

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Lewis*, 2020 NSSC 210

Date: 20200730

Docket: Syd. No. 488527

Registry: Sydney

Between:

Her Majesty the Queen

v.

Christian Michael Lewis

Judge: The Honourable Justice Robin Gogan

Heard: February 25, 26, 27, 28, March 3, 5, 2020, in Sydney, Nova Scotia

Oral Decision: July 8, 2020

Written Decision: July 29, 2020

Counsel: Darcy MacPherson, for the Crown
Darlene MacRury, for the Defence

By the Court (Orally):

Background and Overview

[1] This is a decision in the matter of *R. v. Christian Michael Lewis*. Lewis is before this court on an Indictment dated June 3, 2019, as amended during the trial of this matter. He is charged that:

On or about the 1st day of September 2018, at or near Sydney, in the County of Cape Breton, Province of Nova Scotia, did

Count 1

Wound Albert Bernhardt thereby committing an aggravated assault contrary to Section 268 of the Criminal Code of Canada.

Count 2

In committing an assault on Albert Bernhardt use a weapon to wit: a knife contrary to section 267(1)(a) of the Criminal Code of Canada.

Count 3

Have in his possession a weapon to wit: knife, for a purpose dangerous to the public peace, contrary to Section 88 of the Criminal Code of Canada.

Count 4

Steal a motor vehicle 2014 Dodge Journey, Nova Scotia plate #FWZ 221, the property of Albert Bernhardt and did thereby commit theft contrary to Section 333.1 of the Criminal Code of Canada.

[2] There is no contest that Albert Bernhardt was stabbed and seriously injured on September 1, 2018. Neither is there a contest that the person who stabbed Bernhardt then got into his vehicle and drove away from the scene. All of this was partially observed from a distance by witness Shauna Howell who soon thereafter picked up Bernhardt as he sought help. First responders arrived quickly afterward. Bernhardt was taken to hospital and required emergency surgery.

[3] Based on the information obtained from witnesses, police sought out the accused, Christian Michael Lewis, who turned himself in to police on Tuesday, September 4, 2018.

[4] The parties agree that the injuries suffered by Bernhardt constitute “wounding” for the purpose of Count 1 of the Indictment. Jurisdiction is not an issue. The central issue in this case is identification. The resolution of this issue involves the assessment of alibi evidence. The alibi evidence necessarily engages consideration of credibility of the witnesses on that issue. More will be said about the alibi issue later in these reasons.

[5] The trial of this matter took place over six days in February and March of this year and heard from twelve witnesses. The parties agreed to the admission of opinion evidence by consent.

[6] Before turning to the evidence, let me review basic principles. Christian Lewis 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 never shifts.

[7] A reasonable doubt is based on reason and common sense 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 CanLII 319 (SCC), [1997] S.C.J. No. 77, para. 36; *R. v. Starr*, 2000 SCC 40 (CanLII), [2000] S.C.J. No. 40, para. 242).

[8] Christian Lewis does not have to prove anything to be found not guilty. The burden rests on the Crown to prove beyond a reasonable doubt that he was the person who stabbed Albert Bernhardt and then stole his vehicle on the night of September 1, 2018.

Review of the Evidence

[9] Let me turn to an overview of the evidence. The Crown case relied on a total of ten witnesses as well as a number of *Exhibits* that included various maps, photographs, laboratory and medical reports.

(a) Crown Offence Evidence

[10] The Crown offered the evidence of the complainant, **Albert Bernhardt**. Albert testified that he lived in Nova Scotia from 2015 to October 2018. Prior to leaving Nova Scotia, he lived at 42 Birch Street, Sydney, Nova Scotia. He lived here with his wife, Mary, and four children.

[11] Albert testified about the events of September 1, 2018. He made plans with a friend, Dustin Rogers. He said that Dustin lived at 150 Whitney Ave, Sydney, Nova Scotia. Albert and Dustin were from the same town in North West Territories. They had known each other for 25 years. Dustin was planning to return home to the North West Territories the following day.

[12] Albert said he picked Dustin up at 150 Whitney Avenue. They went for pizza and pop. Then coffee. Then his wife asked him to return home for movie night at home. He said he went to drop Dustin at 150 Whitney Avenue. He saw

Christian Lewis emerge from 150 Whitney Avenue. Albert said a decision was then made with Dustin to ask Christian to “run for cocaine”. As he said, “we trusted him” to “run for cocaine” and Christian got in his car. He said Christian Lewis sat in the back passenger side of the vehicle. Albert was driving a 2014 Dodge Journey.

[13] It was Albert’s testimony that the three of them drove downtown and dropped Christian in front of a big green house. He said they gave him \$80 to buy drugs. Christian left and he was gone long enough that Albert thought he was not coming back. It was about five minutes before he and Dustin left that location. He said he approached the area of the North End General Store. Right across from the store, he said that Christian appeared. Albert stopped his car near the store but not right in front.

[14] Albert said that Christian had blood on his “teeth”. He came to driver’s side door. Albert told him to stop. Christian then went to the passenger’s door. Albert got out of the vehicle. As he walked to the back of his vehicle, he said that Christian jumped off the curb and hit him, “boom boom”. Albert was stabbed on his left side. He said he fell to his knee. There is no dispute that Albert suffered serious injuries as a result of being stabbed with a knife.

[15] Albert said that as he fell to his knee, he heard a door shut. It was Dustin. He told Dustin to run. He said Christian started after Dustin, stopped, then turned, got into Albert's car, and drove away down Dorchester Street. Albert said he saw Christian get in the vehicle but not much more. At this point, Albert identified the vehicle he was driving in a multitude of photographs in *Exhibit 3*.

[16] Albert said he thought he was going to die. Then a car came and stopped. He got in the back seat of the car. He remembered the car stopping in a parking lot. He got out, and walked around to the front of vehicle, and laid down. Police and ambulance arrived. He was taken to hospital and had surgery. He now suffers from PTSD.

[17] Albert concluded his direct examination by identifying the accused as the person who stabbed him.

[18] On cross-examination, Albert said September 1, 2018 was not the first time he had been out with Dustin. They had been together days before. On that day, Albert picked Dustin up at 5:00 or 5:30 p.m. He could not be exact about when he returned Dustin to Whitney Ave but thought it was around 6:30 -7:00 p.m. He recalled it still being bright out. He admitted smoking weed with Dustin while they were out. He thought maybe they shared a joint together.

[19] Albert admitted doing cocaine with Dustin previously. He denied that doing drugs was the bond between them. He said Dustin got the drugs – it was Dustin’s buddy that delivered. They did weed all the time together and he did cocaine when he was out of town for work. Albert said that the stabbing occurred on the third time that he and Dustin did cocaine together.

[20] Albert was asked about September 1, 2018, and the attempts to get cocaine in the period before meeting Christian. His answers to these questions were confusing and evasive. He said he and Dustin agreed to spend \$80. Dustin had the contacts to buy coke, was texting them, but was not having any luck. After returning to 150 Whitney Avenue, they saw Christian emerge and decided to ask him to get cocaine for them. Albert testified that he saw Christian and said to Dustin, “what about him?”. It was Albert’s testimony that he had never seen Christian before but thought he could get them cocaine. I remind myself that at this point, Albert did not know who this person was (and there was no evidence Dustin knew him either). This was just a person emerging from a house where Albert thought Dustin lived.

[21] After getting into the car, Christian and Dustin told Albert where to drive. Albert maintained that five minutes after Christian got out of the car, he thought he had been ripped off and drove away. He did not mention Dustin getting out of the

car and he did not portray himself as being upset at loosing his money or not getting the drugs.

[22] Albert was asked about his statement to police. The statement was provided while he was still in hospital. The events in his statement were different than his trial evidence. He explained these inconsistencies by saying that he was under heavy medication in the hospital. But he also admitted that he was messaging his wife, he was on social media, and in contact with Dustin. He admitted to seeing on social media that police were looking for Christian Lewis, and that Dustin told him it was Christian Lewis that stabbed him. Albert said that he that he recognized Christian from his picture on Facebook.

[23] Albert admitted that when he first spoke to police, he could not tell them who had stabbed him. But he told police that Dustin would know. By the time he gave his statement to police the next morning, Dustin had given him the name Christian Lewis. Albert then admitted that he searched social media and saw pictures of Christian Lewis on Facebook. After all of this, he told police it was Christian Lewis who stabbed him.

[24] I found Albert's evidence disjointed and at times implausible. For example, it seemed incredible to me that he would have seen someone he did not know

emerge from a house and suggest that they ask him to get cocaine. Albert was not a good historian and it was not obvious why that was the case. He gave confusing, and at times, reluctant evidence about the attempt to buy cocaine. He downplayed his role in the sequence of events notwithstanding his admission that he and Dustin had done cocaine together before. When confronted with inconsistencies or implausibility, he was hostile, defensive and combative. It left the impression that he was not comfortable giving evidence about the attempt to buy cocaine, and was prepared to downplay his role, or lie about it.

[25] Aside from these observations, there were two things I noted in his evidence. First, it was clear that when stabbed, Albert did not know the name of the person who did it. He did not attempt to describe the person in any way. If I believe Albert, he only saw the person who stabbed him briefly. The person emerged from a house and got in the back seat of his car. A few minutes later, that person got out of the back of the car to buy cocaine, and returning unexpectedly minutes later before the stabbing quickly occurred. The name Albert eventually gave police came from Dustin. And after getting the name from Dustin, he saw pictures on social media. Those pictures were not before the Court. It was almost eighteen months later that Albert identified Christian Lewis in court as the person who stabbed him. If he recognized Christian Lewis in court, its completely possible

that's because he had seen his picture previously and been told he was stabbed by Christian Lewis. In my view, Albert's identification is tainted and worthy of very little weight.

[26] The second thing of note is Albert's testimony that the person who stabbed him had "blood on his teeth". There was no mention of broken teeth or no teeth. There was blood on his teeth. I will return to this point later in these reasons.

[27] **Dustin Rogers** testified for the Crown. He said that he lived in Sydney while attending high school. He finished in 2013 and then returned for several visits after that. He was in Sydney for a couple of weeks to visit when his friend Albert was stabbed. He has not been back since. When in Sydney, he lived at either a house at 142 Champlain Street (his grandmother's house) or another house split into apartments located "near the old Zellers" and "near the old hospital". He declined to say whose apartment was located there. He was staying on a couch there. He hung out there at times, he did not live there. He said no one should have concluded that he lived there – at 150 Whitney Avenue. This seemed an important point from his perspective.

[28] Dustin knew Albert as they had the same home town and share a nephew. He testified about the day of the stabbing incident. He said he communicated with

Albert on Facebook and then met him at the “hospital street house” around “4-5ish”. Albert drove and he was in the front passenger seat. They went to the Irving garage on George Street to get money from an ATM. The plan was to buy cocaine. Dustin made “a few” phone calls with his cell phone and managed to contact someone. He said that person was Christian Lewis. He testified that he had Christian’s number. He knew him since high school. He was not sure if they were in the same grade.

[29] Dustin testified that he and Albert picked Christian up “down the road” from 150 Whitney Avenue. This was near Hospital Street. Dustin said that Christian hopped in the back seat of the vehicle, on the driver’s side or the middle. When Christian got in the car, he said he could get drugs for them. Dustin then identified Christian Lewis in the courtroom. Dustin could not remember what Christian was wearing on that day.

[30] After Christian got in the car, he told Albert where to go. They did not have an address. It was a location off Dorchester Street behind Quality Cameras. He had never been there before. When they arrived, Christian got out of the car and went around the corner of a green house. After five minutes, Dustin said he got out of the car to check on Christian. After looking briefly, Dustin concluded that

Christian had run off with their money. He returned to the car and told Albert not to worry, he would cover his money. They drove away.

[31] It was Dustin's evidence that shortly afterward, Christian appeared in front of the car. Albert stopped the car. Dustin testified that Christian approached the car yelling that they "broke his tooth" and would have to pay for it. He came to passenger door and opened it as he was yelling. Dustin noticed Christian had something in his hand, behind his back. At this point, Albert got out and headed towards the back of the car. Christian met Albert there. Dustin said that he saw Christian stab Albert. He grabbed Christian by the shoulder and Christian turned toward him with the knife. He ran toward the intersection of Dorchester and Dodd Streets. He said he saw Christian pass by in Albert's car. He could see Christian driving. And he said that "he was grinning" and you could clearly see that one of his top front teeth was "black, gone" and that if he were to smile, "there was, no missing it". He then added that " a chunk was broken off...a lot left ... but a lot broken off". Dustin went into the North End Convenience Store and called 911. He has not seen Christian Lewis since that day.

[32] Dustin said he is certain that the person with them on September 1, 2018, was Christian Lewis. He admitted that he told police they were going to buy weed when the plan was actually to buy cocaine.

[33] On cross examination, Dustin was asked about how well he knew Christian Lewis. He was not sure if they went to school together or if they graduated the same year. Dustin left the Sydney area before graduating in 2013 and only returned afterward on two occasions, including his visit in 2018. He said he stayed at his grandmother's on Champlain Avenue in Sydney. He denied ever living at 150 Whitney Avenue but he did stay there with friends occasionally. He could not remember exactly when he was in Sydney in 2018. I pause here to observe that the evidence does not disclose any actual contact between Dustin and Christian Lewis before September 1, 2018.

[34] Dustin knew Albert from back in the time he was in high school. He said that he met up with Albert six or seven times while in Sydney in 2018. They would go for drives, get coffee. They did cocaine maybe three times in four weeks. He had a source to get cocaine. He said Albert did too. He would do it one or two times a week. He and Albert had the same source for weed.

[35] Dustin said in his trial evidence that the purpose of the get-together with Albert on September 1, 2018 was to get drugs. Albert drove Dustin to an ATM to get money for drugs. He only had \$40 so Albert contributed \$60 so they could buy a gram of cocaine. Dustin said he "made a few calls", and that he called his "regular guy", but he would not have supply until later that night.

[36] Dustin said his next call was to Christian Lewis. This was his first time trying to buy from Christian. He said he just told Albert he was going to try someone else. He did not explain why he thought he could get cocaine from Christian Lewis. He said that he got Christian's number from Facebook and called him while sitting in Albert's car at the Irving garage. He was defensive about what information he discussed with Albert. In a heated exchange with defence counsel, Dustin said "you aren't supposed to ask about other people's people ... that's not how it goes on the streets...it goes without saying that you don't ask questions...its like a respect thing ... its common sense". He then confirmed that he and Albert picked up Christian "near Zellers" and Christian hopped in the back driver's side of the vehicle and moved over to the middle.

[37] He maintained on cross-examination that after going into the green house to buy cocaine, Christian appeared out of nowhere and he was "missing a tooth... missing part of a tooth". The entire sequence of events took 20 minutes to a half hour.

[38] Dustin admitted inconsistencies between his trial testimony and the statement he gave police on September 1, 2018. He said that a statement today would be very different from the one he gave immediately after the events. He blamed the police saying they "asked the wrong questions". He also said he lied

because he was “frantic” when he spoke to police. He said that he was not sure if Albert was going to live or die. He denied being worried about disclosing his dealers’ names.

[39] In my view, being frantic, or being questioned by police, does not explain lying to police about what really happened. Admitting those lies at trial does not excuse them or necessarily enhance credibility. What is now before the Court is an evolving tale. It evolved significantly from the day of the events to trial. And during trial, it continued to evolve. For example, Dustin testified that his first contact with Albert after the stabbing was hours later via Facebook. Dustin first said that he did not remember telling Albert the name of the person who stabbed him, but when pushed on the point said that “he believed that he did” tell him.

[40] There are several other observations about the evidence given by Dustin Rogers. The first point relates to his knowledge of Christian Lewis. Although Dustin said he knew Christian Lewis from high school, he gave no more evidence about the nature of his knowledge, or the extent of any prior relationship. Dustin gave no evidence of any previous direct contact between he and Christian. It was hardly more than a bare assertion that they knew one another.

[41] Dustin was from the North West Territories and said he came to Sydney to attend high school, presumably Sydney Academy. He left Sydney sometime before graduating in the 2013. Christian Lewis later gave more detailed evidence on this point. He testified that he only attended Sydney Academy briefly before leaving school in grade ten. That may have been in 2013, but it was not clear on the evidence. Christian's personal history was of instability and frequent moving of both homes and schools. He attended three different schools and lived in a wide variety of locations in his grade 10 year. His grade 10 year may have spanned more than one school year. He denied knowing Dustin in high school, or having any contact or line of communication with him. He said that they were not connected on social media. He also said he was not sure if he had a phone on September 1, 2018, and if he did, his number was not on social media. On the evidence presented, there was little opportunity for Dustin Rogers and Christian Lewis to know each other at all, let alone well enough to spontaneously engage in a drug deal on September 1, 2018.

[42] Secondly, it was clear that Dustin was well versed in the local drug culture. He thought buying weed was insignificant and saying so an answer to being caught with cocaine. He had contacts to buy weed and cocaine, including a regular contact for cocaine. And he distanced himself from any reference to living at 150

Whitney Avenue or who he knew that lived there. He denied being dropped off there or picking Christian up at that address. This denial was inconsistent with Albert's evidence. Albert thought Dustin lived at 150 Whitney Avenue. Guarding that seemingly unimportant information seemed significant. I readily conclude his evasiveness was related to his broader involvement in the local drug culture.

[43] Third, there were many inconsistencies between Dustin's trial evidence and the testimony given by Albert on some key points. These included:

- (a) Dustin's residence location (Albert said it was 150 Whitney Avenue and Dustin denied this saying he lived with his grandmother on Champlain Avenue);
- (b) The purpose of the Albert and Dustin getting together on September 1, 2018 (Albert portrayed it as a social call with pizza, pop, coffee and weed before deciding to get cocaine while Dustin said it was only about getting cocaine);
- (c) Whether they smoked weed before trying to get cocaine (Albert said they did but Dustin did not);

- (d) How Dustin contacted his dealers (Albert said he was texting and Dustin said he was making calls);
- (e) How Dustin contacted Christian (Albert said they saw him coming out of 150 Whitney Avenue and asked him in person and Dustin said he got Christian's number from Facebook and called him from the Irving gas station on George Street);
- (f) Where they were when Christian got in Albert's vehicle (Albert said they were at 150 Whitney Avenue and Dustin said it was somewhere "near Zellers" and "Hospital Street");
- (g) Where Christian was sitting in Albert's car (Albert said that he got in the rear passenger side and Dustin said he got in the rear driver's side and moved to the middle (evidence that is also inconsistent with the size and space taken by two car seats in the rear of Albert's vehicle));
- (h) How long Dustin tried to get cocaine before contacting Christian Lewis (Albert said that Dustin tried for about forty minutes to get cocaine somewhere before they decided to give up and happened upon Christian at 150 Whitney Avenue but Dustin said he called his "regular guy" who had nothing and then he called Christian);

- (i) Why they called Christian Lewis (Albert said they saw Christian and it was spontaneous and Dustin said he got his number and thought he would try him for the first time – neither explained why they thought Christian Lewis would have access to cocaine); and
- (j) What happened after Christian went into the green house (Albert said they waited five minutes and drove away but Dustin described getting out of the car and having a look for Christian before returning and driving away).

[44] The Crown was of the view that there was common ground between the evidence of Albert and Dustin. I agree that there was some common ground – such as the location of the drug dealer and the general route to and from that location. But that bit of consistency does not overcome the large volume of inconsistency.

[45] The only independent observer of key events was **Shauna Howell**. She was called by the Crown. Ms. Howell was the driver of the vehicle that stopped for Albert after he was stabbed. There were two others in her car, one in the front and one in the back. Neither testified. They were coming from Scotiabank on Charlotte Street, driving up Dorchester Street toward Intercolonial Street. Ms. Howell saw “three guys fighting down by the store”. She did not see anyone get

stabbed. She saw one guy take off in a car and another running up and down the street looking for help. She picked him up because he was bleeding.

[46] Ms. Howell said that the people fighting were behind the car that eventually drove off. But they moved to the middle of the road. The car was parked on the side of the road in front of the convenience store. She viewed all of this from the intersection of George and Dorchester Streets. She was stopped at a red light with traffic crossing her line of sight. She moved ahead when the light turned green. She thought it was about 6:30 p.m. She picked Albert up in front of the convenience store. She drove to the area of Centre 200 and called 911. She and her passengers took Albert out of the car and put him on the ground. He was bleeding.

[47] Shauna Howell testified that she was in contact with Dustin Rogers after the incident while she was waiting to talk to the police. She said that Dustin thanked her for helping his friend. She denied seeing any media coverage about the event. She said she was not contacted by anyone afterward.

[48] Unfortunately, Ms. Howell's evidence does not help resolve the issue of identification.

[49] The next witness was **Cst. Philip O'Neill**. Cst. O'Neill responded to a 911 call on September 1, 2018 at 7:45 p.m. It was still bright out. He was close by on George Street and responded to Liberty Street (near Centre 200) to attend at a stabbing victim. He was first on scene. The victim was on the ground holding his side. He identified himself as Albert Bernhardt. Cst. O'Neill talked to Albert about what happened. He went with him in ambulance to hospital and stayed there until relieved.

[50] Cst. **Corey MacKenzie** arrived on scene shortly after Cst. O'Neill. He responded to the scene after a 911 call at 7:42 p.m. on September 1, 2018. It was a clear day at about sunset. He described his observations while he was in the parking lot adjacent to Liberty Street in downtown Sydney. While at this location, he obtained a statement from Blaine Poirier who had been a passenger in the Howell vehicle. He then proceeded to Dorchester Street and obtained statements from Jessica MacKenzie (another passenger) and Shauna Howell. Finally, he took a statement from Dustin Rogers who was still located in front of the convenience store adjacent to the scene on Dorchester street.

[51] On cross-examination, Cst. MacKenzie said that he was at Liberty Street for about twenty minutes before going to Dorchester Street. He then located

MacKenzie, Howell and Rogers close to the convenience store on Dorchester street. He interviewed them one at a time in his vehicle.

[52] Sergeant **Geoff MacLeod** is the Supervisor of the local Forensic Identification Unit. He was called by the Crown to speak to items of forensic evidence. *Exhibit 5* is a lab report with the results of the analysis of blood swabbed from a pocket knife found in the passenger footwell of Albert Bernhardt's vehicle. There were no fingerprints on the knife. The blood on the knife was a match to Albert Bernhardt. There was no evidence of anyone else's blood on the knife, or in the vehicle. In the end, there was no forensic evidence to assist the identification of the assailant. It was clear however, that the person who stabbed Albert then got in his vehicle and drove a short distance before abandoning it along with the knife used in the attack. It all happened quickly. When police found the Bernhardt vehicle, it was parked but still running.

[53] Sgt. MacLeod also noted that the rear of the Bernhardt vehicle contained two car seats that took up most of the room in the back seat of the car. *Exhibit 3, photo 0091* showed the rear seat area and the location of the car seats. The location of these car seats would make it difficult for an adult to enter from the rear driver's side of the vehicle and move over to the middle as described by Dustin Rogers.

[54] Constable **Dave Kelly** testified. He took photographs of the area of the convenience store on Dorchester Street shortly after 10 p.m. on September 1, 2018. He then went to Hugh Street in Sydney and photographed a 2014 Dodge Journey still running with interior and running lights still on. He marked the location of the vehicle on *Exhibit 1*. This was between 10:30 and 11:00 p.m. He shut the vehicle off by pushing the ignition button and secured the vehicle by putting the two front windows up. The vehicle was towed away. He then went to the hospital and seized Albert's clothing from Cst. Dwight Miller. He took the items of clothing to the Forensic Lab.

[55] It was at this point in the Crown case that it received written notice of alibi evidence from the defence. There had been informal notice given the day prior. This was near the end of the second day of Crown evidence and the day after Dustin Rogers' evidence.

[56] The Crown went on to call **Cst. Leo Farrell**. Cst. Farrell took a statement from Christian Lewis on the afternoon of September 4, 2018, the same day he turned himself in to police. Cst. Farrell had no memory of taking the statement or any observations made at that time in spite of reviewing the statement. After the evidence from Cst. Farrell, the Crown was given an adjournment to investigate the alibi evidence.

(b) *Crown Alibi Evidence*

[57] After a short adjournment, the Crown called **Deputy Sheriff Peter Smits**. Deputy Smits was working in the Courthouse on February 25, 2018, and observed a conversation outside of the courtroom. This took place during the noon recess. He observed Christian Lewis exit the courtroom and gesture to a woman sitting outside. That person accompanied Christian to the far end of the hallway outside of the courtroom. Christian was speaking to someone on speaker phone and discussing where he was on the morning of September 2. Deputy Smits could not hear what year or any response. The Deputy asked Christian who he was talking to on his phone and was told it was his girlfriend. The woman with him was his grandmother, Mary Lewis.

[58] The next Crown witness was **Alexandra Lewis**. She is Christian's sister. She lives on Rudderham Road and has three children, aged three, five and ten. She testified that her brother has two children, a five year old and a newborn. She was asked about the summer of 2018. She said that her brother did not then have a relationship with his daughter's mother but they subsequently reconciled. Alexandra said that she had not been present at any earlier part of the trial.

[59] Alexandra said that her grandmother's name is Mary Lewis. Mary Lewis lives about a ten minute walk from her house. She testified that her brother had his daughter with him every weekend in the summer of 2018. He often visited her with his daughter and went to his grandmother's house. Alexandra had no specific recollection of what happened on the Labour Day weekend in 2018. She concluded her evidence by saying that the first time anyone asked her about her recollection of Labour Day weekend 2018 was when the police served her with a subpoena to attend trial.

[60] Alexandra presented as an honest and forthright witness. She had a good general memory of her brother's access visits with his daughter in the summer of 2018. But she had no specific recollection of the Labour Day Weekend.

[61] After hearing from Alexandra Lewis, the Crown closed its case.

(c) The Defence Evidence

[62] The defence called evidence. It began with **Mary Lewis** who is the grandmother of the accused. She lives on Rudderham Road and has lived in the area her entire life. She said that her granddaughter Alexandra lives "just down over the hill", in her former family home. Its about a three minute drive. She said

that she has eight great grand children including Alexandra's three children and Christian's two children.

[63] She talked about the contact she had with her grandson Christian in 2018. She said that she would pick him up on Fridays at his workplace. She viewed *Exhibit 8* which is Christian's Record of Employment from Superior Truss Limited. She recalled that this was where he worked on Keltic Drive. She said that she recalled picking him up on Friday, August 31, 2018. She was always there to pick him up and came between 4:00 and 4:30 p.m. on Fridays as he would sometimes get off a few minutes early.

[64] From there, she drove to the Mayflower Mall to pick up Christian's daughter. Then they went to Alexandra's house. She said that she dropped Christian and his daughter at Alexandra's at about 5:45 p.m.

[65] Mary Lewis said she next saw Christian Saturday afternoon at around 1:00 p.m. when he walked to her house with his daughter and niece. She said they all played hide and seek outside for a bit and they stayed until about 8 p.m. Around then, she said she noticed the kids were getting tired and she drove them all home. She left Christian and the kids in Alexandra's back yard.

[66] She next saw Christian on Sunday around noon. She took him and his daughter back to the mall to meet her mother. After that, she took Christian to his girlfriend's house on George Street in Sydney. After dropping him there, she didn't see him for a month or so.

[67] Mary Lewis said that she specifically recalled that weekend because it was the last weekend of the summer. And it was the last weekend that she had spent with her grandson Christian. There were no more visits with her granddaughter and she did no more driving for Christian after that weekend. Before that weekend, she followed the same pattern every weekend.

[68] When cross-examined, Mary Lewis was asked about the statement that she gave to police the day before her trial testimony. She acknowledged that she told police that her grandson "usually" spent weekends at Alexandra's house. She testified that she did not realize that the stabbing took place when Christian was "put in jail". She said she has no idea when the alleged stabbing took place.

[69] She was asked about speaking to Christian during the trial outside the courtroom. She said that she did not realize he was on speaker phone with someone. She thought he wanted to talk to her about money. She said that Christian never discussed the Labour Day 2018 weekend with her. He did talk to

her about the fact that she may have to go to court for him. That conversation happened on Monday, February 17, 2020. She said that was the first discussion she had with him about it and she knew that she was with him on the Labour Day weekend in 2018. She was confronted with her statement to police. She acknowledged that it was an accurate recording of what she told police. But she maintained that Christian did not discuss her evidence with her.

[70] After many questions, and a healthy amount of confusion, Mary Lewis clearly testified that she first spoke to defence counsel about her potential trial testimony on the preceding Tuesday, the first day of the trial. She said that she never spoke to Christian about what she would say in court. She said she told him she would testify because she “knew where he was at”. But she would not have thought of it but for the fact that Christian asked her if she would testify. She professed that she had no understanding about the process and the importance of the information. She maintained that Christian was with her on Friday (August 31, 2018) and then Saturday (September 1, 2018) until sometime after 8 p.m. She also said she got a 2018 calendar out and looked at it a few days after Christian said she may have to testify.

[71] Mary Lewis adopted the portions of her statement that were put to her. She did not challenge the accuracy of the statement. She maintained she was telling the

truth both in her statement and her testimony. It was not clear to me that she appreciated there was any difference.

[72] Mary was not asked by anyone about Christian's broken tooth.

[73] The last witness called was the accused, **Christian Lewis**. He is now twenty-three years old and lives in Glace Bay. He is engaged, and has two children. He is employed. He was previously employed at Superior Truss on Keltic Drive in Sydney. He was shown *Exhibit 8* which is his Record of Employment from Superior Truss Ltd. It shows his first day of work as May 22, 2018, and his last day was August 31, 2018. He was unable to continue working because he was in custody in relation to the charges now before the Court.

[74] He discussed his education. He did not complete high school. He did go to Memorial High in Sydney Mines. That did not work out. He moved to Westmount and attended Riverview for part of grade ten. Then he moved to his sister's home in Whitney Pier and attended Sydney Academy for two months. He was doing well at Sydney Academy but had to leave to find work and support himself. He never completed grade ten.

[75] Christian was asked about Dustin Rogers. He denied knowing Dustin growing up. He said he did not know him at Sydney Academy. They are not

friends on social media. He denied having telephone contact with him. Christian's girlfriend obtained a phone for him in late August or September, 2018 and it's the same phone he currently uses. There were no calls from Dustin Rogers. Christian said his number is not posted on social media. He does not know Albert Bernhardt and denied stabbing him.

[76] Christian said that he knew that 150 Whitney Avenue was the address for E.J. Hawco. He and Hawco had been friends in the past. But he never saw Dustin at that address. He denied being contacted by Dustin to sell drugs. He said that "he was not in that life". Weeks before this incident, he cut ties with E.J. Hawco because he did not want to be around him and did not want him in his life. That was the last he saw of E.J. Hawco.

[77] Christian testified about the weekend in question. He said he finished work on Friday and his grandmother took him to Mayflower Mall to meet his daughter. He picked his daughter up around 5pm. This arrangement had been in place since he began working at Superior Truss in May, 2018. After the pick up, they went to his sister's on Rudderham Road. After arriving, they played around until 8:30 or 9:00 p.m. He spent the night in the spare room in the basement of Alex's house.

[78] The next day, the kids played and then they all took the back trails to his grandmother's house. They would have started walking sometime after noon time and arrived around 1:00 p.m. After arriving, they played outside for a bit. At about 4 p.m. they started a BBQ. They ate at a picnic table outside. Then they played a bit more outside. By 8pm or 8:30 p.m., the kids were tired and Mary Lewis drove everyone back to his Alex's house. Christian said that he put his daughter to bed and did not leave the house after that. He slept in the spare room. He did not have a car at the time. This is why his grandmother did all the driving to and from his work and access visits with his daughter.

[79] He went on to testify about what happened on Sunday. Mary Lewis drove he and his daughter back to the Mayflower Mall. They left a little after noon and dropped his daughter just after 1:00 p.m. He had a chest cold at the time and his grandmother dropped him at his girlfriend's house on George Street. He was in bed sick on that Sunday, September 2, 2018.

[80] The next day was the holiday Monday and he was still sick. He became aware of the allegations against him in the news. He did not know what to do. He took advice to turn himself in. He contacted police on Tuesday and met them in front of Daniel's bar on Charlotte Street in Sydney. He was taken to the police station from there.

[81] He was shown *Exhibit 3* and reviewed photos of the pocket knife. He said he had no knowledge of that knife. He denied having or carrying a knife except a utility knife at work. He was shown photos of the Bernhardt vehicle in *Exhibit 3*. He denied being in the vehicle or driving the vehicle.

[82] He testified that he had a chipped tooth when he met with police and gave his statement. His right front tooth had a chip out of it. It was a couple of millimeters and the rest was intact. He explained how the tooth had been damaged a little more than a week before Labour Day weekend when he was hit with a metal lamp by his former girlfriend. After the incident, he left and went to live with a friend. He returned to his girlfriend's apartment on Sunday, September 2, 2018, to get his bags and stayed that night because he was sick.

[83] He denied having any contact in the relevant time period with Albert Bernhardt or Dustin Rogers.

[84] Lewis was subject to vigorous cross-examination. He maintained he was playing with children when the stabbing happened. He acknowledged that his fiancé could confirm when he picked up and dropped off his daughter on the Labour Day weekend in 2018. He said that his fiancé was in the courtroom. She was subsequently excluded from the trial but did not testify. He was asked if he

considered telling the police about his alibi and he said that he followed the legal advice he was given. He said that he found out a week before the trial that he may need his grandmother to give evidence at trial. He said that the “truth of where he was has been there the whole time”. He said if he knew that he should bring that information forward he would have done that.

[85] He was asked about his schooling. He confirmed that he attended grade nine at Sherwood Park school before going to Memorial High School. He attended three different schools for grade ten and it likely spanned more than one school year. He quit school at age sixteen to support himself and did not finish grade ten.

[86] He was asked about his knowledge of Dustin Rogers. He said that he may recognize his name from school, but he denied knowing Dustin or spending time with him in high school. He disclosed his phone number without hesitation in court. He could not recall when this phone was available for him to use. He was shown an image of 150 Whitney Ave and said he recognized it as the place E.J. Hawco lived. He admitted to taking cocaine as early as age fifteen. He could not say the last time he had cocaine but he said he was an adult.

[87] He was asked about his former girlfriend. She was older than him. She was thirty-nine years old when they were dating in 2018. He described her as short

tempered and reluctantly agreed that she was at times physically violent. Their relationship was good at first. Then she became jealous of the time he spent with his daughter and his contact with her mother.

[88] He was asked about his right front top tooth. He acknowledged that a piece of his tooth went missing. He said that his lip was also bleeding as a result of the injury. He said he had a chipped tooth not a broken tooth at the time of the offence. He had dental work done. The chip was repaired in December of 2018.

[89] With the conclusion of Lewis's evidence, the defence closed its case. The Crown then confirmed that it did not intend to call any rebuttal evidence.

Position of the Parties

The Crown

[90] The Crown is of the view that they have established all of the essential elements of the various offences charged beyond a reasonable doubt. The only issue is that of identification.

[91] It argued that the evidence of Albert and Dustin is sufficiently consistent. If it were perfectly similar it would not be as credible. And nothing in the evidence of Shauna Howell is inconsistent with their evidence. It can be relied upon to

establish identification. Particularly the evidence of Dustin Rogers. The Crown acknowledges some tainting of Albert's identification as a result of his communication with Dustin.

[92] On the alibi of Christian Lewis, the Crown says that the police were able to ameliorate the situation by quickly investigating, but still did not cure it. The evidence of Alexandra Lewis is an example of the issue. She could not now remember the day in question or say where Christian was on that day. If she had been asked in a timely manner, she may have been able to recall. On a related point, the Crown questioned why the accused did not offer evidence on his tooth injury if it happened a week before the events of September 1, 2018.

[93] The Crown relied upon an article, "*Alibi Evidence: Responsibility for Disclosure and Investigation*" authored by John Burchill, as well as the decisions in *R. v. Hogan*, 1982 CanLII 3820 (ONCA) and *R. v. Gleghorn* [1995] 3 R.C.S. 175. The Crown recognized that the alibi evidence offered by the defence might be enough to raise a reasonable doubt if given its full weight but argued that it was not worthy of full weight in the circumstances of its disclosure.

[94] The Crown's final submission went to the issue of the broken tooth. The Crown argued that it was simply incredible to say it was just a coincidence that

both Christian and the person who stabbed Albert had a broken front tooth at the relevant time.

The Defence

[95] The defence noted that the Crown case relies on the evidence of Albert and Dustin. On the basis of their evidence alone, a reasonable doubt exists. There were significant inconsistencies in the evidence between these key witnesses. Neither can be relied upon generally or on the specific issue of identification.

[96] On the identification issue, the Crown offered no forensic evidence to link Christian to the events of September 1, 2018. There are no fingerprints and no DNA connecting him to the offence. There was no evidence of telephone contact between Dustin and Christian. The identification made by Albert was based on what he was told by Dustin and his review of social media. The identification of Christian Lewis relies entirely Dustin's evidence, and Dustin is a liar and unreliable. The evidence of Shauna Howell does not support the evidence of either Albert or Dustin.

[97] The defence theory is that Albert and Dustin were involved in a cocaine deal, they were ripped off, and went after the person who did them wrong. In that sequence of events, Albert was stabbed and his car stolen. But that person is not

the accused. The Crown submits that the alibi of Christian Lewis disposes of the matter entirely.

[98] The defence relies on the decisions in *R. v. Downey*, 2018 NSCA 33 and *R. v. Sheek-Hussein*, 2017 ONSC 1764. But the ultimate position is that this is not a case of unreliable identification but of credibility.

Analysis

Assessment of the Evidence – Approach and Principles

[99] 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) the evidence must be assessed in accordance with *R. v. W.(D.)*, [1991] S.C.J. No. 26.

[100] The decision of the Nova Scotia Court of Appeal in *R. v. J.B.J.*, 2011 NSCA 16 is instructive on the approach to the required assessment in the face of alibi evidence:

40 With respect, the trial judge appears to have misunderstood or, at the very least, failed to properly apply the law relating to alibi evidence. The appellant did not need to prove his alibi; the evidence of his alibi need only raise a reasonable doubt that he committed the crime: *Lizotte v. The King*, [1951] S.C.R. 115.

41 Further, the alibi of an accused does not have to be corroborated by independent evidence in order to raise a defence (**R. v. Letourneau**, [1994] B.C.J. No. 265 (Q.L.)(C.A.), para 61).

42 Courts have long recognized, as well, that alibi evidence will frequently be given by relatives and friends of the accused. While this is a reality which may be considered, the evidence cannot be rejected on this ground alone ...

...

45 In **R. v. Parrington** (1985), 20 C.C.C. (3d) 184 (Ont. C.A.), Cory, J.A. (as he then was) offered helpful advice as to how alibi evidence should be considered by a trier of fact:

1. if they believe the alibi testimony given, they must acquit;
2. if they did not believe such testimony, but were left in reasonable doubt by it, again they must acquit the accused;
3. even if they were not left in reasonable doubt by his testimony, then, on the basis of all of the evidence, they must determine whether they are convinced beyond a reasonable doubt of the guilt of the accused. (para. 7)

[101] In fairness to the Crown, none of these basic principles were contested. Its issue with the alibi evidence had to do with the timing of the notice of alibi given by the defence and the impact on its ability to investigate.

Assessment of the Alibi

[102] On this point, I have considered the authorities relied upon by the Crown, and its invitation to discount the weight of the alibi in the circumstances. I have also considered the following decisions: **R. v. Letourneau** (1994), 87 C.C.C. (3d)

481 (B.C.C.A.), leave to appeal refused (1995), 102 C.C.C. (3d) (S.C.C.), **R. v. Nelson** (2001), 147 O.A.C. 358 (Ont. C.A.), **R. v. Wright** (2009), 98 O.R. (3d) 665 (Ont. C.A.), **R. v. J.B.J.**, *supra*, **R. v. Wingfield**, 2013 NSSC 73 and **R. v. W.(N.)**, 2017 NSPC 38/2017 NSPC 39.

[103] It goes without saying that the Crown received late notice of the alibi in this case. In its cross-examination, the Crown inquired about why Christian did not immediately disclose his alibi when questioned by police. Broadly speaking, he said that he took advice and I infer he followed it by not speaking to police.

[104] There are settled principles that apply. It is not permissible to draw a negative inference against alibi evidence on the basis that the accused did not disclose it immediately, nor is it proper to draw an inference that an innocent person would have made immediate disclosure (**R. v. Gleghorn**, *supra*, at para 25 and **R. v. W.(N.)**, 2017 NSPC 39 at paras 149-157).

[105] It is appropriate to consider the impact of very late disclosure of alibi evidence. Notice of alibi evidence has two components: (1) timeliness; and (2) adequacy. The conduct of this case raised the first component. The Crown objected to the late notice on the basis that it hindered the ability to investigate. This was an entirely reasonable position. Late disclosure has the potential to

weaken alibi evidence. But it is not a basis to exclude it. The question is what weight can be given to it in the circumstances.

[106] I consider that the Crown received notice of the alibi after the trial started but before it closed its case. Upon receiving notice, the Crown sought an adjournment to permit investigation. An adjournment was granted. An investigation ensued and statements were taken from witnesses.

[107] As a result of the investigation, the Crown chose to offer the evidence of Alexandra Lewis and Deputy Sheriff Smits as part of its case. The Crown vigorously cross-examined the defence witnesses. Although notice to the Crown came very late, it conducted an investigation. The Crown did not request more time or better particulars. The issue was well canvassed, if not exhaustively canvassed, before the trial concluded. The Crown says that it did not do the investigation it would have done had it received more notice. That may be true. But it did not connect the tight time frame with a specific deficiency in its case or lack of ability to respond. Rather, the Crown was able to lead evidence on the issue and cross-examine the defence witnesses thoroughly.

[108] The Crown cross-examined the defence witnesses on the timing of disclosure. I listened carefully to this evidence. Neither Christian nor Mary Lewis

seemed wise to the complexities of alibi notice. There was certainly no hint of a contrived attempt to defeat a police investigation. There was no suggestion that Mary did not cooperate with the investigation when it did take place.

[109] I credit the Crown with moving quickly to respond to late notice. In the end, the alibi was well tested at trial. The Crown's point was made with the evidence of Alexandra Lewis. Had she been questioned closer in time to the offence she may have had a specific recollection. I consider it unlikely that Mary's evidence would be different if she had been questioned earlier. As I say this, I recognize that I do not have any evidence from Mary on Christian's broken tooth. She was not asked about her memory on that point.

[110] Having considered the late notice and heard the evidence on the alibi at trial, I consider the evidence worthy of weight notwithstanding the late disclosure. In my view, there was no basis to reject the testimony of either Christian or Mary Lewis on this point. But I am hesitant to accept it outright given the late disclosure, the compressed Crown investigation, and the lack of any other evidence on the issue of the tooth injury. Although it appeared fulsome, there were parts of the alibi evidence that were left unexplored. These considerations mean that I am not prepared to accept the alibi as a direct path to acquittal in this case.

[111] I do however, think it is capable of supporting a reasonable doubt, when one considers the overall quantity and quality of the identification evidence.

Overall Assessment

[112] In the event that I am wrong on my assessment of the alibi evidence, I want to be clear that even if I found it did not raise a reasonable doubt in my mind, I am not satisfied that the Crown has proven identity beyond a reasonable doubt. I say this on the basis of concerns I have with Albert and Dustin's credibility. Their identification of Christian and his broken tooth is the only evidence connecting him with the offences. There are no other identification witnesses, no fingerprints, no blood evidence, no social media or telephone connections. Just the evidence of Albert and Dustin. In the circumstances, and among other things, I must be satisfied that their evidence is credible to the required standard.

[113] As noted earlier in these reasons, I found the evidence of Albert and Dustin inconsistent and suspect. They were both evasive and combative and left me with the impression that they were not completely forthright. I found portions of their tale implausible. Unfortunately, nothing about the evidence of Shauna Howell assisted in resolving my concerns.

[114] In contrast, Christian was a quiet and measured witness. He listened to the questions asked and gave direct, fulsome, consistent and plausible answers. His testimony had a tone of compliance that was completely absent from the evidence of both Albert and Dustin. Christian's sister gave consistent, albeit general testimony, and his grandmother remained unimpeached after extensive cross-examination. But I am not engaged in a credibility contest.

[115] The lingering question in my analysis of the evidence has to do with the evidence about Christian's upper front tooth. I would be inclined to accept Christian's evidence outright if not for this issue. I take the Crown's point that it seems like an incredible coincidence that the perpetrator of the attack on Albert would have a broken upper front tooth and so would Christian.

[116] Christian admitted that he had a "chipped" front tooth on September 1, 2018. He said that it occurred about a week before and gave a plausible explanation. He said that it was repaired in December of 2018. The police were aware of his broken tooth when he was questioned. The interviewing officer had no recollection and could not testify about his observations of Christian's tooth or mouth area. Albert described his injured assailant as having a "mouth full of blood" and "bloody teeth". There was no description of a chipped or broken tooth. Dustin did not mention observing any blood and was inconsistent in his description

saying that it was a “gap” and later “a broken tooth”. I could attribute the inconsistencies in the evidence of Albert and Dustin on this point to flawed observations impacted by a traumatic experience. The real problem is - I do not believe them. For two people who say they experienced the same set of events, I consider their evidence materially inconsistent except for their identification of Christian Lewis.

[117] In the end, I have a reasonable doubt as to the credibility of both Albert and Dustin. Their evidence is imperfectly entangled. I do not consider it safe ground on which to accept that the identification of Christian Lewis is proven.

Conclusion

[118] In conclusion, I find that the alibi evidence offered by the accused raises a reasonable doubt notwithstanding the late notice to the Crown.

[119] More importantly, if I am wrong about my assessment of the alibi evidence, I do not accept the identification evidence of Albert Bernhardt or Dustin Rogers. Their evidence left me with a doubt about their credibility. On the basis of their evidence, I am not satisfied of identification beyond a reasonable doubt.

[120] Accordingly, I find Christian Lewis not guilty of all counts in the Indictment dated June 3, 2019.

Gogan, J.