

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Mitton*, 2021 NSSC 325

Date: 20211130

Docket: CRH 505889

Registry: Halifax

Between:

Her Majesty the Queen

v.

Austin Michael Mitton, Robert Victor Fraser, Andriko Jamal Crawley,
Matthew Francis Coaker, Geevan Nagendran, Kevin Edward Clarke-McNeil,
and Kaz Henry Cox

TRIAL DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: November 10, 12, 13, 14, and 15, 2021, in Halifax, Nova Scotia

Counsel: Rick Woodburn and Scott Morrison, for the Crown
Briann Smith, Q.C., for the Defence of Austin Mitton
Nicholaus Fitch, for the Defence of Robert Fraser
Raymond Kuszelewski, for the Defence of Andriko Crawley
Jonathan Hughes, for the Defence of Matthew Coaker
Hanna Garson, for the Defence of Geevan Nagendran
Mathieu Boutet, for the Defence of Kevin Clarke-McNeil
Kaz Cox, self-represented

By the Court (Orally):

[1] This trial was held in November 2021 after the first trial of 6 people, following an incident at the Central Nova Scotia Correctional Facility in Burnside on December 2, 2019. Evidence from the first trial could not be used in this trial. Evidence from this trial could not be used in reaching a decision with respect to the first trial.

[2] On the day before this trial was scheduled to begin the court was made aware that Mr. Marriott's legal counsel could not attend because a trial in which he was involved in Ontario was taking longer than scheduled. The Crown consented to a severance request made on behalf of Mr. Marriott. It was agreed that the severance would not delay this trial or the decision regarding it.

[3] Stephen Anderson was injured on the evening he arrived at the jail. He was assaulted and that assault included puncture wounds. Without prompt medical intervention he would likely have died.

[4] The charges on the indictment against 7 people are conspiracy to commit murder, attempted murder, unlawful confinement, aggravated assault, assault with a weapon, and obstruction of a peace officer.

[5] The North 3 Wing at Burnside has been described in the first decision and the evidence in the second trial was the same. I will not repeat that other than to note that time references are based on the time recorded on the video surveillance system.

Bouncing

[6] Some evidence was provided about the practice of "bouncing". It involves inmates wanting to get another inmate, whom they consider unacceptable, out of their living environment and moved somewhere else because they consider the person to be unacceptable.

[7] That can happen in a few ways. The person can be asked to leave. They can be issued a threat of violence or an ultimatum that if they do not ask to leave the unit they will be assaulted. Or they might just be assaulted on arrival. There was no clear evidence as to how severe an assault might be used to send that message.

Timing

[8] Stephen Anderson was admitted to North 3 on December 2, 2019. He entered the dayroom at 7:24 pm. He was assigned to Cell 8. There is no question that the person in that video is Stephen Anderson. He was strip searched upon his admission to the facility and no injuries were noted that would have required immediate attention.

[9] At 7:49 pm Mr. Anderson walked into his cell.

[10] Andriko Crawley, Austin Mitton, Kevin Clarke-McNeil, Matthew Lambert and Wesley Hardiman entered the cell just behind him. They were joined almost immediately by Colin Ladelpha who came from his cell on the second tier and Kirk Carridice who arrived a few seconds later. Their identities are clear from the video evidence. They arrived together. There is no indication that they were arriving randomly in that all just happened upon the idea at the same time. There is no signal that is evident from the surveillance video. There is nothing to suggest that they were arriving as two or more groups with different intentions. None was trying to stop any of the others. The altercation within the cell began almost immediately.

[11] Mr. Anderson entered his cell at 7:49 pm and within slightly more than 10 seconds the first of the other inmates were in the cell with him. And within a few more seconds there were 6 inmates in the cell with Mr. Anderson, and two were closing the cell door. A seventh inmate arrived about 10 seconds later. At the same time others arrived and faced the correctional officers who had responded to the commotion. The officers were trying to get to Cell 8 where they believed an assault was taking place and inmates had gathered in front of the cell and refused to move to allow them to get in. The cell door opened about 3 minutes after Mr. Anderson entered.

Inside Cell 8

[12] There was no clear and unobstructed view into Stephen Anderson's cell. The door was mostly closed and kept closed but there are a few seconds during which there is a somewhat obstructed view into the cell.

[13] When the door was opened Mr. Crawley, Mr. Mitton and Mr. Clark-McNeil came out with others. There was nothing to indicate that they had been fighting with each other or the others who had entered with them. There were no interactions among the group that would be consistent with some of them having gone into the cell to prevent Mr. Anderson from being assaulted.

[14] Seven people had immediately entered a confined space and as soon as they did that the cell door was closed and held closed behind them. It would be a very large delegation of inmates if the purpose were to propose to Mr. Anderson that he should ask the authorities to be removed from the North 3 dayroom. If the purpose were to deliver such an ultimatum there would be no purpose to be served by having it done in a confined space away from the view of the cameras and correctional staff.

[15] It was suggested that perhaps Mr. Anderson had attacked those individuals after they entered the cell. The presence in the cell of 7 people with a common purpose, the closing of the door behind the group upon entry, the holding of the door shut for about 3 minutes, and the extent of the injuries to Mr. Anderson would be inconsistent with that.

[16] When Stephen Anderson came out of the cell he was injured. He had not been injured before the incident. The injuries were sustained within Cell 8 between 7:49 pm and 7:52 pm. It is not reasonable to infer that he already had puncture wounds that were hidden from view by his clothing and the wounds and the blood coming from them were just not visible when he entered the cell.

[17] It is not reasonable to infer that Mr. Anderson injured himself. He was badly injured. Those injuries, including several puncture wounds, would not have come from a slip and fall or other mishap. Sounds could be heard coming from inside Cell 8. Correctional officers heard slapping, punching, scuffling, kicking, and moaning.

[18] It is not reasonable to infer that after Mr. Anderson went into his cell others arrived and a consensual fight happened to break out. It is a confined space. It is small, especially with 8 adult men in it. It would be a very awkward spot in which to hold a fight and an even more awkward space in which to watch one.

[19] The only reasonable inference from the evidence is that Stephen Anderson was assaulted.

Outside Cell 8

[20] Just as the first people entered Mr. Anderson's cell, at 7:49 pm, two inmates can be seen holding the door closed. The door was held closed by one or two people for about 3 minutes.

[21] B.J. Marriott, Kaz Cox and Robert Fraser who were sitting by the telephones on the far side of the dayroom walked over toward Cell 8. They did not pause to survey what was happening. They do not appear to have had any discussion about what might be happening and whether they should approach. They got up and left at the same time. They did not run. They walked over, clearly together and at the same pace. They did not go over to the door of the cell to get a look at what was going on. They turned and faced the correctional officers who were making their way toward the cell. Nothing about how that happened would suggest 3 people going over to watch a fight.

[22] Jacob Lilly took a position appearing to block access by the correctional officers. He was joined by B.J. Marriott, Kaz Cox, and Robert Fraser.

[23] Matthew Coaker walked over to the area under the stairs where the videogame consoles are kept. He looked at one, crossed over to the other side of the dayroom and seemed to be setting up to play. As things started to develop, he too came over to the area where the correctional officers were trying to get at the cell. He started toward Cell 8 just as Mr. Marriott, Mr. Cox and Mr. Fraser were arriving at the base of the stairs in front of Cell 8. Some other inmates were seated in the area just in front of the stairs under which Mr. Coaker had been looking at the videogame console. They turned around to look. They watched what was happening. Mr. Coaker strode over. He did not hesitate or check out what was happening before coming over. He briefly looked toward Cell 8 but made no effort immediately to look in to see what might be happening. He took up a position with B.J. Marriott, moved back toward the cell and continued to form part of the group of inmates gathered in front of the cell and facing the correctional officers. He was not vocal, and no correctional officer said that Matthew Coaker blocked their way toward the cell. But Matthew Coaker was not someone who just happened to be in the wrong place at the wrong time. He was not there to find out what was happening. He was there for a purpose.

[24] Geevan Nagendran can be seen running from the second floor of the range down to the area where the group had gathered. He had been taking a shower earlier and he arrived in front of Cell 8 once the commotion had begun. He did not just wander down to see what was happening. He ran and almost seemed to have leapt down the stairs. He was jumping about but his actions were consistent with those of a person who does not know quite what he is supposed to be doing. He went from the area where Mr. Cox and Mr. Marriott were facing the correctional

officers back to the area closer to the cell door. At one point he was standing directly in front of Cell 8.

[25] The interaction between the correctional officers and the inmates is significant. The correctional officers were clearly avoiding the use of physical force. They were not touching or laying hands on the inmates. The correctional officers were concerned that if they used any physical force they could be met with violence. They were outnumbered. They tried to convince the inmates to let them have access to Cell 8. But they could not push their way through without contacting the inmates who formed part of the group.

[26] Correctional Officer Shane Kent was in the dayroom while this was going on. He spoke with B.J. Marriott while trying to make his way to Cell 8. Mr. Marriott told Shane Kent not to put his hands on him. Correctional Officer Kent said that he kept his hands on his vest because he did not want to escalate the situation.

[27] That concern informed the way the inmates were required to act in order to prevent access to Cell 8. They did not have to act like an offensive line on a football team and push against the weight of the officers trying to get through. They could achieve the goal of preventing access by just taking up the space in front of the cell after observing that the correctional officers were not willing to use physical force to move them and were avoiding making any contact with them. One or two inmates could not achieve that. But a group could. Because the correctional officers had made the assessment that the use of physical force was not safe, the inmates could prevent them from gaining access to Cell 8 using a more passive approach. All they had to do was to stand in the way. They did not have to resist physical force with physical force. They just had to stand there. Presence in that sense was more than mere presence at the scene of a crime or being in the wrong place at the wrong time. The presence in that case was purposeful presence to achieve together what could not be achieved by acting alone.

[28] The correctional officers were not just trying to break up a gathering. They too had a purpose, and that purpose was obvious. They wanted to get into Cell 8. But they could not use physical force to do it. They were shouting orders to the inmates, who were not complying. This was not a situation in which a randomly placed group of individuals had gathered and were incidentally impeding the

progress of the correctional officers. It is clear from the video that their way was being blocked in a planned and coordinated way.

[29] Mr. Cox and Mr. Fraser came over together with Mr. Marriott. That happened at around the same time as the correctional officers in the dayroom called for assistance. Mr. Cox and Mr. Fraser were not going over to find out what might be happening or to get a look at what was going on in Cell 8. Neither Mr. Cox nor Mr. Fraser went over to get a glimpse of what was happening. Their attention is on the correctional officers, not on what might be happening in Cell 8. They face outward toward the correctional officers who are trying to get to Cell 8.

[30] Correctional Officer Kenneth Burns said that when he was in the dayroom, he kept asking to be allowed to get into Cell 8. He had a direct exchange with Kaz Cox. Mr. Cox told him that no one was getting into that cell. He said that he continued to ask, while hearing the sounds coming from the cell. Mr. Cox repeated that no one was getting in. While it is true that inmates do not grant or withhold permission for correctional officers to move about the dayroom, in the circumstances the officer had a choice of asking or using force. Using force would make matters worse.

[31] Correctional Officer Matthew Hicks was on duty that day as well. He also reported that he heard Kaz Cox say that "It's got to happen. It's going to happen." He said that Mr. Cox told him that he, Mr. Cox, was doing his job and Mr. Hicks was doing his. Correctional Officer Hicks said that Mr. Cox's voice was elevated but not aggravated.

[32] Of the individuals charged on this indictment, 3 went into Cell 8 and were inside that cell when Stephen Anderson was assaulted. They were Mr. Crawley, Mr. Clarke-McNeil, and Mr. Mitton. Mr. Fraser and Mr. Cox were part of the group of three who came over to take up a position in front of the correctional officers. Mr. Coaker walked over from under the stairway to join the group. Mr. Nagendran rushed down the stairs and became involved.

Lockdown

[33] Correctional Officer Kent heard someone say, "It's over." He could not say who said it but because of the way it was muffled he assumed it had come from inside the cell. The door opened and inmates inside the cell came out. Correctional Officer Kenneth Burns said that what he heard was "We're done", just before the door opened.

[34] As the group dispersed and inmates left Cell 8, Correctional Officer Burns said that he saw Andriko Crawley throw a punch at Stephen Anderson who was in a fetal position on the floor in the cell. Mr. Crawley was standing over Mr. Anderson and the punch made contact with Mr. Anderson's face. He also saw Austin Mitton kick Mr. Anderson in the face.

[35] Correctional Officer Hicks said that he could see into the cell. He could see Austin Mitton kick Mr. Anderson in the head as he was leaving the cell. He described it as a backwards "donkey kick".

[36] Inmates were gradually locked into their cells. Some went quickly while others did not. They can be seen on the video walking around the dayroom exchanging "props", which were various types of greetings and eventually made their way to their cells. There does not appear to have been any tension or confrontation amongst the inmates in the dayroom. On the evidence of Correctional Officer Dunham, a lockdown can take as little as 2 minutes or as long as 15 minutes. This one took about 4 minutes. There was nothing much unusual about it.

Stephen Anderson's Injuries

[37] When the nursing staff at the Burnside facility arrived in North 3 in response to a medical distress code, they were required to wait for the inmates to be locked down. Mr. Anderson was taken out into the hallway where they were waiting for him. He can be seen on the video walking out of the dayroom. He made a hand gesture over his head as he left. The fact that he did that does not suggest that his wounds were merely superficial.

[38] When Mr. Anderson got into the hallway he got down to the floor and sat there. He was in considerable distress. He was having extreme difficulty breathing, was bleeding from his nose and ear, one of his eyes was swollen shut and had a bruise on top of his head. He also had puncture wounds on his chest and back.

[39] A call was made to Emergency Health Services. The assessment on the site was that this was not a situation that could be dealt with there. Mr. Anderson required emergency hospital treatment. Mr. Anderson was handed over to EHS when they arrived. They transported him to the hospital and while they were on their way the EHS dispatcher notified the Provincial Trauma Team. They knew that they were dealing with puncture trauma.

[40] Dr. Michael Biddulph is a Provincial Trauma Team Lead. He was qualified as an expert in trauma medicine. That team is called out when a trauma is deemed to be significant enough to require specialized attention. Dr. Biddulph's role was to organize the team for intake and assessment. The members of that team arrived at the hospital and began planning to deal with the injuries that they had been told about. When Mr. Anderson arrived with EHS it was clear that he was in distress.

[41] Stephen Anderson was diagnosed with a tension pneumothorax. It is a more severe and life-threatening form of pneumothorax. The person breathes in, and the air goes into the chest, but it can't get out. That puts pressure on the entire cardiovascular system. If untreated a tension pneumothorax has an extremely high rate of mortality. That was the issue that had to be addressed first.

[42] A needle was inserted into Mr. Anderson's chest wall. When that was done there was immediate decompression. Air was released and Mr. Anderson's vital signs began to improve. Then a chest tube was inserted, and another big gush of air came out. The chest x-ray did not show anything other than a pneumothorax at that time.

[43] Mr. Anderson was eventually treated for multiple cuts. The puncture wounds were treated. They were cleaned and repaired. It was not possible to determine how deep they were. The lung was in good condition and there was no evidence of lacerations or tears on the lungs.

[44] Mr. Anderson was bandaged to create a seal for the chest cavity and the tube was left in his chest. He was handed off by the Trauma Team to General Surgery.

[45] Mr. Anderson remained in hospital for 40 hours. Without treatment he would very likely have died. But his injuries were resolved, and he was released from hospital without an extended stay.

[46] Stephen Anderson was seriously injured. Without treatment he would likely have died. The most serious of those injuries appear to have been the puncture wounds to the chest and back. No weapon was recovered but the only reasonable inference that can be made from those wounds was that a weapon of some kind was used to inflict them. That weapon did not go deep enough into the chest to injure the lungs and it is not known how deep those wounds were.

Conspiracy to Commit Murder – Section 465(1)(a) of the *Criminal Code*

[47] All of the accused are charged that they conspired to kill Stephen Anderson.

[48] My statement of the law in this case is the same as what was stated in the previous case.

[49] A conspiracy means that there must have been an agreement between two or more people, to commit a criminal offence, in this case murder, an intention of two or more people to agree and the intention to put the common design into effect. They need not have put the plan into effect and do not have to have done anything to further the plan. The crime is the making and agreeing upon the plan with the intent of carrying it out.

[50] It is not enough to prove that a person knew about the plan and may even have done some things in furtherance of the plan. They must have been part of a consensus to achieve the mutual criminal object here, murder. What a person does can be used to support an inference that they were part of that agreement, but the acts themselves are not part of the offence.

[51] A conspiracy need not be complex. It does not have to be created over months, weeks, days or even hours. It can be quickly devised and poorly executed or not even executed at all.

[52] The Crown must prove the specific conspiracy on the indictment. It is not enough to prove that the individuals charged had a plan to commit any unlawful act or an unlawful act not specified in the indictment. In this case, the Crown must prove beyond a reasonable doubt that there was a plan to murder Stephen Anderson. If the Crown can only prove that there was a plan to assault Stephen Anderson the conspiracy specified on the indictment has not been proven, so there is no conspiracy. There may be a plan in that case, but there is no conspiracy. To allow the Crown to prove that there was a plan to do something other than what is specified in the indictment would undermine the purpose of providing the particulars. That is to give the accused person information about what is being alleged so that he can have an opportunity to mount a defence.

[53] If the Crown cannot prove that there was a plan to murder Stephen Anderson, the conspiracy charge cannot be made out. In the context of conspiracy to commit murder, as opposed to the separate offence of attempted murder, the charge can be made out if the Crown proves that there was an agreement to cause serious bodily harm, knowing that it would likely result in the death of the person targeted. The actual intent to cause death is not required. In this case, the Crown

would be required to prove only that the plan was one to cause bodily harm so serious that it would likely result in the death of Stephen Anderson.

[54] The Crown contends that the conspiracy began at around 7:28 pm when Jacob Lilly and Brian James Marriott were on the telephones in the dayroom. Mr. Marriott was on the telephone. His conversation was recorded. It was words to the effect of “You go figure that out all right now”, and “Get 4 or 5 guys.”

[55] Mr. Marriott is not named on this indictment. He was not a witness. The statement may be admissible but even if Mr. Marriott’s statement is admitted, it does not change the outcome on this charge

[56] Mr. Lilly, when those words were spoken told the person to whom he was speaking on the phone that something was going on and that he would call them back. It was not made clear that Mr. Marriott was directing Mr. Lilly but the timing suggests that Mr. Lilly’s actions were in response to Mr. Marriott’s request.

[57] The Crown says that Mr. Marriott directed Mr. Lilly to go get 4 or 5 guys to deal with something or take care of something. Mr. Lilly moved about the dayroom speaking to a few inmates and motioning to others to come to Cell 28 which was assigned to Kaz Cox. Just after Mr. Lilly hung up the phone, he went to the second floor. He spoke there briefly with Robert Fraser. Mr. Lilly and Mr. Fraser went into Cell 28 at 7:28 pm. Mr. Cox was already in that cell with Matthew Coaker and Austin Mitton.

[58] Within one minute Austin Mitton left Cell 28. He walked around the dayroom for a short while, went to another cell, then to his own cell, then back to Cell 28 with the others.

[59] Mr. Marriott ended his telephone call within one minute of that. He stopped at Wesley Hardiman’s cell. Mr. Marriott went to Cell 28 and was followed by Mr. Hardiman.

[60] At 7:32 pm Jacob Lilly waved to Andriko Crawley. Mr. Crawley came over and went into Cell 28. Matthew Coaker who had briefly left the cell, arrived back in Cell 28 at about 7:34 pm. Mr. Lilly waved to Mr. Lambert who then went to Cell 28 at 7:43 pm. Kevin Clarke-McNeil arrived in Cell 28 at 7:44 pm.

[61] The group that gathered inside Cell 28 totalled 11 people. They were called together there. They can be seen entering that cell on the video. Of the accused on

this indictment, Mr. Cox, Mr. Fraser, Mr. Coaker, Mr. Clarke-McNeil, Mr. Mitton, and Mr. Crawley were all crowded into Cell 28.

[62] The only person on the indictment and not in Cell 28 was Mr. Nagendran. When Stephen Anderson arrived on North 3 Geevan Nagendran was having a shower. When the shower finished, he interacted with three people, very briefly before 7:49 pm. He spoke with another inmate, who is not alleged to have had anything to do with the assault on Stephen Anderson. He spoke to Wesley Hardiman. They motioned toward the phones, and it is reasonable to infer that they were talking about the use of the phones. He spoke briefly with Mr. McIntosh who motioned toward his beard. Mr. Nagendran provides barber services to inmates and the shaver kit was close by when the exchange happened. It is not unreasonable to infer that the discussion was about trimming Omar McIntosh's beard. So, at that stage, Mr. Nagendran went back to his cell, and it is reasonable to infer that he did so without knowing that Mr. Anderson was on North 3 and knowing nothing about any plan that may have been discussed in Cell 28.

[63] Each of those individuals in Cell 28 in the minutes before 7:49 pm were people with whom Mr. Cox had had some form of interaction in the previous hours. During those interactions, with some, a hand motion was made that could signify an intention to drink something. That was before Stephen Anderson arrived on North 3. If the gathering were planned before Mr. Anderson arrived, it could be inferred that the intent of the gathering was not to plan his assault. But the group did not wander into Cell 28. Some of them can be seen being summoned to Cell 28.

[64] Eleven adult men were gathered in a small space. There could be no question that it was cramped. It would be an uncomfortable place to carry out a routine or friendly conversation that could otherwise have been held in relative comfort of the dayroom. The group left the cell at 7:46 pm. What happened next is relevant to making the determination of whether it is reasonable to infer that the meeting was purely social.

[65] Several of the inmates from Cell 28 moved to a group of tables close to the base of the stairs under which Cell 8 is located. That group included Mr. Mitton, Mr. Crawley, and Mr. Clarke-McNeil. It also included Mr. Lambert, Mr. Hardiman and Mr. Carridice, all of whom later made their way into Mr. Anderson's cell.

[66] A smaller group of three, Mr. Cox, Mr. Fraser and Mr. Marriott went to the area around the phones across the dayroom from Cell 8. From that area they had a line of sight, under the stairs, to Cell 8.

[67] Mr. Anderson went into his cell at 7:49 pm, about 3 minutes after the group left Cell 28 on the second level. As soon as Stephen Anderson entered the cell Mr. Lambert could see him and stood up from his seat. He started toward Cell 8 a few feet away. Within seconds a group of 6 inmates were in Cell 8. They were Kevin Clarke-McNeil, Austin Mitton, Matthew Lambert, Wesley Hardiman and Andriko Crawley who had been gathered in the area close to the cell, and Colin Ladelpha who came down the stairs from his cell.

[68] The cell door was being closed by Jacob Lilly and Omar McIntosh. About 10 seconds later Kirk Carridice went in.

[69] B.J. Marriott, Kaz Cox and Robert Fraser walked over to the cell from across the dayroom. They did not approach in a way that would suggest that they were just interested in seeing what was going on. The three men walked over together, almost in step with each other and close together. They arrived as a group of three. They did not go to the cell to check out the commotion. They turned to face the arriving correctional officers. Mr. Marriott motioned for others to come over. Mr. Cox said that no one was getting in the cell.

[70] The movements of the individuals involved were not random. They were coordinated. Inmates filed into Anderson's cell seconds after he got there. Within seconds Mr. Lilly and Mr. McIntosh manned the door and shut it. Mr. Marriott, Mr. Fraser and Mr. Cox came across the dayroom as a group and took up a position before the correctional officers could get to the cell door. The inmates prevented the correctional officers from gaining access to Cell 8 by impeding their progress. Their posture was defiant. Their actions in blocking the correctional officers were intentional and their purpose was to prevent access to Cell 8.

[71] Just three minutes after the gathering in Cell 28, inmates entered Cell 8 while others closed the door and others blocked access. As soon as Mr. Anderson went into his cell the first group went into his cell. It is not reasonable to infer that they all simultaneously decided to go into Cell 8 and that others simultaneously decided to close the door while others just happened to block access by the correctional officers. There was nothing random about it. The effort by inmates acting together allows for the reasonable inference that the effort was coordinated,

with people having assigned roles discussed in the minutes before the assault took place.

[72] There was a plan.

[73] The Crown has not proven that the plan was part of a conspiracy to kill Stephen Anderson. If Mr. Marriott's words spoken at the phone and apparently acted upon by Mr. Lilly and Mr. Lilly's statement that something was about to happen, were admissible against the others, they do not provide proof that the plan included an intention to kill Stephen Anderson or to wound him so severely that his death was a likely result. The instruction to grab 4 or 5 guys is not proof of an instruction or plan to kill anyone. There is no evidence from what was said in Cell 28 to indicate that anyone discussed the potential that they would kill Stephen Anderson. There is no evidence from the preparation leading up to the assault that anyone intended that Stephen Anderson be killed or that this was part of the plan.

[74] The assault that did take place was serious and the evidence of the assault that did take place can be used, along with the other evidence, to make inferences about whether there had been a plan to kill Stephen Anderson. Stephen Anderson was wounded. He was not killed. He was stabbed in the chest and back with a weapon. There is no evidence about the size or nature of that weapon. There is no evidence about how deep the puncture wounds were though there was no damage to his internal organs. Mr. Anderson was cut and bruised. But the group left him conscious on the floor and stopped the assault before anyone was able to intervene. The reasonableness of the inference that there was an intent to wound Stephen Anderson as opposed to kill him or wound him so seriously that his death was likely, has not been negated by the evidence of the assault itself.

[75] It is reasonable to infer that the plan involved assaulting Stephen Anderson. The way the assault took place, in a confined space, with 7 individuals, with the door being held closed and efforts made to prevent intervention by correctional officers, allows only for the reasonable inference to be made that bodily harm to Mr. Anderson was the intended objective of the plan. The evidence does not establish beyond a reasonable doubt that the plan involved murder, whether that is established by intent to kill or by intent to inflict serious wounds likely to cause death.

[76] Each of the accused is not guilty on the first count of the indictment charging conspiracy to commit murder.

Attempted Murder – Section 239 of the *Criminal Code*

[77] All of the accused are charged with the attempted murder of Stephen Anderson.

[78] The charge of attempted murder is particularly difficult to prove. As my colleague Justice Hunt noted in *R. v. Baxter*, 2019 NSSC 274, at para. 104, it can be harder for the Crown to prove attempted murder than to prove murder itself. That is because of the requirement for the proof of the mental element of intent. It is the specific intent to kill. If the victim dies, there are some mental elements other than the intent to kill that can lead to a conviction. If a person is reckless as to consequences of an assault or anticipates that their actions may or probably will result in the victim's death, they can be found guilty of murder. But for attempted murder there must be the specific intent to kill. *R. v. Ancio*, [1984] 1 S.C.R. 225, at page 248.

[79] The fact that a person stabs another with life threatening results is not, alone, evidence of an intent to kill that person. It is not enough for the Crown to prove that the assailant intended to cause bodily harm that they knew was likely to cause death and were reckless as to whether or not the victim died. The specific intent to kill must be proven. The evidence of that specific intent can be drawn by inference from circumstantial evidence. There must be some evidence, from which the trier of fact can infer that the stabber intended something more than the actual consequence of the wound.

[80] Repeated stab wounds to a vital area might provide circumstantial evidence of an attempt to kill despite the fact that the victim of the stab wounds survived. The inference can be drawn that the person who did the stabbing wanted to kill the victim but was not successful. In that situation the inference that a result other than death was intended would have to be found to be unreasonable.

[81] In this case, there is no evidence apart from the assault itself that supports the inference that those involved in the assault intended to cause the death of Stephen Anderson. There is no evidence that anyone said anything about killing him or used coded language to that effect. He was clearly very badly beaten. Had he not received treatment he likely would have died. But he did not.

[82] It could be argued that the severity of his wounds, which included puncture wounds to the chest and back, with lacerations and bruises to his head, would be such that would allow for the inference to be made that the people who inflicted

those wounds wanted him to die. The evidence is also consistent with the inference that those who wounded Stephen Anderson wanted him to be wounded badly. But the evidence shows that at some point, when Stephen Anderson was still conscious and sitting on the floor those inside the cell stopped. Nothing had intervened to prevent them from continuing with the assault. They could have continued. They did not. That is consistent with the inference that they did not intend to kill him.

[83] Mr. Anderson was stabbed in the chest and back by using something. A weapon was not recovered. Whatever it was, it was sturdy enough to inflict puncture wounds to the chest and back. It may be reasonably inferred that if someone were seeking to inflict injuries that would result in the highest probability of death the target would be the neck. If a large group of men entered a small space intent on killing another and they were armed with even a rudimentary weapon intended to make a puncture wound, it would be reasonable to assume that they would have achieved their purpose. The facts Mr. Anderson was not killed, and the assault stopped without any external cause, support the inference that the intent was not to kill him.

[84] As with conspiracy to commit murder, attempted murder does not allow for any included offences.

[85] Each of the accused is not guilty of attempted murder.

Aggravated Assault – Section 268(1) of the *Criminal Code*

[86] All of the accused are charged with committing aggravated assault. Aggravated assault involves an assault by which the person is wounded, maimed, disfigured, or has their life endangered. To be convicted of the offence the person does not have to have intended to wound or disfigure or endanger the life of the other person. They must only have intended to assault them with the “objective foresight of bodily harm”. *R. v. Godin*, [1994] 2 SCR 484. The offence is proven if the assault has the consequence of wounding, maiming, disfiguring, or endangering the life of the other person in circumstances in which it is reasonable to foresee the infliction of bodily harm.

[87] It has been proven beyond a reasonable doubt that the assault on Stephen Anderson involved at the very least wounding. He was beaten when attacked by several men in a confined space. Anyone involved in the plan to have one person assaulted in a cell by a group of 7 others, behind a door held closed, over a period of time permitted by preventing correctional officers from intervening, could not

have reasonably foreseen anything less than bodily harm. It is not reasonable to infer that the intent of the plan was simply to assault Mr. Anderson in a way that involved a use of force that did not extend to causing bodily harm. Those involved need not have precisely calibrated the anticipated level of bodily harm. There is a broad range of injuries within the scope of bodily harm. But when bodily harm would be reasonably foreseen, and the person is wounded, that is an aggravated assault.

[88] The assault was undertaken as part of a coordinated effort or joint enterprise that had been planned minutes before. While the words spoken by Mr. Marriott and Mr. Lilly at the telephones do not support the inference of an intent to kill, they could be interpreted as the start of plan to assault Stephen Anderson. The co-conspirators' exception to the hearsay rule may apply in prosecutions for substantive offences alleged to have been committed in concert. The safer course however is to not make use of them in determining whether there was a plan. The existence of a plan to assault Stephen Anderson can be reasonably inferred from the gathering in Cell 28 and the coordinated actions of those involved leading up to the assault. Those involved in giving effect to that plan were working together toward a purpose. Section 21(1) of the *Criminal Code* makes anyone a party to an offence if they actually commit the offence, do anything to aid the person committing it or "abet" the person committing the offence. To abet includes encouraging, instigating, promoting or procuring the crime.

[89] The evidence of a plan is circumstantial. There are no statements or intercepted communications in which those involved speak about who they are going to assault, why that person will be assaulted and how they will be assaulted. But as already noted in the discussion on conspiracy, the evidence of coordinated activity in the assault on Stephen Anderson, allows for no reasonable inference other than that it was part of a planned activity.

[90] The sequence of events from the gathering in Cell 28 to the opening of the door of Cell 8, cannot reasonably be inferred to have been random or the spontaneous actions of individuals acting independently. The coordinated actions in having several inmates quickly follow Stephen Anderson into his cell, having the door closed immediately and blocking access by the correctional officers, do not allow for a reasonable inference that the plan was simply to talk to Stephen Anderson. The nature of Mr. Anderson's injuries, along with the number of people involved, the confined space and the time during which the assault took place do not allow for a reasonable inference that the intent was merely to threaten, restrain,

push or in some other way assault Mr. Anderson without causing him bodily harm. The only reasonable inference that can be made is that there was a plan developed to have several inmates assault Stephen Anderson, causing him bodily harm, while others held the cell door closed and others blocked access.

[91] When Stephen Anderson went into Cell 8, he was followed within seconds by Andriko Crawley, Austin Mitton, Kevin Clarke-McNeil, Matthew Lambert, and Wesley Hardiman. They were joined by Colin Ladelpha and later Kirk Carridice. When the door opened and they left the cell, there was no evidence that they had noticeable amounts of blood of their clothing or on their bodies. The argument was made that had they been involved they each would have been covered in blood, just like Mr. Anderson.

[92] Mr. Anderson was the only one with a significant amount of blood on his body and clothes. It is not reasonable to infer that Stephen Anderson inflicted the injuries on himself while others stood at a distance in the small cell avoiding contact with the blood spatter. One or more of the people inside the cell caused Mr. Anderson's injuries.

[93] There is no evidence as to which of the individuals who entered Mr. Anderson's cell assaulted him. The door was, for the most part closed. There was no evidence from Mr. Anderson as to who assaulted him. One person may have administered the blows and created the puncture wounds. Or all of them may have done so. People cannot avoid criminal liability for an assault in these circumstances by saying, "It could have been any one of us and because there is no proof of which one of us did it, none can be found guilty." All went into Stephen Anderson's cell in furtherance of the plan to assault him. They were all part of the group that facilitated that assault by overwhelming him with 7 people in a confined space.

[94] It is not reasonable to infer from the evidence that any of the three individuals named in this indictment who were in the cell, was there as a bystander. They each entered the cell purposefully and together. They had been involved in the gathering in Cell 28. They came down to the area outside Cell 8. They entered that cell as soon as Mr. Anderson went in. It is not reasonable to infer that they were there by chance. They were not there to help Mr. Anderson. And they were not there to watch a consensual fight in a small cell.

[95] It was argued that Mr. Anderson may have been the aggressor and that the inmates who caused his injuries were acting in self defence. The Crown would be

required to prove that the accused were not acting in self defence if there were an air of reality to the defence. There is no air of reality to the suggestion that Stephen Anderson presented a threat to the seven people who filed into his cell after him. There is no evidence of any aggressive words or behaviour by him toward them. Having 7 people enter the cell in rapid succession, having the door closed and held closed and remaining there for three minutes are not consistent with the suggestion that the individuals who entered the cell were acting in self defence.

[96] Mr. Mitton was involved as a party to the assault in Cell 8. He was also seen kicking Mr. Anderson in the head as he left the cell. Mr. Clarke-McNeil was also involved as a party to the assault in Cell 8. Mr. Crawley was involved as a party to the assault in Cell 8 and was also seen punching Mr. Anderson as he left the cell. All three could only have reasonably foreseen that Mr. Anderson would suffer bodily harm from such an assault and they are guilty of the offence of aggravated assault.

[97] Kaz Cox was part of the group that came over from the telephones and took up a position to block the correctional officers from accessing the cell. He can be seen on the video of the incident standing in front of the correctional officers. He confronted Correctional Officer Matthew Hicks. Correctional Officer Hicks gave evidence that Mr. Cox told him that "it" was going to happen and that he, Mr. Cox, was doing his job and the correctional officer was doing his. That statement reported to have been made by Mr. Cox can be used to support the inference regarding his intent. The only way the officers could have got by him would have been to use physical force or make physical contact with him. His intent, as inferred from his actions, was to assist those inside the cell in assaulting Mr. Anderson, by preventing the officers from accessing the cell to stop the assault. The only reasonable inference is that he knew, as part of the plan, that several inmates were assaulting Stephen Anderson in a confined space for a prolonged time and intended to cause bodily harm to him. Mr. Cox is guilty as a party to the aggravated assault.

[98] Robert Fraser was also part of the group that left the area around the telephones to come over to block the access to Stephen Anderson's cell by the correctional officers. Mr. Cox, Mr. Marriott, and Mr. Fraser were sitting at the telephones and started moving together toward Cell 8 just as the first inmates made entry. They did not pause to assess the situation. They do not appear to have talked about it or anything. They got up as a group of three and walked toward the area, as a group of three. They did not walk all the way to the cell and try to look in to

see what was happening. They turned and faced the approaching correctional officers. Unlike Mr. Cox, Mr. Fraser did not make any direct statement about his intent. He broke off from Mr. Cox and Mr. Marriott who were speaking with the correctional officers. Mr. Fraser backed his way closer to Cell 8. He appeared to look into the cell and backed away toward the next cell. He then moved forward toward where Mr. Marriott was standing. Mr. Marriott motioned toward other inmates in the dayroom apparently encouraging them to join the group in front of Cell 8. Mr. Fraser at that point did the same thing. He then moved back to the area closer to the cell.

[99] Mr. Fraser came over with Mr. Cox and Mr. Marriott when the incident began. It was part of a coordinated action. While at times Mr. Fraser seemed uncertain about what he should be doing, he formed part of the group that together prevented the officers from gaining access to Cell 8 to stop the assault on Stephen Anderson. He did not physically block any individual officer but added himself to the crowd that made it impossible for them to safely get to the cell. Mr. Fraser knew the purpose of his actions. He gestured for others to join the group. The larger the group, the more difficult it would be for the officers to get through. Mr. Fraser knew what was going on in Cell 8, knew that several people were causing bodily harm to Stephen Anderson and was part of the plan to facilitate that. In facilitating the aggravated assault on Stephen Anderson, Robert Fraser was a party to it and guilty of the offence.

[100] Mr. Coaker had been involved in the gathering in Cell 28. Presence in Cell 28 does not on its own establish participation in the plan to assault Stephen Anderson. Individuals may have been present who wanted no part in the assault. What individuals did after that meeting is relevant to the issue of their participation in giving effect to the plan. Mr. Coaker was under the stairway appearing to look at the videogame console. He did not seem to take note of the fact that people had entered Stephen Anderson's cell. But as soon as Mr. Marriott, Mr. Cox and Mr. Fraser started toward Cell 8, Mr. Coaker came over to join them. He walked directly to where Mr. Marriott was standing. He glanced briefly toward Cell 8 then turned toward the oncoming officers. He formed part of the wall of inmates standing in front of Cell 8. He remained in the area in front of the cell facing the officers. He was not standing with no purpose or with an innocent purpose. He was there to prevent correctional officers from gaining access to Cell 8 to stop the assault of Stephen Anderson.

[101] As the group left Cell 8, Mr. Coaker made hand gestures with his palms facing down, which could be interpreted as an encouragement to the others to calm down. That was after the assault had taken place.

[102] Matthew Coaker did not make physical contact with any correctional officer and did not block any individual officer. His intentional presence in that immediate area, while the officers were trying to gain access to the cell, facilitated the offence. He did not remain on the periphery. He was at the centre. But he was not in the wrong place at the wrong time. He put himself in that place and did so for a purpose. He backed toward Cell 8 at a time when there was ample room to move without pushing anyone out of the way. His presence in that area clearly had a purpose. He was acting with the others to prevent officers who would not use physical force from intervening in what Mr. Coaker knew was an assault involving the infliction of bodily harm to Stephen Anderson. By facilitating the offence, he was a party to the offence of aggravated assault.

[103] Geevan Nagendran was not part of the gathering in Cell 28. When Stephen Anderson arrived on North 3, Mr. Nagendran was having a shower. There is no evidence from which it can be inferred that Mr. Nagendran knew that Stephen Anderson had come into North 3 or that he was the new occupant of Cell 8. There is no evidence that would allow the inference to be made that Mr. Nagendran knew that there was a plan to assault Stephen Anderson. When he quickly arrived on the scene, apparently after hearing the commotion, it is reasonable to infer that he had no knowledge of what was going on. He may have determined that there was an altercation of some kind in Cell 8. It may be reasonable to infer as well that Mr. Nagendran knew that an assault was happening. That could be based on what was being said and done around him. But it can also reasonably be inferred that he knew nothing other than that an altercation of some kind was happening and that the correctional officers were trying to stop it.

[104] He cannot be found guilty as a party to an offence that he did not know was taking place. Mr. Nagendran is not guilty of aggravated assault.

Obstruction – Section 129(a) of the *Criminal Code*

[105] All those named on the indictment have been charged with obstructing the correctional officers engaged in the lawful execution of their duties.

[106] The officers who responded to the scene were functioning in the lawful execution of their duties.

[107] Mr. Mitton, Mr. Crawley and Mr. Clarke-McNeil were inside Cell 8 when the assault took place. None of them did anything that facilitated the obstruction of the officers. Assaulting Mr. Anderson in his cell may have given a purpose for the obstruction by those outside the cell, but it did not facilitate or encourage those actions. They are not guilty of that offence.

[108] Mr. Cox and Mr. Fraser came toward the cell together and formed part of the group who stood in front of the cell area. Mr. Coaker also formed part of the group or the wall that stood between the officers and the cell where the assault was taking place. Their purpose was to impede the access to that area by the correctional officers. They are each guilty of that offence. The factual basis for the conviction on obstruction is the same as the factual basis upon which liability for party liability to aggravated assault is based. Their actions were the same and they would be found guilty for two offences arising from doing the same thing. Furthermore, those inside the cell could only be convicted of aggravated assault, while those outside the cell would have been convicted as parties to the aggravated assault and convicted of obstruction. Mr. Cox, Mr. Fraser, and Mr. Coaker are guilty of obstruction. Those convictions are stayed.

[109] Mr. Nagendran ran down the stairs. His actions were consistent with those of a person who was not entirely sure what he should be doing. They could be interpreted as showing excitement or enthusiasm, but they are also consistent with some element of confusion. Mr. Nagendran was clearly aware that something was going on in the cell. The correctional officers arrived and were trying to get to Cell 8. They were saying that but even if they could not be heard there is no reasonable inference that can be made other than that Mr. Nagendran knew, from the way that officers and other inmates were standing, that the officers wanted to get to the cell. Mr. Nagendran eventually took up a position directly in front of Cell 8. Nothing prevented him from moving and he did not appear on the video to try to move away from the cell door. While he may have felt some institutional social pressure there was nothing that prevented him from moving away from that spot. He formed part of the group that stopped the correctional officers from getting to Stephen Anderson's cell. He was clearly aware that he was preventing the correctional officers from getting to Cell 28 where the assault was taking place. He is guilty of the offence of obstruction.

Unlawful Confinement – Section 279(2) of the *Criminal Code*

[110] Each of the accused is charged with unlawful confinement of Stephen Anderson.

[111] Mr. Mitton, Mr. Crawley and Mr. Clarke-McNeil were inside Cell 8 when the assault was taking place. They had Mr. Anderson inside that small space for about three minutes. The confinement in this case cannot be separated from the assault. There is no evidence that Mr. Anderson was confined before he was assaulted. He was not confined after the assault. He just happened to have been assaulted in a confined space. The purpose was not to restrict or limit his ability to move, it was to assault him. His inability to escape from the assault was integral to the assault itself. When a person is beaten in that way, their movement is restrained by the fact of the assault itself not by the commission of a separate offence.

[112] Because there was no unlawful confinement as an offence separate from the aggravated assault, none of the accused can be found guilty of that offence.

Assault with a Weapon – Section 267(a) of the *Criminal Code*

[113] No weapon was found that could be associated in any way to the assault on Stephen Anderson.

[114] The injuries on Mr. Anderson's body include puncture wounds. It would not be reasonable to infer that the wounds could have been inflicted by some part of the body of an assailant. The only way that they could have been made was using an object of some kind, which if used for that purpose would be a weapon. Mr. Anderson was assaulted using a weapon of some kind.

[115] There is no evidence as to which of the individuals inside the cell used the weapon. And there is no evidence as to whether anyone knew that one of the others planned to use a weapon or had produced a weapon. There was a plan to assault Stephen Anderson and the only reasonable inference is there was a common intention to cause bodily harm. But there was no evidence that the plan included a weapon or that any of the individuals on the indictment knew that a weapon was to be used.

[116] They are not guilty of assault with a weapon.

Summary

[117] Austin Mitton:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Not Guilty

[118] Robert Fraser:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not guilty

Count 6: Obstruction - Conviction Stayed

[119] Andriko Crawley:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Not Guilty

[120] Matthew Coaker:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Conviction Stayed

[121] Geevan Nagendran:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Not Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Guilty

[122] Kevin Clarke-McNeil:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Not Guilty

[123] Kaz Cox:

- Count 1: Conspiracy to commit murder - Not Guilty
- Count 2: Attempted murder - Not Guilty
- Count 3: Unlawful confinement - Not Guilty
- Count 4: Aggravated assault - Guilty
- Count 5: Assault with a weapon - Not Guilty
- Count 6: Obstruction - Conviction Stayed

Campbell, J.