NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Downey*, 2022 NSCA 59

Date: 20221006
Docket: CAC 487434
CAC 487789
Registry: Halifax

Between:

Daniel Downey

Appellant

v.

His Majesty the King

Respondent

-and-

Shawntez Downey

Appellant

v.

His Majesty the King

Respondent

Judge: The Honourable Justice Duncan R. Beveridge

Appeal Heard: April 5-6, 2022, in Halifax, Nova Scotia

Subject: Criminal law: admissibility of proposed fresh evidence; unreasonable verdict assessment in cases of circumstantial evidence; motion for directed verdict; application for leave to appeal consecutive sentences.

Summary: Shawntez Downey arranged to trade a handgun for drugs with Tylor McInnis. Instead of a deal, Shawntez decided to rob Mr. McInnis while armed with a .45 calibre handgun. Liam Thompson drove Mr. McInnis to do the deal. McInnis had no drugs. Liam Thompson was removed from his car and hogtied with a dog leash to prevent escape. Mr. McInnis ran away. Shawntez and his brother Daniel and another chased McInnis.

Daniel helped load Liam Thompson into the back seat of his car. More than an hour later, a single gunshot killed Mr. McInnis. Daniel directed another individual to help bring Liam Thompson and his car to a nearby location where the victim's body lay in a ditch. Present were Daniel, Tyus McSween and two others. Shawntez directed some of them to load the body into the trunk. Shawntez drove to a nearby cemetery. Daniel and the others followed in Tyus McSween's car. Shawntez attempted to kill Liam Thompson using an assault-style rifle. Thompson had but a minor injury.

A jury convicted Shawntez Downey of the second-degree murder of Tylor McInnis, attempted murder, kidnapping and unlawful confinement of Liam Thompson and Daniel of the unlawful confinement and kidnapping of Liam Thompson and having been an accessory after the fact the Shawntez's murder of Tylor McInnis.

Both appellants move to adduce fresh evidence in the form of Tyus McSween's statements to a private investigator and the police that he, not Shawntez, shot Tylor McInnis. Daniel and Shawntez also complain the verdicts are unreasonable. In addition, Daniel suggests the trial judge erred when she dismissed the directed verdict motion, in her jury charge, and when she imposed consecutive not concurrent sentences.

Issues:

(1) Are the verdicts unreasonable?
(2) Should the Court admit the proposed fresh evidence?
(3) Did the trial judge inadequately charge the jury?
(4) Did the trial judge err in her directed verdict decision?
(5) Did the trial judge commit reversible error in imposing consecutive sentences?

Result:

The motions to adduce fresh evidence are dismissed. The proposed fresh evidence is not in admissible form, it was available at trial but not adduced by the appellants pursuant to their respective reasonable, informed tactical decisions and is not reasonably capable of belief. The jury was properly charged about circumstantial evidence. The jury's conclusion Shawntez shot the victim, in light of all of the evidence, was a reasonable inference based on logic and experience. It does not conflict

with the bulk of judicial experience. In relation to Daniel, the trial judge made no error in dismissing his directed verdict motion and there was ample direct and circumstantial evidence to support the jury's verdicts of unlawful confinement, kidnapping and being an accessory after the fact to murder.

The application for leave to appeal sentence is granted but the trial judge's selection of consecutive as opposed to concurrent sentences is untainted by legal error. The sentence appeal is dismissed.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 36 pages.

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Respondent

Judges:	Beveridge, Scanlan and Van den Eynden JJ.A.
Appeal Heard:	April 5 and 6, 2022, in Halifax, Nova Scotia
Held:	The motions to adduce fresh evidence are dismissed; the appeal of Shawntez Downey is dismissed; leave to appeal sentence for Daniel Downey is granted, his conviction and sentence appeals are dismissed, per reasons for judgment of Beveridge J.A.; Scanlan and Van den Eynden JJ.A. concurring
Counsel:	Jonathan Hughes, for Daniel Downey Alan D. Gold and Ellen Williams, for Shawntez Downey Glenn Hubbard, for the Crown

Reasons for judgment:

INTRODUCTION

[1] Two brothers, Shawntez and Daniel Downey, were found guilty of a variety of offences. They appeal. To avoid confusion, I will refer to them by their first names.

[2] The jury returned guilty verdicts against Shawntez for the second degree murder of Tylor McInnis, attempted murder, kidnapping and unlawful confinement of Liam Thompson. The jury found Daniel guilty of the unlawful confinement and kidnapping of Liam Thompson and having been accessory after-the-fact to Shawntez's murder of Tylor McInnis.

[3] Shawntez and Daniel appeal their respective convictions. Shawntez moves to adduce fresh evidence and argues the murder conviction is unreasonable and not supported by the evidence. Daniel joins in asking the Court to admit fresh evidence. He also claims his convictions are unreasonable and not supported by the evidence. Daniel further argues the trial judge committed legal errors: in her decision to reject the directed verdict motion; her charge to the jury on kidnapping and unlawful confinement; and by imposing consecutive sentences for kidnapping and being an accessory after-the-fact.

[4] I would not admit the fresh evidence and would dismiss Shawntez's appeal. I would grant Daniel's application for leave to appeal sentence, but would dismiss his conviction and sentence appeals.

[5] To provide the necessary context for the arguments advanced by Shawntez and Daniel and why I would not accede to them, I will set out by way of background the essence of the trial evidence. As you read it, you might reflect on Lord Byron's suggestion of the ascendency of truth's strangeness over fiction:

> 'Tis strange,—but true; for truth is always strange;
>
> Stranger than fiction; if it could be told,[1]

BACKGROUND

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[1] George Gordon Byron (Lord Byron), *Don Juan* (1823), Canto 14, Stanza 101.

[6] Tylor McInnis wanted a handgun. Shawntez offered to trade his .45 calibre handgun to Mr. McInnis for an ounce of cocaine. By text exchange, they arranged to meet at the Downey residence on the evening of August 22, 2016 at 10 Alex Lane in North Preston to consummate the deal.

[7] There was no deal. Shawntez decided there was no need to swap his .45 calibre handgun for drugs—instead, he would just take Mr. McInnis' drugs. There was a complication. Last minute car troubles caused McInnis to enlist a young friend, Liam Thompson, to drive him in his Honda Civic to do the swap in North Preston.

[8] When Mr. McInnis showed up in North Preston in Liam Thompson's car, he had no drugs.

[9] Shawntez was not alone when he met Tylor McInnis outside his North Preston home. Also present were his brother, Daniel; cousin, Nicco Smith (Big Nicco); and friend, Ronald Sock (sometimes referred to as Junebug or Junior). Big Nicco armed himself with a knife, Sock with a carrot peeler.

[10] Big Nicco and Junior got Liam Thompson out of the Honda. Thompson was relieved of his hash and told to lie face down on the ground. He complied. Big Nicco went over to where Shawntez and Daniel were standing with Tylor McInnis. As Junior described it, "they" got McInnis to call someone on the phone. Shawntez grabbed McInnis' phone and demanded why was he "talking like that" and pistol-whipped him in the head with his .45 calibre handgun.

[11] Mr. McInnis ran away. Shawntez, Daniel and Big Nicco pursued. Junior remained beside the Honda, where he proceeded to hog-tie Mr. Thompson with a dog leash.

[12] Daniel returned 15-30 minutes later, asked if Junior was "good", went inside the house for a couple of minutes and then left. Twenty to thirty minutes later, Daniel came back a second time, and instructed Junior to get Mr. Thompson into the car and to move it across the road to Willis Lane. Daniel drove as the Honda was a manual transmission.

[13] Daniel left, saying he would be back.

[14] A half-hour later, Junior heard a single gunshot. Judson Falls came out of the house on Willis Lane and asked what was going on. Junior said to Judson,

"Nothing. You'll hear about it". Junior requested Judson to get him some cigarettes, and he did so. Then Junior went to the bootlegger for another pint of "hard stuff".

[15] Daniel came back at a jog. He told Ronald Sock, "… we got to bring the car up to the road". It was not even a minute's drive to their arrival on Downey Road. Sock saw Shawntez and Big Nicco by the ditch with the body of Tylor McInnis wrapped in plastic. Also present was a new actor, "Little Jiggy".

[16] Shawntez and Big Nicco told Sock to help put Mr. McInnis' body in the trunk of the Honda. He did. Daniel, Sock and Little Jiggy ran to 10 Alex Lane to get Little Jiggy's car. They returned and picked up Big Nicco. Shawntez told them to follow him.

[17] Shawntez drove Liam Thompson's Honda to the graveyard. There were no lights. Sock and Daniel got out. Sock saw Shawntez with an AK-style assault rifle. Sock kicked at Thompson's head. Shawntez fired the rifle three times at Liam Thompson as he lay hog-tied in the backseat. Sock thought Thompson was dead. One of the shots went through Sock's foot.

[18] Once in the backseat of Little Jiggy's car, Ronald Sock took off his shoe and saw the blood. Shawntez got in the car with the AK-style rifle. They returned to 10 Alex Lane. Others burned Sock's socks and shoes. Sock did not go the hospital. He later saw Shawntez wiping blood off his pistol's barrel.

[19] Sock described how he took gloves from the Honda's glove compartment to try to clean the Honda of trace evidence. He said he and Big Nicco also used white socks to wipe down the door handles and dash.

[20] A host of circumstantial evidence confirmed or at least supported Ronald Sock's evidence about what had happened to Tylor McInnis and Liam Thompson. This included:

- The phone records establishing multiple contacts between the cellphones of Shawntez and Tylor McInnis the evening of August 22, 2016;

- Phone records establishing the contacts between Tylor McInnis and his wife;

- Sock's blood was found in the rear seat of Little Jiggy's car, along with Shawntez's DNA;
- Three bullet holes were found in the floor of Liam Thompson's Honda;
- Shell casings consistent with a semi-automatic rifle were found in the vicinity of the Honda;
- Tylor McInnis' body was found wrapped in plastic in the trunk of Thompson's Honda, apparently doused with Javex. Also in the trunk were a knife and a carrot peeler with Sock's DNA on it;
- Ronald Sock had a hole in his foot, consistent with a gunshot wound;
- A .45 calibre shell was found in a wooded area off of Downey Road close to an empty Javex bottle, and one of Tylor McInnis' shoes;
- The Medical Examiner confirmed the existence of injuries to Tylor McInnis as consistent with being struck by a pistol. Cause of death was a single gunshot wound to the victim's face, neck and chest;
- Sock's evidence about the use of gloves and socks to wipe down areas of Liam Thompson's Honda was corroborated by locating those items and the vehicle's physical appearance;
- A backpack belonging to Liam Thompson was found with a hole in its strap, consistent with a bullet hole; Thompson suffered what was described as a graze wound to his shoulder; his T-shirt had a hole in it matching the location of his shoulder wound. A dog leash was found in the Honda. Thompson does not own a dog.
- Liam Thompson's physical and mental state when he showed up at his relatives' house the next day.

[21] That is not to say the evidence of Ronald Sock did not have blemishes. Sock was an admitted alcoholic who had consumed liquor throughout the evening of August 22, 2016. The defence stressed he was not even able to recognize the dog leash found in Liam Thompson's Honda.

[22] In addition, Ronald Sock was what is known as an "unsavoury witness". When he was arrested on warrants for failure to appear on other charges, he agreed to give a statement. In exchange, he would not be charged for any offence despite his admitted role. Sock also had a criminal record. The trial judge gave the jury a strong *Vetrovec* warning—a caution to juries about the dangers of reliance on the evidence of unsavoury witnesses.

The proceedings

[23] In order to keep track of the cast of characters and where they ended up, a recap of the proceedings is useful.

[24] Originally, the police charged four individuals with offences in relation to Tylor McInnis' homicide and the various attacks on Liam Thompson: Shawntez, Daniel, Nicco Alexander Smith (Big Nicco) and Judson ("Joey") Falls were all charged with the first degree murder of Tylor McInnis and the unlawful confinement of Liam Thompson; Shawntez and Daniel were charged with Liam Thompson's kidnapping; and, Shawntez alone with the attempted murder of Liam Thompson.

[25] The Crown eventually withdrew all charges against Judson Falls.

[26] At the conclusion of a Preliminary Inquiry on September 25, 2017, the provincial court judge committed: Shawntez on the lesser and included offence of second degree murder, attempted murder, kidnapping and forcible confinement; Daniel and Nicco Smith for kidnapping, unlawful confinement and as accessories after-the-fact to murder.

[27] The Director of Public Prosecutions preferred a direct indictment on November 10, 2017 against Shawntez, Daniel, and Nicco Smith. The indictment charged Shawntez with the first degree murder of Tylor McInnis and the attempted murder of Liam Thompson. Daniel and Shawntez were charged with the unlawful confinement and kidnapping of Liam Thompson. Daniel and Nicco Smith were each charged with accessory after-the-fact to Shawntez's murder of Tylor McInnis and robbery of Tylor McInnis.

[28] Before trial, Nicco Smith re-elected to trial by judge alone. On February 14, 2019, Smith pled guilty to being an accessory after-the-fact to the murder of Tylor McInnis by Shawntez Downey. The other charge against him was dismissed. Chipman J. of the Nova Scotia Supreme Court accepted the jointly recommended

sentence of two years' incarceration plus probation and various ancillary orders (2019 NSSC 228).

[29] On February 12, 2019, the Crown preferred a new direct indictment against Shawntez and Daniel containing the same charges absent any mention of Nicco Smith.

[30] The trial proper commenced on February 19, 2019, before Justice Denise M. Boudreau of the Nova Scotia Supreme Court. On March 8, 2019, at the end of the Crown's case, Shawntez and Daniel each made a motion for a directed verdict.

[31] Shawntez's counsel urged a directed verdict on the first degree murder count. Daniel's counsel argued for a directed verdict on the unlawful confinement and kidnapping counts with respect to Liam Thompson and the robbery count with respect to Tylor McInnis. He abandoned any contest with respect to the accessory after-the-fact count.

[32] They were partially successful. The trial judge gave a bottom line decision on March 11, 2019. She granted the motion for a directed verdict on the charge of first degree murder but refused the application on the included offence of second degree murder. She also dismissed the robbery count against Daniel, but denied the motion to dismiss the other counts. Her reasons are now reported (2019 NSSC 113).

[33] Both counsel sought time to discuss their respective positions. When court reconvened, each declared their decision not to call evidence. Later, I will summarize their arguments to the jury.

[34] The jury deliberated for a total of approximately seven hours before returning guilty verdicts.

[35] There is one more actor that faced legal proceedings—Little Jiggy. His real name is Tyus McSween, but he was only referred to as Little Jiggy at trial. It is his claimed role in the events that is at the heart of Shawntez's fresh evidence motion. Little Jiggy says he alone caused Tylor McInnis' death, and Shawntez was not present when he did so.

[36] Little Jiggy stood trial in Youth Court for being an accessory after-the-fact to Shawntez's murder of Tylor McInnis. Ronald Sock was the Crown's main

witness. The Crown filed the trial transcript as part of their response to the fresh evidence motion.

[37] At his trial, Little Jiggy's lawyer stipulated Shawntez murdered Tylor McInnis, and that Little Jiggy had committed acts that made out the offence of being an accessory after-the-fact to the murder of Tylor McInnis by Shawntez.

[38] The defence advanced was that of duress—Little Jiggy's conduct, as described by Ronald Sock, made out the offence, but Little Jiggy had provided the assistance out of fear from dangerous people—Shawntez and Big Nicco. Little Jiggy did not testify. Nonetheless, the trial judge found an air of reality to the duress defence, and the Crown had not met its burden to disprove the defence. The judge acquitted Little Jiggy.

[39] With this general background, I turn to Shawntez's grounds of appeal and motion to adduce fresh evidence.

APPEAL BY SHAWNTEZ DOWNEY

[40] The arguments on appeal have evolved. Originally, Shawntez's trial counsel, Eugene Tan, complained on appeal the trial judge erred in not granting the directed verdict for second degree murder and the conviction for that offence is unreasonable or not supported by the evidence.

[41] Shortly before the initial appeal hearing date, Mr. Gold assumed carriage of Shawntez's appeal. The Court adjourned the hearing to permit a supplementary factum. Further adjournments followed because Mr. Gold discovered Mr. Tan's investigators had taken a videotaped statement from Little Jiggy on November 30, 2018 where he said he, not Shawntez, had caused the victim's death.

[42] Mr. Gold disclosed this statement to the Crown with a request it be investigated. The Crown followed up with D/Cst. Kyle Doane, one of the original investigating officers in the McInnis homicide. He subsequently took a cautioned recorded statement from Little Jiggy and pursued other inquiries. I will set out additional details of the proposed fresh evidence later.

Unreasonable verdict

[43] An appeal court has the power to quash a conviction if satisfied it is tainted by material legal error, it is unreasonable or unsupported by the evidence, or the product of a miscarriage of justice (s. 686(1)(a)).

[44] Shawntez's principal argument is that his murder conviction is unreasonable or unsupported by the evidence. He concedes the jury charge is not tainted by material legal error, but suggests the trial judge's instructions about circumstantial evidence led to an unreasonable verdict.

[45] Given the settled state of the law, it is no surprise the parties have no disagreement about the principles an appeal court applies when a verdict is challenged as being unreasonable.

[46] It is not sufficient an appeal court merely be satisfied there was some evidence that could support a conviction. An appeal court must re-examine, and to some extent, re-weigh the evidence and consider its effect through the lens of judicial experience. Yet, at the same time, the court must respect the jury's advantages of having heard the evidence first-hand and not merely substitute its view as a thirteenth juror (*R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Biniaris*, [2000] 1 S.C.R. 381 at paras. 38-40).

[47] These principles have been consistently repeated and applied (*R. v. W.H.*, 2013 SCC 22; *R. v. Murphy*, 2014 NSCA 91; *R. v. Phillips*, 2018 ONCA 651 at para. 51; *R. v. Calnen*, 2019 SCC 6 at para. 165; *R. v. McFarlane*, 2020 ONCA 548 at para. 28).

[48] Martin J., in dissent (but not on this issue), in *Calnen* summarized the law as follows:

> [165] Given my conclusions on the previous issues, I am now required to consider whether the jury verdict was unreasonable. An unreasonable verdict, or a verdict which cannot be supported by the evidence, is one that "a properly instructed jury acting judicially could not reasonably have rendered": *R. v. W.H.*, 2013 SCC 22, [2013] 2 S.C.R. 180, at para. 26; see also *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 185; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 36. In *W.H.*, this Court described the appellate court's task in assessing the reasonableness of a verdict. Not only must the court ask whether there is some evidence which, if believed, supports the conviction, it is required to review, analyze and weigh the evidence, and consider through the lens of judicial experience, whether "judicial fact-finding precludes the conclusion reached by the jury": *W.H.*, at para. 28 (emphasis deleted), quoting *Biniaris*, at para. 39. Thus:

> ... in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury's conclusion conflicts with the bulk of judicial experience: *Biniaris*, at para. 40.

[49] I will apply these principles.

[50] No one saw who fired the one shot that killed Tylor McInnis. The Crown relied on circumstantial evidence. It asked the jury to draw the inference that Shawntez shot the victim with the requisite murderous intent.

[51] Appellate counsel argues the large gap in time between when Shawntez, Daniel and Nicco Smith were seen chasing the victim and the shot precludes the jury from being able to draw the inference that Shawntez was the shooter. In other words, someone in the group other than Shawntez murdered the victim.

[52] The foundation of the argument is the fundamental criminal law requirement that guilt of an accused must be established beyond a reasonable doubt. Where the Crown's case is circumstantial, the accused's guilt must be the only reasonable or rational conclusion to be drawn from the whole of the evidence.

[53] The Canadian Judicial Council's *Model Jury Instructions* provides that where the Crown's case is entirely or substantially circumstantial, it is necessary to give the following instruction:

> However, you cannot reach a verdict of guilty based on circumstantial evidence unless you are satisfied beyond a reasonable doubt that (*NOA*)'s guilt is the only reasonable conclusion to be drawn from the whole of the evidence.

[54] In support of this requirement, the *Model Jury Instructions* cites *R. v. Griffin*, 2009 SCC 28 at para. 33 and *R. v. Villaroman*, 2016 SCC 33 at para. 32.

[55] At issue in *R. v. Griffin* was the adequacy of the jury instructions in a circumstantial case. Charron J., for the majority, found the instructions properly conveyed the essence of the requisite guidance:

> [33] We have long departed from any legal requirement for a "special instruction" on circumstantial evidence, even where the issue is one of identification: *R. v. Cooper*, [1978] 1 S.C.R. 860. **The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only**

> **rational inference that can be drawn from the circumstantial evidence is that the accused is guilty.** Imparting the necessary message to the jury may be achieved in different ways: *R. v. Fleet* (1997), 120 C.C.C. (3d) 457 (Ont. C.A.), at para. 20. See also *R. v. Guiboche*, 2004 MBCA 16, 183 C.C.C. (3d) 361, at paras. 108-10; *R. v. Tombran* (2000), 142 C.C.C. (3d) 380 (Ont. C.A.), at para. 29.
>
> [34] There is no question that the instructions in the present case fulfilled this essential requirement. The trial judge repeatedly made clear to the jury that a guilty verdict can only be rendered if guilt is the sole rational inference to be drawn from the circumstantial evidence. …
>
> [Emphasis added]

[56] *R. v. Villaroman* was a judge alone case. The accused had computer problems. He took it to be repaired. The technician found child pornography. The police charged the accused with possession of child pornography. The case was circumstantial. The trial judge drew inferences that led him to be satisfied beyond a reasonable doubt the accused had committed the offence.

[57] The Alberta Court of Appeal disagreed, found the verdict to be unreasonable, and acquitted the respondent. The Crown appealed to the Supreme Court of Canada.

[58] Cromwell J. wrote the unanimous reasons for judgment. He affirmed or clarified a number of important principles. First, there is no need for a particular form of mandatory instruction with respect to circumstantial evidence (para. 22). Second, while "reasonable" and "rational" are virtually synonymous adjectives for alternate inferences, the former term is to be preferred—but use of "rational" does not reveal legal error (paras. 32-34). Third, other "reasonable" inferences need not be based on proven facts but can arise because of the lack of evidence (paras. 35-38).

[59] Shawntez argues the lack of evidence about who was present and what happened over a lengthy period of time, coupled with other pieces of evidence, renders the murder verdict unreasonable because there were other reasonable inferences than Shawntez having been the shooter.

[60] It is therefore useful to quote Justice Cromwell's explanation of the role other reasonable possibilities may play:

> [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.),

> at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
>
> [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
>
> [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.
>
> [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[61] There was a significant gap in time between when Ronald Sock last saw the victim alive and when he heard a gunshot. Sock's description of the times were imprecise. It could have been as little as 75 minutes to as long as 90 minutes.

[62] Counsel also point to the trial judge's comments in her oral sentence decision about her inability to make a finding about what took place within "that wooded area":

> I do appreciate, as I've already described, that three people went in after Mr. McInnis when he ran away. Mr. Downey - Mr. Shawntez Downey was found to have killed Mr. McInnis in those woods. And as I've already described, the facts following the murder of Mr. McInnis including his placing in the trunk, *et cetera*.
>
> **However, in my view, I cannot make any finding about what exactly took place within that wooded area and who else was present and under what circumstances**.
>
> [Emphasis added]

[63] However, context is important. The trial judge's unreported oral reasons show no reluctance or difficulty setting out the facts the jury must have accepted to find Shawntez guilty of murder. The trial judge's comment was made in relation to the Crown's argument at Shawntez's sentence hearing there existed aggravating facts about how Shawntez had committed the murder.

[64] The Crown theory at trial had been that Shawntez had committed the murder while the victim was being forcibly confined, and hence amounted to first degree murder. The trial judge removed that verdict from the jury when she partially granted the motion for a directed verdict (see: 2019 NSSC 113 at paras. 20 *et seq.*).

[65] At the sentence hearing, the Crown urged the judge to increase parole ineligibility due to the aggravating circumstances of the murder—it had been committed in circumstances where the victim was being dominated or controlled. The judge's comments immediately preceding the ones quoted above explain:

> I want to mention at this point, there was a discussion during the trial and again today about some additional facts that the Crown wished to put forward and felt were significant. Due to the circumstances of the murder of Mr. McInnis, including what I've already said, but also evidence from the medical examiner as to the nature and location of the gunshot wounds on Mr. McInnis' body, **the Crown's theory was that the actual killing of Mr. McInnis was done in circumstances of domination is the word that was used. For example, Mr. McInnis being on his knees at the time of his death or some such scenario.**
>
> I'm not going to repeat the discussion that we had about that issue at the trial. During the trial that issue was dealt with at length and I don't intend to re-visit that here. But for today's purposes, **I want to indicate that I do not find that the issue of the dominant nature of the killing can or should be accepted as a fact here or that the jury needed to accept that to convict Mr. Downey**.
>
> [Emphasis added]

[66] I am not persuaded that the verdict reached by the jury is unreasonable or unsupported by the evidence. A trier of fact could have had a reasonable doubt. This jury did not.

[67] The jury was entitled to find that Shawntez was in charge and was the person who murdered Tylor McInnis. Consider:

- It was Shawntez that announced his plan to rob Tylor McInnis;
- The evidence was that Shawntez owned a .45 calibre handgun;
- Shawntez used that handgun to pistol-whip the victim;
- When Tylor McInnis ran away, the group pursued him while Shawntez was still armed with his .45 calibre handgun;
- While no forensic evidence could establish the calibre of the firearm used to kill the victim, a spent .45 calibre shell was found in tall grasses in the vicinity of where the victim's body had been—those same types of grasses were later found on the victim's body and in the Honda's trunk;
- The .45 calibre shell was found near the victim's shoe;
- Death was caused by a single shot at a distance from the victim's face that left no stippling of gunshot residue;
- Shawntez was later observed cleaning blood off his .45 calibre handgun;
- It was Shawntez that was involved in directing Sock and others to load the victim's body into the Honda's trunk 45 to 60 minutes after the lone gunshot.

[68] The jury was also entitled to rely on powerful after-the-fact conduct evidence. It was Shawntez who drove the Honda to the graveyard with the victim in the trunk and Liam Thompson hog-tied in the backseat. The jury accepted Shawntez had used another weapon owned by him, an assault-style rifle, to attempt to murder Liam Thompson—the only surviving independent witness about Shawntez's criminal activities. That conviction is not under appeal.

[69] Mr. Gold points to the fact the jury was satisfied beyond a reasonable doubt Shawntez had used an AK-style assault rifle to try to murder Liam Thompson. He says this fact is inconsistent with Shawntez having had continuous possession of the .45 calibre handgun, which presumably had been used to murder Tylor McInnis. He submits this makes the possibility of a person other than Shawntez having shot the victim reasonable, thereby precluding proof beyond a reasonable doubt. Shawntez's supplementary factum describes this alternative narrative as follows:

> 21. The alternative narrative calls for the .45 calibre firearm to be in someone else's – the shooter's - possession. Any piece of evidence showing another's possession of the murder firearm and inconsistent with Shawntez Downey's possession should leave the matter in doubt with a not guilty verdict. Such a piece of evidence may well, with a lay jury, suffer its significance to evaporate at the hands of confirmation bias. But its evidentiary value is obvious when viewed with the lens of judicial experience.
>
> 22. That evidence is clearly seen when the question is asked: why does Shawntez Downey shoot Thompson with a three-foot rifle (as perforce found by the jury who convicted of the attempt murder count). **That circumstance clearly provides the inference that Shawntez Downey is not in possession of the .45 calibre murder weapon.** It leads to the question: for how long has he not had it, and also: who else does have it and accordingly is apparently the actual killer. If Shawntez Downey shot McInnis with the .45, why did he not use the .45 to shoot Thompson? If he did not use the .45 to shoot Thompson, then maybe he was not the one who used the .45 to shoot McInnis. Of such is the stuff of "other reasonable hypothesis" and reasonable doubt when the lens of judicial experience is applied.
>
> [Emphasis added]

[70] With respect, I do not accept Shawntez's possession and use of his assault-style rifle to try to murder Liam Thompson provides or dictates the inference he was therefore not in possession of the ".45 calibre murder weapon". Even if he was no longer in possession of it, it was conservatively 45 to 60 minutes after the single fatal gunshot the events by the ditch on Downey Road started to unfold. It is just as reasonable to say Shawntez used the rifle because he was low or out of .45 calibre ammunition—in light of the trial evidence Shawntez had made inquiries for .45 calibre ammunition.

[71] Based on all of the evidence, the jury's conclusion that Shawntez shot the victim was a reasonable inference based on logic and experience. It was open for the jury to conclude Shawntez owned a .45 calibre handgun, he used it before and had it after the shooting. Shawntez was in charge. There is no evidence Shawntez gave the gun to anyone else or in any way relinquished control of it or what happened that night. Why would he, if he was not the murderer of Tylor McInnis, take it upon himself to try to murder Liam Thompson and forever ensure his silence?

[72] As I have said, perhaps another trier of fact may have had a reasonable doubt—this jury did not. As Cromwell J. pointed out in *R. v. Villaroman*, it is not for an appeal court to retry the case:

> [69] These were gaps in the Crown evidence about Mr. Villaroman's possession and control of the computer that the trial judge had to take into account in weighing the evidence. However, the Court of Appeal, in its analysis of these gaps, in effect retried the case. It was for the trial judge to decide, as he did, whether the evidence of Mr. Villaroman's powers of control and direction over the computer; the coincidence of his name and the only user name on the computer; the file names descriptive of their pornographic contents; the admission in relation to the non-involvement of two other people with whom he lived; and the length of time the pornography had been on the computer, when considered in light of human experience and the evidence as a whole and the absence of evidence, excluded all reasonable inferences other than guilt. In my view, while not every trier of fact would inevitably have reached the same conclusion as did the trial judge, that conclusion was a reasonable one.

[73] Shawntez criticizes the jury instructions in two respects—there was no instruction about bad character evidence and a flawed instruction on their ability to draw inferences from circumstantial evidence to establish guilt. His factum puts it this way:

> 23. The danger that a jury will unfairly jump to a conclusion of guilt, especially in the case of an unsavoury accused, is a very real one that must be specifically guarded against in the Charge to the Jury. There was no express instruction given to the jury not be influenced in its decision by the extensive evidence of the Appellant's bad character that was introduced. **The Jury was also not told expressly and directly "that an inference of guilt drawn from circumstantial evidence should be the <u>only</u> reasonable inference from all the evidence before you"**. That assistance to the jury about the risk of jumping to conclusions may be given in different ways, including identifying the other reasonable possibilities. It is especially important in a case where the nature of the accused favours prejudiced reasoning and the existence of alternate reasonable possibility arises from gaps in the Crown's case and the absence of available evidence regarding what took place.
>
> [Emphasis added]

[74] With respect, the jury was properly charged on circumstantial evidence. The judge told the jury:

> On the other hand, if there are no proven facts from which an inference or inferences can be drawn, then there can be no inference drawn, only impermissible speculation and conjecture. I must, however, give you one caution. In order to find an accused person guilty of an offence on the basis of circumstantial evidence, you must be satisfied beyond a reasonable doubt that his guilt is the only rational inference that can be drawn on the whole of the evidence.

[75] The judge repeated this caution when she referred to another type of circumstantial evidence—after-the-fact conduct evidence:

> You may use this evidence along with all the other evidence in the case to decide whether Crown counsel has proven an accused's guilt beyond a reasonable doubt, but, as I just mentioned in relation to circumstantial evidence, you must not infer an accused's guilt from this type of evidence unless when you consider it together with the rest of the evidence you are satisfied beyond a reasonable doubt that his guilt is the only rational inference that can be drawn from all the evidence.

[76] In oral argument, Mr. Gold conceded the trial judge relied on the traditional jury instruction about circumstantial evidence, and the use of "rational" as opposed to "reasonable" did not reveal legal error. The concessions are appropriate. I see no reversible error nor one that led the jury to return an unreasonable verdict by leaping to conclusions or via confirmation bias.

[77] Furthermore, the trial judge shared her draft jury charge with counsel. She held extensive pre-charge discussions. Trial counsel voiced no objection to any aspect of her final jury instructions. I would not accede to this argument.

[78] I do not accept the suggestion the judge was required to caution the jury about reliance on evidence of Shawntez's bad character. Trial counsel sought no limiting instruction. Nor would one have been appropriate.

[79] The evidence that revealed Shawntez's criminal activities was inextricably intwined with his motive and plan to trade his .45 calibre handgun for drugs and then to simply rob the victim. The evidence was not extraneous to the issues the jury had to consider.

[80] It would make no sense to tell the jury they can rely on the evidence to establish guilt, but somehow disregard it (see: *R. v. Merz* (1999), 140 C.C.C. (3d) 259 (Ont. C.A.); *R. v. Dupras*, 2003 BCCA 124; *R. v. Van Dyke*, 2014 BCCA 3).

[81] Before moving to the issue of the proposed fresh evidence, I have not addressed Shawntez's original complaint the trial judge erred in law when she declined to grant the directed verdict motion. I have two reasons.

[82] First, counsel in oral argument abandoned the suggestion the trial judge erred. Second, even if she had erred, the scope of this Court's examination of the reasonableness of the verdict demands a more searching analysis than simply whether there was some evidence upon which a reasonable jury, properly

instructed, could convict (see: *R. v. Phillips*, 2018 ONCA 651 at para. 67; *R. v. Bains*, 2015 ONCA 677 at paras. 161-162).

Motion to adduce fresh evidence

[83] The essence of the fresh evidence is the suggestion that Tyus McSween, also known as Little Jiggy, shot and killed Tylor McInnis. The Notice of Motion is supported by two affidavits: one by appellate counsel's legal assistant, Taniya Angunawela, sworn September 28, 2021; the other by Shawntez Downey, sworn September 29, 2021, in which he recounts the trial and appeal proceedings, professes his innocence, but provides no details about what he says happened the night of Tylor McInnis' murder.

[84] The respondent filed materials in response. I will describe these later.

[85] I would provisionally admit all of these materials in order to assess the merits of the motion. I would not admit the proposed fresh evidence. I reach that conclusion for three reasons: the evidence fails the foundational requirement that it must be in admissible form—and it is not; second, the proposed fresh evidence was available to be adduced at trial—but was not pursuant to the appellant's reasonable, informed, voluntary, tactical decision; and lastly, I am not satisfied the evidence is reasonably capable of belief.

[86] Section 683(1) of the *Criminal Code* authorizes an appeal court to admit evidence on an appeal if it considers it to be the interests of justice to do so. The classic formulation to guide this discretion is that of *Palmer v. The Queen*[2]:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[2] [1980] S.C.R. 759 at p. 775.

[87] A five member panel of the Ontario Court of Appeal in *R. v. Truscott*, 2007 ONCA 575, reformulated or condensed these requirements. The Court explained:

> [92] The admissibility of this kind of evidence on appeal is tested against the criteria articulated by the Supreme Court of Canada in *R. v. Palmer and Palmer* (1979), 50 C.C.C. (2d) 193. Those criteria are well known. They encompass three components:
>
> - Is the evidence admissible under the operative rules of evidence?
> - Is the evidence sufficiently cogent in that it could reasonably be expected to have affected the verdict?
> - What is the explanation offered for the failure to adduce the evidence at trial and should that explanation affect the admissibility of the evidence?
>
> [93] The first two of these components are directed at preconditions to the admissibility of *Palmer* evidence under s. 683(1). Evidence that is not admissible under the usual rules of evidence governing criminal proceedings, or is not sufficiently cogent to potentially affect the verdict, cannot be admitted on appeal. The last component, sometimes referred to as the due diligence requirement, is not a precondition to admissibility. It becomes important only if the proffered evidence meets the first two preconditions to admissibility. The explanation offered for the failure to adduce evidence at trial, or in some cases the absence of any explanation, can result in the exclusion of evidence that would otherwise be admissible on appeal.

[88] The cases cited by the parties have the same refrain—the proposed fresh evidence must be in admissible form. One of the earliest cases that firmly established this foundational requirement is *R. v. O'Brien*, [1978] 1 S.C.R. 591. The British Columbia Court of Appeal admitted as fresh evidence a declaration from a deceased individual that purported to accept responsibility for the offence. The unanimous reasons by Dickson J., as he then was, explained the discretion to admit fresh evidence does not extend to inadmissible evidence:

> Section 610 of the *Criminal Code* lends no assistance to [the] respondent's case. It is a prerequisite that any evidence sought to be adduced under the discretion granted by that section be admissible evidence. The section manifestly does not authorize a Court of Appeal to dispense with the law of hearsay evidence. If that were so we would have the anomalous situation in which counsel could seek to adduce on appeal that which the common law prohibits at trial. The section is not operative until the threshold for admissibility as defined by common law and statute is crossed. That threshold has not been crossed in the instant case.
>
> [p. 602]

[89] The meat of the proposed fresh evidence amounts to this: an affidavit by appellate counsel's administrative assistant that attaches the recordings and transcripts of McSween's 2018 and 2021 interviews in which he "confesses" he caused the victim's death. These materials would only be relevant if they were admissible.

[90] There is no affidavit from Mr. McSween—only what he has told others, not under oath. There is no suggestion this hearsay evidence fits any common law exception nor would be admissible under the *Bradshaw* dictates of necessity and reliability (2017 SCC 35).

[91] This "evidence" would not be admissible at trial. It is inadmissible as fresh evidence on appeal.

[92] Every known attempt to introduce third party statements for the truth of their contents has failed (see, for example: *R. v. Teneycke* (1996), 77 BCAC 138; *R. v. Dell* (2005), 195 O.A.C. 355; *R. v. Archer* (2005), 203 O.A.C. 56; *R. v. Assoun*, 2006 NSCA 47; *R. v. Jia*, 2016 BCCA 475; *R. v. Mann*, 2020 BCCA 353; *R. v. Moazami*, 2021 BCCA 328).

[93] In *R. v. Dell*, Sharpe J.A., discussed this requirement:

> [85] Most of the material in the Crown brief relied upon by the appellant is unsworn, inadmissible hearsay. The appellant submits that Keyes' sworn videotaped statement is not hearsay. I disagree. That statement was given at another time for another purpose; indeed, it was given when Keyes was the subject of an investigation for conspiracy to murder Kim Knott. It is not evidence sworn for the purpose of this appeal. Requiring an affidavit sworn in the particular proceeding offering first hand evidence is not a mere formality. It appropriately directs the mind of the witness to the precise reason for which the evidence is offered and provides a means whereby the responding party can test the evidence by way of cross-examination. A statement given under oath at another time and for another reason does not satisfy these important safeguards.

(Quoted with approval by this Court in *R. v. West*, 2010 NSCA 16 at para. 34.)

[94] The appellant argues the evidence of Tyus McSween's purported confessions are reasonably capable of belief and demonstrates an air of reality to a defence that Tyus McSween committed the murder, not the appellant. The appellant's factum puts it this way:

> 1. It is respectfully submitted that the entire evidentiary package, including the cautioned and video recorded confession of Tyus McSween ("Little Jiggy"), and the resulting police investigation and supplementary material, constitutes in its entirety third party suspect evidence admissible "in the interests of justice" pursuant to s. 683(1) of the *Criminal Code* as evidence capable of raising a reasonable doubt regarding the Appellant's guilt of the murder and accordingly a new trial is required.
>
> *R. v. Cain*, 2020 NSCA 84, at para. 13
> *R. v. Litt*, 2021 ONCA 510, at paras. 26-28
> See also *R. v. Assoun*, 2006 NSCA 47, at paras. 295-314

[95] I am unable to accept the suggestion that to gain admission as fresh evidence, an appellant need only show he has evidence he might wish to call at a new trial that is capable of raising a reasonable doubt.

[96] The authorities referred to by the appellant do not provide support. *Cain*, at para. 13, simply refers to the *Palmer* criteria. *Litt*, adopts the *Truscott* reformulation that specifically requires proposed fresh evidence meet the operative rules of admissibility (para. 28). In *Assoun*, this Court clearly rejects such an approach:

> [307] As discussed earlier, it is clear from *O'Brien* and *Dell* that the tendered evidence must be in admissible form. Inadmissible evidence would not have affected the result at trial. This is an application to adduce evidence. It is not just a preview of topics which would be canvassed, through witnesses other than these deponents, if a new trial occurred. If the tendered evidence would be inadmissible at trial, it is inadmissible in the Court of Appeal.

[97] On this basis alone, I would dismiss the proposed fresh evidence motion by Shawntez and supported by Daniel.

[98] The proposed fresh evidence also fails to gain admission because both appellants were aware of its existence and made a conscious tactical decision not to call Tyus McSween as a witness, and the evidence is not reasonably capable of belief.

[99] Although the stricture against admission of evidence discoverable by an appellant through due diligence does not automatically foreclose admission, it is an important factor that must be taken into account in deciding if it is in the interests of justice for an appeal court to admit or exclude proffered fresh evidence. Doherty J.A. explained why in *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.):

> While the failure to exercise due diligence is not determinative, it cannot be ignored in deciding whether to admit "fresh" evidence. The interests of justice referred to in s. 683 of the *Criminal Code* encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the *Code* recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed: *McMartin v. The Queen*, *supra*, at p. 148.
>
> The due diligence criterion is designed to preserve the integrity of the process and it must be accorded due weight in assessing the admissibility of "fresh" evidence on appeal. […]
>
> [p. 411]

(Quoted with approval in *R. v. Lévesque*, 2000 SCC 47 at para. 19.)

[100] I turn to the materials filed. To recap, these are, in chronological order of their filing: the affidavits of Shawntez and Daniel Downey; Taniya Angunawela's affidavit sworn September 28, 2021with various attachments. The respondent filed: the affidavit of Shawntez's trial counsel, Eugene Tan, sworn November 25, 2021; the affidavit of Daniel's trial counsel, Quy Linh, sworn November 24, 2021; the affidavit of D/Cst. Kyle Doane, sworn November 17, 2021; and certified transcripts of Tyus McSween's trial from February and March 2018. By consent, the appellant tendered a supplementary affidavit from Mr. Tan on January 21, 2022 and a transcript of Mr. Tan's May 12, 2021 police interview.

[101] From these materials, the inescapable conclusion is that Daniel did not want Tyus McSween to be called as a witness, and Shawntez made a deliberate tactical decision that his chances of success at trial were better without Tyus McSween.

[102] A private investigator interviewed Tyus McSween on November 30, 2018. Daniel had conveyed information to Eugene Tan about Tyus McSween. Mr. Tan met with Mr. McSween. After a brief conversation, Mr. Tan turned Mr. McSween over to his private investigator who took a video-recorded statement from him.

[103] The essence of this statement is that on August 21, 2016, he got a black rifle from his "buddy", whose name he declined to give. The rifle was to be sold for $2000, and he would split the money with his buddy. Tyus said he started messaging around to see if he could get anybody to buy the gun. Around 8:00 p.m., he got a message from the "Tylor guy", who he did not know personally. Tyus drove to North Preston and met Tylor there. Tyus was alone, and as far as he knew, Tylor was also alone. Tyus got the rifle from his car, but Tylor ran away. Tyus had no idea why he ran away, but Tyus chased him and caught up to him. Tyus said he knocked Tylor to the ground, and had him on his knees. After a couple of hours, Tylor tried to grab the rifle, and the gun fired killing the victim. Tyus ran back to the black car. He saw no one there. He knows Liam Thompson from basketball, but never saw him that night. He had no explanation how the Downeys or Nicco Smith came to be charged with any aspect of the matter.

[104] Mr. Tan's affidavits and related materials demonstrate he and Shawntez had many discussions about the advantages and disadvantages of calling Tyus McSween. Mr. McSween was on standby outside the courthouse on the day the defence made its election whether to call evidence. Mr. Tan recommended to Shawntez not to call Tyus McSween. A detailed letter to Shawntez explained why.

[105] Shawntez gave written instructions not to call Tyus McSween. Mr. Tan's November 25, 2021 affidavit makes it clear the decision was a joint one:

> 9. At the end of the discussion, the Appellant and I were primarily worried about the possible impact the statement might have on the jury as the Crown evidence was that the Appellant was the ringleader of the entire series of events. He was worried that the jury could accept Tyus McSween's evidence, or they could see it as Tyus McSween stepping forward simply as a "good soldier", which the jury could use to support the Crown theory that the Appellant was the leader of this particular group.
>
> 10. In ultimately not using the statement, the Appellant and I reached a consensus that the jury would be more likely to use Tyus's testimony in a negative fashion than a positive one, particularly that it would be used as evidence that the Appellant was the ringleader rather than being used to exonerate him. We were of the opinion that the number of possible shooters present, the number of firearms seen by the principal witness, the lack of credibility on the part of the principal witness and time gap could not ground a guilty verdict.

[106] Daniel supports the admission of the fresh evidence, principally because if Shawntez's murder conviction is quashed, it would at least be open for Daniel to argue his conviction for being an accessory after-the-fact to Shawntez's murder of Tylor McInnis might not survive (see *R. v. Downey*, 2021 NSCA 38 at paras. 39-40).

[107] Daniel's trial counsel, Quy Linh, fully advocated for Shawntez not to call Tyus McSween, and he deposed that Daniel agreed Tyus McSween's evidence could hurt his case before the jury.

[108] Shawntez's counsel on appeal not only makes no suggestion of ineffective assistance of counsel, but that Mr. Tan's advice on this tactical decision was reasonable.

[109] The respondent relies on the decision of *R. v. Maciel*, 2007 ONCA 196.[3] There are parallels between *Maciel* and this case. In *Maciel*, the accused made a tactical decision not to provide to his own lawyer an exculpatory explanation for key intercepted communications relied on by the Crown. The appellant did not call evidence at trial. On appeal, he sought to introduce his affidavit and other evidence that could be seen as corroborative of an exculpatory explanation about the inculpatory intercepts.

[110] Doherty J.A., for the Court, referred to the principles engaged when an appeal court is asked to admit fresh evidence an appellant declined to lead at trial:

> [39] In *Reference Re Regina v. Gorecki (No. 2)* (1976), 32 C.C.C. (2d) 135 at 144 (Ont. C.A.), a very strong five-judge panel observed:
>
>> It is well established, however, that on an appeal by an accused, evidence will not be admitted which was available at the trial or which with reasonable diligence could have been discovered or, at all events, unless there is a satisfactory explanation why the evidence was not adduced at trial. In particular, the Court will not permit evidence to be received on appeal which an accused for tactical reasons deliberately refrained from calling at his trial, and thus permit him to put forward a new defence, when the one advanced has proved unsuccessful. The general rule which precludes the reception on appeal of evidence which was available to the accused at trial is founded on policy considerations, since to permit further evidence to be received, as a matter of course, in such circumstances

[3] Leave to appeal refused, [2007] S.C.C.A. No. 258.

> would result in interminable litigation and, in general, would not be in the interests of justice. [Emphasis added.]
>
> [40] Similar resistance to attempts to undo tactical decisions made at trial through "fresh" evidence applications on appeal is evident in several cases from this court: see for example *R. v. Buxbaum* (1989), 33 O.A.C. 1 at 9-10; *R. v. Canhoto* (1999), 140 C.C.C. (3d) 321 at paras. 43-45; *R. v. Smith* (2001), 161 C.C.C. (3d) 1 at para. 71; *R. v. Perlett* (2006), 212 C.C.C. (3d) 11 at paras. 141-145; see also *Reference Re Gruenke* (1998), 131 C.C.C. (3d) 72 at paras. 90-92 (Man. C.A.), aff'd (2000), 146 C.C.C. (3d) 319 at 320 (S.C.C.); *R. v. Huenemann* (1993), 38 B.C.A.C. 20 at 29 (C.A.).

[111] However, if the proposed evidence is so cogent that an appeal court is satisfied an appellant is innocent it ought to be received regardless of the appellant's tactical trial decisions (paras. 47-48).

[112] In *Maciel*, the proffered fresh evidence met (but barely) the preconditions to admissibility (para. 53) yet failed to gain admission. Doherty J.A. reasoned:

> [55] The evidence proffered on appeal presents an interpretation of the two critical intercepts that would have been put to the jury but for the appellant's decision to keep it from the jury. The jury's verdict might have been different had it heard this evidence. The verdict, however, equally could have been the same. In some respects, the evidence offered on appeal may have made it easier for the jury to accept the Crown's theory. The evidence is not sufficiently cogent to justify ignoring the considered tactical decision made at trial by the appellant. It does not raise sufficient concerns as to the reliability of the verdict to warrant the damage that would be done to the integrity of the criminal justice process by allowing the appellant to secure a new trial by adducing evidence on appeal that he deliberately chose not to adduce at trial, and that should the court order a new trial may never see the light of day at that trial.

[113] In this case, the appellant has failed to satisfy me that the proposed fresh evidence is reasonably capable of belief, let alone so cogent as to compensate for the fact the appellants did not call this evidence because of a reasoned, voluntary tactical decision.

[114] I need not canvass all of the things that preclude objective belief in the stories told by Tyus McSween that try to exculpate Shawntez. I will mention the more glaring.

[115] First, Tyus McSween's November 30, 2018 statement simply makes no sense. He lived in Dartmouth. He says he had the black rifle in the trunk of his car. Tylor McInnis lived in Halifax. Why would there ever be a need for them to

travel to North Preston to complete a deal for the gun? McSween says he was the one that had messaged Tylor McInnis to arrange the North Preston meeting. This is completely contrary to the objective, uncontradicted phone records that demonstrate the victim's ongoing text exchanges with Shawntez leading up to the North Preston meeting.

[116] No reason, logical or otherwise, is ever given by Tyus McSween for the victim to have run away part-way through their negotiations over the gun. Furthermore, Tyus made no mention of Shawntez, Big Nicco and Daniel. He says he can't even offer any information about them. He knows Liam Thompson, but never saw him in North Preston.

[117] D/Cst. Doane took a video-recorded statement from Tyus McSween on February 11, 2021. It introduces significant inconsistencies. This time, Ronald Sock figures prominently in McSween's claim he shot the victim.

[118] Tyus says he already had the gun. He didn't need it. Later in the same statement, he explains he was not given the gun by a friend, but robbed someone to get the gun.

[119] Tyus describes how he met Ronald Sock by chance at a party. It was Sock that communicated with the victim to arrange the North Preston meeting and took care of the financial arrangements, which were never disclosed to him. Tyus makes no mention of Liam Thompson or the three bullet holes in Thompson's car caused by an attempt on his life.

[120] Again, Tyus makes no mention of Shawntez, Daniel or Nicco Smith. Both of Tyus' statements would be contrary to what Shawntez told Eugene Tan. With a waiver of solicitor/client privilege in hand, Mr. Tan told D/Cst. Doane that Shawntez's version was, factually speaking, not much different than what came out at trial. Tylor McInnis came to purchase guns and ammunition, a disagreement ensued "… he arrives and they're all in the, uh-, the driveway, you know that, that much lines up". To be sure, Shawntez's version includes an exculpatory claim that they chase McInnis, but when he caught up with the victim, whatever "had occurred had already occurred".

[121] The Tyus McSween stories are not only significantly inconsistent and contrary to objective forensic evidence, they do not fit other external circumstances. For example, Nicco Smith, Shawntez's cousin, pled guilty to having been an accessory after-the-fact to Shawntez Downey's murder of Tylor

McInnis and was sentenced to two years' incarceration based entirely on the version of events given by Ronald Sock and corroborated by forensic and other physical evidence (2019 NSSC 228).

[122] Tyus McSween's stories are also contrary to the defence advanced by Tyus McSween at his own trial for having been an accessory after-the-fact to Shawntez Downey's murder of Tylor McInnis. Through counsel, Tyus McSween agreed that Shawntez Downey had murdered Tylor McInnis and he had committed acts that assisted Shawntez, but had done so out of fear.

[123] There is one additional factor that drains any last hope of credibility. D/Cst. Doane met with Tyus McSween on November 4, 2021 to request McSween sign a waiver of solicitor/client privilege with respect to his communications with his trial counsel. D/Cst. Doane offered McSween more time to consult counsel or reflect on the request. McSween's response? Not necessary. There would be no waiver of privilege.

[124] Ordinarily, a refusal to waive solicitor/client privilege would be of no moment. In these circumstances, the only reasonable inference is that McSween told his lawyer a version of events that would not assist the appellants and conflicts with his 2018 and 2021 statements.

[125] I would dismiss Shawntez's motion to adduce fresh evidence and his appeal.

APPEAL BY DANIEL DOWNEY

[126] As noted earlier, Daniel suggests: the trial judge erred in her directed verdict ruling; the jury charge was flawed; the verdict of being an accessory after-the-fact to murder was unreasonable and not supported by the evidence; and his sentence for unlawful confinement should not have been consecutive to that for being an accessory after-the-fact to murder.

Jury charge

[127] Daniel suggests the trial judge inadequately instructed the jury about what it says is the Crown's obligation to prove beyond a reasonable doubt Liam Thompson did not consent to being confined.

[128] In support, Daniel relies on *R. v. Gough* (1985), 18 C.C.C. (3d) 453 (Ont. C.A.) and *R. v. Lahaie*, 2019 ONCA 899, for the proposition that a trier of fact

must be satisfied beyond a reasonable doubt the complainant did not consent to the confinement or kidnapping.

[129] The offences of kidnapping and unlawful confinement are found in s. 279 (1) and (2) of the *Criminal Code*. At the relevant time, they provided:

> **Kidnapping**
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> **279 (1)** Every person commits an offence who kidnaps a person with intent
>
> **(a)** to cause the person to be confined or imprisoned against the person's will;
>
> **(b)** to cause the person to be unlawfully sent or transported out of Canada against the person's will; or
>
> **(c)** to hold the person for ransom or to service against the person's will.
>
> **Forcible confinement**
>
> **(2)** Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of
>
> **(a)** an indictable offence and liable to imprisonment for a term not exceeding ten years; or
>
> **(b)** an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.
>
> **(3)** In proceedings under this section, the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force.

[130] *Gough* involved a successful challenge to the constitutional validity of s. 279(3) of the *Criminal Code*.[4] That section purported to place the onus of establishing the lack of resistance was not caused by threats on the accused. Cory J.A., as he then was, referred to the importance of the confinement being against the will, or without the consent of the victim:

> The importance of s. 247(3) derives from the essential elements the Crown is required to prove in proceedings under s. 247(2), namely that the confinement, imprisonment or forcible seizure was against the will or without the consent of the victim. Although lack of consent is not specifically referred to in s. 247(2), it must be a requisite element of the offence. […]

[4] Section 279(3) has since been repealed: S.C. 2018, c. 29, s. 26.

[p. 458]

[131] *Lahaie* was an unusual case. Homeowners made a lawful citizen's arrest of two intruders. They bound them with zip ties. Rather than call the police, the appellants called the intruders' parents. The Crown argued the lawful confinement became unlawful because the appellants failed to deliver the intruders to the police forthwith. The appellants contended the lawful confinement never became unlawful because the intruders consented to its continuance.

[132] Huscroft J.A., for the Court, concluded the unlawful confinement conviction could not stand due to the combination of errors in Crown counsel's closing address, the judge's failure to correct those errors, and the trial judge's instructions caused the jury to be inadequately charged on the key issue of the case—whether the intruders had consented to their confinement (para. 7).

[133] The exact theoretical role absence of consent should play was left for another day. What is clear is that to make out the offence, the Crown must prove beyond a reasonable doubt the confinement was against the will, or without the consent of the complainant. Huscroft J.A. described consent's role as follows:

> **The offence of unlawful confinement**
>
> [21] The parties disagree about the role played by the absence of consent in the *actus reus* of the offence of unlawful confinement.
>
> [22] The appellants submit that the absence of consent to confinement is one of three components of the *actus reus* of unlawful confinement, citing *R. v. Niedermier*, 2005 BCCA 15, 193 C.C.C. (3d) 199, at para. 48, leave to appeal refused, [2005] S.C.C.A. No. 103. The British Columbia Court of Appeal described the three components as follows: "(1) a confinement, (2) the confinement is without lawful authority, and (3) a lack of consent by the complainant to the confinement. Proof of the first two elements is objective; the third, subjective."
>
> [23] The Crown says that only the first two are components of the *actus reus*, and that the lack of consent requirement is subsumed under either or both of those components, citing the decision of the Supreme Court in *R. v. Magoon*, 2018 SCC 14, [2018] 1 S.C.R. 309, at para. 64.
>
> [24] In *Magoon*, at para. 64, the Supreme Court stated that "[u]nder s. 279(2) of the *Criminal Code*, the Crown must establish that (1) the accused confined the victim, and (2) the confinement was unlawful." At para. 72, the court concluded:
>
>> There is no doubt that [the deceased child] was confined on Sunday. She was coercively restrained and directed contrary to her wishes. And the confinement was clearly unlawful. The acts of "discipline" were grossly

> disproportionate, cruel, degrading, deliberately harmful, and far exceeded any acceptable form of parenting. [Emphasis added.]
>
> [25] These passages suggest that the lack of consent is not a separate component of the *actus reus*, but is instead an aspect of the component of confinement. However, there is also authority suggesting that lack of consent is an aspect of the component of lawful authority: see e.g. David Watt, *Watt's Manual of Criminal Instructions*, 2nd ed. (Toronto: Carswell, 2015), at p. 885.
>
> [26] The matter need not be resolved for purposes of this appeal. Whether it is subsumed within one or both of the components of confinement and unlawfulness, there is no doubt that a lack of consent is an element of the offence of unlawful confinement that the Crown must prove beyond a reasonable doubt: *R. v. Gough*, (1985) 18 C.C.C. (3d) 454 (Ont. C.A.), at p. 458. This appeal succeeds because the jury was not adequately informed of this requirement.[5]

[134] The question then becomes, was the jury adequately informed of the requirement that the confinement was against the will or without Liam Thompson's consent?

[135] The law is clear about assessing adequacy of jury instructions. The overarching question is not whether the jury was perfectly instructed, but, rather, was it properly instructed to carry out its adjudicative task.

[136] This requires an appellate court to take a functional approach. This triggers certain interconnected principles. The court must assess 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*, [1997] 1 S.C.R. 314; *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).

[137] So what were the live issues at trial, the position of the parties before the trial judge, and the overall effect of the jury charge? Daniel's trial counsel never argued to the jury the Crown had not established Liam Thompson's confinement was against his will. Counsel simply urged the jury not to rely on Ronald Sock's evidence; there was no physical or forensic evidence that in any way tied Daniel to the scene of the crimes—Sock had simply made up the story of forceful confinement and kidnapping.

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[5] See also the recent discussion in *R. v. Sundman*, 2022 SCC 31 at para. 21.

[138] The trial judge instructed the jury on the offence of kidnapping as follows:

> For you to find Shawntez Downey and/or Daniel Downey guilty of kidnapping Crown Counsel must prove each of the following essential elements beyond a reasonable doubt:
>
> 1. That Shawntez Downey and/or Daniel Downey kidnapped Liam Thompson;
> 2. That Shawntez Downey and/or **Daniel Downey kidnapped Liam Thompson with intent to cause him to be confined against his will**.
>
> If Crown Counsel has not satisfied you beyond a reasonable doubt of each of these essential elements, you must find Shawntez Downey and/or Daniel Downey not guilty of kidnapping.
>
> Each essential element may be made into a question for you to consider carefully and answer. Firstly, did Shawntez Downey and/or Daniel Downey kidnap Liam Thompson. Kidnapping requires proof that Shawntez Downey and/or Daniel Downey unlawfully took Liam Thompson and carried him away or removed him by force or fraud, **against Liam Thompson's wishes**, to another place.

[139] With respect to unlawful confinement, the trial judge instructed the jury on the essential elements and their meaning in the following terms:

> For you to find Shawntez Downey and/or Daniel Downey guilty of unlawful confinement, Crown Counsel must prove each of these essential elements beyond a reasonable doubt:
>
> 1. That Shawntez Downey and/or Daniel Downey intentionally confined Liam Thompson and,
> 2. That the confinement was without lawful authority.
>
> If Crown Counsel has not satisfied you beyond a reasonable doubt of each of these essential elements, you must find Shawntez Downey and/or Daniel Downey not guilty of unlawful confinement. If Crown counsel has satisfied you beyond a reasonable doubt of each of these essential elements, you must find Shawntez Downey and/or Daniel Downey guilty of unlawful confinement.
>
> Once again, each essential element may be made into a question for you to carefully consider and answer: number one, did Shawntez Downey and/or Daniel Downey intentionally confine Liam Thompson? **To intentionally confine another person is to physically restrain that person contrary to his wishes**, thereby depriving that person of his liberty to move from one place to another. Confinement is an unlawful restriction on liberty for some period of time.
>
> [Emphasis added]

[140] A similar instruction was given with respect to kidnapping.

[141] I fail to see how the jury could have misunderstood the issues they had to decide. No one suggested Ronald Sock or Daniel had any lawful authority to physically restrain Liam Thompson. The jury were properly told the Crown had to prove beyond a reasonable doubt Liam Thompson had been physically restrained, contrary to his wishes. For kidnapping, the Crown had to establish that Thompson had been confined against his will and had been taken by the accused to another place against his wishes. "Against his will" and "contrary to his wishes" clearly invoke a consideration of the victim's subjective state of mind—whether he was consenting or agreeing to what was taking place.

[142] Daniel does not suggest the trial judge's instructions were legally flawed *per se*, just that more should have been said about the Crown's obligation to prove beyond a reasonable doubt that Liam Thompson's restraint and movement were against his will or he had not consented. Not only did trial counsel not object to the trial judge's charge at the time, the judge provided a copy of her draft charge beforehand and engaged in lengthy pre-charge discussions. Trial counsel voiced no objections on any aspect of her instructions with respect to kidnapping and unlawful confinement. While not decisive, the failure to object is a factor to be considered (see: *Jacquard* at para. 38; *Daley* at para 58).

[143] The failure to object can take on a larger role where counsel had extensive opportunity to review jury instruction drafts and offer suggestions for improvements (see: *R. v. Huard*, 2013 ONCA 650 at para. 74, leave to appeal refused, [2014] S.C.C.A. No. 13).

[144] In these circumstances, the jury was adequately charged.

Motion for directed verdict/unreasonable verdict

[145] On appeal, Daniel argues the trial judge erred in not granting a motion for directed verdict on the charges of kidnapping, and unlawful confinement and she erred in not providing sufficient reasons. In addition, he claims the verdicts are unreasonable and not supported by the evidence.

[146] With respect, these arguments have absolutely no merit.

[147] The trial judge gave ample reasons that explained why the motion failed on the charges of kidnapping and unlawful confinement. The judge cited the guiding principles from the Supreme Court of Canada in *R. v. Arcuri*, 2001 SCC 54, with respect to situations where a judge's task varies where the Crown relies solely on

circumstantial evidence for one or more of the essential elements of an offence. She summarized her task in that scenario:

> [10] In other words, my task is to determine whether the inference that the Crown asks to draw in any particular case <u>can</u> reasonably be made. If it can, I am not to weigh it as against any other possible inferences, or to choose which of the inferences I would make; that is a task for the trier of fact, in this case, the jury.
>
> [Emphasis in original]

[148] With respect to kidnapping and unlawful confinement, she succinctly set out the elements:

> [33] Kidnapping (ss. 279(1)) can be described as a movement or taking of a person from one place to another, in circumstances where the person is confined or imprisoned against the person's will. The offence of unlawful confinement is described in ss. 279(2), where a person "without lawful authority, confines, imprisons, or forcibly seizes another person".

[149] There was direct and circumstantial evidence the jury could rely on to satisfy these elements. The jury could consider the following evidence:

(a) Liam Thompson was a slightly built young man who agreed to drive his brother's best friend, Tylor McInnis, to North Preston;

(b) Ronald Sock and Big Nicco told Liam Thompson to get out of the car and lie face down on the ground;

(c) Sock and Big Nicco took Liam Thompson's hash;

(d) While Liam Thompson was lying face down on the ground, Tylor McInnis ran away after having been pistol-whipped. Liam Thompson tried to get up, Sock told him not to move;

(e) Sock stayed with Liam Thompson to make sure he did not run off or go to get help;

(f) Sock hog-tied Liam Thompson's hands and feet behind his back with a dog leash;

(g) When Daniel returned, he asked Sock if "he was good" and then Daniel left;

(h) Daniel returned a second time and told Sock they had to move Thompson, and they both loaded Thompson, still hog-tied, face down into the back seat of the Honda;

(i) Daniel drove the Honda to Willis Lane;

(j) Daniel returned after the shot had been fired and told Sock they had to take the Honda from Willis Lane to another location (Downey Road) where the body of Tylor McInnis was in the ditch, wrapped in plastic.

[150] Not only did the trial judge correctly conclude there was some evidence upon which a properly instructed jury could convict Daniel of unlawful confinement and kidnapping, the guilty verdicts of being accessory after-the-fact, kidnapping and unlawful confinement are amply supported by the evidence. Appellate counsel's argument that more needed to be said about the suggestion Liam Thompson somehow consented because he did not struggle or fight back is untenable.

[151] I would not give effect to any of these grounds of appeal and would dismiss his conviction appeal.

Sentence appeal

[152] The trial judge, with the agreement of counsel, stayed the unlawful confinement verdict in order to comply with the edict against multiple convictions for the same wrong (*Kienapple v. R.*, [1975] 1 S.C.R. 729). Her task turned to determining a fit and proper sentence for Daniel's involvement in the kidnapping of Liam Thompson and having been an accessory after-the-fact to Shawntez's murder of Tylor McInnis in light of the circumstances of the offences and those of the offender.

[153] The trial judge sentenced Daniel to four years' incarceration for kidnapping and three years' incarceration consecutive for being an accessory after-the-fact to murder. Her oral reasons are reported (2019 NSSC 384).

[154] Daniel's sole complaint is that the trial judge erred in principle when she imposed consecutive as opposed to concurrent sentences.

[155] Counsel's factum suggests the error in principle is tied to the trial judge having made factual findings unsupported by the trial evidence. I see no such errors.

[156] The trial judge was alive to the issue of whether the sentences should be consecutive or concurrent. She addressed it as follows:

> [55] Counsel are quite right to point out that the question of sentences being concurrent or consecutive relates to the question of whether the offences are separate and distinct from one another, so that their respective sentences should run consecutively to each other, or if they are sufficiently interrelated or interconnected that their sentences should quite properly run concurrently.
>
> [56] In my view these two offences, the kidnaping and the accessory after the fact, are two separate and distinct offences. It is true that they occurred within the same time frame, and that there are some connections between the two. But in my view there are two separate and distinct sets of actions committed by Mr. Downey that constituted offences. They are two offences that address different societal values: in the case of accessory after the fact, the preservation of the administration of justice, and in the case of kidnapping the prevention of personal harm to individuals. The victims were two different people and, in my view, the actions that contributed to the commission of one offence were independent from the actions that contributed to the other offence.
>
> [57] I therefore conclude that these two sentences should run consecutively, and not concurrently. That is a total of seven years.

[157] It cannot be gainsaid an appeal court owes deference to a trial judge's decision whether a sentence should be served consecutively or concurrently (*R. v. McDonnell*, [1997] 1 S.C.R. 948 at para. 46; *R. v. Kandola*, 2014 BCCA 443 at paras. 40-41); *R. v. Lee*, 2018 BCCA 428 at paras. 17-18; *R. v. Friesen*, 2020 SCC 9 at para. 155; *R. v. Probert*, 2021 NSCA 82 at para. 21).

[158] I am not convinced the trial judge committed any error in principle. I would add, the trial judge, as required, took one "last look" to determine if the totality of the consecutive sentences would be unduly long or harsh and found they would not. The appellant voices no complaint about this analysis.

[159] Although I would grant leave to appeal, I would also dismiss the sentence appeal.

Beveridge J.A.

Concurred in:

Scanlan J.A.

Van den Eynden J.A.