Court File No.: 38129

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

-and-

DEAN DANIEL KELSIE

RESPONDENT
(Appellant)

-and-

DIRECTOR OF PUBLIC PROSECUTIONS OF CANADA,
ATTORNEY GENERAL OF ONTARIO, and
CRIMINAL LAWYERS' ASSOCIATION

INTERVENERS

FACTUM OF THE RESPONDENT

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. FACTUAL SUMMARY

1. The Respondent accepts the digest of the evidence at trial in Part I of the *Appellant's Factum* but will elaborate on aspects of it critical to the issues on appeal.[1]

2. The Respondent was an underling in a small drug dealing crew in which Neil Smith was the supplier and Wayne James and Paul Derry the primary distributors. He was assigned to keep watch when cocaine was being cooked into crack. He also delivered drugs and collected money for James, his uncle, to whom he was mainly answerable. He was addicted to crack cocaine. Steven Gareau, also an addict, was a close friend of Derry and Potts and sold drugs under Derry's direction.[2]

3. Plans to kill Sean Simmons originated with a barroom conversation among Smith, James, and Derry in which Smith – a Hells Angels member – said Simmons was to be "whacked" while making a hand gesture across his throat. Derry delegated Gareau to track down Simmons and was able to provide an address for him because it was Derry who had reported to James that Simmons was in Halifax. Gareau diligently begin looking for Simmons, knowing he was to be murdered.[3]

4. The Respondent was unaware of the plan to kill Simmons and the efforts underway to find him. Not until minutes before the shooting was there any suggestion that he commit the crime or play any role in it. He did not know the identity of the target nor of Gareau's role in hunting for him. James's sudden direction that the Respondent commit the crime and Gareau's appearance at the car near the muffler shop happened, from the Respondent's perspective, on the spur of the moment. Nothing was said in the car about any form of payment – in either cash or cocaine – for the crime the Respondent was directed to commit.[4]

5. Derry and Potts, the cornerstone of the Crown case, were dangerous witnesses. Derry was deeply implicated in the plotting of the murder and propelled it forward by commissioning Gareau to locate Simmons. It was Derry who announced, after receiving Gareau's phone call, that

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[1] Paras. 4-53 of the Nova Scotia Court of Appeal Judgment ("Court of Appeal Judgment") provide a comprehensive summary of the evidence: Appellant's Record ("A.R.") Part I, tab 2.
[2] Court of Appeal Judgment, para. 16.
[3] Court of Appeal Judgment, paras 22-24; A.R. Parts II-V vol. I, p. 2090; vol. VI pp. 2547-2558
[4] Court of Appeal Judgment, para. 27

Simmons could be found at 12 Trinity Avenue and Derry who drove them to the scene. It was he and Potts who disposed of the evidence afterward. Derry nonetheless managed to cast himself as a would-be police agent, seeking mainly to *halt* the murder he was stage-managing. He was presented to the jury as an honest witness despite his life of deceitful criminality and his manipulative part in carrying out the murder. He had every reason to minimize his role, his wife's role and the role of his friend Gareau, in the killing. Tina Potts had a comparable history of criminality and motivations parallel to her husband's.[5]

6. The Crown decided to place into evidence the Respondent's statement to the police, given on April 17, 2001 at Springhill Penitentiary where he was being held on unrelated drug charges. The statement was given spontaneously and emotionally, in response to unexpected questioning by the police. While the Respondent omitted reference to his uncle, James, and claimed the gun was originally passed to him by Derry, not James, the statement's essence was a fervent assertion that Sean Simmons was his friend, that he did not know Simmons was the target of the group driving to Dartmouth, and that when he was told this by Gareau he balked at going any further. Gareau then "took" the gun from him, committed the murder before his eyes, and thrust it back into his hands before running away.[6]

7. The Crown argued to the jury that the statement truthfully corroborated Derry and Potts's suspect evidence on sixteen specific points[7] but that its core – Gareau committing the murder with the gun the Respondent had been carrying – was false. The Crown maintained, however, that the Respondent was guilty of first degree murder *even if* the statement was substantially true and expressly incorporated into the Crown theory the proposition that the Respondent must have "provided" – i.e. voluntarily surrendered – the gun to Gareau since there was no indication in the statement of a struggle between them over the weapon.[8]

8. It was common ground that the Respondent returned to the parked vehicle with the gun in his possession and that the foursome sped away with Gareau having fled the apartment building in

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[5] Court of Appeal Judgment, paras. 8-15, 46-41, 98.
[6] Respondent's Statement, A.R. Parts II-V, vol. I, tab 21, p. 416
[7] Crown Closing Address, A.R. Parts II-V, vol. VII, pp. 3016-1319
[8] Crown Closing Address, A.R. Parts II-V, vol. VII p. 3021; Pre-charge submissions of the Crown, A.R. Parts II-V vol. VII, pp. 2976-77 2999, 3014-15; Charge to the Jury, A.R. Parts II-V vol. VIII, p. 3277

a different direction on foot. Derry and Potts testified that the Respondent admitted he had committed the murder upon his return to the car but there was no corroboration of this portion of their story. The defence contended that they were protecting Gareau who changed his appearance after the murder and disposed of the distinctive jacket he had been wearing (with Derry's help).[9]

9. Derry managed over the months following the murder to transform himself from a suspect into a police agent and worked to get the Respondent to implicate himself in the killing while in custody. The Respondent made reference in March 2001 – five months after the killing – to his awareness that it was a "hit" and responded eagerly to Derry's references to the "credit" that could be had for performing it. Derry was directing the path of the intercepted communications, key parts of which were inaudible and had to be interpreted for the jury by him.

B. AVAILABLE VERDICTS

10. The upshot of this evidence was that there was no contest over the fact that the Respondent was in the car on the trip to Dartmouth with at least two people who had taken steps toward murdering Simmons (Derry and James) and that in Dartmouth they met a third (Gareau).[10] The questions for the jury then reduced themselves to a handful, though they were hotly contested:

- Did the Respondent agree in the car to murder Simmons – to join the conspiracy that had been in place for some weeks?
- Did the Respondent commit the murder as a principal?
- If the Respondent did not commit the murder as a principal, did he provide the gun to Gareau voluntarily, making him a party to Gareau's culpable homicide?
- If so, did he have the mental state for a party to murder – knowledge that Gareau would murder Simmons?
- Did he plan and deliberate upon the murder or know that Gareau had done so?

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[9] Court of Appeal Judgment, paras. 30-33

[10] Evidence of Tina Potts, A.R. Parts II-V vol. IV pp. 1051-52, 1059-60, 1404-07. Potts testified she did not know what was going to happened but suspected "someone would get hurt" and was worried it would be Gareau.

11. The path to complete acquittal for the Respondent on these facts was very narrow, since he had joined the drive to Dartmouth contemplating at least some unlawful purpose (according to his statement) and taken possession of a gun to achieve that purpose, after receiving a short primer on its use. If the jury concluded he shot Simmons as a principal, he was guilty of murder. If what took place in the car satisfied the law's definition of planning and deliberation – cautious, thoughtful reflection on a carefully formulated plan – he was guilty of first degree murder.[11] If he gave the gun to Gareau, not knowing Gareau would murder Simmons but believing he would commit an unlawful act with a risk of bodily harm, the appropriate verdict was manslaughter. If he believed Gareau would use the gun to murder Simmons, he was guilty of second degree murder. If he knew Gareau had planned and deliberated upon the murder, he would be guilty of first degree murder (as he would be if he had planned and deliberated upon it himself).

12. The Respondent's narrow path to acquittal was a finding, or reasonable doubt, that he had renounced any role in an unlawful encounter with Simmons and that Gareau took the gun from him without any voluntary surrender of it by the Respondent, contrary to the Crown's allegation about the statement.

C. OVERVIEW OF THE RESPONDENT'S POSITION

13. The Court of Appeal found four errors, two related to the conviction for first degree murder (count 2) and two related to the conviction for conspiracy (count 1). Since the three-year sentence for conspiracy was completed in 2006, the most consequential of the errors are those related to the first degree murder count – except insofar as the Crown contends that the conspiracy conviction, if not based on legal errors, may cure the errors on the murder count.

(i) Errors on First degree Murder (Count 2)

14. The jury received literally no instruction on how to the determine whether, if it found the Respondent committed murder as a party to Gareau's killing of Simmons, he could be guilty of planned and deliberate murder; the only instruction to the jury on the mental state required of a party was erroneous and prejudicial to the Respondent. The Appellant apparently accepts that the trial judge erred in this regard but responds with two arguments, both invoking the curative *proviso*

[11] *R. v. Nygaard*, [1989] 2 S.C.R. 1074 at p. 1084; *R. v. Stiers*, 2010 ONCA 382 at paras. 66-68, at para. 67

in s.686(1)(b)(iii) *Criminal Code*. First, it argues that a verdict based on party liability was not reasonably available in this case as the evidence that the Respondent was a principal was "overwhelming". If so, the acknowledged error was harmless. Second, it argues that in convicting the Respondent of conspiracy to commit murder, on count 1, it implicitly found that he had planned and deliberated on the killing, rendering error in that aspect of the charge on count 2 harmless. [12]

15. There was a second ground of appeal before the Court of Appeal, related specifically to the conviction for planned and deliberate murder. The Court concluded that it did not need to address this ground in light of the other bases for allowing the appeal.[13] It is, however, a strong ground of appeal against the first degree murder conviction and is raised for this Court's adjudication. The jury was expressly told that it could consider the extensive body of co-conspirator hearsay evidence on the issue of planning and deliberation with *no* instruction or limitation whatsoever on its use – the hearsay was simply left as part of the evidence the jury was invited to consider against the Respondent. This error on planning and deliberation, unlike the other one, relates to the Respondent's liability as a *principal* in the shooting and arises from the primary theory of the Crown.

(ii) <u>Error on Failure to Leave Manslaughter as a Verdict (Count 2)</u>

16. The Court of Appeal also found an error in respect of the charge on party liability because the trial judge failed to leave manslaughter as an included offence even though the Respondent's statement that the gun was transferred from him to Gareau, who shot Simmons, compelled an inquiry into the Respondent's knowledge of what crime Gareau would commit with the gun and required a verdict of manslaughter unless it was proved beyond a reasonable doubt that the Respondent knew Gareau would commit murder.[14]

17. The Crown responds to this ground by saying that party liability should not have been left with the jury and that there was no air of reality to a verdict of manslaughter. In any event, the conviction for first degree murder, if upheld, can cure the error in failing to leave manslaughter as an included offence.[15]

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[12] *Appellant's Factum*, paras. 100-101, 113, 119, 134, 151.
[13] Court of Appeal Judgment, para. 136
[14] Court of Appeal Judgment, paras. 109-135.
[15] *Appellant's Factum*, paras. 100-123

(iii) Two Errors on Conspiracy (Count 1)

18. The Court of Appeal found two errors in respect of the conspiracy conviction, both related to the instruction on the co-conspirators exception to the rule against hearsay. First, it found that the judge erred in allowing the jury to consider, under the *Carter* principles[16], the out-of-court acts and declarations of Paul Derry who was a Crown witness but was *not* a member of the conspiracy to kill Simmons. Second, the Court of Appeal found that leaving with the jury the impression that the hearsay evidence was capable of proving beyond a reasonable doubt the Respondent's membership in the conspiracy, if the directly admissible evidence against him did not, presented a misleading view of the case; the Respondent's guilt of conspiracy stood or fell on the events in the car, in Dartmouth, minutes before the homicide that killed Simmons.[17]

19. To these grounds, the Crown responds that because Derry was a witness, there was no error in leaving his out-of-court acts and declarations as directly admissible evidence against the Respondent; they are not covered by the *Carter* rules. And the large volume of hearsay about everyone else's agreement to murder Simmons could assist the jury in deciding if the Respondent himself understood what he was agreeing to in the car in Dartmouth and was therefore of value and not misleading.[18]

(iv) The Respondent's Position

(a) *Position on the Errors*

20. Paul Derry and Tina Potts were singularly dangerous witnesses to rely on for truthful details and had personal reasons to lie about whether the Respondent or Gareau was the shooter. Not only was it possible for the jury to believe, or have a reasonable doubt, about the core facts asserted in the statement of the Respondent adduced by the Crown but the record suggests that at least some jurors *did* believe it, or entertain a doubt about it. There was no denying the need for accurate instruction on party liability for first degree murder, which was not provided.

21. Nor was there any legal basis for declining to leave manslaughter as a verdict. The Court of Appeal was correct in holding that when an aider is alleged to have provided a weapon to a

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[16] Court of Appeal Judgment, paras. 156-162
[17] *R. v. Carter*, [1982] 1 S. C. R. 938; Court of Appeal Judgment, paras. 140-165
[18] *Appellant's Factum*, paras. 59-75.

person who uses it to kill the victim, the knowledge of the aider about the likely conduct of the principal is an essential issue on which the jury must be properly instructed.

22. The clearest and most serious error on the conspiracy count was the first one – allowing the judge to consider the out-of-court hearsay of a past and future police agent, who was not a co-conspirator, as evidence of the Respondent's guilt under the co-conspirator hearsay exception. Derry's testimony was simply the means of putting in evidence his own acts and declarations during the conspiracy. His declarations and acts are nothing but prior consistent statements, in no way admissible for the truth of their contents.

(v) Position on the Curative Proviso

23. The Crown relies on an elaborate structure of reasoning to invoke the curative proviso and claim that all of these errors are curable. Its most sweeping contention is that party liability did not arise on the evidence before the jury. The Respondent submits it would be legally erroneous and a serious injustice now, on appeal, to conclude that party liability was all an illusion and the errors associated with it are meaningless. Moreover, there was a separate, fatal, error in the charge on planning an deliberation as a principal.

24. The Crown's overarching argument on the proviso is that the conspiracy conviction implies that the murder was planned and deliberate. On this reasoning, the error on planning and deliberation was harmless and the first degree murder conviction can be upheld. This, in turn, allows the error on manslaughter to be disregarded. The Crown claims this can be done if the Court of Appeal's determination that the conspiracy conviction rested on error is overturned.[19]

25. To this claim of two levels of curative reasoning, the Respondent submits first that the conspiracy verdict *did* rest on legal error. More importantly, however, the conspiracy verdict says *nothing* about planning and deliberation and cannot possibly salvage a faulty jury instruction on that key issue. On the contrary, in this case, the Respondent's rushed and pressured entry into the conspiracy – if it occurred– was almost certainly not planned and deliberate.

(vi) The Respondent's Position on the Merits of the Case

26. As to the underlying merits of this case – the justice of the verdict – the Respondent submits:

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[19] *Appellant's Factum*, paras. 132, 151.

- Even with a properly instructed jury, the verdict of first degree murder is difficult to justify factually and can barely pass a test of reasonableness, on appeal or at trial. The Respondent was suddenly conscripted into this killing minutes before it occurred, when told by his uncle – his *boss* – that he *had* to do it. He was a lowly member of the group, and a drug addict, probably under the influence of cocaine as the offence occurred.[20] He was surrounded by people who had been carefully planning the killing for weeks without him. He was handed a gun, along with gloves and a vest, and given hurried instructions then led to the scene on foot by Gareau who had been in on the plot for almost as long as Smith, James and Derry. The Respondent had only the briefest of opportunities to make a "carefully thought out calculated scheme", much less to deliberate on it in the cautious, thoughtful, reflective manner the law requires.[21] There is strikingly little evidence that he did either. This dubious verdict means that if the jury *was* improperly instructed on planning and deliberation – as it was, in two respects – the error is necessarily prejudicial.

- There was nothing facially implausible about Gareau, a close ally of Derry and Potts, a veteran criminal and a committed member of the conspiracy, who had set the stage for the murder with his hunt for Simmons and his call to Derry – taking over the killing when the Respondent, a friend of Simmons, balked at doing it himself.

- If that is what happened, there is no case that the Respondent believed Gareau himself had planned and deliberated on the murder and only a weak case that the Respondent had done the planning and deliberation himself during the sudden, improvised change of plan that put the gun in his hands in the car. The jury obviously needed correct instruction on what could make an aider guilty of first degree murder and it did not get them.

- Beyond that, it was a question for the jury whether the Respondent was guilty of first or second degree murder or manslaughter once he handed the gun to Gareau. The arguments the Crown advances to make that seem obvious– not even an *issue* – are not close to conclusive. No one had let the Respondent in on the plot beforehand. Even when Gareau

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[20] See the Respondent's description of himself as "coke induced": Respondent's Statement, A.R. Parts II-V vol. I, tab 21, p. 3

[21] *R. v. Aalders*, [1993] 2 S.C.R. 482 at pp. 502-504; *R. v. Nygaard*, [1989] 2 S.C.R. 1074 at p. 1084; *R. v. Robinson*, 2017 ONCA 645 at para. 34; *R. v. Stiers, supra,* at para. 67

appeared, no one told the Respondent that Gareau had been part of the plot for weeks and understood it was a planned murder. If the Respondent decided he could not go through with the ill-considered agreement he had made in the car, once the victim was identified as his friend, then his belief about what Gareau would do, once in possession of the gun, was a question to which the answer was in no way obvious. He might have anticipated the murder but he had no basis to think Gareau was the killer nor knowledge of any motive for him to kill, and could easily have expected that if the conflict was drug-related, it would result in a warning, threat or intimidation – or even a non-fatal shooting – rather than murder. If so, the Respondent's crime would be manslaughter, a verdict that should have been left in this case as it would be in any case where an aider provides a weapon to a person who uses it to commit murder. In this case, unlike the typical case, the belief would have to have been formed in a second or two – the time from his saying he could not do it to Gareau's taking possession of the gun. So, manslaughter was a real possibility in this case for the Respondent as an aider. Jurors could reasonably reject the Respondent's statement based on the Derry and Potts testimony and the Respondent's intercepted communications but it was entirely a question for the jury; the judge could not properly withhold the issue from them. Nor can a conviction for first degree murder, based on a charge with two serious errors, make the judge's failure moot – even if such reasoning were permitted by this Court's authorities, which it is not.

27. There is also an additional error not addressed by the Court of Appeal but advanced in this Court: the prejudicial instruction that a failure to achieve unanimity would be the "most undesirable result of all" at the conclusion of the trial.

D. ELABORATION ON IMPORTANT FACTS

28. There are four areas in which it is important that the facts be set out in greater detail than they are summarized in paras. 6-32 of the *Appellant's Factum*.

(i) <u>The Plotting of the Murder</u>

29. Sean Simmons had been suspected by Hells Angels of having an affair with the "mistress" of the Halifax chapter's president. He had left Nova Scotia for New Brunswick for some years but recently returned. It was Paul Derry who, meeting Simmons by chance at 12 Trinity Avenue in

Dartmouth, during a drug transaction, reported his presence to Wayne James. James, in turn, told the bikers' "clubhouse" about the reappearance of Simmons and reported back to Derry that Simmons was "probably going to get hurt".[22]

30. This led to a meeting at the Corner Pocket Bar where Derry, James and Neil Smith talked about Simmons and Smith "said he wanted him whacked and made a motion across his throat". That prompted James to say to Derry, "You heard him." This meeting, the inception of the conspiracy, took place a few weeks before the October 3 murder.[23]

31. Derry directed Gareau to find Simmons. Derry's attempt to locate Simmons, for the purpose of killing him, continued "from the day I met him pretty much until the day he died". Derry "left the onus" on Gareau to hunt for Simmons, "pushing" him daily about his efforts. Eventually, Gareau started to call Simmons's wife trying to track him down.[24]

32. Derry actively sought Simmons for the purpose of carrying out the murder. So did Gareau, who went to several meetings with Derry and James where the proposed murder was discussed. The Respondent, however, was at none of those meetings. On the evidence, the Respondent was not aware of, or involved in, the effort to locate Simmons and murder him.[25]

(ii) Gareau's Call and the Drive to Dartmouth

33. Gareau finally found Simmons on the afternoon of October 3, 2000 at 12 Trinity Avenue in Dartmouth. He called Derry in Halifax so that the murder could go ahead. Derry had Gareau repeat this to James, on the phone, and James then went into his apartment and emerged with a gun (earlier lent to him by Tina Potts) and with the Respondent. At that point, Derry and Potts drove with James and the Respondent to Dartmouth. Derry and James were in the front seats, with Derry driving. The Respondent and Tina Potts were in the back.[26]

34. There was no conversation on the drive to Dartmouth about Sean Simmons or the plan to murder him. The agreement was that James would do the killing, using the gun he had brought

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[22] Court of Appeal Judgment, paras. 17-20
[23] Court of Appeal Judgment, para. 21
[24] Court of Appeal Judgment, paras. 22-24
[25] Court of Appeal Judgment, para. 24; Evidence of Paul Derry, A.R. Parts II-V vol. VI pp. 2547-2558
[26] Court of Appeal Judgment, para. 26

with him. There was no role in the killing for the Respondent or for Potts who testified that she was also unaware of the trip's purpose or the group's target; she feared it was her friend, Gareau.[27]

35. Once in Dartmouth, Derry drove past 12 Trinity Avenue and then suggested to James that it would be "crazy" for him to commit the murder – as a six-foot black man he was likely to be noticed by witnesses. This, according to Derry, prompted James to decide, on the spot, that the Respondent would have to do the shooting. James handed the gun to the Respondent and said, "*You're going to have to do it then.*" James then showed the Respondent how to fire the gun. According to Potts, the Respondent agreed and asked for a pair of gloves, which she secured from a hair-streaking kit and which tore when he put them on. She also gave him a vest to keep the hood of his hoodie in place around his head.[28]

36. Derry stopped the car at a muffler shop around the corner from 12 Trinity Avenue. There, Gareau appeared by pre-arrangement with Derry. James gave Gareau $20 and told him to go with the Respondent to the apartment building, leave through the back door and meet them later at a bar.[29] Gareau was wearing a jacket with a prominent cat emblem on the back. He asked for some crack but was refused by James. The Respondent and Gareau left together for 12 Trinity Avenue with the gun in the Respondent's possession. Derry moved the car a short distance and parked beside some bushes.[30]

37. Derry estimated that five minutes later, the Respondent ran back to the car and entered the back seat. He was "excited", "anxious", "panicky", "out of breath" and "adrenaline-pumped". In answer to a question from James, the Respondent said he "shot him three times", describing one shot that "creased his head like a watermelon". The Respondent gave the gun to Potts who looked at it and said it had been fired.[31]

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[27] Court of Appeal Judgment para. 27; Evidence of Tina Potts, A.R. Parts II-V vol. IV pp. 1051-52, 1059-60, 1404-07. Potts said she expected someone to get "*hurt*", not shot, and feared it would be Gareau. The Respondent disagrees with *Appellant's Factum*, para. 11 on this point.

[28] Court of Appeal Judgment, para. 28
[29] Court of Appeal Judgment, para. 29
[30] Court of Appeal Judgment, para. 30
[31] Court of Appeal Judgment, para. 30

38. The gun, the Respondent's clothing and footwear, and another firearm, were then disposed of by Derry and Potts in two trips outside Halifax. The next day, Derry got rid of Gareau's distinctive jacket and observed that Gareau had cut off his long ponytail. Derry and Potts abandoned the car in Amherst. The police were able to recover the gun, some clothing and footwear, and the vehicle, after Derry and Potts began to cooperate with them.[32]

(iii) <u>The Respondent's Statement</u>

39. Gareau was arrested just days after the murder but the Respondent and James were not charged until April 17, 2001, more than six months later. The Respondent was at Springhill Institution when the police came to see him, without warning. He appeared surprised. The officers invited him to make a statement and he spoke at length.[33]

40. The Respondent acknowledged driving with Derry, Potts and James to Dartmouth on the day of the murder. He said he was under the influence of cocaine – "coke induced" – when the events occurred. He agreed he had come into possession of the gun – he claimed from Derry rather than his uncle – but denied shooting Gareau. He said that he had headed to 12 Trinity Avenue with Gareau but refused to carry on when Gareau told him the intended target was Sean Simmons, a friend of the Respondent. He said Gareau took the gun from him and shot Simmons inside the building then passed it quickly back to the Respondent and took off. The Respondent, shocked, ran back to the parked car.

41. The statement set out what the Respondent expected as the car headed toward Dartmouth and what happened when the group arrived:

> S/Sgt. Mosher: Okay, can you outline for myself and Constable LOMOND ahhh….what happened on that day and how you ended up over at ahhh…. At ahhh….Trinity Avenue where Mr. SIMMONS was shot? What your roll (sic) would have been in that.

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[32] Court of Appeal Judgment, paras. 31-34; Evidence of Constable Robert Lomand, A.R. Parts II-V, vol. VII, pp. 2882-2889, 2917-2923

[33] It may assist the Court to listen to the recording of the statement and appreciate the tone of the Respondent in speaking to the officers. The cassette tape was played for the jury and made an exhibit. A CD of the statement is provided in the Respondent's Record.

> Mr. Kelsey (sic): Ummm…*I was told that someone needed to be taught a lesson, whatever, I thought someone was gonna get just, you know, get taught a lesson.* And Paul picked me up in his car ummm….drove me to a location….ummm….passed me a gun. His pager went off and ahhh…. Mr. GAREAU comin' out….comes down the street. *I get outta the car with the gun you know, not with the intention to hurt anybody. I just wanted to frighten somebody, you know.* Ummm…then I found out who the individual was. Ummm…he was my friend. *So I….I back….I coward out, I couldn't do it….you know. And ummm…. The gun was taken from me.* Ummm….Mr. GAREAU went into the building. I followed. Mr. SIMMONS, ya know, greeted me with a hug. After we….after the embrace was over I turned and I heard shots fired. Ummm….Mr. GAREAU comes down beside me….(*Sighs)* ….I hear another shot and I'm….I was standing there. *He goes to pass….he goes….passes me the….the gun. I'm still in shock.* I….I don't know what just happened. I'm coke induced, whatever. I take the gun and I….I see him run, so I run. The only place I had to run was back to the car where Paul was waiting for me. Ummm….I give the….I give the gun to Tina and I go back down….and I went back to Halifax. (emphasis added)[34]

42. Continuing his statement to the police, the Respondent elaborated on his account, returning to the following points: the Respondent initially thought the trip to Dartmouth was for someone to be "taught a lesson"-- frightened; when the Respondent was told by Gareau the target was Sean Simmons, a friend, he could not continue and told this to Gareau; at that point, Gareau took the gun and shot Simmons himself; Gareau then "pressed" the gun back onto the Respondent and left the scene.[35]

(iv) <u>The Credibility and Motivations of Derry and Potts</u>

43. Paul Derry and Tina Potts were exceptionally dangerous witnesses for a jury to base any finding of fact upon and it is very likely that some jurors did not accept any part of their evidence that was not confirmed by other testimony. As the Crown stressed, much of their story *was* confirmed by the Respondent's statement to the police, especially as it related to events on the drive to Dartmouth and the sudden handing of the gun to the Respondent when James decided not to kill Simmons himself. This, however, was also true in the other direction – when the Respondent gave his statement to the police, he was not privy to the statements of Derry and Potts but much of the content of their statements confirmed *his* account. There was no obvious reason for the jury

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[34] Court of Appeal Judgment, para. 49; Respondent's Statement, A.R. Parts II-V, v. I, tab 21, p. 3
[35] Court of Appeal Judgment, paras. 50-51; Respondent's Statement, A.R. Parts II-V, v. I, tab 21, pp. 5, 8

to prefer the account of two skilled liars, wiggling out of liability for murder, to the spontaneous account of the unsophisticated Respondent when brought into a surprise interview with the police. How to assess the evidence of Derry and Potts against the statement of the Respondent was a key question for the jury.

44. The trial judge summed up the criminal histories of the couple, their profitable immunity deal, and Derry's central role in organizing the murder. He gave the jury reasons why reliance on their unconfirmed testimony would be "dangerous":

> When arrested for the murder of Sean Simmons, both Tina Potts and Paul Derry lied to the police. They were given immunity from prosecution in return for cooperating with the police and testifying in court.
>
> …
>
> Mr. Derry acknowledged that his primary purpose in approaching the police was to see if he could work an operation for them. In other words, he was looking to make money. Those two witnesses only approached the police with their stories when they perceived the possibility of some benefit to themselves.
>
> …
>
> … In the absence of any corroborating or confirming evidence, you should be reluctant to accept the evidence of Potts and Derry.[36]

45. The Court of Appeal made its own observations about Derry and Potts in rejecting the Crown's argument that their evidence was likely accepted, in total, by the jury:

> *It would not be unusual for them* [Derry and Potts] *to say whatever was necessary to deflect the blame from themselves and their friend, Gareau.* It would be extremely dangerous to rely on the evidence of Derry and Potts to conclude the case against the appellant was overwhelming. I would decline to do so.[37](emphasis added)

46. The issue on which Derry and Potts's credibility was most obviously important was their attachment to Steven Gareau. The couple had been personal friends with Gareau for years – he had begun as a drug client of Derry but eventually became close to both of them, looking in on Potts when Derry was away. He had come with them to Nova Scotia on a vacation in the summer of 2000 and moved with them to Halifax later that year. He participated in their bank card frauds. The couples' apartment lease and car registration were in his name. Even after his drug use led them to ask him to live elsewhere, they remained close. Derry trusted Gareau to hunt down

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[36] Charge to the Jury, A.R. Parts II-V, Vol. VIII, pp. 3197-3199
[37] Court of Appeal Judgment, para. 99

Simmons and, after the murder, Derry personally disposed of his jacket.[38] He and Potts continued to look out for Gareau's interests after he was arrested and in custody.[39]

47. It was common ground that the Respondent and Gareau walked together from the car to the apartment building. One of them shot Sean Simmons. An important question for the jury was whether Derry and Potts – both self-interested liars – would be prepared to lie to ensure that the Respondent, not their friend, was perceived to be the killer.

PART II: RESPONSE TO APPELLANT'S ISSUES

48. The Appellant, in paragraph 38 of its factum, sets out four questions which it says are in issue on the appeal. At the heart of this appeal, however, lie two issues about the Respondent's conviction for first degree murder that are not captured in the Appellant's list of questions:

> 1. The error of the trial judge in declining to charge the jury on the need for planning and deliberation to find the Appellant guilty of first degree murder as a party (an error apparently conceded by the Appellant).[40]
>
> 2. The error of the trial judge in charging the jury that they could use hearsay evidence against the Respondent in determining whether he planned and deliberated upon the murder. This ground was not addressed by the Court of Appeal but is raised here as reversible error incapable of being cured by the proviso in s. 686(1)(b)(iii) of the *Criminal Code*.

49. With respect to the Appellant's four questions, the Respondent submits:

1. *The NSCA erred in law in holding that Derry's evidence was not admissible against Kelsie at step 3 of the Carter test.*

50. Derry was not a member of the conspiracy to murder Simmons and his acts and declarations in the course of that conspiracy were accordingly not admissible under the *Carter* test. It does not assist the Appellant that Derry himself was the source of evidence about his acts and declarations.

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[38] Court of Appeal Judgment, paras. 10-15, 33.
[39] Evidence of Paul Derry, A.R. Parts II-V, Vol. VI, pp. 2821-2822.
[40] There are no submissions that the charge was not in error on this point.

2. *The NSCA erred in law in finding the acts and declarations of co-conspirators made prior to Kelsie joining the conspiracy could not assist the jury to find Kelsie to be a member of the conspiracy beyond a reasonable doubt at step 3 of the* Carter *test.*

51. Proof of the Respondent's membership depended on the direct evidence of his conduct in the car, minutes before the murder. It was misleading to suggest, as the jury charge did, that this large body of hearsay evidence could contribute to proving beyond a reasonable doubt that the Respondent became a member of the conspiracy.

3. *The NSCA erred in law in finding that there was an air of reality to the included offence of manslaughter.*

52. The Crown put in evidence a statement of the Respondent that was admissible for the truth of its contents. In that statement, he said that the gun was taken from him by Gareau because he was unwilling to use it against Simmons, his friend. The Crown expressly alleged that the Respondent voluntarily *gave* the gun to Gareau. The Respondent could have no knowledge that Gareau had been a participant in the murder plot for weeks and had set up the killing with his call to Derry a short time earlier. What the Respondent *did* believe about Gareau's intentions, at the moment Gareau came into possession of the gun, was a critical issue. If there was even a reasonable doubt that he knew Gareau would murder Simmons – but *did* believe there was a risk of violence – the correct verdict was manslaughter. This was a question on which the jury needed proper instructions and the failure to leave the verdict at all was a serious error.

4. *The NSCA erred in law in declining to invoke the curative proviso.*

53. Beneath this short sentence lies a series of arguments and much of the Appellant's claim for relief. The Respondent submits as follows:

(i) Party liability was a key issue for the jury and it may underlie the verdict of some or all of the jurors; the suggestion that the verdict rested solely on liability as a principal is untenable from the record and a reversal of the Crown's position at trial.

(ii) The conviction for first degree murder does not cure the failure to leave manslaughter as a verdict:

a. because in this case there were two serious errors in the charge on first degree murder itself, one related to the Crown's theory of liability as a principal and one related to its theory of liability as a party.

b. because authorities of this Court in any event preclude resort to a conviction for a greater offence to cure the erroneous failure to instruct the jury on a lesser offence.

(iii) The conviction for conspiracy cannot cure the errors in respect of the charge on planning and deliberation; a finding of planning and deliberation was not inherent in the conviction for conspiracy and the two errors compel overturning the trial verdict.

(iv) There was an additional error at trial in the instruction to the jury on unanimity that the Court of Appeal did not address but which should also preclude a holding that the convictions at trial ought to be restored.

PART III: STATEMENT OF ARGUMENT

A. CONSPIRACY

(i) The Relevance of the Issue

54. The Respondent received only a three-year sentence on the conviction for conspiracy in count 1 of the indictment. It was completed long ago. The primary practical relevance of the conspiracy conviction is to the Appellant's contention that it might assist in curing the defects in the first degree murder conviction. This proposition is addressed at greater length below. If the errors identified in the Court of Appeal are indeed errors, the conviction cannot serve that function. The Respondent submits that the charge on the co-conspirators exception to the hearsay rule, around which the instruction on conspiracy was built, was indeed defective in two respects and that the Court of Appeal made no error in this regard.

(ii) Admission of Hearsay Acts and Declarations of Derry (Appellant's Ground 1)

55. Derry, the Crown's main witness, was in many respects the driving force behind this murder. He reported Simmons' presence in Halifax; he arranged for Gareau to find him; he received the instruction that Gareau be "whacked"; he took the call from Gareau that Simmons was at 12 Trinity Avenue and passed it along to James; he, through Potts, was the source of the murder weapon; he drove the group to Dartmouth, where he had arranged for the rendezvous with Gareau; he drove everyone back to Halifax afterward and took the lead in disposal of evidence related to both the Respondent and Gareau. Despite all that, he was not a conspirator; indeed his

actions were said by him, and the Crown, to be directed toward *preempting* the murder, in consultation with law enforcement, so that he could be paid for his role in an "operation". At no point did he wish or intend to commit murder.

56. This meant, on long-standing and unchallenged authority, that Derry could not be the source of admissible hearsay evidence, available to the jury under the co-conspirators exception to the hearsay rule. The rationale for the exception – that each conspirator is an agent of the others – was completely inapplicable to Derry who was actively attempting to thwart the objectives of the conspiracy and hoping the real conspirators would be caught.[41]

57. The trial judge, however, left the acts and declarations of Derry to the jury on the conspiracy count as admissible evidence under the *Carter* test, as if he were, or could be, a co-conspirator. He did this in explaining both the first and third stages of the test:

> It is not necessary that Mr. Kelsie be the person who actually did the acts in furtherance of the conspiracy, or even that he understood it or knew about it. Similarly, it is not necessary that Dean Kelsie be the person who actually spoke the words in furtherance of the conspiracy, or even that he was there when they were spoken. A conspiracy is like a partnership in crime. Each member is an agent or a partner of every other member, and is bound by, and responsible for the words and conduct of every other member spoken or done to further their unlawful scheme.
>
> *Let me give you some examples of acts and declarations that can be viewed as being in furtherance of the object of this conspiracy.* Mr. James allegedly saying that the clubhouse was looking for Sean Simmons, or that he wanted to know when Sean returned to 12 Trinity. *Mr. James and Derry directing Gareau to go to notify them when Simmons returns to the apartment. Derry and James making efforts through Gareau to locate Simmons by having Gareau call the home of Sean Simmons*. Mr. Gareau leaving a message with Mrs. Simmons saying that Paul had work for Sean. Gareau attending the premises at 12 Trinity. Gareau notifying Derry and James on October 3rd as to the presence of Mr. Simmons at 12 Trinity. James retrieving the pistol from his residence before driving to Dartmouth. Gareau meeting with James outside the muffler shop before the shooting. Gareau proceeding to the residence in the company of Mr. Kelsie just before the shooting.
>
> Members of the Jury, *these examples are not exhaustive, but merely serve to give you an indication of the statements and actions which can be considered as being in a furtherance of a conspiracy to murder Sean Simmons*.[42] (emphasis added)

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[41] *The Queen v. O'Brien*, [1954] S.C.R. 666, pp. 667-668; *R. v. Chang* (2003), 173 C.C.C. (3d) 397 (Ont. C.A.), paras. 53-56

[42] Charge to Jury, A.R. Parts II-V, Vol. VIII, p. 3246-3247; See also pp. 3238-3239.

The Court of Appeal provides a more detailed examination of how the hearsay from Derry was woven into the charge on the conspiracy count through the *Carter* test.[43]

58. The Appellant agrees with all this but argues that evidence about Derry's acts and declarations was admissible against the Respondent because it came from Derry himself – he was a witness. It is here that the parties join issue.[44]

59. The rule in *Carter* begins with an affirmation of the rule against hearsay and creates a narrow exception for acts and declarations of fellow-conspirators. The rule says nothing about the means by which the hearsay is placed in evidence. Often the hearsay comes from intercepted communications. Sometimes it is heard and attested to by an undercover operative. It may be proved by completely uninvolved witnesses who saw the acts or heard the declarations. It may be proved by documents – even scraps of paper produced by a conspirator. Central to the admissibility of acts and declarations proved by any of these means is the need for their source to be a probable co-conspirator.[45]

60. That does not change if the source is a witness in the case, such as Derry. An ordinary witness cannot give evidence about acts he performed or statements he made in the absence of the accused and transform those out-of-court acts and statements into evidence of material facts admissible against the accused. His in-court testimony is capable of proving that words were spoken or acts performed *if* the words or acts are otherwise admissible to prove a fact in issue. But a narration by a witness of what he said and did out-of-court does not transform what he said and did out-of-court into evidence against an accused, capable of proving facts in issue. They have no greater probative value or claim to admissibility than prior consistent statements which are inadmissible to prove the truth of their contents.[46]

61. Thus Derry's account of what he did as an ersatz conspirator, with ambitions to be a police agent, cannot be transformed into admissible evidence establishing the membership of the

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[43] Court of Appeal Judgment, paras. 136-169.
[44] *Appellant's Factum*, para. 44.
[45] *Carter*, *supra*, pp. 946-948.
[46] *R. v. Stirling* [2008] 1 S.C.R. 272 at para. 7; *R. v. Ellard*, 2009 SCC 27 (CanLII), [2009] 2 S.C.R. 19, at para. 31; *R. v. Evans*, 1993 CanLII 102 (SCC), [1993] 2 S.C.R. 629, at p. 643; *R. v. S. (D.D.)*, 2006 NSCA 34 (CanLII), 207 C.C.C. (3d) 319, at para. 83; *R. v. J. (M.A.)*, 2015 ONCA 725 (CanLII), 329 C.C.C. (3d) 149, at para. 45 ; *R. v. Divitaris* (2004), 188 C.C.C. (3d) 390 (Ont. C.A.) at para. 28; *R. v. Austin* (2006) 14 C.C.C. (3d) 38 (Ont. C.A.) at para. 33

Respondent in the conspiracy. It has no greater status than if Derry were caught saying the words on a hidden microphone or performing his acts on a hidden camera, or if another witness came to court to relate what Derry said and did during the currency of the conspiracy. If, in a different case, an undercover officer wrote a note on a napkin to conspirator A saying that accused B will be "picking up the drugs", the note (and the officer's account of it in testimony), would not be admissible to prove B's membership in the conspiracy. The jury was told that things Derry did and said out-of-court in an effort to manipulate a conspiracy into existence, for the purpose of sabotaging it on behalf of the police, were directly admissible as evidence that the Respondent was a member of the conspiracy. The evidence was not adduced in this case simply to prove the conspiracy existed – the jury was invited to use it for the critical proposition that the Respondent was a *member* of the conspiracy and guilty on count 1. The Court of Appeal was correct to identify this as a clear error of law.[47]

(iii) The Permissible Use of Hearsay at *Carter* Step 3 (Appellant's Ground 2)

62. The error identified by the Court of Appeal in this regard had nothing to do with the question of whether acts performed or declarations made before the Respondent's alleged membership were admissible against him under *Carter* if they otherwise satisfied the test. The Respondent accepts that evidence of acts by co-conspirators that precede the alleged date of entry of an accused into a conspiracy are admissible against him if the existence of the conspiracy is proved beyond a reasonable doubt and the membership of the co-conspirator is proved on the balance of probabilities. For example, if A and B are probable conspirators in a proven conspiracy to commit murder and A says to B, "Come with me tonight to meet X. He has the shooting and driving skills we need and I want to bring him into the job", that hearsay would be admissible to prove the membership of X in the conspiracy beyond a reasonable doubt, provided that directly admissible evidence already made his membership probable. Neither the Court of Appeal nor the Respondent suggested otherwise in the proceedings below; the discussion about the supposed conflict among *Proulx*, *Loewen* and *Container Materials* was not raised until the Appellant sought leave to appeal to this Court and does not present itself for resolution on the appeal.[48]

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[47] Court of Appeal Judgment, paras. 155-161.
[48] *Appellant's Factum*, paras. 76-97.

63. The Court of Appeal's concerns were much more prosaic and practical. The Crown had a case, based on directly admissible evidence against the Respondent, that he joined a conspiracy to kill Simmons the existence of which was amply proved and never questioned. Derry and Potts testified to seeing James hand the gun to the Respondent, the Respondent accept the gun, and some coaching on its use, and agree when James told him, "You're going to have to do it then." On the Derry and Potts account, the Respondent left with Gareau and returned later, announcing he had committed the crime. That was a vivid description, based on eyewitness, non-hearsay testimony, of membership in a conspiracy which was begun abruptly, lasted for no more than a few minutes, and was brought to an end with a successful murder.

64. The problem was that the long, complex, detail-laden instruction on the definition of conspiracy and the co-conspirators exception to the hearsay rule, implied that apart from *that* evidence there existed a *separate* body of evidence – the hearsay of co-conspirators – that could add to the direct evidence and remove any doubt about the Respondent's membership in the conspiracy. The judge listed this evidence a number of times, stressing that his list was not exhaustive but merely provided *examples* of hearsay that could be used to prove membership at step 3 of the *Carter* formulation.[49] It was this elaborate instruction, suggesting that hearsay could carry the Crown from possible proof to conclusive proof of the Respondent's membership, that troubled the Court of Appeal. In observing when the conspirators' hearsay came into existence, relative to the Respondent's membership, the Court of Appeal was not making a *legal* ruling that hearsay evidence preceding membership in a conspiracy is inadmissible to prove membership – no such point was argued or accepted. The point was simply that everything relevant to the Respondent's alleged membership in the conspiracy occurred on the afternoon of October 3, 2001 and what preceded it was not capable of adding to a case resting on the evidence of that day's events. This is the Court's reasoning:

> On the appellant's second point: the hearsay evidence introduced did not mention Kelsie, did not allude to him being involved in the conspiracy, and did not suggest that he in any way had any involvement in the conspiracy to murder Mr. Simmons. All of the hearsay evidence relates to a period of time when Kelsie could not, on this record, have been part of the conspiracy. Kelsie was not a member of the conspiracy when these acts and declarations occurred; they could not prove his membership in the conspiracy. The hearsay evidence could not possibly assist them to determine his

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[49] Charge to Jury, A.R. Parts II-V, volume VIII, pp. 3236-37, 3238-39, 3246-47.

> membership beyond a reasonable doubt. He is not implicated in any way by that evidence.
>
> *The only evidence upon which the jury could come to the conclusion that Kelsie was involved in the conspiracy starts with the car ride to Dartmouth. It consists of direct evidence and admissions by the appellant.*
>
> *From the instructions given by the trial judge, the jury would be left with the impression that there was something in the extensive hearsay evidence that was likely to take them from the appellant's probable membership in the conspiracy to his membership beyond a reasonable doubt when it could not. Again, this was in error.*
>
> In these circumstances, the determination of Mr. Kelsie's involvement in the conspiracy depended entirely on the evidence of his own acts and declarations.[50] (emphasis added)

65. Not every case demands, or is suitable for, instruction on the co-conspirators exception. It is complex and confusing and can sound far more consequential than it is. Where so much is made of so little, it is bound to inflate perceptions of the Crown case and operate to the prejudice of the defence – certainly if the judge does nothing to restore some sense of context and perspective for the jury.

66. In these circumstances, it is submitted that the Court of Appeal was correct to find error and quash the conviction on count 1.

B. ERRORS ON FIRST DEGREE MURDER

67. There are three alleged errors before this Court respecting the conviction on first degree murder:

- The failure to leave manslaughter as an available verdict;
- The failure to charge the jury on the element of planning and deliberation respecting first degree murder as a party;
- The instruction that the jury could consider hearsay evidence against the Respondent on the issue of planning and deliberation respecting first degree murder as a principal.

Only the first of these errors is addressed at ground 3 of the Appellant's list of issues.[51]

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[50] *R. v. Kelsie,* 2017 NSCA 89 (CanLII)
[51] *Appellant's Factum*, para. 38.

68. The second is an admitted error, addressed under the Appellant's ground 4, regarding the curative proviso. The third is not addressed at all since the Court of Appeal did not consider it in its judgment, though it was expressly raised on appeal.[52] The Respondent proposes to summarize these errors related to the first degree murder conviction

(i) <u>The Failure to Leave Manslaughter as a Verdict (*Appellant's Factum* Ground 3)</u>

69. The essence of the Respondent's April 17, 2001 statement to the police was that he had not shot Sean Simmons personally but had the gun taken from him by Gareau who committed the murder then returned the gun to him before running off. The Respondent had refused to carry out the mission to scare (as he put it) the person they were going to encounter when he found out from Gareau that it was Simmons. He followed Gareau not to aid or abet him but because he feared he might turn the gun on him if he left the scene.[53]

70. The Respondent had no knowledge of Gareau's involvement in, or commitment to, the murder of Simmons. He was ignorant of Gareau's efforts, steered by Derry, to locate Simmons. Seeing Gareau show up at the car stopped at the muffler shop and get paid $20 would not communicate to the Respondent that Gareau was going to shoot Simmons dead when he took possession of the gun. The Crown *might* be able to persuade the jury that the Respondent did have the *mens rea*, as a party, for murder but it was very much a question for the jury. The legal standard the Crown had to meet was set out in *R. v. Cribbin:*

> The proper instructions with respect to the application of s. 21(1)(b) and (c) and 21(2) require that a distinction be drawn again between the appellant's possible liability for murder or for manslaughter with respect to his participation in the murder of Ginell by Reid. *The jury should have been instructed that the appellant could only be found guilty of murder as Reid's accomplice if he knew of Reid's intention to kill Ginell or to cause him bodily harm that he knew was likely to cause death, and if he, Cribbin, intended to aid or abet Reid.*
>
> …
>
> The jury should then have been instructed about the possibility of Cribbin being guilty only of manslaughter, although as an aider and abetter to the murder committed by Reid: *R. v. Davy*, S.C.C., December 16, 1993 [now reported [1993] 4 S.C.R. 573, 86 C.C.C. (3d) 385]. *If the jury were left in doubt about Cribbin's knowledge of Reid's intention to kill Ginell, or to cause him bodily harm that he knew was likely to cause death, Cribbin could be convicted of manslaughter if he intended*

[52] Court of Appeal Judgment, para. 136.
[53] Respondent's Statement, A.R. Parts II-V, v. I, tab 21, p. 6

> *to aid or abet Reid in assaulting Ginell, and if a reasonable person in the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken*: *R. v. Davy*, supra, per McLachlin J. at p. 9. (emphasis added).[54]

71. The Respondent's statement describes a very brief conversation about his decision to withdraw from the mission and a swift transfer of the gun. If the jury concluded that the Respondent voluntarily surrendered the gun but did not think through, in those few anxious moments, what Gareau was likely to do with it, then he could not be convicted of murder. That would be true even if he realized *immediately afterward* that Gareau *was* going to kill Simmons. But if the Respondent knew that Gareau was not taking the gun to the confrontation for a benign purpose, and would commit *some* crime that could foreseeably result in bodily harm, then manslaughter was the correct verdict. The Crown cannot sidestep this legal imperative by citing arguments it would have made to the jury if manslaughter had been left[55]. Proving that in a matter of a few seconds, the Respondent formed the *mens rea* for party liability to murder was bound to be a challenge for the Crown on this record. The issue certainly had to be left for the jury.

72. Accordingly, it is submitted that the Court of Appeal was correct in holding:

> If the jury concluded that the appellant *voluntarily gave the gun to Gareau on their walk to 12 Trinity Avenue (as the trial Crown alleged and the trial judge left open as a possibility*), then his guilt for what ensued depended entirely on his state of mind as he did so. If he believed Gareau would do nothing with the gun, he would not be a party to any offence no matter what Gareau actually went on to do. *But the appellant could be convicted of manslaughter if he intended to aid or abet Gareau in assaulting Simmons, and if a reasonable person would have appreciated that bodily harm was the foreseeable consequence of giving Gareau the gun.* If he knew of Gareau's intention to kill Simmons or to cause him bodily harm that he knew was likely to cause death and if he, Kelsie, intended to aid or abet Gareau, then he would have aided that murder and been guilty of second degree murder. And if he knew that Gareau had planned and deliberated upon that murder, as discussed above, then he would be guilty of first degree murder. These were all available verdicts.
>
> In my view, *the trial judge erroneously eliminated manslaughter as a verdict*, which was available on a characterization of the evidence in Kelsie's statement.[56] (emphasis added)

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[54] *R. v. Cribbin* (1994), 17 O.R. (3d) 548 (C. A.)

[55] See the points in paras. 114-119 of the *Appellant's Factum*.

[56] *R. v. Kelsie*, 2017 NSCA 89 (CanLII) paras. 124-14

(ii) Failure to Instruct on Planned and Deliberate Murder as a Party

73. This is an error apparently acknowledged by the Crown but said to be harmless because the jury must inevitably have found the Respondent was a principal, not a party, and because, in any event, the conviction for conspiracy means that planning and deliberation was proved to the jury's satisfaction.[57]

74. The gravity of the error requires emphasis. The trial judge, in his charge, completely segregated his treatment of liability as a principal for murder and liability as a party. He gave the jury instructions (themselves flawed) on how to assess whether planning and deliberation had been proven if the Respondent was a principal in the murder but said *nothing* about that issue if he was a party. This means the jury received no direction of any kind on perhaps the most critical issue to be decided on a charge of first degree murder.

75. The only direction the jury received on how to assess the Respondent's mental state as a party to Gareau's murder of Simmons was the following:

> The Crown must also prove that Kelsie intended to aid Gareau to commit the offence of murder. As I said previously, it is not enough that Kelsie's act actually aided Gareau, it must be proven that Kelsie knew or intended that his action would aid Gareau to commit the offence of murder. If Kelsie knew that his act was likely to assist Gareau to commit the offence of murder then you are entitled to conclude that Kelsie intended to aid Gareau to commit the offence. A mere suspicion on the part of Kelsie that Gareau may rely on Kelsie's act in committing an offence is not sufficient to prove an intent to aid.
>
> *The Crown is not required to prove that Kelsie knew the exact or precise details of the offence that Gareau would commit. It is sufficient if he has knowledge of the type of offence Gareau would commit, or that he had the intention of helping Gareau, regardless of the offence Gareau intended to commit*. Again, it is hard to look into other people's minds and determine what their intention is. (emphasis added)[58] (emphasis added)

This compounded rather than solved the problem. With no direction on planning and deliberation specifically, the jury was likely to think that an imprecise knowledge of the "type of offence" Gareau committed would be enough to make the Respondent guilty of the *same offence*. Gareau, however, was clearly guilty of first degree murder on this record – whether he was an aider or

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[57] *Appellant's Factum*, para. 132.
[58] Court of Appeal Judgment, para. 80.

principal – given his weeks of effort to bring about the killing. The jury knew at trial what the Respondent did *not* know when, on the Crown's view of his statement, he "provided" the gun to Gareau. Based on the only instruction the jury received, if he knew the "type of offence" Gareau intended to commit, he was guilty of the offence Gareau *did* commit – which was first degree murder.

76. This is why the Court of Appeal held that to convict of first degree murder, the jury should have been instructed that when the Respondent gave the gun to Gareau: (i) he had to have either the *requisite intent* for murder himself or know that Gareau had that intent; (ii) he had to have given the gun for the *purpose* of aiding Gareau to commit murder; and (iii) he had to have *planned and deliberated* upon the murder or known that Gareau had planned and deliberated on it.[59]

77. Instead, the trial judge's instructions invited the jury to convict the Respondent when he did not possess the requisite mental state for first degree murder. The jury would inevitably conclude that Gareau planned and deliberated upon the murder, since Derry testified Gareau was told the purpose of hunting for Simmons in the week before the shooting was to murder him, but there was no evidence that the Respondent knew Gareau had been part of the murder plot for a week or more. If the Respondent did not know that Gareau had planned and deliberated upon the murder, he would be innocent of first degree murder even if Gareau *was* guilty (setting aside the faulty argument, addressed below, that conspiracy establishes planning and deliberation). The jury charge provided no instruction along these lines.

78. The Court of Appeal was correct to conclude that, on the instructions the jury did receive, "there is a real danger that if they concluded Gareau planned the killing and the appellant [Kelsie] handed him the gun aware that he would likely use it to kill, the appellant would be guilty of planned and deliberate first degree murder. This was incorrect."[60]

79. There was nothing in the charge to prevent the jury from reasoning in this fashion: that if Gareau committed a planned and deliberate first degree murder and the Respondent knew he was going commit a "type" of murder (even second degree) – he was guilty of *Gareau's* crime. This

[59] Court of Appeal Judgment, para. 82.
[60] Court of Appeal Judgment, paras. 83-85.

was a serious error on a central issue. The Appellant's claim that it was nonetheless harmless error is addressed below.

(iii) Instruction on Hearsay as Evidence of Planning and Deliberation by a Principal

80. The trial judge instructed the jury that in deciding whether the Respondent, as a principal in the killing of Sean Simmons, planned and deliberated on his murder, they should consider inadmissible hearsay from other alleged participants in the crime. This evidence included all the hearsay evidence that was said to be potentially admissible on the conspiracy charge but with *no instruction*, about the pre-conditions to its admissibility based on *Carter*. The jury was simply referred to this body of hearsay as though it were admissible and available for their consideration.[61]

81. The jury was told:

> *Let me now turn to the evidence which may assist you in determining whether proof has been made beyond a reasonable doubt of the essential elements of planning and deliberation on the part of the accused.* Again, you will be hearing this for the third, fourth, perhaps fifth time, so please bear with me. I do not want to offend your sensibilities, but I do have a duty to perform as I am sure you will appreciate.
>
> Paul Derry testified that he was present at a meeting with Neil Smith and Wayne James where Derry overheard Smith say to James, I want him whacked, in reference to Sean Simmons. He also testified that at the same time that he said this, Mr. Smith made a gesture with his finger across his throat. Shortly after this Mr. Derry engaged the assistance of Gareau in locating Simmons. He asked Gareau to stay at 12 Trinity, and he advised him about when Simmons returned to that location. He testified that on October 3rd he got a call from Gareau, advising that Simmons was at 12 Trinity Avenue. He passed the phone to Mr. James, and a short time later Mr. James came to Derry's vehicle where he was, and carrying a pistol which Potts and Derry had provided to him sometime before. Mr. Kelsie was also there. Derry testified that there was conversation in the vehicle, and that at one point he tried to convince James not to do it because he was a six-foot black man and would be recognized. His evidence was that Mr. James then passed the gun to Kelsie and said words to the effect that, You will have to do it. Ms. Potts' evidence essentially parrots that of Mr. Derry. (emphasis added).[62]

82. The jury could not possibly have understood any obligation on their part to consider this litany of hearsay evidence only if the *Carter* criteria were satisfied. The trial judge instructed the

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[61] *R. v. Koufis*, [1941] S.C.R. 481; *R. v. Jamieson* (1989), 48 C.C.C. (3d) 287 (N.S.C.A.); *R. v. Satkunananthan* (2001), 152 C.C.C. (3d) 321 (Ont. C.A.); *R. v. Smith; R. v. James*, 2007 NSCA 19 at paras. 223- 244; *R. v. Sutton* (1999), 140 C.C.C. (3d) 336 at paras. 13-19.

[62] Charge to Jury, A.R. Parts II-V, Vol. VIII, pp. 3268-3269.

jury in segregated compartments about conspiracy (count 1) and first degree murder (count 2). He began his charge on the co-conspirators exception to the hearsay rule by noting that what he was about to tell them was "*a special rule* regarding how you should decide whether or not Dean Kelsie was a *member of the alleged conspiracy*".[63] The *Carter* rules, in other words, applied explicitly and solely to the count of conspiracy. There was no mention of them, even inferentially, in the charge on first degree murder where the jury was turned loose on the hearsay without direction or limitation. The instruction on first degree murder was walled off from the charge on conspiracy and the co-conspirators exception; during the charge on the co-conspirators exception, there was no reference to first degree murder. The lunch recess was then held. After lunch, during the charge on first degree murder, there was no further reference to conspiracy or the co-conspirators exception and the criteria related to it.[64] The only reasonable inference is that the jury felt free to make such use as they wished of the inadmissible hearsay in deciding on planning and deliberation on the part of the Respondent as a principal in the murder.

83. The Court of Appeal elected not to rule on this ground, having already found a series of errors covering both convictions on the indictment. The misdirection, however, is clear. The Crown on this appeal insists that the jury convicted the Respondent as a principal, not a party. It is therefore essential that the Court address this ground which goes directly to liability for first degree murder as a principal.

C. APPLICATION OF THE PROVISO (*APPELLANT'S FACTUM* GROUND 4)

84. The Crown's claim to have the proviso in s.686(1)(b)(iii) of the *Criminal Code* applied to the errors in this case appears to rest on four main contentions:

- The evidence for first degree murder as a principal is overwhelming and was clearly the basis of the jury's verdict. This erases any concern for error regarding party liability, including the absence of an instruction on planning and deliberation by a party and the failure to leave manslaughter as a lesser included offence.[65]

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[63] Charge to Jury, A.R. Parts II-V, vol. VIII, p. 3241
[64] Charge to Jury, A.R. Parts II-V, vol. VIII, pp. 3251-70
[65] *Appellant's Factum*, paras. 145-150.

- Insofar as there may be errors capable of affecting the verdict, they are cured by the conviction for conspiracy which "removes any need for debate" about the merits of the first degree murder conviction.[66]
- The conviction for first degree murder – itself salvaged by the proviso – supports invocation of the proviso regarding the failure to leave manslaughter. This is so in spite of authorities forbidding such reasoning which, if necessary, should be overruled.[67]
- The absence of objection from the defence is a basis to find either that errors were not committed or that they were harmless.

(i) <u>Does the First degree Murder Verdict Rest Solely on Liability as a Principal?</u>

(a) The Crown's position at trial

85. The Crown at trial expressly insisted on an instruction that any juror who believed the substance of the Respondent's statement, or was left in doubt by it, should nonetheless convict him of first degree murder. This was not a marginal or tangential aspect of its trial strategy. The Crown put the statement in evidence knowing that the jury could rely on it for the truth of its contents. Its tactical purpose was to provide confirmation of the dangerous evidence of Derry and Potts, while maintaining a path to conviction of the Respondent if the statement were believed. In closing argument, the Crown attempted to avoid crediting the statement by referring to its exculpatory features only obliquely. The Crown implied that if the statement was true, the gun was *voluntarily* surrendered by the Respondent to Gareau – making him a party to any crime he anticipated Gareau would commit.[68]

86. The Crown was less subtle, however, in writing a summary of its theory for inclusion in the jury charge.[69] That summary included the following characterization of the evidence:

> In the alternative, Dean Kelsie is a *party to the planned and deliberate murder of Sean Simmons*. Either Mr. Kelsie actually shot Sean Simmons, *or aided Steven Gareau* in the killing of Sean Simmons, by among other things, ***providing him with the murder weapon***, attending the murder scene with him, and fleeing the scene with the murder weapon.

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[66] *Appellant's Factum*, paras. 132-134, 151.
[67] *Appellant's Factum*, paras. 124-131.
[68] Court of Appeal Judgment, paras. 112-114.
[69] Pre-charge Conference, A.R. II-V, Vol. VII, pp. 2999-3000.

> …
> On October 3rd, 2000, Dean Kelsie entered into the existing agreement among Neil Smith, Wayne James, and Steven Gareau, by adopting their criminal purpose, the murder of Sean Simmons, as his own. Dean Kelsie achieved the goal of the conspiracy either by shooting and killing Sean Simmons himself *or by aiding Steven Gareau in doing so*.[70] (emphasis added)

87. With this characterization, the Crown unequivocally invited the jury to convict the Respondent of first degree murder *even if* it believed his statement. This made it imperative that the jury be correctly charged on planning and deliberation and on any included offences arising from this construction of the evidence. Crown counsel agreed that such an instruction was required.[71]

(b) The jury's reaction

88. A key submission of the Appellant is that the Court can infer from the jury's questions the "pathway" by which it reached its guilty verdict of first degree murder – through application of s.231(3) of the *Criminal Code*, which says that contract murder or "murder by arrangement" is first degree murder.[72] The Respondent submits this argument is untenable.

89. First, the jury was not required to reach its verdict by *one* pathway. They were expressly told this and it is entirely possible that one faction concluded the Respondent was a principal in the killing and a second had a reasonable doubt about that but concluded that he was, in any event, either a party *or* a principal, while a third decided that he was a party. The jury had to be properly instructed on all pathways to liability.

90. Second, the jury's question regarding "murder by arrangement", on the fifth day of deliberations, almost surely means that *no one* on the jury reached a verdict of first degree murder by this route, whether on a party or principal analysis. It would seem obvious in principle that a person who committed a second degree murder could not later become guilty of first degree murder by accepting a gratuitous payment, not arranged in advance of the killing. That, however, was what

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[70] Charge to Jury, A.R. II-V, Vol. VIII, p. 3285.
[71] Pre-charge Conference, A.R. Parts II-V, vol. VII, pp. 2976-77
[72] *Appellant's Factum*, paras. *136-144.*

the jury wanted clarified and it took counsel and the judge overnight to arrive at an answer, given to the jury the next morning.[73]

91. Once the jury was told that the "arrangement" had to precede the murder, they would have virtually no basis for convicting the Respondent under s.231(3). He, like Tina Potts, came to Dartmouth with no assigned role in the planned killing. Derry was the driver. James was to be the shooter, escorted to the apartment by Gareau. The decision to give the Respondent *any* role in the killing was made at the last minute, following Derry's warning to James, and was observed by both Derry and Potts. It included *no* "arrangement" nor any mention of "consideration". James just said, "You have to do it" and the Respondent agreed, got ready, and departed with Gareau.

92. Third, two of the jury's other questions show it taking very seriously the question of the Respondent's potential liability as a party, based on his statement. The question on the second day of deliberations was important for two reasons – it not only showed the jury wrestling with the question of party liability (they asked the judge to "review the issue of party to a crime") but it also asked if they had to *agree* on one pathway or the other ("is it sufficient to find that a person was either a party or a principal?"). The answer to the latter inquiry was that the jury did *not* have to agree on one pathway or the other. This means that for the balance of their deliberations, up to their verdict, it is possible, even probable, that they considered the evidence from *both* perspectives, with some jurors preferring – or even certain about – each pathway and assured that they did not have to resolve any differences about which was correct.

93. This inference is fortified by the question the jury asked on the third day of their deliberations. They requested to view the videotape of the apartment building and hear the evidence of Neil Taylor and Donald Currie, two witnesses who heard the shooting as it occurred and registered the likely departure from the building of Gareau, out the back door.[74] There is no apparent reason for the jury's interest in this evidence apart from determining whether the Respondent or Gareau was the shooter, and the time that passed between the shots and Gareau's flight. The import of both witnesses' evidence was that the shots happened close in time to each other and that Gareau went out the back door some appreciable time after them. While the evidence is not conclusive, it would tend to suggest that Gareau was present for both shots and could have

[73] Jury Question, A.R. Parts II-V, vol. VIII, pp. 3351, 3377-3378
[74] Jury Question, A.R. Parts II-V, Vol. VIII, p. 3348.

fired them; the evidence suggests he did not flee the building in between them.[75] This is almost surely a question directed toward assessing the Respondent's potential liability as a party.

(c) Conclusion

94. Much time was spent at trial on party liability. The Crown placed the issue squarely in evidence and insisted on an instruction that it was a basis on which the jury could convict of first degree murder. The jury received extensive – though faulty – instruction about it from the judge and evinced by its questions a good deal of interest in it. They knew, because they were told, that they did not have to agree on one approach or the other. On this record, it cannot reasonably be concluded that the jury regarded liability as a principal as "overwhelming"; this would require unanimous and unqualified acceptance of the Derry and Potts story. It is much more likely that they were divided on that issue but comforted by the fact that they did not have to select one route or the other. This meant they had to be properly instructed on both.

(ii) <u>Could a Valid Conspiracy Conviction Cure the Error on First Degree Murder?</u>

95. If this Court determines that the Court of Appeal erred in quashing the conviction for conspiracy to commit murder, the Crown argues that it can salvage other errors in the charge,[76] on the basis that a finding of conspiracy means that the Respondent planned and deliberated upon the murder and that he intended to kill Simmons. This analysis is legally incorrect. A valid conspiracy conviction could play no role in curing errors on the murder conviction.

96. The only necessary inference from a conspiracy conviction would be that the Respondent agreed in the car, a few minutes before the shooting of Sean Simmons, to commit murder with the gun handed to him by his uncle and boss – who told him he "had to do it." That would contradict his claim that in the car he perceived the goal to be just frightening the unidentified victim. However, the jury could easily find he was indicating his awareness that a murder was in the offing and still conclude he renounced his intention when he found out from Gareau, minutes after he had entered the conspiracy, that Simmons was the target. If so – ignorant of Gareau's prior involvement in the murder plot – he could easily be unsure of what Gareau would do with the gun once he had surrendered it to him, as the Crown alleged he did. The Respondent certainly had no desire or

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[75] Evidence of Donald Currie A.R. Parts II-V vol. IV, pp. 1019-21; Evidence of Neil Taylor, A.R. Parts II-V vol. III, pp. 918-920, 928-29.
[76] *Appellant's Factum*, paras. 132-134; 151.

personal motive to kill Simmons once he gave up the gun so the only question is whether, in those fraught and fast-paced circumstances, he formed a subjective awareness that Gareau would kill Simmons – *before* letting him have the gun. A conspiracy conviction can do nothing to establish that.

97. No more than a momentary assent to the directive of James was required for the jury to convict the Respondent on conspiracy. That is true as a matter of law and it was expressly conveyed to the jury by the trial judge:

> Any person who has become a member of the conspiracy *may leave it at any time afterward, and for any reason. What is essential is membership, not the length of it,* or the reason for giving it up. A person may become a member of the conspiracy without knowing all of the details of the agreement, or understanding, or without knowing who all of the other members are.[77] (emphasis added)

98. The jury had this instruction in writing. It was well supported by the law which emphasizes that a conspiracy is complete at the *moment of agreement* and requires no further action, or ongoing assent, by a member.[78] Membership certainly does *not* require planning and deliberation – on the evidence at trial, the Respondent became a member of the conspiracy within moments of hearing that it existed. Any conscientious juror who believed that the Respondent understood murder to be the object of the conspiracy would be compelled to convict on that count, even if he believed that the Respondent's agreement lasted only for a minute or two and that hearing from Gareau that Simmons was the target was his "reason for giving it up". So, a valid conviction for conspiracy is not capable of establishing the Respondent's state of mind when he left with Gareau, learned the name of the victim, and balked at continuing with the plan.

99. A conspiracy conviction also cannot cure the error related to planning and deliberation in the charge on first degree murder. The charge on party liability contained no direction on planning and deliberation and was admittedly erroneous. The charge on liability as a principal invited resort to a vast body of hearsay and was equally faulty. There was nothing about a finding of conspiracy in the circumstances of this case that implied planning and deliberation. This was an odd – arguably

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[77] Charge to Jury, A.R. Parts II-V, Vol. VIII, p. 3240

[78] *R. v. O'Brien,* [1954] S.C.R. 666 at pp. 3-9. 15. 18-; *R. v. Papalia; R. v. Cotroni,* [1979] 2 S.C.R. 256 at pp. 16-17, 21; *R. v. Pizzardi; R. v. Levis,* [1993] O.J. No. 2338 (Ont.C.A.); aff'd [1994] SCJ No. *R. v. J.F.*, 2014 SCC 12 at pp. 43-44; *R. v. Cook,* [1884] O.J. No. 58 at p. 3

inappropriate – case to lay a conspiracy charge against the Respondent since he played no part in the plotting leading up to the trip to Dartmouth; what the Crown alleged to be "conspiring" was inseparable from the mere formation of the *mens rea* for murder.

100. Proof of planning and deliberation was the weakest aspect of the Crown case. The law requires that a "plan" be a "carefully thought out" calculated scheme or design before it elevates murder to first degree murder and that it be "deliberated" upon in a manner that is "cautious", "considered not impulsive" and "not hasty or rash" but rather characterized by thoughtful reflection and a weighing of advantages and disadvantages.[79] The evidence of the Respondent's agitated state upon his return to the car—anxious, panicky, breathless, "adrenaline-pumped"—strongly suggests he never entered a state of cautious reflection in advance of the shooting. The Crown's argument may be tested by supposing that the trial judge instructed the jury that "if you find the Appellant entered the conspiracy to commit murder in the car, you will also inevitably find that his participation in the murder of Sean Simmons was planned and deliberate". Such an instruction would, on these facts, be indefensible.

101. Even if there were a proper path for a properly instructed jury to convict the Respondent of planned and deliberate murder, it was one with ample room for reasonable doubt. A conviction for conspiracy could not cure those shortcomings. Accordingly, even if the conviction for conspiracy were restored, it could have no effect on the order for a new trial on first degree murder.

(iii) <u>Do the Intercepted Communications Prove Guilt?</u>

102. The Appellant places emphasis throughout its factum on three conversations between Derry and the Respondent while the latter was in custody in Halifax. It submits that these conversations could contribute to a finding that the case that the Respondent murdered Sean Simmons as a principal was "overwhelming".

103. The jury had these conversations in transcript and recorded form and spent six days struggling with the case. The interceptions were simply incapable of supporting a decisive inference about the Respondent's role in the homicide, looked at collectively or individually. The

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[79] *R. v. Aalders,* [1993] 2 S.C.R. 482 at pp. 502-504; *R. v. Nygaard,* [1989] 2 S.C.R. 1074 at p. 1084; *R. v. Robinson,* 2017 ONCA 645 at para. 34; *R. v. Stiers,* 2010 ONCA 382, at para. 67

recordings were of poor quality and the Crown was heavily dependent on Derry – a practised liar and manipulator – to interpret their meaning.

104. The communications most emphasized by the Appellant illustrate why a juror could reasonably view them quite differently from a prosecutor:

- It would be obvious to anyone in the aftermath of the killing that it had been a "hit". The Respondent's use of this word does not imply that he was aware of the plan *before* the drive to Dartmouth and the evidence is that he was not. James, either believing the Respondent had performed the killing or simply wanting to keep him quiet about Gareau's actions, could well have given him a small payment for his small role. The "hit" reference can in no way be interpreted to mean that the Respondent knew about the killing in advance, much less that he was expecting, in advance, to be paid for it. The evidence is all the other way.

- The Respondent's reference to a person – the Crown alleges he meant Gareau – leaving after the first shot and before the second is very likely false and intended to fool Derry. There seems to have been no appreciable time between the shots and the evidence of building residents tends to suggest that Gareau left after *both* shots had been fired – a subject the jury's question on the third day of deliberation indicates their interest in.

- Derry and the prosecution interpreted the passage "… it'd never feel the same in my hand as that did *that night.* That's like I was married to that motherfucker" as a reference to the Respondent holding the murder weapon. Derry could, of course, offer any interpretation that suited his purposes but a reasonable jury would be skeptical of this one since the murder did not take place at night but in broad daylight, at about 3:30 p.m.[80]

105. The jury had good reasons for not relying on the intercepted communications in the way the Crown invited. Neither at trial nor on this appeal do the interceptions come close to establishing an overwhelming case of first degree murder.

(iv) <u>Does the First Degree Murder Render Harmless the Error on Manslaughter?</u>

106. This Court has recently held that errors in excluding lesser offences from the list of verdicts available to a jury cannot be cured by a conviction for the greater offence. The general approach to the question in *R. v. Jackson* was affirmed by a majority of the Court, after careful consideration,

[80] *Appellant's Factum*, paras. 22-26.

in *R. v. Sarrazin*.[81] The debates in the Court of Appeal for Ontario and this Court yielded three possible approaches to the question. The majority in both courts concluded that the possibility a jury's verdict will be shaped in part by its options meant that the failure to leave the lesser offence (manslaughter in *Jackson* and attempted murder in *Sarrazin*) would generally be fatal, despite a conviction for the greater offence. The dissent in the Court of Appeal in *Sarrazin* urged a "holistic" approach to the proviso's application, accepting the concerns of the majority but supporting invocation of the proviso when the evidence of guilt is "very strong" and the error in the charge of minor significance.[82] The dissent in this Court rejected the premise that failure to leave a lesser offence mattered at all if the jury was properly instructed on the greater offence and entered a conviction.[83]

107. The Respondent makes two submissions. First, it does not serve the orderly administration of justice for the Court simply to reverse course now on its view of jury psychology and the dynamics of group decision-making. The premise that a jury's analysis of facts is sometimes shaped by the end result has been convincing to judges around the common law world, as *Sarrazin* and *Jackson* both confirm. There is no new social psychology evidence to discredit that premise and no way either to confirm or refute it by legal reasoning alone. In such circumstances, *stare decisis* and regard by the Court for its own judgments militate in favor of leaving the current law in place.

108. Beyond that, this appeal is a very rickety vehicle to support a change in the law. The error in failing to leave manslaughter was certainly not a minor one. For a faction of jurors accepting the essence of the Respondent's statement, and unwilling to see him acquitted, the omission leaves out a verdict they might well have found convincing – manslaughter, based on uncertainty about the Respondent's awareness of Gareau's mental state. As it was, these jurors were left with only first degree or second degree murder. But further error intrudes at this point – this jury faction received literally *no instruction* on how to tell the two levels of murder apart. This is a critical failing and distinguishes this case from *Sarrazin* where the instruction on causation – the difference between attempt and the full offence – was impeccable, a point emphasized by both the majority

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[81] *R. v. Jackson*, [1993] 4 S.C.R. 573; *R. v. Sarrazin*, [2011] 3 S.C.R. 505, 2011 SCC 54; *R. v. Sarrazin*, 2010 ONCA 577.
[82] *Sarrazin* (Ont. C. A.) *supra*, para. 107 (endnote 13).
[83] *Sarrazin (*S.C.C.), *supra,* paras. 44-59.

and minority. In this case, the Crown argues that a juror who regarded a full acquittal as unpalatable would opt for second degree murder. But the difference between first and second degree murder for a party was not explained *at all*. And a jury faction that understood the Respondent's level of guilt was a function of Gareau's level of guilt could easily conclude he had to be convicted of first degree murder simply because that is the crime of which Gareau was manifestly guilty.

109. To cure this messy sequence of errors, the Appellant can only invoke the conspiracy conviction – even though the conspiracy would be, for the Respondent, an ephemeral event, entered abruptly and quickly abandoned when Gareau identified Simmons as the target. It cannot cure the omission of correct instructions on planning and deliberation and is in no sense a surrogate for that crucial finding.

110. There is no version of a revised approach to the proviso which would make this mélange of mistakes harmless. This case illustrates the wisdom of the majority approaches in *Jackson* and *Sarrazin*. However, for a proponent of the holistic approach to the proviso, there is not a "very strong case" of first degree murder but the opposite. Nor is there a proper instruction on the greater charge and a merely minor error on the lesser one. And for a proponent of the dissenting view in *Sarrazin* (at this Court) the erroneous instruction on the greater charge is also an insurmountable hurdle to finding the error harmless. Along with all this, for any members of the jury who were persuaded that the Respondent shot Simmons himself, there was a separate error on planning and deliberation in the invitation to consider inadmissible hearsay – a misdirection nothing can cure.

(v) What is the Relevance of the Absence of Defence Objection?

111. The Appellant has cited the absence of objection from the Respondent's trial counsel in answer to grounds of appeal found to be meritorious by the Court of Appeal.[84] Similar arguments were advanced in the court below to no avail, for good reason.[85] The primary responsibility for an accurate charge to the jury lies with a trial judge, regardless of the positions taken by counsel.[86] In this case, the trial judge made serious, almost inexplicable, errors on fundamental points.

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[84] *Appellant's Factum*, paras. 101-105, 122, 130.
[85] Court of Appeal Judgment, paras. 91-94, 129-130, 167.
[86] *R. v. Pickton*, 2010 SCC 32 at paras. 26-27; *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 37-38; *R. v. Arcangioli*, [1994] 1 S.C.R. 129, at pp. 142-143

112. In respect of the failure to leave manslaughter as a verdict, the original error was his; the Respondent's counsel was clearly unsure what to do in the face of the trial judge's pressing him on the question; the judge's error was the primary source of the misdirection. Not leaving manslaughter in a case where a gun was transferred from a party to a principal in a matter of seconds, and the party had no awareness of the principal's commitment to the murder, was indefensible on any view of the case.

113. The judge failed to give the jury any instruction on the critical issue of planning and deliberation for a party. He was the draftsman of the charge and his failure to touch on such a key issue is difficult either to understand or justify. The Crown should have picked up on this error since it was the driving force behind the theory of party liability. The Crown obviously just blundered, like defence counsel and the judge. It would be speculative and unfair to suppose that defence counsel had some concealed *tactical* reason for not objecting himself; the failure could only hurt his client.[87] He, like the other legal participants at trial, just failed to notice major flaws in the charge.

114. The same is true of the judge allowing the jury to draw freely from the hearsay of Paul Derry on the conspiracy count and to consider the *entire range of* hearsay on the issue of planning and deliberation as a principal. This was patent error, introduced into the charge by the trial judge and not resisted either by the Crown, which benefited from the error, or the defence, which was hurt by it. It is illogical to ascribe tactical calculations to counsel on either side. They simply made mistakes on an issue for which the trial judge was ultimately responsible.

115. The Respondent was let down not only by his counsel but by the judge and the Crown who should have caught and corrected the mistakes. This is the last case in which it is appropriate to

[87] Whether an absence of objection reflected a tactical choice or a "lapse" by counsel is an important, often decisive, consideration in assessing positions taken, or not taken, by defence counsel: *R. v. Calnen,* 2019 SCC 6 at para. 67; *R. v. Hodgson*, [1998] 2 S.C.R. 449 at para.100; *R. v. Ferguson,* [2001] 1 S.C.R. 281, rev'g (2000),142 C.C.C. (3d) 353 (Ont. C.A.) at paras. 38-40, 91; *R. v. Jones*, 2011 ONCA 584 at para. 42.

evaluate either the existence of errors or their gravity through the lens of defence counsel's position.[88]

D. ERROR ON UNANIMITY AND THE UNDESIRABILITY OF DISAGREEMENT

116. The Respondent also submits that the order for a new trial should be upheld on the basis of a separate ground argued before the Court of Appeal but not addressed in its judgment. The trial judge twice directed the jury that *"disagreement is the most undesirable result of all at the conclusion of any legal proceeding."* He said this at the beginning and end of his charge.[89] It is submitted that this unprecedented direction undermined the right – and duty – of jurors to disagree after a conscientious examination of the evidence and deliberation on the views of other jurors.

117. In *R. v. G.(R.M.)*, this Court considered the proper response to a jury's message that its deliberations had reached an impasse and highlighted a series of principles about the duties of jurors and how they should be communicated by a judge in an "exhortation". Among these principles were: (i) it is important to allow a jury to deliberate "without imposing any form of pressure upon them"; (ii) an exhortation should avoid "introducing factors which are extraneous and irrelevant to the task of reaching a verdict"; (iii) it "should not encourage a juror, by reference to extraneous considerations or by exerting unwarranted pressures, to abandon an honestly held view of the evidence" or "to change his or her mind simply for the sake of conformity"; (iv) an exhortation "must not interfere with the right of jurors to deliberate in complete freedom uninfluenced by extraneous pressure".[90]

118. Advising a jury, as here, that they have "the right to disagree" and then telling them that their *exercise* of that right would be the "most undesirable result of all" at the trial, introduces an extraneous pressure far more coercive than bland references to cost and inconvenience. It communicates that *nothing could be worse* than the failure to reach a verdict. A wrongful conviction due to a compromise to avoid a hung jury is, however, a *far* more undesirable outcome

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[88] The Respondent's lawyer at trial was the antithesis of the "experienced" counsel sometimes referred to in the authorities: see, for example, *Calnen, supra,* paras. 6, 17; *R. v. T. (A.)*, 2015 ONCA 65 at paras. 41-42.

[89] Charge to Jury, *Appeal Book* Vol. VIII, pp. 3158, 3289

[90] *R. v. G. (R.M.)*, [1996] 3 S.C.R. 362, para. 26

than a hung jury. A juror who thought otherwise, and submitted to opposing views to avoid this "most undesirable" outcome, would be unsuited for jury service. In a case with six days of deliberation, this cannot be dismissed as an insignificant error. The Appellant submits that it requires a new trial.

PART IV: COSTS

119. The Respondent, like the Appellant, does not seek costs.

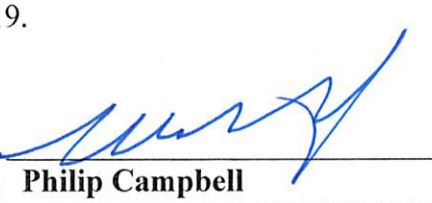
PART V: ORDER REQUESTED

120. It is submitted that the order for a new trial on first degree murder by the Nova Scotia Court of Appeal should be upheld if reversible error is found respecting the failure to leave manslaughter as a verdict or the direction on jury unanimity.

121. The appropriate order is the quashing of the conviction for first degree murder and the substitution of a verdict of second degree murder under s. 686(1)(b) and (3) of the *Criminal Code* if all other grounds fail but one or the other of the two errors related to planning and deliberation is affirmed.

122. The Respondent requests that the order of the Court of Appeal directing a new trial on the count of conspiracy to commit murder be affirmed.

Dated at Toronto this 5th day of March, 2019.



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PART VI:

ORDERS RESPECTING CONFIDENTIALITY AND PUBLICATION

123. There are no orders currently in effect respecting sealing, confidentiality, publication, classification of information in the file as confidential, or restriction on public access to information in the file, that could have an impact on the reasons of the Court.

PART VII: TABLE OF AUTHORITIES AND LEGISLATION

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