SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Acosta*, 2021 NSSC 343

Date: 20211216
Docket: CRH No.: 504091
Registry: Halifax

Between:

Her Majesty the Queen

v.

Jose Manuel Acosta

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	October 25, 26 and 27, 2021 in Halifax, Nova Scotia
Oral Decision:	December 16, 2021
Written Decision:	December 16, 2021
Counsel:	Rick Woodburn, for the Provincial Crown Ian Hutchison, for Jose Manuel Acosta

By the Court (Orally):

Introduction

[1] Jose Manuel Acosta is charged with a six-count Indictment referable to firearms offences concerning a January 20, 2018 incident in Halifax. During the early morning hours of that winter day, Mr. Acosta encountered Halifax Regional Police (HRP) officers at the apartment building where he resided. The Indictment charging Mr. Acosta reads as follows:

> 1. that he, on or about the 20th day of January, 2018 at or near Halifax, in the Province of Nova Scotia, did unlawfully have in his possession a weapon or imitation of a weapon, to wit., a Smith and Wesson revolver for a purpose dangerous to the public peace or for the purpose of committing an offence, contrary to Section 88(1) of the Criminal Code.
> 2. AND FURTHER that he at the same time and place aforesaid, did possess a firearm, to wit a Smith and Wesson revolver, without being the holder of a license under which he may possess it, and in the case of a prohibited firearm or restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 91(1) of the Criminal Code.
> 3. AND FURTHER that he at the same time and place aforesaid, did possess a firearm, to wit a Smith and Wesson revolver, knowing that he was not the holder of a license under which he may possess it, and in the case of a prohibited firearm or restricted firearm without being the holder of a registration certificate for the firearm, contrary to Section 92(1) of the Criminal Code.
> 4. AND FURTHER that he at the same time and place aforesaid, did without lawful excuse use, carry, handle, ship, transport or store a firearm, to wit a Smith and Wesson revolver, in a careless manner or without reasonable precaution for the safety of other persons, contrary to Section 86(1) of the Criminal Code.
> 5. AND FURTHER that he at the same time and place aforesaid, did store, carry, transport a firearm, to wit a Smith and Wesson revolver, contrary to Storage, Display, Transportation and Handling of Firearms by Individuals Regulations, thereby contravening a regulation made under paragraph 117(h) of the *Firearms Act*, contrary to Section 86(2) of the Criminal Code.
> 6. AND FURTHER that he at the same time and place aforesaid, did possess a loaded restricted weapon, to wit., a Smith and Wesson revolver, together with readily accessible ammunition capable of being discharged in the same firearm and was not the holder of an authorization or license under which

> he may possess the said firearm, contrary to Section 95(1)(A) of the Criminal Code.

[2] The Crown called five witnesses and introduced 18 exhibits during the trial. The Defence elected not to call evidence. The HRP officer in charge of the investigation, Cst. Stephen Guzzwell, provided background evidence surrounding the circumstances leading to the arrest of Mr. Acosta. While in the Larry Uteck area of Halifax in response to a potential impaired driving offence, Cst. Guzzwell found himself in what he described as an "odd" situation.

Cst. Stephen Guzzwell

[3] During the early morning of January 20, 2018, the uniformed Cst. Guzzwell parked his marked police car at the main entrance to 56 Jacob Way, otherwise known as the Abigail I apartment building. He was responding to an impaired driving report and received information that the driver resided at this building. When he was unable to enter the main lobby of the secure building, Cst. Guzzwell proceeded down the side of the apartment complex to see about entering through the garage door. He then saw a taxi park in the nearby cul-de-sac and observed three or four people exiting the vehicle. The individuals, whom he thought to be males, "picked up pace" as they entered the building through the (now open) garage door. Cst. Guzzwell then made his way into the open garage door.

[4] Upon entering the underground parkade, Cst. Guzzwell saw a person crouched behind a nearby parked Honda Civic. He noticed a large liquor bottle on the ground behind the Civic. The person stood up and faced Cst. Guzzwell. The officer observed that the man's eyes were bloodshot. Cst. Guzzwell posed a number of questions and found the person to be evasive.

[5] To the left of the Civic, Cst. Guzzwell observed a parked Jeep Laredo. He heard a "rustling sound" and then saw a person crawling underneath the Jeep. As Cst. Guzzwell's "threat level was significantly increased", he radioed for back-up and unholstered his conducted energy weapon (taser).

[6] At this point Cst. Guzzwell observed through the window of the door by the garage door "a dark skinned male". Cst. Guzzwell declined the man's request that he open the locked door.

[7] Cst. Guzzwell next saw that the person who had been under the Jeep was now up and had moved out of his sightline. At this point Cst. Guzzwell was joined by

Cst. Nicole Bohemier, who arrived on the scene. She assisted him in placing under arrest the first male he had encountered, MC. The officers found a significant amount of cash on Mr. C. Cst. Guzzwell believed that Mr. C was under the influence of drugs and/or alcohol.

[8] Cst. Guzzwell next saw that the garage door was open and a male, whom he would soon identify as the accused, walk into the parkade. The two had a brief conversation and I accept the utterances attributed by Cst. Guzzwell to Mr. Acosta:

- that he lived in the building;
- that he knew Mr. C;
- that he had been drinking alcohol earlier in the evening with Mr. C; and
- that he offered to take care of Mr. C.

[9] Cst. Guzzwell described Mr. Acosta as having a "helpful demeanor". He noted that he did not appear to be angry, although he thought that Mr. Acosta "was too close for my comfort".

[10] Cst. Guzzwell did not take Mr. Acosta up on his offer to look after Mr. C. On cross-examination he acknowledged that there are many times when people are willing to assist to get others away from a situation. He asked Mr. Acosta to leave the area and "eventually he did". The officer then resumed his search of the parkade, whereupon he again observed the individual whom he described as a "dark skinned male". After briefly interacting with the man, DW, Cst. Guzzwell took him into custody.

[11] Constables Robert Arab and Nicholas Marinelli arrived on the scene. After Cst. Marinelli dealt with Mr. W, Cst. Guzzwell spoke with Cst. Marinelli. He learned that Cst. Marinelli had seized several items from under the Jeep. Cst. Guzzwell recalled that the seized items, including a revolver, were laid out on the hood of the vehicle. On cross-examination he agreed Cst. Marinelli was present when the gun was laid out on the hood.

[12] Cst. Guzzwell said that the items were found in a Gucci bag (exhibit 2) and consisted of:

- exhibit 3 – Nike gloves

- exhibit 4 – small plastic bag containing – at the time – a small quantity of marijuana;
- exhibit 5 – $169.10 (counted by Cst. Marinelli);
- exhibit 6 – 357 Smith & Wesson revolver; and
- exhibits 7 and 8 – 357 ammunition.

[13] Cst. Joseph Malcolm attended with his police dog and the dog assisted with locating a "hunting style" knife placed on one of the front tires of the Civic. Cst. Guzzwell did not know if the knife underwent forensic analysis. On cross-examination he clarified that a request for forensic analysis of the knife was never made.

[14] Cst. Guzzwell soon thereafter "unconditionally released" Messrs. C and W. The focus of the police investigation then turned to the question as to where the firearm came from. The revolver and other seized items were given to Det. Cst. Jonathan Beer of the Forensic Identification Section ("Ident") and on February 13, 2018 a warrant was ultimately granted to obtain Mr. Acosta's DNA.

Cst. Nicholas Marinelli

[15] Cst. Marinelli confirmed that he and Cst. Arab were dispatched as back-up and arrived at the point when Messrs. C and W were in custody. Cst. Marinelli escorted Mr. C to the rear of his police SUV and Cst. Arab took Mr. W there.

[16] Cst. Marinelli agreed on cross-examination that he made no notes of any of the physical contact he may have had with Mr. C. He maintained that he did not place handcuffs on Mr. C, although he agreed that Mr. C was handcuffed along with Mr. W. He agreed that he or Cst. Arab assisted Mr. C getting into the back of the SUV. He acknowledged the nearly four year passage of time and said, "I don't have a clear memory, I don't recall if I did". Later, he admitted it was difficult to recall the details of the night. Although he did not recall having physical contact with Mr. C, he agreed that it was possible.

[17] Cst. Marinelli was referred to his note from 2:05 a.m. on January 20, 2018 and acknowledged that he processed property belonging to Mr. C. He confirmed this to include money, a phone, keys and money clip.

[18] Given that Cst. Guzzwell thought that something might have been "stashed", Cst. Marinelli went behind the Jeep and noticed a leather strap hanging down from

the rear axle. He pulled out a Gucci bag, opened it and observed cash, gloves and marijuana. He then opened the zippered side pouch and discovered a hand gun. He removed the gun, unloaded it and then placed it with the other contents inside the bag. Later, Cst. Marinelli logged the items in at the police station property room. He said that he put on a pair of latex gloves while carrying out this task. The gun was placed in a box and then stored in an exhibit locker. He thought that he dealt with this item first and then went on to catalogue and store the purse and remaining contents.

[19] On cross-examination Cst. Marinelli remembered that while at the police station he logged the items and wore purple latex gloves. Cst. Marinelli had no memory of changing his gloves. He agreed that his notes record that he processed property but that there is no reference to gloves.

[20] While at the scene Cst. Marinelli said his normal practice would have been to wear latex gloves when handling seized items. In this matter, he is unsure and conceded that he did not make note of wearing gloves in his notebook.

[21] Cst. Marinelli recalled pulling the gun out of the purse with his hand in a claw-like position. He touched the stock or handle with two or three fingers. He said that he "made the gun safe" by pressing the cylinder release button; when the cylinder opened the six rounds fell out into the bag. Cst. Marinelli pushed the cylinder back and placed the firearm inside the bag.

[22] Cst. Marinelli recalled turning the bag over to Cst. Arab. Cst Marinelli showed the bag to Cst. Bohemier but could not recall if he showed it to Cst. Guzzwell. Cst. Marinelli acknowledged that the usual protocol would have been to contact Ident. He did not do this because he initially did not realize that there was a firearm. He described the entire experience as a "learning situation… here we are".

[23] On cross-examination Cst. Marinelli specifically denied laying the firearm out on the hood of a vehicle. He added that while they were in the garage he did not show Cst. Guzzwell the firearm.

Pamela Priest

[24] Pamela Priest was the project manager and site supervisor during construction of the Abigail I. She explained that the only access to the inside lobby of the building is through the use of a fob or by dialing a tenant and having the tenant "buzz" a person in. Similarly, she explained that the garage door can only be opened by those

tenants possessing a fob or clicker to open the large door. As for the person doors into the garage, they are considered fire exits and only open from the inside of the garage.

[25] Once inside the garage, Ms. Priest explained that there is no access into the area of elevators without a fob which has to be scanned on the small black box to the right of the door. These doors, like the fire doors, are hinged to automatically close.

[26] On cross-examination Ms. Priest agreed that the fire doors can be opened from the inside and do not require a fob. She agreed that if one knows where the emergency garage door button is located, the garage door can be opened without a clicker or fob. She added that the building has a history of the garage door sticking and failing. Ms. Priest agreed that there have been occasions when people have accessed the garage without a clicker as it has been left opened.

Jonathan Beer

[27] Det. Cst. Beer is an Ident officer with HRP. He became involved in this matter in late February, 2018 when he received a request to process the seized exhibits. With the aid of 15 photographs of the exhibits, he explained how he carried out this task. On cross-examination he agreed that the exhibits were seized on January 20, 2018 and processed on February 28, 2018. During the time interval the exhibits were stored in a locker at the central main storage area of headquarters. Det. Cst. Beer was not responsible for storage of the items.

[28] While wearing a mask, smock and latex gloves (which he changed – to prevent cross-contamination – as he went from one exhibit to the next), Det. Cst. Beer catalogued and photographed the firearm and other retrieved items by placing them on a large table, which was covered in paper. On cross-examination he acknowledged that he did not replace the paper but that the table was long enough to spread out the exhibits. He agreed all of these precautions were taken to prevent his DNA from getting on the exhibits. On cross-examination Det. Cst. Beer agreed the lab is more controlled than a crime scene. For this reason, he stated that officers at a crime scene tend to change their gloves more.

[29] Det. Cst. Beer testified as to how he swabbed the muzzle, handle, trigger and chamber of the firearm. He noted that after the gun was initially photographed that a "crazy glue type fuming" was done to bring out any body secretions (oil, sweat). With the aid of the photographs he demonstrated how the process transformed the

clean looking firearm to one with "ridge detail". Det. Cst. Beer did not find any finger prints; however, the glue process did not affect the DNA extraction. Det. Cst. Beer explained that the coating actually provides a protection.

[30] Det. Cst. Beer explained how he obtained the swabs, noting his training from police academy and an eight week Ident "in-house" course. He estimated that by the time he completed these swabs that he would have completed hundreds of previous DNA swabs. He noted that he "completely swabbed" both sides of the trigger and trigger guard and that he swabbed "almost all of the firearm". He confirmed that the five swabs (exhibit 17) that he took are the same five swabs (B-1 – B-5) identified in Louise Cloutier's first report (exhibit 13).

Louise Cloutier

[31] An RCMP biology forensic specialist working in the Ottawa laboratory, Ms. Cloutier was qualified as an expert in: "interpretation and reporting of body fluid and hair examination results; interpretation and comparison of human DNA typing profiles; forensic application of statistics to forensic DNA typing results; formulation of conclusions; report(s)".

[32] Ms. Cloutier touched on her extensive *curriculum vitae* and reviewed her job duties with a focus on DNA analysis. The expert went through exhibits 13 – 15, her three forensic science and identification services laboratory reports generated in this matter. Importantly, she testified that the DNA swab of the trigger of the firearm (exhibit 6) seized was a "true match" for "Male 1", whom she identified to be the accused. In particular, she backed-up her conclusion that:

> 7. The DNA typing profile obtained from exhibit B-1 [swab of trigger of firearm] is of mixed origin consistent with having originated from two individuals.
>
>   a. The profile of the major component, previously designated as Male 1, matches that of the known sample, exhibit C-1 [Jose Manual Acosta]. The estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile is 1 in 6.2 sextillion.

[33] She added that in her opinion the above is what she considers to be a "rare profile". Ms. Cloutier bases this opinion on the fact that the swab demonstrates that the information is provided at "all 15 regions of interest". Accordingly, there is a "full profile" for Mr. Acosta.

[34] Ms. Cloutier reviewed portions of her working file (over 70 pages), the notes she made while completing her reports. She noted that the swab of the firearm trigger was 1.09 nanograms, representing a higher reading than the swabs from the revolver grip and muzzle or the rounds of ammunition. Based on all of what she reviewed, Ms. Cloutier stated that both quantitatively and qualitatively, the most complete DNA information came from Mr. Acosta, and not from the trace DNA detected from two other males on the other parts of the gun.

[35] On cross-examination she said that 1.09 was "not a big amount of DNA; however, enough to produce an interpretive profile". She agreed that the amount of DNA on a swab does not necessarily correlate with the amount that may have been on the firearm. She acknowledged that there could have been more DNA on the firearm. Further, Ms. Cloutier could not say when the DNA was deposited on the firearm or how it arrived on the swab. She could not say whether the transfer was primary or secondary. On cross-examination Ms. Cloutier agreed with detailed examples concerning how DNA can be directly and indirectly transferred.

[36] Ms. Cloutier explained how DNA can be transferred directly and indirectly or secondarily. She noted that DNA may "degrade" when exposed to environmental factors. On cross-examination Ms. Cloutier agreed that DNA degrades at different rates, depending on the conditions. Asked whether there at one time could have been more DNA from Male 2 than Male 1 on the gun, she answered, "possibly". She agreed that there is no "time stamp" indicating when the DNA was deposited.

[37] On cross-examination Ms. Cloutier agreed that the swabs were taken by the HRP officer and then sent to the laboratory for a three stage analysis. She agreed that whereas her first report (exhibit 13) refers to exhibit "B-1, swab of trigger of firearm", what was received from the police was labelled "swab of firearm trigger/chamber". Ms. Cloutier did not follow-up with this discrepancy.

[38] Ms. Cloutier confirmed that her work is reviewed pursuant to the Standards Council of Canada's quality assurance. This ensures that when work is carried out at the laboratory that there is no unwanted transfer of DNA or any contamination. She reviewed the safeguards including the wearing of masks, lab coats and sterile gloves (changed regularly). She noted that public access is restricted at the RCMP laboratories and that if there is any quality assurance protocol deviation that it is noted and investigated. Ms. Cloutier agreed that the protocols do not extend to police forces; "they have their own". She acknowledged that laboratory protocols do not extend to the crime scene but that when retrieving items police should wear

sterile gloves. Given various hypothetical situations (more will be said about these scenarios later in this decision) concerning the way that that a firearm could be dealt with at a crime scene, Ms. Cloutier acknowledged that it was "possible" to have DNA transfer occur.

[39] On re-direct examination Ms. Cloutier stated that while these scenarios were possible, "whether its probable… it's up to the Court".

Exhibit 18

[40] As with all of the exhibits, exhibit 18 was entered by consent. The exhibit confirms that the firearm in question is a Smith & Wesson, model 586-2, 357 Magnum calibre double action revolver, bearing serial number AZA0548 and the bullets are 357 Magnum calibre cartridges. Further, exhibit 18 contains an affidavit deposing:

> I, John William Parkin, Chief Firearms Officer, Provincial Firearms Office, in the City of Halifax, in the Province of Nova Scotia, so designated under the *Firearms Act*, S.C. 1995, C-39, hereby certify that I have access to the records of the Canadian Firearms Registry established under section 87 of the *Firearms Act* and that a search has been conducted of those records (known as the Canadian Firearms Information System) on September 28, 2020 and this search has disclosed that:
>
> Jose Manuel ACOSTA, 1987-11-24, does not possess a Possession and Acquisition License issued under the *Firearms Act*, S.C. 1995, C-29, and did not possess a Possession and Acquisition License issued under the *Firearms Act*, S.C. 1995, C-39 on January 20, 2018. Furthermore, no current application for a firearms license or firearm registration bearing the name Jose Manuel ACOSTA, 1987-11-24, has been found in the Canadian Firearms Information System.

Position of the Crown

[41] The Crown argues that all of the evidence points to Mr. Acosta's guilt. From Cst. Guzzwell's testimony they posit that the three or four men acted suspiciously from the moment they chose not to enter the apartment building through the normal front entrance and "picked up the pace" upon undoubtedly seeing the parked marked police car. The Crown points to Mr. Acosta's utterances revealing he lives in the building, that he was with the other men earlier in the evening and his attempts to have the police let him deal with Mr. C. When Cst. Guzzwell asked Mr. Acosta to leave, the Crown points out that he actually walked to the area deeper into the garage. The Crown says it is obvious why Mr. Acosta goes "way down there… because he

knows the gun is under the car and he's hoping the police don't find it. Whether or not the police find it, he has to get the police out of there".

[42] The Crown is prepared to concede that because it is not documented in his notes after he found the firearm, Cst. Marinelli did not don gloves at the crime scene. Nevertheless, they point to how he carefully handled the firearm. Further, the Crown submits that it "would not make any sense" for the officer to have laid the gun on the hood of the vehicle. As for Cst. Marinelli not changing gloves each time he handled the gun, the Crown says that this is not an issue because the numbering of the exhibits demonstrates, as he recalled, that he processed the gun first.

[43] The Crown submits Det. Cst. Beer followed proper protocols and that his DNA swab collection from all points of the gun produced a full profile. They point out that the only DNA profile – covering all 15 areas – is Mr. Acosta's, with the other DNA being the trace of two males. Further, the Crown submits that Mr. Acosta's DNA is found exclusively on the trigger and that one "has to be handling that firearm for it to be in that particular area".

[44] With respect to the hypotheticals put to Ms. Cloutier, the Crown questions their factual basis and submits that they do not equate with reasonable inferences. For example, they say there is no evidence that Cst. Marinelli put his hand on the gun after shaking hands with Mr. Acosta. Accordingly, the Crown's submission is that common sense dictates the "most reasonable scenario" is that Mr. Acosta possessed the illegal firearm and must be convicted of at least the first five of the six count Indictment.

Position of the Defence

[45] The Defence denies the Crown's assertions and submits that the Crown has not proven Mr. Acosta's guilt beyond a reasonable doubt. Mr. Acosta argues that possession is not made out from the Crown's evidence.

[46] The Defence acknowledges Ms. Cloutier's DNA conclusions; however, he points out that the fact that his DNA is found on part of the gun does not equate with the gun having been in his possession. The Defence also emphasizes that there are many problems with the way that Cst. Marinelli handled the gun such that the kinds of quality assurance Ms. Cloutier spoke of was not carried out, especially at the crime scene.

[47] Finally, the Defence argues that the evidence is such that there are a host of reasonable alternative inferences that should be preferred over the Crown's theory of the case. The Defence asks that all of the counts be dismissed and that the Court find him not guilty.

Law, Analysis and Disposition

[48] To determine whether Mr. Acosta is guilty of some or all of the six charges I must focus on whether or not he had possession of the firearm. Possession is defined by s. 4 (3) of the *Criminal Code*, RSC 1985, c C-46:

> Possession
>
> (3) For the purposes of this *Act*,
>
> (a) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[49] In *R. v. Pham*, 2005 CarswellOnt 6940 in Justice Kozak's majority decision he noted at paras. 14 and 15 :

> [14] Section 4(3) of the Code creates three types of possession:
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> (i) personal possession as outlined in s. 4(3)(a);
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> (ii) constructive possession as set out in s. 4(3)(a)(i) and s. 4(3)(a)(ii); and
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> (iii) joint possession as defined in s. 4(3)(b).
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> [15] In order to constitute constructive possession, which is sometimes referred to as attributed possession, there must be knowledge which extends beyond mere quiescent knowledge and discloses some measure of control over the item to be possessed. See *R. v. Caldwell* (1972), 7 C.C.C. (2d) 285, [1972] 5 W.W.R. 150 (Alta. S.C. (A.D.)); *R. v. Grey* (1996), 28 O.R. (3d) 417, [1996] O.J. No. 1106 (C.A.).
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> [my emphasis added]

[50] Constructive possession is key to this case. In deciding whether Mr. Acosta had some measure of control over the gun, I am mindful of further appellate decisions including *R. v. Stauth*, 2021 ABCA 88 and *R. v. Bjornson*, 2018 ABCA 282. In *Bjornson*, the Alberta Court of Appeal considered what is required to establish constructive possession, noting at para. 19:

> [19] To establish constructive possession under s 4(3)(a) of the *Criminal Code*, RSC 1985, c C-46 (Code), the Crown must prove that the accused: (1) had knowledge of the object, (2) knowingly put or kept the object in a particular place, whether or not that place belongs to him; and (3) intended to have the object in the particular place for his use or benefit, or that of another person: *R v Morelli*, 2010 SCC 8 at para 17, [2010] 1 SCR 253.

[51] Despite the Crown's submissions, given the evidence put forward, I have great difficulty concluding that the Crown has met its burden of proving Mr. Acosta's guilt beyond a reasonable doubt. Keeping the above jurisprudence in mind, I cannot fathom that the evidence discloses that Mr. Acosta had knowledge of the gun, knowingly put or kept it in a particular place and intended to have the firearm in the place for his use or benefit. Indeed, I find the Crown has failed to prove that Mr. Acosta had some measure of control over the firearm.

[52] Without question there is DNA evidence on the trigger of the 357 Magnum which matches Mr. Acosta's profile in all 15 areas. Nevertheless, the DNA evidence causes me concern, such that I am left with reasonable doubt surrounding possession of the gun. In this regard, I return to the testimony of officers Guzzwell and Marinelli. I found Cst. Guzzwell's evidence that the gun was laid out on the hood of the Jeep to be reliable and credible. On the other hand, I did not find Cst. Marinelli reliable or credible when he denied laying the firearm on the hood of the vehicle. Indeed, I found Cst. Marinelli to have had an unclear recall of events and he had no crime scene notes in this area to assist his recall.

[53] My doubt about the veracity of Cst. Marinelli's testimony is increased when I consider the officers' competing recall of observing the 357 Magnum at the crime scene. Whereas Cst. Guzzwell was convincing in this recollection of observing the firearm and how the presence of the gun heightened his concerns, Cst. Marinelli was less than convincing when he maintained that he did not even show the gun to Cst. Guzzwell.

[54] Obviously the firearm could have been contaminated when placed on the hood of the Jeep. There were further contamination opportunities when I consider how

Cst. Marinelli handled the gun without gloves following his interaction with Mr. C. When I consider this in the context of Ms. Cloutier's evidence, I am left with concerns about transference of Mr. Acosta's DNA being on Mr. C who in turn could have transferred it to Cst. Marinelli and ultimately the gun.

[55] Even if I ignore the evidence regarding potential cross-contamination, timing and degradation, I still am left with questions surrounding whether Mr. Acosta committed any of the crimes set forth in the Indictment. In this regard, I am cognizant of our Court of Appeal's decision in *R. v. O'Brien*, 2010 NSCA 61. In Justice Beveridge's majority decision he noted the role of DNA evidence at para 18:

> [18] It is well established that DNA evidence is simply a piece of circumstantial evidence. Like fingerprint evidence, it merely indicates that a person's DNA somehow got where it was found, not that a person committed the crime. (See *R. v. Terciera* (1998), 123 C.C.C. (3d) 1, [1998] O.J. No. 428 (C.A.), aff'd [1999] 3 S.C.R. 866). The Crown acknowledged that the DNA evidence in this case was the equivalent to that of a fingerprint. That is, if accepted, it established that at some point in time, the appellant had handled, or even worn the mask. It did not, without more, establish that the appellant had committed the robbery.
>
> [my emphasis added]

[56] In setting aside the conviction at trial, Justice Beveridge focussed on the drawing of inferences, as demonstrated at para. 27:

> [27] His reasoning process can be summarized as: the mask was worn by a person who robbed the store. The accused at some point handled or wore the mask. Ergo, he robbed the store. With all due respect, the trial judge needed to ask himself a further question: in light of the evidence, and bearing in mind the obligation of the Crown to prove beyond a reasonable doubt the identity of the accused as the robber, can I draw the inference that the accused was the person who robbed the store? By not asking this question, the trial judge failed to consider if there was any other explanation for the presence of the appellant's DNA on the mask along with other factors such as the presence or absence of other evidence on the issue of identity. There is no indication in the trial record that the appellant matched the description of the robber given by Ms. Coates, or as revealed on the tape. Fingerprints found on the piece of the cash register did not match those of the appellant. Although I note the trial judge observed that he was unable to say the robber was not wearing gloves, Coates did not say he was.
>
> [my emphasis added]

[57] In the within case I have to ask myself given all of the evidence, and bearing in mind the Crown's obligation to prove beyond a reasonable doubt possession of the gun, if I can draw the inference that it was Mr. Acosta who possessed the firearm.

[58] This is a case of circumstantial evidence. The Crown has encouraged me to opt for the "most reasonable scenario" and convict Mr. Acosta. The Crown adds that I should focus on Ms. Cloutier's evidence and not consider the possible hypotheticals presented in cross-examination, but the most probable. With respect, this is a criminal case, not a civil contest concerned with probabilities. In *R. v. Villaroman*, 2016 SCC 33 Justice Cromwell, on behalf of the unanimous Supreme Court of Canada discussed the proper approach to circumstantial evidence in the criminal context at paras. 27 and 28:

> [27] While this 19th century language is not suitable for a contemporary jury instruction, the basic concern that Baron Alderson described - the danger of jumping to unwarranted conclusions in circumstantial cases - remains real. When the concern about circumstantial evidence is understood in this way, an instruction concerning the use of circumstantial evidence and the reasonable doubt instruction have different, although related, purposes: see B. L. Berger, "The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated" (2005), 84 Can. Bar Rev. 47, at pp. 60-61.
>
> [28] The reasonable doubt instruction describes a state of mind - the degree of persuasion that entitles and requires a juror to find an accused guilty: Berger, at p. 60. Reasonable doubt is not an inference or a finding of fact that needs support in the evidence presented at trial: see, e.g. *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at pp. 600-610. A reasonable doubt is a doubt based on "reason and common sense"; it is not "imaginary or frivolous"; it "does not involve proof to an absolute certainty"; and it is "logically connected to the evidence or absence of evidence": *Lifchus*, at para. 36. The reasonable doubt instructions are all directed to describing for the jurors how sure they must be of guilt in order to convict.

[59] In order to convict Mr. Acosta I must beyond a reasonable doubt be sure of his guilt. I am not. In this regard, I am not at all persuaded that the Crown's scenario is the only logical inference that can be reasonably drawn from the evidence. Returning to *Villaroman*, Justice Cromwell highlights reasonable alternative inferences at para. 30:

> [30] It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. No particular language is required. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such

> evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. It may be helpful to illustrate the concern about jumping to conclusions with an example. If we look out the window and see that the road is wet, we may jump to the conclusion that it has been raining. But we may then notice that the sidewalks are dry or that there is a loud noise coming from the distance that could be street-cleaning equipment, and re-evaluate our premature conclusion. The observation that the road is wet, on its own, does not exclude other reasonable explanations than that it has been raining. The inferences that may be drawn from this observation must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[60] In *R. v. Ali*, 2021 ONCA 362, at paras. 97-98, the Ontario Court of Appeal explained the relationship between drawing inferences from circumstantial evidence and the Crown's obligation to prove its case beyond a reasonable doubt in the context of a jury trial:

> [97] An inference of guilt drawn from circumstantial evidence must be rooted in the evidence and must be the only reasonable inference available on the totality of the evidence. However, when the jury is considering whether the Crown has met its burden to show that guilt is the only reasonable inference, the jury is not engaged in fact-finding and is not limited to considering alternative explanations founded on the evidence. Instead, the jury is testing the force of the inference urged by the Crown against the reasonable doubt standard. In doing so, the jury can consider other reasonable alternative explanations for the conduct. Those alternative explanations may or may not lead the jury to conclude the Crown has failed to prove that guilt is the only reasonable inference available on the evidence: *R. v. Villaroman*, 2016 SCC 33, at paras. 28, 35-42.
>
> [98] In determining whether the Crown has met that burden in a circumstantial evidence case, the jury may apply its logic and common sense to the totality of the evidentiary picture, including gaps in that picture, and consider whether other reasonable possibilities not only exist, but preclude a finding that an inference of guilt is the only reasonable inference available….

[61] Here, I am mindful of reasonable alternative inferences. For example, although the Crown has asked the Court to infer that Mr. Acosta showed up to try to get the police away from discovering the gun, I can just as easily infer that he was trying to get his friend out of trouble. A further reasonable inference might be that anyone who knew that their gun was stashed in a garage with police around would flee the scene.

[62] In a recent case of circumstantial evidence, *R. v. Kennedy*, 2021 NSSC 211, Justice Arnold in acquitting an accused, drew on *Villaroman* noting as follows at para. 62 and 63:

> [62] In *R. v. Villaroman*, 2016 SCC 33, Cromwell J., for the court, noted that "in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt" (para. 30). He went on to explain that the modern state of the law is that inferences consistent with innocence do not require proven facts:
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> > [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts" ... However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts ... Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
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> > [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.
> >
> > [37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt ... I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused" ... "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. [Some citations omitted.]
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> [63] Justice Cromwell went on to contrast the approach to exculpatory circumstantial evidence to that governing inculpatory evidence, citing *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375, where the court stated that "[i]n

> the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation" (emphasis in original). The court explained that "according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed" (emphasis omitted). Justice Cromwell commented that the idea "that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative" was a helpful way of describing the line between "plausible theories and speculation" (para. 41).

[63] I have determined that the Crown has not met its burden in this case of circumstantial evidence. In doing so, I have examined the totality of the evidence, including the gaps. In my view, other reasonable possibilities not only exist, but preclude a finding that an inference of guilt is the only reasonable inference available. In the result, I hereby acquit Jose Manual Acosta of all counts.

Chipman, J.