NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Shea***, 2011 NSCA 107

Date: 20111202
Docket: CAC 324385
Registry: Halifax

Between:

Shawn Michael Shea

Appellant

v.

Her Majesty the Queen

Respondent

Docket: CAC 324542
Registry: Halifax

Between:

Chad Albert Stevenson

Appellant

v.

Her Majesty the Queen

Respondent

Docket: CAC 328759
Registry: Halifax

Between:

Stacey Marie McKenna

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Hamilton and Farrar, JJ.A.
Appeal Heard:	May 25, 2011, in Halifax, Nova Scotia
Held:	Appeals from conviction of Shea and Stevenson dismissed; Shea and Stevenson granted leave to appeal sentence but the sentence appeals are dismissed; McKenna's appeal from conviction dismissed per reasons for judgment of Farrar, J.A.; Saunders and Hamilton, JJ.A. concurring.
Counsel:	Luke Craggs, for the appellants Shea and McKenna Timothy A.M. Peacock for the appellant Stevenson Mark Scott, for the respondent

Reasons for judgment:

[1] The appellants appeal from the decision of Supreme Court Justice Arthur LeBlanc wherein he found Shawn Michael Shea and his co-accused Chad Albert Stevenson guilty of two counts of extortion contrary to s. 346(1.1)(a) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 and one count of forcible confinement contrary to s. 279(2) of the **Criminal Code**. Shea was also convicted of breaching a condition of Recognizance contrary to s. 145(3) of the **Criminal Code**. Shea and Stevenson were both sentenced to a period of custody totalling 6 years and six months.

[2] Stacey Marie McKenna, Shea's partner, was convicted as an accessory after the fact for assisting Shea and Stevenson in fleeing the scene and assisting them to avoid detection. For her role she received a 12 month conditional sentence.

[3] Shea and Stevenson appeal complaining the trial judge inappropriately used hearsay evidence in arriving at his verdict. They further say that the trial judge erred in finding that the verdict was the only rational conclusion arising from the circumstantial evidence. Shea also argues that the verdict was unreasonable and that the trial judge failed to properly apply the law of unlawful confinement. Finally, they complain their sentences are unduly harsh and seek leave to appeal their sentences.

[4] McKenna argues that, if the principal actors, Shea and Stevenson, have their convictions overturned with respect to the substantive offence of unlawful confinement, she must, legally, be acquitted as an accessory after the fact. She also argues that the doctrine of wilful blindness could not attract criminal liability on the facts of this case.

[5] For the reasons that I will develop, I would grant leave to appeal the sentencing decisions and dismiss the appeals both from conviction and sentence.

Facts

[6] I will review the facts in more detail in addressing the individual grounds of appeal. As a brief overview, the three appellants happened to be targets of judicially authorized interceptions (commonly known as wiretaps) of their private telephone communications in the investigation of an unrelated crime.

Approximately seven wiretap interceptions and the identity of the voices on them were admitted by consent at trial. Sometime on January 9th, 2009, a Lincoln motor vehicle owned by Shea, was taken from 40 Wheatstone Crescent, the residence Shea shared with McKenna.

[7] Shea suspected that Luke Hersey either took the Lincoln motor vehicle or caused it to be taken from his residence. He enlisted Stevenson and McKenna in his attempts to determine the whereabouts of the vehicle and to obtain its return.

[8] They learned that Luke Hersey resided at 21A Panavista Drive, Westphal, Nova Scotia. Shea and Stevenson went to his residence on January 10, 2009, in the early afternoon. They knew the vehicle wasn't there but they attended at the residence with the intention of forcing Luke Hersey to disclose its location. While Shea and Stevenson were at Luke Hersey's residence, Luke Hersey and Shea had telephone conversations with Luke's brother Joel which were intercepted by the police. During one of the conversations with his brother, Luke told Joel that Shea and Stevenson were in possession of firearms or weapons. Eventually Luke directed Joel to return the Lincoln to Shea.

[9] Shea and Stevenson were present at 21A Panavista Drive from approximately 1:15 to 1:45 p.m. on January 10, 2009.

[10] When Shea and Stevenson left 21A Panavista Drive they exited through the rear of the property where the property joins the Forest Hill Parkway. Through a telephone conversation with McKenna, they directed her to where they could be picked up. The three appellants were arrested shortly after by the Halifax Regional Police in the Cole Harbour area.

[11] The Lincoln was eventually returned to 40 Wheatstone Crescent on January 10, 2009, at approximately 6:30 p.m. It was determined to have been at the residence of Josh Sherlock, a friend of the Hersey's.

[12] This is a very brief overview of the facts. As indicated earlier, I will review the evidence in greater detail in addressing the individual grounds of appeal.

Issues

[13] I would summarize the issues relating to the appellants in the following manner and in the following order:

(i) Was the verdict unreasonable or unsupported by the evidence? (Shea)

(ii) Did the trial judge err by failing to consider other reasonable inferences arising from the evidence? (Stevenson/Shea)

(iii) Did the trial judge err in his interpretation of the application of the law relating to hearsay evidence regarding conversations between Luke and Joel Hersey? (Stevenson/Shea)

(iv) Did the trial judge err in his interpretation and application of the law relating to unlawful confinement? (Shea)

(v) Were the sentences for Stevenson and Shea improper, unfit or unduly harsh? (Stevenson/Shea)

(vi) Can McKenna's conviction as an accessory after the fact be upheld if the persons found guilty as the principals have their convictions overturned?

(vii) Did the trial judge err in applying the law of wilful blindness to attribute to McKenna's specific knowledge of the extortion for which he found Shea and Stevenson guilty?

[14] I will address the standard of review when addressing each issue.

(i) Was the verdict unreasonable or unsupported by the evidence?

[15] Section 686(1)(a)(i) of the **Criminal Code** provides:

> **686. (1)** On the hearing of an appeal against a conviction ..., the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence, ...

[16] The test for appellate review of whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence is expressed in **R. v. Yebes**, [1987] 2 S.C.R. 168 as follows:

> 23 ... curial review is invited whenever a jury goes beyond a reasonable standard. ... the test is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered".

[17] The Supreme Court of Canada in **R. v. Biniaris**, 2000 SCC 15 elaborated on the **Yebes** test:

> 36 ...
>
> That formulation of the test imports both an objective assessment and, to some extent, a subjective one. It requires the appeal court to determine what verdict a reasonable jury, properly instructed, could judicially have arrived at, and, in doing so, to review, analyse and, within the limits of appellate disadvantage, weigh the evidence. This latter process is usually understood as referring to a subjective exercise, requiring the appeal court to examine the weight of the evidence, rather than its bare sufficiency. The test is therefore mixed, and it is more helpful to articulate what the application of that test entails, than to characterize it as either an objective or a subjective test.
>
> 37 The *Yebes* test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury.
>
> The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal. ...

[18] This statement of the law was recently affirmed in **R. v. Lee**, 2010 SCC 52 (¶ 4).

[19] With this test in mind, I will now turn to the trial judge’s decision.

[20] Shea and Stevenson were both convicted of extortion and forcible confinement.

[21] Section 346(1) of the **Criminal Code** defines extortion as follows:

> **346**. (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

[22] Section 279(1) sets out the elements of the offence of forcible confinement:

> **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.
>
> (2) Every person who takes a person hostage is guilty of an indictable offence and liable
>
> (a) if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organization, to imprisonment for life and to a minimum punishment of imprisonment for a term of
>
> (i) in the case of a first offence, five years, and
>
> (ii) in the case of a second or subsequent offence, seven years;
>
> (a.1) in any other case where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
>
> (b) in any other case, to imprisonment for life.

[23] Only Shea argues that the verdicts are unreasonable or not supported by the evidence. With respect, this argument is nothing more than an articulation of alternative potential interpretations of certain pieces of evidence. The question is not whether the conviction was the only reasonable verdict; the question is whether it was a reasonable verdict. **R. v. Portillo** (2003), 174 O.A.C. 226, ¶ 51.

[24] I will review the evidence in some detail to illustrate that the verdicts were reasonable and amply supported by the evidence.

[25] Shea and Stevenson intended to go to Panavista Drive on the date in question in order to recover the Lincoln vehicle. The intention was expressed at different times in the telephone intercepts by both parties both before and while they were at the premises.

[26] The appellants were inside 21A Panavista Drive on January 10, 2009 between approximately 1:15 and 1:45. At the time they had a number of telephone conversations with Joel Hersey. Again, all of these conversations were intercepted by the police and introduced in evidence.

[27] The telephone calls between Shea and Joel Hersey were intended to negotiate a drop off of the Lincoln back to Shea. During one of the conversations Shea indicated to Joel Hersey "I got him (i.e. Luke) right here", the inference was that he was holding Luke until the vehicle was returned.

[28] During the conversations Shea agreed to wait at Luke Hersey's apartment while Joel made his way over. During one conversation Joel asked to speak to Luke. Joel asked Luke if Shea and Stevenson were "strapped". Luke confirmed to Joel that Shea and Stevenson were "strapped". The evidence at trial established that the term "strapped" meant that they were carrying a firearm or a weapon.

[29] Shea also had telephone conversations with Josh Sherlock (a friend of the Herseys'). Like the conversations with Joel Hersey, the conversation with Sherlock involved efforts to determine the whereabouts of the Lincoln and obtain its return. The conversations not only confirmed the intention or motive behind Shea and Stevenson's attendance at the apartment but also revealed their impatience at trying to re-acquire the car.

[30] In convicting the appellants, the trial judge connected the essential elements of the offences to the underlying facts. In addition to being armed, Mr. Shea told Joel Hersey that he had Luke. This led the trial judge to infer that it was an effort to extort from the Herseys the return of the Lincoln vehicle. The overall circumstances led the judge to conclude that the words and conduct of the appellants Shea and Stevenson constituted a threat within the definition of extortion. There was also evidence that the appellant Stevenson physically assaulted Luke Hersey. This evidence included:

1. Mr. Hersey's swollen lip and the physical condition of the interior of 21A Panavista Drive when the police attended shortly after Shea, Stevenson and McKenna were arrested;

2. the physical injury to the knuckle of Stevenson as witnessed by the police officers involved in his arrest;

3. the words of Stevenson himself, in a telephone excerpt, when he commented that Luke Hersey asked him, when he had regained consciousness, whether it was Stevenson who had knocked him out.

[31] Finally, the police found a shotgun outside the residence of 21A Panavista Drive, a shotgun shell was found inside the residence, a military style knife and case were found to the rear of 21A Panavista Drive and another knife was found on Cranberry Crescent, near the residence and on the route Shea and Stevenson took to flee the scene.

[32] There was ample evidence before the trial judge to draw the inference that Shea and Stevenson were armed, that they forcibly confined Luke Hersey for the purposes of having him disclose to them the location of the Lincoln and that Luke Hersey's movements were restricted by Shea and Stevenson. He was also justified in concluding, on the evidence, that Shea and Stevenson used violence and threats of violence to induce Joel Hersey to give them the car and that by those threats and violence they intended to obtain the car and there was no reasonable justification or excuse for their conduct.

[33] Shea's argument that the verdict is unreasonable or not supported by the evidence is without merit. I would dismiss this ground of appeal.

(ii) Did the trial judge err by failing to consider other reasonable inferences arising from the evidence? (Stevenson/Shea)

[34] Both Stevenson and Shea raise this ground of appeal.

[35] The standard of review with respect to circumstantial evidence was addressed in **R. v. Dhillon**, 2001 BCCA 555, where the Court held at ¶ 102:

> 102 Since the Crown's case is entirely circumstantial, it seems to me that this court must determine whether a properly instructed jury, acting judicially, could have reasonably concluded that the only rational conclusion to be reached from the whole of the evidence is that the appellant murdered the victim.

Within such an inquiry, the standard of review for an error is correctness. The standard of review for possible inferences that may be drawn from the evidence is palpable and overriding error (**R. v. Biniaris**, **supra**, ¶24).

[36] Shea and Stevenson relied on **R. v. Cooper**, [1978] 1 S.C.R 860 and **R. v. Liberatore**, 2010 NSCA 82 in support of their argument that the trial judge erred in applying the proper standard of proof to the circumstantial evidence. They further pointed out aspects of the evidence which they say may lead to an alternative reasonable inference. I am not persuaded by the appellant's submissions.

[37] First, the trial judge expressly instructed himself with respect to the use of circumstantial evidence and the standard of proof applying to such evidence in a criminal trial. He specifically and correctly stated the law as cited in **R. v. Cooper, supra**, in his decision, pp. 2-4. Moreover, within his decision he stated that the "inference" (p. 21), "the clear and logical inference to be drawn" (p. 23) satisfied the court that the circumstantial evidence met the essential elements of the offences beyond a reasonable doubt. He also reiterated this analysis with respect to post-offence conduct of flight by Shea and Stevenson (p. 25).

[38] In each instance, the trial judge indicated the inference was derived from the consideration of the totality of the evidence.

[39] Shea and Stevenson's reliance on **R. v. Liberatore, supra**, is ill-founded. In **Liberatore**, the outcome was primarily premised on the trial judge's incorrect treatment of the evidence before him based on the underlying principles in **R. v.**

W.(D.), [1991] 1 S.C.R. 742, ¶11-13. The Court found error where the trial judge had not concluded that the guilt of the accused was the "only reasonable inference to be drawn from the proven facts" (**Liberatore**, ¶13-14). In that case Liberatore testified and provided an alternative explanation for his actions as viewed by the police. The trial judge did not address his evidence in his decision. That is not this case.

[40] The trial judge clearly instructed himself with respect to the burden of proof as it relates to circumstantial evidence. He reviewed the evidence with respect to each and every element of the offences and, having properly instructed himself, was satisfied that the Crown had proved the elements of the offence beyond a reasonable doubt. To illustrate by way of example, the appellants take issue with the trial judge's following comment:

> The clear and logical inference to be drawn is that by threatening Luke Hersey with physical violence they made him change his position from being unwilling to return the Lincoln to directing Joel Hersey or Josh Sherlock to return the vehicle to Shea. (Trial Decision, p. 23)

[41] The appellants argue that the trial judge did not overtly consider whether any alternate clear and logical inference could possibly be drawn from the evidence thereby constituting an error of law. They say that there are other reasonable inferences to be drawn. For example, the only evidence of "being strapped" related to Joel Hersey; the placement of the shotgun outside the residence was inconsistent with it being in Shea and Stevenson's possession; and the evidence of the physical assault on Luke was capable of a different inference. With respect, I disagree. Once again, the appellants are simply arguing that individual pieces of evidence are not sufficient to establish the appellants' guilt. The argument ignores the totality of the evidence. The trial judge properly instructed himself with respect to the law and it is after this self-instruction that he analyzed the evidence and drew the conclusions set out previously. It was not necessary for the trial judge to go further and insert the words "and that is the only logical inference to be drawn" as suggested by Shea and Stevenson, to show he had considered alternative reasonable inferences. I am satisfied on reading the trial judge's self-instruction, his analysis of the evidence and his conclusions that he correctly cited and applied the law with respect to circumstantial evidence.

[42] I would also add that the trial judge's application of **Cooper, supra**, to the evidence in this case may well have been prudent but unnecessary. **Cooper** is to be employed when the case is entirely or largely circumstantial. In this case, there was direct evidence of:

1. Shea enlisting Stevenson to assist him in attending Luke Hersey's apartment to re-acquire the motor vehicle;

2. Shea's state of mind as to his frustration increasing through unsuccessful attempts to re-acquire the vehicle;

3. Shea and Stevenson's intention to attend the residence of Luke Hersey to somehow get the vehicle; and

4. Shea and Stevenson's presence in the apartment while armed.

[43] When there is direct evidence such a self-instruction is not required. See, for example, **R. v. Manoukian** (1996), 91 O.A.C. 213 at ¶2-4, where the court held:

> 4 In this case, the evidence was not entirely circumstantial and further, the main issue at trial was the intention of the accused. In these circumstances, it was not necessary for the trial judge to instruct the jury with any more precision than he did with respect to circumstantial evidence. In fact, the instructions may have been simpler and clearer if the judge had simply charged the jury in terms of the traditional formula of proof beyond a reasonable doubt whatever the type of evidence adduced. In any event, no reasonable juror could have been confused on the basis of the judge's instructions in this case as to the obligation to be satisfied beyond a reasonable doubt before entering a conviction.

[44] Having found that the trial judge's analysis and conclusions are correct, I need not go on to consider whether his application of **Cooper**, **supra**, was absolutely necessary. The trial judge applied the heightened scrutiny as directed by **Cooper**, This could only have benefited the appellants.

[45] I would dismiss this ground of appeal.

(iii) Did the trial judge err in his interpretation of the application of the law relating to hearsay evidence regarding conversations between Luke and Joel Hersey? (Stevenson/Shea)

[46] Again, both Shea and Stevenson raise this ground of appeal.

[47] The standard of review in determining whether the trial judge erred in admitting in hearsay evidence for the truth of its contents was stated by this Court in **R. v. Poulette**, 2008 NSCA 95 as follows:

> 16 In **R. v. Smith; R. v. James**, 2007 NSCA 19, [2007] N.S.J. No. 56 (QL), Cromwell, J.A., for this Court, set out the standard of review applicable to the admission of statements under the principled exception to the hearsay rule:
>
> > [166] Appellate review of the admission of these statements must accept the trial judge's findings of fact absent manifest error. However, the correctness standard of review applies to the questions of whether the judge invoked an incorrect legal standard, failed to consider a required element of a legal test or made some other error in principle. In addition, the judge's application of the legal principles to the facts will generally be reviewed for correctness in rulings such as this concerning the admissibility of evidence: **R. v. Merz** (1999), 140 C.C.C. (3d) 259 (Ont. C.A.) at para. 49; **R. v. Underwood (G.B.)** (2002), 170 C.C.C. (3d) 500 (Alta. C.A.) at paras. 60-63. **R. v. Assoun** (2006), 207 C.C.C. (3d) 372, leave to appeal ref'd [2006] S.C.C.A. No. 233 (C.A.) at para. 54; **R. v. P.S.B.**, (2004), 222 N.S.R. (2d) 26 (C.A.) at para. 37.
>
> 17 The trial judge's ruling on admissibility, if informed by correct principles of law, is entitled to deference. There is no basis to interfere with the trial judge's weighing of the factors supporting or countering the reliability of the statement absent error in principle or a finding that the trial judge's decision is unreasonable or unsupported by the evidence. (**R. v. Blackman**, 2008 S.C.C. 37, [2008] S.C.J. No. 38 (Q.L.) at paras. 36 and 46)

[48] I will review the trial judge's decision on this standard.

[49] The only statement from the wiretaps that Shea and Stevenson contest as to admissibility is the exchange between Joel and Luke Hersey in a wiretap excerpt. That excerpt, with the impugned conversation underlined, is as follows:

Joel Hersey: Do they got, do they got guns over there or what?

Shea: (Background: Yeah, I'm goin' to get the camera)

Joel Hersey: What?

Luke Hersey: Here, I'll call ya right back, call ya right back

Shea: (Background:)

Luke Hersey: What?

Joel Hersey: Are they strapped over there?

Luke Hersey: Yeah

Joel Hersey: ..... right now?

Luke Hersey: I'll call ya , I'll call ya right back, bud

Voice 6: (Background: Hey)

(My Emphasis)

[50] That exchange took place on Saturday, January 10th, 2009, at approximately 1:43 p.m. The trial judge had this to say about that evidence:

> I found as a fact that Mr. Shea and Mr. Stevenson had firearms and weapons with them on January 10, 2009 when they were in Luke Hersey's residence. I accept the evidence of Cst. Fairbairn that "being strapped" means that a person has a firearm or weapon, likely a firearm. I am also satisfied that Mr. Stevenson's intention on January 9th, 2009, was to go to Luke Hersey's home alone if he had a buddy, which, in the circumstances, I find meant a gun or a firearm, not another person.
>
> I am also satisfied that the sawed-off shotgun found near the steps leading to the residence, that is the side door of the residence, at 21A Panavista Drive was such a weapon, as were the two knives found either at the rear of 21A Panavista Drive or on Cranberry Crescent. I also found that both Mr. Shea and Mr. Stevenson were in possession of firearms or weapons. During one of the conversations of January 10th, 2009, Joel Hersey asked his brother, Luke, if they

> were strapped and Luke answered in the affirmative, referring to Mr. Shea and Mr. Stevenson.

[51] Not only does the trial judge accept Constable Fairbairn's definition of "being strapped", but "being strapped" was also confirmed to an extent by Mr. Stevenson's own words on January 10th, 2009, at approximately 12:58 a.m. in another wiretap intercept. In this conversation he was enlisting Mr. Shea to assist him in trying to recover the car and said: "I'd go myself but I ain't got no fuckin' buddy. You know what I mean?"

[52] The trial judge found that " buddy" in these circumstances meant a gun or a firearm, not another person (Decision, p. 18). Shea is clearly stating his intention to be armed in his efforts to recover the car.

[53] Here the statement is between the victims of an extortion at the instance of Shea. That is, Luke Hersey is the conduit by which Shea tries to extort the return of the motor vehicle from Joel Hersey. Shea wanted Joel Hersey to know that Luke Hersey was being held as ransom for the car.

[54] No one was aware of the conversation being recorded by the police. There would have been no reason to fabricate. Indeed, in light of the preceding discussions between Joel Hersey and Shawn Shea, it is quite reasonable to assume that Shawn Shea would have encouraged Joel Hersey to believe that Shea and Stevenson were well armed when they arrived at Luke Hersey's residence.

[55] The statement by Luke Hersey that Shea and Stevenson were "strapped" is clearly hearsay. It was adduced to prove the truth of its contents and there was no opportunity for contemporaneous cross-examination of the declarant. (**R. v. Khelawon**, 2006 SCC 57, ¶ 56).

[56] The trial judge admitted the evidence on the basis that it formed part of the *res gestae*.

[57] The trial judge's analysis of the statement as part of the *res gestae* is admittedly brief. However, I am satisfied he properly set out the law with respect to *res gestae* and applied it to the facts of this case. As such his admission of the evidence as part of the *res gestae* is entitled to deference.

[58] The trial judge's decision on the *res gestae* issue is contained at pp. 18-20 of his decision. I will not reproduce all of the decision but only what I consider to be the pertinent portions of those reasons as it relates to the issue:

> ... Joel Hersey asked his brother, Luke, if they were strapped and Luke answered in the affirmative, referring to Mr. Shea and Mr. Stevenson.
>
> I note the following comments from Sopinka and Lederman at paragraph 6.301.
>
> > There are three basic situations in which the court have properly invoked the *res gestae* doctrine to admit utterances offered for their truth. They may be categorized as:
> >
> > (1) declarations of bodily and mental findings and conditions;
> >
> > (2) declarations accompanying and explaining relevant acts; and
> >
> > (3) spontaneous exclamations.
>
> ...
>
> ...The authors of "The Law of Evidence in Canada" again state when dealing with spontaneous exclamations as follows:
>
> > The hallmark of admissibility is the contemporaneity of the statement with the act. Because of the coincidence in time of the statement to the event, the hearsay dangers are minimized. (1) there is little time for calculated insincerity on the part of the declarant as the physical and mental shock of the event stills conscious reflection; (2) there is no problem of faulty memory as the event is still transpiring or has been just completed; and (3), the perception of the declarant may well be heightened by the event.
>
> As I have said before, I believe that the statement that "they were strapped" is part of the *res gestae*. Or more particularly a spontaneous exclamation by a person present when the acts took place. The statement in question was made by Luke Hersey while the event in question is (sic) forcible confinement and extortion by Mr. Shea and Mr. Stevenson was ongoing or immediately afterward.
>
> I am satisfied that the statement is accorded significant level of trustworthiness on that basis. ...

(My emphasis)

[59] The term "*res gestae*" was discussed by Lord Wilberforce in **Ratten v. R.**, [1971] 3 All E.R. 802 (P.C.) at p. 806:

> The expression 'res gestae', like many Latin phrases, is often used to cover situations insufficiently analysed in clear English terms. ... concentration tends to be focused on the opaque or at least imprecise Latin phrase rather than on the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been the victim of assault or accident.

[60] Lord Wilberforce then goes on to set down what is, arguably, the modern test for excited utterances at p. 807:

> The first matter goes to weight. ... The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: . . . As regards statements made after the event it must be for the judge, by preliminary ruling, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received.

[61] **R. v. Ratten** was cited with approval by this Court in **R. v. Magloir**, 2003 NSCA 74 (¶ 27).

[62] In **R. v. Hamilton**, 2004 CarswellOnt 6424 (Sup. Ct. J.) one of the accused attempted to introduce disposition evidence through intercepts that also constituted

hearsay. The moving defendant, Davis, wanted to show that a third party, Webb, was a viable murder suspect, in part through the violent disposition of Webb revealed on the recorded intercepts. The application judge rejected the admissibility of the evidence on the basis of propensity but made comments regarding hearsay and the *res gestae* exception as it relates to intercepted communications:

> 34. ... First, the intercepts of December 7, 2001, indicate the recording of criminal activity during the recording and may well be admissible as part of the res gestae of the crimes talked about during the recordings.

The trial judge rejected the evidence on the basis they did not implicate Webb in the crime before the court (¶ 35).

[63] In **R. v. MacInnes,** 2010 O.J. No. 4639 (Q.L.)(Sup. Ct. J.) the accused was charged with kidnapping, assault, and extortion of Paul Aubry. Aubry later committed suicide before trial. Family members were going to testify to unrecorded phone conversations with the victim *during his confinement*. There was clear evidence that Aubry sounded scared on the phone (¶ 21-22). The trial judge held that the statements were part of the *res gestae* and admissible:

> 30 In my opinion the telephone calls to Andre Vezina and Beryl Aubry on July 17 constitute compelling and substantively spontaneous statements with respect to Mr. Aubry's state of mind on the date in question. In both cases there are circumstantial guarantees of trustworthiness in the circumstances surrounding the making of the statements. I can divine no motive for Aubry to lie to Andre Vezina and his sister given the dire predicament in which he found himself. ...
>
> 31 In any event, in my view, the statements constitute part of the res gestae because they occurred during the course of the unlawful confinement of Paul Aubry. To that extent the statements would be admissible as part of the circumstances of the offences themselves. In *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (O.C.A.) at p. 207, the Court stated:
>
> ...
>
> 32 In my view the statements by Paul Aubry to his brother-in-law Andre Vezina and his sister Beryl Aubry should be admitted under the rubric of res gestae in that the stress or pressure of the events can safely discount the possibility of concoction or deception on the part of Paul Aubry. The statements may also be admitted under the principled exception to the rule against hearsay, as they meet the twin criteria of necessity and threshold reliability.

[64] A review of the case law shows that the key elements of this test are a statement that is spontaneously declared under shock or pressure sufficient to ensure the declaration's reliability and remove any suspicion of concoction or fabrication, and made under circumstances of relative contemporaneity to the traumatic event.

[65] Given the violent, threatening, menacing or stressful nature inherent in the crime of extortion and unlawful confinement, and given the ability of wiretap intercepts to capture a crime in progress, intercepts of victims to extortion as in the present case would seem to be a text-book case for the application for the *res gestae* exception to the hearsay rule. **R. v. Hamilton**, **supra** and **R. v. MacInnes**, **supra** reflect this.

[66] I am satisfied that the trial judge did not err in admitting the conversation between Joel and Luke Hersey into evidence as part of the *res gestae*. As stated previously, the statement was made at a time Luke Hersey was being held against his will, he did not know he was being recorded and had no reason or motive to fabricate. As such, it can be regarded as a true reflection of the situation as it unfolded and was properly introduced in evidence for the truth of its contents.

[67] Even if I found the trial judge erred in admitting the statement as part of the *res gestae*, I would find it admissible on the principled approach to the exception to the hearsay rule. In **R. v. Mapara**, 2005 SCC 23, the Supreme Court of Canada outlined the procedural framework for analyzing hearsay:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by *indicia* of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In "rare cases", evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

[68] I am also satisfied that the evidence meets the *indicia* of reliability and necessity for its admission. I will explain why.

Necessity

[69] The appellants argue that the Hersey brothers were available for testimony with Luke Hersey being incarcerated at the time of trial. The suggestion being that hearsay was not necessary since the declarant from inside the house, Luke Hersey, was available to testify. However, necessity is not so narrowly defined. Lamer, C.J.C. in **R. v. Smith**, [1992] 2 S.C.R. 915 held:

> ... the criterion of necessity must be given a flexible definition, capable of encompassing diverse situations. What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available. Necessity of this nature may arise in a number of situations. Wigmore, while not attempting an exhaustive enumeration, suggested at §1421 the following categories:
>
> (1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]. This is the commoner and more palpable reason. . . .
>
> (2) The assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources . . . . The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.
>
> Clearly the categories of necessity are not closed.

[70] These examples of necessity are repeated in **R. v. B.(K.G.)**, [1993] 1 S.C.R. 740 where Lamer, C.J.C. gave the following examples of the second type of necessity at p. 797:

> As an example of the second type of necessity, many established hearsay exceptions do not rely on the unavailability of the witness. Some examples include admissions, present sense impressions and business records. This is because there are very high circumstantial guarantees of reliability attached to such

> statements, offsetting that fact that only expediency or convenience militate in favour of admitting the evidence.

[71] In **K.G.B.** Lamer, C.J.C. finds that unavailability is not the key aspect of necessity, explaining by reference to a civil case involving documentary hearsay in the form of hospital records (at p. 797):

> Indeed, in shaping the law of hearsay in Canada, this Court has not treated necessity in the sense of unavailability as the sine qua non of admissibility. In *Ares v. Venner*, [1970] S.C.R. 608, for example, nurses' records were admitted as evidence at a medical negligence trial. The nurses, though present in court through the trial, were not called as witnesses. The Alberta Court of Appeal ordered a new trial, on the basis that Wigmore's necessity ground for the admission of hearsay was not satisfied since the nurses were available to testify. This Court allowed an appeal from this decision, holding at p. 626 that:
>
> > Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein.
>
> The Court made no reference to the present availability of the nurses as it related to the admissibility of the hearsay evidence, except to note their presence in court meant that the defendant could have challenged the accuracy of the notes if he had so wished. Similarly, the maker of the prior inconsistent statement is present in court as a witness to be examined and cross-examined as to the accuracy of the recording of the statement. *Ares v. Venner* stands as an example of a judicially-created hearsay exception which did not require unavailability. While the decisions in *Khan* and *Smith* established that Canadian courts will no longer carve out categorical "exceptions", the new approach shares the same principled basis as the existing exceptions.

[72] The **K.G.B.** approach to necessity is also reflected in **R. v. Starr**, 2000 SCC 40, where Iacobucci, J. discusses how the traditional exceptions may influence the necessity analysis:

> 206 ... Apart from that, a review of the traditional exceptions reveals that there are reasons beyond “pure” necessity why a court might wish to admit reliable hearsay evidence. This point was addressed by Lamer C.J. in *B. (K.G.*), at pp. 796-97, where he explained that the need to permit the admission of certain forms of hearsay can stem not only from the unavailability of the out-of-court declarant, but also from the quality of the evidence itself. Lamer C.J. cited Professor

> Wigmore's explanation (*Wigmore on Evidence*, vol. 5 (Chadbourn rev. 1974), at p. 253) that some hearsay evidence "may be such that we cannot expect, again, or at this time, to get *evidence of the same value* from the same or other sources" (emphasis in original). Such hearsay may be admitted, where appropriate, less on the basis of necessity and more on the basis of "expediency or convenience". The traditional exceptions are useful, therefore, because they are instructive as to the types of situations that may produce hearsay that is the best evidence in the circumstances.

[73] Indeed, in some cases the quality of the out-of-court statement may be of equal or superior quality than later testimonial evidence. This does not mean the necessity can be ignored under the principled approach, but rather that it must be evaluated reasonably in relation to the quality of the evidence.

[74] I am satisfied that the evidence falls in the second category of necessity referred to by Lamer, C.J.C. in **Smith, supra**, and as such one could not expect to get evidence of the same value from the same or any other source.

[75] I will now turn to the reliability aspect of the evidence.

Reliability

[76] It is clear that a judge is first required to assess some level of threshold reliability (**R. v. Khelawon, supra** at ¶ 2). Any categorization of factors to be considered when assessing reliability has been put to rest by Charron, J. in **Khelawon**:

> 4 As I will explain, I have concluded that the factors to be considered on the admissibility inquiry cannot be categorized in terms of threshold and ultimate reliability. Comments to the contrary in previous decisions of this Court should no longer be followed. Rather, all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence. In each case, the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility.

[77] The unanimous Court in **Khelawon** goes on to say that courts should adopt a more functional approach and focus on the particular dangers raised by the hearsay evidence:

> 93 As I trust it has become apparent from the preceding discussion, whether certain factors will go only to ultimate reliability will depend on the context. Hence, some of the comments at paras. 215 and 217 in *Starr* should no longer be followed. Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on those attributes or circumstances relied upon by the proponent to overcome those dangers. In addition, the trial judge must remain mindful of the limited role that he or she plays in determining admissibility — it is crucial to the integrity of the fact-finding process that the question of ultimate reliability not be pre-determined on the admissibility *voir dire*.
>
> . . .
>
> 100 In my view, the opinion of Kennedy J. better reflects the Canadian experience on this question. It has proven difficult and at times counterintuitive to limit the inquiry to the circumstances surrounding the making of the statement. This Court itself has not always followed this restrictive approach. ...

[78] On the subject of overcoming the "hearsay dangers" such that the utterance has sufficient reliability to overcome the admissibility threshold, Charron, J. continues:

> 61 Since the central underlying concern is the inability to test hearsay evidence, it follows that under the principled approach the reliability requirement is aimed at identifying those cases where this difficulty is sufficiently overcome to justify receiving the evidence as an exception to the general exclusionary rule. <u>As some courts and commentators have expressly noted, the reliability requirement is usually met in two different ways</u>: ...
>
> 62 <u>One way is to show that there is no real concern about whether the statement is true or not because of the circumstances in which it came about. Common sense dictates that if we can put sufficient trust in the truth and accuracy of the statement, it should be considered by the fact finder regardless of its hearsay form.</u> ...
>
> 63 Another way of fulfilling the reliability requirement is to show that no real concern arises from the fact that the statement is presented in hearsay form because, in the circumstances, its truth and accuracy can nonetheless be sufficiently tested. Recall that the optimal way of testing evidence adopted by our adversarial system is to have the declarant state the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination. This preferred method is not just a vestige of past traditions. ... However, in some cases it is not

possible to put the evidence to the optimal test, but the circumstances are such that the trier of fact will nonetheless be able to sufficiently test its truth and accuracy. Again, common sense tells us that we should not lose the benefit of the evidence when there are adequate substitutes for testing the evidence.

64 These two principal ways of satisfying the reliability requirement can also be discerned in respect of the traditional exceptions to the hearsay rule. Iacobucci J. notes this distinction in *Starr*, stating as follows:

> For example, testimony in former proceedings is admitted, at least in part, because many of the traditional dangers associated with hearsay are not present. As pointed out in Sopinka, Lederman and Bryant, *supra*, at pp. 278-79:
>
> > . . . a statement which was earlier made under oath, subjected to cross-examination and admitted as testimony at a former proceeding is received in a subsequent trial *because the dangers underlying hearsay evidence are absent*.
>
> Other exceptions are based not on negating traditional hearsay dangers, but on the fact that the statement provides circumstantial guarantees of reliability. This approach is embodied in recognized exceptions such as dying declarations, spontaneous utterances, and statements against pecuniary interest. [Emphasis added by Iacobucci J.; para. 212.]

65 Some of the traditional exceptions stand on a different footing, such as admissions from parties (confessions in the criminal context) and co-conspirators' statements: see *Mapara*, at para. 21. In those cases, concerns about reliability are based on considerations other than the party's inability to test the accuracy of his or her own statement or that of his or her co-conspirators. Hence, the criteria for admissibility are not established in the same way. However, in cases where the exclusionary rule is based on the usual hearsay dangers, this distinction between the two principal ways of satisfying the reliability requirement, although not by any means one that creates mutually exclusive categories, may assist in identifying what factors need to be considered on the admissibility inquiry.

66 *Khan* is an example where the reliability requirement was met because the circumstances in which the statement came about provided sufficient comfort in its truth and accuracy. Similarly in *Smith*, the focus of the admissibility inquiry was also on those circumstances that tended to show that the statement was true. On

> the other hand, the admissibility of the hearsay statement in *B. (K.G.)* and *Hawkins* was based on the presence of adequate substitutes for testing the evidence. ...
>
> (My emphasis)

[79] Put another way, the circumstances of the utterance must overcome what is lost to a sufficient degree such that the inability to test the declarant's perception, memory, narration or sincerity through cross-examination presents minimal dangers to trial fairness, *or*, there is a substitute for testing through cross-examination. Again, the Supreme Court in **Khelawon** discusses these issues:

> 2. ... Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its *exclusion*, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.
>
> (Underlining mine)

[80] In the present appeal, it can hardly be contested that the words captured were uttered to the extent they were captured and recorded. The question remains, was Luke Hersey sincerely and accurately recalling, perceiving and narrating events when he said "Yeah" they were strapped, in the circumstances surrounding this alleged extortion? The trial judge was satisfied the statement was reliable. So am I.

[81] I repeat, there would be little reason for Luke Hersey to lie to his brother. The conversation and nature of the statements, caught contemporaneously on a wiretap, supports an indication that there was no time to fabricate and no motivation to lie.

[82] Therefore, the question of Joel Hersey to the effect “Are they strapped?” and Luke’s answer “yeah” can be seen as spontaneous in the sense that they are contemporaneous with being victims of the alleged crime and the exertion of coercive tactics by the appellants, including the confinement of Luke against his will. Under these circumstances we can put sufficient trust in the truth and accuracy of the statement to overcome the danger inherent to its hearsay form.

[83] I am satisfied that it meets the threshold of necessity and reliability and would thereby be admissible, even if it did not form part of the *res gestae*.

(iv) Did the learned trial judge err in his interpretation and application of the law relating to unlawful confinement? (Shea)

[84] Only Shea raised this ground of appeal.

[85] Shea’s argument on this issue was addressed, in substance, under the first ground of appeal relating to unreasonable verdict.

[86] The standard of review on this type of question was summarized by Cromwell, J.A. (as he then was) in **R. v. Grouse**, 2004 NSCA 108:

> [44] In summary, I would state the applicable principles of the standard of appellate review of a finding of voluntariness in a conviction appeal as follows:
>
> 1. The judge's findings of fact, including the weight to be assigned to the evidence and the inferences drawn from the facts, are to be reviewed on the standard of palpable and overriding error: **Buhay** at para. 45.
>
> 2. The judge's statements of legal principle are to be reviewed on the standard of correctness: **Oickle** at para. 22.
>
> 3. The judge's application of the principles to the facts is to be reviewed on the standard of palpable and overriding error unless the decision can be

> traced to a wrong principle of law, in which case the correctness standard should be applied: **Buhay** at para. 45; **Housen** at para. 37.
>
> [45] In my view these principles were admirably and succinctly summarized by Rand, J. in **Fitton** when he stated at p. 962:
>
> > The inference [i.e., as to voluntariness] one way or the other, taking all the circumstances into account, is one for drawing which the trial judge is in a position of special advantage; and unless it is made evident or probable that he has not weighed the circumstances in the light of the rule or has misconceived them or the rule, his conclusion should not be disturbed. (Emphasis added)

[87] The trial judge's statements of legal principle on unlawful confinement are to be reviewed on a standard of correctness, and his application of the principles to the facts is reviewed on a standard of palpable and overriding error.

[88] Shea does not, in his factum, take issue with the trial judge's statement of the law of unlawful confinement but rather, argues that the evidence is insufficient to support the trial judge's findings. As such, this ground of appeal will be reviewed on the palpable and overriding error standard. At ¶ 76 of his factum, Shea states:

> 76. It is respectfully submitted that there was insufficient evidence upon which the Judge could find beyond a reasonable doubt that Luke Hersey was confined within the legal definition of that expression. There was no evidence that he was, against his will, in any way deprived of moving about the house, or if he was even interested in doing so.

[89] With respect, Shea is asking us to re-weigh the evidence and reach a different conclusion than the trial judge. Shea's argument on this point was addressed under the first ground of appeal where he argued that the verdicts were unreasonable and unsupported by the evidence. I have already determined that there was ample evidence upon which the trial judge could conclude that the offence of unlawful confinement had been made out by the Crown beyond a reasonable doubt.

[90] Shea suggests that there was limited evidence relevant to the unlawful confinement charge. In making this argument, Shea ignores the weight of evidence that the trial judge had before him relating to the confinement. I will not review that evidence as I have already addressed it under Issue #1 (see ¶ 26-33). However, the nature and number of exchanges between Joel Hersey and Shawn Shea establish

that Shea and Stevenson were at Luke Hersey's apartment and that the only reasonable and logical conclusion to be drawn from that evidence was that they were holding him as a "bargaining chip" for the return of the vehicle. This was not a social visit. Shea and Stevenson were at Luke Hersey's apartment with a purpose, and that purpose was to restrain him and hold him until the car was returned. No other conclusion is warranted on the evidence.

[91] I would dismiss this ground of appeal.

(v) Were the sentences for Stevenson and Shea improper, unfit or unduly harsh? (Stevenson/Shea)

[92] The standard of review where appeals against sentence are concerned was recently stated by the Supreme Court of Canada in **R. v. L.M.**, 2008 SCC 31:

> [14] In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that . . . the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
>
> > . . . absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
>
> (See also *R. v. W. (G.)*, [1999] 3 S.C.R. 597, at para. 19; A. Manson, *The Law of Sentencing* (2001), at p. 359; and F. Dadour, *De la détermination de la peine: principes et applications* (2007), at p. 298.)
>
> [15] Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (*M. (C.A.)*, at para. 91). In sum, in the case at bar, the Court of Appeal was required — for practical reasons, since the trier of fact was in the best

> position to determine the appropriate sentence for L.M. — to show deference to the sentence imposed by the trial judge.

[93] Shea, in his factum, takes no issue with the trial judge's consideration of the appropriate purposes and principles of sentencing. His argument is essentially if he is successful on one or more grounds of appeal the sentence should be reduced. The ultimate determination of whether the sentence was excessive, he says, may hinge on the outcome of the appeal with respect to the various charges for which he was convicted. I have already determined that I would dismiss the appeals from conviction. Similarly, Stevenson takes no issue with the trial judge's consideration of the appropriate purposes and principles of sentencing. However, he argues that it was unduly harsh.

[94] I am satisfied the appellants have not satisfied the heavy onus on them in showing that the trial judge's decision on sentencing was excessive.

[95] This was a home invasion. In a pre-meditated fashion Shea enlisted the services of Stevenson to act as his "heavy" in order to recover his motor vehicle. They armed themselves. They attended Luke Hersey's apartment for the purposes of unlawfully confining him and extorting the return of the vehicle from him. They occasioned violence on Luke Hersey.

[96] Both came before the court with lengthy, violent criminal records. Both were subject to weapons prohibitions. Stevenson had just finished serving a significant period of incarceration for a serious offence. Shea was on a recognizance for serious offences at the time.

[97] The trial judge properly took into consideration that the sentence should strive to be proportionate to the gravity of the offence and degree of responsibility of the offender.

[98] In my view, the sentencing judge made no error in principle; he considered all relevant factors; he did not place undue emphasis on any factors; and the sentence is not "demonstrably unfit" or "clearly unreasonable" in the circumstances. The sentences imposed were well within the range and were not manifestly unfit.

[99] I would allow leave to appeal from sentence but dismiss the appeal.

(vi) Can McKenna's conviction for accessory after the fact be upheld if the persons found guilty as the principals have their convictions overturned?

[100] The parties say that this ground of appeal raises a question of law and as such is subject to a standard of correctness. I agree. However, as I have already determined that the convictions of Shea and Stevenson should be upheld, it is not necessary to address this ground of appeal.

(vii) Did the trial judge err in applying the law of wilful blindness to attribute to McKenna's specific knowledge of the extortion for which he found Shea and Stevenson guilty?

[101] The standard of review is mixed as set out in **Grouse, supra**, referred to in ¶ 44-45. The trial judge convicted McKenna of the **Criminal Code** and, in particular, convicted her of being an accessory after the fact to the commission of the offence of extortion.

[102] She was also charged with being an accessory after the fact to the offence of break and enter and to the offence of forcible confinement. At trial, the Crown stipulated to the trial judge that if McKenna were convicted of being an accessory after the fact to extortion, they would not seek convictions on the other two charges. For her role, she was sentenced to a 12 month conditional sentence.

[103] The trial judge had this to say about McKenna's involvement:

> Counts 5, 6, and 7 of the indictment charges Ms. McKenna with assisting Mr. Shea and Mr. Stevenson to escape 21A Panavista Drive or to avoid police detection. In order for the Crown to succeed it must establish the following elements beyond a reasonable doubt. That Ms. McKenna knew or was wilfully blind to the fact that a crime had been committed by Mr. Shea and Mr. Stevenson. That Ms. McKenna desired to help Mr. Shea and Mr. Stevenson to escape and that Ms. McKenna provided some assistance in their escape.
>
> The evidence satisfies me that Ms. McKenna assisted Mr. Shea in his attempts to locate the Lincoln vehicle that she knew had been towed away from 40 Wheatstone Crescent. She is heard on several intercepts to say that the vehicle had been removed and can be heard assisting Mr. Shea in his attempts to find Ralston Road where he believed the car to be located.

Ms. McKenna is heard on the intercepts inquiring whether the police were at 21A Panavista Drive. She's also heard to be engaged in conversation with Mr. Shea when he is directing her as to where to drive when he left 21A Panavista Drive. I am unable to find that Ms. McKenna was the driver of the vehicle, however, that took both Mr. Shea and Mr. Stevenson to 21A Panavista Drive at the outset on January 10th.

Ms. McKenna was fully aware that Mr. Shea was attempting to locate Luke Hersey as he had not recovered the Lincoln and she was also right at the next stop in his search for the vehicle was 21A Panavista Drive. If she did not have intimate knowledge of the events that occurred in the residence of Luke Hersey while Mr. Shea and Mr. Stevenson were inside the residence that was because she didn't ask. Deliberately choosing not to know something when given reason to believe that further inquiry is necessary satisfies the mental element of the offence. An inquiry as to whether the police were there is the wrong question, in my opinion. It is important that this suspicion without a conscious decision to make further inquiry as to whether or not the police were there is tantamount to wilful blindness, which equates to actual knowledge.

Let me repeat that phrase. It is important that this suspicion was a conscious decision not to make a further inquiry that could confirm to Ms. McKenna, that the suspicion is tantamount to wilful blindness, which equates to actual knowledge.

An essential element to be established is that Ms. McKenna helped Mr. Shea and Mr. Stevenson to escape justice by receiving, comforting or assisting them. This includes anything a person does to help another person to allude the authorities whether in respect of criminal charges or apprehension by police. I have previously referred to evidence and findings of fact that Ms. McKenna intended and desired to assist Mr. Shea and Mr. Stevenson to avoid detection by the police thereby escaping justice. Her knowledge of the missing Lincoln, her attempts to assist Mr. Shea in locating the vehicle, her inquiry as to whether the police were still at 21A Panavista Drive, waiting for directions as to where to pick up Mr. Shea and Mr. Stevenson, actually picking them up behind the church, driving the Blazer vehicle and increasing her speed when she met the police vehicle all underlies this conclusion.

(My emphasis)

I am satisfied that the purpose of Ms. McKenna's action was to provide the means by which Mr. Shea and Mr. Stevenson could escape the area of 21A Panavista Drive undetected. The Crown has offered in its brief submission that if there is a conviction on count number 5 no conviction will be sought on counts

> number 6 and number 7. Accordingly, I find Ms. McKenna guilty of count number 5 of the indictment, namely an accessory after the fact to extortion.

[104] I have set out the trial judge's reasons for convicting McKenna in some detail. McKenna does not argue that wilful blindness cannot attribute actual knowledge to her as an accessory after the fact but rather, that the evidence was insufficient to establish that she was wilfully blind. In particular, she says there was "nothing presented" which would allow the Court to conclude that she knew or ought to have known that Shea and Stevenson had been involved in some sort of criminal activity when she provided them with transportation away from the neighbourhood around Panavista Drive. Moreover, she argues that there was no evidence presented that she had actual knowledge of the offence committed or actually suspected the offence committed and consciously decided not to make inquiries that could confirm the suspicion. With respect, I disagree. The evidence and facts, as found by the trial judge, satisfied him that McKenna assisted Shea in his attempts to evade the police. She is heard on the wiretaps asking whether the police are at 21A Panavista Drive. She is also heard being given directions by Shea where to pick them up after they had fled the scene.

[105] When the police were behind her, she accelerated until they forced her to stop. In addition to the post-offence conduct of McKenna assisting Shea and Stevenson in evading the police, there is also the evidence of her conduct before Shea and Stevenson went to Luke Hersey's apartment. She is heard on several wiretap intercepts to say that the vehicle had been removed and, later, could be heard assisting Shea in his attempts to find Ralston Road where they believed the car to be located.

[106] All of this led the trial judge to conclude that, if she did not have actual knowledge of the events that occurred in the residence of Luke Hersey while Shea and Stevenson were inside, it was because she did not ask.

[107] In **R. v. Briscoe**, 2010 SCC 13, Justice Charron defined wilful blindness as follows:

> [21] ... The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries. ...

[108] There was ample evidence for the trial judge to conclude that McKenna was wilfully blind and guilty of the offence of an accessory after the fact. I would dismiss this ground of appeal.

Conclusion

[109] I would dismiss the appeals from conviction of Shea and Stevenson. I would grant both of them leave to appeal from sentence but dismiss the sentence appeals. With respect to McKenna, I would dismiss her appeals from conviction.

Farrar, J.A.

Concurred in:
Saunders, J.A.
Hamilton, J.A.