SCC File No.38217

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

DEVANTE GEORGE-NURSE

APPELLANT
(Appellant)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANT
(DEVANTE GEORGE-NURSE , APPELLANT)

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

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS

1. On August 13, 2015, the unknown driver of a black SUV rolled down his window and fired four shots from a firearm in a residential neighbourhood in Toronto. The Appellant, Devante George-Nurse, was a passenger in the vehicle. The theory of the Crown was that the Appellant had counselled the unknown driver to fire the gun. On May 23, 2017, the Appellant's trial began before the Honourable Justice S. Dunphy of the Superior Court, sitting with a jury. On May 31, 2017, the Appellant was found guilty of discharging a firearm while reckless for the safety of another person, and of being in a motor vehicle knowing there was a firearm therein. He was acquitted of discharging a firearm with intent to endanger life. On August 10, 2017, the Appellant was sentenced to four years imprisonment on the first conviction and six months concurrent on the second conviction. On May 9, 2018, his appeal against conviction was heard by the Court of Appeal for Ontario. On June 6, 2018, the Court released a split decision. MacPherson and Miller JJ.A. upheld the verdicts at trial. Hourigan J.A. found the verdicts to be unreasonable and would have acquitted the Appellant.

2. The Appellant appeals as of right to this Honourable Court. His position is that the verdicts are unreasonable, largely for the reasons articulated by Hourigan J.A. at the Court of Appeal for Ontario. He requests that the appeals be allowed and acquittals entered.

The Facts of the Case

3. On August 12, 2015, the Appellant, Devante George-Nurse ("Mr. Nurse"), drove his mother's car to a residential townhouse complex in Toronto to visit his god-sister, Jasmine, and an ex-girlfriend, Rikisha Reddon Barrow. At about 2:00 p.m. the next day, the Appellant learned from Ms. Barrow that, overnight, someone had slashed the tires of his car and thrown a brick at its windshield. She told him that this had been done by a neighbour, Shakur Foster, with whom she had an on-again, off-again relationship. Mr. Foster, who had an extensive criminal record for assault, robbery, theft and multiple instances of failures to comply, was known to have recently been involved in a shooting incident, and that very morning had been assaulted or "jumped" by a group of young men.

4. Mr. Nurse had a brief, two-minute confrontation with Mr. Foster, who was in the back yard of his townhouse. The Appellant then went back into Ms. Barrow's residence and, shortly afterward, Mr. Foster and Ms. Barrow began a loud and public argument outside. There was conflicting evidence about the state of mind of Mr. Nurse, who was described as angry, but also said to be laughing it off. Notably, there was no evidence of Mr. Nurse threatening retaliation towards Mr. Foster.

5. About 30 minutes after these events, a black SUV arrived in the common parking lot of the townhouses and picked up the Appellant. There was no evidence about the ownership of the SUV, and outside of the driver being a light-skinned black man, no evidence of any kind about the driver. Likewise, there was no evidence about who had called the driver of the SUV to cause him to arrive. The Appellant could be seen in surveillance camera footage talking on his cell phone, but a witness testified that he was talking to his insurance company. The police seized and searched the Appellant's cell phone when he was arrested, but found no evidence that he had spoken to anyone else in that time frame. There were four adults at the residence in addition to the Appellant at that time, any of whom could have called the driver.

6. Mr. Nurse walked out to the SUV and got in the front passenger seat. The SUV started to leave, then backed up and stopped, and the Appellant got out. He went to his own car and retrieved a backpack, in which he kept his jewelry. The SUV then drove towards the exit of the complex and stopped near Mr. Foster's yard. Its driver rolled down his window, fired four shots from a gun, and drove away at high speed. Mr. Foster testified that he heard a bullet ricochet off his fence, but the forensic evidence did not support this. A shell casing was found in the driveway.

7. The Crown did not suggest that Mr. Nurse fired any of the shots, but rather that he counselled the driver to do so.

The Decisions Below

8. The jury deliberated for 9 hours. They acquitted the Appellant of discharging a firearm with intent to endanger the life of Foster (section 244(1) of the *Criminal Code of Canada*). They convicted him of discharging a firearm while being reckless as to the life or safety of others, namely pedestrians and residents of Roywood Drive, pursuant to section 244.2(1)(b) of the

Criminal Code, and of occupying a vehicle while knowing that there was a firearm in that vehicle, pursuant to section 94(1) of the *Criminal Code*.

9. At the Court of Appeal for Ontario, Hourigan J.A. found the verdicts to be unreasonable, as there were other reasonable inferences inconsistent with guilt that were available on the evidence. He would have entered acquittals on both counts. MacPherson and Miller, JJ.A. found that the decision of the Appellant to not testify negated the inferences consistent with innocence, and concluded that the jury acted reasonably in approaching the case in the same way. They upheld the verdicts and dismissed the appeal.

PART II – QUESTIONS IN ISSUE

Issue 1: Did the Majority of the Court of Appeal for Ontario Err by Finding That the Verdicts Were Reasonable?

Issue 2: Did the Majority of the Court of Appeal Err By Using the Trial Silence of The Appellant as Positive Evidence of Guilt?

Issue 3: Did the Majority of the Court of Appeal Err in Finding That the Jury Was Entitled to Use the Appellant's Trial Silence Against Him?

PART III - STATEMENT OF ARGUMENT

Issue 1: The Majority of the Court of Appeal for Ontario Erred by Finding that the Verdicts Were Reasonable

Were there alternative reasonable inferences?

10. In his analysis, Hourigan J.A. identified two reasonable inferences that arose from the evidence adduced at trial. He said:

> In the case at bar, there was no evidence that the appellant summoned the SUV driver. There was also no evidence regarding what was said, if anything, between the appellant and the SUV driver. Did the appellant counsel the driver to shoot at Mr. Foster? It is possible that that was exactly what he did. But it is also possible that it was the driver's intention to shoot at Mr. Foster without any counselling from the appellant.[1]

[1] *Reasons for Decision*, Record of the Appellant (AR), Tab 1A, at para. 14.

11. There were at least two reasonable inferences available on the evidence which were consistent with innocence. The first is that the driver took it upon himself to "avenge" his friend by trying to frighten Mr. Foster. In this scenario, the driver, without any encouragement from the Appellant, decided to scare the person who had vandalized his friend's property, stopped in front of Foster's back yard, and fired the shots in the air.

12. A second reasonable inference consistent with innocence is that the driver and Mr. Foster had their own history of animosity. Mr. Foster was known to have a history of violent criminal activity, and on the evidence had lots of enemies. Because of his access to a firearm, and his ready use of it, the driver was apparently also part of the criminal world. He may have decided to fire his gun in close proximity to Foster for his own satisfaction. This would have required no encouragement from the Appellant.

13. The theory of the Crown was also a reasonable inference, but no less speculative than the scenarios described above. The Appellant may have urged the driver to discharge his firearm in Foster's vicinity because he was angry at him.

The Law

14. This was a purely circumstantial case. In such a case, a verdict of guilt can only be returned if that verdict is the only reasonable inference available on the evidence. There is no need to consider "conceivable" inferences if they are not reasonable. For example, if the only alternative scenario offered in a drug possession case is that an unknown person broke into the accused's apartment and planted drugs there for an unknown reason, that inference amounts to speculation. That is not this case. The scenario offered by the Crown and those offered by the defence were all plausible and derived from the evidence adduced at trial. The majority in the Court of Appeal did not suggest that the alternative inferences put forward by the defence were unreasonable.[2]

[2] *R. v. Griffin*, [2009] 2 S.C.R. 42, at paras. 33-35, 79; *R. v. Dipnarine* (2014), 316 C.C.C. (3d) 357 (Alta. C.A.), at paras. 21-25.

15. A reasonable inference can arise from the lack of evidence. An innocent inference need not be based on a "proven fact"[3].

16. The *Biniaris/Yebes* test applies to this appeal. That test was articulated for a circumstantial case in this Court's unanimous decision in *R. v. Villaroman*[4]:

> Where the Crown's case depends on circumstantial evidence, ***the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence***: *Yebes*, at p.186; *R. v. Mars* (2006), 205 C.C.C. (3d) 376 (Ont. C.A.), at para. 4; *R. v. Liu* (1989), 95 A.R. 201 (C.A.), at para. 13; *R. v. S.L.R.*, 2003 ABCA 148 (CanLII); *R. v. Cardinal* (1990), 106 A.R. 91 (C.A.); *R. v. Kaysaywaysemat* (1992), 97 Sask. R. 66 (C.A.), at paras. 28 and 31. [emphasis added]

Since there were other reasonable conclusions available to the jury consistent with innocence in the Appellant's case, the jury's verdicts are bound to be unreasonable.

17. This was the analysis made by Hourigan J.A. in the Court of Appeal. He said:

> The case against the appellant on this count was based entirely on circumstantial evidence. The Crown provided a plausible narrative to support its contention that the appellant counselled the SUV driver to shoot at Mr. Foster. However, in cases where the proof of one or more of the elements of the offence depends exclusively or largely on circumstantial evidence, an inference of guilt must be the only reasonable available inference. This ensures that the trier of fact will not "fill in the blanks" in the evidence by overlooking reasonable alternative inferences: *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 30.
>
> In the case at bar, there was no evidence that the appellant summoned the SUV driver. There was also no evidence regarding what was said, if anything, between the appellant and the SUV driver. Did the appellant counsel the driver to shoot at Mr. Foster? It is possible that that was exactly what he did. But it is also possible that it was the driver's intention to shoot at Mr. Foster without any counselling from the appellant.
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> . . . . .
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> The trier of fact is required to look logically at the evidence or absence of evidence, in light of human experience, to determine whether an inference other than guilt may reasonably be drawn

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[3] *R. v. Villaroman*, [2016] 1 S.C.R. 1000, at paras. 35-36; *R. v. Bui*, [2014] ONCA 614, at paras. 24-25.

[4] *R. v. Villaroman*, [2016] 1 S.C.R. 1000 at para. 55; *R. v. Barrett*, [2004] N.S.J. No. 86 (N.S.C.A.), at para. 19.

. . . . .

> In my view, there was a lacuna in the evidence such that no trier of fact acting reasonably could have concluded that there was no reasonable inference other than guilt[5].

The Conviction for Being In a Motor Vehicle While Knowing There Is a Firearm Therein

18. The Crown's case on this charge also suffered from a fatal lack of evidence. Section 94(1) of the *Criminal Code* makes it an offence for a person to be in a motor vehicle in which he or she knows there is a prohibited or restricted firearm, device or ammunition. S. 94(3) further provides:

> 94(3): Subsection (1) does not apply to an occupant of a motor vehicle who, on becoming aware of the presence of the firearm, weapon, device or ammunition in the motor vehicle, attempted to leave the motor vehicle, to the extent that it was feasible to do so, or actually left the motor vehicle.

19. Undoubtedly, the Appellant became aware of there being a firearm in the vehicle once the shots were fired by the driver, but there was no evidence that he knew of the firearm before this. After the shots were fired, the vehicle left at a high rate of speed, and it was not "feasible" for the Appellant to leave the vehicle. There was no evidence of what happened after the SUV left the townhouse complex. The jury was left to speculate whether the saving provision in s. 94(3) applied. As a consequence, the conviction on this charge was also unreasonable.[6]

<u>Issue 2:</u> **The Majority of the Court of Appeal Erred By Using The Trial Silence Of the Appellant as Positive Evidence of Guilt**

20. The majority at the Court of Appeal, in their re-weighing of the case, used the Appellant's decision not to testify as a piece of inculpatory evidence:

> My colleague emphasizes that since the case against the appellant was based entirely on circumstantial evidence, an inference of guilt must have been the only reasonable available inference: see *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 30. He determines that there was another reasonable inference available in this case: that the driver intended to shoot at Foster without any counselling from the appellant.
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> However, I note that the appellant did not testify at trial. In my view, ***his failure to testify negates the alternative inference my colleague identifies.*** [emphasis added]

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[5] *Reasons for Decision*, AR, Tab 1A, at paras. 14-16, 20.
[6] *R. v. Swaby* (2001), 54 O.R. (3d) 577 (C.A.), at paras. 17-19.

. . . . .

> This court is therefore entitled to consider the appellant's failure to testify in assessing ***whether an innocent inference was available***: *Noble*, at para. 103. [emphasis added]

21. This line of reasoning is problematic for a number of reasons. First, it treats the Appellant's silence at trial as a piece of inculpatory evidence. Second, the inference underpinning this reasoning is too weak to support a conviction in these circumstances. In other words, the majority reasons that the failure to testify can be used as an evidential fact from which an adverse inference can be drawn, and that inference is so strong that it removes any room for reasonable doubt. This, it is respectfully submitted, is an error.[7]

Silence At Trial Is Not Inculpatory

22. The majority at the Court of Appeal conflates two different issues: whether the accused had put an innocent explanation into evidence; and whether the accused was able to put an innocent explanation into evidence. With respect, the Court of Appeal was entitled to consider the former, but was not entitled to conclude the latter. This is made plain in the passage relied on by the majority from *Noble*:

> In my view, the appellate review cases do not contradict the conclusion that ***silence may not be placed on the evidentiary scales***, either by the trier of fact or ***by appellate courts***. Rather, the cases hold that appellate courts, like triers of fact, may refer to the silence of the accused as indicative of the absence of an exculpatory explanation; ***silence is not inculpatory***, but nor is it exculpatory. Nowhere do the appellate review cases outlined above explicitly state that silence may be used as a "make-weight" by the trier of fact, but there is wording that suggests that silence may be used simply in the limited sense of not providing an innocent explanation.[8]

23. In cases where there the only reasonable inference available on the evidence is guilt, the appellate court can notice that no alternative scenarios have been put into evidence by the defence. The court thus does not have to speculate about other "conceivable" inferences that have no basis in evidence. Only in this way can an appellate court "use" the silence of an accused at trial. This is quite different than saying that alternative scenarios consistent with innocence, that arise from the evidence or lack of evidence in the Crown's case, can be ignored.

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[7] *Reasons for Decision*, AR, Tab 1A, at paras. 31-32, 35.
[8] *R. v. Noble*, [1996] B.C.J. No. 699 (B.C.C.A.), at paras. 72, 103, 105.

The Presumption of Guilt is Weak in This Case

21. The presumption underlying the drawing of an adverse inference from the decision not to testify – that the accused has no innocent explanation to offer – is a weak one at best. There are many reasons for an accused to decide not to testify that have nothing to do with guilt or innocence, whether it be trial strategy, an assessment that the Crown has failed to prove its case, an unfortunate demeanour or a morbid inability to speak in public, to give just some examples. This point, noted by Sopinka J., was made at the Court of Appeal level in *R. v. Noble*[9] by McEachern, C.J.B.C.:

> Experience and logic tell me that no inferences [arising out of the decision of an accused to not testify] that will weigh on the evidentiary scales should be permissible. This is because one never knows why an accused does not testify. Without that knowledge, one can never safely say that the accused would have given evidence if he had a defence to, or an explanation for, the Crown's case. For example, he may be advised by his counsel that his best course is to attack the Crown's case, or "go for the doubt" rather than to inflame the judge or jury against him by exposure of a record. The accused may be unable to take the stand without implicating others whom he does not wish, or does not dare, to mention. . . . Further, the honest but hopeless witness is not unknown to criminal law practitioners. I once acted for a woman in a serious case who was such an unusual person that it might have been negligent to allow her to give evidence. Most experienced counsel have had clients or witnesses whose true story was not likely to be believed, so that they could not give believable evidence without lying. There are undoubtedly other reasons why an accused may not give evidence.
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> . . . . .
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> With respect to inferences, for the reasons already stated, ***it would be logically and dangerously wrong to infer, or to instruct a jury, that the accused must have no answer if he does not give evidence.*** [emphasis added]

24. Since defence counsel is prohibited from providing an explanation for why an accused might decide not to testify, the appellate court can only speculate as to why that decision was made. The assumption made by the majority in the case at bar, that the only inference to be drawn from the Appellant's decision not to testify is one of guilt, is highly questionable. Indeed, Hourigan J.A. wrote in his dissent:

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[9] *R. v. Noble*, [1996] B.C.J. No. 699 (B.C.C.A.), at para. 38-39, 47; aff'd [1997] 1 S.C.R. 874, at para. 62.

a. It would have been foolhardy for any competent defence lawyer to advise a client to testify in these circumstances. There was simply no need to call evidence to support an alternative version of events.[10]

The Neutrality of Trial Silence

25. According to *Noble*, an appellate court can only view trial silence as a species of "no evidence". In other words, trial silence is a neutral factor. To repeat here for convenience:

> [T]he cases hold that appellate courts, like triers of fact, may refer to the silence of the accused as indicative of the absence of an exculpatory explanation; ***silence is not inculpatory***, ***but nor is it exculpatory***.[11]

In the case at bar, the furthest the appellate court was entitled to go was to observe that no innocent inference had been provided by the defence. That conclusion would respect the essential neutrality of trial silence. What they were not entitled to do was to conclude that no innocent explanation could have been given by the defence. This reasoning is prohibited because it necessarily involves giving the Appellant's trial silence evidentiary weight. If trial silence is maintained as a neutral factor, it cannot be used to remove inferences consistent with innocence. As such inferences were available on the Crown's evidence, the verdict of guilt was unreasonable.

Issue 3: The Majority of the Court of Appeal Erred in Finding That the Jury Was Entitled to Use the Appellant's Trial Silence Against Him

26. The use of an accused's silence at trial has undergone an evolution over the last few decades. Whatever powers the appellate court may or may not have in this area, it is firmly established that a trier of fact is not entitled to give trial silence evidentiary significance, and that to do so is an error of law. The majority at the Court of Appeal found that it was reasonable for the jury to engage in this prohibited line of reasoning. With respect, it is submitted that no jury is acting reasonably if it is applying an error of law.

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[10] *Reasons for Decision*, AR, Tab 1A, at para. 19
[11] *R. v. Noble*, *supra*, at para. 103. [Emphasis added]

The Jury Entitled Was Not Entitled To Use the Appellant's Trial Silence Against Him

27. Prior to 1997, it was acceptable for a trier of fact to draw an adverse inference against an accused who did not testify at trial. For example, in 1994, this Court explicitly held that the jury could draw an adverse inference from a failure to testify:

> In any event, subject to the caveat that failure to testify cannot be used to shore up a Crown case which otherwise does not establish guilt beyond a reasonable doubt, a jury is permitted to draw an adverse inference from the failure of an accused person to testify: *Kolnberger v. The Queen*, [1969] S.C.R. 213; *Corbett v. The Queen*, [1975] 2 S.C.R. 275; *Vezeau v. The Queen*, [1977] 2 S.C.R. 277, and also *R. v. Johnson* (1993), 12 O.R. (3d) 340 (C.A.).

However, in 1997, the *R. v. Noble* decision of this Court held that such an inference was incompatible with the right to silence and the presumption of innocence. For the majority, Sopinka J. wrote:

> This appeal concerns the evidentiary significance of the failure of the accused to testify at trial. While it is plain that the accused has a right not to testify at trial, may the trier of fact consider this silence in arriving at its belief in guilt beyond a reasonable doubt? In my view, the right to silence and the presumption of innocence preclude such a use of the silence of the accused by a trier of fact. It is apparent in the present case that the trial judge did place independent weight on the accused's failure to testify in reaching his belief in guilt beyond a reasonable doubt, ***which in my view constituted an error of law***. [emphasis added][12]

If a trier of fact, whether judge or jury, does make the mistake of giving weight to trial silence, this is an error of law requiring the overturning of the verdict.[13]

28. This view is now firmly entrenched in the jurisprudence. As the Ontario Court of Appeal said in *R. v. Prokofiew*:

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[12] There was a concern in *R. v. Noble* that a jury could not be told of this rule of law because of section 4(6) of the *Canada Evidence Act*. That concern was resolved in *R. v. Prokofiew*, where this Court, unanimously on this point, held that such an instruction was permissible, though not mandatory in every case. *R. v. Prokofiew* (2010), 256 C.C.C. (3d) 355 (Ont. C.A.), aff'd [2012] 2 S.C.R. 63.

[13] *R. v Francois*, [1994] 2 S.C.R. 827, at para. 11; *R. v. Noble*, [1997] 1 S.C.R. 874 at para. 53, 94, 96; *R. v. Anderson*, [2017] NBCA 51, at para. 17-19, 25 (N.B.C.A.).

> *Noble* clearly changed the law with respect to the use that could be made of an accused's failure to testify. Authorities that, like *Vézeau*, explicitly recognized the right to draw an adverse inference from the failure of an accused to testify have been overtaken by *Noble* and limited to the defence of alibi. After *Noble*, leaving aside s.4(6), ***an instruction that the jury could not use an accused's failure to testify against that accused would be a correct statement of the law***. [emphasis added]

In upholding the *Prokofiew* decision in this Court, Moldaver J. (for a unanimous court on this point) explained the way in which a failure to testify could not be used:

> In cases where the jury is given an instruction on the accused's right to remain silent at trial, the trial judge should, in explaining the right, make it clear to the jury that an accused's silence is not evidence and that it cannot be used as a makeweight for the Crown in deciding whether the Crown has proved its case. In other words, if, after considering the whole of the evidence, the jury is not satisfied that the charges against the accused has been proven beyond a reasonable doubt, ***the jury cannot look to the accused's silence to remove that doubt and give the Crown's case the boost it needs to push it over the line***[14]**.** [emphasis added]

29. The *obiter* discussions in *R. v. Noble* about the powers of an appellate court in this regard were explicitly left unresolved and have not since been revisited by this Court. What is crystal clear, however, is that a jury is prohibited from this line of reasoning. *Noble* repeatedly insists that a trier of fact is not permitted to use silence to remove innocent inferences from consideration:

> [I]f there exists in evidence a rational explanation or inference that is capable of raising a reasonable doubt about guilt, ***silence cannot be used to reject this explanation***.
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> . . . . .
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> [I]f, however, there is a rational explanation which is consistent with innocence and which may raise a reasonable doubt, ***the silence of the accused cannot be used to remove that doubt.*** [emphasis added]

Yet, the majority at the Court of Appeal found that the jury in the case at bar was entitled to use the Appellant's silence against him:

> The appellant was in the car during the events in question. He obviously knows who the driver/shooter was. He also obviously knows what happened leading up the shooting. Yet, he did not provide an innocent explanation at trial. ***It was not unreasonable for the***

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[14] *R. v. Prokofiew* (2010), 256 C.C.C. (3d) 355 (Ont. C.A.), at para. 34, aff'd [2012] 2 S.C.R. 63, at para. 4.

> ***jury to consider this and conclude there was no exculpatory explanation or innocent inference available.*** [emphasis added]

30. The only way for the jury to "consider this" – "this" being the failure to testify – was to give that failure evidentiary significance and to use it, as did the majority, to negate alternative rational inferences that were consistent with innocence. This they were not entitled to do, and the majority was in error in finding that they could.[15]

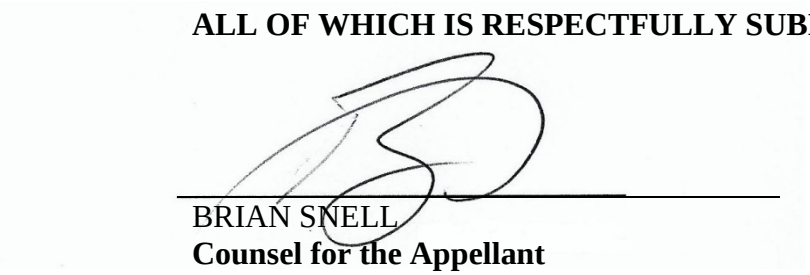
PART IV - SUBMISSIONS AS TO COSTS

27. The Appellant makes no submissions as to costs.

PART V - ORDER REQUESTED

28. The Appellant respectfully requests that the appeals be allowed, the convictions overturned and acquittals entered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, This 25th day of September, 2018



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[15] *Reasons for Decision*, AR, Tab 1A, at para. 31-32, 36; *R. v. Noble, supra* at para. 78 and 89.

PART VI – TABLE OF AUTHORITIES

Cases **at Paragraph(s)**

PART VII – STATUTORY PROVISIONS

Criminal Code of Canada, RSC 1985, c C-46, ss. 94, 244, 244.2

Code criminel (L.R.C. (1985), ch. C-46), ss. 94, 244, 244.2