IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: R. v. N.W., 2017 NSPC 39

Date: August 16, 2017
Docket: 3015277
Registry: Halifax

Between:

Her Majesty the Queen

v.

W.(N.)

RESTRICTION ON PUBLICATION:

section 110 YCJA - Identity of Young Person and section 111 – Identity of Victim or Witness

TRIAL DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	June 26, 27, 28, 29, 30, July 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21 and 24, 2017
Decision:	August 16, 2017
Charges:	section 235, *Criminal Code*
Counsel:	James Giacomantonio and Terry Nickerson, for the Crown
	Roger Burrill and Anna Mancini, for W. (N.)

By the Court:

Introduction

[1] J.C. was shot dead on Mount Edward Road in Dartmouth shortly before dawn on March 29, 2016. He had spent the last hours of his life driving around neighbourhoods in Halifax and Dartmouth with four other teenagers in a stolen car. One of those teenagers, M.B., has pleaded guilty to the second-degree murder of J.C. He was originally charged jointly with N.W. for first-degree murder. M.B. admits to facilitating the shooting of J.C. and being present when he was shot. He says it was N.W. who pulled the trigger.

[2] Each of the four teenagers who spent those last hours with J.C. testified at this trial. Three of them – M.B., L.D., and L.C. – testified as Crown witnesses. N.W. testified in his own defence. He was present with the other young men for J.C.'s final couple of hours but says he was dropped off at home when the night's activities wound down. It is his evidence that he learned about the shooting the next day.

[3] The Crown has urged me to reject N.W.'s claim that he had nothing to do with the shooting of J.C. The Crown submits that I should accept the evidence of M.B., L.D. and L.C. and find that N.W. planned and deliberated J.C.'s murder. The Crown says that despite the unsavoury characters of M.B., L.D. and L.C., I should be satisfied they are telling the truth about what happened in those final hours before J.C. was gunned down. In particular the Crown asks that I accept the evidence of M.B. who testified to witnessing N.W. shoot J.C.

[4] The fundamental issue in this case is whether the Crown has proven beyond a reasonable doubt that it was N.W. who shot J.C. to death.

The Crown's Burden of Proof Beyond a Reasonable Doubt

[5] N.W. enjoys the presumption of innocence, a presumption only displaced if the Crown proves his guilt beyond a reasonable doubt. Suspicion of guilt or a belief in probable guilt do not displace the presumption. Only proof beyond a reasonable doubt can establish guilt. The Crown's heavy onus of proving N.W.'s guilt beyond a reasonable doubt never shifts.

[6] A reasonable doubt is based on reason and common sense which must be logically connected to the evidence or lack of evidence. Suspicion and probability fall far short of the reasonable doubt standard. Proof beyond a reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities. (*R. v. Lifchus, [1997] S.C.J. No. 77, para. 36; R. v. Starr, [2000] S.C.J. No. 40, para. 242)*

[7] N.W. does not have to prove anything to be found not guilty. The burden rests on the Crown to prove beyond a reasonable doubt that, rather than being at home asleep as he has claimed, N.W. fired the shots that killed J.C.

First Degree Murder

[8] First degree murder is an intentional killing that is both planned and deliberate. "Planned" means that "the scheme has been conceived and carefully thought out before it was carried out" and "deliberate" means "considered, not impulsive." (*R. v. Nygaard, [1989] S.C.J. No. 110, paragraph 17*) A plan for the purposes of first degree murder is "a calculated scheme or design that has been carefully thought out, and the nature and consequences have been considered and weighed." "Deliberate" includes the concepts of being slow in deciding and cautious, implying that the accused must take time to weigh the advantages and disadvantages of his or her intended action.

Gunshots

[9] A 911 call led to Cst. Veinotte, a patrol officer, finding J.C.'s body. Glenda Ashford had heard two gunshots as she was driving up Mount Edward Road shortly after 5 a.m. on March 29. I will be discussing Ms. Ashford's evidence in more detail in due course.

[10] Cst. Veinotte, who estimates he got to Mount Edward Road within 2 or 3 minutes of being dispatched, had driven up and down the street, passing 33 Mount Edward Road once in each direction, without seeing J.C.'s body. It was dark. It was only once Cst. Veinotte activated his "alley" lights with their wider illumination that he spotted J.C. lying on the sidewalk. He estimates this to have been about 5:30 a.m.

The Evidence from the Scene

[11] J.C. was lying facedown in a pool of blood on the sidewalk near 33 Mount Edward Road. He had been shot twice, once in the chest and once in the head. No projectiles were recovered from his body. A .30 calibre shell casing was discovered close by. Police investigators located a bullet embedded in the siding of a home at 40 Mount Edward Road, diagonally across the street from J.C.'s body.

[12] The evidence of the Crown's firearms expert, Laura Knowles, establishes that the projectile (*Exhibit 18*) dug out of the siding at 40 Mount Edward was fired from a 30-30 rifle (*Exhibit 13*) later seized from M.B. Ms. Knowles also concluded that a bullet fragment (*Exhibit 16*) recovered from the floor of an apartment on Lakecrest Drive was also fired from the 30-30 rifle. (*Exhibit 42, Report of Laura Knowles, page 3, items #4 and #5*) I will discuss the Lakecrest Drive shooting later in these reasons.

The Evidence of the Medical Examiner

[13] J.C.'s cause of death is not in issue: he died of gunshot wounds. Dr. Marni Wood, a medical examiner and forensic pathologist, performed the post-mortem examination of J.C. on March 29. (*Exhibit 40, Dr. Wood's Post-Mortem Report*) She concluded that J.C. sustained a contact-range perforating gunshot wound to his chest and an indeterminate-range perforating gunshot wound to his head.

[14] J.C. was facing his killer when he was shot. Dr. Wood testified that the shot to J.C.'s chest was an entry wound. (*Exhibit 40, page 2; Exhibit 3, photographs 66 and 67*) The soot Dr. Wood found in the wound indicates contact by the firearm. There was no stippling around the wound: Dr. Wood explained that stippling is usually an indication the firearm was further away from the body. The bullet exited through J.C.'s back after damaging major abdominal organs. (*Exhibit 40, page 3; Exhibit 3, photographs 42 and 43*)

[15] J.C. had his hood up when he was shot in the head. Damage to his hood was consistent with his head wounds. (*Exhibit 25, photographs 10 and 14*) The shot to J.C.'s head went in through his left cheek (*Exhibit 40, page 3; Exhibit 3,*

photographs 76 and 77) and out his right temple. (*Exhibit 40, page 3; Exhibit 3, photographs 79 and 80*)

[16] Dr. Wood was unable to tell which wound was inflicted first but indicated that either one would have been "rapidly fatal" on its own. The chest wound would have caused major blood loss and rapid death. The shot to J.C.'s head caused serious injuries to his brain.

[17] Dr. Wood testified that in her opinion there was blood pressure and a pulse – in other words J.C. was alive - when his injuries were sustained whichever order they occurred in. It was her evidence that the substantial amount of blood present was not just passive drainage. This means J.C.'s heart was still functioning when he was shot the second time, whichever of the "rapidly fatal" shots was fired first. Dr. Wood's evidence tells me therefore that the shots fired into J.C. were fired in close succession.

J.C.'s Clothing

[18] Three items of clothing worn by J.C. when he was killed have significance. J.C. had on black and white track pants (*Exhibit 23*), a light grey hoodie (*Exhibit 22*), and over the hoodie, a black Polo jacket (*Exhibit 24*). These items were removed at the autopsy. D/Cst. Croft identified them in court. He agreed on cross-examination that a view of the back of these garments would be of a black jacket and white pants.

The Searches of the Residences of M.B., L.D. and N.W.

[19] On April 1, 2016, M.B. went out on his front step in the middle of the night. He had recently acquired a 12-gauge shotgun. He decided to see if it worked. He fired it into the ground. He took it back to his room and went to bed.

[20] The shotgun blast drew police to the scene. They located N.W. outside M.B.'s residence and arrested him. Later that day police investigators searched M.B.'s home and that of N.W.'s nearby. In M.B.'s bedroom under the mattress police found a loaded 30-30 sawed off rifle and a 12-gauge shotgun. They also seized unexpended .30 calibre cartridges and shotgun shells.

[21] The search of N.W.'s home produced nothing relevant - no guns and no ammunition. The only item of interest was a single shotgun shell located on N.W. during a search incidental to his April 1 arrest.

[22] L.D.'s residence was also the subject of a search. The search warrant was executed on April 3, 2016. Nothing seized from L.D.'s home was shown to have any significance to this trial.

The .30 Calibre Sawed-Off Rifle

[23] As I have noted, Laura Knowles' forensic testing established that the sawed-off 30-30 rifle seized from M.B. on April 1 discharged the projectiles found by police in the siding of the house across from J.C.'s body and in the floor of an apartment on Lakecrest Drive.

[24] M.B. identified the rifle in court (*Exhibit 13*) and testified he had obtained it in a robbery about a month to a month and a half before J.C.'s murder.

[25] It was M.B.'s evidence that the shotgun had been obtained in a robbery executed by him and N.W. using the sawed-off 30-30 rifle. He says he stashed the rifle under his mattress at N.W.'s request because there was a police presence in the neighbourhood.

[26] M.B. says the sawed-off 30-30 rifle was used to fire a shot into the Lakecrest Drive apartment on March 29, 2016. M.B. says this rifle was later used by N.W. to kill J.C.

An Overview of the Night of March 28 and the Morning of March 29

[27] Police investigators eventually acquired from M.B. and L.D. in May and June 2016, a narrative of the events preceding J.C.'s murder. L.C. was also interviewed. All three have admitted lying to police. After lying to the police on three previous occasions, on May 6, 2016, M.B. told police N.W. had shot J.C. When questioned by police on March 29, April 1, and April 26 he had never mentioned N.W. He says his identification on May 6 of N.W. as the shooter was the truth.

[28] In the hours before J.C. was shot, M.B., L.D., L.C. and J.C. drove around Dartmouth and Halifax in a stolen car, smoked marijuana and planned but failed to

effectively execute various robberies. A lot of evidence was elicited from M.B., L.D. and L.C. about the stillborn robberies. It is not particularly helpful to recite it all and sort through the small differences in their recollections. It is enough to say that none of the robberies were successful. For one reason or another, no one got robbed.

[29] It was L.C. who undertook the failed robberies. J.C. didn't participate at all. The evidence indicates M.B. didn't have much respect for L.C. and J.C. and regarded them with some disdain.

[30] Around 3 a.m. N.W. joined the group after M.B. called him and went to pick him up.

[31] M.B. testified that N.W. identified the target for the Lakecrest Drive shooting. He says that when L.C., who fired the shot into the apartment, was later agitated about possibly having shot someone, N.W. told him to shut up and stop worrying.

[32] It was M.B.'s evidence that N.W. took a disliking to J.C. and, around 5 a.m. after J.C. decided to leave the group to go home, began talking about wanting to kill him. M.B. says he facilitated the killing by driving N.W. to Mount Edward Road where J.C. was walking so that N.W. could shoot him. M.B. testified in considerable detail about witnessing the shooting. I will come back to that evidence later.

Critical Events in the Hours Before J.C. was Murdered

[33] The critical events in J.C.'s last hours were the shooting at Lakecrest Drive, the "leg room" interaction in the back seat of the Kia, the return to L.D.'s house, and the shooting itself. Before I examine these events, I am going to review evidence from the principal Crown witnesses: M.B., L.D., and L.C.

M.B.

[34] M.B. is the Crown's key witness. His evidence is enough to convict N.W., if I accept it. He carries considerable baggage however – his narrative of the events casts him as N.W.'s accomplice in the murder and, even independently of that fact,

he is an unsavoury witness, one whose evidence has to be approached with great caution.

[35] In March 2016, M.B. was 15 years old. Despite being younger than L.D. and L.C., he has accumulated a criminal record of 23 convictions. (*Exhibit 28*) His record includes firearms offences arising out of the incident on April 1, 2016, and numerous breaches of release and sentence orders. M.B. freely admitted that court orders generally meant little to him.

[36] M.B.'s youth record does not reflect the extent of his criminality. In March 2016, he identified as a member of a "group" – on cross-examination he rejected the term "gang" – called the Jack Boys. The Jack Boys committed robberies when they needed money. They often targeted drug dealers because drug dealers wouldn't go to the police. M.B. testified that although they were not always armed when doing the robberies, it was an advantage to have weapons.

[37] Although J.C. became a member of the Jack Boys, M.B. did not indicate positive feelings for him. His feelings toward J.C. may be best described as indifference. In M.B.'s words he "didn't care for him." This appears not to be the same as not liking him. M.B. says he didn't care for J.C. "because I didn't know him." Asked if it is true that he didn't like J.C., M.B. responded, no.

[38] M.B. acknowledged that there had been some history between him and J.C. He says that J.C. had sent out some Facebook messages saying bad things about M.B.'s "people", describing them as no good at making money. M.B. agreed this slur bothered him and made him mad. One of the other Jack Boys told M.B. to let it go and even though M.B. wanted to settle scores with J.C., he says he followed the advice and dropped the issue.

[39] I note that this accords with what J.C. told L.C. on March 28. They were making their way over to L.D.'s house. L.C. had mentioned to J.C. that M.B. might be there. J.C. said he and M.B. had had an argument on Facebook but he wasn't worried about it. I mention that evidence not for its truth. I am noting it for the fact that J.C. said it.

[40] I find there is nothing to indicate an outstanding "beef" between M.B. and J.C. on March 28 and 29.

L.D.

[41] Compared to M.B. and L.C., L.D. has a relatively modest criminal record of nine convictions. (*Exhibit 34*) L.D.'s convictions are mostly for breaches of sentence and release orders. However, his record is also not representative of the true extent of his criminality. Like M.B., L.D. was a member of the Jack Boys.

[42] M.B. and L.D. were close. L.D., who in March 2016 was 17, viewed M.B. as his little brother and closest friend. He had known M.B. for about five years. Facebook postings entered into evidence show L.D.'s regard for M.B. One of his public postings stated: "If I lose my brother, I lose myself." (*Exhibit 26, page 3*) L.D. testified that in March 2016 he spent every day either in conversation with or in the company of M.B. This was M.B.'s evidence too.

[43] L.D. appears to have accorded M.B. considerable respect and a certain amount of deference. He confirmed this in his evidence and it is revealed by what L.D. decided to do when he found the keys to the Kia the five teenagers drove around in just before J.C. was murdered. A little background will be helpful. The keys were the fruits of a decision by L.D., L.C. and J.C. to go, at L.C.'s suggestion, and look for what they could steal from unlocked cars. They had been hanging out at L.D.'s, playing video games and smoking. L.D.'s anticipated curfew check was an impediment to him leaving his house but once the police had come by, he was in the clear. The three of them set off to do the "car-hopping", as they termed it.

[44] It was L.D. who spotted the keys in the Kia. He had become separated from L.C. and J.C., who had gone back to his house. L.D. took the Kia keys and walked to M.B.'s.

[45] L.D. acknowledged on cross-examination that he took the keys to M.B. because he respected him and thought he might know what to do with the car. It is notable that L.D. did not take it upon himself to steal the Kia and drive to M.B.'s. He sought out M.B. and M.B. did know what to do with the car. Although L.D. started out driving, M.B. took over and was in control of the car for the rest of the night. He was also in control of the 30-30 rifle which he brought along.

[46] M.B. and L.D. drove back to L.D.'s house where they found L.C. and J.C. It was past midnight by this point. L.C. says it was M.B.'s idea to do robberies.

L.C.

[47] L.C. turned 18 in March 2016. He has a more serious record than M.B. and L.D. In addition to convictions for breaches of release and sentence orders, L.C. has convictions as a youth for possession of stolen property, assault with a weapon, extortion, break and enter and robbery. He is currently serving a 33-month sentence as an adult for breaking and entering two residences from which electronics and other property was stolen. On March 29, L.C. who was subject to a house arrest condition, was evading police. He knew they were looking for him.

[48] L.C. was not a member of the Jack Boys although he knew L.D. and to a lesser extent, M.B. He and J.C. were friends.

[49] L.C. did not know N.W. Like J.C. he met N.W. for the first time around 3 a.m. on March 29 when N.W. joined them in the back of the Kia.

[50] Before N.W. was picked up, L.C. had been an active participant in the several planned robberies that sputtered out. On each occasion, he had been given the 30-30 rifle by M.B. He agreed that M.B. had control of the gun throughout the night.

[51] L.C. described an incident that M.B. and L.D. also recalled in their evidence. He and J.C., sitting in the back seat of the Kia, were handed a crushed-up substance by M.B. that he claimed was cocaine. L.C., prepared to take his word for it, laid out some lines but the substance seemed to him to be candy. L.C. testified that he felt something was "fishy." He thought M.B. might be trying to drug him.

[52] M.B. was cross-examined about this incident and agreed that the candy-as-cocaine prank was a test of L.C. and J.C. L.D. was also asked about this incident in cross-examination. He acknowledged that he and M.B. had been testing L.C. and J.C. to see if they would accept the candy as cocaine.

[53] The candy incident and the feeble robbery efforts left M.B. with no respect for either L.C. or J.C. L.C.'s intuition that something "fishy" was going on was correct.

[54] There was another similar incident just before the group drove to Lakecrest Drive. This time M.B. passed L.C. and J.C. a "blunt", which L.C. says "didn't taste

like weed." M.B. confirmed in his evidence that he knowingly handed L.C. a "blunt" that contained substandard marijuana. L.C. threw it out the window. He again thought this was "fishy." He testified that he thought "they" – M.B. and L.D. – were "fucking with me for some reason…I felt like there was a problem with me."

The Shooting at Lakecrest Drive

[55] Up to the point of N.W. joining them, M.B.'s loaded rifle had only been used as a prop. M.B. handed it to L.C. at the various sites for the prospective robberies but it was not discharged until the shooting at Lakecrest Drive. M.B. agreed that he was in control of the gun. When it was needed for a prospective robbery, he handed it over to L.C.

[56] Despite some differences in the testimony about the Lakecrest Drive shooting, there is common ground. N.W., M.B. and L.D. all knew who lived in the apartment. L.C. did not. N.W. and M.B. believed there was money and drugs at the apartment. L.D. testified that M.B. had a "beef" with S.W. who lived in the apartment. No one balked at the prospect of a robbery.

[57] L.C. made the request but neither M.B. nor L.D. wanted to participate. L.C. says he got the gun from M.B. and asked N.W. if he would go with him. N.W. agreed. He and L.C. are at odds about the shooting. N.W. says he went along as a look-out. L.C. testified it was at N.W.'s urging that he shot through a window at the back of the apartment into the living room. It was N.W.'s evidence that all he did was open the window. N.W. denies telling L.C. to shoot into the apartment.

[58] L.C. testified that N.W. wanted him to shoot at a figure sleeping in the living room. N.W. has denied this. He says he could not see into the dark living room and only accompanied L.C. to keep watch. N.W. testified that he slid open the window so that L.C. could slip into the apartment and steal S.W.'s "weed" which, N.W. says, he told L.C. was under S.W.'s mattress. N.W. says he did not expect L.C. to shoot into the apartment. He testified that L.C. "just shot the gun off for no reason."

[59] It was L.C.'s evidence that he deliberately aimed to miss the sleeping figure. He and N.W. ran back to the car. There was no attempt made at a robbery.

The "Leg Room" Incident

[60] After the Lakecrest Drive shooting, the teenagers went back to a parking lot where they had been previously that night and sat smoking marijuana. L.C. was worked up and anxious. He thought he might have hit the person in the apartment. N.W. told him to shut up and stop worrying.

[61] M.B., L.D. and L.C. all told a similar story about the interaction between N.W. and J.C. in the back seat of the Kia at this time. M.B. testified that N.W. conducted a "little test" on J.C. by opening his legs wide to see if J.C. would react. He didn't right away. When he did ask N.W. to close his legs, according to M.B.'s version, N.W. said, are you trying to make me look like a bitch? J.C. said he wasn't, he just wanted some space. M.B. says N.W. responded: "I ain't no bitch."

[62] In his direct examination L.D. described the incident as "an argument", saying that "somebody asked somebody to move their leg and they was telling them no." L.D. says he told them "chill out, and we was cool." He later said the argument was between N.W. and J.C. and again described how "Somebody told somebody to move their leg or something, and they wouldn't move their leg." He testified to not knowing who was causing the problem and says once he told them to "chill" they settled down. It was his evidence that "they were just hyped back there."

[63] Under cross-examination by Mr. Burrill, L.D. walked back his description of the leg room dispute. He agreed with the suggestions put to him that everyone was "easy going with each other" and there were no signs of tension.

[64] L.C. was in the backseat with N.W. and J.C. He testified that N.W. had his legs spread out and was clenching his fists. J.C. told him don't do that. According to L.C. the atmosphere was tense between N.W. and J.C. L.C. thought "something's going to go down…"

[65] N.W. also testified about his interaction with J.C. in the Kia at the parking lot. He says it was a very benign exchange between them. J.C. asked for more room for his legs. N.W. said alright. He says he thought J.C. just wanted more space and had no problem with his request. N.W. says, "I just closed my legs." He

testified that he was just sitting "normally" and not trying to send a message to anyone.

The Return to L.D.'s House

[66] By now it was close to 5 a.m. L.C. was unsettled by the interaction between N.W. and J.C. in the backseat of the Kia. He was concerned about himself and decided he wanted to get back to L.D.'s on Spring Avenue and stay there. He told the others he needed to get his duffle bag at L.D.'s in order to commit a robbery. M.B. drove them back to L.D.'s.

[67] M.B., L.D., L.C. and N.W. are not all on the same page about what happened when they arrived back at L.D.'s house. There is some basic agreement. L.C., J.C. and L.D. went into the house. L.C. said he wasn't feeling well and stayed inside. L.D. and J.C. left, J.C. having told L.C. he was going to walk to his grandmother's. He did not get back in the Kia. L.D. did.

[68] L.C. testified that when he went into L.D.'s house he checked his tablet quickly. He recalls the time was 5:02 a.m. He was not challenged on this recollection and no one countered it with any contrary evidence. It is an important piece of evidence that I will come back to.

[69] Although L.D. says M.B. did not come into his house while he was inside with L.C. and J.C., both M.B. and L.C. testified he did. N.W. says M.B. didn't and that after L.D., L.C. and J.C. went into the house, he asked M.B. to drive him home. N.W. testified that he told M.B. he wanted to get home before his mother woke up. He says he had no idea what the time was. N.W. says M.B. dropped him off, they shook hands, and he then went to bed which ended the night for him.

[70] I determined that this testimony by N.W. was evidence of alibi. I will return to discuss this shortly.

The Shooting of J.C. according to M.B.

[71] The Crown has put M.B. forward as an eyewitness to how J.C. ended up dead on Mount Edward Road minutes after leaving L.D.'s house. The following narrative comes from M.B.'s testimony.

[72] M.B. testified that after waiting outside L.D.'s house for L.D., L.C. and J.C. to return, he went into L.D.'s house to see what was taking so long. While inside J.C. told him he had a bad feeling about N.W. He thought N.W. didn't like him. Although M.B. offered him a drive, J.C. did not want to get back in the car and said he wanted to walk.

[73] J.C. left L.D.'s. L.D., M.B. and N.W. were "chillin'" in the Kia in L.D.'s driveway. N.W. asked M.B. if he liked J.C. Was J.C. M.B.'s for real brother? M.B. says he told him no, he had "dissed my people so I didn't really care for him." N.W. asked the same question of L.D. L.D. said if M.B. didn't care for J.C. then he didn't care for him either.

[74] N.W. said he was going to "merk" J.C. which M.B. understood meant he was going to kill him. M.B. testified that N.W. was going "to catch a body."

[75] M.B. gave N.W. the rifle because he asked for it. N.W. started to chamber it. M.B. took it back and unloaded it. He says he told N.W. to wait until he got out of the car and then "load it back up" so that it didn't go off accidentally. M.B. believed, incorrectly, that the rifle had no safety

[76] L.D. told them the direction that J.C. would be walking. J.C. was on the left side of Spring Avenue across from L.D.'s house. N.W. said, "Pull over, I'm going to get him right now." M.B. told him to "hold on", that he would turn around so N.W. could get out and J.C. would be on the same side.

[77] M.B. testified that at this point he announced he would be going home "after this" which prompted L.D. to propose being dropped off so M.B. wouldn't have to go out of his way later. On the way back to L.D.'s place, they drove by J.C. again. M.B. honked the horn and J.C. waved.

[78] M.B. says he dropped L.D. off which left only him and N.W. in the car. M.B. testified that after L.D. got out of the car, he turned the Kia around and "we go do it."

[79] The return to L.D.'s home on Spring Avenue had only taken about five minutes. A minute or two later M.B. and N.W. were on Mount Edward Road, parked in a driveway. M.B. testified that N.W. had told him to pull in front of J.C.

M.B. decided instead to pull into a driveway behind J.C. so he would not be in the street.

[80] M.B. testified that he watched J.C.'s murder from the driver's seat of the Kia. He was about 10 feet away. He made his observations through the passenger side window.

[81] N.W. got out of the Kia with his hood pulled tight. He had the gun behind his back. M.B. could see him talking to J.C. A car drove by. N.W. was shaking J.C.'s hand. The car reached the intersection of Mount Edward and Spring. N.W. shot J.C. once in the stomach. J.C. fell to the ground. N.W. shot him in the head.

[82] M.B. gave very detailed evidence about what he says were his observations of J.C.'s shooting. N.W. held the rifle with his left hand behind his back. He pulled the gun up using his right hand with his left hand was near the trigger. He fired and hit J.C. in the stomach. He transferred the gun from his left hand to his right hand, cocked it again, and shot J.C. in the head. M.B. testified that the gun was on J.C.'s head when the trigger was pulled.

[83] Shown crime scene photographs, M.B. says that N.W. was standing just ahead of crime scene marker #1 (*Exhibit 1, photo 16*) when N.W. fired the first shot. This was where the spent cartridge was found, shortly afterwards, by police investigators.

[84] M.B. says he asked N.W. why he shot J.C. in the head when J.C. was already dead, so M.B. believed, because he had seen J.C. twitching on the ground. N.W. told him he had seen J.C. move and he "wanted to make sure he wasn't going to come back and snitch" on him.

[85] M.B. had not been able to hear any conversation between N.W. and J.C. He says that N.W. told him later that he had to delay shooting J.C. until the car passed by. He stalled J.C. by telling him he was there with J.C.'s bank card that he had forgotten. M.B. says about 10 seconds after the car drove by N.W. fired the first shot.

[86] M.B. testified that after dropping L.D. off N.W. was saying he was going to kill J.C. When M.B. pulled into the driveway on Mount Edward it was his understanding that N.W. was going to get out and shoot J.C.

N.W.'s Evidence about the Shooting of J.C.

[87] N.W. says that M.B. is telling a string of lies about J.C.'s shooting. He says that M.B. is able to give such a rich description of what happened to J.C. on Mount Edward Road because he was the shooter. N.W. testified that M.B. had dropped him off at his home and he had gone to bed. He says he learned about J.C.'s murder the next day.

[88] N.W. says he saw M.B. on March 29 after he woke up. He and M.B. drove down to Lakecrest Drive to see if anyone had been killed or wounded in the shooting the night before. There was no police presence and they drove home.

[89] N.W. testified that he and M.B. continued to hang around together in the days after J.C. was murdered. They participated together in what was, according to N.W., the theft of the shotgun from Dm., a man that N.W. knew.

[90] It was M.B.'s evidence that the plan had been to rob Dm. of the shotgun using the 30-30 rifle. He says N.W. referred to the murder of J.C. on April 1 when he and M.B. were planning that robbery. M.B. testified N.W. told him that now he had killed someone, M.B. should too – "I got a body, so now you going to get one too." N.W. denied saying this to M.B.

N.W. and the Principles in W.(D.)

[91] In assessing the testimony of the principal witnesses in this trial, I am governed by the following legal principles: (1) I can accept all, some, or none of a witness's evidence; and (2) N.W.'s evidence must be assessed in accordance with *R. v. W.(D.), [1991] S.C.J. No. 26.*

[92] The *W.(D.)* principles require me to acquit N.W. if I believe his testimony; if his testimony raises a doubt even if I do not believe it; and, if on the whole of the evidence I have a doubt, even if I do not believe N.W.

[93] Since *W.(D.)*, the Supreme Court of Canada has clarified the obligation that rests on a trial judge deciding a case that turns on credibility: "... the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the

evidence as a whole establishes the accused's guilt beyond a reasonable doubt." (*R. v. Dinardo, [2008] S.C.J. No. 24, para. 23*)

Assessing N.W.'s Evidence

[94] The first two steps in the *W.(D.)* analysis require me to determine if I believe N.W.'s evidence and even if I don't, whether it raises a doubt. I will introduce my assessment of N.W.'s evidence by saying that it has left me with very serious reservations about his truthfulness. I can indicate that this has led me to the third step in *W.(D.)*, that is, whether on the whole of the evidence I am left with a reasonable doubt that N.W. murdered J.C. But before I go there, I must explain why at the first two steps of *W.(D.)*, I have found N.W.'s testimony to lack credibility.

[95] N.W. testified about the Lakecrest Drive shooting and the "leg room" incident and in each instance offered a description of his involvement that cast him in a benign and essentially passive role. They were descriptions that just don't fit with other evidence. I will also be discussing N.W.'s intercepted phone calls and text messages in May and June, 2016 and his explanations for what was being discussed. And I will address N.W.'s evidence of alibi.

[96] The third step in the *W.(D.)* analysis will require me to assess the evidence of M.B. and L.D. They are witnesses whose evidence must be approached with great caution. M.B. and L.D. and also, L.C., are known as *Vetrovec* witnesses and are subject to special rules.

[97] I am going to discuss the *Vetrovec* rules now because, in my analysis of the first two *W.(D.)* steps, I am going to be contrasting the evidence given by N.W. about the Lakecrest Drive shooting and the "leg room" incident to the evidence of L.C.

The Vetrovec Witnesses

[98] The Supreme Court of Canada in *R. v. Vetrovec, [1982] 1 S.C.R. 811, R. v. Bevan, [1993] S.C.J. No. 69, R. v. Khela, [2009] S.C.J. No. 4*, and *R. v. Smith, [2009] S.C.J. No. 5*, to name a few of the applicable cases, has emphasized that it is dangerous to convict an accused on the unconfirmed evidence of an unsavoury witness. The trier of fact should look for independent evidence that offers "comfort

... that the witness can be trusted in his or her assertion that the accused is the person who committed the offence." (*Khela, paragraph 42*)

[99] *Vetrovec* cautions are not merely for juries. If warranted, they must feature in judicial reasoning in judge-alone trials. Where a trial judge in a judge-alone trial is considering the testimony of an untrustworthy witness, she must give herself "a clear and sharp warning" in accordance with the law. (*R. v. Kehler, [2004] S.C.J. No. 1, paragraph 24*) While it has been held that a trial judge, sitting alone, is not required to verbalize the *Vetrovec* warning to herself (*R. v. McAllister, 2008 NSCA 103, para. 25),* trial judges are obligated to provide adequate reasons for our conclusions. *(R. v. Sheppard, [2002] S.C.J. No. 30* and *R. v. Braich, [2002] S.C.J. No. 29)*

[100] L.C. is a *Vetrovec* witness. His criminality has extended from his youth into early adulthood. On March 29, he was associating with L.D. and M.B. and actively collaborating in criminal activities. This indicates L.C.'s compromised moral code. That being said, I have not found any basis in the evidence for concluding that L.C.'s testimony about the events of March 29 was influenced by loyalty toward M.B. and L.D. Nor have I found evidence that L.C. lied in court about the events of March 29. Some details he gave are corroborated or not contested: I heard independent evidence that L.C. did arrive unannounced at a friend's home, N.C., armed with the rifle and looking for "weed" – N.C. testified about this; Laura Knowles' expert evidence confirms that the rifle L.C. says he used to fire a bullet into the Lakecrest Drive apartment did in fact do so; and L.C. did return to L.D.'s and chose not to leave.

[101] L.C. acknowledged in cross-examination that he lied to police about the Lakecrest Drive shooting, telling investigators that N.W. had fired into the apartment. He says he assumed if he told the truth he would be charged with attempted murder. There is a clear logic in that thinking and L.C.'s strategy for not incriminating himself.

[102] At trial L.C. showed no particular eagerness to point a finger at N.W., whom he had met for the first time on March 29, 2016. When asked if he saw N.W. in the courtroom – N.W. was sitting in the prisoner's dock – L.C. responded: "I'll be

honest with you, he don't look the same. That don't look like him at all…I'm being honest with you. That doesn't look like the same guy at all."

[103] I also have been unable to identify a reason why L.C. would lie about what happened on March 29. He did not use his appearance at the trial to cast himself in a favourable light. He spoke of entertaining thoughts of shooting his ex-girlfriend's new boyfriend. He was prepared to rob people at gunpoint although he never quite managed to do it. And there is no evidence he obtained any benefit from being a Crown witness.

The Lakecrest Drive Shooting

[104] Contrasted with L.C.'s evidence about the Lakecrest Drive shooting, I found N.W.'s testimony lacked credibility. N.W. knew S.W. who lived in the Lakecrest Drive apartment. L.C. didn't. N.W. said he had been at the apartment "a lot" in the past. He says he used to "chill" with S.W. "a couple of years ago." It therefore makes no sense to me that N.W. would have simply been standing watch with the expectation that L.C. was going to jump through the window, find S.W.'s bedroom and seize the drugs under the mattress. What likelihood of success could that plan have had?

[105] L.C.'s version of what was to occur at Lakecrest Drive makes much more sense. L.C. thought he was going to do a robbery with N.W. The prize was to be 50 grams of weed. N.W. slid open the window and told L.C. to "hop in." L.C. responded, no you hop in. N.W. then urged L.C. to shoot through the window at the sleeping figure. L.C. said to N.W., you do it. L.C. then fired the shot. He says he acted of his own free will but he wasn't sure what would happen if he didn't do it. He says he was "kind of like, I don't know, frightened, right?"

[106] Afterwards, N.W. was unperturbed about the shooting but L.C. was in a state of high anxiety, thinking he might have killed someone. That has a strong ring of truth to it and is a reaction consistent with his version of the events – that he had not gone up to the window with the intention of shooting anyone.

[107] There is another aspect of N.W.'s testimony about the Lakecrest Drive shooting incident that makes no sense to me. The young man sleeping on the floor of the living room was M-o, a friend of N.W.'s. N.W. had known him for several

years. There is no evidence that N.W. knew it was M-o sleeping in S.W.'s living room. N.W. acknowledged in his evidence that he never told M-o or his twin brother, M.C.O., who was also a good friend, that L.C., someone he met for the first time that night, had fired the shot into the apartment. Notwithstanding the fact that N.W. says he was surprised when L.C. pumped off the shot, he never told M-o what had happened. Even when M-o snapchatted him to say he had almost been shot, N.W. says he does not remember telling him it was L.C. who did it.

[108] The only conclusion I can draw is that N.W. said nothing because he played an active role in nearly getting M-o shot. And so even though he testified that he wasn't worried about getting into trouble for the Lakecrest Drive shooting because he hadn't fired the shot, his decision not to tell M-o and M.C.O. about L.C. taking the surprising and unexpected step of discharging the rifle into the apartment indicates to me that in his testimony N.W. was minimizing his involvement.

The "Leg Room" Incident

[109] As with the Lakecrest Drive shooting, N.W. minimized the subsequent "leg room" incident in the back of the Kia. He portrayed the exchange with J.C. as polite and unremarkable. L.C. who was sitting in the backseat with N.W. and J.C. noted a tense interaction caused by N.W. spreading his legs, crowding J.C., and clenching his fists. This was what decided L.C.'s course of action: that he should get away from the situation he perceived was building, go back to L.D.'s and stay there.

[110] The edgy atmosphere was also identified by J.C. whose discomfort is evidenced by his telling L.C., "I'm not having nobody plot on me." That indication of J.C.'s state of mind, evidence that is admissible as an exception to the hearsay prohibition, accords with L.C.'s sense that there was an undercurrent of tension. I find N.W.'s testimony deliberately downplayed the "leg room" incident and painted an inaccurate portrayal of his interaction with J.C. in the backseat of the Kia.

The Intercepts in late May

[111] In May and June 2016, N.W. was living in Toronto with his father. He testified that in April after he had been charged with mischief, his father had

wanted him to relocate from Nova Scotia. While N.W. was in Toronto his cell phone was subject to a Part VI interception by police. Four phone calls and a number of texts were tendered into evidence at this trial.

[112] N.W. acknowledged participating in the telephone calls (*Exhibit 49*) and text messaging (*Exhibit 51*) with his friend, M.C.O. and offered an explanation of them to counter the Crown's theory of their meaning.

[113] N.W.'s explanation for what was being discussed in the intercepted phone calls left me with the impression that he had thought of an answer for everything. And he simply did not tell the whole truth in answering Mr. Giacomantonio's questions about what he and M.C.O were talking about.

[114] A stark example of this emerges out of a phone call between N.W. and M.C.O. on May 18, 2016. (*Exhibit 49, Session 329*) There is a lot of talk in the call about girls. N.W. repeatedly insisted that he and M.C.O. were simply talking about girls they had met at the mall, how to approach them and how to dress. He was once again offering a benign explanation. There is a very telling remark made by N.W. during the call. He says to M.C.O., "I'm just gonna make them just fall in love ___then I want to break the girls down you know, to get every cent from that shit right." N.W. testified in direct examination that when he said that he was imitating how M.C.O.'s older brother talked. But I don't believe him. Although it took considerable effort, Mr. Giacomantonio eventually extracted an admission from N.W. on cross-examination about what he and M.C.O. were really discussing. It wasn't just about meeting girls at the mall. It was about prostituting girls. And, notwithstanding N.W.'s sanitized explanation, that is just what it sounds to have been about.

[115] To whatever extent N.W. was involved in prostituting girls in Toronto is irrelevant to this trial. The relevance of this evidence is only that when testifying, N.W. tried to avoid telling the whole truth about the discussion with M.C.O. on May 18. It is another example of N.W.'s offering an explanation that concealed what was really going on.

[116] Two other telephone conversations between N.W. and M.C.O. were entered into evidence. (*Exhibit 49, Sessions 488 and 494*) The Crown submits these conversations reveal that N.W. wanted to eliminate M.B. and L.D. because they

could identify him as J.C.'s killer. N.W. vehemently denied this and offered a detailed explanation for what was being discussed.

[117] It was N.W.'s evidence he wanted M.C.O. to help him get to the bottom of "rumours" he was hearing that M.B. was saying N.W. was responsible for J.C.'s murder. He says this is what he was talking about when he said to M.C.O. on May 25 in Session 488: "I'm about to tell [M-o] to take [M.B.] on a cruise." As I mentioned, M-o is M.C.O.'s twin brother and was in Nova Scotia at the time. N.W. testified that when he said this to M.C.O. he was talking about getting M-o to take M.B. on a drive to talk to him and find out if the rumours were true. N.W. and M.C.O. then had the following exchange:

N.W. I was talkin' to him a few times.

M.C.O. He be actin' funny?

N.W. No he actin' smooth. He's just real quiet though.

M.C.O. Yeah that's pretty sketchy man.

…

M.C.O. Well you know when I'm down home man, I definitely holler at your boy.

N.W. If you holler, you holler in the right way.

M.C.O. Yeah, imagine, give me the go, just give me the go.

N.W. (Laughs) He already knows what's up.

M.C.O. I'll put them where they need to be.

N.W. Yeah, someone needs to put him where he needs to be…

[118] N.W. testified that he and M.C.O. were only talking about N.W.'s interest in having M.C.O. talk to M.B. about the rumours. Holler, says N.W. just means talk. N.W. says he just wanted to know if the rumours were true. As for the reference to putting "them where they need to be", N.W. struggled to explain what he had meant by this. He eventually said he was just talking about M.B.'s "mindset", the way he was thinking, that he wanted someone to get him to tell the truth instead of

alleging that N.W. had murdered J.C. N.W. testified that M.B. was still his "buddy" and he didn't want to believe he was saying what N.W. was hearing.

[119] Earlier in the same telephone call, M.C.O., who was also in Toronto, talked about wanting to return to Nova Scotia. M.C.O. tells N.W. that a friend of his, D., is "Cryin' for me to come out." D. is also known as "Trap." N.W. knows he is capable of violence because he asks M.C.O. if D. is "ready to get crackin" which he explained in his direct testimony was an inquiry about whether D. was ready to "start shooting or whatever" to "solve" the problems he had with certain people. He agreed on cross-examination this meant gang violence. N.W. acknowledged on cross-examination that D. had access to firearms.

[120] D.'s name comes up in text exchanges between N.W. and M.C.O. in June which I will get to shortly.

[121] On May 26, approximately 24 hours after the talk about taking M.B. on a "cruise", N.W. and M.C.O. have another, shorter call. (*Exhibit 49, Session 494*) N.W. wants something to happen, something to do with M.B., urgently. He says to M.C.O., "Like I want it to happen ASAP like hey man, just crazy, cause its going on too bad. This man got out and then this is a lot of fucked up shit happen. Like this is weird." N.W. says he was talking about M.B. getting out of the Waterville, the youth "jail", which made the rumours seem more believable. The police had been to N.W.'s father's home for a DNA sample which N.W. says indicated to him it was true that M.B. and L.D. were implicating him in J.C.'s murder.

[122] In the next breath, D. gets mentioned. M.C.O. brings him up saying he is going to call him as soon as he gets off the phone with N.W. N.W. says in response: "Alright, cool. Hey, I'm gonna try to find out where he's stayin' at." N.W. testified he wanted to locate M.B. so "they" would know where to go.

[123] N.W. was asked about this in cross-examination. He told Mr. Giacomantonio he understood that M.C.O. was going to tell D. "to talk to [M.B.] and find out what's going on." He denied that the plan was to have D. kill M.B.

[124] N.W.'s explanation for what he and M.C.O. were talking about in the May 26 telephone call lacks credibility. D. was discussed in the May 25 call as a man who was quite prepared to use violence to deal with interpersonal disputes. I

simply do not believe that he would have been dispatched to talk to M.B. If D.'s services were being engaged, it was for violence. And, subsequently, in the June texts, D.'s name comes up again. As I will discuss, N.W. acknowledged in his evidence that the text exchange where M.C.O. referenced D. was a text exchange that contemplated violence.

[125] Before I move on to talk about the June texts, I want to discuss an intercept that was put to N.W. on cross-examination. On May 28, 2016, police investigators intercepted a call between N.W. and M.B. (*Exhibit 55, Session 619*) In the call they discussed the murder investigation:

M.B. Yeah bro, the Feds are actin' crazy man.

N.W. Like what they sayin'?

M.B. Yo man, the other day they came to my house, they just asking all kinds of questions. Yo man, they asked my mom for my DNA.

N.W. They did?

M.B. Yeah.

N.W. And did she give it to them?

M.B. No. I wasn't giving them my DNA, unless I'm getting arrested with something.

N.W. (Laughs) That's crazy man. Why would they ask for that?

M.B. I don't even know. They said they ah…My mom said that they have the DNA on the gun – that's what they said, something like that.

N.W. You said there's DNA on the gun or somethin' like that?

M.B. Yeah, that's what she said, she said there's something like that.

N.W. Now what gun you talkin' about?

M.B. I can't even tell you man.

N.W. (Laughs)

M.B. (Laughs)

N.W. I don't know what you talkin' about. What the. Like really.

M.B. Yeah, it is crazy though.

[126] This exchange occurred the day after M.B. signed a Letter of Acknowledgement with the police and agreed to work as an agent in the investigation with the express goal of trying to get incriminating information from L.D., N.W. and L.C. N.W. knew exactly what M.B. was referring to – the gun that shot J.C. and the police saying there was DNA on it. When N.W. had this discussion with M.B. the police had already indicated an ostensible interest in getting a sample of his DNA, a fact he had shared with M.C.O. in their call on May 26.

[127] On May 28 N.W. had an amiable conversation with M.B. including about M.B. joining N.W. in Toronto. Significantly, there was no mention by N.W. at any time in the call about what he claims he was hearing at this same time, that M.B. and L.D. were telling police he had killed J.C.

[128] The call was N.W.'s opportunity to ask his friend, M.B., directly about whether he was saying N.W. had been involved in J.C.'s murder. N.W. said in cross-examination that he did not want to talk to M.B. about it over the 'phone. Asked what he would have had to fear from raising it, N.W. responded that he hadn't wanted M.B. "to say something on the 'phone, then him getting in trouble for it." Even though he had been anxiously discussing the issue with M.C.O. two days earlier, N.W. says on May 28 he opted not to address his concerns with M.B. when he had the opportunity to do so.

[129] The fact that N.W. did not ask M.B. about the "rumours" he was hearing is another reason I disbelieve his claim that the conversations with M.C.O. were about nothing more than trying to arrange for someone to talk to M.B.

The June Text Exchanges with M.C.O.

[130] On June 26 and 27, 2016, N.W. and M.C.O. exchanged a number of texts that were obtained by police and entered into evidence. (*Exhibit 51, Tabs 18 - 52*)

It is the Crown's theory that the texts are evidence of a conspiracy between N.W. and M.C.O. to eliminate M.B. and L.D. because they could implicate N.W. in the murder of J.C. N.W. flatly denies this.

[131] N.W. was asked about the texts when he testified. I do not find his explanations for them to be credible.

[132] On June 26 at 15:44 hours, M.C.O. sent N.W. a text that lends itself to the interpretation urged by the Crown – "N what bout home boy [n…] he gotta go?" (*Exhibit 51, Tab 18, session 925*) ["N…"] is L.D.'s nickname. N.W. testified that he doesn't remember getting this text. Asked if he had been surprised to see it in the disclosure, N.W. said "kind of, because I didn't see it." He says he does not know what M.C.O.'s message meant.

[133] M.C.O. sent another text referencing L.D. at 17:17 hours on June 26 – "You want me to do him in and what's goin wit [n…] u heR about him u want me take care of that for ya" (*Exhibit 51, Tab 25, session 977*) N.W. testified that he wanted M.C.O. to "beat [L.D.] up and send him a message" that he could not be going around spreading rumours about him.

[134] N.W. sent M.C.O. a text only a minute later in which he said: "Nah let boo breath for now but [N…] got out??" (*Exhibit 51, Tab 26, session 979*) "Boo" is irrelevant to this trial. N.W. was probably responding to M.C.O.'s text a couple of minutes earlier at 17:16 hours in which M.C.O. had said: "Lol boo can get it to." (*Exhibit 51, Tab 23, session 975*)

[135] N.W. says that in session 979 – the "let Boo breath for now" text - he was telling M.C.O. "don't do anything" and asking him if L.D. had got out of jail. L.D. and M.B. getting out of jail was noteworthy to N.W. In late May, M.B.'s release from jail was more than a passing interest to N.W. As I have noted, in the telephone call with M.C.O. on May 26 (*Exhibit 49, session 494*) N.W. had said about M.B.: "This man got out of jail and then this is a lot of fucked up shit happen. Like this is weird."

[136] The June texts between N.W. and M.C.O. focused on L.D. At 17:18 hours on June 26, M.C.O. sent N.W. a text: "Yeah bro the next day so what u sayin done him??" (*Exhibit 51, Tab 27, session 981*) The Crown has argued this is part of a

conversation about eliminating L.D. N.W. testified that he and M.C.O. were talking about beating L.D. up to send him the message that he couldn't be going around "saying that I did something I didn't do."

[137] At 17:23 hours N.W. texted M.C.O. asking: "How much u want for him?" (*Exhibit 51, Tab 30, session 984*) N.W. testified that he was going to pay M.C.O. and D., previously mentioned in the May phone calls, to beat L.D. up and rob him to "send a message to [L.D.] that…him and [M.B.] can't just go around pointing a finger, like, just saying that I did something that I didn't do."

[138] M.C.O. told N.W. he didn't want anything for the job, saying: "All I want is for u to keep doing u thing." (*Exhibit 51, Tab 32, session 986*)

[139] The plan to attack L.D. acquired a sharper focus on June 27. At 22:12 hours, M.C.O. texted N.W.: "Where he at" (*Exhibit 51, Tab 39, session 1215*) N.W. responded within seconds: "Home" (*Exhibit 51, Tab 40, session 1216*) At 22:14 hours, M.C.O. asked N.W. "Think if I kick the door down me n trap we can get em" (*Exhibit 51, Tab 41, session 1217*) N.W. obviously thought so as he texted back: "Yea easy he room up stairs like the first on the left" (*Exhibit 51, Tab 42, session 1218 at 22:15:45 hours*)

[140] N.W.'s description of where M.C.O and D. would find L.D.'s room was accurate. The photographs taken by police during the search of L.D.'s residence show that his bedroom was indeed the first bedroom on the left at the top of the stairs. (*Exhibit 8, photograph 40*)

[141] A few minutes after the text exchanges about how to locate L.D., N.W. was again ruminating about M.B. and L.D. being released from jail. "…Lol idk [I don't know] how these boys going to jail and getting back out like that" (*Exhibit 51, Tab 46, session 1222*) Although N.W. claimed in his testimony he was simply amused by M.B. and L.D. managing to get themselves released from custody, this explanation is not consistent with the tone of earlier calls and texts.

[142] And M.C.O.'s response to N.W.'s text indicates that whatever was going on with M.B. and L.D. was a serious concern. Less than a minute after hearing from N.W. about "these boys going to jail and getting back out like that", M.C.O. texted: "That's what I'm sayin dey do any funny business to u again?" (*Exhibit 51,*

Tab 47, session 1223) The reasonable inference is that N.W. was concerned M.B. and L.D. were getting released from jail because they were talking to the authorities.

[143] N.W.'s credibility is also undermined by his testimony in relation to the first two texts I mentioned – M.C.O.'s texts to N.W. on June 26 at 15:44 hours and 17:17 hours where he asked N.W. "N what about home boy [n…] he gotta go?" (*Exhibit 51, Tab 18, session 925*) and "…what's goin wit [n…] u heR about him u want me take care of that for ya" (*Exhibit 51, Tab 25, session 977*) N.W. deflected these texts, saying that he does not think he ever saw the one M.C.O. sent at 15:44 and that the text at 17:17 hours meant nothing to him. Yet he testified that by 17:18 hours on June 26 he and M.C.O. were discussing a plan to have L.D. beaten up. The "he gotta go?" text suggests more than a mere beating. N.W. testifying that he did not see it is more consistent with his pattern of minimization than it is with plausibility.

[144] It is the Crown's theory that N.W. was plotting with M.C.O. through phone calls and texts to kill M.B. and L.D. As I have described, N.W. testified that the talk in the May calls about M.B. was nothing more than N.W. trying to find out if he was indeed saying that N.W. was responsible for killing J.C. N.W. says he just wanted someone to talk to M.B. Yet in June, according to his own evidence, N.W. wanted L.D., whom he says he suspected of spreading the same story, beaten up. And, as I have noted, when N.W. had the opportunity on May 28 to ask M.B. directly if he was talking about N.W. and the J.C. murder, he didn't do so.

[145] These pieces do not fit together. I find N.W.'s explanations unbelievable. Taking at face value N.W.'s evidence that he wanted L.D. beaten up, it does not make sense to me that he would have only been looking to have M.C.O. or his brother, M-o, talk to M.B. The addition of D. into the mix, who used violence, had access to guns, and was identified as a likely participant in the intended beating of L.D., makes it more plausible that N.W. had violence, not talking, in mind for M.B.

[146] N.W. had a couple of explanations for why it was just talk for M.B. and a beating for L.D. He said that M.B. was his friend whereas L.D. was not. He also said that he "just didn't" get someone to go and send a message to M.B. He said

M-o was going to talk to M.B. and didn't and he, N.W., "didn't think about trying to get someone else to talk to him."

[147] Although N.W. never followed up on whether D. paid a visit to M.B. as had been discussed in the May 26 telephone call with M.C.O. (*Exhibit 49, session 494*), I simply do not believe N.W.'s claim that he was only ever interested in having M.B. questioned. This is another blow to N.W.'s credibility.

[148] And furthermore, I find that, at the very least, N.W. wanted M.B. and L.D. – who had evidence about what was going on just before J.C. was murdered – harmed.

N.W.'s Alibi

[149] During his direct examination, N.W. disclosed an alibi for the first time. As I noted earlier in these reasons, while L.D., L.C. and J.C. were inside L.D.'s house around 5 a.m. on March 29, N.W. says he asked M.B. to drive him home. Once home he went to his bedroom. His younger brother joined him and they went to sleep.

[150] Mr. Giacomantonio identified this as alibi evidence that the Crown had been afforded no timely opportunity to investigate. He asked that I permit him to cross-examine N.W. on it. He indicated he would be asking me to draw a negative inference due to its eleventh-hour disclosure. Mr. Burrill argued that N.W.'s evidence did not constitute alibi, saying it was merely a feature of his general defence of denial. I ruled that N.W. had given alibi evidence and, on the basis that the Crown had no opportunity to investigate it, permitted Mr. Giacomantonio to cross-examine N.W. in relation to it. (*R. v. W.(N.), 2017 NSPC 38*)

[151] In response to Mr. Giacomantonio's questions about why he had not disclosed his alibi at the time of his arrest in mid-July 2016, N.W. says he didn't tell the police anything. He testified that his father told him "to say nothing."

[152] At the time of his arrest, N.W. was 17 years old, a young person within the meaning of the *Youth Criminal Justice Act*. He would have been entitled to speak to his father when he was arrested. It is not unreasonable to think that a young person in such circumstances would follow the advice of a parent. I further note that it is not permissible to "draw a negative inference against alibi evidence on the

grounds that the accused did not disclose that alibi immediately upon arrest, nor draw an inference that an innocent person would have made such immediate disclosure." (*R. v. Cleghorn, [1995] S.C.J. No. 73, para. 25, per Major, J. dissenting in the result*) I therefore find it would be inappropriate for me to draw a negative inference from the fact that N.W. did not disclose evidence of alibi at the time of his arrest.

[153] However, N.W. had ample opportunity subsequent to his arrest to disclose evidence of alibi. He did not do so. He did not mention his alibi even when he says he knew M.B. and L.D. were falsely claiming that he was responsible for J.C.'s murder.

[154] N.W. provided his alibi at the end of his trial during his examination-in-chief. If believed, it is a complete defence to the murder charge.

[155] What has been termed the "improper disclosure" of an alibi, a disclosure as in this case that was neither timely nor adequate, "can only weaken alibi evidence; it cannot exclude the alibi." (*R. v. Cleghorn, para. 4*) I must assess what weight, if any, to accord it.

[156] N.W.'s decision not to reveal his alibi when there was an opportunity for it to be investigated and the absence of any alibi witnesses, such as his younger brother, are factors for me to consider in determining what weight to give to the alibi. (*R. v. Nelson, [2001] O.J. No. 2585, para. 8 (C.A.)*) These factors alone strip the alibi of any evidentiary value. They also mean I have no basis for evaluating the alibi other than my assessment of N.W.'s credibility. As I have indicated, I have serious reservations about N.W.'s credibility. These reservations are pervasive and extend to his evidence of alibi. I am sufficiently skeptical about N.W.'s truthfulness that I find myself unable to accept his alibi. His testimony amounted to benign explanations for much of the evidence tendered against him. His alibi strikes a similar tone. In the result, I have no confidence in it.

[157] To be clear, I am giving the alibi evidence no weight but I draw no inference of guilt against N.W. on the basis of not having accepted it.

Conclusion with Respect to the First Two Steps of W.(D.)

[158] For the reasons I have indicated, I do not find N.W. to be credible. His evidence does not create a doubt in relation to the Crown's case against him. What I must now do is examine the whole of the evidence to determine if the Crown has proven beyond a reasonable doubt that N.W. is guilty of murdering J.C. That requires me to assess the evidence of M.B. As I mentioned earlier, M.B. is a *Vetrovec* witness whose testimony that N.W. shot J.C. has to be supported by independent evidence that will reassure me what he says can be trusted. (*Khela, paragraph 42*)

M.B.'s Lies and Self-Interest

[159] There is good reason not to trust M.B. In addition to his criminality, cross-examination revealed that he lied repeatedly after J.C.'s murder – in Facebook messages (*Exhibit 30*) and to the police, denying any knowledge about the killing. M.B. told his interrogators that he knew nothing and could not help with any information. In response to a message from J.C.'s brother he sounded indignant – "Why would you even ask me" and said he was at home all night on a 9 o'clock curfew and knew nothing. He told J.C.'s brother that if he wanted to accuse M.B. of being involved he had better come and confront him in person. M.B. agreed this was a threat. He agreed that it was a proposal to settle the issue by violence.

[160] M.B. testified that he lied to police because he did not want to get caught. His guilty plea to second degree murder indicates he had plenty to hide.

[161] M.B. first talked to the police on March 29 when they came to his house. He denied knowing anything about the shooting of J.C. He agreed on cross-examination that he chose to actively mislead the police. M.B. also lied to police about the guns found under his mattress on April 1. He said he had bought them both together the day before. That was a lie. He said he had never touched the rifle before. That was a lie. He agreed with Mr. Burrill that he was lying to protect himself. He was trying to avoid being implicated in an unrelated shooting in early March and the shootings on March 29.

[162] On April 26, 2016, while waiting for Youth Court, M.B. spoke with D/Cst. Jefferies. He told D/Cst. Jefferies that on March 29 he had been home with his mother because of a 9 o'clock curfew. He lied about not going anywhere before and after the curfew. He lied about not being with J.C.

[163] M.B. agreed with Mr. Burrill that he had told these lies to protect himself from being implicated in J.C.'s murder.

[164] The winds began to shift in early May. Police investigators working on the J.C. homicide investigation came to Waterville to talk to M.B. They made arrangements to transport him to Halifax. D/Cst. Jefferies told M.B. about the $150,000 reward and M.B. called the 1-800 number he was given to inquire about it. He was then transported to the Halifax police station. M.B. agreed he thought about the $150,000 all the way there. He was offered the opportunity to make a "without prejudice" statement. He knew that meant he could give a statement without the consequences of any liability.

[165] It was at this point that M.B. told police for the first time that N.W. had shot J.C. He had previously made no mention of N.W.

[166] M.B. was returned to Waterville and sentenced on May 17, 2016, for offences related to the April 1 discharging of the shotgun. On May 26, 2016, he was collected by D/Cst. Sayer and provided a video-taped statement. He did not inquire about the $150,000. He says he knew if he gave information that led to a successful prosecution he could apply for the $150,000 reward.

[167] The next day M.B. signed a Letter of Acknowledgement and agreed to work as an agent for the police investigating J.C.'s murder. He lost his protected status when the police discovered he was withholding information from them. On July 21, 2016, he was jointly charged with N.W. for the first degree murder of J.C.

Examining the Whole of the Evidence

[168] Examining the whole of the evidence to determine if the Crown has proven beyond a reasonable doubt that N.W. murdered J.C. requires me to evaluate whether I can believe anything that M.B. testified to in his evidence.

[169] In the Crown's theory of this case, M.B. was N.W.'s accomplice in J.C.'s murder and has pleaded guilty on that basis. As Mr. Burrill has argued, this makes him a particularly dangerous witness. "All that an accomplice must add to an otherwise truthful, and potentially confirmable story, is the participation of the accused." (*R. v. Smith, 2009 SCC 5, para. 15*)

[170] Mr. Burrill, in his vigorous submissions on N.W.'s behalf, says I should not be satisfied to accept that M.B. was merely a party to J.C.'s murder. Mr. Burrill argues that M.B. knows so much about how J.C. was killed because he was the killer. He says that M.B.'s unsavoury character, his obvious plea bargain for second degree murder, his lying to police and in his Facebook postings, and his indifference toward J.C. should leave me with a reasonable doubt that N.W. pulled the trigger.

[171] To believe M.B. I have to find independently corroborating evidence that will afford me the comfort that he is telling the truth about what he says he witnessed on March 29 just before dawn on Mount Edward Road. As stated by the Supreme Court of Canada, "…where the only issue in dispute is whether the accused committed the offence, the trier of fact must be comforted that the impugned witness is telling the truth *in that regard* before convicting on the strength of that witness's testimony." (*Khela, para. 43, emphasis in the original*)

The Evidence of L.C. that Corroborates M.B.'s Testimony

[172] It is well recognized that the evidence of one inherently untrustworthy witness can be corroborated by the evidence of another witness with respect to whom similar concerns arise. *(R. v. Naicker, [2007] B.C.J. No. 2626 (C.A.), paragraph 34, citing R. v. Illes, [2007] B.C.J. No. 364, paragraphs 30-31 and R. v. Pollock, [2004] O.J. No. 2652 (C.A.), paragraph 161)* This applies to my assessment that L.C.'s evidence corroborates testimony given by M.B.

[173] I am satisfied that L.C. had no motive to collude with M.B. in giving false testimony and I find there is no evidence or suggestion of collaboration between them. That being the case, "the corroboration of two such witnesses can be strong and reliable." *(Naicker, paragraph 34; R. v. Roks, [2011] O.J. No. 3344 (C.A.). paragraphs 67 and 72)*

[174] I find that it is very unlikely L.C. and M.B. would be collaborating on a story that falsely implicates N.W. L.C. testified that he did not have a close relationship with M.B. having "only chilled with [him] like two or three times" before March 29.

[175] I already indicated in these reasons that I have found no basis for disbelieving L.C.'s version of the events of March 29. His testimony of the Lakecrest Drive shooting, the "leg room" incident involving N.W. and J.C., and what happened when the teenagers returned to L.D.'s house around 5 a.m., corroborates what M.B. has said about these events.

[176] Earlier in these reasons I described L.C.'s testimony about the shooting into the Lakecrest Drive apartment. It corroborates what M.B. has said he observed – N.W. and L.C. going up to the window, N.W. opening it and L.C. firing the gun. And L.C.'s evidence of being in an anxious and agitated state corroborates M.B.'s description of how L.C. was reacting after the shooting.

[177] I have accepted the evidence of L.C. that N.W. was deliberately provocative in his interaction with J.C. in the backseat of the Kia. It was an interaction that sufficiently unnerved L.C. he wanted to seek sanctuary at L.D.'s. L.C.'s evidence about the interaction corroborates what M.B. also described, evidence I reviewed earlier in these reasons. M.B. testified that N.W. tested J.C. to see if "he was a bitch or not." M.B. says that after the "bitch test", L.C. wanted to go back to L.D.'s to get his bag.

[178] L.C. and M.B. shared a similar recall of another event. They both remember M.B. going into L.D.'s house after L.D., L.C. and J.C. had gone inside. M.B. says he did this to see what was taking everyone so long. L.C. testified that when M.B. came into the house L.C. told him he wasn't going back out. Both L.C. and M.B. testified that M.B. was not inside the house very long - M.B. thought maybe 2 to 3 minutes.

[179] I find that M.B. did go into L.D.'s house. It makes sense that he would have: L.C.'s evidence was that he had suggested going back to L.D.'s house to get his duffle bag before attempting another robbery. M.B. would therefore have been expecting the return to L.D.'s would be nothing more than a pit stop.

[180] L.C. also corroborates M.B.'s testimony about what was going on inside L.D.'s. L.C. says he pretended to be ill as an excuse to stay put. M.B. testified that when he went in to see what everyone was doing, "[L.C.] was pretending to be asleep on the bed, said he didn't feel good, and then [L.D.] was coming back out and [J.C.] said he wanted to go home, said he had a bad feeling."

[181] N.W. testified that M.B. did not go in to see what the others were doing at L.D.'s and instead, while they were inside, drove him home. I find that did not happen. I accept M.B.'s evidence that did not happen. I accept that M.B. and L.D. returned to the Kia in which N.W. was waiting.

The Evidence of Glenda Ashford that Corroborates M.B.'s Testimony

[182] Glenda Ashford heard the shots that killed J.C. She was up very early on March 29 to take her daughter to swim practice. Her drive home took her up Mount Edward Road. She described what she observed and heard in the moments before and just after J.C. was murdered.

[183] On Mount Edward Road, Ms. Ashford approached a crosswalk and slowed down, mindful of dog walkers at that time of the morning. (That crosswalk, marked by Ms. Ashford on Exhibit 33, is two house lots before the location where J.C.'s body was found.)

[184] As Ms. Ashford passed the crosswalk heading toward Spring Avenue, she started to accelerate. She was driving 40 – 50 kilometers an hour. She noticed two men on the right side of the street a short distance from the crosswalk. They were talking, either in a driveway or close to the sidewalk. One man was facing her and the other man had his back to her.

[185] Ms. Ashford says about the two men catching her attention, "You notice people out at that time in the morning because you don't see too many people out at that time of day."

[186] There was a vehicle close by, pulled straight in to the driveway, that is, not reversed in. Ms. Ashford testified she believes the vehicle had not pulled fully into the driveway. She noticed the tail lights. She testified to seeing the lights were on and to her recollection, the vehicle was partially pulled in to the driveway. The men were on the passenger side of the vehicle and maybe within a couple of feet of it.

[187] Ms. Ashford recalls that one of the men, the man facing her as she approached, was wearing lighter clothing than the other man. It was her evidence that he had on a lighter jacket and lighter pants, and she thinks, a hoodie. The man with his back to her had on darker clothing. In her direct evidence, she did not

recall if that man had a hoodie on. Ms. Ashford says she noticed the lighter/darker clothing contrast because it was dark out. It "stood out" to her.

[188] Ms. Ashford does not think there was a significant difference in the height of the two men. She testified that the man facing her was taller. On cross-examination she was asked about body type and said that the man with his back to her was "maybe a little stockier."

[189] It was not long after she passed the men – she estimated less than a minute, 30 to 40 seconds - that Ms. Ashford heard a gunshot. Within a couple of seconds, she heard a second shot.

[190] Ms. Ashford was shown photographs taken by Forensic IDENT officers of the location where J.C.'s body was found. In the photograph shown to Ms. Ashford, J.C.'s body is covered by a tarpaulin. (*Exhibit 3*, *photograph 4*) Ms. Ashford said she thinks the driveway next to the tarp is where she saw the vehicle parked. That is the driveway where M.B. says he parked the Kia while N.W. shot J.C. It is the driveway for 31 Mount Edward Road.

[191] Ms. Ashford's evidence corroborates M.B.'s evidence about J.C.'s shooting. The driveway he identified in court as the driveway he had pulled into was the driveway at 31 Mount Edward Road. (*Exhibit 1*, *photograph 7*) According to M.B., N.W. and J.C. were on the passenger side of the vehicle, facing each other. M.B. testified that N.W. fired the first shot only once a car had driven by. He estimated 10 seconds. The second shot was fired very shortly after the first one.

Evidence of the Lighting on Mount Edward Road that Corroborates M.B.'s Testimony

[192] I have had to consider whether M.B. could have seen N.W. murder J.C. as he has claimed. I described earlier the detailed evidence M.B. gave of what he says he saw. It was dark out which raises the issue of visibility. This was addressed by police investigators tasking D/Cst. Marshall Hewitt of Forensic IDENT to take photographs of the murder scene two days later at approximately the same time in the pre-dawn morning. D/Cst. Hewitt testified that the objective of his task was to "capture the ambient light" at the scene.

[193] Exhibit 20 is the series of photographs taken by D/Cst. Hewitt on March 31, 2016 between 5:25 and 5:40 a.m. D/Cst. Hewitt testified he used a three-second exposure for his camera which he described was "a good exposure" that accurately depicted the lighting he observed.

[194] D/Cst. Hewitt testified that all the street lights were working. His photographs show that there was considerable illumination in the street at the time when Glenda Ashford made her observations and M.B. claims to have made his.

[195] D/Cst. Hewitt was accompanied by D/Cst. Croft. D/Cst. Hewitt photographed D/Cst. Croft standing in dark clothing by a bunch of flowers that marked where J.C.'s body had been found just past the driveway for 31 Mount Edward Road. D/Cst. Croft is quite visible and the immediate area is quite brightly lit. (*Exhibit 20, photograph 7*) D/Cst. Croft can also be seen from the direction that Ms. Ashford was travelling as she passed the crosswalk and headed up Mount Edward. (*Exhibit 20, photograph 11*)

[196] D/Cst. Hewitt's photographs also satisfy me that someone parked part-way into the driveway at 31 Mount Edward Road could have seen the interaction between J.C.'s killer and J.C. on the sidewalk. There is sufficient light from the streetlights at this location. (*Exhibit 20, photograph 14*)

The Timing Evidence that Corroborates M.B.'s Testimony that He Did Not Drive N.W. Home

[197] Ms. Ashford testified that she called 911 within five minutes of hearing the gunshots. (*Exhibit 32, 911 call*) Her call to 911 was automatically recorded as being received at 5:19:15 a.m.

[198] The timeline created by the bookends of L.C.'s tablet showing 5:02 a.m. and Ms. Ashford's 911 call supports M.B.'s evidence that, contrary to N.W.'s claim, he did not drive N.W. home.

[199] Ms. Ashford's evidence means J.C. was shot at about 5:14 a.m. Just before J.C. left L.D.'s house, L.C. had checked his tablet and seen the time - 5:02 a.m. Twelve or so minutes later, someone shot J.C. dead. M.B. was at the scene when that happened.

[200] Despite his familiarity with his neighbourhood, on cross-examination N.W. testified he could not say how long it took M.B. to drive him home. When he was cross-examined M.B. agreed that it was a five-minute drive from L.D.'s to N.W.'s. Assuming that is accurate, N.W.'s claim that M.B. drove him home would have required M.B. to drop N.W. off and then drive to Mount Edward Road, park the Kia, get out, go around to the passenger side, and be observed by Ms. Ashford in conversation with J.C. all in under 12 minutes. That does not represent a realistic scenario.

Other Evidence that Corroborates M.B.'s Testimony that He Did Not Drive N.W. Home

[201] There is other evidence that corroborates M.B.'s testimony that he did not drive N.W. home. L.C. testified that L.D. left the house and returned not long afterwards. It was L.D.'s evidence that when he left he got back into the Kia with M.B. and N.W. although he was soon returned home. M.B. could not have driven N.W. home, returned to collect L.D., brought him back, and then driven to Mount Edward Road in the time between when J.C. left L.D.'s around 5:02 and when he was shot at approximately 5:14 or 5:15 a.m.

[202] If N.W. was not at home as he has claimed, he had to have been with M.B. on Mount Edward Road when J.C. was shot. I know from L.C.'s evidence that he was not at L.D.'s. Only L.C. remained at L.D.'s until L.D. returned.

[203] And there is only one scenario that fits the timing and related evidence. That scenario is the one described by M.B. who says he drove N.W. to Mount Edward Road, not home.

Is There Evidence that Raises a Reasonable Doubt?

[204] There are three pieces of evidence that require close examination to determine if they raise reasonable doubt. They are:

- Ms. Ashford's evidence that the one of the men on Mount Edward Road was stockier than the other man. This is relevant because N.W., J.C. and L.D. were slimmer than M.B. who had a more muscular build.

- Dr. Marni Wood's evidence that there was no soot in the wound to J.C.'s head suggesting that it was not a contact shot. She described it as an indeterminate-range shot to J.C.'s head. This is relevant because M.B. testified that for the second shot, N.W. put the rifle to J.C.'s head and pulled the trigger.

- The evidence that L.D. told L.C. that he and N.W. had shot someone, that they shot the person twice, including once through the head.

Glenda Ashford's Evidence about the Stockier Man

[205] The evidence established that M.B. had the stockier build of any of the young people he was with that night. Ms. Ashford testified that the man with his back to her was maybe a little stockier than the man facing her. But I am satisfied that the man whose back Ms. Ashford saw, the man in the darker clothing, was J.C. The shooter was facing him and facing Ms. Ashford as she approached. The shooter, whom Ms. Ashford saw as she drove up Mount Edward Road, was not the stockier of the two men.

Dr. Marni Wood's Evidence About J.C.'s Head Wound

[206] Both shots fired into J.C. were fired through his clothing. Soot, although not a great amount, in his chest wound caused Dr. Wood to conclude the firearm had been in contact with his body. (*Exhibit 3, photograph 69*) There was no soot in J.C.'s head wound. Does this evidence undermine M.B.'s testimony that he had seen N.W. place the rifle on J.C.'s head and fire the second shot? I find it does not.

[207] The absence of soot in J.C.'s head wound is not inconsistent with a close contact shot. Dr. Wood testified that an explanation for no soot could have been the fact that he was shot through his hood. Dr. Wood also testified about J.C.'s chest wound that she was not surprised to see soot in a wound underneath two layers of clothing – J.C. had been wearing a jacket over a hoodie when he was shot. It was Dr. Wood's evidence that the presence of soot will depend on the firearm and when it has been cleaned. The soot evidence does not change the fact that J.C. was shot at close range as described by M.B.

L.D. Telling L.C. About Two Shots and One through the Head

[208] The evidence disclosed that L.D. told police investigators he had made a very specific statement to L.C. sometime after 5 a.m. on March 29. It is a statement that raises the question, probed by Mr. Burrill in cross-examination, of whether L.D. could have witnessed J.C.'s murder or was told about it by M.B.

[209] L.D. acknowledged having told L.C. that he and N.W. shot somebody, that the "somebody" was shot twice including through the head. That describes how J.C. was murdered. I have examined this evidence in relation to the Crown's claim that N.W., and not M.B. or L.D., shot and killed J.C.

[210] L.D. was asked in direct examination if he had ever told anybody that he killed J.C. He answered no. His answer was also no on cross-examination when it was suggested to him he had told the police that he had shot J.C. When Mr. Burrill read to him part of his June 26 statement to D/Cst. Buell, the same portion that was later put to him on re-direct, L.D. pointed out that he did not tell L.C. that he and N.W. had shot J.C. What he said to D/Cst. Buell on June 26, 2016, is that he told L.C. he and N.W. had shot <u>somebody</u>. L.D. says this was a lie.

[211] L.D. acknowledged in cross-examination that he had told L.C. the "somebody" had been shot twice and was shot through the head. Mr. Burrill noted how coincidental it was that the alleged lie L.D. told L.C. was an accurate description of how J.C. was murdered. L.D. says he just made the information up and denied witnessing J.C.'s shooting or learning the details from his closest friend at the time, M.B.

[212] L.D. admitted during cross-examination that when he was questioned by police investigators three days before D/Cst. Buell interrogated him, he lied repeatedly to them, denying he had said to L.C. that he had shot someone. He acknowledged that he had lied to the police on that occasion to protect himself and M.B.

[213] On re-examination, L.D. adopted the statement he gave D/Cst. Buell on June 26, 2016, in which he said that when he came back to his house after being dropped off by M.B., and before he went to bed, he told L.C. that he and N.W. had shot somebody. L.C. did not ask for details of who or why. L.D. told D/Cst. Buell

that when he said this he had not known J.C. had been shot. He had thought something was going to happen between N.W. and J.C. because N.W. had been talking about J.C. L.D. testified that he was telling the truth when he said to D/Cst. Buell: "…I didn't think he was going to shoot him. But I knew something was going to happen." L.D. told D/Cst. Buell that he lied to L.C. to make himself "seem hard" and claimed, "But I did not get any information from them guys…"

[214] It is very coincidental indeed that what L.D. told D/Cst. Buell he had said to L.C. right around the time J.C. was murdered by two shots with one to the head mirrored how J.C. was killed. It is not easy to accept L.D.'s claim of simply conjuring up details that happened to match the shooting of J.C. so precisely. He could have acquired the information about how J.C. was shot by being at Mount Edward Road, or by M.B., his best friend at the time, telling him about it right after it happened. Despite L.D.'s denial, it is well within the realm of possibility that M.B. told him how J.C. was murdered. However, it is also plausible that L.D. made a clever guess.

[215] Setting aside the coincidental content of L.D.'s statement for a moment, there is nothing in it that raises a doubt about N.W.'s involvement in J.C.'s shooting. L.D.'s told L.C. that N.W. was involved. He also said he was involved. I accept that part was a lie. I find that L.D. was not the taller man dressed in lighter clothing that Glenda Ashford observed on Mount Edward Road.

Eliminating L.D. as the Shooter

[216] L.D. is tall and slimly built like N.W. He also owned a light-coloured track suit, either light grey or white, with a hood, in March 2016. I know this from a Facebook posting he made of himself wearing the suit. (*Exhibit 36, page 4*)

[217] There is no evidence that L.D. wore that lighter-coloured track suit on March 29. L.D. testified in his direct examination that upon returning to his house with L.C. and J.C. around 5 a.m. on March 29, he changed his clothes. He says he put on grey jogging pants and a black sweater. I accept that evidence.

[218] L.D. then left with M.B. and N.W. but it was not long before he asked to be driven home. Although L.D. says he proposed this to avoid M.B. later having to go out of his way to drop him off, I find that L.D. made the request because of the

tone in the car. He says they had just passed J.C. on the street and N.W. asked, "Can we smoke him?" to which L.D. replied: "Nah, it's just down the street from my house. And then [M.B.] looked at me, I was like, "Yeah, take me home." Asked by Mr. Giacomantonio to explain his response to N.W.'s question, L.D. said that "…the police would be coming to my door and stuff because it's just like three houses down from my house." It is obvious L.D. was attuned to the fact that something was about to go down and he should bail out while he could.

[219] L.D. confirmed this in cross-examination when he agreed with Mr. Burrill's suggestion that he wanted to go home because he knew something bad was going to happen. He had said much the same thing to D/Cst. Buell on June 26, 2016. In that statement, which he adopted at this trial, L.D. said he knew something was going to happen between N.W. and J.C. L.D. said this to D/Cst. Buell during a discussion about why he had told L.C. that he and N.W. had shot somebody.

[220] As J.C. walked home in the early morning hours of March 29, 2016, L.D. was in the Kia with M.B. and N.W. sensing that something bad was going to happen. Despite telling D/Cst. Buell he didn't expect J.C. to be shot, he could have known that after Lakecrest Drive there would be two remaining bullets in the rifle – Laura Knowles testified it had a three-round capacity magazine - and that a shot to the head would be the best guarantee of the victim not surviving to identify his killers. That could have been the clever guess that gave L.D.'s statement to L.C. such coincidental detail.

[221] In summary, L.D.'s statement to L.C. containing details – two shots and one to the head – that happened to describe how J.C. was killed, could have been a clever guess. But, however L.D. came to make that statement to L.C., I do not find it causes me to think that L.D. may have been the shooter. In other words, I find that L.D.'s statement to L.C. is not a source of reasonable doubt in this case.

Motive

[222] Motive is not an essential element of the offence of first-degree murder. For its case against N.W. to succeed, the Crown does not have to prove why he would have wanted to kill J.C. But it is not as though J.C.'s murder came out of nowhere. J.C.'s life just didn't matter that much. The evidence indicates that he was marginalized and ultimately, expendable. M.B. testified that he and N.W.

discussed the murder "a couple of times" afterwards. N.W. told him he "just wanted to kill someone. He just wanted to catch a body." It was M.B.'s evidence that N.W. selected J.C. "Because he didn't like him. He thought he was a bitch."

Has the Crown Proven Beyond a Reasonable Doubt that N.W. Shot J.C.?

[223] The evidence of J.C.'s actual shooting came from two witnesses – Glenda Ashford and M.B. I am going to focus now on their evidence.

[224] Glenda Ashford was a very good witness. She gave a straight-forward, unembellished narrative and was observant and descriptive. The recording of her 911 call reveals a similarly calm attention to detail. She testified that because it was dark out she noted a significant detail about the two men on the sidewalk - the contrast in their clothing. D/Cst. Hewitt's photographs (*Exhibit 20*) satisfy me that a contrast in brightness would have been noticeable.

[225] The Crown elicited evidence about what M.B., N.W. and J.C. were wearing on March 29. L.C. testified that N.W. was wearing "a white track suit." He says that N.W. wore it the entire time he was with him and he did not see N.W. change out of it. L.D. also recalls that N.W. was wearing an all-white suit. M.B. testified that N.W. was wearing a bright "all white" jogging suit with "some black patches on it."

[226] I know from Dr. Woods' evidence about his wounds that J.C. was facing his killer when he was shot. This positioned him with his back to Ms. Ashford as she drove up Mount Edward Road toward Spring Avenue. She saw the back of his black jacket. The man facing him was contrasted by brighter clothing.

[227] The only person wearing a bright white jogging suit in the early morning hours of March 29 was N.W. None of the others was wearing a white track suit on March 29. Everyone else was dressed in clothing that was darker. I know what J.C. was wearing when he was shot. His clothing was seized at the autopsy and exhibited in this trial. J.C.'s jacket (*Exhibit 24*) was dark.

[228] I also know that J.C. had his hood up when he was shot. Ms. Ashford testified that she didn't think the man with his back to her had his hood up. I do not find that discrepancy to be of any significance.

[229] Seconds after her observations of the two men on the sidewalk, Ms. Ashford heard the shots that killed J.C. I view Ms. Ashford's recollection of the brighter clothing on the man facing her to be the significant evidence, far more significant than her thinking that the man with his back to her was not wearing a hood.

[230] I turn now to M.B. I did not find M.B. to be an evasive witness who tried to minimize his involvement in all the sordid events of March 29. He was not reluctant to disagree when answering questions. Unlike N.W., M.B. made no effort to cast himself in a more favourable light. He showed no reluctance about "owning" his role in the events and was coldly matter-of-fact. He presented a chilling indifference to J.C. and displayed no emotion about the senseless murder of this young man. For example, when he testified about N.W. mentioning his intention to "merk" J.C., he said his response was: "All right, cool."

[231] The narrative M.B. gave of what happened to J.C. on Mount Edward Road had the same quality as his testimony about everything else that happened once the Kia was stolen – it was straight-forward and unembroidered. Taken with the evidence that corroborates what he described, and which affords me comfort, I find M.B., despite his unsavoury character, to be a credible witness.

[232] I do not accept that N.W. was driven home by M.B. around 5 a.m. I find that M.B. went into L.D.'s house and then he and L.D. rejoined N.W. in the Kia. L.C. stayed behind at L.D.'s and J.C. headed off, walking. L.C. had noted the time on his tablet just before J.C. left. It was 5:02 a.m. J.C. did not get far before he was shot dead.

[233] I accept the evidence of M.B. that when he was briefly in L.D.'s house at the end of the night to find out what was causing the delay, J.C. told him he did not want to get back in the car with N.W. This state of mind evidence explains J.C.'s decision to walk home. Back in the Kia with M.B. and L.D., as I described earlier, N.W. was talking about killing him. I find that M.B. did what he had done on every other occasion that night, he did the driving and handed over his rifle. This time he handed it to N.W. to facilitate J.C.'s murder.

[234] M.B. testified having already admitted responsibility for being a party to the murder. He says he expects to receive a youth sentence but has been given no promises. M.B. was asked the following question in direct examination:

Mr. Giacomantonio: On this file or the outstanding file where you're facing charges of attempted murder [referring to an unrelated shooting in early March 2016], no one has given you any promises that, if you testify here, that's going to affect how you're treated?

M.B. No.

[235] M.B. had lied consistently to avoid being held responsible for participating in J.C.'s murder but all that pretense has now been abandoned. While there is a benefit to M.B. to be sentenced as a youth for murder rather than as an adult, there is no evidence that M.B. stands to gain anything by lying in court about N.W.'s role in J.C.'s murder. M.B. says there have been no deals made with him for leniency in exchange for his evidence against N.W. There is no evidence that if M.B. had refused to testify against N.W. or presented with a comprehensive memory loss he would have faced a sentencing as an adult. I have found no evidence that M.B. was motivated to lie about N.W. in order to secure a personal advantage.

[236] N.W. caught wind in May and June 2016 of M.B.'s decision to cooperate with the investigators and believed L.D. was talking to them too. It is obvious it concerned him. He wanted something done about it. Even by his own admission he tried to orchestrate getting L.D. beaten up. And, as I noted earlier, I reject N.W.'s claim that he merely wanted inquiries made with M.B. about what he had heard. L.D. and M.B. have testified that they were present when N.W. started talking about wanting to kill J.C. N.W.'s attempts to have them shaken down or worse is probative evidence that he had something to hide about his involvement in J.C.'s murder. (*R. v. Tran, 2001 NSCA 2, para. 27*)

[237] I find the Crown has proven beyond a reasonable doubt that N.W. went to Mount Edward Road with M.B. He went there to kill J.C. It was a plan of murder that he formed when he, M.B. and L.D. were in the Kia and J.C. was walking home. M.B.'s testimony establishes it was a murder he deliberated on while he waited for Glenda Ashford to drive by. Ms. Ashford's evidence confirms that the shots were fired after she had passed. N.W. deliberated again when he fired the bullet into J.C.'s head so he wouldn't get up.

[238] I find that N.W. caused J.C.'s death by shooting him in the chest and then in the head. He intended to kill J.C., a killing he planned in advance and deliberated upon. The Crown has proven each of the essential elements of first degree murder beyond a reasonable doubt. I therefore convict N.W. of the first-degree murder of J.C.

Jurisdiction

[239] During this trial, I was appointed to the Nova Scotia Court of Appeal. Pursuant to section 669.3 of the *Criminal Code* and section 140 of the *Youth Criminal Justice Act* I retained jurisdiction to complete the trial. It is jurisdiction that I can decline to continue to exercise for N.W.'s sentencing. (*R. v. Shrubsall, [2000] N.S.J. No. 270 (S.C.); R. v. F.(D.P.), [2002] N.J. No. 445 (S.C.)*) The Crown has given notice it is seeking an adult sentence for N.W. His sentencing hearing, which I expect will be lengthy in any event, will not happen soon. In the circumstances where I am expected to take up my responsibilities at the Court of Appeal and have undertaken to do so without significant delay, I am declining jurisdiction pursuant to section 669.2(1) of the *Criminal Code* and recusing myself from N.W.'s sentencing hearing. I expect the Provincial Court judge taking over from me in Courtroom #6 will conduct it.

[240] I conclude by expressing my profound thanks to Crown counsel, Mr. Giacomantonio and Mr. Nickerson, and to Defence counsel, Mr. Burrill and Ms. Mancini, for their skilful and professional approach to this sad, challenging case.

Derrick, P.C.J.