of latex gloves, and one work glove.

[28] The shotgun had a live and a spent shell in it. On examination, the gun was determined not to be prone to shock discharge.

[29] The phone records were obtained for phone numbers subscribed to by Paul Smith, the appellant, Kaitlin Fuller, and Chad Smith. Nathan Johnson did not possess or own a cell phone. Those records and a wireless network engineer confirmed the inculpatory evidence of Paul Smith and Kaitlin Fuller and contradicted the fanciful exculpatory tale woven by Nathan Johnson.

[30] Nathan Johnson and Kaitlin Fuller testified before the jury and within a *voir dire* to determine if Johnson was an adverse witness within the meaning of s. 9(1) of the *Canada Evidence Act*. The parties agreed that the evidence on the *voir dire* would be broad enough to enable them to argue the admissibility of the evidence under the principled exception to the hearsay rule (i.e. did the evidence meet the requirements of necessity and reliability pursuant to *R. v. Bradshaw*, 2017 SCC 35). It is no mean task to keep track of what Johnson admitted was true and what he admitted he had told Fuller but which he claimed was not true. Further, because the evidence of what Johnson had told Fuller as to what had happened was

confirmed or supported by other evidence, there was a real danger the jury might rely on Fuller's recitation of Johnson's admissions to convict the appellant.

The Evidence of Nathan Johnson

[31] The Crown had no reliable way to know if Mr. Johnson would testify or what he would say if he did. Perhaps it was comforted by the detailed oral statements Mr. Johnson had made to Kaitlin Fuller the night of the murder.

[32] Nathan Johnson testified that he had known the appellant since he was nine or ten years old. On October 23, 2010, he went to the appellant's house in Dartmouth and hung out. Paul Smith showed up. On Smith's mention of a card game, they went and played poker at a friend's house.

[33] Later, Paul Smith dropped the appellant off at his girlfriend's house in Dartmouth. Paul Smith then dropped Nathan Johnson off at the top of Highfield Park Avenue.

[34] Johnson said he did not have a cell phone, so he used a pay phone to call Chad Smith's cell phone because Chad Smith owed him money for drugs. Chad Smith did not answer, so he called Mr. Smith's place of work and placed a fake order for pizza. He knew that Smith would deliver it.

[35] Johnson had a gun stashed in the woods close by. He had it for security due to his drug business. When Chad Smith showed up "it just let off". He gave other descriptions that also suggested an accidental discharge.

[36] Johnson said he panicked and fled. He hid the shotgun in the drainpipe. He ran to his aunt's house that was close by where he changed his clothes. He texted Kaitlin Fuller via a computer. She came and picked him up.

[37] Once back in Halifax, he admitted he told Kaitlin Fuller that he had been involved in something crazy, he did not want to kill Chad Smith. He then claimed that he made up a "cover story"—and that he added names. He told Kaitlin Fuller it was the appellant and Paul Smith that had called Chad Smith and that one of them had shot the deceased.

[38] He did not confess to Kaitlin Fuller that he had shot Chad Smith, only that he was involved in a murder. However, he repeated that he had not meant to kill Chad Smith, he just wanted to scare him. He thought he had shot him in the arm.

[39] But Nathan Johnson had trouble keeping his story straight. Unprompted, he admitted he told Ms. Fuller that he had worn gloves and had hidden them near the shotgun:

> Q. Okay. You had mentioned something earlier about telling Kaitlin about gloves. Do you recall that?
>
> A. Yeah, I told her that I had put the gloves by the gun and stuff like that.
>
> Q. Sorry, that you had done what?
>
> A. I had the gloves. I had gloves.
>
> Q. You had gloves?
>
> A. Yeah.
>
> Q. Did you actually have gloves when you did this?
>
> A. Yeah.
>
> Q. Where did you get those from?
>
> A. I stole them from Paul.
>
> Q. You stole them from Paul?
>
> A. Yeah.
>
> Q. Okay. What do you mean exactly, you stole them from Paul?
>
> A. I was in his car. They were just, like, on the mat. I just took them.

[40] The Crown asked for a s. 9(1) *voir dire* to seek a declaration that Nathan Johnson was an adverse witness. Mr. Johnson, Ms. Fuller, a former police investigator, and a wireless network engineer testified. I need not provide a précis of all of the *voir dire* evidence. The following is sufficient to put into context what the trial judge did.

The evidence on the s. 9(1) voir dire

[41] After the completion of Nathan Johnson's examination and cross-examination on the *voir dire*, the Crown called Ms. Fuller.

[42] She testified that after consistent communication with Nathan Johnson on October 23, around supper time it went quiet. She called the appellant's phone and asked him to have Nathan call. Nathan did not call. She offered that the appellant seemed to be outside, it was windy, and he was out of breath. She then sent a text to have Nathan call.

[43] Later, she received a Facebook message from Nathan that he was at his aunt's. She arranged for a ride to go pick Nathan up. On the way, she got another message that he had something to tell her. The large police presence in Highfield Park was noticed.

[44] Ms. Fuller picked up Johnson at his aunt's on Leaman Drive, which is close to the wooded area, directly behind 15 Joseph Young Street.

[45] Back in Halifax, at around 10:30-11:00 p.m., Nathan told Fuller that he and the appellant were at a pizza shop and the appellant wanted to get revenge for having been struck with either a crowbar or a hammer. Nathan volunteered, "let's go get him, then". To which the appellant replied, "No, I want to kill him". Nathan Johnson got Ms. Fuller to feel his chest, his heart was beating that fast.

[46] Johnson told Ms. Fuller that they had contacted someone named Paul to go get a gun. He and the appellant picked out the location of the blue building due to the woods and the proximity of his aunt's house. There was some uncertainty whether the appellant or Nathan Johnson placed the phony pizza order. At one point, Ms. Fuller said that Nathan told her he had done so. The order was for pizza and pop.

[47] Nathan waited close to the woods while the appellant was by the stairs. The appellant shot the victim and ran to Johnson saying, "I got him, I got him". Johnson took the shotgun and ran through the woods where he hid it on his way to his aunt's. Ms. Fuller described other after the fact conduct by Nathan Johnson and, to a lesser extent, the appellant.

[48] The evidentiary portion of the *voir dire* ended on April 5, 2018. Before submissions began on April 6, the trial judge announced his decision to give a *Vetrovec* warning in relation to Paul Smith and Nathan Johnson. He said this:

> THE COURT: All right. Just before we get into the argument as planned, I thought I should say this at the outset. I'm not sure it'll affect your argument in any way but I have, in the course of going through this matter further and considering the evidence thus far, I am of the view that when we resume with the jury on Monday, among other mid-trial instructions that may be prudent and will be reviewed with you, I will be giving a **Vetrovec** in respect of Paul Smith and ... and Nathan Johnson and I will ... I propose to do that and I might elicit comments from you later, you know, give you time to think about it but I would propose to do that really first thing and before Mr. Johnson resumes his testimony so that they would have it and it would be ... that **Vetrovec** warning would be threaded

> back to Mr. Smith and it would also be in respect of Mr. Johnson, obviously preceding anything further with Mr. Johnson but just on the basis of both these witnesses thus far, if you will.

[49] Neither Crown nor defence counsel voiced any concern about the trial judge's proposed direction. To the contrary, defence counsel twice assured the trial judge that he was in agreement with the proposed *Vetrovec* warning.

[50] At the close of *voir dire* submissions on April 6, 2018, the trial judge delivered emphatic oral reasons declaring Nathan Johnson an adverse witness. The trial judge cited cases and secondary authorities that discuss the legal uncertainty whether a declaration of adversity under s. 9(1) permits cross-examination at large or can be restricted. Without analysis or discussion, he restricted the Crown's cross-examination to six areas. The trial judge later released his reasons in written form (2018 NSSC 94):

> [7] Mr. Johnson, Ms. Fuller, retired Halifax Regional Police homicide detective, Stephen Waterfield, and cell phone expert engineer, Joseph Sadoun, provided testimony and ten exhibits were entered by consent. The Defence did not call evidence on the *voir dire*. At the conclusion of the evidence, counsel presented oral argument and on April 6, 2018, I provided an oral decision as follows:
>
> > On the basis of the trial proper evidence, thus far, of Nathan Johnson and the *voir dire* evidence, I have no hesitation in determining within the meaning of s. 9(1) of the *Canada Evidence Act*, that Mr. Johnson is a witness adverse to the Crown. Accordingly, I am going to permit the Crown to cross-examine Mr. Johnson. The cross-examination shall be restricted to these areas:
> >
> > 1. the circumstances surrounding Mr. Johnson saying what he said to Ms. Fuller on the night of October 23, 2010 (per Nathan Johnson's prior oral statement);
> > 2. the motive behind making Mr. Smith the target (per Nathan Johnson's prior oral statement);
> > 3. the circumstances surrounding the obtaining of the gun (per Nathan Johnson's prior oral statement);
> > 4. the call made to the pizza shop (per Nathan Johnson's prior oral statement);
> > 5. where Mr. Johnson and Mr. Riley waited by 15 Joseph Young at the material time (per Nathan Johnson's prior oral statement); and,

> 6. the reference to Mr. Riley in connection to shooting the gun (per Nathan Johnson's prior oral statement).

[51] The Crown did not cross-appeal this or any of the trial judge's other evidentiary rulings. The law on this important question remains unsettled.

[52] On April 9, 2018, before Nathan Johnson resumed his testimony in front of the jury, the trial judge gave mid-trial instructions to the jury about a witness's criminal record and prior inconsistent statements. No complaint is made of these. As foreshadowed by the judge, he modelled a mid-trial *Vetrovec* warning based on *Watt's Model Jury Instructions (Final)* for Crown witnesses of unsavoury character. He told the jury:

> Now before Mr. Johnson is called back to the witness stand, there is another mid-trial instruction I must read to you. I would add that upon reflection, I have determined that this instruction must also be considered with respect to Paul Smith's evidence.
>
> The title of this mid-trial instruction provides a clue as to what it is all about, and I quote: Crown Witnesses of Unsavoury Character, closed-quote. I will now read this mid-trial instruction as it pertains Paul Smith and Nathan Johnson.
>
> Paul Smith testified for the Crown and Nathan Johnson is testifying for the Crown. There is a special instruction that has to do with their evidence. It is an instruction that you must keep foremost in your mind when you are considering how much or little you will believe of or rely upon their evidence in making your decision in this case.
>
> There are characteristics of these witnesses and other circumstances that require the evidence of Paul Smith and Nathan Johnson to be treated with caution. Experience teaches us that testimony from a Crown witness of this kind must be approached with the greatest care and caution.
>
> In this regard, you will recall both individuals have criminal records, and Mr. Johnson has actually been convicted of first-degree murder. Common sense tells you that in light of these circumstances, there is good reason to look at the evidence of Mr. Smith and Mr. Johnson with the greatest care and caution.
>
> You are entitled to rely on the evidence of Mr. Smith and/or Mr. Johnson, however, even if it is not confirmed by other witnesses or other evidence, but it is dangerous for you to do so. Accordingly, you should look for some confirmation of the evidence of Mr. Smith or Mr. Johnson from somebody or something other than Mr. Smith or Mr. Johnson before you rely on the evidence of Mr. Smith or Mr. Johnson in deciding whether Crown counsel has proven the case against Mr. Riley beyond a reasonable doubt.

> Now there is yet another caution I must now read to you in connection to the evidence of Paul Smith and Nathan Johnson. And I should say that indeed is what I just read to you. But I want to add something else.
>
> Should you ultimately determine Mr. Johnson and/or Mr. Smith to be not credible, you cannot use such a finding or findings against Mr. Riley to conclude he is somehow not credible and therefore guilty.

[53] Before resuming my narrative of the trial, I interject to say it is highly doubtful that a *Vetrovec* warning is an appropriate mid-trial instruction. Obviously, the evidence is not complete. It is therefore premature to instruct the jury: why a *Vetrovec* warning may be warranted; the strength of that warning; and, whether there is any evidence from another source that might tend to confirm the unsavoury witness's testimony. I do not suggest that it necessarily constitutes reversible error, but it cannot be countenanced.

Resumption of the evidence

[54] Nothing dramatic unfolded in the ensuing Crown cross-examination of Nathan Johnson. The Crown established that Johnson had been jointly charged with the appellant with the first degree murder of Chad Smith. They had spent a year in jail together and had been through a Preliminary Inquiry together. Johnson had the Crown disclosure and the various statements that Kaitlin Fuller had given to the police, as well as her Preliminary Inquiry testimony.

[55] Ms. Fuller testified at his trial. He did not. A jury convicted Johnson of the first degree murder of Chad Smith. His appeal was unsuccessful, and there were no attempts to further appeal. The first time he had ever told anyone that he was the only one responsible for the murder of Chad Smith was at the appellant's trial.

[56] Nathan Johnson also asserted that he had told Ms. Fuller he had blamed the whole issue on the appellant and Paul Smith. It was Randy and Paul that made the pizza call. It was always Randy and Paul.

[57] Mr. Johnson denied telling Ms. Fuller that Paul was not there, it was just the appellant waiting by the door with the shotgun. Johnson explained that he made the statements to Ms. Fuller in order to spread the rumour that others had committed the murder. He denied he told Ms. Fuller that he had made the pizza call and the appellant had run around the building saying "I got him, I got him" and gave Johnson the shotgun. He also denied telling Ms. Fuller that the reason for the

murder was that Chad Smith had struck the appellant in the head some years before.

[58] Defence counsel had an easy go of things in cross-examination. Nathan Johnson agreed that he had told Ms. Fuller he was along for the ride. He did not even know it was going on, it just happened, and he was there. He told her he did not even know Chad Smith. But he did know him from a drug debt.

[59] He had memorized Chad Smith's cell phone number. It was an easy one to remember. There was no answer when he called from the pay phone. He could not tell his story before this trial because that would be an admission he had shot Chad Smith—it would be used against him.

[60] The proceedings before the jury were again interrupted for submissions to be made on the Crown's application to adduce Nathan Johnson's statements to Kaitlin Fuller for the truth of their contents (the "*Bradshaw*" application). Understandably, the Crown was unsuccessful. Mr. Johnson was available. Necessity could not be met.

[61] On April 9, 2018 the judge did not provide oral reasons, just the bottom line—the presumptively inadmissible hearsay evidence of Kaitlin Fuller would remain inadmissible. Written reasons would follow, and they did, on April 18, 2018 (2018 NSSC 95).

[62] But in the meantime, on April 10, 2018, the Crown sought permission to lead evidence from Ms. Fuller about oral statements she said Johnson had made to her, but which he did not admit, and which were inconsistent with his trial testimony. Citing prejudice concerns, the trial judge ruled that the Crown could not adduce those details for any purpose. There is no Crown appeal.

[63] Two experts rounded out the Crown's case, S/Sgt. Royce MacRae, from the RCMP's Technological Crime Unit, and wireless network engineer, Joseph Sadoun. S/Sgt. MacRae analyzed Chad Smith's cell phone. Mr. Sadoun gave evidence about the likely location of the appellant's cell phone on October 23, 2010. I will refer to their evidence later when I discuss whether the impugned *Vetrovec* error was harmless.

[64] The Crown closed its case on April 10, 2010. The appellant elected not to testify nor call evidence. Extensive pre-charge discussions with counsel ensued,

which included both the existence and content of a *Vetrovec* warning for Paul Smith and Nathan Johnson.

[65] The trial judge gave counsel a copy of his draft jury charge. For the most part, counsel were content with its contents. Defence counsel offered suggestions. The trial judge accepted.

[66] Before providing details of the jury charge and the pre-charge discussions, I will set out the principles that underpin a *Vetrovec* warning to understand why I am not convinced the trial judge committed reversible error.

THE VETROVEC PRINCIPLES

[67] Like many legal rules, what has become known as a *Vetrovec* caution or warning, takes its name from a case, *R. v. Vetrovec*, [1982] 1 S.C.R. 811.

[68] The sole issue in *Vetrovec* was the trial judge's jury charge on the evidence said to corroborate the testimony of an accomplice. The full Court abolished the English and Canadian common-law rule that juries must be warned of the danger to convict based on the uncorroborated evidence of an accomplice. In addition, the technical labyrinth of corroboration was replaced by the simple query if there were evidence from another source that confirmed the witness's evidence.

[69] No more pigeonholes for witnesses. It would be up to the trial judge to decide if the jury should be cautioned and the extent of the caution. Dickson J., as he then was, wrote of this discretion and why rigid rules would not do:

> … Because of the infinite range of circumstance which will arise in the criminal trial process it is not sensible to attempt to compress into a rule, a formula, or a direction the concept of the need for prudent scrutiny of the testimony of any witness. What may be appropriate, however, in some circumstances, is a clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness. …
>
> p. 831

[70] The Court achieved a welcome departure from formal technical rules. Yet, uncertainty and legal controversy has continued to thrive over a trial judge's discretion to warn a jury about reliance on unsavoury witnesses.

[71] Despite its discretionary nature and the consequent deference owed to the trial judge, there are cases where a *Vetrovec* caution is required. In other words,

the failure to include a proper caution can amount to legal error. Some of the relevant circumstances include: the importance of the evidence to the Crown's case; the intensity of concern to doubt the unsavoury witness' testimony; the position of counsel at trial; and, the balance of the judge's jury charge (see: *R. v. Bevan,* [1993] 2 S.C.R. 599; *R. v. Brooks*, 2000 SCC 11).

[72] The last substantive word from the Supreme Court of Canada on the correct approach to assess the need and adequacy of a *Vetrovec* warning comes from *R. v. Khela,* 2009 SCC 4 (and its companion case, *R. v. Smith*, 2009 SCC 5). Fish J., for the majority, restated the law on *Vetrovec* warnings. He stressed the controlling discretion of the trial judge, while at the same time providing guidance to trial judges:

> [11] **The central purpose of a *Vetrovec* warning is to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony**. In appropriate cases, the trial judge should also draw the attention of the jurors to evidence capable of confirming or supporting the material parts of the otherwise untrustworthy evidence.
>
> [12] Since the decision of this Court in *Vetrovec*, the very real dangers of relying in criminal prosecutions on the unsupported evidence of unsavoury witnesses, particularly "jailhouse informers", has been highlighted more than once by commissions of inquiry into wrongful convictions (see, for example, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) and *The Inquiry Regarding Thomas Sophonow* (2001)). The danger of a miscarriage of justice is to be borne in mind in crafting and in evaluating the adequacy of a caution.
>
> [13] The crafting of a caution appropriate to the circumstances of the case is best left to the judge who has conducted the trial. No particular set of words is mandatory. In evaluating its adequacy, appellate courts will focus on the content of the instruction and not on its form. Intervention on appeal will not be warranted unless a cautionary instruction should have been given but was not, or the cautionary instruction that was given failed to serve its intended purpose.
>
> [14] **No single formula can be expected to produce an appropriate instruction for every foreseeable – let alone *unforeseeable* – situation at trial. That is why we vest in trial judges the discretion they must have in fashioning cautionary instructions responsive to the circumstances of the case**. Trial judges nonetheless seek, and are entitled to expect, guidance from this Court as to the general characteristics of a sufficient warning. **I shall later outline in broad brushstrokes a proposed template which, while not at all mandatory, will in my view be of assistance to trial judges without unduly**

> **fettering their discretion, and will reduce the number of appeals attributable to the present uncertainty regarding the governing principles.**
>
> [Emphasis added]

[73] The principled framework proposed by Fish J. came from the Ontario Court of Appeal's reasons in *R. v. Sauvé* (2004), 182 C.C.C. (3d) 321. It is comprised of four elements: what is the evidence that requires special scrutiny; why the evidence deserves such scrutiny; it is dangerous to convict on such evidence, but the jury may do so if satisfied the evidence is true; and, the jury should look for evidence from another source tending to demonstrate the unsavoury witness is telling the truth about the guilt of the accused. He described the framework as follows:

> [37] In *Sauvé*, at para. 82, the Ontario Court of Appeal set out a principled framework that will assist trial judges in constructing *Vetrovec* warnings appropriate to the circumstances of each case. That proposed framework, which I adopt and amplify here, is composed of four main foundation elements: (1) drawing the attention of the jury to the testimonial evidence requiring special scrutiny; (2) explaining *why* this evidence is subject to special scrutiny; (3) cautioning the jury that it is dangerous to convict on unconfirmed evidence of this sort, though the jury is entitled to do so if satisfied that the evidence is true; and (4) that the jury, in determining the veracity of the suspect evidence, should look for evidence from another source tending to show that the untrustworthy witness is telling the truth as to the guilt of the accused (*R. v. Kehler*, 2004 SCC 11, [2004] 1 S.C.R. 328, at paras. 17-19).
>
> [Emphasis in original]

[74] A *Vetrovec* warning serves to protect against wrongful conviction. The warning has no place at the table where it is the accused who testifies or calls witnesses to try to establish their innocence or raise a reasonable doubt. As Charron J.A., as she then was, in *R. v. Pilotte* (2002), 156 O.A.C. 1, observed seventeen years ago:

> [92] The appellant contends that the trial judge's instruction with respect to Lachance and Roger Pilotte, coming as it did immediately after the trial judge had identified the unsavoury witnesses for the Crown, would have led the jury to conclude that they were also unsavoury witnesses whose evidence could not be relied upon without confirmatory evidence. **It is well-established that unsavoury witness warnings ought not to be given with respect to defence witnesses**: see *R. v. Hoilett* (1991), 3 O.R. (3d) 449 at 451-52 (Ont. C.A.).
>
> [Emphasis added]

[75] A trial judge who instructs a jury that it is dangerous to act on the evidence of defence witnesses in the absence of independent confirmatory evidence commits legal error (see: *R. v. Tzimopoulos* (1986), 17 O.A.C. 1 at para. 105).

[76] In *R. v. Hoilett* (1991), 3 O.R. (3d) 449, [1991] O.J. No. 715, Lacourcière J.A. for the Court spoke of the trial fairness repercussions caused by application of a *Vetrovec* warning to defence witnesses and the accused:

> 9 We are all of the view that the impugned portion of the charge constituted, in essence, a *Vetrovec* warning which was inappropriately applied to the appellant himself and to his principal defence witnesses. It was not, as the Crown contends, a mere general observation based on common sense to examine the evidence of witnesses carefully, having regard to their character. We regard the direction as a fundamental error which had the effect of degrading defence evidence, thus resulting in unfairness of the trial. This was compounded by a statement of the trial judge to the effect that the appellant, Mr. Hoilett, had an interest in the outcome of the trial. Combined with the characterization of the accused and his witnesses as persons of unsavoury character, the direction as a whole had the effect of insisting on the appellant's character and thus undermining the defence.

[77] In *R. v. Chenier* (2006), 207 O.A.C. 104 the trial judge erred when he gave an inadequate *Vetrovec* warning for an unsavoury Crown witness and a *Vetrovec* warning for an exculpatory *defence* witness. Blair J.A. explained how the latter error can impact the burden of proof:

> 46 I do not accept this argument either. The rationale behind the principle that a *Vetrovec* warning is not to be given in connection with defence evidence is that the instruction to look for confirmatory/corroborative evidence impermissibly transfers a burden to the accused and is contrary to the requirements of *W.(D.)*. Defence evidence need only raise a reasonable doubt. In spite of this relationship between *Vetrovec* and *W.(D.)* in the context of defence evidence, however, the purpose of a *Vetrovec* warning and the purpose of a *W.(D.)* instruction are quite different. The former is designed to help equip the jury to assess the reliability of, and the weight to be given to, the testimony of a disreputable or unsavoury witness called to advance the Crown's case. The latter is designed to help equip the jury to assess whether the Crown has met its onus of proving the case beyond a reasonable doubt on all of the evidence, once the reliability or non-reliability of the defence evidence has been determined. Thus, where the charge goes beyond what is permissible commentary on the credibility of an unsavoury defence witness and directly or implicitly instructs the jury to find independent confirmation of the witness' testimony, it is unlikely that coupling such a direction with a specific *W.(D.)*-like directive will mitigate the erroneous *Vetrovec* warning respecting the defence witness. Such was the case here.

[78] The appellant relies on these latter cases as the backbone for his argument that the trial judge erred by giving a *Vetrovec* warning for Nathan Johnson and the error was "critical".

[79] It is easy to now say, with the clarity of hindsight, that it would have been better had the trial judge not lumped Paul Smith and Nathan Johnson together. In the circumstances of this case, if the trial judge erred in his instruction, the error was harmless. I say this for the following reasons:

1. It was for the jury to decide if a witness such as Nathan Johnson adopted as true any part of his prior inculpatory statements;
2. The trial judge clearly instructed the jury that should they have a doubt based on all of the evidence, including in particular that of Nathan Johnson, they must acquit the appellant;
3. Defence counsel did not just remain silent or acquiesce on this issue—he actively encouraged the jury be told that Nathan Johnson was an unsavoury witness and a warning be given;
4. The Crown summation to the jury in no way invited the jury to disregard Nathan Johnson's evidence because it was dangerous to rely on it in the absence of independent confirmatory evidence;
5. There is no reasonable possibility that a jury could reasonably believe or have a reasonable doubt based on Nathan Johnson's evidence.

ANALYSIS

[80] Nathan Johnson was not a defence witness. He was called by the Crown. The cases that clearly say a *Vetrovec* warning is legally wrong for a defence witness do not directly govern.

[81] A Crown may call a witness whose evidence tends to inculpate an accused but also in other respects exculpates an accused. Where there is such a "mixed witness", the trial judge should demarcate, if it is possible, the inculpatory from the exculpatory portions and charge the jury accordingly. That is, why it is dangerous to rely on the inculpatory aspects to convict, but to acquit they need only have a reasonable doubt based on the exculpatory portions, alone or in combination with other evidence (see: *R. v. Rowe*, 2011 ONCA 753 at para. 34).

[82] The appellant argues that Nathan Johnson was not a "mixed witness" because in the cold light of the transcript, he did not expressly adopt any of his

prior oral statements to Kaitlin Fuller that inculpated the appellant in the murder of Chad Smith.

[83] I am not persuaded by this argument. First, it was up to the jury to find as a fact whether Nathan Johnson adopted any of his prior inconsistent statements. Second, despite Mr. Johnson's attempts to exonerate the appellant, he confirmed certain aspects of Paul Smith's evidence, and the jury could draw certain inculpatory inferences based on what Johnson admitted was true about their pre- and post-offence contact. Third, there are a number of cases where Crown witnesses have been held not to have adopted their prior inculpatory statements yet a *Vetrovec* warning upheld or found harmless (see: *R. v. Gelle*, 2009 ONCA 262; *R. v. Tran*, 2010 ONCA 471 at paras. 27-28; *R. v. Shand*, 2011 ONCA 5, leave to appeal denied, [2011] S.C.C.A. No. 270; *R. v. Murray*, 2017 ONCA 393 at paras. 128-132).

[84] In *R. v. Gelle*, the sole ground of appeal was the *Vetrovec* warning given in relation to one Abreha, a Crown witness, who recanted his police statement that had inculpated the appellant and swore the appellant was not involved in the crime. The trial judge ruled that the prior inconsistent statement could not be played for the jury because the witness had refused to adopt it as true (*R. v. Gelle*, [2004] O.J. No. 5044).

[85] MacPherson J.A., for the majority, found no legal error. He stressed that: Abreha was a Crown witness; a trial judge's discretion as to the existence and content of a *Vetrovec* warning should be respected; prior to the jury charge, defence counsel accepted the plan to give a *Vetrovec* warning and did not object to instructions given; the jury was told they may believe Abreha's testimony if they found it trustworthy even if no one or nothing else confirmed it. Armstrong J.A. in concurring reasons would have upheld the conviction because there was no reasonable possibility that the verdict would have been different in light of the strength of the Crown's case.

[86] At the end of the evidence on April 10, 2018, there was further discussion about the *Vetrovec* warning to be given for Paul Smith and Nathan Johnson. The judge gave to the parties a copy of his proposed charge and time to review it to provide comments. They did, virtually paragraph by paragraph.

[87] Defence counsel suggested changes to the paragraphs that set out the *Vetrovec* warnings for Paul Smith and Nathan Johnson. The trial judge agreed.

Defence counsel then requested a type of *W.(D.)* instruction in relation to Nathan Johnson's evidence:

> MR. McGUIGAN: So that type of ... that instruction, *W.(D.)* instruction, again having broader application to, for instance, Defence witnesses but also Crown witnesses who are favourable to the Defence and this is a situation where that would apply actually very explicitly because if you go through the steps in *W.(D.)*, as it pertains to the testimony of Nathan Johnson, it would apply without ... without question. If they believed Nathan Johnson then they must find Randy Riley not guilty. The second step being if they do not believe Nathan Johnson but are left in a state of reasonable doubt by his evidence about the guilt of Randy Riley, they must acquit. And further, if they don't believe, you know, the third *W.(D.)* prong, if they disbelieve him, his evidence did not raise a reasonable doubt pertaining to Randy Riley, then they assess the remaining evidence to determine ... if they're left in a reasonable doubt by the remaining evidence or lack of evidence they must acquit.

[88] The trial judge wondered how he could give such an instruction in light of the agreed upon *Vetrovec* warning. Emails were exchanged. The trial judge eventually acceded to provide the requested instruction. After summation, defence counsel expressly agreed with the wording to be used.

[89] With the concurrence of counsel, this is what the judge instructed the jury:

> Now given the circumstances and evidence of Mr. Johnson and Mr. Smith, their evidence must be treated with caution. And experience teaches us that testimony from Crown witnesses of this kind in these circumstances with their background must be approached with the greatest care and caution. I will now continue with my cautionary words regarding these two unsavory witnesses. In order for you to properly grasp what I will say, I have decided to read a similar instruction for each of Paul Smith and Nathan Johnson. And I will start with Mr. Johnson.
>
> **Common sense tells you that in light of these circumstances, there is good reason to look at Nathan Johnson's evidence with the greatest care and caution. You are entitled to rely on Nathan Johnson's evidence, however, even if it is not confirmed by another witness or other evidence. But it is dangerous for you to do so.**
>
> **Accordingly, you should look for some confirmation of Nathan Johnson's evidence from somebody or something other than Nathan Johnson before you rely upon his evidence in deciding whether Crown counsel has proven the case against Mr. Riley beyond a reasonable doubt.**
>
> To be confirmatory of the evidence of Nathan Johnson, evidence must be independent of him. To be independent, confirmatory evidence must come from another witness or witnesses other than Nathan Johnson. Evidence that is tainted

> by connection to Nathan Johnson cannot be confirmatory of his evidence because it lacks the essential quality of independence. To be confirmatory of Nathan Johnson's testimony, the testimony of another witness or other witnesses or other evidence must also tend to show that Nathan Johnson is telling the truth about Mr. Riley's lack of involvement.
>
> **To be confirmatory, the testimony of another witness or other witnesses or other evidence need not itself implicate Nathan Johnson in the commission of the offence, but it must give you the comfort that Nathan Johnson can be trusted when he says that he, Nathan Johnson, committed the offence.**
>
> Nathan Johnson, in the circumstances in which he testified, might well make you wish that somebody or something else confirmed what he said. You may believe Nathan Johnson's testimony, however, if you find it trustworthy, even if no one or nothing else confirms it. When you consider it, however, keep in mind who gave the evidence and the circumstances under which Nathan Johnson testified.
>
> [Emphasis added]

[90] I have highlighted the most troubling aspect of the trial judge's approach to Mr. Johnson's evidence. If that is how it had been left, it would be difficult not to say that the onus of proof had been misplaced. However, that is not how it was left.

[91] The trial judge shortly thereafter added:

> Now on the vital issue in this case raised by Nathan Johnson's evidence that it was he who shot Chad Smith without the knowledge or participation of Randy Riley, you have credibility findings to make. **That is to say, you will have to consider his evidence and the other evidence, including Paul Smith's evidence. If, after considering all the evidence at this trial, you are left in a state of doubt as to Mr. Riley's guilt, you must find him not guilty.**
>
> [Emphasis added]

[92] Later, when the trial judge stressed the Crown's obligation to prove all of the essential elements beyond a reasonable doubt, he added:

> Now the concept of reasonable doubt should remain foremost in your mind. A criminal trial is not a contest of credibility. Be careful not to start to see it as a choice between what Paul Smith said and whatever evidence you find that confirms that on one hand and what Nathan Johnson said and whatever evidence confirms that on the other hand.
>
> It is not a choice between those two things. You should not just decide that one story is more believable than the other. Remember, the Crown has to prove guilt

> beyond a reasonable doubt. That doubt can come from the evidence or lack of evidence led by the Crown. It can come from any other evidence, as well.

[93] Furthermore, even if the trial judge erred in law in giving a *Vetrovec* warning in relation to the evidence of Nathan Johnson, this Court has the power under s. 686(1)(b)(iii) of the *Criminal Code* to dismiss the appeal if the Crown can establish that the error did not cause a substantial wrong or miscarriage of justice.

[94] This provision is commonly called the curative *proviso*. It is to this issue I turn.

CURATIVE PROVISO

[95] The curative *proviso* is only available to "cure" or excuse legal error or procedural irregularity where there has been no substantial wrong, miscarriage of justice or prejudice. Section 686(1) provides:

> 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;
>
> (b) may dismiss the appeal where
>
> (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
>
> (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
>
> (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
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the

> appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[96] The modern interpretation of this power requires the Court to focus on whether there is any reasonable possibility that the verdict would have been different without the error (*R. v. Charlebois*, 2000 SCC 53; *R. v. Bevan*, *supra*). As explained in *R. v. Van*, 2009 SCC 22, absent an element of trial unfairness, the error may be excused if harmless on its face or in its effect, or where the case against the appellant is so strong that a jury would inevitably have convicted.

[97] The burden is on the Crown to establish the *proviso* on a balance of probabilities. Here, the Crown does not suggest that the case against the appellant was overwhelming. It asks for the *proviso* to be invoked because the error was harmless in its effect.

[98] I agree. I do so because of the position of the parties before the jury, the balance of the jury charge, and no properly instructed jury could reasonably believe or be left in reasonable doubt by Nathan Johnson's exculpatory tale. I will touch on each of these.

Position of the parties

[99] Some of the reasons that sap the appellant's argument that the trial judge erred are also relevant to the significance of the impugned direction.

[100] The Crown's summation certainly pointed out to the jury the evidence that contradicted Nathan Johnson's exculpatory tale, but at no time suggested the jury could not rely on Nathan Johnson's evidence unless it was confirmed by other independent evidence. As note by Doherty J.A. in *R. v. Johnson* (2002), 166 C.C.C. (3d) 44 at para. 69, this is a relevant consideration.

[101] Defence counsel also made no reference to the need to find independent confirmatory evidence. He suggested to the jury that:

> In fact, the only real witnesses of consequence here, the only witnesses that realistically the Crown can say even point to Mr. Riley in any capacity whatsoever; Paul Smith, Nathan Johnson. Those are the two most important witnesses in this case, without question.

[102] Counsel then argued that the jury may well be skeptical of portions of Nathan Johnson's evidence. He acknowledged that Johnson was an unsavory witness, but his evidence should raise a reasonable doubt:

> Now before I talk more about Nathan Johnson, say this, the Crown called him as a witness. He was not a Defence witness. They chose to put Nathan Johnson on the witness stand to present evidence, to give evidence to you to help in deciding this case. And despite that, that he was called as a Crown witness, they are asking you to disbelieve him. And, in fact, that has been the focus of the Crown's argument here today, almost the entire focus, Disbelieve Nathan Johnson, Disbelieve Nathan Johnson.
>
> Well, don't lose sight of the task, don't lose sight of what your job is and your important job. This is not the trial of, Is Nathan Johnson a liar? That is not what is happening here. Your ultimate task, Has the Crown proven beyond a reasonable doubt that Randy Riley committed these crimes? That's the task. **Even if you are skeptical of parts of Nathan Johnson's testimony, he is equally an unsavoury witness deserving of such a warning. Even if you are skeptical of parts of it, or all of it, you have to go back to that task. Are you left with a reasonable doubt? If you are, not guilty.**
>
> [Emphasis added]

[103] The point of this is that neither counsel suggested to the jury that it would be dangerous to rely on Johnson's evidence unless they found independent confirmatory evidence. Instead, the focus was where it should be: whether the Crown had proven its case beyond a reasonable doubt.

[104] Furthermore, appellant's counsel not only raised no objection to the approach taken by the trial judge, he was engaged in helping the trial judge craft the jury instructions he now says are critically wrong.

[105] It is of course the responsibility of the trial judge to get the law right (*R. v. MacLeod*, 2014 NSCA 63, aff'd 2014 SCC 76; *R. v. Pickton*, 2010 SCC 32 at para. 27). Agreement of counsel cannot change the law. What is wrong cannot be made right by counsel's silence or even agreement.

[106] A failure to object has long been recognized as relevant, but not determinative on appeal; it can be indicative that the error was not serious (*R. v. Van*, *supra* at para. 43; *R. v. Brooks*, *supra* at para. 99).

[107] Counsel's express agreement is even more relevant to the seriousness or impact of the impugned instruction, particularly where counsel had full opportunity

over many days to consider the instruction now said to be fatal to the conviction. As Doherty J.A. observed in *R. v. Polimac*, 2010 ONCA 346:

> [96] … It is hardly accurate to describe the position of trial counsel who makes no objection after being given a full opportunity to vet and comment on the jury instructions before they are delivered as a "failure to object". **Counsel's duty to assist the court in fulfilling its obligation to properly instruct the jury, referred to by Fish J. in *R. v. Khela*, [2009] 1 S.C.R. 104 at para. 49, takes on added significance where counsel has been given a full copy of the proposed instructions and an ample opportunity to vet them, and has engaged in a detailed pre-trial dialogue with the trial judge. In those circumstances, counsel's position at trial becomes very important when evaluating complaints, raised for the first time on appeal, that matters crucial to the defence were not properly addressed by the trial judge in her instructions.**
>
> [Emphasis added]

Balance of the charge

[108] I have quoted above the judge's instructions that twice emphasized that the fundamental question was whether they had a reasonable doubt as to the appellant's guilt. These instructions correctly guided the jury on how to decide the case (*R. v. Shand, supra* at para. 221).

No prejudice in the circumstances

[109] The evidence of Nathan Johnson was like a Hail Mary pass with no one in the end zone to catch it. To say it was unsatisfactory would be kind. A jury would have to suspend all belief for it to raise a reasonable doubt. Consider:

(a) Nathan Johnson was an unsavoury witness. He had convictions for attempted robbery, armed robbery, assaulting and resisting peace officers, drug possession and breach of recognizance;

(b) Johnson had been tried and convicted of first degree murder of Chad Smith, where he declined to testify to even try to refute the version of events he had given to Kaitlin Fuller which inculpated himself and the appellant in the first degree murder of Chad Smith;

(c) He claimed to be a drug dealer with Chad Smith as his client, yet Johnson had no cell phone;

(d) Johnson claimed that he kept a sawed-off shotgun stowed in the woods for protection due to his claimed drug business;

(e) Johnson said that he alone had called Chad Smith, first to Mr. Smith's cell phone to try to reach him to collect a drug debt. An independent eyewitness described two people at the Aliant pay phone from which the fake pizza delivery order was placed. More importantly, objective independent evidence demonstrated no such call was made;

(f) Johnson claimed that he had spent the afternoon with the appellant, only going to another close-by Dartmouth home where they played cards for "hours" and did not leave until it was dark; yet the Crown expert demonstrated that the appellant's cell phone (which Johnson admitted he had used throughout the day) went to a variety of locations, including an area in close proximity to where Paul Smith testified he had driven Johnson and the appellant to pick up the shotgun;

(g) Johnson explained that he had not told anyone before the appellant's trial he had shot the victim because he would have had to admit he had murdered the victim. However, his trial testimony was in fact not just exculpatory of the appellant, Johnson repeatedly claimed the shooting was accidental;

(h) Paul Smith's testimony, which was almost completely at odds with Nathan Johnson's exculpatory tale, was corroborated by independent objective evidence.

[110] I agree with the Crown that no reasonable jury would have believed Johnson or would have had a reasonable doubt based on his evidence.

[111] I would therefore not give effect to this ground of appeal.

THE BALANCE OF THE GROUNDS

[112] The appellant also complains that: the trial judge erred by not instructing the jury on the essential elements of manslaughter; the trial judge erred by not relating the evidence to the issues; and, the verdict is unreasonable or not supported by the evidence. I will address each briefly.

[113] With respect to manslaughter, the appellant acknowledges that the facts of this case do not present a clear or obvious path to manslaughter.

[114] If the evidence of Nathan Johnson were believed by the jury or raised a reasonable doubt, the appellant was not guilty of any offence. On the other hand,

if the jury accepted Paul Smith's evidence, confirmed in part by independent objective evidence, the appellant was either a principal or active party to the murder of Chad Smith.

[115] The lack of objection by counsel at trial, while not determinative, is telling. I would not give effect to this ground of appeal.

[116] I agree with the appellant that more could have been done to relate the evidence to the issues, but that is not the test. The trial judge need not deliver a perfect jury charge. Adequacy is what governs. The charge must adequately equip the jury to carry out its adjudicative role.

[117] A pragmatic functional approach is used to measure claims of inadequacy, testing the instructions as a whole against their ability to fulfil their intended purposes (*R. v. Huard*, 2013 ONCA 650 at paras. 64-74; *R. v. Melvin*, 2016 NSCA 52 at para. 31).

[118] Justice Watt provided a useful précis of the principles in *R. v. Cudjoe*, 2009 ONCA 543, as follows:

> 152 The role of the trial judge in instructing a jury generally, and in reviewing and relating the evidence to the issues in particular, is to decant and simplify. The trial judge should not simply leave the evidence in bulk for the jury, assigning to them responsibility for determining the relationship between the evidence and the issues that arise for their decision: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 13; *R. v. Royz*, 2009 SCC 13, at para. 2. The extent to which the evidence must be reviewed to fulfill the obligation of the trial judge will depend on the circumstances of individual cases: *Daley* at para. 57; *Royz* at para. 3.
>
> 153 Any assessment of the validity of a complaint about an inadequate review and relation of the evidence to the issues in a particular case should keep in mind the considerable discretion reposed in trial judges to choose the method of reviewing and relating the evidence to the issues they consider best suited to the circumstances of the case being tried: *R. v. John*, [1971] S.C.R. 781, at pp. 792-793.

[119] The defence had ample opportunity to comment on the approach set out in the trial judge's proposed jury charge. While not determinative, it is far more significant than merely a failure to object. As observed by the Ontario Court of Appeal in *R. v. Huard*, *supra*:

> 74 Fourth, while failure to object to a jury charge on a ground said later to amount to error is not dispositive on appeal, the failure to object affords some

> evidence that trial counsel did not consider the charge incomplete or unfair as later alleged: *Jacquard*, at paras. 35-37. **It is all the more so when counsel has had extensive opportunity to review drafts of proposed final instructions and ample time to offer suggestions for inclusions, deletions, and improvements to ensure appreciation of the case advanced.**
>
> [Emphasis added]

[120] In these circumstances, the trial judge thoroughly set out the evidence relevant to the credibility concerns that the defence relied upon. I would not give effect to this ground of appeal.

[121] 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).

[122] 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 appeal court is not to act as a "thirteenth juror" but defer to the fact finding role of the jury. Arbour J., writing on behalf of the court in *Biniaris* explained:

> [40] When an appellate court arrives at that conclusion, it does not act as a "thirteenth juror", nor is it "usurping the function of the jury". In concluding that no properly instructed jury acting judicially could have convicted, the reviewing court inevitably is concluding that these particular jurors who convicted must not have been acting judicially. In that context, acting 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.

[123] This caution was repeated more recently in *R. v. W.H.*, 2013 SCC 22:

> [2] Of course, a jury's guilty verdict based on the jury's assessment of witness credibility is not immune from appellate review for reasonableness. However, the reviewing court must treat the verdict with great deference. The court must ask itself whether the jury's verdict is supportable on *any* reasonable view of the

> evidence and whether proper judicial fact-finding applied to the evidence *precludes* the conclusion reached by the jury. Here, the Court of Appeal did not follow this approach. It asked itself instead whether an experienced trial judge could give adequate reasons to explain the finding of guilt and, having answered that question in the negative, found the verdict unreasonable. In my respectful view, the Court of Appeal applied the wrong legal test and reached the wrong conclusion.
>
> [Emphasis in original]

[124] The appellant acknowledges that a reasonable jury could reject Nathan Johnson's evidence. However, he says that there were problems with the credibility and reliability of Paul Smith's testimony. Those problems were ably argued to the jury and pointed out by the trial judge. At the end of the day, it was up to the jury to accept some, all, or none of Smith's evidence.

[125] There was ample evidence on which a reasonable jury acting judicially could find the appellant guilty of first or second degree murder. The forensic evidence demonstrated that the victim was shot at close range by a shotgun blast to his chest after being lured to the location by a phony pizza order.

[126] According to Paul Smith: the appellant had a self-confessed motive to harm the victim; he drove the appellant and Nathan Johnson in order for the appellant to get "a thing" (which he understood to be a gun); the appellant came limping out of the apartment building with something down his right pant leg, wearing "doctor gloves" and gave a pair of gloves to Johnson; the appellant said that he had been beaten up by a white guy years earlier and he "had to take care of it"; after the murder, the appellant told Paul Smith that he "had taken care of it".

[127] There was independent evidence that tended to confirm various aspects of Paul Smith's evidence. Without being exhaustive: the wireless network engineer's testimony about the movements of the appellant's cell phone; the presence of two individuals at the approximate time of the phony pizza order; and, the discovery of two pairs of latex gloves in the area where the shotgun was discovered.

[128] The jury obviously had a doubt on the issues of planning and deliberation. That doubt does not equate to a conclusion the verdict of second degree murder is unreasonable or unsupported by the evidence.

[129] I would not give effect to this ground of appeal and would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Bourgeois, J.A.

Dissenting Reasons for Judgment: (Scanlan, J.A.)

Introduction:

[130] I refer to the reasons of my colleague and say that it is not necessary to repeat his recital of the facts although in my analysis below I will refer to or expand upon facts as I feel necessary.

[131] I will summarize my reasons why I disagree with my colleague's conclusion that this appeal should be dismissed. I would have set aside the convictions on both counts and ordered a new trial on a single charge of second degree murder, and a single count under s. 92(1) of the *Criminal Code*.

1. The *Vetrovec* instruction was developed as a jury instruction in an effort to decrease the chance of wrongful conviction. That instruction has been viewed as having a real impact on how juries weigh evidence of unsavoury Crown witnesses. The importance of giving a *Vetrovec* instruction, even though it has been described as discretionary, can be measured by the number of convictions that have been set aside when a *Vetrovec* instruction has not been given. Convictions have also been set aside when a *Vetrovec* instruction has been given, and it should not have been. This is one such case.
2. Those who crafted the *Vetrovec* instruction would likely give pause if they were to now find that a rule intended to limit the risk of wrongful conviction was used in a way that may well have increased the risk of wrongful conviction. The jury, in this case, had been instructed that it should look for confirmatory evidence related to the testimony of Mr.

Johnson, and that it would be dangerous to rely upon his evidence if there was no confirmatory evidence. That inappropriately discounts the weight to be given to his evidence in the absence of corroboration. The problem stems from the fact that Mr. Johnson's evidence was exculpatory and it should not have been subjected to a *Vetrovec* instruction.

3. I do not accept that the mere fact a witness has been called by the prosecution determines whether a *Vetrovec* instruction should be given. The necessity of the instruction is to be determined based upon the nature of the evidence, not who called the witness. In this case the prosecution called the witness, but the evidence of Nathan Johnson was exculpatory. He said he killed Mr. Smith during an attempt to collect on a drug debt.

4. All participants at trial: defence counsel, Crown counsel, and the trial judge, mistakenly believed that a *Vetrovec* instruction was required in relation to Nathan Johnson even though he was an exculpatory witness. I am not convinced that the fact defence counsel at trial agreed, even encouraged the instruction be given, is sufficient reason to deny the appeal in this case. I will discuss this in greater detail below.

5. My colleague says the Crown would not argue that the evidence against the appellant was overwhelming (see ¶97 above). With the greatest respect, I suggest that is a generous descriptor as to the strength of the prosecution's case. The removal of the *Vetrovec* instruction as related to Mr. Johnson's evidence may well have caused the jury to attribute more weight to his evidence.

6. I cannot agree with my colleague that the error was harmless. It is impossible to determine how the jury determined the guilt of the accused. There is no written decision to allow us to discern the jury's path of reasoning.

Issues

[132] Although a number of issues were raised in the Notice of Appeal, I am satisfied that a consideration of three questions is dispositive of this appeal:

1. Was there an error in the instruction to the jury in relation to the evidence of Nathan Johnson?

2. Should the convictions be set aside?
3. If so, what charges should the appellant face on retrial?

Analysis

[133] Whether there was an error in the jury instruction relating to how the jury should weigh the evidence of Nathan Johnson is a legal issue. Instructions to a jury on applicable law must be correct. In an appellate assessment of the instructions to a jury the standard of review is one of correctness (*R. v. Kelsie*, 2017 NSCA 89, ¶56, (overturned in part, 2019 SCC 17); *R. v. Miller*, 2009 NSCA 71, ¶14).

[134] The law distinguishes between a purely exculpatory, inculpatory and mixed witness when it comes to the instruction required. I am satisfied that Nathan Johnson was a purely exculpatory witness and that the law is clear in saying that a *Vetrovec* instruction should not have been given in relation to Mr. Johnson as an exculpatory witness. Even if I were wrong, and Mr. Johnson were described as a mixed witness, the jury instruction did not identify the exculpatory versus inculpatory evidence and explain the proper way to apply *Vetrovec* to the different types of evidence. The instruction in relation to the evidence of Nathan Johnson was an error in law.

[135] The issue of whether there was an error in the instruction is not dispositive of the appeal as there will be consideration as to the seriousness of any error and, related to the issue of trial fairness, an assessment as to the potential impact of the error. In that regard I consider the trial and instructions as a whole.

[136] It is not for this Court to weigh the evidence on appeal. I consider the evidence only to the extent necessary to frame the issues on appeal. Such an examination leads me to conclude that the improper instruction may well have impacted the deliberations in a meaningful way, possibly having influenced the verdict.

[137] The *Vetrovec* instruction was developed in recognition of the pitfalls associated with evidence coming from "unsavoury" witnesses. When a *Vetrovec* instruction is applied to exculpatory witnesses it places an undue burden on an accused. It may even shift the burden to an accused to present confirmatory evidence when there is no such obligation. In the context of Mr. Johnson's evidence he said, he alone committed the murder. In such circumstances the

appellant's ability to present confirmatory evidence may well have been limited or in fact impossible. Some aspect of that assertion must be correct for Nathan Johnson is serving a life sentence for the murder of Chad Smith. The objective of a *Vetrovec* instruction is to put in place safeguards to protect against wrongful convictions, not to shift the burden of proof to an accused when it comes to an unsavoury exculpatory witness.

[138] At law there is a difference between an exculpatory verses inculpatory witness when it comes to *Vetrovec* instruction. The instruction should not be given in relation to exculpatory evidence. The trial judge referred to the fact that Mr. Johnson was a Crown witness, perhaps implying that was a determining factor in his decision to instruct the jury as he did. Who calls a witness is not determinative of, nor in fact does it have any bearing on, whether a *Vetrovec* instruction should be given. It is the nature of their evidence (exculpatory, inculpatory, or mixed) that determines whether such a instruction should be given. As I note below, even if a witness is a mixed witness, a trial judge has a duty to separate the inculpatory from the exculpatory evidence and explain the different application of the special instruction as it relates to the different types of evidence.

[139] The trial judge gave a full throttle *Vetrovec* instruction in relation to Nathan Johnson's evidence. It would appear that none of the lawyers, nor the trial judge, appreciated the distinction at law between inculpatory versus exculpatory witnesses. My colleague places a lot of emphasis upon defence counsel agreeing with, and even encouraging the trial judge to give the *Vetrovec* instruction. The accused's counsel, who is also counsel on appeal, admitted that he did not know the law on that issue. Apparently Crown counsel didn't know the law either. If they did, they would have alerted the trial judge as to the error. An accused does not forfeit his right to a trial, based on the rules of evidence as provided by law, simply because his counsel did not know the law. The assessment of counsel's role is more complex than that. I respectfully suggest, as the potential that the error may have affected the verdict increases, appeal courts should focus less on the role of defence counsel. At the end of the day, the objective is to ensure the safety of the verdict, not to saddle appellants with the mistakes of trial counsel.

[140] I do not suggest that every error in a jury instruction results in a new trial. Counsels' role in how the jury instruction was crafted weighs heavily in this case but in the end it is for the trial judge to get it right. In this case, it was an error that may have made a substantial difference as to how much weight the jury attributed to the evidence of Nathan Johnson.

[141] A number of cases have dealt with situations where a *Vetrovec* instruction had been given or applied to an exculpatory witness. I have already referred to the purpose of the instruction. I add, it is intended to ensure that a jury does not place undue weight on the testimony of an unsavoury witness to convict an accused. This is in keeping with the law striving to protect an accused against wrongful conviction. It is consistent with the burden on the Crown, to prove a charge beyond a reasonable doubt (see: *R. v. Khela*, 2009 SCC 4, ¶12).

[142] Several cases have highlighted the fact that the *Vetrovec* instruction is only to be given as it relates to an inculpatory witness (*R. v. Tzimopoulos*, [1986] O.J. No. 817 (C.A.), ¶105; *R. v. Hoilett*, [1991] O.J. No. 715 (C.A.), ¶7; *R. v. Chenier*, [2006] O.J. No. 489 (C.A.), ¶45; and *R. v. Vassel*, 2018 ONCA 721, ¶156).

[143] A consequence of the erroneous instruction is that it can transfer the burden of proof to the accused requiring him/her to produce evidence that corroborates the exculpatory witness before it can be placed on the same footing as other witnesses. In *Chenier* Blair J.A. said that such an error:

> [49] … (i)s contrary to the requirements of *W. (D.)*. Defence evidence need only raise a reasonable doubt. In spite of this relationship between *Vetrovec* and *W. (D.)* in the context of defence evidence, however, the purpose of a *Vetrovec* warning and the purpose of a *W.(D.)* instruction are quite different. … [*W. (D.)*] is designed to help equip the jury to assess whether the Crown has met its onus of proving the case beyond a reasonable doubt on all the evidence, once the reliability or non-reliability of the defence evidence had been determined. Thus, where the charge goes beyond what is permissible … it is unlikely that coupling such direction with a specific *W.(D.)*-like directive will mitigate the erroneous *Vetrovec* warning …

[144] Here, as in *Chenier*, the *W.(D.)* instruction is unlikely to have mitigated the effect of the erroneous *Vetrovec* instruction. Here, the jury was instructed to look for confirmatory evidence as it related to Nathan Johnson's evidence. Absent confirmation, the jury was instructed to put his evidence into a special bin worthy of different treatment than the rest of the evidence at trial (other than the inculpatory evidence of Paul Smith). In the words of the trial judge:

> …you should look for some confirmation of Nathan Johnson's evidence from somebody or something other than Nathan Johnson **before you rely upon his evidence in deciding whether Crown counsel has proven the case against Mr. Riley beyond a reasonable doubt**.
>
> [Emphasis added]

[145] In this case, the jury should have been instructed that they could consider the issue of credibility, taking into account the unsavoury character of Mr. Johnson, but that the law does not require that the jury look for confirmation. The *W.(D.)* instruction could then clearly set out the proper way for the jury to assess whether the Crown had proven the guilt of the appellant beyond a reasonable doubt.

[146] In jury trials the absence of reasons can make it impossible to ascertain how the error may have affected the jury in its deliberations; whether it impacted the verdicts. One could hardly imagine a more crucial witness for the defence than Mr. Johnson. He was convicted for murdering Chad Smith. He said that the murder occurred while he was attempting to collect a drug debt. Mr. Johnson now takes full and sole responsibility for the murder, saying the appellant did not commit the murder. In an agreed statement of facts there was an admission that in a search of the victim's car, after his death, the police found a small amount of marijuana, a digital scale, dime bags and a firearm. This is consistent with the evidence of Nathan Johnson saying he was attempting to collect on a drug debt.

[147] The evidence of Mr. Paul Smith and Ms. Fuller was to the effect that the murder was revenge for some non-descript insult or assault by the victim upon the appellant a number of years ago. Mr. Johnson admitted that he told this to Ms. Fuller in an attempt to deflect blame from himself.

[148] On appeal there can be only a limited weighing of evidence. I consider the evidence only to the extent that I ask of its relevance to the legal issues. It is not for me, on appeal, to attempt to weigh that evidence in an attempt to determine whether, without a *Vetrovec* instruction in relation to Mr. Johnson, there would have been a different verdict. I am satisfied that his evidence was of vital importance to the issue of guilt or innocence and it should have been considered without the application of the *Vetrovec* instructions.

[149] Nathan Johnson was called by the prosecution. He said he committed the murder but admitted that he had tried to deflect the blame from himself to others by spreading false rumours as to who killed the victim after the incident. As noted, he said the murder occurred in the context of him attempting to scare the victim into paying a drug debt. He said it had nothing to do with some vague insult or assault on the appellant that had supposedly occurred some years earlier.

[150] A main prosecution witness was Paul Smith. He had a lengthy criminal record worthy of a *Vetrovec* instruction. He gave a statement to the police only after he had been told "… you could be arrested or you could be a witness." and he

had, in fact, been arrested. Paul Smith said that on July 23, 2013 he met with Steve Fairburn, a police officer, who told him what the police thought had happened on the day of the murder. He had not given any statement to police prior to July 2013. Recall that the murder occurred on October 23rd, 2010.

[151] One day later, July 24, 2013, Mr. Smith was arrested in relation to the murder of Chad Smith. The police suggested that he had made the call to lure the victim to the location of the murder. He was not charged for the murder, but said he told the police about what occurred. What he said was very similar to what the police officer had told him the day before, only Smith said he did not make any phone call. At no time did Paul Smith say he witnessed the murder. It should be for a properly instructed jury to consider the evidence of Mr. Smith in light of the evidence of Mr. Johnson, without being told that they should look for confirmation of Mr. Johnson's evidence or that it was dangerous to accept his evidence in the absence of confirmation.

[152] At ¶30 and ¶60 of my colleague's reasons he referenced the evidence of Kaitlin Fuller who testified before the jury and also within a *voir dire*. While it is not for this Court to assess the credibility of witnesses, the comments of the trial judge as to the reliability of Ms. Fuller's evidence on the *voir dire* are noteworthy. I refer to excerpts from the trial judge's decision on the *Bradshaw* application (reported as 2018 NSSC 95), where he said in the context of the *Bradshaw* application that he had concerns about the "trustworthiness" of Ms. Fuller's testimony listing a number of concerns:

> [19] I would add that even if it could somehow be demonstrated that Ms. Fuller's evidence is necessary, on the basis of her *voir dire* testimony, I have numerous reliability concerns.
>
> […]
>
> [21] Unlike the trial judge in *Johnston*, given her *voir dire* evidence, I have a host of concerns regarding the trustworthiness of Ms. Fuller's testimony as to what she says she was told by Nathan Johnson seven and a half years ago, including:
>
> - She has no direct knowledge of the murder (so she cannot verify what she was told by Nathan Johnson)
> - She was given transcripts to prepare but, "*I didn't have a chance to really go over...*"
> - She made no notes or journal entries
> - She did not record the conversation

- She says she was never told the name of the victim
- She cannot remember if she was told the name of the pizza shop
- At first she told police she did not know who made the call to the pizza shop. In a subsequent statement she did: "*there were a lot of questions, I kept remembering things I couldn't remember at first*"
- Asked why she did not include Paul Smith's last name when she told police he took Mr. Johnson and Mr. Riley to get a gun: "*I was young and scared and didn't want to bring in other people's names*"
- She did not go to police right away (to provide her initial statement) but, rather, the day after a "*major fight*" with Mr. Johnson (six days after the murder), "*in a panic*"
- The relationship with Mr. Johnson involved "*a lot of lying going on*"; for example, she was 17 but told Mr. Johnson she was older
- It was not a happy / healthy relationship
- Mr. Johnson could have been smoking weed when he gave her his statement, she's not sure
- She was certain a crowbar was used years before to hit Mr. Riley; however, in her October 29th statement she said hammer and when asked about this, she replied: "*ya, I know I said hammer, it was just a mistake". "I do believe I corrected myself in my other statement and said crowbar*"
- In testimony at Nathan Johnson's trial she said 'hammer' and when this was put to her she said, "*hammer is wrong, it is crowbar*"
- In her statements of November 2, 3 and 5 she said it was a hammer, to which she responded: "*it's been a really long time. Maybe it was a hammer, maybe a crowbar, I wasn't there...*"
- When it was put to her that Nathan Johnson told her they saw the pizza guy when parked in front of the shop, she responded: "*I don't know the exact words*" and agreed she was "*piecing things together*"
- When it was suggested to Ms. Fuller that whereas she said in her direct testimony that Mr. Riley was waiting by the stairs, she was shown her October 29th statement and then agreed, "*Nathan did not tell me that" and then said, "I may have made some mistakes, like that one*"
- Toward the end of her cross-examination, Ms. Fuller acknowledged: "A lot of things came to me over time". "*I honestly can't remember that far back". "Some things in my mind have changed over time*"

[22] Accordingly, even in the event the Crown could make a case for necessity, I would have grave concerns about permitting Ms. Fuller to give evidence before the jury about Mr. Johnson's oral statement. I say this in the context of my

reliability concerns, particularly in light of what I would characterize as the Supreme Court of Canada's new rule set out in para. 44 of *Bradshaw*:

> 44 In my view, the rationale for the rule against hearsay and the jurisprudence of this Court make clear that not all evidence that corroborates the declarant's credibility, the accused's guilt, or one party's theory of the case, is of assistance in assessing threshold reliability. A trial judge can only rely on corroborative evidence to establish threshold reliability if it shows, when considered as a whole and in the circumstances of the case, that the only likely explanation for the hearsay statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement. If the hearsay dangers relate to the declarant's sincerity, truthfulness will be the issue. If the hearsay danger is memory, narration, or perception, accuracy will be the issue.

[23] In *Johnston*, Justice Steel nicely summarizes how corroborative evidence comes into play by drawing on *Bradshaw* and a recent case of (now Justice) Judge Derrick:

> 104 In *Bradshaw*, the corroborative evidence relied on by the judge, i.e., the accurate description of the murders and the weather on the night in question, did not actually implicate Bradshaw in the murders. Those corroborative details were equally consistent with the possibility that the declarant was lying about Bradshaw's participation.
>
> 105 Again, in the case of *R v W(N)*, 2017 NSPC 33, the Court declined to admit a videotaped statement for the truth of its contents. Judge Derrick (as she then was) held that the evidence could have been corroborative of the truthfulness of the witness's statement, but it could also have been equally consistent with other hypotheses including the desire of the witness to go home, something which he had indicated multiple times throughout the interrogation (see para 31).

[153] Clearly the trial judge had an opportunity to observe Ms. Fuller and assess the reliability of her evidence. His assessment that she was not reliable does not in any way reassure me that the jury was not impacted by the erroneous *Vetrovec* instruction in relation to Mr. Johnson.

[154] The *Vetrovec* instruction was part of a mid-trial instruction and repeated in relation to Mr. Johnson in the final jury instructions. The excerpts below show that it was given special emphasis by the trial judge:

> Now I want to talk to you about the unsavoury character warning that I touched on when I gave you mid-trial instructions earlier on. Paul Smith and Nathan Johnson testified for the Crown. There is a special instruction that has to do with their evidence. **It is an instruction that you must keep foremost in your mind**

> when you are considering how much or little you will believe of or rely upon their evidence in making your decision on this case.
>
> […]
>
> Now given the circumstances and evidence of Mr. Johnson and Mr. Smith, their evidence must be treated with caution. And experience teaches us that testimony from Crown witnesses of this kind in these circumstances with their background must be approached with the greatest care and caution. I will now continue with my cautionary words regarding these two unsavoury witnesses. In order for you to properly grasp what I will say, I have decided to read a similar instruction for each of Paul Smith and Nathan Johnson. And I will start with Mr. Johnson.
>
> Common sense tells you that in light of these circumstances, there is good reason to look at Nathan Johnson's evidence with the greatest care and caution. You are entitled to rely on Nathan Johnson's evidence, however, even if it is not confirmed by another witness or other evidence. **But it is dangerous for you to do so.**
>
> Accordingly, you should look for some confirmation of Nathan Johnson's evidence from somebody or something other than Nathan Johnson before you rely upon his evidence in deciding whether Crown counsel has proven the case against Mr. Riley beyond a reasonable doubt.
>
> To be confirmatory of the evidence of Nathan Johnson, evidence must be independent of him. To be independent, confirmatory evidence must come from another witness or witnesses other than Nathan Johnson. Evidence that is tainted by connection to Nathan Johnson cannot be confirmatory of his evidence because it lacks the essential quality of independence. To be confirmatory of Nathan Johnson's testimony, the testimony of another witness or other witnesses or other evidence must also tend to show that Nathan Johnson is telling the truth about Mr. Riley's lack of involvement.

[Emphasis added]

[155] My colleague correctly points out that the instruction read as a whole still advises the jury that it is entitled to rely upon the evidence of Mr. Johnson even if there is no confirmatory evidence. I am not convinced that is enough in the circumstances of this case. Recall, as I have quoted above, the trial judge said of the *Vetrovec* instruction "**It is an instruction that you must keep foremost in your mind** when you are considering how much or little you will believe or rely upon their evidence in making your decision on this case." Later he said:

> You are entitled to rely on Nathan Johnson's evidence, however, even if it is not confirmed by another witness or other evidence. But it is **dangerous** for you to do so.

[Emphasis added]

[156] In the end I am satisfied the incorrect legal instruction may well have impacted the jury's assessment of the exculpatory evidence. It is not possible to precisely gauge the impact the erroneous instruction had in this case. I turn now to whether the role of counsel is such that we should ignore the error because of the role defence counsel played in the crafting of the jury instruction.

The role of counsel at trial and does it affect the disposition of the appeal?

[157] In this case, neither Crown or defence counsel objected to the jury instruction. Counsel for the appellant was also the defendant's trial counsel. He explained on appeal that his failure to object was an error in his understanding of the law. I take no comfort from the fact that appellant counsel was also trial counsel for the accused. There is no application here for ineffective counsel. That said, I am not convinced that an error by trial counsel should alone be the reason this appeal should be dismissed. The fact that trial counsel erred in his understanding of the law does not automatically result in a forfeiture of an accused's right to a trial in accordance with the applicable rules.

[158] It was incumbent upon all of the participants, defence counsel, the Crown and the trial judge, to ensure that the jury was properly instructed on the law. If the judge erred in the instruction, **both Crown and defence** had an opportunity and duty to highlight the error. There is no explanation from the respondent as to why Crown counsel did not point out the error in the instruction. The most likely explanation is that none of the participants appreciated that there was an error. As I mentioned, at the end of the day the responsibility to properly instruct the jury falls upon the trial judge (*R. v. MacLeod* and *R. v. Pickton*). As part of his instructions, the trial judge told the jury they must take their instructions on the law from him.

[159] In *R. v. Calnen*, 2019 SCC 6, the Court discussed the strategic reasons as to why defence counsel may not object to portions of a jury charge. Failure to object for strategic reasons can speak to the seriousness (or lack of seriousness) of the mistake. If trial counsel embraces a strategy that in the end may disadvantage the

client, the client may well end up bearing the consequence of that strategic choice. In *Calnen*, Justice Moldaver said:

> [38] In my respectful view, defence counsel's failure to object to the absence of a limiting instruction against general propensity reasoning of the kind my colleague now says was essential speaks not only to "the overall satisfactoriness of the jury charge on this issue", but also to "the gravity of any omissions in the eyes of defence counsel"; it may further be taken as an indication that defence counsel felt such an instruction would not have been in his client's interests: *R. v. Kociuk*, 2011 MBCA 85, 278 C.C.C. (3d) 1, at para. 86, cited with approval by Rothstein J. in *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 66; see also *R. v. R.T.H.*, 2007 NSCA 18, 251 N.S.R. (2d) 236, at paras. 98-99, per Cromwell J.A. (as he then was). As Bastarache J. explained in *Daley*, at para. 58:
>
> > … it is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: "In my opinion, defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection."
>
> (See also *Thériault v. The Queen*, [1981] 1 S.C.R. 336, at pp. 343-44, where Dickson J. (as he then was) wrote: "Although by no means determinative, it is not irrelevant that counsel for the accused did not comment, at the conclusion of the charge, upon the failure of the trial judge to direct the attention of the jury to the evidence . . . .")

[160] In *Calnen*, defence counsel's failure to object was at the forefront, or at least a consideration on appeal.

[161] During this appeal I asked all counsel to advise as to whether there could have been any tactical advantage to the accused to allow the trial judge to erroneously give the *Vetrovec* instruction in relation to Mr. Johnson's evidence. Like me, they could not identify any discernable advantage to the accused in having the *Vetrovec* instruction as it related to Mr. Johnson.

[162] Here, the error in the instruction could only have misled the jury in terms of how they should weigh Mr. Johnson's evidence. Although called by the Crown at trial, Mr. Johnson's evidence was clearly exculpatory. The jury was instructed to look for confirmation because Mr. Johnson was an unsavoury witnesses. The effect of that instruction was to say that in the absence of confirmatory evidence it

was dangerous to acquit the appellant based on the evidence of Mr. Johnson. That is not the law.

[163] I refer to the decision of Doherty, J.A. in a unanimous decision in *R. v. Rowe*, 2011 ONCA 753. In that case, the Court was considering a matter where there was an unsavoury witness. A witness, in parts of his evidence, implicated the appellant and in other parts exculpated the appellant. The Court described the witness, for the purpose of *Vetrovec*, "a mixed witness". Justice Doherty referred to *R. v. Gelle*, 2009 ONCA 262; *R. v. Tran*, 2010 ONCA 471; and *R. v. Shand*, 2011 ONCA 5 as indicating that a *Vetrovec* caution will often be appropriate in respect of a "mixed witness" saying:

> [33] … The specifics of that caution and the format of the instruction are left very much in the discretion of the trial judge. The jury instruction will be sufficient if, considered in its entirety, that instruction makes clear to the jury both that it is dangerous to rely on the inculpatory portion of the *Vetrovec* witness's evidence without confirmatory support, and that the jury must acquit if the exculpatory portions of that witness's evidence, alone or taken in combination with the rest of the evidence, leave the jury with a reasonable doubt. …
>
> [34] Where, as in this case, the inculpatory portions of the witness's testimony are easily demarcated from the exculpatory portions, the best course is to specifically refer the jury to the exculpatory portions and to instruct the jury that with respect to those portions, the question is not whether the evidence is confirmed by other evidence, but rather whether the evidence alone or in combination with the other evidence heard in the case leaves the jury with a reasonable doubt.
>
> […]
>
> [42] The *Vetrovec* instruction with respect to Andrade's evidence did not make clear that the search for confirmatory evidence was properly directed at the inculpatory portions of Andrade's testimony and that the appellant should be acquitted if Andrade's exculpatory evidence, considered in the context of the entirety of the evidence, left jurors with a reasonable doubt. To the contrary, I read the *Vetrovec* instruction as requiring the jury to approach all facets of Andrade's evidence with caution and to search for confirmatory evidence of Andrade's testimony before relying on any part of it. That direction constitutes an error in law.

[164] That case highlights the importance of a trial judge differentiating between inculpatory and exculpatory evidence from a single witness. It also highlights the seriousness of giving a *Vetrovec* instruction in relation to an exculpatory witness. Here, there were two different witnesses and because they were both unsavoury,

the trial judge lumped them together, giving a *Vetrovec* instruction for both. He failed to in any way separate all or even part of Mr. Johnson's exculpatory evidence.

[165] The jury should not have been instructed to look for confirmatory evidence in relation to an exculpatory witness. They should not have been told that it was dangerous to accept his evidence. To do so shifts the burden of proof to an accused person. I reiterate the comments of Blair J.A. in *Chenier***:**

> … it is unlikely that coupling such direction with a specific **W (D.)**-like direction will mitigate against the erroneous **Vetrovec** warning…

It is not for this Court to weigh the evidence now on appeal and say it was capable of belief or not, and on that basis accept the verdict. In paragraph 29 above my colleague referenced the evidence of Nathan Johnson as "the fanciful exculpatory tale woven by Nathan Johnson." I resile from making such finding of fact as that is not my role on appeal. I limit myself to considering the evidence at face value and ask, if it was properly considered, in accordance with the law, could it have made a difference in the verdict. To that my answer is yes. It should be for a properly instructed jury to decide if it was a 'fanciful tale', or evidence which may have, when considered with the evidence as a whole, left the jury with a reasonable doubt.

[166] As stated, it is impossible to determine how that misdirection may have affected the jury deliberations. Mr. Johnson, however, took full responsibility for the murder of Chad Smith, professing the innocence of the appellant. The evidence was too critical to the issue of guilt or innocence to now guess at how the misdirection may have impacted the jury's verdict. The error in the jury instruction is serious enough to warrant a new trial.

[167] I agree with my colleague that the evidence did not present a reasonable path to a verdict of manslaughter and the trial judge did not err in not instructing the jury in that regard.

[168] As to the appellant's argument that the verdict is unreasonable or not supported by the evidence, I am satisfied that there is evidence upon which the verdict could have been rendered. That verdict however is not a safe verdict in light of the erroneous *Vetrovec* instruction. The verdict is very much dependent upon how the jury weighs the evidence once properly instructed. The dichotomy

of the evidence would not support a finding on appeal that an acquittal nor conviction is warranted at this stage. In my view a new trial is the only option.

[169] Other than the issue of the *Vetrovec* instruction, I agree with my colleague that there are no other grounds of appeal that would justify setting aside the conviction.

[170] In saying that a new trial should be ordered I say as well, I am not convinced that this is an appropriate case in which to apply the curative provisions of section 686(1) (b) (iii) of the *Criminal Code*. As noted in *R. v. D.M.*, 2007 NSCA 80, ¶35, for the Crown to rely on that *proviso*, it must show that without the legal error the verdict would have been the same. In this case there was a significant error in relation to a pivotal witness. I am not convinced to any degree of certainty that the verdict would have been the same with a properly instructed jury.

Disposition

[171] In this case a retrial on the original charge of first degree murder is not an option. The Crown appropriately concedes that, in the absence of a cross-appeal, this Court can only order a retrial on second degree murder, not first degree murder (see: *R. v. Magoon*, 2018 SCC 14, ¶58, and *R. v. Guillemette,* [1986] 1 S.C.R. 356). In *R. v. Sullivan*, [1991] 1 S.C.R. 489 the Court stated:

> This Court has previously held that a court of appeal has no jurisdiction to disturb a verdict of acquittal unless there has been an appeal by the Crown from that acquittal. (page 504).

[172] The convictions on both counts in the Indictment should be quashed and the appellant should be retried on second degree murder as well as the single count under section 92(1).

Scanlan, J.A.