NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ritch and Sparks*, 2022 NSCA 52

Date: 20220712
Docket: CAC 496279
Registry: Halifax

Between:

Samanda Rose Ritch

Appellant

v.

Her Majesty the Queen

Respondent

Docket: CAC 496989
Registry: Halifax

Between:

Calvin Jim Sparks

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Anne Derrick
Appeal Heard:	March 22 and 23, 2022, in Halifax, Nova Scotia
Subject:	Criminal law: jury charge on *Vetrovec* caution; after-the-fact conduct; third-party suspects; party liability; and manslaughter. Admissibility of accused's statements to a cell plant; continuation of jury deliberations following a request to re-hear evidence.
Summary:	The appellants were charged with first-degree murder in the stabbing death of the victim. The Crown presented evidence from disreputable witnesses, including an eyewitness, after-the-fact conduct by the appellants, and statements made by

Ms. Ritch to an undercover police officer operating as a cell plant. The appellants did not dispute being present. Mr. Sparks' defence was that third parties were the killers. Through her counsel, the jury were told that Ms. Ritch's mere presence did not attract criminal liability. The parties agreed with the trial judge's decision to include an instruction to the jury on manslaughter as a possible verdict for Ms. Ritch. Both appellants were convicted of first-degree murder.

Issues: Did the trial judge err in her jury charge on: the special caution relating to the credibility of the disreputable Crown witnesses (the *Vetrovec* caution); the appellants' after-the-fact conduct; the third-party suspects evidence; party liability for first-degree murder; and manslaughter?

Did the trial judge err in admitting most of Ms. Ritch's statements to the undercover police officer?

Did the trial judge err in not directing the jury to cease deliberations after they requested a re-play of a witness's evidence?

Result: The appeals are dismissed. The trial judge's jury instructions complied substantively with the relevant legal principles. Viewed in the context of the evidence, the entire charge, and the trial as a whole, they performed the required function of equipping the jury to apply the law when assessing the facts. The trial judge's *Vetrovec* caution served the purpose for which it was intended, enabling the jury to evaluate the evidence of the disreputable witnesses with great care in determining whether it was credible. Although the judge's after-the-fact conduct instruction was under-inclusive in its review of the evidence, the under-inclusiveness was to the appellants' advantage. The judge properly charged the jury on the third-party suspects evidence in accordance with the applicable principles and adequately reviewed the evidence. Her charge on aiding followed the reasoning path established in *R. v. Johnson*, 2017 NSCA 64. Ms. Ritch was not simply present at the scene. The trial judge did not review all the evidence that implicated Ms. Ritch in aiding a planned and

deliberate murder, which enured to her benefit. The instructions on manslaughter were correct, and while sparse, they were sufficient. The trial judge identified in her instruction what the jury had to consider: if they were not satisfied beyond a reasonable doubt that Ms. Ritch had the requisite mental state for murder when she aided Mr. Sparks' assault of the victim, then the included offence of manslaughter was applicable. In relation to the grounds of appeal not relating to the jury charge, the trial judge made no errors of law. Her decision to exclude only a discrete portion of the cell plant evidence was reasonable and owed significant deference. As for the continuation of jury deliberations following the request to re-hear evidence, the trial judge was best situated to determine whether it was necessary to provide a stop-deliberating direction. There was no request made by counsel for a direction and nothing to indicate it was required.

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 55 pages.

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Judges:	Beveridge, Bourgeois, and Derrick, JJ.A.
Appeal Heard:	March 22 and 23, 2022, in Halifax, Nova Scotia
Held:	Appeals dismissed, per reasons for judgment of Derrick, J.A.; Beveridge and Bourgeois, JJ.A. concurring
Counsel:	Richard Litkowski and Myles Anevich, for Calvin Sparks Erin Dann and James Bray, for Samanda Ritch Mark Scott, Q.C., for the respondent

Reasons for judgment:

Introduction

[1] On June 16th, 2017 Nadia Gonzales was brutally murdered. She bled to death on the upper floor of an apartment building after being stabbed 40 times. She had just arrived with a friend, John Patterson, when she was attacked. Mr. Patterson was also stabbed but escaped.

[2] Calvin Sparks and Samanda Ritch do not dispute they were present. Mr. Sparks' defence was that third parties were the killers. Through Ms. Ritch's counsel, the jury were told that her mere presence did not attract criminal liability. Neither accused testified.

[3] After a trial by Justice Christa Brothers in the Supreme Court of Nova Scotia with a jury, Mr. Sparks and Ms. Ritch were each convicted of first degree murder. They were acquitted of the attempted murder of Mr. Patterson with Mr. Sparks being convicted instead of assault causing bodily harm. They raise a number of issues in their appeals. They agreed to have their appeals heard together.

[4] Both appellants claim the trial judge made errors in her instructions to the jury about unsavoury Crown witnesses—the *Vetrovec*[1] warning, and in relation to after-the-fact conduct. Ms. Ritch's appeal also concerns the admission of statements she made to an undercover police officer, and the judge's instructions to the jury in relation to both manslaughter and party liability in a planned and deliberate murder. Mr. Sparks' appeal concerns jury instructions about third party suspects and the continuation of jury deliberations after the jury requested a re-play of evidence.

[5] I would dismiss the appeals. I find the appellants have failed to show the trial judge erred in admitting Ms. Ritch's statements to the undercover police officer, how she conducted the trial, or in her instructions to the jury.

Broad Overview of the Evidence

[6] Nadia Gonzales and Calvin Sparks were in business together as drug dealers. They shared a 2005 Honda Accord and a cell phone. Over time their relationship soured. Each accused the other of providing information to the police. Mr. Sparks

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[1] *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811 [*Vetrovec*].

was jealous of Ms. Gonzales' financial success. The car was a source of friction. The Crown led evidence that Mr. Sparks started to talk about having Ms. Gonzales eliminated. The jury heard from John Patterson and Joseph Fowler about these conversations. There was also other evidence of planning and deliberation.

[7] Several witnesses, including Mr. Patterson, testified that on June 15th, 2017 Mr. Sparks and Ms. Ritch went to the apartment building at 33 Hastings Drive ("33 Hastings") in Dartmouth where, the next day, Ms. Gonzales would be murdered. They visited Apartment 16 which was lived in by Wayne Bruce and Marion Graves, both heavy, habitual crack cocaine users and customers of Ms. Gonzales. Mr. Bruce had also purchased crack from Mr. Sparks.

[8] Mr. Patterson, a friend of Mr. Bruce's, was paying a visit to Apartment 16 when Mr. Sparks and Ms. Ritch arrived. Ms. Graves testified they came with a black hockey bag.

[9] Leaving Ms. Ritch in the living room, Mr. Sparks pulled Mr. Patterson into Mr. Bruce's bedroom for a private conversation. He disclosed that he intended to kill Ms. Gonzales, had already dug a grave, and planned to chop her up and put her in a garbage bag. Mr. Patterson tried to dissuade Mr. Sparks but he remained resolute in his intentions.

[10] Mr. Bruce and Ms. Graves both testified that Mr. Sparks and Ms. Ritch returned to the apartment on June 16th. Mr. Bruce was sharing some crack cocaine with a couple of friends. Ms. Graves was in and out of the apartment doing laundry on the bottom floor. On one of her trips down the back stairs she saw Mr. Sparks and Ms. Ritch in the stairwell with a black hockey bag. When Ms. Graves returned to the apartment, Mr. Sparks and Ms. Ritch were inside with Mr. Bruce.

[11] While Ms. Graves had been attending to the laundry, Ms. Ritch had come to the apartment door and indicated to Mr. Bruce that Mr. Sparks wanted the visitors gone. Once Mr. Bruce ushered them out, Ms. Ritch and Mr. Sparks entered dressed in dark hoodies. Mr. Sparks was carrying a large bag, the size of a hockey bag, which he took into Mr. Bruce's bedroom. According to Mr. Bruce, Mr. Sparks kept asking if Ms. Gonzales was coming back.

[12] The evidence indicated Ms. Gonzales spent June 16th making drug deliveries with Mr. Patterson. Eventually, some hours later, at 7:22 p.m. Mr. Bruce received a text from Ms. Gonzales indicating, "There in 8 mins". Mr. Sparks got up and went

to the living room window that looked out over Hastings Drive. Shortly afterwards, he announced they had arrived.

[13] Ms. Graves had finished the laundry and some housework and left the apartment at approximately 7:30 p.m.. This was confirmed by CCTV footage that captured her walking through a nearby parking lot. She only knew much later something might be wrong when she started calling Mr. Bruce's cell phone around 10 p.m. and got no answer.

[14] Mr. Bruce testified that after Mr. Sparks spotted the arrival of Ms. Gonzales and Mr. Patterson, he and Ms. Ritch went into Mr. Bruce's bedroom briefly. When they emerged their hoods were up and they each had a knife. Mr. Sparks told Mr. Bruce to go to his bedroom. From the bedroom Mr. Bruce heard the hallway door open. He did not see what happened next.

[15] A 911 call dispatched police to 33 Hastings Drive. The first officers arrived at 7:46 p.m. Mr. Patterson was lying on the grass across the street from the apartment building. He had been stabbed. There was worse to come. Inside 33 Hastings on a stairway landing, police found Ms. Gonzales in a large black hockey bag. She was dead. An autopsy identified a dozen stab wounds to her neck, including wounds that severed her carotid artery and jugular vein, resulting in significant blood loss. She had also been stabbed in her right flank and thigh.

[16] Ms. Gonzales and Mr. Patterson had gone into 33 Hastings for the purpose of making a drug delivery to Mr. Bruce. They were accompanied by another man, Mike. A tenant testified she had held the door of the building open for "two guys and a girl" around 7:30 p.m.

[17] John Patterson described what happened when he and Ms. Gonzales arrived outside Apartment 16. Ms. Gonzales knocked and a few minutes later, the door swung open and Mr. Sparks leapt out, pouncing on her and knocking her to the ground with a blow to the head. He straddled her and began to stab her. Ms. Ritch sprang out of the apartment right behind Mr. Sparks and positioned herself next to the prone Ms. Gonzales. Mr. Patterson viewed her moving her body and hands in a manner that suggested to him she too was stabbing Ms. Gonzales. He said what he saw Ms. Ritch doing "wasn't nice". When Mr. Patterson tried to pull Mr. Sparks off Ms. Gonzales, Mr. Sparks stabbed him in the arm, inflicting a serious injury. Unable to do anything to help his friend, Mr. Patterson fled the building, ultimately collapsing on the grass outside. Mike was long gone from the scene. There was no suggestion of any involvement by him and he was not called as a witness.

[18] The tenant of the apartment directly below Apartment 16 testified to hearing a loud crashing sound sometime between 6:30 p.m. and 7 p.m. on June 16th. After complaining to the building superintendent and returning to his apartment, the tenant heard thumping and, looking through a window into the stairwell, noticed a black hockey bag on the landing between the third and fourth floors. He could also see the feet of two individuals. When he entered the stairwell for a closer view of the bag, he noticed human hair sticking out of the zipper at the top and what looked like blood staining on the side. The two individuals were gone. The tenant told the jury there was a back door to the apartment building leading outside.

[19] The Crown's theory was that Mr. Sparks and Ms. Ritch got Ms. Gonzales into the black hockey bag and started to drag it down the stairs, before abandoning the effort. When examined by police investigators, the hockey bag was found to contain a large blue tarp, a tarp bag, some plastic garbage bags, and the handle of a broken knife. The blade of the knife was located on the floor of the landing outside Apartment 16.

[20] The Crown led eyewitness and video evidence of two individuals in dark hoodies travelling through backyards near the apartment building at the relevant time. A neighbour heard the very excited voices of a male and a female. They were in a hurry, climbing through a hedge and over a fence. Police located an orange-handled knife in the grass.

[21] Video footage from a discount store shortly after the attack on Ms. Gonzales captured a female purchasing rubbing alcohol, peroxide, bandages and gauze. She appeared to have something wrapped around her left ring finger. Her purchases included a pair of pink tights, the packaging for which was located by police the next evening in the front seat of the Gonzales/Sparks Honda Accord. An employee from the store identified the distinctive brand.

[22] Around 10 p.m. on June 16th police detained three men outside of 33 Hastings for investigative purposes and officer safety. Jacob Sparks, Vincent Sparks and James Riley were taken into custody and searched. They were very cooperative. They had no injuries and there was no forensic evidence connecting them to Ms. Gonzales' murder. At trial Mr. Sparks' defence counsel argued she could have been killed by these men.

[23] Mr. Sparks and Ms. Ritch were arrested at Ms. Ritch's family home very early in the morning of June 17th and taken into custody. They both had serious

cuts on their hands which required stitching, and in the case of Mr. Sparks, surgical reattachment of tendons.

[24] While Ms. Ritch was in custody at the police station, an undercover police officer, U/C Sherri, was placed in the adjacent cell. Ms. Ritch and U/C Sherri struck up a conversation which, according to U/C Sherri's evidence, Ms. Ritch dominated. Ms. Ritch made a number of admissions, which her defence counsel sought to have excluded from evidence. Following a *voir dire*, Justice Brothers ruled all but a portion of Ms. Ritch's utterances to be admissible evidence. The jury heard this evidence when U/C Sherri testified.

[25] The jury also heard statements made by Mr. Sparks in telephone calls from jail in June 2017. The Crown argued this was after-the-fact conduct evidence that incriminated him in Ms. Gonzales' murder. I will describe these calls when I discuss the trial judge's instructions to the jury on after-the-fact conduct evidence. Some of the calls were to Joseph Fowler.

[26] Joseph Fowler had been friends with both Ms. Gonzales and Mr. Sparks. He testified Mr. Sparks talked to him prior to June 16th about getting rid of Ms. Gonzales. The plan, such as it was, involved stabbing Ms. Gonzales in the neck with the orange-handled knife Mr. Sparks always had on him.

[27] Mr. Fowler liked Ms. Gonzales and warned her that Mr. Sparks wanted to kill her. A text message on June 14th, 2017 from Mr. Fowler to Ms. Gonzales stated he had been "asked to take you out" and could have done so because of the opportunity presented by being alone with her.

[28] Mr. Fowler said Mr. Sparks was angry about text messages in Ms. Gonzales' phone that showed she was communicating with the police. Mr. Sparks was also jealous of the money Ms. Gonzales was making in the drug trade. He suggested Mr. Fowler participate in killing Ms. Gonzales, a proposal Mr. Fowler told the jury he sidestepped: "I would just put him off, right? Tell him what he wanted to hear…Yeah, I wasn't trying to have nothing to do with that. It's not how I roll".

[29] The jury heard about forensic evidence that implicated Mr. Sparks, including DNA belonging to him and Ms. Gonzales in the Honda Accord, on parts of the hockey bag, on the orange-handled knife found in the backyard near 33 Hastings, and on the conducted energy weapon (taser) that had belonged to Ms. Gonzales found at Ms. Ritch's residence. Mr. Sparks' DNA was also located in the stairwell

at 33 Hastings. Ms. Ritch's DNA was found on fingernail clippings from Ms. Gonzales' right hand.

Overview of the Crown and Defence Theories of the Case

[30] The Crown's theory was that Mr. Sparks planned and deliberated Ms. Gonzales' murder which he carried out by stabbing her to death outside Apartment 16. It was the Crown's position that Ms. Ritch was an active participant in Ms. Gonzales' murder; either by way of a direct involvement in the physical act of stabbing Ms. Gonzales or by assisting Mr. Sparks in committing the murder which she knew was planned and deliberate.

[31] Mr. Sparks' defence was that third parties, namely other drug dealers (Frankie Tynes, Jacob Sparks, Vincent Sparks, and/or James Riley) who claimed Dartmouth as their drug-dealing turf—Nadia Gonzales was from Halifax—murdered her. He did not dispute the murder was planned and deliberate.

[32] Ms. Ritch's defence was a denial of any knowledge of or involvement in Ms. Gonzales' murder. Her only involvement, if Mr. Sparks was the killer, was as an accessory after the fact, with which she was not charged.

Grounds of Appeal

[33] As I noted earlier, the complaints on appeal by Ms. Ritch and Mr. Sparks focus primarily on the trial judge's instructions to the jury. Before I deal with those grounds of appeal I will address the issue of Ms. Ritch's statements to the undercover officer and Mr. Sparks' argument that jury deliberations should have been stopped once they asked to re-hear John Patterson's testimony.

Did the Trial Judge Err in Not Excluding the Entirety of Ms. Ritch's Statement to the Undercover Police Officer?

[34] Once the police had Ms. Ritch in custody on June 17th they collected information from her by way of a cell plant, the undercover police officer, U/C Sherri. In a pre-trial *voir dire*, Ms. Ritch sought to have the trial judge exclude the entire conversation with U/C Sherri on the basis it had been obtained through a violation of her right to remain silent under s. 7 of the *Charter*. The judge heard evidence about the cell plant operation and from U/C Sherri, considered the relevant law, and ruled that all but a portion of the exchange was admissible and could be presented to the jury.

[35] The trial judge excluded conversation that came after a comment U/C Sherri made when Ms. Ritch said "CJ" was going to shoot her when he got out. U/C Sherri responded to this by saying it didn't sound like he would be getting out anytime soon if it was planned. The trial judge characterized that statement by U/C Sherri as an elicitation, in other words, the functional equivalent of an interrogation.

Evidentiary Background

[36] After her arrest in the early morning of June 17th, Ms. Ritch was given the opportunity to speak to a lawyer and did so. She was interviewed by D/Cst. Brigette Cross on and off throughout most of the day. The interviewing was interrupted by breaks, including for Ms. Ritch to attend at the hospital to receive medical attention to her cut finger. During this time, police investigators were cueing up the cell plant.

[37] U/C Sherri testified she had been a Halifax Regional police officer for ten years. Her "cover" officer, "Cover Brad", reviewed what she needed to know for her undercover role: the briefing sheet and the caselaw sheet, as well as an exit strategy, issues of contact with other prisoners, preparation for work in small spaces and a safety briefing. U/C Sherri was given minimal information about the homicide so as not to influence the operation.

[38] The undercover officer used her phone to take notes of her conversation with Ms. Ritch. She told defence counsel the notes were "pretty accurate". She also had a vivid memory of the discussion.

[39] U/C Sherri testified Ms. Ritch told her that her "ex" had stabbed a "girl" in Dartmouth over 30 times and put her in a duffle bag. She confirmed it was the same case where a man had also been injured, saying she hoped he didn't die. She also said the police had been asking her where she parked the car which she had been driving. The car had bloody clothes in it. She had cleaned it and scrubbed the steering wheel. She had wanted to burn the car but her ex told her not to. She described the location where the car was parked. She said the "dead girl's" taser was at her house with the deceased's blood on it. She had burned her clothing and shoes on a camp stove. She told U/C Sherri "they" had found the deceased's phone in a vehicle and discovered by scrolling through text messages that she had been "snitching" to the police "hard core". It was not established when Ms. Ritch learned the information.

[40] U/C Sherri said Ms. Ritch told her she didn't stab the victim; she just helped put her in the duffle bag. She was scratched by the victim which was why she had a cut on her face. She had been stabbed in the hand "while it was happening". She told U/C Sherri the plan was to hide the girl in the storage unit downstairs in the apartment building. She added the police were unaware of the fact that a hole had been dug in an alley. She did not say who had dug the hole.

[41] Ms. Ritch indicated a third man had been present. She mentioned there was a "strap" in "the crackhead's apartment". In response to U/C Sherri not immediately grasping what she meant, Ms. Ritch explained the "strap" was a shotgun. A shotgun was subsequently located by police in Apartment 16.

[42] On cross-examination, U/C Sherri confirmed Ms. Ritch had told her she was wearing gloves when she helped put the girl in to the hockey bag and that no blood got through to her hands as a result. Ms. Ritch had also told her she was wearing gloves when she cleaned the car.

[43] U/C Sherri testified the conversation with Ms. Ritch lasted approximately one hour and twenty minutes. It ended around midnight when Ms. Ritch fell asleep.

The Trial Judge's *Voir Dire* Decision

[44] The trial judge made a number of findings of fact in her *voir dire* ruling on the admissibility of Ms. Ritch's statements to U/C Sherri.[2] She found Ms. Ritch initiated the conversation and was immediately talkative, choosing to speak freely to the officer about the charges against her. Within a short time, she told U/C Sherri why she had been arrested, and informed her about the events leading to her arrest. The judge accepted U/C Sherri's evidence about what was said by Ms. Ritch, finding her to be a credible and reliable witness. She found her to be more credible and reliable than Ms. Ritch who had also testified at the *voir dire*.

[45] The trial judge found that U/C Sherri was not required to be a mere listening post but was entitled to actively participate in the conversation. U/C Sherri knew very little about the details of the investigation, helping her to avoid eliciting

[2] Reported as *R. v. Sparks and Ritch*, 2020 NSSC 128 [*Sparks and Ritch*].

questions and "ensuring any information learned was from the accused".[3] U/C Sherri did not trick Ms. Ritch into making inculpatory statements. The judge held:

> From the evidence on the *voir dire*, I conclude that, during the bulk of the conversation, there was no elicitation as defined by the caselaw. Ms. Ritch provided a voluntary statement to the undercover officer. The conversation flowed naturally up to the point where the officer said "well if it was planned, he's not getting out any time soon." [4]

[46] The trial judge concluded the undercover officer did not do anything to violate Ms. Ritch's right to silence. With the exception of the elicitation comment, the trial judge found no causal link between U/C Sherri's conduct and Ms. Ritch's statements: "Nothing else that U/C Sherri did prompted, coaxed or cajoled a response from Ms. Ritch." [5]

[47] The exception was the "not likely getting out anytime soon" comment. The trial judge viewed this as having crossed the threshold to elicitation:

> This veiled inquiry went to planning and deliberation, directing or steering the conversation back to the issue of planning, resulting in the functional equivalent of an interrogation. Any information Ms. Ritch provided after this statement amounted to an elicitation." [6]

[48] The trial judge deemed U/C Sherri's comment to be "moderately serious". She found:

> It undermined Ms. Ritch's right to silence by actively eliciting a statement from her. This amounted to her being conscripted by subterfuge to give evidence against herself after that statement. In my view, all the statements made after this comment are tainted by the active elicitation, contrary to section 7.[7]

[49] The judge then embarked on the s. 24(2) analysis. She reviewed the factors delineated by the Supreme Court of Canada in *R. v. Grant* [8]. She did not proceed through the steps, she simply found that what Ms. Ritch said to U/C Sherri after the elicitation statement had to be excluded and could be easily severed "from the

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[3] *Ibid* at para. 86.
[4] *Ibid* at para. 85.
[5] *Ibid* at para. 107.
[6] *Ibid* at para. 100.
[7] *Ibid* at para. 109.
[8] 2009 SCC 32, as cited in *R. v. Letourneau*, 2010 ONSC 2027 [*Grant*].

evidence which was obtained legally". She said: "In some cases, this is not possible and all the evidence is tainted. Here, there is a clear demarcation".[9]

The Arguments on Appeal

[50] Ms. Ritch argued the trial judge made two fatal errors in her decision to only exclude a portion of the utterances she made to U/C Sherri: she failed to consider whether the statements made prior to the "elicitation" were "obtained in a manner" that infringed the *Charter* and she did not provide any analysis for how she applied the *Grant* factors. In Ms. Ritch's view the entire cell plant conversation should have been excluded due to the "clear temporal and contextual nexus" between the *Charter* breach and the cell plant conversation. This "one continuous transaction" that unfolded over a short span of time was aimed at gathering inculpatory admissions from Ms. Ritch.

[51] In the respondent's submission, the trial judge's decision was responsive to a breach she found to be serious but inadvertent. The judge exercised her discretion to fashion a remedy that did not exclude utterances U/C Sherri had not elicited. The respondent argued deference should be accorded to that more modest approach.

The Governing Principles

[52] In the context of a cell plant, infringing the right to silence will involve an "impermissible causal link between the undercover officer's conduct and the statements made to him by the accused."[10] In *R. v. Broyles*, the Supreme Court of Canada indicated a series of factors are relevant to a judge's analysis of whether an elicitation occurred:

> …these factors test the relationship between the state agent and the accused so as to answer this question: considering all the circumstances of the exchange between the accused and the state agent, is there a causal link between the conduct of the state agent and the making of the statement by the accused? For convenience, I arrange these factors into two groups. This list of factors is not exhaustive, nor will the answer to any one question necessarily be dispositive.[11]

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[9] *Sparks and Ritch*, *supra* note 2 at para. 111.
[10] *R. v. Liew*, [1999] 3 S.C.R. 227 at para. 57 [*Liew*].
[11] [1991] 3 S.C.R. 595 (QL) at para. 31.

[53] The trial judge considered the factors in her analysis of whether there had been elicitation by U/C Sherri.[12] She also properly reviewed the Court's decisions in *R. v. Hebert*[13] and *R. v. Liew*[14]. The majority in *Liew* held:

> In affirming a detainee's right to silence, *Hebert* and *Broyles* preserve and define an area of police investigation where undercover operations, including cell block interviews, are perfectly legitimate. The undercover officer's interventions in the exchange at issue in this appeal are so innocuous that to conclude that the appellant's statements are inadmissible is effectively to abolish, contrary to *Hebert* and *Broyles*, that legitimate area of police investigation. It would be tantamount to adopting either a "listening post" standard or an "absolute right to silence" standard, both of which were unambiguously rejected by this Court in those cases.[15]

[54] Once she determined there was evidence from Ms. Ritch that had been "obtained in a manner that infringed" her section 7 right to silence, the trial judge was required to exclude the evidence "if it is established, that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute".[16]

[55] The pivotal question on the issue of whether evidence should be excluded is the nature of the connection between the violation of Ms. Ritch's *Charter*-protected right to silence and the utterances she made during the cell plant. As held by the Supreme Court of Canada in *R. v. Mack*:

> …The courts have adopted a purposive approach to this inquiry. Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A "remote" or "tenuous" connection between the breach and the impugned conduct will not suffice.[17]

[56] Considerable deference is afforded a trial judge's determination of the strength of the connection between a piece of evidence and a *Charter* breach

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[12] *Sparks and Ritch*, *supra* note 2 at para. 72.
[13] [1990] 2 S.C.R. 151.
[14] *Supra* note 10.
[15] *Ibid* at para. 58.
[16] S. 24(2), *Canadian Charter of Rights and Freedoms*; *R. v. Wittwer*, 2008 SCC 33 at para. 19.
[17] 2014 SCC 58 at para. 38 [*Mack*]. See also: *R. v. Tim*, 2022 SCC 12 at para. 78.

because that determination is a question of fact. Appellate interference is only warranted where the judge "has failed to consider the proper factors or has made an unreasonable finding".[18]

The Principles Applied

[57] The trial judge referred herself to the applicable legal principles and undertook a rigorous examination of the evidence given by Ms. Ritch and U/C Sherri about their conversation. She made findings of credibility and reliability that are supported in the record. She found "U/C Sherri's communication did not include questioning, gentle or otherwise, or involve actively encouraging Ms. Ritch to speak about the alleged offences".[19] She found no causal link between U/C Sherri's conduct and Ms. Ritch's utterances until the "elicitation" statement. She was satisfied there was "a clear demarcation" that separated the legally permissible exchange between Ms. Ritch and U/C Sherri and Ms. Ritch's utterances that followed the "elicitation".[20] It cannot be said that any of the earlier utterances were obtained in a manner that infringed Ms. Ritch's right to silence.

[58] This is not a case where a broader scope for exclusion was justified. The trial judge found a single *Charter* breach as a result of a statement made by U/C Sherri close to the end of the cell plant operation. Prior to that point Ms. Ritch had dominated the conversation with free-flowing, voluntary utterances. Indeed, it is reasonable to question whether the statement by U/C Sherri constituted an elicitation at all. She had merely responded to Ms. Ritch's concerns that violence would be perpetrated against her. As the respondent notes, some of the details excluded by the trial judge had been provided by Ms. Ritch to a police investigator during a formal interview. Ms. Ritch had shown a predilection for not choosing to exercise her right to silence while in police custody on June 17th despite having been made well aware of it.

[59] The trial judge's decision to exclude evidence from the cell plant was reasonable and eminently fair to Ms. Ritch. It was unnecessary for her to have undertaken an exhaustive *Grant* analysis. She considered the appropriate factors in

[18] *Mack, supra* note 17 at para. 39.
[19] *Sparks and Ritch, supra* note 2 at para. 107.
[20] *Ibid* at para. 111.

her exclusion analysis and her ultimate determination is owed significant deference.[21]

Conclusion

[60] I would dismiss this ground of appeal.

Did the Trial Judge Err by Not Directing the Jury to Cease Deliberations When They Requested a Playback of Evidence?

[61] This ground of appeal was raised only by Mr. Sparks.

[62] A little over two hours after the jury began their deliberations on December 12th, 2019 they asked for a re-play of evidence. Finding the appropriate recordings took some organization on the part of the trial judge and counsel. In the meantime the jury continued to deliberate. Mr. Sparks says the trial judge should have directed them to stop until they had re-heard the evidence. He does not argue the judge's failure to do so by itself justifies a new trial; rather it is an error to be taken into account with the other errors he alleges were made.

Factual Background

[63] The judge's instructions to the jury concluded on December 12th, 2019 at 2:34 p.m. The jury retired but was told to not start deliberations while the judge had a discussion with counsel. At 2:37 p.m. the jury was sent word they could start deliberating.

[64] At 5 p.m. the jury asked to re-hear John Patterson's evidence. During the discussions between the judge and counsel about cueing up the evidence the jury continued their deliberations. None of the counsel raised any objection to them doing so. When the jury was brought back into court at 6 p.m. the trial judge told them deliberations were concluded for the night and they would be able to start again the next morning at 9:30 a.m.

[65] The court reconvened on December 13th at 9:25 a.m. and the jury continued their deliberations. The trial judge and counsel turned their attention back to organizing the re-play of John Patterson's evidence.

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[21] *Grant*, *supra* note 8 at para. 86. See also, *R. v. Pountney*, 2019 BCCA 423 at para. 19.

[66] At 9:34 a.m., the jury sent a note asking for a re-instruction on planning and deliberation. They were brought back into court at 9:56 a.m. and the trial judge re-read this part of her instruction. She explained the re-play of John Patterson's evidence would be ready shortly. It commenced at 10:08 a.m.

[67] The jury indicated after nearly two hours they had heard the portion of the evidence they were interested in and asked to review "the relevant cross-examination". Once the jury members had left the courtroom, Ms. Ritch's counsel, Mr. Planetta, suggested that when the jury had a question the trial judge should give a stop-deliberating direction: "the normal jury instruction, I believe, is to…when you hand in a question to stop deliberating". He did not indicate any urgency: "…not right away but maybe at the next break..." The trial judge ensured she understood what Mr. Planetta was proposing: "That when they give a question, they're to stop deliberating". He responded: "Right".

[68] Playback of Mr. Patterson's cross-examination began just after noon. The judge gave the stop-deliberating direction about 45 minutes later right before the lunch recess. She said: "I want to remind you of something. Once you give me a question, you should stop deliberation until you receive the answer from me…"

[69] The playback of John Patterson's evidence occupied the court for the balance of the afternoon of December 13th following the lunch break. The jury then asked to remain until 8 p.m. to continue their deliberations. Telling them it had been a long day, the trial judge declined the request and sent them to a hotel. The jury chose to return the next day at 9 a.m. to resume deliberating.

[70] On December 14th at 10:57 a.m. the jury sent word they had a verdict.

The Arguments on Appeal

[71] Mr. Sparks says the jury should have been told to stop deliberating when they made the request to re-hear John Patterson's evidence. In his submission, the request for a re-instruction on planning and deliberation made within 10 minutes of starting their deliberations on the morning of December 13th indicates the jury was at a crucial stage in their assessment of Mr. Sparks' liability. John Patterson's evidence was central to this issue. Allowing the jury to continue deliberating may have distorted the jury's reasoning process. Mr. Sparks submits the stop-deliberating direction provided by the trial judge the next day was too little, too late. He says "the potential for impermissible reasoning festered and metastasized" while the deliberations continued as the John Patterson evidence was readied.

[72] Mr. Spark relies on *R. v. Ellis* where it was held that:

> 42 A trial judge's response to a deliberating jury's question should also be timely. Unreasoning haste should not trump the need for a clear, correct and comprehensive judicial response to the jury's question. On the other hand, undue delay, without a corresponding instruction to cease deliberations where the question reflects a misunderstanding or seeks an explanation of important legal principles, is not without its own risks. Chief among those is the risk that the reasoning process that leads to a verdict and the verdict itself may be corrupted by legally impermissible reasoning.[22]

[73] In Mr. Sparks' submission, a stop-deliberating direction should have been given when the jury requested the re-play of evidence. It should not be restricted to only when a substantive question has been asked.

[74] The respondent says there is no authority requiring a trial judge to direct a jury to cease deliberations until their question has been answered to the satisfaction of counsel.

The Governing Principles

[75] Jury questions are important and can indicate there is a specific difficulty being encountered that requires the assistance of the trial judge.[23] The judge has an obligation to provide "a clear, correct, and comprehensive response to the jury's question".[24] There is no authority that obliges a trial judge to direct the jury to cease its deliberations where a request has been made and a response is being formulated, although there may be circumstances where it is appropriate and prudent to do so.

The Principles Applied

[76] The trial judge did not commit error when she dealt with the request for a re-play of evidence without directing the jury to cease deliberations. The jury was not indicating it needed clarification of a legal principle nor that they were confused about a legal issue. They wanted to re-hear the evidence from the Crown's eyewitness to the homicide. They required the trial judge's help only to the extent of the evidence being made available to them. There were additional issues for the jury to work through as they waited for a re-play of John Patterson's testimony.

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[22] 2013 ONCA 9 at para. 42 [*Ellis*].
[23] *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521 at 528.
[24] *Ellis*, *supra* note 22 at para. 41

There is no basis for Mr. Sparks' suggestion the jury's reasoning process may have been corrupted.

[77] Although it was Ms. Ritch's counsel who spoke up, it is reasonable to infer Mr. Sparks' very experienced counsel was familiar with trial judges directing deliberations cease when a jury question has been received. At the time the jury requested a re-play of John Patterson's evidence he did not ask for such a direction to be given.

[78] In some circumstances it will be necessary for a trial judge to provide a stop-deliberating direction. The judge is best situated to determine whether to do so. There was no request for a direction here and nothing to indicate it was required.

Conclusion

[79] I would dismiss this ground of appeal.

Jury Instructions – General Principles

[80] In the next series of issues I will be discussing the trial judge's instructions to the jury. The appellants have jointly criticized her *Vetrovec* caution required for unsavoury witnesses and her charge on after-the-fact conduct. In addition, Mr. Sparks submits the judge's instruction on third party suspects was deficient. Ms. Ritch says the instructions on manslaughter and party liability for a planned and deliberate murder fell short of what is required. In my examination of these complaints I have applied the following principles.

[81] Whether a trial judge has erred by misdirection or non-direction in the jury instructions is a question of law subject to review on a standard of correctness. But a jury charge is not to be measured against a standard of perfection. An accused is entitled to a properly, not a perfectly, instructed jury.[25] Appellate review must undertake a functional approach that examines "the alleged errors in the context of the evidence, the entire charge, and the trial as a whole".[26] It "will encompass the addresses of counsel as they may fill gaps left in the charge…"[27]

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[25] *R. v. Goforth*, 2022 SCC 25 at para. 20 [*Goforth*], citing *R. v. Daley*, 2007 SCC 53 at para. 31 [*Daley*]; *R. v. Jacquard*, [1997] 1 S.C.R. 314 at paras. 2, 32 [*Jacquard*].

[26] *Goforth supra* note 25 at para. 21, citing *R. v. Calnen*, 2019 SCC 6 at para. 8 [*Calnen*]; *R. v. Pickton*, 2010 SCC 32 at para. 10 [*Pickton*]; *R. v. Jaw*, 2009 SCC 42 at para. 32 [*Jaw*].

[27] *Daley*, *supra* note 25 at para. 58.

[82] Failure of counsel to object to the charge, while not decisive, is a factor in appellate review. The absence of an objection may be taken as indicative of the overall soundness of the instructions and the seriousness of the alleged violation later complained about as a ground of appeal.[28] This is even more the case,

> …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.[29]

[83] However, trial judges "bear the ultimate responsibility for the content, accuracy, and fairness of the jury charge".[30] Crown and Defence counsel are expected to assist and "identify what in their opinion is problematic" with the instructions.[31]

[84] It is the trial judge's role to "decant and simplify" the law and evidence for the jury.[32] An exhaustive review of the evidence is not required,[33] although the judge must "review the substantial parts of the evidence, and give the jury the theory of the defence, so that they may appreciate the value and effect of that evidence, and how the law is to be applied to the facts as they find them".[34]

[85] "The structure or organization of a jury charge is largely a matter within the trial judge's discretion".[35] The instructions must,

> …considered as a whole, satisfy the requirements of the authorities. The issue on appellate review is not whether another approach might have better equipped the jury to perform its task. For that might be said in almost every case with the infinite wisdom of hindsight. The standard is adequacy, not perfection.[36]

[86] The record in this case indicates a conscientious and diligent effort was undertaken by the trial judge to ensure her instructions complied with the relevant legal principles and requirements, and satisfied all parties. The judge conducted several, lengthy pre-charge discussions with counsel, inviting and considering their

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[28] *Ibid* at para. 58; *Jacquard*, *supra* note 25 at para. 38.
[29] *R. v. Huard*, 2013 ONCA 650 at para. 74 [*Huard*].
[30] *Calnen*, *supra* note 26 at para. 161, citing *Jaw*, *supra* note 26 at para. 44; *Jacquard*, *supra* note 25 at para. 37; *R. v. Khela*, 2009 SCC 4 at para. 49 [*Khela*].
[31] *Daley*, *supra* note 25 at para. 58.
[32] *Goforth*, *supra* note 25 at para. 22, citing *Jacquard*, *supra* note 25 at para. 13; *R. v. Rodgerson*, 2015 SCC 38 at para. 50.
[33] *Daley*, *supra* note 25 at para. 56.
[34] *Azoulay v. The Queen*, [1952] 2 S.C.R. 495 at pp. 497-8.
[35] *R. v. Debassige*, 2021 ONCA 484 at para. 105, citing *Daley*, *supra* note 25 at para. 30.
[36] *Huard*, *supra* note 29 at para. 52.

comments on her draft charge which they had been given to review. She made changes to her instructions as a result of the input she received.

Did the trial judge err in her Vetrovec instructions to the jury?

[87] Four civilian witnesses were very significant to the Crown's case: John Patterson, Wayne Bruce, Marion Graves, and Joseph Fowler. The trial judge was required to give a special caution to the jury, known as a *Vetrovec* warning, in relation to each of these witnesses. I am satisfied she did so without committing reversible error.

[88] A *Vetrovec* caution—"a clear and sharp warning to attract the attention of juror[s] to the risks of adopting, without more, the evidence of the witness"[37]—will be merited for witnesses who are "unsavoury", "untrustworthy", "unreliable", or "tainted".[38] This will include,

> …all witnesses who, because of their amoral character, criminal lifestyle, past dishonesty or interest in the outcome of the trial, cannot be trusted to tell the truth—even when they have expressly undertaken by oath or affirmation to do so.[39]

[89] The caution warns a jury "of the danger of relying on the impugned witness's testimony without being comforted, by some other evidence, that the witness is telling the truth about the accused's involvement in the crime".[40] The instruction to the jury should also point to "the type of evidence capable of providing such comfort".[41]

Evidentiary Background

[90] Each of the four witnesses merited a *Vetrovec* caution given their untrustworthy and unreliable characters.

[91] I will briefly recap their connections to Ms. Gonzales and the appellants: John Patterson was a friend of Ms. Gonzales who accompanied her on drug deliveries, including the fateful June 16th delivery to 33 Hastings. Wayne Bruce and Marion Graves regularly purchased crack cocaine from Ms. Gonzales and Mr. Sparks. Joseph Fowler knew both Ms. Gonzales and Mr. Sparks, although the

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[37] *Vetrovec*, *supra* note 1 at p. 831.
[38] *Khela*, *supra* note 30 at para. 3.
[39] *Ibid*.
[40] *R. v. Smith*, 2009 SCC 5 at para. 2 [*Smith*].
[41] *Ibid.*

evidence indicated he had expressed a preference for Ms. Gonzales, to the point of warning her about Mr. Sparks' murderous inclinations.

[92] John Patterson and Wayne Bruce gave evidence that implicated Ms. Ritch in the murder of Ms. Gonzales. Warning the jury to look for supporting evidence in relation to what they had to say about her was therefore also necessary.

[93] Serious credibility issues affecting the four witnesses were exposed in cross-examination. These were emphasized by defence counsel in their jury addresses.

The Jury Addresses by Defence Counsel

[94] Defence counsel left the jury in no doubt about the unsavoury character of the four witnesses. Ms. Ritch's counsel, Mr. Planetta, told the jury to reject Mr. Patterson's purported credibility because he was a habitual crack cocaine user, had lied under oath about not knowing Wayne Bruce was a drug dealer, and had shown "a blatant disrespect" for court orders that prohibited him from using drugs.

[95] Mr. Planetta took aim at Mr. Bruce for his admissions he had lied in his statements to police and under oath at trial, and for admitting that lying did not bother him and was easy to do. He reminded the jury Mr. Bruce had originally been charged with Ms. Gonzales' murder and said that gave him a motive to not be truthful in his police statements. He urged the jury "not to believe anything he said to you".

[96] Mr. Planetta chronicled for the jury the evidence about Marion Graves: she was a decades-long crack cocaine user and had a lengthy criminal record that included convictions for crimes of dishonesty. He emphasized the significance of Ms. Graves' two public mischief convictions for falsely accusing innocent people. She had failed to follow court orders and had not returned to court following the lunch break that interrupted her testimony.

[97] In his jury address, Mr. Sparks' counsel, Mr. Jeffcock, referred to the same evidence about Ms. Graves' disreputable character. He also discussed what made Mr. Patterson and Mr. Bruce inherently untrustworthy: protracted, habitual use of crack cocaine, Mr. Bruce's lies under oath at trial—denying he was a drug dealer, and saying he would not source drugs for other drug dealers. Mr. Jeffcock called Mr. Bruce a "perjurer" and exhorted the jury to view him as having "absolutely no credibility". He said Mr. Bruce shared a common thread with Mr. Patterson, Ms. Graves and Mr. Fowler—"he had absolutely no problem lying".

[98] Mr. Jeffcock reminded the jury about Mr. Fowler's lies—that he had claimed to have been working full-time which was shown to be untrue and that he had been in jail for a curfew breach when in fact his surety had rendered.

[99] Notably, Mr. Jeffcock referred twice to the *Vetrovec* caution he knew the trial judge would be providing, the content of which he was familiar with from pre-charge discussions. When he started to discuss Mr. Patterson in his address, he told the jury:

> You're going to hear from Justice Brothers about a special instruction on certain witnesses. He's one of them. Follow what Justice Brothers says about how you deal with these people.

[100] After telling the jury Mr. Bruce should be regarded as having no credibility, Mr. Jeffcock said:

> And again, you will hear from Justice Brothers with a direction as to how you go through the very, very difficult task of sort of parsing out what use, if any, you can make of his evidence.

Pre-Charge Discussions with Counsel

[101] In pre-charge discussions the judge addressed the reasons for providing a *Vetrovec* caution in relation to each of the four witnesses. The discussion encompassed their characteristics and circumstances later described to the jury.

[102] The trial judge observed that the jury instruction would have to address the exculpatory evidence the *Vetrovec* witnesses had given. In the case of Mr. Fowler, he testified Ms. Ritch was not present for any discussions he had with Mr. Sparks about a plan to murder Ms. Gonzales. Mr. Bruce had given evidence about Frankie Tynes being a gangster that people—John Patterson and Nadia Gonzales—were afraid of; a drug dealer who could be violent, who thought of Dartmouth as all of his territory, felt no one else should be dealing drugs there, and had been watching Mr. Bruce's apartment. Mr. Bruce also testified that at no time had Mr. Sparks asked him to telephone, in other words, lure, anyone to come to the apartment on June 16th. Mr. Sparks' counsel would tell the jury these aspects of Mr. Bruce's evidence raised a reasonable doubt about Mr. Sparks being the person who killed Ms. Gonzales. The trial judge said the jury would be told they were not required to look for confirmatory evidence where the testimony of a *Vetrovec* witness was exculpatory.

[103] In pre-charge discussions, the judge reviewed with counsel in extensive detail the confirmatory evidence she should draw to the jury's attention as part of the *Vetrovec* instruction.

The Trial Judge's *Vetrovec* Caution

[104] In her charge, the trial judge said in relation to each of the four witnesses: "Experience teaches us that testimony from a Crown witness of this kind in these circumstances and with this background must be approached with the greatest caution and care". The jury was told to keep the special instruction "foremost in your minds when you are considering how much or little you will believe of or rely upon his evidence in making your decision in this case". She then reviewed each witness's circumstances and background:

- John Patterson—criminal record that included a number of convictions for theft, a crime of dishonesty; shoplifting to get money for drugs.
- Wayne Bruce—criminal record; originally charged with first degree murder of Ms. Gonzales; admitted to lying under oath during his testimony.
- Marion Graves—criminal record with over 75 convictions, including numerous offences involving dishonesty; failure to return to court after lunch as directed to continue her testimony. (The trial judge noted Ms. Graves did come back to court the next day to complete her cross-examination.)
- Joseph Fowler—criminal record; admitted to lying under oath during his testimony.

[105] In relation to each witness, the trial judge referenced evidence that was potentially confirmatory. She gave an almost identical introduction to the specific parts of the trial evidence. The caution in relation to Mr. Patterson serves as an example:

> You are entitled to rely on Mr. Patterson'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 Mr. Patterson's evidence from somebody or something other than Mr. Patterson before you rely on his evidence in deciding whether the Crown counsel has proven the case against…the accused, beyond a reasonable doubt.

> To be confirmatory of the evidence of Mr. Patterson, evidence must be independent of Mr. Patterson…To be confirmatory the testimony of another witness or other witnesses or other evidence need not self-implicate the accused in the commission of the offence, but it must give you comfort that Mr. Patterson can be trusted when he says that Ms. Ritch and Mr. Sparks committed any offences.[42]
>
> You may find that there's some evidence in this case that confirms or supports some parts of his testimony. It is for you to say whether this or any evidence confirms or supports his testimony and how that affects whether or how much you believe of or rely upon his testimony in deciding this case.

[106] The trial judge gave an additional warning in relation to Mr. Bruce, saying he had admitted to being untruthful in his evidence at trial, and adding: "For his evidence to confirm another person's evidence you must first be satisfied that he was not being untruthful with you in relation to that specific piece of evidence".

[107] For each witness, the trial judge identified possible exculpatory evidence. With Mr. Patterson, Mr. Bruce and Ms. Graves, it was evidence about their knowledge or observations of the third party suspects. For Mr. Fowler, it was evidence about Ms. Ritch, or more precisely, the absence in his testimony of evidence inculpating Ms. Ritch in the planning of Ms. Gonzales' murder.

[108] What the trial judge said in relation to each witness was similar. She impressed on the jury that they did not need to search for confirmatory evidence to accept exculpatory evidence and find reasonable doubt.

The Arguments on Appeal

[109] The appellants each complain the trial judge's *Vetrovec* caution was inadequate. Ms. Ritch says the "particular danger" posed by the evidence of Wayne Bruce was not emphasized and would not have been apparent to the jury. She explains the concern in her factum: "…as a former suspect, and potential accomplice, Mr. Bruce had both the means and motive to fabricate a compelling version of events that falsely implicated" both accused.

[110] In Ms. Ritch's submission, the trial judge further erred by indicating Mr. Patterson's evidence could be confirmed by Mr. Bruce's testimony that both accused were in his apartment on June 16th before the attack on Ms. Gonzales. Ms.

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[42] In her instruction to the jury on confirmatory evidence for Mr. Fowler's testimony, the trial judge referred to evidence that would provide comfort Mr. Fowler was telling the truth "when he says that Mr. Sparks planned to commit the offence". The trial judge went on to note that Mr. Fowler did not say Ms. Ritch was involved in the plan "and that she never spoke to him about a plan and was never present when a plan was discussed".

Ritch's argument refers to the passage in the trial judge's instructions where she told the jury about evidence that could confirm Mr. Patterson's evidence: "Now, remember my warning about Mr. Bruce, but Mr. Bruce testified they, both Mr. Sparks and Ms. Ritch, were in Apartment 16 before Ms. Gonzales arrived".

[111] Ms. Ritch says Mr. Bruce's evidence did not have the requisite qualities of being independent of Mr. Patterson and untainted. She refers to Mr. Bruce, charged as a party to Ms. Gonzales' murder, receiving disclosure which included Mr. Patterson's statement to police and his description of Ms. Ritch and Mr. Sparks springing out of Apartment 16 and launching themselves at Ms. Gonzales.

[112] Mr. Sparks criticizes the trial judge's *Vetrovec* instruction for not going far enough. He set out the nature of the deficiency in his factum:

> The trial judge clearly set out the tools that the jury could use to identify evidence capable of enhancing the trustworthiness of these witnesses, but failed to properly instruct on why their trustworthiness was questionable to begin with. Simply outlining that the witnesses had extensive criminal records and a history of drug use fell well short of the minimum standard required by the *Vetrovec* jurisprudence.

[113] In Mr. Sparks' submission, the *Vetrovec* instruction needed to emphasize for the jury the particular hazards associated with relying on the evidence of the four witnesses, and, in relation to Mr. Bruce and Mr. Fowler, the significance of their deceitful testimony at the trial. Mr. Sparks says the trial judge "had to ensure that the jury understood that these two witnesses were capable of manipulating the truth while appearing confident and honest before the jury".

[114] In the respondent's submission, the appellants' criticisms are without merit. The jury had the benefit, not only of the trial judge's caution, but also defence counsels' cross-examinations and final jury addresses which emphasized the dangers of relying on the witnesses' evidence.

The Governing Principles

[115] While the jury must understand the reasons for special scrutiny of a witness's evidence, the trial judge has latitude in crafting the caution:

> This requires identifying for the jury the characteristics of the witness that bring his or her credibility into serious question. **It does not necessitate an exhaustive**

> **explanation of how a particular characteristic might enable a witness to upset the fact-finding process.[43]**
>
> [*emphasis added*]

[116] Appellate review of a trial judge's *Vetrovec* caution must take a functional approach.[44] It is to be considered with the jury charge, read as a whole and in the context of the record.[45] In *R. v. Sauvé*,[46] the Ontario Court of Appeal's assessment of the adequacy of the *Vetrovec* warning in the context of the record noted the extensive cross-examination of the unsavoury witnesses, the closing addresses of defence counsel, and the trial judge's review of the evidence in his jury instructions. Indeed, defence counsel have a responsibility to address in their final summations, "the issue of unsavoury witnesses and the presence or absence of confirmatory evidence".[47] Defence counsel did so here.

[117] A trial judge's *Vetrovec* warning must, however, contain certain elements.[48] It is to be crafted within a "principled framework".[49] The trial judge is required to:

- Provide the jury with an understanding of the reasons the witness's credibility requires special scrutiny.
- Identify for the jury the characteristics of the witness that bring their credibility into serious question.
- Warn the jury that while it may rely on the unconfirmed evidence of a *Vetrovec* witness, it is dangerous to do so.
- Direct the jury to look for independent evidence that tends to confirm material aspects of the evidence given by the *Vetrovec* witness.[50] The instruction must "make clear the type of evidence capable of offering support".[51]

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[43] *Smith*, *supra* note 40 at para. 14.
[44] *Ibid* at para. 23.
[45] *Ibid* at para. 13; *Khela*, *supra* note 30 at para. 44.
[46] (2004), 182 C.C.C. (3d) 321 (ONCA) [*Sauvé*]
[47] *Khela*, *supra* note 30 at para. 50.
[48] *Ibid* at para. 82.
[49] *Ibid* at para. 30.
[50] *Sauvé*, *supra* note 46 at para. 82; *R. v. Brooks*, 2000 SCC 11 at para. 94; *Khela*, *supra* note 30 at paras. 11 and 37.
[51] *Khela*, *supra* note 30 at para. 46.

[118] The *Vetrovec* caution does not need to follow a particular formula.[52] Trial judges have significant discretion to craft the instruction in accordance with the circumstances of the trial.

The Principles Applied

[119] Although the trial judge could have provided a more robust recital when reviewing the witnesses' backgrounds and circumstances, I find no reversible error in her *Vetrovec* caution. The jury would have been left in no doubt about these witnesses' credibility and reliability issues once defence counsel finished dealing with them in their cross-examinations and final full-throated jury addresses.

[120] It would also have been preferable for the judge to specifically highlight how Mr. Bruce's receipt of disclosure containing Mr. Patterson's police statements could have assisted him in concocting a false narrative for aspects of his evidence.[53] This should have been referenced in her instructions on the importance of confirmatory evidence. It was mentioned to the jury by counsel for Mr. Sparks in his closing address.

[121] However, in identifying confirmatory evidence for Mr. Patterson's testimony that Mr. Sparks and Ms. Ritch lunged out of the apartment at Ms. Gonzales, the trial judge referred only once to Mr. Bruce's evidence. I mentioned previously that the judge prefaced this reference by telling the jury to remember the caution she had given them about Mr. Bruce. She proceeded to immediately recount Ms. Graves' confirmatory evidence about Mr. Sparks and Ms. Ritch being in the apartment when she left around 7:30 p.m.

[122] Furthermore, no one disputed that Mr. Sparks and Ms. Ritch were in Apartment 16 when Ms. Gonzales and Mr. Patterson arrived outside the door. Defence counsel sought to have the jury infer that third parties set upon Ms. Gonzales and Mr. Patterson and then inflicted wounds on Mr. Sparks and Ms. Ritch as they tried to escape from the apartment.

[123] It is relevant to note that trial counsel did not object to the trial judge's *Vetrovec* caution. The record indicates close attention was being paid to the judge's instructions as Ms. Ritch's counsel asked her to correct a misstatement she made

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[52] *Ibid* at paras. 13-14; *Smith*, *supra* note 40 at para. 16.
[53] *Smith*, *supra* note 40 at para. 15.

about U/C Sherri's evidence when she was reviewing evidence that was possibly confirmatory of Mr. Patterson's testimony. No other concerns were raised.

[124] The *Vetrovec* caution is to be assessed on the basis of whether it served the purpose for which it was intended. Reviewed in the context of the record as a whole, I am satisfied it did. Any reasonable jury provided with the trial judge's instruction would have evaluated the evidence of Mr. Patterson, Mr. Bruce, Ms. Graves and Mr. Fowler with great care in determining whether it was credible.

Conclusion

[125] I would dismiss this ground of appeal.

Did the trial judge err in her instructions to the jury on after-the-fact conduct in relation to either or both Ms. Ritch and Mr. Sparks?

[126] Ms. Ritch and Mr. Sparks each criticized the trial judge's instructions to the jury on the after-the-fact conduct evidence. Ms. Ritch says the jury should have been told the after-the-fact conduct evidence that related to her could not assist them in assessing whether she had the requisite mental intent for first or second-degree murder. Mr. Sparks says the instruction dealing with the after-the-fact conduct evidence relating to him was so inadequate as to constitute a non-direction.

[127] In Ms. Ritch's case there was evidence of individuals leaving the vicinity of 33 Hastings that the jury could have accepted were her and Mr. Sparks. The jury also had video footage and testimony about a young woman purchasing items shortly after the murder at a nearby discount store. In Mr. Sparks' case there was the evidence of flight, his disposal of bloodied bandages when in the custody of the police, and his telephone calls from jail.

Evidentiary Background – Flight, Discount Store Purchases, Disposal of Bandages and Telephone Calls from Jail

[128] The after-the-fact conduct evidence included CCTV footage and eyewitness testimony. Witnesses heard and observed two figures travelling through the backyards of their properties. They mentioned very excited voices, one male and the other, female. The individuals were in a hurry, climbing through a hedge and over a fence. This was just after CCTV footage had captured two individuals at 7:43 p.m. hurrying away from the apartment building.

[129] Shortly after Ms. Gonzales was murdered, and not far from 33 Hastings, CCTV footage at the Bargain Basket in Dartmouth showed a young woman purchasing items that could be used to treat a wound. She had something wrapped around her left ring finger. The jury had U/C Sherri's evidence that Ms. Ritch had spoken about sustaining a stab wound to her left ring finger.

[130] At the police station following his arrest, Mr. Sparks was informed forensic IDENT investigators wanted to swab his bandaged hands. He asked to use the washroom. Police officers stationed outside heard repeated flushing. When Mr. Sparks emerged, the bandages were gone.

[131] During the period of June 21st to June 27th while in custody at the Central Nova Scotia Correctional Facility, Mr. Sparks called family and friends on the telephone.[54] A message at the start of each call informed Mr. Sparks and the person he called they were being recorded. During this time, Ms. Ritch was in jail, in the women's section. In the calls, Mr. Sparks made a number of statements:

- In a call on June 21st, 2017, Mr. Sparks urged his father to find the Honda Accord, saying: "…the…only thing I'm worried about is the car. Find the car". That same day, he told his cousin to put $50 on Ms. Ritch's canteen but said: "I don't want no money on her phone because, yeah, I don't know how…how her lips are right now". He emphasized this later in the call: "I just got to worry about Samanda. Just don't put no money…on her phone though, I don't want her talking to nobody. She's loose lip…"

- On June 23rd, 2017, Mr. Sparks talked to his girlfriend, telling her he had had surgery on his hands. He said: "My hands are all fucked up" and when asked what happened, responded: "The murder thing happened". He added: "…it's involved in the case that I can't talk about". On June 24th, he said in a call with Joseph Fowler: "…my hands are all fucked up from the incident". Mr. Sparks stated in several calls that he was innocent although he did not describe anyone stabbing or cutting his hands.

- In a call on June 24th referring to Ms. Ritch, Mr. Sparks said: "I don't want to put no money on her phone, right, because I don't know what she will say…"

[54] In the Statement of Admitted Facts, Mr. Sparks admitted it was his voice in the telephone calls from the jail.

- In the June 24th call with Mr. Fowler, who had been contacted by police for an interview, Mr. Sparks urged him to destroy the SIM card from his phone: "Fucking, I need you to, when you're done off this phone man, break that SIM card and don't talk to that officer…" Mr. Sparks reiterated the direction to break the SIM card several times and told Mr. Fowler he had a SIM card "at the house if you need a new SIM card with top up minutes". He told Mr. Fowler: "You got to change your number or cancel the number, man. For real, you can't talk to them people".

- Mr. Sparks was still trying to locate the Honda Accord on June 26th when he asked his father to get the car registered in his name so he could make inquiries to see if it had been impounded. He also talked to his cousin that day, reiterating his concerns about Ms. Ritch: "…it's just the only thing that I got to worry about is her fucking talking too much, that's what I'm saying. Like I didn't want no money on her phone…like I got to get a message to her just to keep her mouth shut until trial and let me…when I go on the stand and I tell…tell our story and then we're going to be set free because we're both innocent…I shouldn't talk about it anymore than that. You know what I mean?"

- In the same June 26th call with his cousin, following a discussion about his suspicion the police were tapping his father's phone, Mr. Sparks said: "…that's why I told the white boy to fucking delete…like fucking break his number and get a fucking new one because like they're tapping your shit…" The jury was entitled to infer this was a reference to Mr. Sparks' earlier telephone conversation with Joseph Fowler.

- Mr. Sparks spoke to Mr. Fowler again on June 27th. He wanted to get Mr. Fowler on his visiting list so he could talk to him in person. Mr. Fowler still had the phone and Mr. Sparks emphasized "…you're supposed to change the number for me, though, man. Like that was important to me, man".

[132] The jury had heard evidence from Joseph Fowler that Mr. Sparks texted him about wanting to kill Ms. Gonzales. Mr. Fowler testified he got rid of his phone—it was "heating [him] out" because he had exchanged messages with Mr. Sparks and Ms. Gonzales:

> So I knew there were text messages there and stuff, you know what I mean? Like, I knew that I had talked to him and I had talked to her, and she's deceased, right?

The Trial Judge's Charge on After-the-Fact Conduct

[133] In her instructions, the trial judge referred to the individuals seen leaving the vicinity of 33 Hastings, the evidence about Mr. Sparks' bandages and his phone calls from jail.[55] She reminded the jury that Ms. Ritch had told U/C Sherri she cleaned the car, burned bloody clothes, helped put Ms. Gonzales in a hockey bag "and they were going to bring her to a storage locker".

[134] The trial judge instructed the jury about the use they could make of after-the-fact conduct, if they were satisfied the individuals involved were the accused. She told them:

- After-the-fact conduct only has an indirect bearing on the issue of any accused's guilt.
- They must be careful about inferring guilt from the conduct because there may be other explanations for it, something unconnected with participation in the offence charged.
- They were entitled to use the after-the-fact evidence along with other evidence to support an inference of guilt only if they had rejected any other explanation for the conduct.
- Specifically in relation to the evidence provided by CCTV footage and eyewitnesses about the two individuals hurriedly leaving the vicinity of 33 Hastings, if the jury found the Crown had "proven beyond a reasonable doubt"[56] that it was Mr. Sparks and Ms. Ritch then they may consider "the way in which those individuals left 33 Hastings".
- If they found that Mr. Sparks and Ms. Ritch actually "did or said what they are alleged to have done or said" then they must next consider whether the

[55] It is questionable whether what Mr. Sparks said in his telephone calls from jail constitutes after-the-fact conduct. His statements are more properly understood as admissions. The same can be said about the statements Ms. Ritch made to U/C Sherri.

[56] This is an incorrect statement of the law. Individual pieces of evidence are not to be subjected to proof beyond a reasonable doubt (*R. v. Morin*, [1988] 2 S.C.R. 345). The Crown pointed this out in a pre-charge discussion. It remained in the charge and was an error that enured to the appellant's benefit.

> after-the-fact conduct "was related to the commission of the offences charged or to something else".

[135] The trial judge directed the jury to consider all of the evidence and noted that evidence offering an alternate explanation for the conduct was of particular importance. She reviewed a number of possible innocent explanations for Mr. Sparks' apparent disposal of the bandages, why he would be hesitant to have his injured hands swabbed, the fact that he did not immediately present himself when the police arrived to arrest him, and his request for letters of support for Ms. Ritch.[57] She suggested if the jury found it was Mr. Sparks and Ms. Ritch going through the backyards it could have been because they feared for their safety from third parties. She said the utterances made by Ms. Ritch to U/C Sherri could indicate involvement as an accessory after the fact, an offence with which she had not been charged. She concluded with a firm statement about the requirement to consider all the evidence from the trial:

> You must not use this evidence about what an accused did or said afterwards in deciding or helping you decide that the accused committed these offences unless you reject any other or any innocent explanation for it. If you do not or cannot find that what Ms. Ritch and Mr. Sparks did or said afterwards was related to the commission of the offences charged, you must not use this evidence in deciding or in helping you decide that Ms. Ritch and Mr. Sparks committed the offences charged. On the other hand, if you find that what or anything Ms. Ritch or Mr. Sparks did or said afterwards was related to the commission of the offences charged, not to something else, you may consider this evidence, together with all the other evidence, in reaching your verdict. The evidence I have reviewed here of actions and words done or said after cannot, by themselves, satisfy the standard or proof beyond a reasonable doubt. These are just pieces of circumstantial evidence to be considered as you choose with the whole of the evidence.

The Arguments on Appeal

[136] Ms. Ritch argues that while after-the-fact conduct was relevant and admissible on the issue of whether she and Mr. Sparks were the individuals involved in the attack on Ms. Gonzales, it was not probative on the issues of intent and planning and deliberation. This required the trial judge to give the jury a "no probative value" instruction.

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[57] The record does not reveal where the jury actually heard about letters of support for Ms. Ritch. There was discussion by the Crown in the absence of the jury about playing a telephone call in which the letters were apparently mentioned by Mr. Sparks, but in the end, that call was never put into evidence.

[137] It is Mr. Sparks' position the jury instruction did not go far enough and amounted to a non-direction. The trial judge should have articulated more clearly for the jury the dangers of relying on the evidence and the specific uses to which it could be applied. The judge saying the evidence could be used to assist in determining whether the appellants committed the offence as charged was "an unhelpful and vague general instruction".

[138] The respondent says the trial judge's instructions were to the appellants' advantage. The Crown's factum puts the point bluntly: "Had the trial judge more comprehensively captured the post-offence conduct, it would have charted a blueprint for a conviction to first-degree murder".

The Governing Principles

[139] The leading authority on after-the-fact evidence is the Supreme Court of Canada decision in *R. v. Calnen*. At para. 113 the majority of the Court held:

> In addition to being aware of the general principles, it is important for counsel and trial judges to specifically define the issue, purpose, and use for which such evidence is tendered and to articulate the reasonable and rational inferences which might be drawn from it. This often requires counsel and the court to expressly set out the chain of reasoning that supports the relevance and materiality of such evidence for its intended use. Evidence is to be used only for the particular purpose for which it was admitted...[58]

[140] *Calnen* explained the "no probative value" instruction which Ms. Ritch now says the jury should have been given in relation to any after-the-fact conduct attributed to her: it is a "specific instruction to a jury that certain evidence has a limited use or is of no probative value on a particular issue…"[59]

[141] Trial judges are to "expressly state the inferences available to the jury".[60] The inferences are not to be drawn from a vacuum but must be reasonable "according to the measuring stick of human experience" and will depend on "the nature of the conduct, what is sought to be inferred from the conduct, the parties' positions, and the totality of the evidence".[61]

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[58] *Calnen*, *supra* note 26.
[59] *Ibid* at para. 113 (per Martin, J. dissenting although not on this point).
[60] *Ibid* at para. 115 (per Martin, J. dissenting although not on this point).
[61] *Ibid* at para. 112 (per Martin, J. dissenting although not on this point).

The Principles Applied

[142] Although there was considerable pre-charge discussion about the after-the-fact conduct, the trial judge received no real help from counsel in crafting her instructions to define the permissible use of the evidence. Where the pre-charge contributions by defence counsel seem to have been influential is with respect to the trial judge's emphasis on possible innocent explanations for the conduct. The trial judge was responsive to the discussions in her charge, for example, modifying her language by not using the term "flight" to describe how the two individuals left the 33 Hastings neighbourhood; telling the jury that delay in surrendering to the police on the morning of June 17th could have represented the experience of Mr. Sparks and Ms. Ritch as members of an over-policed, racialized community; and noting there was no evidence Mr. Sparks was instructed by the police not to dispose of his bandages.

[143] Measured against the requirement that an after-the-fact conduct instruction is to define the purpose and use to which the jury is to put the evidence and to articulate the reasonable inferences to be drawn, the trial judge's instructions were under-inclusive. She did not instruct the jury on how what they found Ms. Ritch and Mr. Sparks to have done could be used to infer intent or the mental state for planning and deliberation. Had she done so it would have been highly detrimental to each of the appellants. I agree with the respondent's observation that the under-inclusiveness was to their advantage.

[144] The trial judge did not make specific reference to Mr. Sparks and Ms. Ritch stuffing Ms. Gonzales into the black hockey bag they had brought with them, their immediate flight together, and Ms. Ritch's calm demeanor while making purchases at the bargain store. As the respondent has noted, this evidence was relevant to differentiating between manslaughter and murder, and between first-degree and second-degree murder.

[145] A "no probative value" instruction for Ms. Ritch would not have been apposite in this case. As held in *Calnen*, "The existence of alternative explanations for the accused's conduct does not mean that certain evidence is no longer relevant".[62] It was for the jury as the trier of fact to determine what inferences to draw from the after-the-fact conduct and the weight to be given to any inferences.

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[62] *Ibid* at para. 124 (per Martin, J. dissenting although not on this point).

It would not have been appropriate for the trial judge to have usurped "the jury's exclusive fact-finding role" with a "no probative value" instruction.[63]

Conclusion

[146] I would dismiss this ground of appeal in relation to both appellants.

Did the Trial Judge Err in her Instructions to the Jury on Third Party Suspects?

[147] This issue relates solely to Mr. Sparks. He says the trial judge's charge on the third party suspect issue was inadequate, constituting reversible error. He argues the trial judge should have instructed the jury they must be satisfied beyond a reasonable doubt the third party suspects did not commit the murder. His trial counsel told the jury that Jacob Sparks, Frankie Tynes, Vincent Sparks or James Riley could have killed Ms. Gonzales. He said the presence of Jacob Sparks, Vincent Sparks and James Riley at 33 Hastings on the night of the murder at least raised a doubt about who had perpetrated the offence. He also put Frankie Tynes' fearsome reputation into the mix.

Jury Address by Mr. Sparks' Counsel

[148] Ms. Gonzales was murdered around 7:30 p.m. on June 16th. At approximately 10 p.m. that night the police detained Jacob Sparks, Vincent Sparks and James Riley in the parking lot outside 33 Hastings. Mr. Sparks' counsel told the jury the text messaging from Jacob Sparks prior to the murder should have been understood to indicate he wanted Ms. Gonzales murdered because he thought she was providing information to the police. In the words of defence counsel about who was responsible, "It was Jacob and his buddies…". He suggested to the jury that "Jacob Sparks, Vincent, Mr. Riley, and anyone else involved" had been inside 33 Hastings, committed the murder, left by the back door "returned to wherever they'd previously been, changed their clothing, disposed of their weapons, if they still had them…"

[149] Mr. Sparks' counsel intended the jury to have Frankie Tynes in mind as another possible perpetrator. He had elicited in his cross-examination of Mr. Bruce that Mr. Tynes was "a gangster", used "extortion" as a business practice, could be violent, regarded Dartmouth as his drug-dealing turf and did not want anyone else

[63] *R. v. White*, [1998] 2 S.C.R. 72 at para. 27.

operating in his territory. He referred to this evidence in his closing address to the jury and noted a call Mr. Bruce had received on the night of the murder that confirmed Mr. Tynes was watching the apartment.

The Trial Judge's Instruction on Third Party Suspects

[150] By the time the trial judge embarked on the section of her charge dealing with third party suspects the jury had heard her review Mr. Sparks' defence theory: that Ms. Gonzales' competitors, including Jacob Sparks, were jealous of her success and regarded her with suspicion, particularly as Jacob had had his house raided by police a few days prior to June 16th. Ms. Gonzales was arguing with Jacob by text on the day she was murdered.

[151] The trial judge opened her instructions about third party suspects by telling the jury:

> As I explained to you during the trial, anyone charged with an offence may introduce or rely on evidence that shows or tends to show that someone else, not the person charged, committed the offences. The evidence may be direct, it may be circumstantial, or it may be both. In this case Mr. Sparks says that Jacob Sparks, Frankie Tynes and their associates, Vincent Sparks and James Riley, that their presence raises a reasonable doubt as to who committed these offences. Evidence that shows or tends to show that Mr. Tynes and Mr. Sparks, along with their associates, committed the offences with which Mr. Sparks is charged, taken together with the rest of the evidence, may cause you to have a reasonable doubt about whether it was Mr. Sparks who committed the offences with which he is charged.

[152] The judge then provided a thorough review of the evidence that established the Crown witnesses, Mr. Bruce, Mr. Patterson, Ms. Graves and Mr. Fowler, all had a connection with Jacob Sparks and his associates. She reminded the jury of John Patterson's testimony that Frankie Tynes and Jacob Sparks could be violent, were in competition with Calvin Sparks, were upset and jealous of Ms. Gonzales' drug-trafficking success and wanted to shut her down. Mr. Patterson had told police that men hated her success. He had also told police the raid on Jacob Sparks' residence had caused him to fear there would be repercussions against him and Ms. Gonzales. Mr. Patterson described having angered Frankie Tynes and Jacob Sparks when he helped Calvin Sparks and Ms. Gonzales purchase the Honda.

[153] The judge noted Wayne Bruce's agreement on cross-examination with the description of Frankie Tynes as "a gangster" and someone who was known to be violent. Mr. Bruce had testified that Mr. Patterson and Ms. Gonzales were both concerned about Mr. Tynes who viewed all of Dartmouth as his territory. She referred to Marion Graves' evidence that pressure was coming from Frankie Tynes about cocaine being sold from Apartment 16. And she described the presence in the parking lot at 33 Hastings of Jacob Sparks, Vincent Sparks and James Riley on the night of the murder.

[154] The trial judge went through the testimony of police officers who arrested and processed Jacob and Vincent Sparks and James Riley. The men had no injuries and no blood on them. They were calm and compliant. The police found no blood or other evidence in the Toyota Jacob Sparks had been driving that night. The judge referred to Mr. Patterson's testimony that he saw none of the men outside Apartment 16 at the time he was stabbed.

[155] Having conducted a review of the relevant evidence, the trial judge charged the jury as follows:

> …I've talked about some of the evidence that came through Crown witnesses with regards to third party suspects. I ask you to consider it all, along with the evidence in relation to third party suspects. If you believe the evidence that shows or tends to show that Jacob Sparks, Frankie Tynes, Vincent Sparks, or James Riley committed the offences with which Ms. Ritch and Mr. Sparks are charged, you must find both accused not guilty of those offences. If you do not believe the evidence that shows or tends to show that Jacob Sparks, Frankie Tynes, Vincent Sparks, or James Riley committed the offences with which Ms. Ritch and Mr. Sparks are charged but that evidence raises a reasonable doubt in your mind that the accused committed those offences, you must find the accused not guilty of those offences. If you do not believe the evidence that shows or tends to show that Mr. Sparks, Mr. Tynes – Mr. Jacob Sparks, Frankie Tynes, Vincent Sparks, or James Riley committed the offences with which the accused are charged and that evidence does not raise a reasonable doubt in your mind that the accused committed those offences, you must consider whether the rest of the evidence that you accept satisfies you beyond a reasonable doubt that the accused committed the offences charged.

The Arguments on Appeal

[156] Mr. Sparks says the judge's instruction should have emphasized that in order to convict the jury had to be "satisfied beyond a reasonable doubt that,

notwithstanding the third party evidence, the accused committed the offences charged".

[157] In the respondent's submission the trial judge's charge on third party suspects maintained the jury's focus on the Crown's onus to prove the charges beyond a reasonable doubt. This had also been driven home in defence counsel's closing address where he emphasized Mr. Sparks was under no obligation to prove anything and the jury should have been left with a reasonable doubt as to who perpetrated the crime.

The Governing Principles

[158] When the defence of third party suspects is advanced at trial, the question for the trier of fact is whether, on the evidence as a whole, the possible involvement of the third party raises a reasonable doubt about the guilt of the accused.[64] All third party suspect evidence needs to do is raise a reasonable doubt.[65]

[159] Third party suspect jury instructions should identify the evidence that points to another perpetrator and then review evidence relied on by the Crown to rebut this suggestion. The formula recommended by Justice David Watt in *Watt's Manual of Criminal Jury Instructions* is favoured.[66]

[160] Third party suspect evidence must be relevant and probative to be admissible. A sufficient connection between the third party and the offence is essential. "The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation".[67] The claim that another individual perpetrated the offence, raising a reasonable doubt about the accused's involvement, may be "overwhelmingly defeated by the evidence pointing to the accused as the perpetrator".[68]

The Principles Applied

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[64] *R. v. Tomlinson*, 2014 ONCA 158 at para. 78; *R. v. Khan* 2011 BCCA 382 at para. 91.
[65] *R. v. Ranglin*, 2018 ONCA 1050 at para. 59 [*Ranglin*].
[66] *Ibid* at paras. 61-63.
[67] *R. v. Grandinetti*, 2005 SCC 5 at para. 47.
[68] *Ranglin*, *supra* note 65 at para. 60.

[161] The trial judge properly charged the jury in accordance with the applicable principles for a third party suspects instruction. She followed the *Watt* instruction approved by the Ontario Court of Appeal in *Ranglin*.[69] She was required to direct the jury that, taking all the evidence into account, they had to be satisfied the third party suspects evidence did not raise a reasonable doubt about Mr. Sparks' guilt.

[162] There was no obligation on the Crown to prove the third party suspects did not commit the murder. In pre-charge discussions the trial judge correctly dismissed defence counsel's argument this was required. Mr. Sparks' trial counsel otherwise approved of the judge's wording for the instruction.

[163] Mr. Sparks' only defence was that other individuals, not him, stabbed Ms. Gonzales to death. Despite the frailty of this assertion given the evidence that rebutted it[70], the role of third party suspects was afforded ample play in defence counsel's closing address and the trial judge's review of the evidence. The judge gave only a limited review of Crown evidence that countered the third party suspects claim. She said there was no evidence the third party suspects were in the building when Ms. Gonzales was murdered and that the police found no forensic connection between the arrested men and the murder scene. The judge did not revisit the considerable forensic and after-the-fact conduct evidence that linked Calvin Sparks to the murder.

[164] Having had an extensive opportunity to comment on the proposed instruction in a pre-charge back-and-forth with the trial judge and Crown counsel, Mr. Sparks' counsel agreed with the wording. While this is not dispositive, it is material. The evaluation of the complaint that the trial judge's instruction was insufficient must be conducted with this in mind, that defence counsel have raised "for the first time on appeal, that matters crucial to the defence were not properly addressed in the trial judge's jury instructions".[71]

Conclusion

[165] I would dismiss this ground of appeal.

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[69] *Ibid* at paras. 60-63.

[70] In pre-charge discussions with the trial judge, Crown counsel took the position the third party suspect defence was "available for the jury's consideration".

[71] *R. v. Polimac*, 2010 ONCA 346 at para. 107. See also, *Huard*, *supra* note 29 at para. 74.

Did the trial judge err in her instructions to the jury on party liability in relation to Ms. Ritch?

[166] This ground of appeal relates only to Ms. Ritch.

[167] The evidence from June 15th and 16th, 2017 that pointed to Ms. Ritch's involvement in Ms. Gonzales' murder required the trial judge to instruct the jury on party liability. The jury heard evidence Mr. Sparks' plotting to kill Ms. Gonzales had failed to secure Joseph Fowler's assistance. It was the Crown's theory that Ms. Ritch was recruited instead.

Evidentiary Background

[168] At the start of these reasons I reviewed the evidence of Ms. Ritch's involvement with Mr. Sparks in the murder of Ms. Gonzales. Although there was no evidence of Ms. Ritch being privy to discussions Mr. Sparks had with Mr. Patterson and Mr. Fowler about killing Ms. Gonzales, there was evidence from Mr. Patterson, Mr. Bruce and Ms. Graves that could—and ultimately did—satisfy the jury she had been either a principal or a party.[72] One or the other of these options provided a route to Ms. Ritch's conviction for first-degree murder.

Pre-Charge Discussions

[169] In each of the three pre-charge meetings between the trial judge and counsel there was discussion about Ms. Ritch's potential liability as a party to first-degree murder. Crown counsel made their position clear: Ms. Ritch could be found guilty as either a principal or an aider. They emphasized that if the jury accepted what Ms. Ritch had told U/C Sherri—that she had not stabbed Ms. Gonzales—there remained the issue of whether she could be found guilty of first-degree murder as a party for having aided Mr. Sparks. The evidence in support of the Crown's position included John Patterson's observations of what Ms. Ritch did when she emerged from Apartment 16 just after Mr. Sparks. The Crown noted Ms. Ritch was close enough to Ms. Gonzales' body to get knifed in the hand in the course of the flurry of stabbings.

[72] The jury was instructed, correctly, they did not have to be unanimous on the basis for finding Ms. Ritch guilty. They simply had to all agree guilt had been proven beyond a reasonable doubt (*R. v. Johnson*, 2017 NSCA 64 at para. 64 [*Johnson*]).

[170] The trial judge indicated to counsel she thought it would be "very confusing" to put the aiding instruction in the middle of her charge on first-degree murder. She said: "I think I've got to keep it separate". Crown counsel agreed. Ms. Ritch's counsel had no comment and said he thought it was "fine" for the jury to hear the relevant evidence referred to twice.

[171] The charge on aiding was further discussed by the trial judge and counsel immediately following the closing address by Ms. Ritch's counsel. The trial judge noted she had reviewed this Court's decision in *R. v. Johnson*[73] and was utilizing the approach taken "as a roadmap here". Ms. Ritch's counsel agreed it was correct to do so. He also agreed with the trial judge's structure as did Crown counsel. In response to the judge saying it felt "a little clumsy", Ms. Ritch's counsel said he was "content".

[172] There was a final extensive discussion about the aiding instruction after Mr. Sparks' counsel had addressed the jury. The trial judge had sent counsel the questions the jury would need to consider in relation to party liability for Ms. Ritch. She emphasized that in preparing her charge she had adhered to the direction in *Johnson*. Counsel for the Crown and Ms. Ritch agreed this was the correct authority to follow. The judge and counsel then reviewed the content for the applicable decision tree with Ms. Ritch's counsel agreeing it complied with *Johnson*.

The Trial Judge's Jury Instructions on Liability as an Aider

[173] The trial judge began her instruction on aiding with an introduction. She explained that guilt could be proven against Mr. Ritch as a principal to Ms. Gonzales' murder or as an aider:

> Under our law a person may participate in an offence and be guilty of it in different ways. A person may commit an offence by personally doing everything necessary to commit the offence either alone or along with somebody else who participates in the same way. A person may commit an offence by helping another person to commit that offence. This help may be by doing something or failing to do something that is their legal duty to do for the purpose of helping the other person commit the offence…

[73] *Johnson, supra* note 72.

[174] The jury were told they did not have to all agree on the basis for liability as long as they were unanimous that guilt had been proven beyond a reasonable doubt.

[175] The trial judge instructed the jury that:

- Mere presence was not enough to establish guilt. “Sometimes people are in the wrong place at the wrong time”.

- An aider must do something for the purpose of assisting the principal to commit the offence. The components of the state of mind requirement—the purpose—are intent and knowledge, which the Crown had to prove: by establishing Ms. Ritch intended to assist Mr. Sparks, or the principal, to commit the offence and by establishing that Ms. Ritch knew that Mr. Sparks intended to commit the offence.

- The Crown did not have to prove that Ms. Ritch desired the successful commission of the offence.

[176] The trial judge then pivoted to an instruction on the essential elements of first-degree murder. She told the jury she would later explain that liability for guilt as an aider applied only to Ms. Ritch and only on the charge of first-degree murder, not the attempted murder of Mr. Patterson.

[177] When she returned to the issue of aiding, the trial judge told the jury that if they were not satisfied beyond a reasonable doubt on each of the essential elements for first-degree murder, Ms. Ritch would not be guilty as a principal “but may still be guilty as an aider to Mr. Sparks”. To find her guilty of first-degree murder on this basis, the judge instructed the jury they must first be satisfied beyond a reasonable doubt that Mr. Sparks unlawfully caused Ms. Gonzales’ death and that:

- Ms. Ritch did or “omitted to do something” that aided Mr. Sparks to unlawfully cause Ms. Gonzales’ death. Ms. Ritch did not have to cause or contribute to Ms. Gonzales’ death.

- Ms. Ritch did those things or at least one of them for the purpose of aiding Mr. Sparks to unlawfully cause Ms. Gonzales’ death.

- Ms. Ritch either had the requisite intent for murder when she did those things or knew Mr. Sparks had the requisite intent for murder.

- Ms. Ritch did those things or at least one of them for the purpose of aiding Mr. Sparks to commit a planned and deliberate murder.

- Ms. Ritch did those things either with the intent to commit planned and deliberate murder or knew the murder was planned and deliberate.

[178] The trial judge then returned to discussing Mr. Sparks and Ms. Ritch as principals in the first-degree murder of Ms. Gonzales. She went on to provide an extensive review of the evidence, which included a description of Mr. Patterson's eyewitness testimony. The judge summarized the observations he made of Ms. Ritch as Mr. Sparks sprang out of Apartment 16 and knocked Ms. Gonzales down:

> …Just seconds later, he says, the apartment door opened and Ms. Ritch came out very quickly. As Ms. Gonzales went down, Ms. Ritch came out. Mr. Patterson said that she was dancing on her toes. He testified he meant she was moving very quickly, like running on the spot.
>
> …
>
> Mr. Patterson observed Ms. Ritch on the ground, on her stomach, next to Ms. Gonzales and thought she was cutting Ms. Gonzales. Ms. Ritch was on the side of Ms. Gonzales and the motion of her hands was a stabbing motion, going up and down. She was close to Ms. Gonzales' left hand. Mr. Patterson testified Ms. Ritch was using her right hand but was not positive because he had lost his glasses and his vision was blurred and the pain he felt was unimaginable.[74] Mr. Patterson said Ms. Ritch was on the floor next to Ms. Gonzales moving violently and her whole body was shaking. She was near Ms. Gonzales' hands and moving her hand up and down like she was cutting and making a stabbing motion. He described it as not a nice motion…He testified he never saw Ms. Gonzales get up.

[179] After her recital of the evidence, the trial judge told the jury she was going to instruct them on aiding. She recapped the principles she had explained earlier:

> If you are not satisfied beyond a reasonable doubt that Ms. Ritch did or omitted to do one or more acts that aided Mr. Sparks to cause the death of Nadia Gonzales, you must find her not guilty. If you are convinced beyond a reasonable doubt she did or omitted to do one or more acts that aided Mr. Sparks to cause the death of Nadia Gonzales, you go on to the next question in relation to aiding.

[180] The trial judge then turned to the next question which as framed, was a question relating to the appellants' roles as principals: "Did Ms. Ritch and/or Mr.

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[74] The trial judge had already described Mr. Patterson's testimony that he had tried to pull Mr. Sparks off Ms. Gonzales only to be stabbed.

Sparks cause Ms. Gonzales death unlawfully?" Following her instructions in relation to this question, the trial judge addressed aiding:

> …In relation to aiding, if you are convinced beyond a reasonable doubt that Ms. Ritch did or omitted to do something or at least one of them for the purpose of aiding Mr. Sparks to unlawfully cause Ms. Gonzales' death, you go on to the next question in relation to aiding.

[181] The trial judge pivoted back to the next question in relation to principals – "Did Ms. Ritch and/or Mr. Sparks have the state of mind required for murder?" After discussing the state-of-mind requirements for murder, the trial judge indicated that if the jury was not satisfied Ms. Ritch had been proven to have either of the applicable intentions as principal or aider, then this left manslaughter which, the judge said, she would explain later.

[182] The trial judge's instructions did not return to address Ms. Ritch's potential liability as a party until she had reviewed for the jury the evidence in relation to the intent element for murder and the jury's obligation to find Ms. Ritch and Mr. Sparks not guilty of second-degree murder if they were not satisfied beyond a reasonable doubt the requisite intent had been proven.

[183] The jury was told however that if satisfied beyond a reasonable doubt on intent for murder, they were to go "to the next question in relation to liability as principals". The trial judge then gave an instruction in relation to manslaughter as a possible verdict for Ms. Ritch. She moved on to address the question of whether the murder of Ms. Gonzales was planned and deliberate. This included an instruction on the law and a review of the evidence they should consider.

[184] The trial judge's review of "some of the evidence" relating to the murder being planned and deliberate included reminding the jury about Mr. Patterson's testimony that on the day before the murder Ms. Ritch had come to Apartment 16 and directed him to go to Mr. Bruce's bedroom. He did so, closed the door and waited. Mr. Sparks came in and disclosed his plan to kill Ms. Gonzales.

[185] In her review of evidence at this juncture in her instructions, the trial judge summarized Joseph Fowler's testimony, which included him saying he had met Ms. Ritch only once and briefly. The judge went on to instruct the jury that if they were not satisfied beyond a reasonable doubt Ms. Gonzales' murder was planned and deliberate, they were to find Ms. Ritch and Mr. Sparks not guilty of first-degree murder but guilty of second-degree murder. If the jury was satisfied beyond

a reasonable doubt that the murder was planned and deliberate then the accused were guilty of first-degree murder.

[186] The trial judge concluded with a final instruction on this branch of the jury's reasoning process:

> In relation to liability as an aider, if you are not satisfied beyond a reasonable doubt that Ms. Ritch committed the planned and deliberate murder of Nadia Gonzales, she can still be an aider to Mr. Sparks, if you are convinced beyond a reasonable doubt that when she did acts or at least one of them she did so for the purpose of aiding Mr. Sparks to commit a planned and deliberate murder and when she did those things, she planned and deliberated the murder or knew the murder was planned and deliberated. If you are satisfied of this beyond a reasonable doubt, you must find Ms. Ritch guilty of first-degree murder.

[187] On the morning of December 13th, the second day of jury deliberations, the trial judge re-read her instructions on aiding, reproduced above, as part of her response to the jury's request for her to "please define the terms planned and deliberate for clarity".[75] At the end of her recital, she added: "If you are not satisfied of this beyond a reasonable doubt, you would not find her guilty of first-degree murder".

The Arguments on Appeal

[188] Ms. Ritch submits the trial judge's aiding instructions did not properly equip the jury with the legal principles or the evidence to which they were to be applied. She explained this in her factum:

> The charge to the jury on party liability was flawed in two respects: first, the trial judge conflated the elements necessary to establish liability as an aider with this required to prove liability as a principal; and second, the trial judge failed to review for the jury the evidence (or lack thereof) as it related to Ms. Ritch as an aider. As a result, though the jury heard a description of the legal concepts applicable to liability as an aider, those general constructs were not properly tied to the "concrete reality of this case".[76]

[189] Ms. Ritch notes the trial judge's interspersing of the requirements for proof of guilt as principals with the requirements for finding her guilty as an aider, which she described as "convoluted".

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[75] The trial judge's response to the jury's request was a re-reading of her instruction on planning and deliberation which included the instruction on aiding a planned and deliberate murder.

[76] *R. v. Whynder*, 2020 NSCA 77 at para. 63 [*Whynder*].

[190] Ms. Ritch argues the trial judge was required to explain what the Crown had to prove beyond a reasonable doubt, if the jury had a doubt about whether she had stabbed Ms. Gonzales: (1) the acts she committed that helped the stabber; and (2) that when she did these acts, she had knowledge of the stabber's murderous intent and intended to facilitate the commission of the offence. She cites this Court's decision in *R. v. Whynder*[77] as authority and says the jury instructions, read in their entirety, did not equip the jury to determine these critical issues.

[191] In Ms. Ritch's submission, the trial judge also failed to relate the evidence to her alleged role as an aider. She says the jury instructions were deficient in providing the necessary guidance. As explained in her factum:

> It was not obvious whether or how Ms. Ritch's presence at the scene of the stabbing amounted to "assistance" sufficient to establish the conduct requirement for liability as an aider; nor that as a non-stabber at the scene, she intended to provide assistance to the principal by her presence. The jury was similarly left without any direction as to what evidence it should consider in deciding whether the Crown met its burden in respect of the *mens rea* requirement for liability as an aider.

[192] While acknowledging the sequencing could have been different, the respondent says the trial judge's instructions were adequate and fit for purpose. Ms. Ritch's counsel endorsed the trial judge's instructions on aiding and the re-charge, in response to the jury's request, on the definition of planned and deliberate. The respondent further notes the decision trees for liability as a principal and as an aider were clear guides for the jury's reasoning. There was no indication from the jury that they were experiencing any confusion or required clarification on what the Crown was required to prove to establish Ms. Ritch's guilt of first-degree murder beyond a reasonable doubt.

The Governing Principles

[193] Appellate review of the adequacy of a jury charge must respect the scope accorded to the trial judge's crafting of her instructions:

> …The cardinal rule is that it is the general sense which the words used must be conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the

[77] *Ibid* at para. 72.

> sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.[78]

[194] The trial judge had broad discretion on how she conveyed the requirements for proof beyond a reasonable doubt that Ms. Ritch aided Mr. Sparks to commit first-degree murder.

[195] A person who aids someone to commit a planned and deliberate murder is as guilty as the principal.[79] In accordance with Beveridge, J.A.'s approach in *Johnson*, the trial judge was required to instruct the jury they needed to be satisfied beyond a reasonable doubt that Ms. Ritch:

- did one or more acts that aided Mr. Sparks to unlawfully cause Ms. Gonzales' death.
- did one or more of those acts for the purpose of aiding Mr. Sparks to unlawfully cause Ms. Gonzales' death.
- when doing those acts that aided Mr. Sparks, she knew Mr. Sparks had the requisite intent for murder (means to cause death or cause bodily harm he knows is likely to cause death and is reckless whether death ensues or not).
- when doing those acts that aided Mr. Sparks, she knew Mr. Sparks intended to commit the planned and deliberate murder of Ms. Gonzales.[80]
- when doing those acts that aided Mr. Sparks, she did them for the purpose of aiding Mr. Sparks to commit the planned and deliberate murder of Ms. Gonzales.

[196] It was not necessary to establish that Ms. Ritch desired the offence be committed, or knew precisely how it was to be committed. The Crown did not have to prove Ms. Ritch personally had the intent for murder to secure her conviction as an aider: the Crown needed only establish Ms. Ritch's knowledge of Mr. Sparks' murderous intent.[81]

The Principles Applied

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[78] *Daley*, *supra* note 25 at para. 30.
[79] *R. v. Briscoe*, 2010 SCC 13 at para. 13 [*Briscoe*].
[80] *Johnson*, *supra* note 72 at para. 81. See also, *Briscoe*, *supra* note 79 at paras.16-18.
[81] *Johnson*, *supra* note 72 at para. 79.

[197] Although the jury instructions on aiding were intermingled with the instructions on Mr. Sparks' and Ms. Ritch's liability as principals, the trial judge faithfully followed the reasoning path established in *Johnson*. Unlike the jury charge in *Whynder*, here the trial judge did relate the legal principles to the "concrete reality" of the case. Her charge addressed all the applicable principles and reviewed some of the relevant evidence. She equipped the jury with a decision tree to guide them through the steps for determining if the Crown had, or had not, proven Ms. Ritch's guilt as an aider to first-degree murder beyond a reasonable doubt:

> **Box 1**: Are you satisfied beyond a reasonable doubt that Calvin Sparks unlawfully caused Nadia Gonzales' death?
>
> No—Final Verdict: Not Guilty
>
> Yes→Box 2
>
> **Box 2**: Did Samanda Ritch do or omit to do one or more acts that aided Mr. Sparks to unlawfully cause Nadia Gonzales' death?
>
> No—Final Verdict: Not Guilty
>
> Yes→Box 3
>
> **Box 3**: Did Samanda Ritch do those things (or at least one of them) for the purpose of aiding Mr. Sparks to unlawfully cause Nadia Gonzales' death?
>
> No—Final Verdict: Not Guilty
>
> Yes→Box 4
>
> **Box 4**: Did Samanda Ritch when she did those things did she have the state of mind for murder or knew Mr. Sparks had the state of mind for murder?
>
> No—Final Verdict: Not Guilty of First-degree Murder, but Guilty of Manslaughter
>
> Yes→Box 5

Box 5: When Samanda Ritch did those acts (or at least one of them) did she do so for the purpose of aiding Mr. Sparks to commit the planned and deliberate murder of Nadia Gonzales?

No—Final Verdict: Not Guilty of First-degree Murder, but Guilty of Second Degree Murder

Yes→Box 6

Box 6: When Samanda Ritch did those acts she planned and deliberated the murder of Nadia Gonzales or knew the murder was planned and deliberate.

No—Final Verdict: Not Guilty of First-degree Murder, but Guilty of Second Degree Murder

Yes→Final Verdict: Guilty of First-degree Murder

[198] In *Whynder*, where the victim was shot in the head, this Court emphasized that a jury charge on aiding must provide:

> …clear and comprehensive instructions about the need for the Crown to prove beyond a reasonable doubt not just acts by the appellant which in fact helped or encouraged the shooter, but when he did them it was with the knowledge of the shooter's murderous intent and with the particular intention to facilitate or encourage the principal to commit the offence.[82]

[199] The trial judge gave these precise instructions to Ms. Ritch's jury. Not only was there no objection from defence counsel, the instructions were endorsed. And while they where interspersed with the instructions on liability as a principal, which even the judge thought was somewhat awkward, there was no indication the jury had any difficulty understanding what they had to decide or how to go about their task. The jury came back to the judge with a request for clarification of the term planned and deliberate; they sought no guidance following her instructions on aiding a first-degree murder.

[200] There is also nothing to suggest the jury stumbled over the language of omission—that Ms. Ritch could be found guilty of murder as an aider if the jury found she "did or omitted to do" one or more acts that aided Mr. Sparks to unlawfully cause Ms. Gonzales' death. Any concern the trial judge's reference to

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[82] *Whynder, supra* note 76 at para. 72.

"omitted to do" might have invited an inference that Ms. Ritch's liability could arise from her failing to intervene and stop the attack on Ms. Gonzales cannot be said to have merit.

[201] The error of including the words was harmless. The jury instructions were not compromised by the use of the irrelevant terminology. No "omitting to do" inference was suggested to the jury by the trial judge at any time nor by Crown or defence counsel. No one made the error of proposing Ms. Ritch had any legal duty to stop the murderous assault of Ms. Gonzales. The jury never asked a question about this instruction. There is nothing to indicate the inclusion of the "omitted to do" language in the trial judge's charge confused or misled the jury.

[202] Ms. Ritch also complains the judge failed to adequately instruct the jury on the evidence that purportedly established her role as a party. I will reiterate how she expressed this in her factum:

> It was not obvious whether or how Ms. Ritch's presence at the scene of the stabbing amounted to "assistance" sufficient to establish the conduct requirement for liability as an aider; nor that as a non-stabber at the scene, she intended to provide assistance to the principal by her presence.

[203] With respect, Ms. Ritch was not simply a "presence at the scene". The evidence of Ms. Ritch's assistance of Mr. Sparks' lethal plot and her intention to assist him execute it was overwhelming. Ms. Ritch could only benefit from the trial judge's under-inclusive review of the evidence in her instructions on aiding.

[204] At the stage where the trial judge's instructions focused on planning and deliberation, she primarily reviewed evidence relating to Mr. Sparks. She said very little about Ms. Ritch. A more robust disquisition would have covered evidence that was decidedly unhelpful to Ms. Ritch.

[205] The jury had already heard damning evidence about Ms. Ritch's presence at 33 Hastings on June 15th and 16th, much of which the trial judge had previously reviewed. Ms. Ritch had directed Mr. Patterson into Mr. Bruce's bedroom so Mr. Sparks could talk to him the day before the ambush and murder of Ms. Gonzales. On the day of the murder, Ms. Graves encountered Ms. Ritch with Mr. Sparks and the black hockey bag in a stairwell. She later saw them in the apartment. Mr. Bruce described how Ms. Ritch had emerged with Mr. Sparks from the bedroom, her hoodie up, armed with a knife and wearing gloves. U/C Sherri testified that Ms. Ritch told her she was wearing gloves which is why Ms. Gonzales' blood "didn't

get through" to her hands. There was forensic evidence that no DNA other than Ms. Gonzales' was located on the broken knife blade found outside Apartment 16. The jury could reasonably infer the handle, found by investigators in the hockey bag with Ms. Gonzales, had been held by the gloved Ms. Ritch. Mr. Patterson's vivid observations of Ms. Ritch described an active participant—"I could see she was doing something with her hands…It was not nice".

[206] Ms. Ritch's face was scratched during the attack on Ms. Gonzales. She was stabbed in the hand. It was reasonable for the jury to have inferred that Ms. Ritch sustained the scratch in the initial stage of the attack when Ms. Gonzales was still capable of trying to defend herself. Ms. Ritch's DNA was on Ms. Gonzales' fingernails. These pieces of evidence were consistent with John Patterson's testimony, reviewed by the trial judge in her charge, that Ms. Ritch had placed herself on the ground next to the prone Ms. Gonzales and appeared to be "cutting" her.

[207] The jury understood full well that they could decide whether Mr. Patterson's evidence about Ms. Ritch was credible. However, it is evidence that, taken with the other evidence I referred to earlier, supported Ms. Ritch's guilt for first-degree murder as a principal or an aider. There was no disadvantage to Ms. Ritch that all the relevant evidence was not reviewed by the trial judge in her instructions on aiding a planned and deliberate murder.

[208] The trial judge, who had earlier given the jury a detailed summary of the trial evidence, told them to consider all the evidence, both in relation to determining Ms. Ritch's and Mr. Spark's state of mind for murder, and in relation to whether the murder was planned and deliberate. It is unsurprising the evidence guided the jury to return a guilty verdict against Ms. Ritch for first-degree murder.

Conclusion

[209] I would dismiss this ground of appeal.

Did the trial judge fail to properly instruct the jury on manslaughter in relation to Ms. Ritch?

[210] This remaining ground of appeal relates only to Ms. Ritch.

[211] Although the trial judge left manslaughter as a possible verdict, Ms. Ritch argues the instruction was so inadequate and confusing as to effectively amount to

non-direction. In her submission, the trial judge's failure to provide a proper and meaningful instruction constitutes an error requiring a new trial.

Pre-Charge Discussions with Counsel

[212] There was considerable pre-charge discussion between counsel and the trial judge on whether manslaughter should be left with the jury in relation to Ms. Ritch. There was unanimity that in the case of Mr. Sparks, the only verdicts were guilty of first-degree murder or not guilty.

[213] In the initial pre-charge discussions, Ms. Ritch's counsel wanted an all-or-nothing charge with the available verdicts restricted to either guilty as charged or not guilty. In the course of two pre-charge discussions he argued that a manslaughter verdict was not supportable on the facts given the number of stab wounds. The Crown agreed. Their positions had changed by the time of the third and final pre-charge discussion. Counsel acknowledged the jury could find Ms. Ritch only knew something unlawful was going to happen, for example an assault, but not murder.

[214] The trial judge, who had raised the issue in the first place, agreed an instruction on manslaughter should be given to the jury in relation to Ms. Ritch, but not Mr. Sparks. The judge explained her reasons for instructing on manslaughter in a written decision:

> [29] In this case, Ms. Ritch did not testify. If the jury accepts the evidence of the undercover officer, U/C Sherri, the evidence of Mr. Patterson, the evidence placing Ms. Ritch's DNA on Ms. Gonzales' fingernail, as well as the evidence of Mr. Bruce and Marion Graves placing her at the scene shortly before Ms. Gonzales' death, they could be convinced beyond a reasonable doubt that she either was a principal or aided Mr. Sparks in committing an unlawful act. However, they might not be convinced beyond a reasonable doubt that she had the requisite intent for murder. In that case, it would be open to the jury to convict Ms. Ritch of manslaughter.
>
> [30] …If the jury is left with a reasonable doubt in relation to the states of mind for first- or second-degree murder, but finds that Ms. Ritch aided in the unlawful death of Ms. Gonzales, then Ms. Ritch could be convicted of manslaughter.[83]

[83] *R. v. Sparks and Ritch*, 2020 NSSC 127.

[215] In her jury charge review of the trial evidence, the trial judge referred to the testimony of U/C Sherri that Ms. Ritch had told her she didn't stab Ms. Gonzales. It was this evidence, if accepted, that might have left the jury with a reasonable doubt that Ms. Ritch was guilty of murder.

The Trial Judge's Instructions on Manslaughter

[216] The trial judge's instructions reviewed the state-of-mind for murder issue in the context of whether the Crown had proven beyond a reasonable doubt that Mr. Sparks and Ms. Ritch were principals in the murder of Ms. Gonzales:

> Now as a principal the next question is did Ms. Ritch and/or Mr. Sparks have the state of mind required for murder? The crime of murder requires proof of a particular state of mind. For unlawful killing to be murder Crown counsel must prove beyond a reasonable doubt that Ms. Ritch and/or Mr. Sparks either meant to kill Nadia Gonzales or meant to cause Nadia Gonzales bodily harm that Ms. Ritch and/or Mr. Sparks knew was likely to kill Nadia Gonzales and was reckless whether Nadia Gonzales died or not. In other words, to prove that Ms. Ritch and/or Mr. Sparks committed murder Crown counsel must satisfy you beyond a reasonable doubt either that Ms. Ritch and/or Mr. Sparks meant to kill Nadia Gonzales or that Ms. Ritch and/or Mr. Sparks meant to cause Nadia Gonzales bodily harm that Ms. Ritch and/or Mr. Sparks knew was so serious and dangerous that it would likely kill Nadia Gonzales and proceeded despite his or her knowledge that Nadia Gonzales would likely die as a result. Crown counsel does not have to prove both. One is enough. All of you do not have to agree on the same state of mind as long as everyone is sure that one of the required states of mind have been proven beyond a reasonable doubt. If Ms. Ritch did not mean to do either, Ms. Ritch committed manslaughter, and I will explain that later.

[217] The jury was then told to consider all the evidence: what Ms. Ritch did or did not do, how she did or did not do something, and what she did or did not say. They were instructed to look at Ms. Ritch's words or conduct "before, at the time, and after the unlawful act that caused Ms. Gonzales' death". The judge said "all these things and the circumstances in which they happened may shed light on Ms. Ritch's…state of mind at the time. They may help you decide what she…meant or didn't mean to do".

[218] The trial judge instructed the jury to decide the issue of intent on all of the evidence, to which she made passing reference, having previously reviewed it in detail. At this juncture in her charge she mentioned the evidence of the stab wounds inflicted on Ms. Gonzales and their lethality, Mr. Patterson's testimony

about the actions of Mr. Sparks and Ms. Ritch in the hallway, and Mr. Bruce's testimony about them being in his apartment and how they left.

[219] The trial judge returned to the issue of manslaughter telling the jury:

> If you are not satisfied beyond a reasonable doubt that when Ms. Ritch did those things, she did not have the state of mind for murder and did not know Mr. Sparks had the state of mind for murder, you would find Ms. Ritch not guilty of second degree murder but guilty of manslaughter.

[220] The jury was provided with decision trees that laid out the reasoning path they were to follow in determining whether the Crown had proven in relation to Ms. Ritch any of the possible verdicts beyond a reasonable doubt: first-degree murder, second-degree murder or manslaughter. The trial judge reviewed one of the decision trees to explain to the jury how to use them.

The Arguments on Appeal

[221] Ms. Ritch argues the trial judge's instruction were cursory, inadequate, confusing and shifted the burden of proof through the erroneous use of a double negative. The jury was told if they were not satisfied beyond a reasonable doubt that when Ms. Ritch did certain things she did not have the mental state for murder the applicable verdict would be manslaughter. In Ms. Ritch's submission, the trial judge should have said if the jury was satisfied beyond a reasonable doubt that when she did certain things she did not have the requisite mental states for murder, the applicable verdict would be manslaughter. Ms. Ritch says there was no "clear route" for the jury to find her not guilty of murder and guilty of manslaughter.

[222] The respondent agrees that while it was appropriate for the trial judge to have left manslaughter as a possible verdict, it was "highly unlikely" to have been "a point of realistic debate for the jury".[84] The Crown said in its factum:

> Manslaughter was an included offence that everyone understandably struggled with. The lead up to the ambush on Ms. Gonzales, the lethal attack focused on the neck, and the aftermath, all pointed to an intentional killing. Neither of the Appellants suggested otherwise at trial. For Mr. Sparks this was an ID case. For Ms. Ritch, it was a question of whether the Crown could prove that she was any more than an accessory after the fact.[85]

[84] Factum of the Respondent at para. 102.
[85] Factum of the Respondent at para. 97.

The Governing Principles

[223] As I noted earlier, the adequacy of a trial judge's instructions is to be assessed in the context of the evidence and the trial as a whole, including the entirety of the jury charge.[86] What is essential is that "at the end of the day, the jury is given the necessary instructions to arrive at a just and proper verdict".[87]

[224] For the jury to have arrived at a manslaughter verdict for Ms. Ritch, they would have had to be satisfied the Crown succeeded only in proving beyond a reasonable doubt the *mens rea* of objective foreseeability of the risk of non-trivial bodily harm to Ms. Gonzales in the context of a dangerous act.[88]

The Principles Applied

[225] The trial judge's instructions on manslaughter were correct and while sparse, they were sufficient. It cannot be said the jury was diverted from a proper consideration of all the available verdicts, including manslaughter. The trial judge identified in her instruction what was essential for the jury to consider for a manslaughter verdict: whether they were satisfied beyond a reasonable doubt that Ms. Ritch had the requisite mental state for murder when she aided Mr. Sparks' assault of Ms. Gonzales. If not, the included offence of manslaughter came into play.

[226] I further note that Ms. Ritch's counsel expressed no concern with the manslaughter instruction. Nor did the jury ask for any clarification.

[227] The pathway to manslaughter was also readily apparent in the decision tree provided to the jury. The series of questions[89] the jury was required to work through would have enabled them to clearly identify the route to a manslaughter verdict:

Box 1: Did Ms. Ritch and/or Mr. Sparks cause Ms. Gonzales' death?

No—Final Verdict: Not Guilty

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[86] *Jaw*, *supra* note 26 at para. 32.
[87] *Pickton*, *supra* note 26 at para. 10.
[88] *R. v. Creighton*, [1993] 3 S.C.R. 3 at para. 79 (QL).
[89] The Decision Tree (Exhibit JL 14 at trial) refers to Samanda Rose Ritch and Calvin Joel Sparks and Nadia Gonzales. I have abbreviated the names.

Yes→Box 2

Box 2: Did Ms. Ritch and/or Mr. Sparks cause Ms. Gonzales' death unlawfully?

No—Final Verdict: Not Guilty

Yes→Box 3

Box 3: Did Ms. Ritch and/or Mr. Sparks have the state of mind required for murder?

No – Final Verdict: Mr. Sparks not guilty of first degree murder. Ms. Ritch guilty of manslaughter.

Yes→Box 4

Box 4: Was Ms. Ritch and/or Mr. Sparks' murder of Ms. Gonzales both planned and deliberate?

No – Final Verdict: Not guilty of first degree murder, but guilty of second degree murder

Yes→Box 5

Box 5: Final Verdict: Guilty of First Degree Murder.

[228] The mistaken inclusion of the double negative, viewed in the context of the entire charge, cannot be elevated to the level of a reversible error. The "stringent test" for establishing the charge was sufficiently confusing to warrant a new trial has not been met.[90] There was no risk the double negative caused the jury to reverse the onus from the Crown to Ms. Ritch. The trial judge's instructions emphasized the burden borne by the Crown of proving any of the possible verdicts beyond a reasonable doubt. The jury could not have thought the burden ever shifted to Ms. Ritch.

[229] This was not a case where the jury was left without the option of considering whether Ms. Ritch was only guilty of a lesser, included offence. They were

[90] *R. v. R.V.*, 2019 ONCA 664 at para. 158.

instructed on manslaughter and second-degree murder which provided them with alternatives. That they returned a finding of guilt for first-degree murder is an obvious indication they never came close to entertaining manslaughter as the appropriate verdict.[91]

Conclusion

[230] I would dismiss this ground of appeal.

Disposition

[231] I would dismiss both appeals and confirm the convictions for first-degree murder.

Derrick, J.A.

Concurred in:

Beveridge, J.A.

Bourgeois, J.

[91] *R. v. Cornelius*, 2011 ONCA 551 at paras. 42-44.