

NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Boyer*, 2021 NSCA 47

Date: 20210615

Docket: CAC 493730

Registry: Halifax

Between:

Jeff Boyer

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Carole A. Beaton

Appeal Heard: April 6, 2021, in Halifax, Nova Scotia

Cases Considered: *Kienapple v. R.*, [1975] 1 S.C.R. 729; *R. v. Downey*, 2021 NSCA 38; *R. v. Villaroman*, 2016 SCC 33; *R. v. Coburn*, 2021 NSCA 1; *R. v. Barrett*, 2020 NSCA 79; *R. v. MacDonald*, 2020 NSCA 69; *R. v. Roberts*, 2020 NSCA 20; *R. v. Herntier*, 2020 MBCA 95; *R. v. Carter*, [1982] 1 S.C.R. 938; *R. v. Mapara*, 2005 SCC 23; *R. v. Anderson*, 2020 ONCA 780; *R. v. R.E.M.*, 2008 SCC 51; *R. v. Lights*, 2020 ONCA 128

Subject: Criminal; Evidence—circumstantial; Verdict; Verdict—unreasonable verdict

Summary: Mr. Boyer was convicted of six conspiracy and drug related offences flowing from investigation of an interprovincial drug trafficking operation. The Crown’s case against him was circumstantial in nature. Among the four grounds raised on appeal, Mr. Boyer argued the trial judge’s verdict was unreasonable.

Issues: Did the convictions constitute an unreasonable verdict?

Result: The trial judge's decision articulated the proper legal test. On a case of circumstantial evidence the trier of fact, applying the principles in *R. v. Villaroman*, 2016 SCC 33 must be satisfied the accused's guilt is the only reasonable conclusion on the whole of the evidence. The trial judge's decision did not address other reasonable possibilities suggested by the evidence or absence of evidence.

It was not possible to discern, on the totality of the evidence, how the judge concluded the guilt of the accused. The assessment of plausible alternatives was not undertaken. As such, the verdicts were unreasonable. It was not necessary to address the remaining grounds of appeal.

The appeal is allowed. The convictions are quashed and acquittals are entered on all counts.

<p><i>This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 31 pages.</i></p>
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Judges: Farrar, Derrick and Beaton JJ.A.

Appeal Heard: April 6, 2021, in Halifax, Nova Scotia

Held: Appeal allowed, per reasons for judgment of Beaton J.A.;
Farrar and Derrick JJ.A. concurring

Counsel: Paul Niefer, for the appellant
Scott Millar and Monica McQueen, for the respondent

Reasons for judgment:

[1] On July 26, 2018, the Honourable Justice C. Richard Coughlan of the Supreme Court of Nova Scotia convicted Mr. Boyer of trafficking in marijuana, laundering proceeds of crime and possession of proceeds of crime, and of conspiring with others to commit each of those same offences. Charged in October 2015, Mr. Boyer's matters involved 19 days of trial, two s. 11(b) delay applications (one pre-trial and one post-conviction), and a contested disclosure hearing.

[2] On November 1, 2019 Mr. Boyer was sentenced to 54 months custody for conspiracy to traffic marijuana, three years concurrent for conspiracy to launder proceeds of crime and 54 months concurrent for trafficking. The charge of laundering proceeds of crime garnered a concurrent sentence of three years. A ten-year weapons prohibition order and a DNA order pursuant to s. 487.051 of the *Criminal Code* were also imposed, along with victim surcharges.

[3] The charges of conspiracy to possess proceeds of crime and possession of proceeds of crime were stayed on application of the "*Kienapple* principle" (*Kienapple v. R.*, [1975] 1 S.C.R. 729), in view of the "... rule against multiple convictions for the same wrongful conduct" (*R. v. Downey*, 2021 NSCA 38 at para. 7). The judge declined to impose either a fine or an order of forfeiture.

[4] Mr. Boyer's charges stemmed from a lengthy police investigation that began in January 2015. Between May 15 and October 9, 2015, a combination of surveillance and interception tactics fleshed out the details of an illegal drug trafficking operation, whereby individuals would travel from Vancouver to Halifax with large quantities of marijuana in suitcases. These couriers would then return to Vancouver with significant sums of cash in their luggage.

[5] At trial, Mr. Boyer did not dispute the existence of the operation. His defence challenged the circumstantial nature of the case and the Crown's theory he was higher up the conspiracy ladder, with a more senior role as a director of the operation.

[6] Mr. Boyer asks this Court to intervene, on the basis the judge's verdict was unreasonable. He seeks acquittals or, in the alternative, a new trial due to what he argues was the judge's failure to provide sufficient reasons for the convictions. In the further alternative, he argues the proceedings should be stayed on the basis of delay. He says the judge made incorrect determinations, in two separate

applications, that there had been no violation of his s. 11(b) *Charter* rights. If the Court is not persuaded to disturb his convictions, in the final alternative Mr. Boyer says his sentence should be reduced to reflect the proper application of the principle of parity.

[7] For the reasons that follow I am persuaded the verdict was unreasonable. It is not necessary for me to address the other issues raised by the appeal. I would allow the appeal and enter acquittals on all counts.

Background

[8] Mr. Boyer came to the attention of police investigators as a result of a combination of tools and techniques employed to monitor and piece together the movements of individuals believed to be involved in an interprovincial marijuana trafficking operation. Those methods included accessing cell phone and airline records, interception of telephone communications (wiretaps), undercover visual surveillance, surreptitious electronic tracking of vehicles and the interception and search of couriers' suitcases to record the contents (so-called "sneak and peek" operations).

[9] The investigators amassed evidence identifying certain individuals as couriers, and illustrating the arrangements for and movement of marijuana, secreted in the couriers' suitcases, on flights from Vancouver to Halifax. Once in Halifax, the couriers would be met by a local member of the operation ("Taxi") and taken to a hotel. Taxi would then depart with the suitcases, returning the baggage to the courier within several hours to a day. Immediately thereafter, Taxi would deliver the courier and suitcases to the Halifax airport for a return flight to Vancouver.

[10] Numerous times between May and October 2015, the police intercepted the couriers' luggage. On outgoing flights to Halifax they recorded the contents of the suitcases as holding little except multiple, meticulously packaged bundles of marijuana. On the return flights to Vancouver searches revealed the luggage contained significant quantities of cash, usually in excess of \$100,000, and on one occasion as much as \$300,000.

[11] At trial, the Crown laid the groundwork to develop a portrait of the parties involved and the details of the operation.¹ The Crown’s task included synthesizing the significance of the various investigative techniques referred to earlier in para. 8.

[12] As noted by the Crown in argument before this Court, a considerable volume of evidence was put before the judge to develop the “baseline” of proof that implicated Mr. Boyer. An evidentiary framework was built, into which the Crown inserted particular events alleged to relate to Mr. Boyer’s role, given the circumstantial nature of the case against him. The Crown’s theory was that Mr. Boyer was a “director”, involved in the management of, but removed from the day-to-day activities of the trafficking operation.

[13] There were two aspects of the evidence that played a significant role in the Crown’s case against Mr. Boyer. Those were:

- (a) A July 15, 2015 daytime undercover surveillance of Mr. Boyer’s residence.
- (b) A series of September 2015 phone conversations between Mr. Boyer and alleged co- conspirator Mr. Lockett, and between Mr. Lockett and courier Mr. Germaine.

The significance of these events will be discussed in greater detail later in these reasons.

Standard of Review

[14] The standard of review on an assertion of unreasonable verdict requires consideration of whether “... the trier of fact, acting judicially, could reasonably be satisfied that the accused’s guilt was the only reasonable conclusion ...” on the whole of the evidence (*R. v. Villaroman*, 2016 SCC 33 at para. 55). The burden to establish the unreasonableness of a verdict “... is a high one” (*R. v. Coburn*, 2021 NSCA 1 at para. 29).

Analysis

¹ Certain facts relating to the conspiracy were admitted by Mr. Boyer in two Agreed Statements of Fact pursuant to s. 655 of the *Criminal Code*. Some of the documentary evidence was also admitted by consent.

[15] Mr. Boyer asserts the judge made findings of fact without considering other reasonable possibilities suggested by the evidence or absence of evidence. He maintains the failure to do so resulted in the judge entering verdicts which were not supported by the evidence and, as such, were unreasonable. He asks this Court to enter acquittals as the appropriate remedy.

[16] The analysis to be undertaken on an assertion of unreasonable verdict was discussed by the Court in *R. v. Barrett*, 2020 NSCA 79:

[45] In *R. v. Lights*, 2020 ONCA 128, Watt J.A. described our task on the assertion of an unreasonable verdict as this:

[30] A verdict is unreasonable if it is one that no properly instructed jury, acting judicially, could reasonably have rendered. This test requires not only an objective assessment of the evidence adduced at trial, but also, to some extent at least, a subjective evaluation of that evidence. To discharge this responsibility, we are required to review, analyse, and, within the limits of appellate disadvantage, weigh the evidence. This weighing is only to determine whether that evidence, considered as a whole, is reasonably capable of supporting the verdict rendered: *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, at para. 9; *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 186; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36; *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 663.

[17] As noted earlier, the case against Mr. Boyer was grounded in circumstantial evidence—he was never seen with drugs or money, nor did the investigation suggest he had acted as a courier. My analysis must start from the approach described in *R. v. MacDonald*, 2020 NSCA 69:

[30] The trial judge was obliged to apply the law as it relates to circumstantial evidence correctly. Where it is alleged, as it is here, that the trial judge failed to consider other reasonable inferences arising from the evidence, the proper approach for appellate review is as summarized in *R. v. Villaroman*, 2016 SCC 33, at para 71:

... it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable...

[31] **In a circumstantial case, a trial judge must have concluded that guilt was the only reasonable inference to be drawn from the evidence.** (*Villaroman*, at para. 30) (Emphasis added)

(See also *R. v. Roberts*, 2020 NSCA 20 at para. 19.)

[18] Caution must be taken in considering Mr. Boyer's argument, as deference is owed to the factual findings of the judge. As argued by the Crown, it is the totality of the facts found by the judge that must be examined to assess whether they do or do not support any reasonable alternative conclusion. Whether individual aspects of the evidence could generate another innocent explanation in any one instance is not the concern; it is the entirety of the evidence that is significant (*R. v. Roberts*, *supra*, at paras. 56–57). As noted in *R. v. Herntier*, 2020 MBCA 95:

[365] [...] The test for an unreasonable verdict is not whether there is an alternative explanation for each piece of evidence, but whether the evidence as a whole could reasonably satisfy a trier of fact of the guilt of the accused beyond a reasonable doubt. ...

[19] Mr. Boyer argues that even accepting the analysis is not to be conducted in a “piecemeal” way, the Crown's obligation to prove the elements of the offence beyond a reasonable doubt was not met in this case. He contends the whole of the circumstantial evidence against him, which crystallized in surveillance of his home on July 15, 2015 and a series of September 2015 phone calls, does not establish his guilt as the only reasonable inference to be drawn from the evidence.

[20] Assessment of the reasonableness of the verdict rests in an examination of the evidence available to the judge, and how it was applied in view of the *Villaroman* principles. The judge first correctly set out the law in relation to conspiracy and the test he was to apply. He stated:

[9] To obtain a conviction on any of the conspiracy charges, the Crown must establish beyond a reasonable doubt that there was an agreement among two or more persons to commit the particular indictable offence set out in the charge and that Mr. Boyer was a party to that agreement.

[21] The judge then identified the long established three-step analysis provided in *R. v. Carter*, [1982] 1 S.C.R. 938 and confirmed again in *R. v. Mapara*, 2005 SCC 23 concerning the use of hearsay statements of co-conspirators.² It was critical to the Crown's case that certain otherwise inadmissible hearsay evidence be determined admissible, on the road to meeting its burden, if it was to be successful in securing convictions against Mr. Boyer. The judge described his task:

² The co-conspirators exception to the hearsay rule is relevant to the matter of evidence concerning intercepted communications, which will be discussed later.

[10] The law with respect to the admissibility of evidence when a conspiracy is alleged was recently set out in **R. v. Kelsie**, 2017 NSCA 89 where Farrar, J.A., in giving the Court's judgment stated at paragraphs 140 to 145:

[140] In *R. v. Carter*, [1982] 1 S.C.R. 938, the Court set out a 3-step process for the admissibility of hearsay evidence and the use of that evidence by the trier of fact, when deliberating on a conspiracy charge. *Carter* was summarized by the Ontario Court of Appeal in *R. v. Gagnon*, 2000 O.J. No. 3410 as follows:

50 In *R. v. Carter* (1982), 67 C.C.C. (2d) 568, the Supreme Court of Canada set out the following three-tiered approach to apply in conspiracy cases:

Considering all the evidence, the trier of fact must conclude beyond a reasonable doubt that the conspiracy charged in the indictment existed. This determination is independent of any consideration as to whether an indicted or unindicted conspirator is actually a member of the conspiracy charged.

Once the trier of fact is satisfied beyond a reasonable doubt that the conspiracy charged existed, the trier of fact must determine, exclusively on the basis of "evidence directly receivable against the accused", whether the accused was probably a member of the conspiracy. The trier of fact is not to consider co-conspirator hearsay evidence at this stage of deliberations.

If the trier of fact concludes that an accused was probably a member of the conspiracy, the trier of fact must determine whether the Crown has proven that accused's membership in the conspiracy beyond a reasonable doubt. At this stage of deliberations, the trier of fact is entitled to consider hearsay acts and declarations of co-conspirators made in furtherance of the objects of the conspiracy. The trier of fact must be cautioned that the mere fact that the conclusion has been reached that an accused is probably a member of a conspiracy does not make a conviction automatic. (Emphasis in original)

[141] In *R. v. Mapara*, 2005 SCC 23, the Supreme Court of Canada affirmed the 3-step process set out in *Carter* and defined the co-conspirators' exception to the hearsay rule as follows:

8 The co-conspirators' exception to the hearsay rule may be stated as follows: "Statements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the

accomplishment of the common object” (J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 303). Following *Carter*, co-conspirators’ statements will be admissible against the accused only if the trier of fact is satisfied beyond a reasonable doubt that a conspiracy existed and if independent evidence, directly admissible against the accused, establishes on a balance of probabilities that the accused was a member of the conspiracy. (Emphasis in original)

[...]

[22] Embarking on step one of the *Carter* analysis—to determine whether it was proven beyond a reasonable doubt the conspiracy existed—the judge set out in lengthy chronological order the details of the evidence gathered between May and October 2015. He began by stating at para. 16 “the facts are as follows” and continued with a recitation that consumed the bulk of the decision. That said, it was not incumbent on the judge to specifically preface each and every paragraph of his lengthy recap of the evidence with repetitive commentary to the effect of “this is a finding of fact”. It was also not necessary to repeat his factual findings made in the first step at each subsequent stage of the analysis.

[23] The facts found by the judge described the evidence that identified individuals involved in the operation, and details such as where and with whom they lived and the vehicles they drove. It “connected the dots” in terms of illustrating dates and points of contact between and among those people—how their various activities and movements connected them. The findings by the judge included the details of various Vancouver–Halifax–Vancouver trips by certain members of the operation, and what the contents of their luggage revealed on those trips.

[24] Of the events the judge canvassed, those that pertained specifically to Mr. Boyer are reproduced here:

May 21, 2015

[...]

[21] At 12:46 p.m. Mr. Germaine walked up to the front door of a townhouse Unit 103-3467 Gislason Avenue, Coquitlam, the residence of Mr. Boyer. The Chevrolet Tahoe was backed into the driveway and was parked next to the grey Chrysler. At 13:26 a white Ford F150 registered to Darren Telford was parked in front of Unit 103 behind a white Mercedes. At 13:29 an unknown male exited the area of Unit 103 and went to the Ford F150. Approximately a minute later the male was let into the front door of Unit 103.

[...]

[23] No one saw Mr. Boyer that day. No suitcases or anything was seen going in or out of Unit 103 that day.

[...]

June 4, 2015

[28] At 12:52 p.m. Mr. Germaine backed the Tahoe up to the garage at Unit 103-3467 Gislason Avenue. Mr. Germaine was seen by the Tahoe, but it was not known where he went. It is unknown whether the garage door of the Unit 103 was open or not. The Chrysler 300C registered to Calvin Boyer and driven by Jeffrey Boyer was parked just east of Unit 103. Mr. Boyer was not seen nor was anyone seen driving the Chrysler. Nothing was seen going from Unit 103 to the Tahoe, nothing was seen coming out of the front door of Unit 103. The Tahoe was at Unit 103 for approximately ten minutes. At 13:02 the Tahoe left the 3400 block of Gislason Avenue.

[...]

June 10, 2015

[...]

[33] At approximately 17:40 hrs a Buick Murano was in front of Unit 103-3467 Gislason Avenue. Later at 18:50 the Buick returned and a white male and female walked out of the Unit, then went back in. At 21:41 a white Ford F150 with Alberta licence plates parked in front of Unit 103 and a white male with tattoos on both arms walked to the front door.

[...]

July 15, 2015

[50] Mr. Pilling returned to Vancouver from Halifax. He got two large blue suitcases from the baggage carousel. He left the airport at approximately 12:40 p.m. and drove directly to Mr. Boyer's residence, Unit 103-3467 Gislason Avenue, arriving at approximately 1:57 p.m. A grey Chrysler 300 licence plate 356 WVP was parked east of Mr. Boyer's residence in a visitors' parking spot. Mr. Pilling removed two large suitcases from his Chevrolet Cruze and took them into the open garage of Unit 103. Mr. Pilling came out of the garage and retrieved papers from the Cruze and went back into the garage. At 2:13 p.m. Sgt. Shailver Singh walked by the open garage of Unit 103 and observed two suitcases – one open and empty and the other closed. Mr. Pilling left at approximately 2:05 p.m. After Mr. Pilling left, a white Dodge Ram pickup arrived. At 2:25 p.m. an unidentified male came out of the garage of Unit 103. He opened the rear door of the Dodge Ram. Then at approximately 2:30 p.m. the man again came out of the Unit 103 and drove away in the Dodge Ram. No one saw Mr. Boyer that day. Sgt. Singh did not see any cash or marihuana that day.

[...]

October 1, 2015

[91] Mr. Boyer was observed at 17:37 hours getting out of the grey Chrysler 300 he used which was registered in his father's name.

[...]

October 10, 2015

[95] Mr. Boyer called Mr. Lockett on the telephone. Mr. Boyer told Mr. Lockett he was at the front door and Mr. Lockett told Mr. Boyer he would meet him at the front door in "two secs".

October 20, 2015

[96] At 9:56 a.m. Mr. Boyer was driving the Chrysler 300, B.C. licence 356 WVP. Later that morning he went to a fitness centre. At 12 noon he and Stephen Lockett left the fitness centre together.

[...]

October 28, 2015

[...]

[101] Cst. Michael Everitt was site commander for the execution of the search warrant at Douglas Neumann's residence. Among the items seized were numerous telephones and weapons, in excess of 47 kg of marihuana which was double packaged in bags inside vacuum sealed bags, as well 2016 grams of shatter (a concentrated marihuana derivative), a large quantity of vacuum sealed packaging and ziplock bags, digital scales, a food saver vacuum sealer, a blue Heys soft sided suitcase and an Air Canada Altitude *[sic]* Elite 50K card in Mr. Neumann's name. Three medical marihuana licences were found, including one in the name of Jennifer Alice Lockett, Stephen Lockett's wife, which had Mr. Neumann's address as the registered storage site.

[102] Some of the ziplock bags were examined for fingerprints and one of the large ziplock bags contained two fingerprints, which were Jeffrey Michael Boyer's fingerprints.

[103] Sgt. Michael Kwan was the team commander for the execution of the search warrant at Jeffrey Boyer's residence. Among the items located were a number of cell phones, a back *[sic]* Heys suitcase with the name tag, Ashley Buss, on it, a money counter, a food sealer, Jeffrey Boyer's passport and a copy of an application for certified copy of a marriage certificate showing Jeffrey Michael Boyer and Ashley Dawn Buss were married in California on September 10, 2015. In a crawlspace underneath the stairs downstairs a safe and a M & N nylon bag were located. The bag contained five bundles of \$20 bills totalling \$10,000.00, a smaller bundle of 90 \$20 bills totalling \$1,800.00, and the safe that contained a bundle of 100 \$20 bills totalling \$2,000.00. The sum of \$1,390.00 was found in the kitchen.

[104] The Chrysler 300 contained the registration for the vehicle, an expired medical marihuana licence in the name of Jeffrey Boyer and a box of plastic nitro gloves. During the search, Mr. Boyer was cooperative at all times. No marihuana or score sheets were found during the search. Nothing illegal to possess was found.

[105] Mr. Boyer registered a business name JMB Construction and Renovations with the British Columbia Registry Services on October 4, 2004. He had a medical marihuana licence which allowed indoor production of 146 plants and a storage quantity of 6570 grams and a storage address of 408-22290 North Avenue, Maple Ridge, British Columbia. Mr. Boyer did not travel to Halifax or Montreal during the course of this investigation.

[106] Lisa Papez rented a condo Unit 408-22290 North Avenue, Maple Ridge, from Jeffrey Boyer and Ashley Boyer (formerly Ashely Buss) from October 2014 to September or October 2016. She did not see any marihuana stored there or anyone come to pick up marihuana. She parked a vehicle in the parking area for the unit. She did not know if the unit had a storage unit – she does not think it did, because she did not use it. She believed there was a bike storage area – she did not use it. Behind the building there were houses and behind the houses a tent area for homeless people.

[107] On September 14, 2015, the following text message “778-919-3607 reeces new number delete old one pls” was sent from Mr. Germaine’s phone to Jeffrey Boyer, Stephen Lockett and phones used by Devendra Prasad and Ryan Franklin. On the same day the following message was sent to an unknown party “Reece new number 778-919-3607”. Between September 15 and October 14, 2015 text messages concerning Mr. Germaine’s new number were sent to seven other phones.

[...]

[109] In this case, vehicles were tracked to the area of North Avenue, Maple Ridge shown as the storage area of Mr. Boyer’s marihuana licence. As a result of the evidence of Ms. Papez and the nature of the tracking devices, I make no finding as to the purpose of the visits to North Avenue.

[25] Following completion of his chronological listing of events revealed by the investigation, the judge then immediately concluded:

[111] The evidence shows an ongoing scheme of couriers consistently travelling to Halifax, being met by Mr. Withrow and after the tracking device was discovered on his Camry by others, the presence of the drugs and money was confirmed by the police searches of the couriers’ luggage.

[112] I find the Crown has proved beyond a reasonable doubt the existence of a conspiracy as charged in the Indictment, namely to traffic in cannabis marihuana, to transport currency with the intent to conceal or convert the currency, knowing

and believing that it was obtained as a result of trafficking in cannabis marihuana, and to possess currency exceeding \$5,000.00 knowing it was obtained by the commission of an offence punishable by Indictment.

[26] The judge found, on step one of the *Carter* analysis, that the Crown had established beyond a reasonable doubt the existence of a conspiracy.

[27] Turning to step two of the *Carter* analysis—whether the judge was satisfied on a balance of probabilities that Mr. Boyer was a member of the conspiracy—he again correctly identified the Crown’s burden and his task:

[113] At this stage, the trier of fact must determine, exclusively on the basis of “evidence directly receivable against the accused” whether the accused was probably a member of the conspiracy. The trier of fact is not to consider co-conspirator hearsay evidence at this stage of deliberations. It is also at this stage, the determination is made whether others were probable members of the conspiracy.

The judge then set out the evidence against Mr. Boyer:

[114] The evidence directly receivable against Mr. Boyer is as follows:

June 4, 2015

[115] Mr. Germaine backed into the driveway of Mr. Boyer’s residence. Mr. Boyer was not seen that day. It is not known whether the garage door of the residence was open and nothing was seen going in or out of the residence.

June 20, 2015

[116] Mr. Germaine arrived in Vancouver at 11:30 a.m. and went to various places. At approximately 4:40 p.m. Mr. Germaine and the Chrysler 300 which Mr. Boyer drove was seen in the vicinity of Mr. Lockett’s residence. About 10 minutes later, Mr. Germaine and an unidentified male exited the front door. The unidentified male was described as being 6’ to 6’1” tall and weighing 170 lbs. Det. Cst. Yee had no recollection of the unidentified male having tattoos. They had a conversation between the parked cars and then Mr. Germaine got into his Tahoe, the male into the Chrysler and they drove out in tandem. Mr. Germaine first and then the Chrysler.

July 15, 2015

[117] Mr. Pilling returned to Vancouver from Halifax and drove directly to Mr. Boyer’s residence. He took two suitcases into the open garage of Mr. Boyer’s residence. Two suitcases were observed in the garage, one open and empty and the other closed. No one saw Mr. Boyer that day. No marihuana or cash was seen that day.

August 5, 2015

[118] Mr. Germaine returned to Vancouver with a large amount of cash. He left the airport at 6:38 p.m. and went home. At 9:11 p.m. Mr. Germaine and an unidentified male arrived at Mr. Boyer's residence. At 9:13 p.m. Mr. Germaine, the unidentified male and another male (believed to be Mr. Boyer) were seen through a window speaking in the kitchen. At 9:25 Mr. Germaine and the unknown male left. Nothing was seen been [sic] taken into the residence or out of the residence by Mr. Germaine or the unidentified male. Sgt. Kwan stated Mr. Boyer had a sleeve of tattoos on his left arm.

September 2, 2015

[119] Mr. Boyer's Chrysler was seen in the vicinity of Mr. Newman's [sic] residence.

September 16, 2015

[120] Mr. Boyer, who was in Tahiti, called Mr. Lockett. During the course of the conversation, they discussed business in which they were both involved. When speaking about people, they did not use names. The following exchanges took place. Mr. Boyer is Voice 1 and Mr. Lockett is Voice 2:

VOICE 1: What, um, tsk, you, you know the, the Hami guy?

VOICE 2: Yeah, yeah

VOICE 1: What's he sayin'?

VOICE 2: Uh, he's ready next week again

VOICE 1: Okay, we can do, like, uh. Yeah, okay

VOICE 2: Yeah, so I'll hit him with that and then he's askin' for more. You remember that other thing we, we gave him?

VOICE 1: Yeah

VOICE 2: He's askin' for double that

VOICE 1: He wants more of it

VOICE 2: So ____

VOICE 1: He was happy with it?

VOICE 2: Yeah, yeah. So I, I doubled, he wants double that so I put the order in for that. That's gonna be ready next week. So that'll go out too

VOICE 1: Okay, good. You, you talked to my buddy _____. 'Kay, if, if my other buddy asks don't let him know that we're doing this right now, like, if, uh

VOICE 2: No, I won't, I won't

And

VOICE 1: And did, did you ever talk to the Asian guy?

VOICE 2: Ah, no, he didn't fuckin' buzz me at all

VOICE 1: What's that?

VOICE 2: He, he hasn't

VOICE 1: _____

VOICE 2: Buzzed me at all the Asian guy. No. Uh, which, which is Asian guy I cant' [sic] remember

VOICE 1: Okay, hit him up, hit him up then

VOICE 2: Okay. Wh-which, which is he again?

VOICE 1: China

VOICE 2: Oh China. Ah, that's right. Yeah, yeah. Okay, okay. Yeah, I'll hit him up see what the fuck's goin' on with him

VOICE 1: So hit him up. I already told him that you would be talkin' to him and he said no problem

And

VOICE 2: Buddy's out in H now and, uh, he's gonna be about thirty short but I said, whatever, just get what you can

VOICE 1: Whatever I don't care

VOICE 2: Yeah, I just thought I fuckin' better get somethin' here, man. Who knows what's gonna happen

VOICE 1: We just gotta get it out of there, right

VOICE 2: Yeah, (Short laugh) exactly. Exactly, so

VOICE 1: (Laughs)

VOICE 2: So at least it will be close anyway, right

VOICE 1: Okay, chippin' away at least. Chippin' away. What about, uh

VOICE 2: Yeah, exactly

VOICE 1: Black guys

VOICE 2: I'm still grabbin stuff

VOICE 1: What about the black guys?

VOICE 2: Uh, the black guys. Yeah, he's sayin' any day too. And I'll, I'll be fine I'll uh

VOICE 1: Oh, okay, that's okay then.

VOICE 2: That's, that's for him

VOICE 1: This is all right

VOICE 2: Yeah, yeah, it's just, you know, when, when, when H goes down, fuck, I mean, that's what takes all your time so I'm fuckin' bored. But it's been good

September 20, 2015

[121] Mr. Boyer called Mr. Lockett on the telephone. Mr. Lockett is Voice 1 and Mr. Boyer Voice 2. The following conversation took place:

VOICE 1: Yo

VOICE 2: Hey, _____. Sorry, meeting ran long. You fuckin' home?

VOICE 1: Yeah, I'm home, buddy. How long

VOICE 2: Just

VOICE 1: Ya _____?

VOICE 2: Fuckin', I can be there in two seconds. Just come

VOICE 1: Okay

VOICE 2: Uh, I'm just like on uh, Harris Road right now. If you wanna pop down, I'll just pick ya up

VOICE 1: Okay. I'll come down right now

VOICE 2: _____. 'Kay, bye

VOICE 1: 'Kay _____

October 10, 2015

[122] Mr. Boyer called Mr. Lockett on the telephone. Mr. Lockett is Voice 1 and Mr. Boyer is Voice 2. The following conversation took place:

VOICE 1: Yo

VOICE 2: Yo what's goin' on?

VOICE 1: Ah pulling into my underground why what's goin' on?

VOICE 2: Ah okay

VOICE 1: Ah what's goin' on?

VOICE 2: I'm at the front door

VOICE 1: Ah, I'm pulling in the underground, I'll meet you in at the front door in two secs

VOICE 2: Okay bye

VOICE 1: Okay bye

October 20, 2015

[123] Mr. Boyer was seen with Mr. Lockett.

October 28, 2015

[124] The search warrants were executed in British Columbia and Nova Scotia. In British Columbia the operation occurred at approximately 8 to 9:15 a.m. At 9:12:31 a.m. Stephen Lockett called Jeffrey Boyer. Mr. Boyer is Voice 1 and Mr. Lockett is Voice 2 and the following conversation took place:

VOICE 1: What's goin' on, buddy?

VOICE 2: _____ goin', bud

VOICE 1: Uh, yeah, have a look

VOICE 2: Got nothin'

VOICE 1: I'll, I'll talk to ya. What?

VOICE 2: I don't know. Oh, _____ there's uh got it in my hand.

VOICE 1: One sec.

VOICE 2: Oh, yeah, okay

VOICE 1: Okay, buddy. Bye

VOICE 2: 'Kay, bye

[125] During the search at Douglas Neumann's residence a large ziplock bag was seized which when examined for fingerprints was found to contain among other fingerprints, two of Mr. Boyer's fingerprints.

[126] I have previously set out what was found during the search of Mr. Boyer's residence.

[127] Det. Sgt. John Babiar of the Toronto Police Service was qualified to give opinion evidence in relation to the packaging, pricing, quantities and use of cannabis marihuana, the inter-provincial trafficking of drugs, various methods used to covertly store drugs and /or money for transport, drug hierarchies, distribution methods of drug traffickers, drug networks, drug couriers, "stash houses", street jargon, street terminology, covert codes, modes of communication, counter surveillance techniques and evidence in relation to currency obtained by crime and money laundering.

[128] I found Det. Sgt. Babiar to be knowledgeable in his field and his evidence to be of great assistance. He described how drug dealers operate under the assumption their phone is being monitored by police, they attempt to limit discussions concerning incriminating activities over the phone. The more sophisticated individuals will only use the phone to establish a meeting time/location and will only discuss such matters in person. Their conversations are frequently guarded and lack the flow of normal conversations. Locations may be referred to by initials, for example, Toronto may be "T".

[129] In reviewing the above mentioned conversations between Messrs. Boyer and Lockett, the conversations were guarded, names were not used. A location was referred to as “H”. I note on the date of the conversation about “H” September 16, 2015, the reference to “H” was “Buddy’s out in H now, and, uh, he’s gonna be about thirty short but, I said, whatever, just get what you can”.

[130] The conversations of September 20 and October 10, 2015 were brief arranging face to face meetings, nothing was discussed on the phone. The conversation of October 28, 2015 was brief and guarded containing no explanation about what was going on.

[131] In the search of Mr. Boyer’s residence a money counter and food saver were located. Although Det. Sgt. Babiak testified at the upper levels of drug operations, money counters are present and in this operation the drugs were transported in bags sealed by sealers such as food savers, such items are widely available and have innocent uses.

[132] The \$10,000.00 found in the search of Mr. Boyer’s residence could be in connection with the business name he registered JMB Construction and Renovations.

[133] **Considering the evidence directly receivable against Mr. Boyer, I am satisfied on a balance of probabilities that Mr. Boyer was a member of the conspiracy.**

[134] I am also satisfied on a balance of probabilities that Reece Germaine, Derek Pilling, Douglas Neumann, Darren Telford and Stephen Lockett were members of the conspiracy.

[135] Messrs[.] Germaine, Pilling, Newman [*sic*] and Telford were shown by the flight records of Air Canada and WestJet to have made frequent short trips to Halifax and other cities including St. John’s and Toronto from Vancouver. They would return to Vancouver the same day or in the next day or two. The luggage of the men was searched and each of them had luggage which contained large quantities of marihuana or cash. The marihuana carried by the various couriers were packaged in the same manner.

[136] The evidence also shows on the balance of probabilities that Stephen Lockett was a member of the conspiracy. (Emphasis added)

[28] Those aspects of the evidence related to, mentioning or including Mr. Boyer were not conclusive of the Crown’s allegations against him. Mr. Boyer never disputed the existence of a conspiracy. Rather, he maintained he had no involvement with it whatsoever. More was needed to connect Mr. Boyer to the events and activities concerned. As noted earlier, there were two discrete aspects of the evidence the Crown relied upon to prove the conspiracy charges against him.

The July 15, 2015 surveillance

[29] Mr. Boyer asserts it is significant that the judge, in his conclusions on step one of the *Carter* analysis, did not find that cash had been delivered to Mr. Boyer's residence during the July 15, 2015 surveillance of his home. This was important because a cash delivery would have linked Mr. Boyer to the couriers' activities. In its factum, the Crown responds to that argument as follows:

45. e. On July 15, 2015, returning drug courier Mr. Pilling delivered two suitcases of cash to the appellant's residence immediately upon leaving the airport. This critical visit by a courier to the appellant's residence allows of no other conclusion, when considered in the context of all the other evidence, than that two suitcases of cash, proceeds of drug trafficking, were handed to the appellant and he took possession of them because he had authority over the transaction. Despite complaints that the respondent would characterize as minor with respect to the details of the surveillance, the fact of the delivery overall is unassailable. The appellant has not suggested that Sgt. Singh was lying about his observations of the suitcase open in the garage, only that the evidence of others, who did not have Sgt. Singh's vantage point, would suggest such observations were difficult. It was not unreasonable for the trial judge to accept the delivery as fact, and the finding ought not to be interfered with. Although the appellant was not seen in the vicinity of the open suitcase in the garage, the inference that he was the intended recipient is unassailable. That is the meaning and importance of the admonition, in the jurisprudence, that the evidence must be considered as a whole, not piecemeal. One piece of evidence can support another in the determination of final conclusions. (Footnote removed)

[30] What the judge did describe concerning that event was the following:

July 15, 2015

[50] Mr. Pilling returned to Vancouver from Halifax. He got two large blue suitcases from the baggage carousel. He left the airport at approximately 12:40 p.m. and drove directly to Mr. Boyer's residence, Unit 103-3467 Gislason Avenue, arriving at approximately 1:57 p.m. A grey Chrysler 300 licence plate 356 WVP was parked east of Mr. Boyer's residence in a visitors' parking spot. Mr. Pilling removed two large suitcases from his Chevrolet Cruze and took them into the open garage of Unit 103. Mr. Pilling came out of the garage and retrieved papers from the Cruze and went back into the garage. At 2:13 p.m. Sgt. Shailver Singh walked by the open garage of Unit 103 and observed two suitcases – one open and empty and the other closed. Mr. Pilling left at approximately 2:05 p.m. After Mr. Pilling left, a white Dodge Ram pickup arrived. At 2:25 p.m. an unidentified male came out of the garage of Unit 103. He opened the rear door of the Dodge Ram. Then at approximately 2:30 p.m. the man again came out of the Unit 103 and drove away in the Dodge Ram. **No one saw Mr. Boyer that day. Sgt. Singh did not see any cash or marihuana that day.** (Emphasis added)

[31] The judge did not find or even infer the delivery of cash to Mr. Boyer. I do not agree the findings made by the judge could support what the Crown argues is the “unassailable” inference Mr. Boyer was the “intended recipient” of anything. Nothing in that paragraph of the judge’s decision could permit the significance the Crown asks be taken from it. The paragraph is conclusive only of the judge accepting Mr. Pilling was at Mr. Boyer’s residence with two suitcases, one seen empty and one seen closed. The judge’s factual findings did not include a finding about the contents of the suitcases. This was confirmed by the judge later in the decision. During his analysis on part two of the *Carter* test (whether the accused was probably a member of a conspiracy), the judge again found:

July 15, 2015

[117] Mr. Pilling returned to Vancouver from Halifax and drove directly to Mr. Boyer’s residence. He took two suitcases into the open garage of Mr. Boyer’s residence. Two suitcases were observed in the garage, one open and empty and the other closed. **No one saw Mr. Boyer that day. No marihuana or cash was seen that day.** (Emphasis added)

[32] The surveillance evidence had no greater significance than that which the judge afforded it. I agree with Mr. Boyer that: (i) the judge did not make any finding that Mr. Pilling made any delivery or that the suitcases contained anything, much less proceeds of crime from Halifax; (ii) the judge did not find that Sgt. Singh saw in the garage the same two suitcases Mr. Pilling had taken from his flight to Vancouver earlier on that same day.

[33] I cannot agree with the Crown’s argument that the judge accepted a delivery of cash had occurred, much less that it was a delivery to Mr. Boyer as opposed to anyone else. Mr. Boyer’s guilt is not the only reasonable explanation for the observations made during the surveillance. This is significant, as the record does not reveal any other evidence that could connect Mr. Boyer to the receipt of sums of money. We do not know if the judge considered any alternate reasonable inferences, but he did not find the significance of that event attached to Mr. Boyer in the manner the Crown sought to use it.

[34] Relying on the Supreme Court of Canada decision in *R. v. R.E.M.*, 2008 SCC 51 (para. 16) the Crown urges that while the evidence linking Mr. Boyer to the illegal activities, taken in isolation, may not be sufficient to prove guilt, it is in the totality of the evidence that the case against Mr. Boyer emerges. I agree the judge was required to consider the totality of the evidence, however I do not share the Crown’s view of the impact of the evidence on the culpability of Mr. Boyer.

[35] With respect, it is also not clear how the judge found Mr. Boyer to be a “probable member” of the conspiracy. The judge explicitly indicated he did not consider the evidence of the money counter, food saver equipment and cash found in a search of Mr. Boyer’s residence to be inculpatory. In doing so, the judge applied the *Villaroman* principles in allowing for the availability of other reasonable explanations for the presence of those items.

[36] In effect, the judge identified the evidence “directly receivable” against Mr. Boyer and then chronicled a series of events, culminating with the statement (in para. 133) that he was satisfied on a balance of probabilities Mr. Boyer was a member of the conspiracy. However, the judge did not explain how it was the evidence he was prepared to accept connected to and informed his conclusion that Mr. Boyer was probably part of the conspiracy.

[37] Further difficulty arises in relation to the third stage of the *Carter* analysis. The judge began consideration of the third step by again reminding himself of the Crown’s burden:

[137] At this stage the trier of fact must determine whether the Crown has proved the accused’s membership in the conspiracy beyond a reasonable doubt. At this stage the trier of fact is entitled to consider the hearsay acts and declarations of co-conspirators made in furtherance of the objects of the conspiracy.

[138] The standard “beyond a reasonable doubt” is very different from the standard of “a balance of probabilities”. The Crown is required to prove each essential element of an offence beyond a reasonable doubt.

[38] The judge then recounted the principles articulated in *Villaroman* including regarding the use to be made of other reasonable inferences. Notwithstanding having armed himself with those principles, the judge did not proceed to conduct that aspect of the exercise. The record does not reveal the judge considered or examined the alternative inferences he was invited by the defence to make. Had he done so in a manner that could now be identified, and still concluded Mr. Boyer’s guilt, Mr. Boyer’s objections would be baseless.

[39] It was part of the judge’s task to consider the reasonableness of any alternative inferences or conclusions that might be drawn from the evidence or absence of evidence, including from other explanations offered by Mr. Boyer at trial. With respect, it is not possible, as part of the task of meaningful appellate review, to discern whether the judge considered any such alternatives. While not

incumbent upon him to address every single possibility, nor to do so at length, the judge's reasons do not indicate whether there were other possibilities considered or, if they were, why they were rejected.

The telephone calls

[40] Certain evidence, consisting of telephone conversations between Mr. Boyer and a co-conspirator, and between other co-conspirators that referenced Mr. Boyer's involvement, were also critical to the Crown's case against Mr. Boyer.

[41] Paragraph 45(f) of the Crown's Factum states:

A number of intercepted communications tied the appellant directly to the conspiracy to traffic drugs into Halifax. Some of those communications were his own, while some others were by third parties, but which became admissible under the well-established exception to the hearsay rule. These calls include:

- i. Lockett [*sic*] and Germaine complaining about "Major" (the appellant) and his failure to take care of certain logistical matters because he was partying.
- ii. Germaine, upon his return from Halifax, asking Lockett who he should go see, between Lockett and the appellant.
- iii. A call where Lockett discusses getting a suitcase from Neumann.
- iv. Calls by Newmann to Lockett and to Air Canada complaining about his "lost" suitcase after the RCMP seized the drug cash therein. (Footnotes omitted)

[42] Mr. Boyer maintains there was nothing in the evidence that could link him to trafficking in the specific location of Halifax, an element of the conspiracy charges the Crown was required to prove. The Crown contends in "subtle but clear ways" it can easily be seen Mr. Boyer was a director in the trafficking operation. The Crown says it was in looking at all of the surrounding circumstances that the judge made the determination there was a conspiracy, and was satisfied the location of it was Halifax.

[43] A phone conversation described at para. 140 of the judge's decision led him to conclude, while conducting the third step of the *Carter* analysis (proof of membership in a conspiracy beyond a reasonable doubt), Mr. Boyer was the "Major" referred to in a conversation between two conspirators:

[140] In a phone conversation between Reece Germaine and Stephen Lockett on September 8, 2015, the following exchange took place. Mr. Germaine is Voice 1 and Mr. Lockett is Voice 2:

VOICE 2: Just come, just come by, ma-maybe just come by after the traffic, eh?

VOICE 1: Yeah, that's what I might do. I'm gonna go home, chill, drop my shit off, shower and then I'll come out

VOICE 2: Yeah

VOICE 1: That way. Should I come to your house or go to Major's?

VOICE 2: Yeah, come to me. No, he, he's away for two weeks buddy

VOICE 1: Oh, where is

VOICE 2: _____

VOICE 1: He?

VOICE 2: Yeah, he went, he _____ married and then he's goin' on a honeymoon

VOICE 1: Oh right. He went to uh

VOICE 2: Yeah

VOICE 1: Ta-tahiti or somethin'

VOICE 2: Yeah

VOICE 1: Like that

VOICE 2: Yeah, he's goin' to California first to get married there and then they're goin' to Tahiti

VOICE 1: Wow

[141] The evidence shows Mr. Boyer was married in California on September 10, 2015 and his passport and his conversation with Mr. Lockett of September 16, 2015 establish he was in Tahiti. **I find Mr. Boyer is the "Major" referred to in the above conversation.** (Emphasis added)

[44] However, there is nothing in that phone conversation which ties Mr. Boyer to Halifax, and no mention of Halifax during that conversation.

[45] I return to (and repeat here for ease of reference) the judge's description at para. 120 of the September 16 phone conversation between Mr. Boyer and Mr. Lockett. The call represents evidence capable of bearing other reasonable inferences that are inconsistent with Mr. Boyer's guilt. The judge wrote:

[120] Mr. Boyer, who was in Tahiti, called Mr. Lockett. During the course of the conversation, they discussed business in which they were both involved. When speaking about people, they did not use names. The following exchanges took place. Mr. Boyer is Voice 1 and Mr. Lockett is Voice 2:

VOICE 1: What, um, tsk, you, you know the, the Hami guy?

VOICE 2: Yeah, yeah

VOICE 1: What's he sayin'?

VOICE 2: Uh, he's ready next week again

VOICE 1: Okay, we can do, like, uh. Yeah, okay

VOICE 2: Yeah, so I'll hit him with that and then he's askin' for more. You remember that other thing we, we gave him?

VOICE 1: Yeah

VOICE 2: He's askin' for double that

VOICE 1: He wants more of it

VOICE 2: So ____

VOICE 1: He was happy with it?

VOICE 2: Yeah, yeah. So I, I doubled, he wants double that so I put the order in for that. That's gonna be ready next week. So that'll go out too

VOICE 1: Okay, good. You, you talked to my buddy _____. 'Kay, if, if my other buddy asks don't let him know that we're doing this right now, like, if, uh

VOICE 2: No, I won't, I won't

And

VOICE 1: And did, did you ever talk to the Asian guy?

VOICE 2: Ah, no, he didn't fuckin' buzz me at all

VOICE 1: What's that?

VOICE 2: He, he hasn't

VOICE 1: _____

VOICE 2: Buzzed me at all the Asian guy. No. Uh, which, which is Asian guy I cant' [sic] remember

VOICE 1: Okay, hit him up, hit him up then

VOICE 2: Okay. Wh-which, which is he again?

VOICE 1: China

VOICE 2: Oh China. Ah, that's right. Yeah, yeah. Okay, okay. Yeah, I'll hit him up see what the fuck's goin' on with him

VOICE 1: So hit him up. I already told him that you would be talkin' to him and he said no problem

And

VOICE 2: Buddy's out in H now and, uh, he's gonna be about thirty short but I said, whatever, just get what you can

VOICE 1: Whatever I don't care

VOICE 2: Yeah, I just thought I fuckin' better get somethin' here, man. Who knows what's gonna happen

VOICE 1: We just gotta get it out of there, right

VOICE 2: Yeah, (Short laugh) exactly. Exactly, so

VOICE 1: (Laughs)

VOICE 2: So at least it will be close anyway, right

VOICE 1: Okay, chippin' away at least. Chippin' away. What about, uh

VOICE 2: Yeah, exactly

VOICE 1: Black guys

VOICE 2: I'm still grabbin stuff

VOICE 1: What about the black guys?

VOICE 2: Uh, the black guys. Yeah, he's sayin' any day too. And I'll, I'll be fine I'll uh

VOICE 1: Oh, okay, that's okay then.

VOICE 2: That's, that's for him

VOICE 1: This is all right

VOICE 2: Yeah, yeah, it's just, you know, when, when, when H goes down, fuck, I mean, that's what takes all your time so I'm fuckin' bored. But it's been good

[46] There is one reference to "H" and one to "Hami". Mr. Boyer argues the judge could not have reached the conclusion he did at para. 145 of the decision:

[145] It is clear from the phone conversation between Messrs. Lockett and Boyer on September 16, 2015 they were involved in business together. In the conversation Mr. Lockett said "Buddy's out in H now." People do not speak like that. A person may say, Buddy's in Hamilton or Hawaii or wherever. Using the initial was an attempt to hide what was being said. Det. Sgt. Babiar described how

drug dealers use initials instead of the name of a place. In fact at the time of the conversation, Mr. Telford was in Halifax. I find the conversation dealt with drug trafficking in Halifax.

[47] While the judge referred to Mr. Telford being in Halifax, he did not explain the relevance, or how that connected to Mr. Boyer. Mr. Boyer maintains the judge's finding that "H" meant Halifax was the lone fact connecting him to a conspiracy in Halifax and Mr. Telford's presence in Halifax was the only link.

[48] Furthermore, Mr. Boyer argues, the judge based his finding of Mr. Boyer's culpability as a conspirator on a single telephone conversation, the same one for which he concluded "H" meant Halifax, without having considered any other reasonable inferences to be drawn from that conversation.

[49] Defence counsel had suggested to the judge several possibilities for "H", other than Halifax. On the face of it, the judge's conclusion that "H" is a reference to Halifax violates the *Villaroman* doctrine as it never considers or makes room for other reasonable possibilities. If the judge did do so, there is no indication of it.

[50] The record indicates numerous possibilities for "H" were suggested to the judge in closing submissions, but his reasons do not make clear they were considered, much less rejected. This was significant, as the finding "H" meant Halifax was the single fact that established Mr. Boyer's involvement in a conspiracy taking place in Halifax.

[51] A phone conversation between Mr. Germaine and Mr. Lockett on September 7, 2015 was recounted at para. 142 of the judge's reasons:

[142] In the phone conversation between Reece Germaine and Stephen Lockett on September 7, 2015, the following exchange took place. Mr. Germaine is Voice 1 and Mr. Lockett is Voice 2:

VOICE 1: Hello

VOICE 2: Buddy, where's your computer?

VOICE 1: Uh, it's on my, on the bed

VOICE 2: Oh, you're sleeping. Okay, well have, have a look at it.

VOICE 1: Yeah I am, I am. Um, what's goin' on, everything okay?

VOICE 2: Yeah, it's fine but just look at it

VOICE 1: Uh, _____

VOICE 2: (Clears throat)

VOICE 1: _____. Uh, uh, tonight?

VOICE 2: Yeah, that's the only thing under, like, two, 2K (Short laugh)

VOICE 1: Holy Jesus

VOICE 2: H-have you talk to him is he gonna be there? Is he gonna be back here soon or what, what's he doin'?

VOICE 1: I don't know the fuckin' guy partied last night, man

VOICE 2: Oh fuck. Who's the Taxi?

VOICE 1: _____. No, not

VOICE 2: Who

VOICE 1: The Taxi. Taxi guy doesn't even drink, he's good.

VOICE 2: No

VOICE 1: But, like

VOICE 2: Okay, yeah, that's fine but who cares about _____

VOICE 1: (Clears throat)

VOICE 2: He's an idiot

VOICE 1: But, but the fuckin' guy that partied last night, uh, Taxi's tryin' to get a hold of him to grab files

VOICE 2: Ah, he's such a fuckin' idiot, isn't he?

VOICE 1: No, my God, like

VOICE 2: God, he's annoyin'. And he

VOICE 1: I know

VOICE 2: Knew you were coming too. I already talked to him. What a f-. ah, he's so annoyin'

VOICE 1: Yeah, and then he, and then he, and then he, he fuckin' pretended like he didn't. Told Taxi, like, oh, yeah, I didn't know he's coming today

VOICE 2: Oh he

VOICE 1: Pretended like he

VOICE 2: Knew. I talked to him

VOICE 1: I know

VOICE 2: Major talked _____

VOICE 1: I know he knew. I talked to him yesterday

[52] The same conversation was then elaborated upon by the judge in the ensuing paras. 143–144:

In this conversation the language is guarded, for example, Mr. Lockett telling Mr. Germaine to look at his computer, not telling him what to look for. At line 26 of page 3 of 6 reference to Taxi guy trying to grab “files”. Mr. Lockett makes reference that Major talked.

I find the above conversations were made while the conspiracy was ongoing and were made in furtherance of the conspiracy. (Emphasis added)

With respect, this finding by the judge about the call, that the two parties to it were engaged in a conspiracy, does not implicate Mr. Boyer.

[53] The Crown maintains the judge obviously considered other reasonable inferences, as demonstrated by his findings that there were alternative explanations for the significance of Mr. Boyer’s two fingerprints found on a plastic baggie, and the money counter, food saver/sealer machine and cash seized during the search of Mr. Boyer’s residence. It is unfortunate this was the only mention by the judge of alternate explanations for evidence. We cannot know whether that same analysis was exercised in relation to other alternative theories for the circumstantial evidence, either as offered to the judge or presented by the evidence.

[54] We do not know why the judge was satisfied the telephone conversations to which he referred in his decision pointed to no other conclusion but the involvement and role of Mr. Boyer in a conspiracy occurring in Halifax. There was no meaningful link between what the judge articulated as facts and how they then informed his conclusions. Respectfully, the judge does not appear to have made room for, considered or rejected other reasonable inferences.

[55] The Crown asks us to consider that because Mr. Boyer did not testify at trial, his submissions to the judge that “H” could mean locations other than Halifax was merely speculative. While he was not obliged to do so, the Crown suggests Mr. Boyer could have testified (with immunity under the *Canada Evidence Act* as to any other offences in which he might then have been engaged) to explain his reference to “H” in the September 16, 2015 telephone conversation. In its factum, the Crown argues:

46. As stated above, the appellant did not testify, and this Court can take that into account in assessing whether the verdict was unreasonable. The appellant did present other evidence in his own defence, but that evidence served only to try to contradict a few narrow inferences that the Crown sought to impress upon the trial

judge. The evidence presented did not respond to the significant pieces of evidence implicating the appellant in the conspiracy.

[56] Although Mr. Boyer did not testify to provide alternate explanations, that does not resuscitate an otherwise unreasonable or unsupportable conviction. In *Barrett, supra*, the implications of not testifying were discussed:

[48] Without casting aside either the presumption of innocence or the burden of proof resting with the Crown, an observation by the court in *Lights, supra*, echoes in this case. Like Mr. Barrett, the accused in that case did not testify at trial. The court noted:

[33] When the claim of an unreasonable verdict rests on the assertion that, based on the evidence, the trier of fact could not have reasonably rendered the guilty verdict, an appellate court is entitled to consider that the accused did not testify at trial or adduce other evidence to support any other reasonable inference consistent with innocence: *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at pp. 280-81; *R. v. Wu*, 2017 ONCA 620, at para. 16.

[49] All his criticisms of the perceived flaws of the quality of the corroborative evidence are without the benefit of any alternative evidence from Mr. Barrett. This observation is not intended to suggest any burden on him or any other accused at trial, but it does now permit us to regard the trial evidence through that lens. (See also *R. v. Roberts*, 2020 NSCA 20 at para. 52.)

[57] I recognize the absence of evidence from Mr. Boyer, although he did call evidence on certain matters.³ However, the evidence that was before the judge, even without Mr. Boyer’s own testimony as to alternative explanations, does not support his guilt as the only reasonable conclusion. In making that observation, I recognize the role of the Court is not “... to retry the case or in effect to act as a 13th juror ...” (*R. v. Anderson*, 2020 ONCA 780 at para. 30).

[58] The judge assumed everything Mr. Lockett did involved Mr. Boyer, without indicating whether he considered the possibility that Mr. Lockett, a person with whom Mr. Boyer associated, could have been engaged in a different conspiracy or operation that did not include Mr. Boyer. For example, certain aspects of the intercept evidence pertaining to Mr. Lockett included discussions, with no mention of Mr. Boyer, about people working for one “Bone” or “T-Bone”, leaving ample room for the possibility that person was the directing mind providing instructions to couriers.

³ In particular, the judge accepted defence evidence that established Mr. Boyer’s rental property was not used as a “stash house”.

[59] I agree with Mr. Boyer's argument that because intercepted communications link other people known by or associated with him to activities in Halifax does not mean, beyond a reasonable doubt, he was involved in those activities. Considered objectively, the evidence is equally consistent with him having had some other type of connection to or relationship with the people the Crown asserts were his co-conspirators.

[60] At para. 149 of his decision, the judge stated:

[149] In the conversation between Messrs. Boyer and Lockett on September 16, after pleasantries about his trip, it was Mr. Boyer who asked the first question about business:

What, um, tsk, you, you know the Hami guy?

Mr. Boyer goes on asking Mr. Lockett questions to be brought up to date about the business. Mr. Boyer then gives directions to Mr. Lockett. Mr. Boyer appears to be senior to Mr. Lockett in the organization. In his report, Det. Sgt. Babiar addresses the controlling minds of the drug operation stating:

In large scale drug distribution schemes there is generally an individual or individuals working cooperatively directing the operation(s). ... Those making the decisions overseeing the operations are at the top end of the hierarchy.

The evidence shows this was a large scale drug operation. The searches of the couriers' luggage establish large quantities of cannabis marihuana were involved worth hundreds of thousands of dollars. I find that Mr. Boyer was a person directing the operation along with Mr. Lockett.

[61] It is not clear how the judge concluded Mr. Boyer was directing the operation with Mr. Lockett. Perhaps he did so on the basis of the telephone conversation he recounted between Mr. Lockett and Mr. Boyer, or on the basis of the telephone conversation he had earlier described between Mr. Lockett and Mr. Germaine; it is not apparent. The judge then goes on to state "Mr. Boyer appears to be senior to Mr. Lockett in the organization", but does not explain what evidence he relied on to reach that conclusion.

[62] I am persuaded by Mr. Boyer's argument that a number of aspects of the evidence relied upon by the Crown to construct its case against him can support other reasonable inferences inconsistent with his guilt.

[63] Reading the record, there were other ways to look at the evidence, including those suggested to the judge. Presuming for the moment the judge rejected these

alternative explanations, I am unable to conclude why or on what basis he did so, or how and why the evidence propelled him to the conclusions he reached.

[64] I recognize the length of the trial and the volume of evidence put before the judge was not slight. However, I am not persuaded the judge “... grappled with the substance of the live issues on the trial” (*R.E.M., supra*, at para. 64). While “... it remains fundamentally for the trier of fact to decide whether any proposed alternative way of looking at the case is reasonable enough to raise a doubt” (*R. v. Lights*, 2020 ONCA 128 at para. 71), we do not know if the judge took account of those proposed alternatives. That leaves the unanswered question: why was it the judge was left with no reasonable doubt?

[65] The absence of any confirmation of consideration of plausible alternatives makes it impossible to discern why the judge was satisfied the only reasonable explanation, on the totality of the circumstantial evidence, was the guilt of the accused. A review of the judge’s decision does not indicate he considered any alternatives—an integral component in the exercise of the assessment of a circumstantial case.

Conclusion

[66] The totality of the evidence could not support the convictions entered against Mr. Boyer. Given the determination of the unreasonable verdict, the appropriate remedy is to quash the convictions. There is no possibility, on the evidence contained in the record, that a properly instructed trier of fact might convict.

[67] I would allow the appeal, quash the convictions and enter an acquittal on each of the six counts of the Indictment.

Beaton J.A.

Concurred in:

Farrar J.A.

Derrick J.A.