NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Greenwood*, 2022 NSCA 53

Date: 20220726
Docket: CAC 472885
Registry: Halifax

Between:

Leslie Douglas Greenwood

Appellant

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice David P. S. Farrar

Appeal Heard: March 29, 2022, in Halifax, Nova Scotia

Subject: **Jury trials -- murder – *mens rea* for aiding and abetting – jury charges – *Vetrovec* warnings – use of hearsay evidence – curative proviso**

Summary: In 2012, the appellant was convicted of two counts of first degree murder in the deaths of Kirk Mersereau and Nancy Christensen. This Court set aside those convictions and ordered a re-trial (*R. v. Greenwood*, 2014 NSCA 80).

The re-trial occurred in January 2019. The appellant was again convicted by a jury of two counts of first degree murder. He now appeals, challenging the judge's charge to the jury on a number of fronts, including failure to properly charge on the *mens rea* element of aiding and abetting; failed to give a proper corrective instruction after the jury heard inadmissible hearsay; failed to differentiate between the inculpatory and exculpatory evidence of a key witness when giving a *Vetrovec* caution; incorrectly instructed the jury on the co-conspirator's hearsay exception to the hearsay rule; and erred in instructing the jury on proper inferences. Greenwood also argues that the trial judge erred in

summarily dismissing his s. 11(b) *Charter* application and in failing to exclude Greenwood's statements to the police.

Issues: Did the trial judge commit reversible error in his charge to the jury, in admitting Greenwood's statements, and in dismissing his s. 11(b) application?

Result: The trial judge failed to properly instruct the jury on the *mens rea* element of aiding and abetting; failed to provide a sufficient corrective instruction after the jury heard inadmissible hearsay evidence; failed to differentiate between a key witness's inculpatory and exculpatory evidence in giving a *Vetrovec* warning; and erred in his instruction on the co-conspirator's exception to the hearsay rule. He did not err in summarily dismissing the appellant's s. 11(b) *Charter* application, nor did he err in his instructions on the proper inferences to be drawn by the jury.

This was not a proper case, as suggested by the Crown, for the application of the curative proviso to excuse the errors pursuant to s. 686(1)(b)(iii) of the *Criminal Code*.

Appeal allowed. New trial ordered.

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Judges:	Farrar, Van den Eynden and Beaton JJ.A.
Appeal Heard:	March 29, 2022, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Farrar J.A.; Van den Eynden and Beaton JJ.A. concurring
Counsel:	Michelle Psutka, for the appellant Mark Scott, Q.C. and Erica Koresawa, for the respondent

Reasons for judgment:

Overview

[1] On May 9, 2012, a jury convicted the appellant, Leslie Greenwood, of two counts of first degree murder in the deaths of Kirk Mersereau and Nancy Christensen. He appealed those convictions. On September 8, 2014, this Court set aside the convictions and ordered a new trial (2014 NSCA 80, *Greenwood #1*). The retrial before a jury took place over 17 days, starting January 8, 2018, with Justice Jamie Campbell presiding. On February 2, 2018, Greenwood was again convicted of two counts of first degree murder. He now appeals those convictions.

[2] For the reasons that follow, I would allow the appeal, set aside the convictions, and order a new trial.

Background

[3] On September 9, 2000, Mr. Mersereau and Ms. Christensen were killed, execution style, in their home. The Crown's key witness was Michael Lawrence, who pleaded guilty to first degree murder in their deaths in 2012.

[4] Lawrence also pleaded guilty to first degree murder in the death of Charles Maddison. He killed him on September 8, 2000.

[5] In September 2000, Lawrence was 26 years old. He had just been released from prison in June of that year where he was serving time for possession of drugs for the purpose of trafficking.

[6] Lawrence had a criminal history, spanning from 1992 to 2012, which included drug offences, robbery, use of firearms and the three first degree murders referred to above.

Lawrence's Testimony

[7] Lawrence testified he had longstanding mental health issues which became "very bad" in 1998. He suffered from symptoms of schizophrenia which went undiagnosed until 2004. He often heard voices and suffered from hallucinations and delusions.

[8] In September 2000, he owed Curtis Lynds a drug debt in the amount of $28,500. He was desperate to repay the debt. He testified that he could be hurt, even killed, over the issue. Lawrence met Lynds while they were both in prison in 1996. Lawrence was serving time for an armed robbery of a bank in Windsor, Nova Scotia. He sold drugs for Lynds while in prison and continued to do so after he was released.

[9] He incurred the debt when he was sent back to prison in February of 2000. He explained a "stash" of drugs he received from Lynds went missing while he was in jail. As a result, he was unable to pay Lynds for the drugs, thereby incurring the debt.

[10] After being released from prison, Lawrence came up with the idea of planning a robbery to get money to pay the debt. The plan was simplistic. He had been observing the Superstore on Lacewood Drive in Halifax. He noticed a Brink's truck arriving at the store every morning. The Brink's guard would enter the store and shortly thereafter would come out with a bag of money. His plan was to threaten the Brink's employee with a gun, grab the money, and leave.

[11] On September 6, 2000, he met with Lynds to tell him of his plan to pay the debt. Also present were Jason Lindsay and Jonathan Burgoyne.

[12] Lawrence told Lynds that he needed a gun and a car. Lynds agreed to supply him with a handgun. To obtain a car, they came up with an idea of carjacking a vehicle and killing the person who was driving the car.

[13] Lawrence spent the night of September 6, 2000 at Burgoyne's house.

[14] On September 7, 2000, at approximately lunchtime, Lynds picked Lawrence up and took him to Lynds' home on Hiram Lynds Road. Lawrence testified that during their time at Lynds' home, they discussed the plans for the robbery and carjacking.

[15] He spent that evening at Lynds' house and woke up at approximately 6:00 a.m. on the morning of September 8, 2000. Lynds then drove him to a house in North River, Nova Scotia. Lawrence thought the house may have belonged to Lynds' grandmother. Lynds went into a barn on the property and came out with a paper bag containing a .357 Magnum. Lynds loaded it and gave it to Lawrence.

[16] Lynds then drove him to Burgoyne's house where he met up with Jason Lindsay. Lindsay then drove Lawrence to the Brookfield exit on Highway 102 and dropped him off. It was approximately 7:00 a.m.

[17] Lawrence began hitchhiking. The first car to stop was driven by Mr. Maddison. Mr. Maddison informed him that he was headed to Halifax to see a doctor for his back. After driving for a few minutes, Lawrence produced the .357 Magnum and pointed it at Mr. Maddison. Lawrence told him he was going to miss his appointment and directed Mr. Maddison to drive to Panuke Road in Hants County.

[18] When they got to Panuke Road, Lawrence told Mr. Maddison to pull over on the side of the road and stop. He told him they were going to go for a walk in the woods and Lawrence was "just going to leave him there for a little while and just take his truck". They walked a short distance into the woods where Lawrence shot Mr. Maddison in the chest and then the head to "make sure he was dead". He left Mr. Maddison's body in the woods, went back to the truck, and drove away. This was at approximately 9:00 a.m.

[19] Lawrence then drove to Halifax to the Bayers Lake Business Park where he met up with Lynds. The meeting had been arranged the day before. Lynds was to help him with the robbery. He and Lynds had discussed how they were going to commit the robbery, where Lynds would pick Lawrence up, and where they would hide the money.

[20] However, the robbery never occurred. Lawrence arrived too late and the Brink's truck was leaving as he was driving in.

[21] Subsequently, Lawrence again met up with Lynds who was angry with Lawrence that he had missed the opportunity to rob the Brink's truck. Lynds told Lawrence he was going to have to do it the next day. Lawrence agreed. Lawrence left Mr. Maddison's truck in the business park.

[22] At that point, Lynds and Lawrence returned to Panuke Road and covered Mr. Maddison's body with brush. Lynds dropped Lawrence off at the Sunrise Motel in Brookfield where Lawrence was to spend the night. The plan was that Lynds and Lindsay would pick him up the next morning, Saturday, September 9, 2000 at 9:00 a.m., to again attempt to rob the Brink's vehicle at the Superstore.

[23] Lynds and Lindsay did not arrive to pick up Lawrence as planned at 9:00 a.m. They arrived in Lindsay's car at approximately 11:00 a.m. By that time, it was too late to attempt the Brink's robbery.

[24] Lynds advised Lawrence that there had been a change in plans. When they got in Lindsay's car, Lynds told Lawrence that Lawrence was going to do a hit for him to repay the debt instead of committing the robbery.

[25] Lynds, Lindsay, and Lawrence then drove back to Bayers Lake to retrieve Mr. Maddison's truck.

[26] Lawrence followed Lindsay and Lynds to a clearing in the woods where he left the truck. Then, in Lindsay's car, Lynds and Lindsay drove Lawrence past Kirk Mersereau's home to show him where he lived. This was the first time Lawrence was told Mersereau's name.

[27] Lawrence did not know, nor had he ever heard of, Mersereau.

[28] The plan was for Lawrence to go to the Mersereau home. If a man answered the door, Lawrence was to inquire whether he had a Ski-Doo for sale and if he was Kirk Mersereau. After he answered "yes" to the questions, Lawrence was to kill him.

[29] They returned to Lynds' home on the late afternoon of Saturday, September 9. At Lynds' direction, Lawrence hid the .357 Magnum in a tree in the woods.

[30] After hiding the gun, Lynds told Lawrence to stay with Lindsay and he would be back in a few minutes.

[31] When Lynds returned, Lawrence testified Greenwood was with him. Lawrence did not know Greenwood. He had never met him.

[32] Lawrence claimed that Lynds informed him of another change in plans. Greenwood was going to go with him to the Mersereau residence, and both Nancy Christensen and Kirk Mersereau were to be killed.

[33] Lawrence said Lynds explained to him that Greenwood knew Mersereau and was trusted by Mersereau, so he could easily get into the house.

[34] Lynds also had with him another gun, a .32 calibre pistol. Lynds cleaned the bullets and loaded both the .357 Magnum and the .32 calibre to capacity.

[35] Lawrence testified he was instructed by Lynds that they would drive in Greenwood's car to retrieve Mr. Maddison's stolen truck and then drive the truck to Mersereau's to commit the murders. He was also instructed Greenwood would have the .357 Magnum, enter in the house first, shoot Mr. Mersereau and Ms. Christensen. Lawrence would come in after to ensure that they were dead.

[36] After the killings, they were to drop the guns off the bridge on Station Road into the Kennetcook River. They would then return to the clearing where they had previously stashed the truck, burn it, and leave in Greenwood's car.

[37] Lawrence testified he and Greenwood left Lynds' house in Greenwood's car with a jug of gasoline and the guns. They then drove to the clearing to retrieve Mr. Maddison's truck.

[38] With Greenwood driving the truck, they drove to the Mersereau residence.

[39] Lawrence said they parked near Mersereau's home, and he stayed on the floor of the truck to avoid being seen. Greenwood went into the house with a .357 Magnum. Lawrence testified he was on the floor of the truck for about five minutes when he heard gunshots. He then got out of the truck and headed toward the house. On the way, he was attacked by a Rottweiler dog.[1] He fired the .32 twice and shot the dog once. He then entered the house where he observed Mr. Mersereau and Ms. Christensen who both appeared to him to be dead.

[40] Ms. Christensen was sitting in a chair. Mr. Mersereau was lying on the floor. Lawrence walked over to Mr. Mersereau and shot him in the head twice with the .32. He then shot Ms. Christensen in the head and returned and shot one more bullet into Mr. Mersereau's head. At that point, he said the gun was empty.

[41] Lawrence then left the house where he met up with Greenwood. He said Greenwood forgot his sneakers in the house and returned to retrieve them. They then drove away. It was approximately 8:00 p.m.

[42] They stopped on the bridge on Station Road and Lawrence got out and threw the two guns in the river.

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[1] Mersereau and Christensen had four dogs. Police evidence from several officers indicated all the dogs were accounted for, and none of them had been shot or injured in any way.

[43] Lawrence testified they returned to the same clearing where they had picked up Mr. Maddison's truck earlier, removed their clothing, placed the clothing inside the truck, put new clothing on, doused the truck with gasoline, and set it on fire. At approximately 9:00 p.m., Saturday, September 9, 2000, they left in Greenwood's car.

[44] Lawrence said he spent that night at Greenwood's girlfriend's house.

[45] The next morning, Lawrence said that he and Greenwood went to Lynds' house at approximately 9:00 a.m. or 10:00 a.m. When asked what happened at Lynds' house, Lawrence replied:

> **A.** We confirmed what we had did for him.
> **Q.** Okay. So just tell me how you confirmed what you had done.
> **A.** That they were shot dead and it was over with.
> **Q.** Okay. So who said what?
> **A.** I told them … Curtis said it was … I confirmed that I did what he sent me to do.
> **Q.** Okay.
> **A.** Had shot them in the head after Les had shot them first.

[46] After hearing this, Lynds confirmed to Lawrence that his drug debt had been satisfied.

[47] On September 13, 2000, Lawrence returned to where he had shot Mr. Maddison, this time to bury the body. Originally, when speaking to police he implicated Neil Burns, a person he said had caused him a lot of trouble over the years, in having assisted him in burying the body of Mr. Maddison. He later changed his story and said Joe Leopold, a friend he sometimes did roofing work for, had helped him with that task.

[48] Lawrence was arrested in December 2011 and, on January 12, 2012, pleaded guilty to three counts of first degree murder in the deaths of Charles Maddison, Kirk Mersereau and Nancy Christensen. He is currently serving a life sentence.

Greenwood's Statements

[49] Greenwood did not testify, but portions of his statement to undercover police officers and subsequent arrest statement taken December 9, 2010 were played for the jury. They also received a redacted version of his arrest statement. In both statements, Greenwood admitted to driving Maddison's truck to the victims' home

with Lawrence, but insisted he was only going to pick up drugs for Jeff Lynds, Curtis Lynds' uncle, who was alleged to be the head of a criminal enterprise and associated with the Hells Angels.

[50] The interaction with the undercover officers occurred on November 30, 2010 over the course of about three hours. Three undercover officers posed as members of Hells Angels from Montreal sent to see if Greenwood could discredit what Jeff Lynds had been telling the police in more recent times about the then ten-year-old unsolved murders. In his interactions with the undercover officers, Greenwood again denied having a gun, shooting either of the victims, or knowing of any murder plan.

[51] The arrest statement was played for the jury at his first trial. Fichaud J.A. in *Greenwood #1*, summarized it as follows:

> [36] The Crown introduced into evidence a videotape of Greenwood's interrogation by the police, conducted day-long on December 9, 2010. The transcript is 442 pages. To synopsize:
>
> - Greenwood repeatedly denied shooting Mersereau and Christensen.
> - Greenwood said that he was asked by Jeff Lynds to drive to Mersereau's home to pick up some hash and tobacco, as he had done for Jeff Lynds on prior occasions, and he knew nothing of a plan to kill anyone.
> - Greenwood said Jeff Lynds told him that Lawrence would accompany him for the pick-up.
> - Greenwood said they drove to Mersereau's home, then Greenwood and Lawrence went into the house, Greenwood picked up the hash and tobacco from Mersereau, Greenwood then went outside, and Lawrence remained inside chatting with Mersereau.
> - Greenwood said that, while he was outside and walking back to the truck, he heard shots from inside the home and, at that point, Greenwood didn't know who fired the shots. He thought Mersereau might have fired them.
> - Then Lawrence rushed out, threw a gun onto the seat of the car, and told Greenwood to drive to the bridge. Lawrence said to Greenwood "Ask me no questions, I'll tell you no lies".
> - At the bridge, Lawrence threw the gun over the bridge into the river. Lawrence told Greenwood to throw a gun box off the bridge, which Greenwood did.

- Greenwood said he was dropped off at his girlfriend's house. He wasn't involved with burning the truck.
- Greenwood said he never had a gun, and knew nothing of a second gun.
- Greenwood said that he did not go to Curtis Lynds' home on September 10.

[52] The transcript of the arrest statement and the version which was played for the jury at both trials contained the following:

> GREENWOOD: Maybe he had two [guns] on him, I don't look, I didn't realize he pulled the trigger.
>
> MORGAN: Well Mike gives you up, then you've got Jeff who's the head of the organization, who's another crazy bastard running around shooting people, both of them saying you have a gun, and you pulled the trigger.
>
> GREENWOOD: That's where my lawyer comes in, there's nothing more I can do…
>
> [The "Jeff" referred to is Jeff Lynds; Morgan is Cpl. Morgan]

Other Witnesses

[53] Jeff Lynds did not testify. He was dead before Greenwood's first trial. In the first trial, the recorded statement of Jeff Lynds was played during Greenwood's police interrogation. In *Greenwood #1*, Fichaud J.A. found the recorded statement of Jeff Lynds to be inadmissible. It was not played at the second trial.

[54] However, hearsay evidence of Jeff Lynds still found its way into the record at the second trial through the playback of Greenwood's arrest statement as set out above.

[55] Curtis Lynds did not testify at either trial. Neither did Jonathan Burgoyne.

[56] Jason Lindsay gave evidence at Greenwood's first trial. By the time of the second trial, he was also deceased. The jury heard a playback of his evidence from the first trial. Fichaud J.A. referred to Lindsay's evidence in *Greenwood #1*:

> [41] Lindsay first mentions Greenwood in his account of Sunday morning, September 10. On the Crown's direct examination, Lindsay testified:
>
> Q. So on Sunday, September 10th of 2000, were you at Curtis's house ...
> A. Yeah.

Q. ... still?
A. Yeah.
Q. And what, if anything, happened on that day?
A. I recall seeing Les and Mike come up the driveway in an old brown, I think it was like a Skylark or a smaller car.
Q. So when you ... when you say "Les", which Les are you referring to?
A. Greenwood.
Q. And Mike?
A. Lawrence.

...

Q. So what else did you notice that morning?
A. He was pretty pale looking when he got out.
Q. Who was pale looking?
A. Les.
Q. And what happened next?
A. They ... Curtis ... they were outside by the front deck of Curtis's house and Curtis confronted Mike and asked him if he did that? And Mike said, Yeah, I got them both.
Q. And what did Curtis say?
A. Curtis, after that, he was just standing there.
Q. And what ... what else ...
A. Curtis asked Mike if he did that and that's what Mike said, Yeah, I got them both.
Q. And so ...
A. And Les never said a word, he was just standing right beside Curtis, like the three of them were (there?)
Q. So you described Les as looking what?
A. Pale.
Q. And any other way you could describe him?
A. It was like he'd seen something he shouldn't have. [Emphasis added.]

[57] Lindsay's recollection of the conversation on September 10, 2000 differs significantly from Lawrence's testimony at the second trial. Lindsay did not recall Lawrence making any reference to "we" when referring to who committed the murders.

[58] Several other witnesses gave evidence, including police officers and experts. Forensic evidence confirmed that two guns had been used, a .32 calibre and a .357 Magnum. Expert evidence established that Kirk Mersereau was shot eight times. His cause of death was a high velocity projectile wound to the head and several high velocity projectile wounds to his body. Nancy Christensen died of a high velocity projectile wound to the head from a .357 Magnum.

[59] The evidence did not establish whether there were one or two shooters.

Issues on Appeal

[60] Mr. Greenwood appeals his convictions. I have reordered the issues from the factum and will address them in the following order:

1. The trial judge erred in his instructions on *mens rea* for both principal and party liability and in failing to leave second degree murder as a possible verdict;
2. The trial judge erred in failing to provide a sufficient corrective instruction when the jury heard hearsay evidence of Jeff Lynds in Mr. Greenwood's arrest statement;
3. The trial judge erred in failing to differentiate between Jason Lindsay's inculpatory and exculpatory evidence in his *Vetrovec* caution;
4. The trial judge erred in summarily dismissing the appellant's s. 11(b) application;
5. The trial judge erred in refusing to exclude the appellant's undercover statement as an abuse of process, and in failing to exclude the appellant's derivative arrest statement;
6. The trial judge erred in failing to review the exculpatory evidence regarding the appellant's membership in the conspiracy at step two of his *Carter* instruction;
7. The trial judge erred in his instructions on proper inferences, resulting in a reversal of the burden of proof.

Analysis

Issue 1: The trial judge erred in his instructions on *mens rea* for both principal and party liability and in failing to leave second degree murder as a possible verdict.

Standard of Review

[61] Whether a trial judge erred in instructing the jury is a question of law subject to review on a correctness standard.

[62] In *R. v. Johnson*, 2017 NSCA 64, Beveridge J.A. set out the approach appellate courts should take when considering whether a jury was properly instructed:

> [47] The overarching question is whether the jury was properly instructed. This requires an appellate court to take a functional approach. This approach triggers certain interconnected principles. It requires an assessment of the putative error in light of the live issues at trial, the position of the parties before the trial judge, and the overall effect of the charge, without undue focus on isolated phrases or minute dissection. Substance prevails over form (see: *R. v. Jacquard*, *supra*; *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.); *R. v. Daley*, 2007 SCC 53; *R. v. Araya*, 2015 SCC 11; *R. v. Rodgerson*, 2015 SCC 38 at para. 54; *R. v. Robinson*, 2016 BCCA 192; *R. v. Cromwell*, 2016 NSCA 84 at paras. 25-26).

[63] When reviewing a jury charge, appellate courts should consider the general sense the words must have conveyed to the mind of the jury. Jury charges should be even-handed, fair, and balanced. "A jury charge should not be a partisan broadcast" (*R. v. Huard*, 2013 ONCA 650, at ¶69).

[64] As noted by the Supreme Court of Canada in *R. v. Jacquard*, [1997] 1 S.C.R. 314, appellate courts "must ensure that the yardstick by which [they] measure the fitness of a trial judge's directions to the jury does not become overly onerous" (¶1). Further, the Supreme Court of Canada in *Jacquard* stated that appellate courts:

> [1] […] must strive to avoid the proliferation of very lengthy charges in which judges often quote large extracts from appellate decisions simply to safeguard verdicts from appeal. Neither the Crown nor the accused benefits from a confused jury. Indeed justice suffers.
>
> [2] These comments are not meant to suggest that we sanction misdirected verdicts. This Court has stated on repeated occasions that accused individuals are entitled to <u>properly</u> instructed juries. There is, however, no requirement for <u>perfectly</u> instructed juries. As I specifically indicated at the hearing of this case, a standard of perfection would render very few judges in Canada, including myself, capable of charging juries to the satisfaction of such a standard. [Original emphasis]

[65] Recently, in *R. v. Goforth*, 2022 SCC 25, the Supreme Court of Canada reiterated that an accused is entitled to a properly, not a perfectly, instructed jury. This standard of review applies to Issues 1, 2, 3, 6 and 7 as I have set out above.

Instructions on *Mens Rea* for Principal and Party Liability

[66] Greenwood asserts the trial judge erred in his instructions on *mens rea* for both principal and party liability. However, Greenwood has not made any substantive arguments on the alleged errors by the trial judge on *mens rea* for principal liability in either his written or oral submissions.

[67] As such, I will focus on the alleged errors of the trial judge regarding his charge to the jury on *mens rea* for party liability.

[68] The liability of an aider for first degree murder is distinct from that of a principal. As noted by this Court in *R. v. Kelsie*, 2017 NSCA 89[2]:

> [78] The liability of an aider of a planned and deliberate murder depends on two things: (i) whether the principal had in fact planned and deliberated on the murder; and (ii) whether the aider knew of the planning and deliberation by the principal. […]
>
> [79] In *R. v. N.T.J.*, after canvassing the law, Beveridge, J.A. provides a useful summary of what is necessary for a trial judge to convey to a jury regarding the requirements of an aider's potential liability for a planned and deliberate first degree murder:
>
> > [80] From this brief canvas of the law, there are some fundamental principles that emerge. In the context of an aider's potential liability for a planned and deliberate first degree murder, a trier of fact must be satisfied beyond a reasonable doubt that the accused:
> >
> > - did or omitted to do something that aided another person to unlawfully cause the victim's death
> > - did those things (or at least one of them) for the purpose of aiding that other person to unlawfully cause the victim's death
> > - when he did those things (or at least one of them) he either had the requisite intent for murder or knew that the principal offender had the requisite intent for murder
> > - when he did those things (or at least one of them), he did so for the purpose of aiding the principal offender to commit a planned and deliberate murder
> > - when he did those things, he planned and deliberated the murder, or knew that the murder was planned and deliberate

[2] Aff'd on this issue, 2019 SCC 17.

[69] In *R. v. Saleh*, 2019 ONCA 819, the Ontario Court of Appeal concisely summarized the necessary *mens rea* for liability as a party for first degree murder:

> [99] To be found liable for first degree murder as an aider or abettor of a planned and deliberate murder, an accused must have knowledge that the murder was planned and deliberate; wilful blindness will satisfy the knowledge component of s. 21(1)(b) or (c): *Briscoe*, at paras. 17, 21, 25. In *Almarales*, this court described in more detail the *mens rea* element for first degree murder, at para. 70:
>
> > The fault requirement, as in all cases of secondary participation by aiding, consists of two elements: an *intention* to help the principal and *knowledge* of the principal's intention. An aider must know that the principal intends to commit a planned and deliberate murder, and intend to help the principal to commit a planned and deliberate murder. The aider may acquire his or her knowledge that the murder is planned and deliberate through actual participation in the planning and deliberation, or by some other means. The means of acquiring knowledge are as irrelevant to culpability as proof of knowledge is essential to it. [Italics in original; underlining added; citations omitted.]
>
> See also: *R. v. Maciel*, 2007 ONCA 196, 219 C.C.C. (3d) 516, at paras. 88-89, leave to appeal refused, [2007] S.C.C.A. No. 258. [Emphasis included in original text]

[70] A person's knowledge that a murder was planned and deliberate can be proven through actual involvement in the planning and deliberation or through some other means; such a distinction is irrelevant under s. 21(1) of the *Criminal Code*, which dictates party liability as an aider (*R. v. Maciel*, 2007 ONCA 196, at ¶89).

[71] Trial judges should describe separately the essential elements for party liability and principal liability (*Kelsie*, at ¶80-81). Trial judges should refer to the essential elements of party liability as an aider when discussing the "planned and deliberate" requirement for first degree murder.

[72] In *Kelsie*, this Court held that "[w]ithout more, simply telling the jury that 'knowledge of the type of offence [the appellant] would commit' would make the appellant a party to the offence, was an improper instruction". There, the trial judge provided a charge to the jury on the accused's liability for first degree murder as a party. The instruction, on the *mens rea* for party liability, stated:

> [80] […]
>
> The Crown must also prove that Kelsie intended to aid Gareau to commit the offence of murder. As I said previously, it is not enough that Kelsie's act actually aided Gareau, it must be proven that Kelsie knew or intended that his action would aid Gareau to commit the offence of murder. If Kelsie knew that his act was likely to assist Gareau to commit the offence of murder then you are entitled to conclude that Kelsie intended to aid Gareau to commit the offence. A mere suspicion on the part of Kelsie that Gareau may rely on Kelsie's act in committing an offence is not sufficient to prove an intent to aid.
>
> The Crown is not required to prove that Kelsie knew the exact or precise details of the offence that Gareau would commit. It is sufficient if he has knowledge of the type of offence Gareau would commit, or that he had the intention of helping Gareau, regardless of the offence Gareau intended to commit. Again, it is hard to look into other people's minds and determine what their intention is. [Emphasis included in original text]

[73] This Court found that the instruction related to murder in general and not first degree murder, the offence at issue in the trial. Such an instruction permitted the jury to convict the appellant when he may not have possessed the necessary *mens rea* for first degree murder as a party. Specifically:

> [85] On the instructions the jury received, there is a real danger that if they concluded Gareau planned the killing and the appellant handed him the gun aware that he would likely use it to kill, the appellant would be guilty of planned and deliberate first degree murder. This was incorrect.

[74] In *Kelsie*, the Court rejected the Crown's argument that although the trial judge did not refer to the *mens rea* for party liability, he did define the requirements of planning and deliberation in other portions of the jury charge. The trial judge only defined the requirements of planning and deliberation in respect to whether a principal is guilty of first degree murder. Such an instruction is insufficient:

> [88] It is not sufficient for the trial judge to have charged on planning and deliberation as a principal and then, without the jury being told, assume that they would necessarily come to the conclusion that aiding first degree murder required the appellant to have knowledge of planning and deliberation by Gareau.

[75] In *Saleh*, the Ontario Court of Appeal considered, in the context of party liability, whether the trial judge was required to tell the jury that they had to

determine if the accused intended to help the principal offender commit a planned and deliberate murder. The Court noted that:

> [119] While the general instructions in the "Modes of Participation" section of the charge correctly set out the elements for aiding or abetting, the subsequent instructions in the "state of mind" and "planned and deliberate" sections obscured the need to find proof of the elements of aiding or abetting: the act of assistance or encouragement, and the intention to assist or encourage a planned and deliberate first degree murder: *R. v. Mendez*, 2018 ONCA 354, at para. 9.
>
> [120] While at the end of her instructions on "state of mind" the trial judge did direct the jury to consider whether Saleh knew what Esrabian intended when he shot Hassan, her instructions were deficient in several respects:
>
> (i) they were confusing, in that they did not clearly distinguish liability as a principal from secondary participation: "If you have concluded that Fadi Saleh was an active participant, either as a principal or as a party in the killing of Hussein El-Hajj Hassan…";
>
> (ii) they were incomplete in respect of the elements of party liability, not referring to the additional element of intention to help; and
>
> (iii) this part of the instruction related to murder in general, not first degree murder. Without more, simply telling the jury that they must "consider whether Fadi Saleh knew what Shant Esrabian intended when he shot Hussein El-Hajj Hassan" was an inadequate instruction on Saleh's liability as a party to a first degree murder.
>
> [121] The trial judge's instructions on "planned and deliberate" did not provide the "more," as they lacked any reference to the elements of liability as an aider or abettor. The observation by the Nova Scotia Court of Appeal in *R. v. Kelsie*, 2017 NSCA 89, 358 C.C.C. (3d) 75, at para. 88, rev'd 2019 SCC 17, 433 D.L.R. (4th) 260, applies equally here:
>
> > It is not sufficient for the trial judge to have charged on planning and deliberation as a principal and then, without the jury being told, assume that they would necessarily come to the conclusion that aiding first degree murder required the appellant to have knowledge of planning and deliberation by [the principal]. [Emphasis added.]

[76] Likewise, in *R. v. Huard*, the Ontario Court of Appeal held that:

> [64] Since the *actus reus* and *mens rea* of aiding and abetting are different from the corresponding elements of the principal offence, jury instructions in a case in which an accused is alleged to have participated in the commission of an offence as an aider or an abettor should not only explain the essential elements in aiding or abetting, but should also link those elements to the essential elements of the offence charged, so that the jury understands what the Crown must prove to

> establish an accused's liability for the specific offence as an aider or an abettor. Whether the aider or abettor is tried jointly with the principal, or, as here, separately, is of no moment – the principles governing the liability of the aider or abettor remain the same: *Sparrow*, at pp. 457-458. [Emphasis added.]

[77] Trial judges need to relate the description of "aiding" to the specifics of the case before the jury, or the evidence, that could assist the jury in determining whether the accused is liable as a party. In *R. v. Josipovic*, 2019 ONCA 633, the Ontario Court of Appeal held:

> [66] I have canvassed the instructions on aiding to some extent in my analysis of the first ground of appeal. I have explained that in outlining the essential elements of the crime of murder, the trial judge should have separately described those elements as they applied to the shooter and to the helper. As articulated in *R. v. Huard*, [2013] O.J. No. 4912, 2013 ONCA 650, at para. 64:
>
> > Since the *actus reus* and *mens rea* of aiding and abetting are different from the corresponding elements of the principal offence, jury instructions in a case in which an accused is alleged to have participated in the commission of an offence as an aider or an abettor should not only explain the essential elements in aiding or abetting, but should also link those elements to the essential elements of the offence charged, so that the jury understands what the Crown must prove to establish an accused's liability for the specific offence as an aider or an abettor.
>
> [67] Although the trial judge made reference to aiding in the course of discussing the elements of the offence, he never explained what the Crown had to prove to establish liability for murder as an aider. He did not relate the generic description of aiding to the specifics of this case, or the evidence that could assist the jury in determining whether either appellant was liable as an aider. [Emphasis added.]

[78] In *R. v. Mendez*, 2018 ONCA 354, the Ontario Court of Appeal ordered a new trial in part because the jury was not equipped to decide the case as the trial judge had not related the essential elements of aiding to the evidence in the case (¶8). Specifically, the trial judge told the jury to consider whether the appellant was an active participant in the offence, without relating the evidence to the essential elements of aiding in a balanced way, which had the potential to mislead the jury (¶14). The trial judge did not "focus the jury's attention on the absence of evidence of acts of aiding" or the "evidence that pointed away from the existence of a joint plan" (¶17).

[79] In this case, Greenwood argues that the alleged errors made by the trial judge on *mens rea* for party liability are similar to that in *Kelsie*. The trial judge,

here, instructed the jury that a person can commit an offence in two ways, as follows:

> … One, a person commits an offence if he alone or with someone else personally does everything necessary to constitute the offence. That form of proof would involve proving that Leslie Greenwood shot Nancy Christensen and Kirk Mersereau. The Crown does not have to show which bullet killed ... each person. It does not have to prove that the person in those circumstances was still alive when the shot was fired. If the Crown has proven that both Leslie Greenwood and Mike Lawrence fired shots at Mersereau and Christensen with the intent to kill or seriously injure them, then both can be guilty of murder. That's the first way.
>
> The second way is this. A person commits an offence if he does anything for the purpose of helping another person to commit the offence. A person is guilty of murder, for example, if he drives another to the scene knowing that the person is going to commit murder and does so for the purpose of helping the other to commit the murder. It's not enough to prove that the person's action had the effect of aiding in the commission of the offence; it must be proven that the purpose of the action was to aid in committing the murder. The offence would be driving or assisting for the known purpose of committing a murder.
>
> …
>
> Aiding in the commission of the offence, which is involved here, requires proof that the accused person knew what was going to happen and acted for the purpose of aiding in making it happen and that the thing that happened is murder. [Emphasis added.]

[80] This was the trial judge's only discussion of aiding. The trial judge then explained the elements of murder, generally. After reviewing the requisite elements of murder, the trial judge stated:

> Not every murder is a first degree murder. To prove that Leslie Greenwood's murder of Mersereau and Christensen was first degree murder, Crown counsel must prove beyond a reasonable doubt not only that Leslie Greenwood murdered Mersereau and Christensen but also that the murders were both planned and deliberate. It's not enough for Crown counsel to prove that Leslie Greenwood murdered Mersereau and Christensen. It's not enough for Crown counsel to prove that the murder was planned or that the murder was deliberate. In order to establish that the murders of Mersereau and Christensen were first degree murder, Crown counsel has to prove not only that Leslie Greenwood committed murder but that the murders he committed were both planned and deliberate. It is the murder itself that must be planned and deliberate, not something else that Mr. Greenwood did or said.

[81] Following this, the trial judge defined, in detail, “planned” and “deliberate”. However, the trial judge’s charge on “planned” and “deliberate” focused on liability as a principal. The trial judge also reiterated that “[i]t’s for [the jury] to say whether the murders … were both planned and deliberate”.

[82] The trial judge erred in his charge to the jury on the *mens rea* for party liability in two respects.

[83] First, the trial judge did not, at any point in his instructions, describe the distinct essential elements of aiding, including the *mens rea* for party liability, nor relate the general description of aiding to the specifics of this case, nor review the evidence that may point to the appellant as a party to the offence.

[84] Second, the trial judge did not instruct the jury that a finding of guilt for first degree murder as a party required the appellant to have knowledge of the principal’s planning and deliberation. As in *Kelsie*, to assume that the jury “would necessarily come to the conclusion that aiding first degree murder required the appellant to have knowledge of planning and deliberation” is not sufficient (¶88).

[85] The Crown makes the point that trial counsel did not object to the instruction. While this Court is entitled to take into account the fact that there were no objections by trial defence counsel when considering the seriousness of the putative error, such a consideration is not determinative (*Johnson*, at ¶55). A failure to object by defence counsel, in the circumstances of this case, does not diminish or allow us to excuse the seriousness of the misdirection (*Kelsie*, at ¶94). The Ontario Court of Appeal held likewise in *Mendez*, finding a failure by defence counsel is not conclusive on this issue (¶18).

[86] The distinction between *mens rea* for an aider and for a principal is important in this case. Other than Lawrence’s testimony, there was no evidence that Greenwood was involved in the planning and deliberation of the murders. Lindsay’s evidence, which I will discuss in more detail later, certainly calls into question Greenwood’s involvement and knowledge that a murder was going to take place, let alone a planned and deliberate murder.

[87] Greenwood repeatedly denied any knowledge of the plans to murder Mersereau and Christensen in his statements to police.

[88] Based on the charge to the jury, they may have been left with the impression they could convict Greenwood of first degree murder because he drove Lawrence

to the Mersereau home and assisted him in getting access to the house where Lawrence committed the murders without it being proven beyond a reasonable doubt that Greenwood knew that Lawrence had planned and deliberated on the murders.

[89] In the circumstances of this case, this amounts to reversible error and requires a new trial.

[90] I would allow this ground of appeal.

Issue 2: The trial judge erred in failing to provide a sufficient corrective instruction when the jury heard hearsay evidence of Jeff Lynds in Mr. Greenwood's arrest statement.

Jeff Lynds' Hearsay Statement and the Trial Judge's Instruction

[91] This issue has two elements. The first involves the admissibility of evidence. When the jury heard Greenwood's arrest statement, they heard the police officer say to Greenwood, "Mike gives you up, then you've got Jeff who's the head of the Organization … both of them saying you had a gun, and you pulled the trigger". [Emphasis added.]

[92] As noted earlier, the Jeff referred to is Jeff Lynds. There is no evidence Jeff Lynds was at the Mersereau residence at the time of the shooting—he could not have seen Greenwood with a gun, nor could he see him pull the trigger. Hearsay from him should not have been admitted. The Crown acknowledges this. The question then becomes whether the judge's instruction to the jury alleviated any prejudice that arose as a result of this evidence having been admitted.

[93] When the audio-tape was played for the jury with Jeff Lynds' hearsay evidence included, there was an immediate discussion between counsel and the court about this evidence being heard by the jury and them receiving a transcript of it.

[94] After this discussion, the offending portion was removed from the transcript the jury received. However, they had already heard the evidence from the audio-tape. The trial judge then said this to the jury:

> […] the printed part's been removed but what you've heard hopefully will just be removed from your memory and you won't be able ... you'll be able to just not consider it at all. I'm also going to say to you that during the course of it, you

> would have heard the Sergeant speaking, telling Mr. Greenwood what Jeff said. Jeff said this, Jeff said that. What I've told you earlier is what the Sergeant said to Mr. Greenwood isn't evidence. I'm just going to repeat that to you and sort of double up on it or double down on it I guess is the phrase that's used now and say it's when he's talking about what someone else told him, it's not evidence either. So what ... what he says that Jeff said to him isn't evidence because what he says isn't evidence, okay. It's only what Mr. Greenwood says and the only reason you're hearing from anybody else is to give a context to what Mr. Greenwood says. Counsel, is that instruction satisfactory? [Emphasis added.]

[95] Greenwood's counsel agreed the instruction was satisfactory. Unfortunately, it was not.

[96] This was the only instruction given on the use that could be made of Jeff Lynds' hearsay evidence.

[97] A similar issue arose in the 2014 trial. It also concerned Jeff Lynds' audio-recordings which were embedded in Greenwood's statement. In *Greenwood #1*, Fichaud J.A. set out the Chief Justice's charge to the jury as follows:

> [131] The Chief Justice's jury charge said:
>
> > If you were [*sic*] use what Jeffrey Lynds says on that tape in relation to the ultimate determination of the guilt or the innocence of Les Greenwood, that would be a bad verdict. It's that simple. You cannot use it for that purpose.
> >
> > Please ... you can use it for context in relation to his ... the statements that ... and the answers that Les Greenwood is giving and the Crown has every right to put that statement before you to allow you to consider the various things that he said, but do not use what was played for his benefit against him in any manner unless, in the one instance, they talk about the fact that he totally adopted something. Do not ... one thing he didn't adopt was what Jeff Lynds ... Lyons ... I have a problem with that surname, obviously ... Jeff Lyons was saying. So please use it in the right context.
>
> [132] This passage charged the jury "do not use what was played for his benefit against him in any manner unless, in the one instance, they talk about the fact that he totally adopted something" but "one thing he didn't adopt was what Jeff Lynds ... was saying." The passage acknowledged that what Jeff Lynds said about the murders has no probative value. This may be coupled with the Chief Justice's mid-trial comment to counsel after the tape had been played to the jury (above para 128): "if I had seen it coming up, I might well have considered a probative versus prejudicial aspect to it". It appears that, in retrospect, the Chief Justice wished he had weighed the non-existent probative value against the clear prejudice. [Emphasis added.]

[98] Similarly, the trial judge here instructed the jury that what Jeff Lynds said was to give context to what Greenwood said.

[99] Again, Fichaud J.A. explained in *Greenwood #1* why Lynds' evidence could not be used to contextualize Greenwood's evidence:

> [144] But the instructions didn't stop there. The Chief Justice added directions as to the jury's permitted use of the Lynds' excerpts. My concern is with the confusion introduced by the instructions on the jury's permitted use. The jury was charged (above, para. 131): "you can use it for context in relation to his ... the statements that ... and the answers that Les Greenwood is giving and the Crown has every right to put that statement before you to allow you to consider the various things that he said ...." What was the jury to make of this instruction?
>
> [145] The only issue for the jury "to consider [about] the various things he said" was Greenwood's credibility. The instruction would lead the jury to understand that they should "contextualize" Lynds' statements to assess the credibility of Greenwood's denial. That was the Chief Justice's understanding. He said (above para 130) "it's only to put it into context. It goes to the credibility of the answers".
>
> [146] Jeff Lynds said Greenwood shot Mersereau and Christensen. Greenwood said he didn't shoot anyone and didn't have a gun. The jury attributes meaning and value to both statements, positions Lynds' spoken word next to Greenwood's spoken denial, compares and appraises the spectacle. That is the natural way to use Lynds' statement to assess Greenwood's credibility. But attributing value to Lynds' statement is impermissible, and is forbidden by the Chief Justice's other instruction. It isn't apparent how the jury could reconcile the two instructions. [Emphasis added.]

[100] The same considerations apply to the second trial. There is nothing to contextualize. The evidence was clearly inadmissible and has no probative value. Its prejudice is obvious. The only issue was Greenwood's credibility in his responses to the police officer on the audio-tape. To tell the jury they could use Jeff Lynds' hearsay evidence to give context to what Greenwood said creates the same issue as the first trial. Attributing any value to what Jeff Lynds said was impermissible.

[101] I agree with Greenwood's counsel that the issue was exacerbated by the Crown's submissions to the jury. In his closing address, Crown counsel said the following:

> […] I want you to contrast that with the way you observed Mr. Greenwood speaking to the officers who interviewed him and how he reacted when pressed on things and how we suggest he was being evasive and non-responsive in

> relation to certain questions, particularly when Corporal Firth was confronting him with some of the discrepancies in his own account that he had given to Corporal Morgan and elsewhere. [Emphasis added.]

[102] The Crown, in its factum, suggests that trial Crown counsel was referring to evasiveness that arose when Cpl. Firth was confronting Greenwood with some of the discrepancies. However, the Crown in referencing the above passage starts at "when Corporal Firth …". It does not cite the portion where trial Crown said "particularly". I do not read the Crown's submissions at trial as being limited to Greenwood's interaction with Cpl. Firth.

[103] Immediately after being confronted with what Jeff Lynds purported to say, Greenwood's response was, "[T]hat's where my lawyer comes in, there's nothing more I can do".

[104] This could be understood by the jury as Greenwood being avoidant when confronted with evidence of others placing him at the scene with the gun and pulling the trigger.

[105] In my view, as in *Greenwood #1*, the trial judge's instructions on Jeff Lynds' hearsay evidence were confusing and could have lead the jury to use the evidence in an impermissible way. If the jury considered Greenwood to be evasive in his response when confronted with Jeff Lynds' statement, it could have impacted on Greenwood's credibility[3] and corroborated Lawrence's testimony.

[106] The jury could also have used or relied on the hearsay statement to corroborate Lawrence's testimony. The trial judge had provided the jury with a *Vetrovec* warning in relation to Lawrence's evidence telling the jury it would be dangerous to accept Lawrence's testimony unless someone else confirmed what he said. Jeff Lynds' statement does that—it puts Greenwood at the murder scene, with a gun, and pulling the trigger.

[107] Even though Greenwood's counsel agreed the instruction was sufficient, that does not allow us to diminish or excuse the misdirection (*R. v. Kelsie*, at ¶94).

[108] I would allow this ground of appeal.

Failure to Leave the Included Offence of Second Degree Murder With the Jury

[3] Even though Greenwood did not testify, the jury still had to conduct a credibility assessment in relation to his police statements.

[109] As noted above, appellate courts should be concerned with whether the jury was properly instructed.

[110] Trial judges are not required to instruct juries on all included offences (*Jacquard*, at ¶2). In some cases, the evidence may establish an all or nothing case for a conviction or an acquittal, with no possibility of establishing an included offence (*R. v. Ronald*, 2019 ONCA 971, at ¶41). The obligation to instruct a jury on an included offence depends on several considerations, as noted by the Ontario Court of Appeal in *R. v. Yumnu*, 2010 ONCA 637:

> [228] Sometimes, commission of one offence includes the commission of another or others. An allegation of first degree murder, for example, includes both second degree murder and manslaughter: *Criminal Code*, ss. 662(1)(a); 662(2); and 662(3). But a trial judge does not always have an obligation to instruct a jury on every offence that is included in another as a matter of law: the obligation to instruct on included offences depends upon, among other factors, the evidence adduced, the issues raised and the positions of the parties. Where no reasonable view of the evidence could cause the jury to acquit of the principal offence charged, but convict of a lesser or included offence, a trial judge need not instruct the jury on the lesser offence: *R. v. Wong* (2006), 2006 CanLII 18516 (ON CA), 209 C.C.C. (3d) 520 (Ont. C.A.), at para. 12.

[111] The Ontario Court of Appeal commented on the same issue of leaving the included offence of second degree murder with a jury in *R. v. Ronald*:

> [42] There should be no instruction on potential liability for an included offence only when, on a consideration of the totality of the evidence and having due regard to the position of the parties and the proper application of the burden of proof, there is no realistic possibility of an acquittal on the main charge and a conviction on an included offence: see *R. v. Aalders*, 1993 CanLII 99 (SCC), [1993] 2 S.C.R. 482, at pp. 504-505; *R. v. Grewal*, 2019 ONCA 630, at para. 36; *R. v. Chalmers*, 2009 ONCA 268, at paras. 51-58; *R. v. Wong* (2006), 2006 CanLII 18516 (ON CA), 209 C.C.C. (3d) 520, at para. 12 (Ont. C.A.); *R. v. Wade*, 1994 CanLII 10562 (ON CA), 18 O.R. (3d) 33, at pp. 49-50, rev'd on other grounds, 1995 CanLII 100 (SCC), [1995] 2 S.C.R. 737; *R. v. Sarrazin*, 2010 ONCA 577, 259 C.C.C. (3d) 293, at para. 64, aff'd 2011 SCC 54, [2011] 3 S.C.R. 505.

[112] However, failing to leave with the jury a possible verdict on an included offence that arises on the evidence is an error of law (*R. v. Doxtator*, 2022 ONCA 155, at ¶25; leave to appeal to the Supreme Court of Canada granted). No appellate deference is owed in such circumstances (*Doxtator*, at ¶25).

[113] Allegations of first degree murder can include both second degree murder and manslaughter as included offences. As the Ontario Court of Appeal noted in *Doxtator*, "[i]n first degree murder cases, where there is any air of reality on the evidence, the included offences of manslaughter and second degree murder should be left with the jury" (¶26). In assessing whether there is an air of reality, the Ontario Court of Appeal in *Ronald* provides guidance:

> [46] When the question is should an included offence be left with the jury, the issue is whether, on the totality of the evidence, the jury could reasonably be left in doubt with respect to an element of the main charge that distinguishes that charge from an included offence: see *Wong*, at paras. 11-12. In the context of this case, it is the presence of planning and deliberation which distinguishes first from second degree murder. Second degree murder must be left with the jury if there is a reasonable possibility that the jury could have a doubt as to whether the murder was planned and deliberate. When, as here, there is more than one accused, that question must be answered separately for each accused and the answers may be different.
>
> [47] When the defence, or the Crown, argues that a jury should be instructed on the possibility of a conviction on the included offence of second degree murder, it is not essential that the party seeking the instruction point to evidence capable of supporting inferences that are inconsistent with planning and deliberation. Unlike positive defences, there is no evidentiary burden on the defence, or the Crown, to put the possibility of a conviction for the included offence of second degree murder "in play". It is sufficient if, on the totality of the evidence, a reasonable jury could be left unconvinced, beyond a reasonable doubt, that the murder was planned and deliberate. That potential uncertainty can provide the basis for a proper verdict of not guilty of first degree murder, but guilty on the included offence of second degree murder.
>
> [48] The trial judge, when deciding if the included offence of second degree murder should be left with the jury, must look to the totality of the evidence to consider not only what inferences could reasonably be drawn, but also the possibility that a reasonable jury might not draw any inference from certain evidence, perhaps because the jury regards the underlying evidence as untrustworthy or equivocal. A jury's decision that it will not draw an inference or inferences from certain evidence can open the door to a doubt on the issue of planning and deliberation. The trial judge must consider whether that is a realistic possibility in deciding whether to leave the included offence of second degree murder with the jury. [Emphasis added.]

[114] In this case, the trial judge instructed the jury on second degree murder as follows:

> If you're not satisfied beyond a reasonable doubt that the murders of Mersereau and Christensen were both planned and deliberate, you must find Leslie Greenwood not guilty of first degree murder but guilty of second degree murder. If you're satisfied beyond a reasonable doubt that the murders of Christensen and Mersereau were both planned and deliberate, you must find Leslie Greenwood guilty of first degree murder. You may find that one murder was planned and the other wasn't. That's up to you to decide.
>
> […]
>
> The fourth question is about planning and deliberation, and if you get to the fourth question, it's whether the Crown has proven that Leslie Greenwood went to the Mersereau-Christensen home with a plan to kill Nancy and Kirk and deliberately did that. Again, if you get to that question, it should not be a difficult one at all. [Emphasis added.]

[115] This was the only instruction given by the trial judge on the possibility of finding Greenwood guilty of an included offence. This instruction was discussed with counsel in the pre-charge conferences.

[116] Clearly, the trial judge thought there was an air of reality on the evidence to find Greenwood not guilty of first degree murder, but guilty of second degree murder. The issue is whether this instruction was sufficient to leave the possibility of a conviction on second degree murder open with the jury. Specifically, Greenwood argues on appeal that the trial judge's instructions made this an "all or nothing" case.

[117] I am satisfied the trial judge's instructions left open the possibility for the jury to find Greenwood not guilty of first degree murder, but guilty of second degree murder. The trial judge's instructions to the jury followed Justice Watt's *Ontario Specimen Jury Instructions (Criminal)*. As noted by Justice MacPherson, whose dissent decision was upheld by the Supreme Court of Canada, in *R. v. Banwait*, 2010 ONCA 869:

> [173] […] These instructions are the product of the lengthy and focussed collaboration of many of the very best criminal law judges, lawyers and academics in Canada. If appellate courts conclude too easily or too often that these instructions are wrong or insufficient, charging a jury will become a perilous endeavour indeed.

[118] In *Yumnu*, the Ontario Court of Appeal dismissed the appellant's argument that the trial judge's instructions were deficient as they did not adequately leave the included second degree murder offence with the jury. The Court noted that the

trial judge followed the approach of the Justice Watt's *Ontario Specimen Jury Instructions (Criminal)*. In *Yumnu*, the trial judge instructed the jurors on planned and deliberate, leaving second degree murder with the jury if they were not satisfied that the murder was both planned and deliberate:

> [236] In connection with second degree murder, the jurors were instructed that if they were satisfied beyond a reasonable doubt that either Cardoso or Duong committed murder, but not satisfied that the murder was both planned and deliberate on the part of Cardoso or Duong, they were to find that appellant not guilty of first degree murder, but guilty of second degree murder.

[119] The instructions on second degree murder in *Yumnu* mirror those in this case because both followed Justice Watt's model instructions. Such an instruction is sufficient to leave second degree murder with the jury.

[120] A separate issue arises on this portion of the trial judge's charge: whether, in stating that if the jury got to the fourth question of planned and deliberate, its conclusion "should not be a difficult one at all", the trial judge impermissibly opined on factual findings; and whether that had the effect of negating the possibility for the jury to find Mr. Greenwood not guilty of first degree murder, but guilty of second degree murder.

[121] Trial judges are entitled to give opinions on a question of fact if it is clear to the jury that the opinion is given as advice and not a direction that must be followed. However, trial judges are not permitted to express an opinion that will directly or indirectly influence the jury on the verdict to be rendered. As noted by the Supreme Court of Canada in *R. v. Gunning*, 2005 SCC 27:

> [31] Hence, it is never the function of the judge in a jury trial to assess the evidence and make a determination that the Crown has proven one or more of the essential elements of the offence and to direct the jury accordingly. It does not matter how obvious the judge may believe the answer to be. Nor does it matter that the judge may be of the view that any other conclusion would be perverse. The trial judge may give an opinion on the matter when it is warranted, but never a direction. [Emphasis added.]

[122] In this case, based on the statement and its context in the broader jury charge, it is not clear precisely what the trial judge meant by making this statement to the jury. It seems to have been a spontaneous remark by the trial judge. The trial judge did not tell the jury that his statement was an opinion given as advice and not a direction. It is possible that the jury heard this brief statement from the

trial judge and weighed it as an opinion on the verdict when deciding whether Greenwood was guilty of first degree murder or second degree murder.

[123] However, when reading the jury charge as a whole, the trial judge was clear throughout that the jury was responsible for any factual findings. Later in his instructions, the trial judge clearly explained that it was the jury who must decide issues of fact, stating:

> The law allows me to comment or express opinions about issues of fact. When I do that, though, please remember you don't have to reach the same conclusion. You, not I, decide what happened in the case. In this section, if I mention my instructions on the law, it's just to remind you of them in the context of the evidence. I don't want there to be any confusion between my instructions on the law that you've heard and must follow and my review of the evidence and opinions about that evidence that are intended only to provide you with some help, but which is always subject to your role as the only judges of the facts in the case.

[124] In conclusion on this issue, I am satisfied the trial judge properly left second degree murder as a possible verdict before the jury. While I have concerns about whether the trial judge offered an impermissible opinion that first degree murder was the obvious verdict, this statement, read in the context of the entire jury charge, did not remove the possibility for the jury to find Mr. Greenwood guilty of second degree murder. I would dismiss this ground of appeal.

Issue 3: The trial judge erred in failing to differentiate between Jason Lindsay's inculpatory and exculpatory evidence in his *Vetrovec* caution.

Jason Lindsay's *Vetrovec* Warning

[125] Jason Lindsay's criminal record spans from 1991 to 2009. In 2010, police told Lindsay they were charging him with Maddison's murder based on information they received from Jeff Lynds.

[126] Lindsay contacted police to give his story. He signed an agreement with the RCMP and entered the witness protection program. He was compensated monetarily for his cooperation and was never charged.

[127] As noted earlier, Lindsay testified at Greenwood's first trial, but died before the second trial. His evidence from the first trial was played to the jury. On September 6, 2000, he was at his friend Burgoyne's house. Lawrence and Curtis

Lynds arrived talking of a plan for Lawrence to rob a Brink's truck. Lindsay agreed to be the getaway driver. In return, he was to receive a rifle from Lynds.[4] He picked Lawrence up at Lynds' the next morning and dropped him off at a highway overpass around 6:30 a.m.

[128] On September 8, Lindsay followed Lynds to a parking lot where Lawrence arrived in a blue truck. Lawrence left intending to commit the robbery. He returned after about twenty minutes, having had to abandon the plan.

[129] On September 9, Lindsay drove Lynds and Lawrence to Kennetcook where Lynds showed Lawrence where Mersereau lived. Lynds said something to the effect of people were going to be killed and said something to Lawrence about asking about a snowmobile.

[130] Lynds then directed Lindsay to a remote place in the woods, about a 40 to 45 minute drive away. The same blue truck that Lindsay had seen the day before was there.

[131] Lindsay waited in his vehicle while Lynds and Lawrence spoke beside the truck.

[132] Lindsay then took Lynds and Lawrence back to Lynds' house.

[133] After dropping them off, he went to Burgoyne's house, returning to Lynds' house later that night where he spent the night.

[134] On September 10, Lawrence arrived at Lynds' with Greenwood in a small multi-coloured car. Greenwood looked pale, like he "saw something he shouldn't have". Greenwood did not say anything. Lynds asked Lawrence if he did it and Lawrence responded, "[Y]eah, I got them both".

[135] After the playback of Lindsay's evidence, the trial judge provided a detailed mid-trial *Vetrovec* instruction. After referring to Lindsay's criminal record, compensation from police, and incentive to avoid being charged with Mr. Maddison's murder, the trial judge instructed the jury:

> [S]ome witnesses have a sort of special status, and there's another kind of warning that has to be given for Jason Lindsay, much the same as the warning that

[4] Even though the robbery did not happen, Lindsay testified Lynds gave him the gun as compensation for having taken time off work.

> I gave you or the instructions that I gave you with regard to Mike Lawrence. […] [I]t's a special warning that comes for certain kinds of witnesses.
>
> […] you'll hear this again from me at the very end. But it's an instruction that you have to keep at the foremost of your mind when you're considering how much or how little you're going to rely on, in this case, Jason Lindsay's evidence in deciding the case.
>
> […]
>
> Witnesses like Jason Lindsay are sometimes simply referred to as unsavoury witnesses. Common sense tells you that there's a good reason to look at his evidence with great care and caution. There would be good reason to question his honesty, in general, but that doesn't mean that he's lying now. It would be dangerous for you to rely on Jason Lindsay's evidence unless it's confirmed by another witness or by other evidence. That confirmation isn't just a matter of somebody else saying that part of what Jason Lindsay said was true. The confirmation should be with respect to the circumstances surrounding the deaths of Nancy Christensen and Kirk Mersereau. You should consider the source of that confirmation. <u>There's a danger of convicting somebody of murder based on the unconfirmed evidence of someone like Jason Lindsay, though it's possible for you to do so if you're satisfied that it's true</u>.
>
> […] it really has to be brought to your attention now so you'll be aware of it, now and as the trial moves on. <u>So during the rest of the trial you should look for and look back at what you've seen and heard for some confirmation of Jason Lindsay's evidence from somebody or something other than Jason Lindsay before you rely on [his evidence in] deciding whether the Crown has proven the case against Mr. Greenwood beyond a reasonable doubt</u>.
>
> Mr. Lindsay's circumstances might make you wish that someone or something else had confirmed what he said. You may believe Jason Lindsay's testimony if you find it trustworthy, even if no one or nothing else confirms it. But when you consider it keep in mind who gave the evidence. You may find there's some evidence that confirms or supports parts of Mr. Lindsay's evidence. It's for you to say whether or not that or any other evidence confirms or supports his testimony and how that affects whether or how much you believe or rely upon his testimony in deciding the case. Okay? So you need to know that now so that you're aware going forward and looking back at the kind of thing you should be looking for. [Emphasis added.]

[136] In *R. v. Riley*, 2019 NSCA 94, Scanlan J.A.'s dissent was upheld by the Supreme Court of Canada (2020 SCC 31). In his reasons, Scanlan J.A. distinguished between purely exculpatory, inculpatory, and mixed witnesses when giving a *Vetrovec* warning:

> [134] The law distinguishes between a purely exculpatory, inculpatory and mixed witness when it comes to the instruction required. I am satisfied that Nathan Johnson was a purely exculpatory witness and that the law is clear in saying that a *Vetrovec* instruction should not have been given in relation to Mr. Johnson as an exculpatory witness. Even if I were wrong, and Mr. Johnson were described as a mixed witness, the jury instruction did not identify the exculpatory versus inculpatory evidence and explain the proper way to apply *Vetrovec* to the different types of evidence. The instruction in relation to the evidence of Nathan Johnson was an error in law.
>
> […]
>
> [137] The *Vetrovec* instruction was developed in recognition of the pitfalls associated with evidence coming from "unsavoury" witnesses. When a *Vetrovec* instruction is applied to exculpatory witnesses it places an undue burden on an accused. It may even shift the burden to an accused to present confirmatory evidence when there is no such obligation. In the context of Mr. Johnson's evidence he said, he alone committed the murder. In such circumstances the appellant's ability to present confirmatory evidence may well have been limited or in fact impossible. Some aspect of that assertion must be correct for Nathan Johnson is serving a life sentence for the murder of Chad Smith. The objective of a *Vetrovec* instruction is to put in place safeguards to protect against wrongful convictions, not to shift the burden of proof to an accused when it comes to an unsavoury exculpatory witness.
>
> [138] At law there is a difference between an exculpatory verses inculpatory witness when it comes to *Vetrovec* instruction. The instruction should not be given in relation to exculpatory evidence. The trial judge referred to the fact that Mr. Johnson was a Crown witness, perhaps implying that was a determining factor in his decision to instruct the jury as he did. Who calls a witness is not determinative of, nor in fact does it have any bearing on, whether a *Vetrovec* instruction should be given. It is the nature of their evidence (exculpatory, inculpatory, or mixed) that determines whether such a instruction should be given. As I note below, even if a witness is a mixed witness, a trial judge has a duty to separate the inculpatory from the exculpatory evidence and explain the different application of the special instruction as it relates to the different types of evidence.

[137] More recently in *R. v. Grant*, 2022 ONCA 337, the Ontario Court of Appeal addressed the importance of distinguishing between a witness's inculpatory and exculpatory evidence:

> [90] […] As a result, at most Kamkin was a "mixed witness", some of whose evidence tended to be exculpatory in character, some of which might be inculpatory.

> [91] Notwithstanding the exculpatory tendency of several aspects of Kamkin's evidence, the trial judge included his evidence in her traditional charge on eyewitness identification evidence. That was an error for several reasons.
>
> [92] First, the trial judge's instruction on eyewitness identification evidence did not acknowledge that some of Kamkin's evidence tended to be exculpatory in nature. That was a material omission, given the otherwise circumstantial nature of the evidence against Kawano and the centrality of Kamkin's evidence to Kawano's defence.
>
> [93] Second, the charge did not offer the jury any assistance about how to distinguish exculpatory from inculpatory evidence and assess the exculpatory evidence. Instead, it treated Kamkin's evidence as a single whole. […] [Emphasis added.]

[138] In my view, the judge here erred in a similar manner as the trial judge in *Grant*.

[139] Lindsay's evidence was largely exculpatory. It is difficult to identify anything in his evidence that is inculpatory. The only portion of his evidence that could be interpreted as inculpatory was his evidence Greenwood showed up in the company of Lawrence on the morning following the shootings. Greenwood denied being there on that morning. This may be an inconsistency, but it is far from implicating him as being an active participant in the murders or the planning and deliberation of them.

[140] Even if he could be seen as a mixed witness, the tendency of the rest of his evidence was exculpatory. Lindsay was involved from the outset when the plan was to rob the Brink's truck. He was present with Lawrence and Curtis Lynds when they went to show Lawrence where Mersereau lived. At no time during the planning of either the Brink's aborted robbery or the murders of Christensen and Mersereau was Greenwood's name mentioned as being part of the plan. Lindsay did not see Greenwood at Lynds' residence where the plot to commit the murders was alleged to have been hatched.

[141] On the Sunday morning when Greenwood and Lawrence arrived at Curtis Lynds' house, the single most exculpatory piece of evidence was uttered by Lawrence in a response to a question from Lynds: "I got them both". After hearing that, Lindsay went to Burgoyne's house where he testified he said the following: "I just went in and told him, I said, Holy shit, Mike just killed three people and I sounded hysterical and Johnny pointed to his lips like that because he thought his place might be tapped".

[142] He also gave evidence that Greenwood looked like he saw something he shouldn't have and he was very pale. Lindsay testified that he had seen Greenwood on previous occasions and he had never looked like that. As in *Grant*, the trial judge failed to acknowledge that some of Lindsay's evidence could have been exculpatory, nor did he offer the jury any assistance in determining between evidence that was exculpatory and inculpatory. He simply treated Lindsay's evidence as a single whole and instructed the jury accordingly. He gave the same instruction for Lindsay as he did for Lawrence. The distinction between the two of them is obvious—Lawrence's evidence is inculpatory whereas Lindsay's was largely exculpatory.

[143] This was a material error. Neither the lawyers nor the trial judge considered the distinction between inculpatory and exculpatory witnesses when considering whether to give the *Vetrovec* warning.

[144] The jury was told to look for confirmation of Lindsay's evidence before relying on it. The error is of a nature that cannot be cured by the fact defence counsel did not object to it.

[145] I would allow this ground of appeal.

Issue 4: The trial judge erred in summarily dismissing the appellant's s. 11(b) application.

Standard of Review

[146] The decision to summarily dismiss a *Charter* claim is discretionary and attracts deference on appeal. In *R. v. Orr*, 2021 BCCA 42, the court explained why this is so:

> [53] The standard of appellate review governing the summary dismissal of a *Charter* claim was set out this way by Bennett J.A. in *Vickerson*:
>
> > [61] The discretion to decline to hold a *voir dire* is founded in the need for trial judges to control the course of proceedings and to not embark upon enquiries that will not assist the real issues in the trial: *M.B.* at para. 45. These case management powers are a critical tool that trial judges should use to minimize delay: *R. v. Cody*, 2017 SCC 31 at para. 38, citing *Vukelich* with approval on this point.

> [62] Absent an argument on appeal demonstrating that the trial judge's discretion in declining to hold a *voir dire* was not exercised judicially, this Court cannot and should not disturb such rulings. [Original emphasis]

> [54] The importance of the deferential standard cannot be overstated. As explained by Charron J. in Pires, Lising, without deference to the discretionary exercise of case management powers, judges are "likely to embark upon many unnecessary hearings rather than risk vitiating an entire trial," and the trial court's "power to control the proceedings then becomes more illusory than real" (at para. 47). Such a result would be antithetical to the increased jurisprudential calls to avoid unnecessary delay in criminal proceedings and the "special role" judges play in heeding that call: *R. v. Jordan*, 2016 SCC 27 at paras. 41, 45, 114, 116, 139; *Cody* at paras. 1, 36-39; *R. v. Thanabalasingham*, 2020 SCC 18 at para. 9.

[147] In *R. v. Cody*, 2017 SCC 31, the Supreme Court of Canada emphasized the importance of trial judges exercising their case management powers to minimize delay:

> [38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.

Jordan **Application**

[148] The trial judge summarily dismissed Greenwood's *Jordan* application because the defence did not intend to adduce an evidentiary foundation for the application that would permit a fair and efficient hearing. In doing so, he was exercising his case management powers in the manner encouraged by *R. v. Cody*:

> Here, the issue is less about whether the motion is devoid of merit or is unlikely to be successful or is certain to fail. It is whether here there is a sufficient evidentiary record to enable the Court to make a reasoned decision on the merits.

> It's not whether the motion itself has merit but whether, based on the evidence, it will even be possible to decide that.
>
> We have two weeks in this case to deal with pre-trial motions. It could be said that the motions could simply use up all that time without risk of incurring further delay. But there remains a requirement that trials and cases be managed in a way that's respectful of resources including Court time.
>
> […]
>
> The main issue here is the absence of transcripts to determine what was or was not said during each Court appearance. Defence counsel were informed of the practice in Nova Scotia for transcripts to be filed in 11(b) motions. The practice in other provincial jurisdictions may be that logs prepared by the Court Clerk are an official record of the proceedings. In Nova Scotia, they're not. That's not their purpose. Counsel were made aware of that.

[149] The trial judge appropriately considered the proposed evidentiary foundation, applied the relevant legal principles, and exercised his case management powers reasonably in the circumstances by allowing the Crown's motion to summarily dismiss the *Jordan* application. Furthermore, his decision led to no injustice. The *Jordan* application could have been revived with the appropriate evidentiary foundation at any time during the proceeding.

[150] The trial judge's decision did not deprive Greenwood of a right. It did not result in the final adjudication of an issue. The defence had ample opportunity both before and after the hearing to perfect the *Jordan* application. There were five months where an application could have been made between the date of the decision and the end of trial.

[151] I am cognisant of the fact that the defence asked for an adjournment of the application which was denied by the trial judge. Similarly, deference is owed to the trial judge's decision to refuse to grant an adjournment and, again, this did not result in any injustice to Greenwood.

[152] The trial judge's decision addressing the *Jordan* application was determined in accordance with the relevant legal principles. His decision should be afforded deference. I would dismiss this ground of appeal.

Issue 5: The trial judge erred in refusing to exclude the appellant's undercover statement as an abuse of process, and in failing to exclude the appellant's derivative arrest statement.

[153] As I would allow the appeal, the admissibility of Greenwood's statements to the police will be a live issue in the new trial, if one occurs. Therefore, it would be inappropriate for this Court to pre-determine the issue.

Issue 6: The trial judge erred in failing to review the exculpatory evidence regarding the appellant's membership in the conspiracy at step two of his *Carter* instruction.

The *Carter* Instruction

[154] Greenwood argues the trial judge failed to review exculpatory evidence when he instructed the jury on Greenwood's membership in the conspiracy to kill Christensen and Mersereau. This is commonly referred to as the *Carter* instruction, after the case of *R. v. Carter*, [1982] 1 S.C.R. 938, and addresses the co-conspirators exception to the hearsay rule.

[155] In *Carter*, the Court set out a three-step process for the admissibility of hearsay evidence and the use of that evidence by the trier of fact when deliberating on a conspiracy charge. Greenwood was not charged with conspiracy to commit murder. However, the co-conspirator exception to the hearsay rule is not limited to charges of conspiracy. It also applies to any offence committed in furtherance of a common design where, as in this case, the Crown is seeking to rely on acts or declarations of co-conspirators to prove its case against the accused (*R. v. Satkunananthan* (2001), 152 C.C.C. (3d) 321 (ONCA), at ¶100).

[156] The Ontario Court of Appeal in *R. v. Gagnon* (2000), 136 O.A.C. 116 (ONCA), summarized *Carter* as follows:

> [50] In *R. v. Carter* (1982), 67 C.C.C. (2d) 568, the Supreme Court of Canada set out the following three-tiered approach to apply in conspiracy cases:
>
> > Considering all the evidence, the trier of fact must conclude beyond a reasonable doubt that the conspiracy charged in the indictment existed. This determination is independent of any consideration as to whether an indicted or unindicted conspirator is actually a member of the conspiracy charged.
> >
> > Once the trier of fact is satisfied beyond a reasonable doubt that the conspiracy charged existed, the trier of fact must determine, exclusively on the basis of "evidence directly receivable against the accused", whether the accused was probably a member of the conspiracy. The trier of fact is not to consider co-conspirator hearsay evidence at this stage of deliberations.

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

[157] In response to Greenwood's argument that the instruction was deficient, the Crown says the following:

> 85. No prejudice arose from the trial Judge's instruction on the co-conspirator's exception to hearsay. This is so for two main reasons: (i) a full instruction would not have helped the Appellant; and (ii) there was no need to rely on the exception to hearsay to implicate the Appellant in this planned execution.

[158] I agree with the Crown to the extent that it may not have been necessary to rely on the co-conspirators exception to hearsay to implicate Greenwood in this planned execution. However, I cannot agree that the failure to give a full *Carter* instruction was not prejudicial to Greenwood.

[159] The trial judge's instruction is relatively short, and I will set it out in its entirety:

> First, you have to decide whether there was what in law is called a common design. That's an unlawful purpose of some kind. You'd have to be satisfied beyond a reasonable doubt, on that criminal standard of reasonable doubt, that there was a plan of some kind to commit a murder. You can use all of the evidence to decide whether there was a common purpose and that includes the statements, themselves, including the words alleged to have been spoken by Curtis Lynds, for example. You'd be using the statement just to decide whether the existence of the plan had been proven. At that stage your only concern, first, is was there a common design, was there a plan to commit a murder.
>
> Then, second, if you're satisfied beyond a reasonable doubt that there was a common design to murder Mersereau and Christensen, you'd have to decide then whether Curtis Lynds, Mike Lawrence, Jason Lindsay, and Leslie Greenwood were probably participants in that common design. You have to consider each person separately and decide whether he was probably part of the common design. Consider only what each person himself did or said to decide whether he was probably a participant in the plan.

So, first, it's proof beyond a reasonable doubt that there was a common design and, second, proof that it was more likely than not or probably each person was a part of the plan.

So just to give you some of the evidence that would go into that here, you had evidence from Mike Lawrence about a plan to kill Nancy and Kirk. He said that it was developed with Curtis Lynds and evolved from the original plan to rob a Brinks truck. Mike Lawrence gave evidence about how he met with Lynds in the presence of Jason Lindsay and they talked about the new plan to kill Mersereau and Christensen in return for cancelling a drug debt. Jason Lindsay did some of the driving and was supposed to act as the getaway car driver under the plan by which Mike Lawrence would show up at the home, inquire about a Ski-Doo, and kill Kirk Mersereau. Mike Lawrence gave evidence about how that changed. Curtis Lynds met with him on the morning of the murders and obtained guns ... and he obtained guns. He told how Lynds showed them the home where Mersereau and Christensen lived. He told of how Curtis Lynds loaded both guns. He told of how he was put up in a hotel by Curtis Lynds before and after the murders, and he told then of how Leslie Greenwood arrived and was part of the planning with him and with Curtis Lynds.

It's for you to say whether Curtis Lynds said or did the things that Mike Lawrence said he did and whether you're satisfied beyond a reasonable doubt that there was a common design or a plan to kill Kirk and Nancy. And then, if you're satisfied that probably Curtis Lynds, Mike Lawrence, Jason Lindsay, and Les Greenwood were part of that plan, then you get to the third step.

The statements that are to be used have to have been made while the plan or common design was ongoing and must have been in furtherance of that plan. So if you're satisfied beyond a reasonable doubt there was a plan to murder Mersereau and Christensen, you're satisfied as to probably who participated in the plan and that Mr. Greenwood was probably part of that plan, you can consider the out-of-court statements or conduct by someone else who you find was probably a participant in deciding the case against Leslie Greenwood. But you can only use the statements that were made while the plan was going on and in furtherance of the plan.

So again, that's a fairly complicated legal test to apply in terms of how you use statements that are alleged to have been made by Curtis Lynds about the plan. Think of it this way, using Curtis Lynds as an example: Was there a plan to kill Kirk and Nancy? Was it proven beyond a reasonable doubt? Was Les Greenwood probably a participant in the plan? Was Curtis Lynds probably a participant in the plan? If so, you can use what Curtis Lynds is reported to have said ... I'll go back there. Was Curtis Lynds probably a participant in the plan and was Mike Lawrence probably a participant in the plan? If so, you can use what Mike Lawrence says that Curtis Lynds is reported to have said while the plan was going on for the purpose of accomplishing the plan. And of course, with all of

> that, it's only if you believe what Mike Lawrence reported that Curtis Lynds said. [Emphasis added.]

[160] Not only did he fail to review exculpatory evidence, he did not explain to the jury or outline for them what evidence would constitute direct evidence of Greenwood's participation in the conspiracy.

[161] In *Canada Criminal Code Offences*, John Gibson and Henry Waldock discuss the requirements for jury instructions of the co-conspirator's exception to the hearsay rule. They note that the "trial judge must clearly identify for the jury which pieces of evidence it may use at each stage of the analysis and for what purpose."[5]

[162] Further, *Black's Law Dictionary*[6] defines "direct evidence" as:

> **direct evidence.** (16c) **1.** Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption. — Also termed *positive evidence*. Cf. *circumstantial evidence*; *negative evidence*. **2.** *See original evidence* (1).
>
> > "As commonly used, direct evidence is the immediate perception of the tribunal or the statement of a witness as to the existence of a constituent fact." 1 Charles Frederic Chamberlayne, *A Treatise on the Modern Law of Evidence* § 15, at 16 (1911).
> >
> > "A little reflection shows that no disputed case will ordinarily be proved solely by circumstantial or solely by testimonial evidence. Ordinarily there is evidence of *both kinds*. The matter has been obscured by the use of the term 'direct evidence,' — a term sometimes used to mean testimonial evidence in general, but sometimes also limited to apply only to testimony directly asserting the fact-in-issue … The term 'direct' evidence has no utility." John H. Wigmore, *A Students' Textbook of the Law of Evidence* 40 (1935).

[163] As such, the term "direct evidence" includes both inculpatory and exculpatory evidence.

[164] In *R. v. White* (1997), 114 C.C.C. (3d) 225 (ONCA), the Ontario Court of Appeal stated that there is no formula required for instructions to a jury on the *Carter* analysis. In *White*, the trial judge informed the jury that they could only

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[5] John L. Gibson & Henry Waldock, *Canadian Criminal Code Offences* (Toronto: Thomson Reuters Canada, 1988, loose-leaf) ch 9 at s 9.22 (WL Canada).
[6] *Black's Law Dictionary*, 11th ed, *sub verbo* "evidence".

consider "direct evidence" against each of the appellants at the second stage of the analysis. The appellant argued that the trial judge erred in failing to define the meanings of "direct evidence" and "directly admissible evidence". In dismissing the appeal, the Court held:

> [142] It is of course always preferable to avoid legalese and to use common words and expressions that may be easily understood by a lay jury. Counsel for Sennet is quite correct in his submission that the expressions "direct evidence" and "directly admissible evidence" in and of themselves are not likely to be of any real significance to a lay jury. A jury would more likely understand the suggested direction that "they may only consider the appellant's own acts and declarations at this stage". The trial judge would have to carefully point out, however, that they need not consider these acts and declarations in isolation. It is often necessary and permissible to consider other evidence in order to put these acts and declarations in their proper context; otherwise, the direct evidence would sometimes be meaningless.
>
> …
>
> No particular formula is required so long as on the whole of the instructions it is clear that the jury would not have misapprehended what evidence they could consider in deciding whether either appellant was probably a member of the alleged conspiracy. Had the trial judge given no further instruction on this issue beyond the passage referred to above, we would agree that the direction would have been unclear and inadequate. <u>But after giving the above-noted instruction, the trial judge proceeded to go through the evidence in detail to point out to the jury the evidence they could properly consider with respect to each appellant at this second stage of their deliberations. In our view, this was the proper approach as it illustrated quite clearly to the jury what was meant by "direct evidence" and "directly admissible evidence"</u>. [Emphasis added.]

[165] Unlike *White*, the trial judge here did not go through the evidence in detail to point out to the jury the evidence they could properly consider against Greenwood at step two of *Carter*.

[166] In *R. v. Maugey* (2000), 146 C.C.C. (3d) 99, the Ontario Court of Appeal held that the trial judge erred by not reviewing the inculpatory and exculpatory evidence that was admissible in step two of the *Carter* analysis. The trial judge instructed the jury on the *Carter* analysis but only briefly reviewed the admissible evidence. The Court held that "[b]ecause there was both inculpatory and exculpatory evidence on the issue of the appellants' knowledge and involvement, it is not possible to say what the jury would have done had they been referred to the available evidence in the charge":

> [32] The reason why it is so important that the jury be specifically charged on which evidence is directly admissible against an accused is because it is that evidence which may make the accused a probable member of the conspiracy and allows the hearsay statements of other co-conspirators to be applicable as evidence against him. In order to be able to apply the test, the jury must understand which pieces of evidence are available as evidence admissible directly against an accused.

[167] In *Proulx c. R.*, 2016 QCCA 1425, the Quebec Court of Appeal considered, among other issues, whether the trial judge erred in failing to weigh all the directly admissible evidence at step two of the *Carter* analysis. The Court made the following observation:

> [54] On this point, the appellant is partially right. When examining the evidence directly admissible against an accused in a conspiracy case, before finding that the accused's participation in the conspiracy was probable, the judge must weigh all the direct evidence, not just the elements unfavourable to the accused while setting aside those that weigh in his or her favour. Considering only a portion of the direct evidence can be unduly prejudicial to an accused. [Emphasis added.]

[168] Although, as the Crown says, it may not have been necessary to give the *Carter* instruction, if the trial judge was going to do so, he had to review the direct evidence, both exculpatory and inculpatory, against Greenwood at step two of *Carter*. He failed to do so. This was important as the only person who testified that Greenwood was involved in the planning of the murders was Lawrence. Lindsay's evidence could have called into question Greenwood's involvement in the plan.

[169] I have other concerns about the *Carter* instruction. It appeared in the trial judge's instructions almost as an afterthought and is untethered to what use could be made of the instruction in deliberating Greenwood's guilt for first degree murder. As well, nowhere in the instruction does the trial judge tell the jury if they were satisfied that Greenwood was a probable member of the conspiracy the evidence which was admissible at step three still requires the Crown to prove beyond a reasonable doubt Greenwood was a member of the conspiracy.

[170] The jury should have been told they could use the out-of-court statements or conduct of others to decide if they were satisfied beyond a reasonable doubt Greenwood was a member of the conspiracy. The trial judge instead instructed the jury if they found that Greenwood was probably part of the plan to murder Christensen and Mersereau, they could consider out-of-court statements or conduct

of other participants "in deciding the case against Greenwood". The way the jury was instructed suggests they could find Greenwood guilty of first degree murder if they found he was probably a member of the conspiracy. This is incorrect.

[171] Given my concerns on the trial judge's instruction on party liability, this instruction provided the jury with an impermissible path to conviction.

[172] I would allow this ground of appeal.

Issue 7: The trial judge erred in his instructions on proper inferences, resulting in a reversal of the burden of proof.

[173] This ground focuses on a brief portion of the jury charge where the trial judge said the following:

> The lawyers can ask you to draw inferences. That's quite proper. You shouldn't speculate about things for which there is no evidence at all though. Inference is evidence-based; speculation is non-evidence-based.

[174] Greenwood argues the trial judge reversed the burden of proof when instructing the jury that they could not speculate based on "non-evidence". With respect, this unfairly parses the trial judge's instruction.

[175] The trial judge properly instructed the jury on direct evidence and circumstantial evidence; on drawing the line between inference and speculation; on reasonable doubt; and on the Crown's burden to prove its case beyond a reasonable doubt. He also instructed the jury that reasonable doubt could arise from the absence of evidence. I do not see his instructions as undermining the presumption of innocence or reversing the onus of proof.

[176] I would dismiss this ground of appeal.

Curative Proviso – s. 686(1)(b)(iii)

[177] The Crown said that if there were any errors in the trial judge's charge to the jury the curative proviso should apply. I reject that argument for essentially the same reasons Fichaud J.A. rejected it in *Greenwood #1*.

[178] Greenwood's conviction rested solely on the evidence of Lawrence. Lawrence was the most unsavory of witnesses. He admitted to cold-heartedly assassinating three people he had never met before, lying to the police because it

suited him, and saying another individual committed the crime of helping bury Mr. Maddison's body. His accounting of events and his character call into question whether the evidence was sufficient to convict Greenwood of first degree murder. The other evidence was not so "overwhelming that any other verdict would have been impossible to obtain" (*R. v. Van*, [2009] 1 S.C.R. 716, at ¶34). The errors which I have identified individually and cumulatively have the impact of potentially affecting this verdict. I would decline to excuse the errors under s. 686(1)(b)(iii).

Conclusion

[179] I would allow the appeal, overturn both convictions, and order a new trial should the Crown choose to proceed in that manner.

Farrar J.A.

Concurred in:

Van den Eynden J.A.

Beaton J.A.