SCC File No. 39006

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

RANDY DESMOND RILEY

APPELLANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT

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

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PART I - OVERVIEW OF POSITION AND STATEMENT OF FACTS

Overview

1. This appeal concerns under what circumstances and how a **Vetrovec** warning may be given to a jury regarding an unsavoury Crown witness who falls into the category of a "mixed witness".

2. This appeal also concerns the application, by the Majority of the Nova Scotia Court of Appeal, of the curative proviso in section 686 (1)(b)(iii) of the **Criminal Code**.

3. A few important facts may assist in understanding the Respondent's position on this appeal.

4. The victim, Donald Chad Smith, was ambushed and murdered in a killing motivated by revenge. The phrase "revenge is a dish best served cold" is an apt description of what occurred in this murder.

5. The Appellant, Randy Riley, had indicated to his long-time friend, Paul Smith, that a "white guy" had hit him on the head years ago with an object and that he wanted to take care of it. A day or two after the murder, the Appellant told Paul Smith that he has taken care of the problem he had mentioned a couple of days before.

6. The Appellant, with the assistance, of Nathan Johnson, had lured the victim to a place where the victim was murdered.

7. The victim was shot in the chest, at close range, with a sawed-off shotgun. The shotgun was later recovered in the woods near the murder scene. The victim died almost immediately after he was shot.

8. At an earlier separate trial, Johnson had been convicted of first-degree murder. His appeal against conviction to the Nova Scotia Court of Appeal was dismissed by a unanimous panel of the Court. He did not seek leave to appeal to this Court.

9. At the Appellant's trial, Johnson was called as a Crown witness. Johnson testified that it was he who shot the victim and that the Appellant had nothing to do with the murder. However, this evidence exculpating the Appellant was in marked contrast to what Johnson said in his

testimony he wrongfully told his girlfriend, Kaitlyn Fuller, after the victim was murdered. He told Ms. Fuller that he had no level of participation in the murder and that the Appellant was involved in the murder. The jury therefore heard his previous completely opposite statement, inculpatory of the Appellant, during his testimony.

10. The Respondent says that because the jury heard two versions of what occurred, one exculpatory and the other inculpatory, this put Johnson into the category of what is referred to in the case law as a "mixed witness".

11. With defence counsel's agreement, the trial judge gave the jury a **Vetrovec** caution regarding Johnson's evidence.

12. On appeal to the Nova Scotia Court of Appeal, and now to this Court, the Appellant now says that the giving of the **Vetrovec** caution was an error by the trial judge. The Appellant also says that the Majority of the Nova Scotia Court of Appeal erred in applying the curative proviso.

13. It is the position of the Respondent that the Majority of the Nova Scotia Court of Appeal correctly upheld the giving of the **Vetrovec** warning in the context of jury instructions, reminding of the need to have proof beyond a reasonable doubt before a conviction could be entered.

14. The Respondent says that because Nathan Johnson was in the category of a "mixed witness", it was within the discretion of the trial judge to give the **Vetrovec** warning. Although the trial judge did not give a warning that distinguished between the inculpatory and exculpatory aspects of Johnson's testimony, the balance of the charge made it clear to the jury that they had to consider Johnson's evidence and if it raised a reasonable doubt, they had to acquit.

15. Counsel for the defence agreed with the giving as well as the wording of the **Vetrovec** warning. Counsel for the defence did not seek an instruction distinguishing the inculpatory and exculpatory components of Johnson's testimony, did not complain about its omission and offered no dissent from the language of the **Vetrovec** warning used in the instruction given by the trial judge.

16. If this Court concludes that the caution in the **Vetrovec** warning extended to exculpatory evidence, this Court ought to consider the tactical conduct of defence counsel and conclude that no substantial wrong or miscarriage of justice occurred.

17. Defence counsel on appeal to the Nova Scotia Court of Appeal said that as trial counsel he had made an error in the conduct of the case. However, he raised this without an ineffective assistance of counsel ground of appeal and without a proper evidentiary foundation to support the assertion.

18. Without such fresh evidence, it must be assumed that defence counsel acted competently at the trial and in his client's best interests.

19. In his closing address to the jury, defence counsel recognized that it required real convincing to have the jury believe Johnson's evidence. In his closing address he labelled Johnson as "… equally an unsavoury witness deserving such a warning."[1] Common sense dictated that Johnson was a very unbelievable witness. Not to have acknowledged to the jury Johnson's unsavouriness as a witness would have ignored reality.

20. Acknowledgement of Johnson's unsavoury character was a tactical decision made at trial by defence counsel. He did more than simply not object to a **Vetrovec** warning. He actively encouraged that a warning be given. He should not now be able to withdraw from that tactical decision.

21. However, if this Court concludes that the trial judge did err, then the Respondent says that the Majority of the Nova Scotia Court of Appeal correctly applied the curative proviso.

22. Even if an error occurred in giving the **Vetrovec** warning, it did not affect the verdict. And therefore no substantial wrong or miscarriage of justice occurred. Johnson's evidence was very unsatisfactory. It is submitted that no reasonable jury would have believed Johnson or would have had a reasonable doubt based on his evidence. The harmless error rule should apply whether or not Johnson was a "mixed witness".

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[1] Trial Transcript, p. 1807, lines 20 and 21, Appellant's Record, Vol. X, Tab 46

23. This Court may consider the fact that the Appellant did not testify at his trial in applying the curative provision.

24. The dissenting justice in the Nova Scotia Court of Appeal did not properly review the law regarding the application of the curative proviso. Nor did the justice properly apply the law regarding the curative proviso to the facts of the case.

25. The Majority of the Nova Scotia Court of Appeal correctly upheld the Appellant's conviction for second degree murder.

History of Proceedings

26. The Appellant was originally charged, along with Nathan Johnson, on the same Indictment with first-degree murder of Donald Chad Smith.

27. A severance motion was brought by the defence and granted, resulting in the Appellant being tried alone on the offence of first-degree murder and possession of a firearm without a firearms registration certificate.

28. Nathan Johnson was tried separately from the Appellant. Nathan Johnson's 13-day trial in the Supreme Court of Nova Scotia ran from November 16, 2015 to December 4, 2015. At the conclusion of his trial Nathan Johnson was found guilty of first-degree murder and possession of a firearm without a firearms registration certificate. On December 18, 2015, Nathan Johnson was sentenced to life imprisonment without parole for 25 years on the first-degree murder offence. He was sentenced to 12 months imprisonment for the firearms offence.

29. Johnson's appeal to the Nova Scotia Court of Appeal was dismissed by a unanimous panel on June 12, 2017.[2] Nathan Johnson did not seek leave to appeal to this Court.

30. The Appellant's trial was originally scheduled for March, 2016. However, the trial was moved several times at the request of the Appellant, so that he would have counsel to represent him at trial.

[2] **R. v. Johnson**, 2017 NSCA 64

31. The Appellant's 15-day trial was held before the Honourable Justice James L. Chipman, of the Supreme Court of Nova Scotia, sitting with a jury. The trial ran from March 26, 2018 to April 16, 2018. At trial the Appellant was represented by Mr. Trevor McGuigan who was also the Appellant's counsel on the subsequent appeal to the Nova Scotia Court of Appeal.

32. At the trial the Crown called 16 witnesses and the defence called no evidence. At the conclusion of the trial on April 16, 2018, the jury found the Appellant guilty of the included offence of second-degree murder of Donald Chad Smith and of the offence of possession of a firearm without a firearms registration certificate.

33. On May 1, 2018, the Appellant filed a prisoner's notice of appeal against conviction to the Nova Scotia Court of Appeal. The Appellant was subsequently able to retain counsel for this appeal through Nova Scotia Legal Aid. On October 3, 2018 the Appellant, through his counsel, Trevor McGuigan, filed an amended notice of appeal against conviction with the Nova Scotia Court of Appeal.

34. The Appellant's appeal to the Nova Scotia Court of Appeal was heard on May 28, 2019.

35. On December 5, 2019, the Appellant's appeal was dismissed by a Majority of the Nova Scotia Court of Appeal.[3]

36. On the 6th day of January 2020, the Appellant filed a Notice of Appeal to this Court.

Facts Giving Rise to the Conviction

37. On October 23, 2010, the victim, Donald Chad Smith, was found dying in front of the door to 15 Joseph Young Street, Apartment #3 in Dartmouth, Nova Scotia.[4]

38. One of the occupants of Apartment # 3, Donald Manning, had heard a loud bang and had immediately run out of his apartment to investigate the noise.[5]

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[3] **R. v. Riley**, 2019 NSCA 94
[4] Trial Transcript, p. 201, lines 10 – 13 and p. 207, line 6 to page 209, line 5, Appellant's Record, Vol. IV, Tab 38
[5] Trial Transcript, p. 203, lines 1 – 6, Appellant's Record, Vol. IV, Tab 38

39. When Mr. Manning found the victim, the victim was breathing his last breaths of life.[6] He had been shot in the chest area and was laying in a pool of his own blood.[7]

40. On the ground beside the victim was a pizza delivery bag.[8] This bag can be seen in Exhibit # 1, photograph # 8.[9]

41. Inside the delivery bag was a pizza box with a pizza inside it. This pizza had been sent to 15 Joseph Young Street, Apartment # 3 for delivery by the victim.[10]

42. The victim had worked as a pizza delivery driver at Panada Pizza in Dartmouth for less than a week before he was murdered.[11]

43. David Bryant, who also worked for Panada Pizza, had taken a telephone call for a pizza order at 8:45 pm on October 23, 2010. The order was for a 16-inch pepperoni pizza and a two litre orange pop.[12]

44. Mr. Bryant had written two telephone numbers onto the front of the pizza box. One telephone number, 465-9696, came from the caller ID display on the Panada Pizza telephone. The call display identified this number as coming from an Aliant payphone. The other number, 292-6753, was given to Mr. Bryant by the male who called in the pizza order.[13]

45. Mr. Bryant recalled that the man who placed the pizza order initially asked for the order to be delivered to 15 Highfield, Apartment 3. Mr. Bryant told the caller this must be a mistake because there was no Apartment 3 in 15 Highfield. Mr. Bryant then told the caller he must have

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[6] Trial Transcript, p. 208, lines 11 – 17, Appellant's Record, Vol. IV, Tab 38
[7] Trial Transcript, p. 249, line 4 to p. 250, line 3 and p. 288, line 22 to p. 289, line 9, Appellant's Record, Vol. IV, Tab 38
[8] Trial Transcript, p. 480, line 4 to p. 481, line 6, Appellant's Record, Vol. V, Tab 39
[9] Appellant's Record, Vol. II, Tab 10
[10] Trial Transcript, p. 448, line 1 to p. 449, line 14 and p. 451, line 18 to p. 452, line 1, Appellant's Record, Vol. V, Tab 39
[11] Trial Transcript, p. 444, line 17 to p. 445, line 2 and p. 446, lines 5 – 21, Appellant's Record, Vol. V, Tab 39
[12] Trial Transcript, p. 448, lines 1 – 13 and p. 451, lines 7 – 10, Appellant's Record, Vol. V, Tab 39
[13] Trial Transcript, p. 450, lines 3 – 15 and p. 452, line 19 to p. 453, line 12, Appellant's Record, Vol. V, Tab 39

meant 15 Joseph Young, Apartment 3. The caller responded, "Yeah, that's what I meant."[14] Mr. Bryant noted that the caller had a deep voice.[15]

46. Mr. Bryant testified that once the pizza was made, he handed it to the victim who put it in a pizza bag. He also gave the victim a $5 bill to make change. The victim left Panada Pizza around 9:15 pm to make the pizza delivery.[16]

47. When the victim arrived at 15 Joseph Young Street, Apartment 3, he was shot to death either by the Appellant, or Nathan Johnson at the behest of the Appellant, with a sawed-off shotgun. The Appellant did this as revenge against the victim for an assault, by the victim, on the Appellant years earlier.

48. Based on the evidence of Paul Smith and Kaitlin Fuller, Johnson's girlfriend, along with supporting evidence, the following events were the background to the murder of Donald Chad Smith.

49. Up until the events on October 23, 2010, Paul Smith and the Appellant had been good friends for 10 to 15 years. Paul Smith had seen or spoken to the Appellant every other day. Paul Smith had lived in Dartmouth since he was five years old.[17]

50. Paul Smith testified that:

- The Appellant called him on the telephone around 7 p.m. on October 23, 2010.[18]
- During the telephone call conversation the Appellant had asked Paul Smith to pick him up. When Paul Smith arrived at the Appellant's pick up location behind Harbourview School on Trinity Avenue in Dartmouth, Nathan Johnson was with the Appellant. It took about 10 minutes from the time of the call for Paul Smith to pick up the Appellant

[14] Trial Transcript, p. 448, line 17 to p. 449, line 14, Appellant's Record, Vol. V, Tab 39
[15] Trial Transcript, p. 451, lines 11 – 15, Appellant's Record, Vol. V, Tab 39
[16] Trial Transcript, p. 451, line 18 to p. 452, line 19, Appellant's Record, Vol. V, Tab 39
[17] Trial Transcript, p. 611, line 6 to p. 612, line 18, Appellant's Record, Vol. VI, Tab 40
[18] Trial Transcript, p. 613, line 13 to p. 614, line 3, Appellant's Record, Vol. VI, Tab 40

and Johnson. Both the Appellant and Johnson got into Paul Smith's vehicle. The Appellant told Paul Smith what was going on and where he needed to go.[19]

- Once the Appellant got into Paul Smith's vehicle, he told Mr. Smith that he had a problem with a white guy. The white guy had beaten him up years ago with an "object". He had been hit on the head.[20] The Appellant told Mr. Smith that he needed to get a "thing".[21] Paul Smith drove from Trinity Avenue to a big apartment building behind the Superstore out by the MicMac Hotel. He drove to this location via Prince Andrew Street. The drive took about 15 minutes.[22] During the drive, the Appellant said that he had to "take care of it."[23]

- When Paul Smith's vehicle arrived at the location requested by the Appellant, the Appellant got out of the vehicle and went into an apartment building. When the Appellant returned, he was walking with a limp and Paul Smith saw some object, about two feet long, in the Appellant's right pant leg.[24]

- The location of the apartment building was as he circled on Exhibit 16, a map of the Dartmouth area.[25] A small version of this map was entered as Exhibit 17.[26]

- When the Appellant returned to the vehicle, Paul Smith noticed that the Appellant was wearing "doctor's gloves". These were see-through plastic gloves. The Appellant handed a pair of these same type of gloves to Nathan Johnson.[27]

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[19] Trial Transcript, p. 614, lines 4 – 10 and p. 614, line 13 to p. 616, line 3, Appellant's Record, Vol. VI, Tab 40
[20] Trial Transcript, p. 617, lines 4 – 9; p. 667, line 7 to p. 670, line 21; p. 681, line 18 to p. 682, line 1 and p. 692, lines 1 – 4, Appellant's Record, Vol. VI, Tab 40
[21] Trial Transcript, p. 624, lines 17 and 18, Appellant's Record, Vol. VI, Tab 40
[22] Trial Transcript, p. 618, line 9, to p. 620, line 20, Appellant's Record, Vol. VI, Tab 40
[23] Trial Transcript, p. 619, lines 12 – 18, Appellant's Record, Vol. VI, Tab 40
[24] Trial Transcript, p. 627, lines 1 – 20 and p. 687, line 1 to p. 691, line 2, Appellant's Record, Vol. VI, Tab 40
[25] Trial Transcript, p. 637, line 3 to p. 639, line 7 - Appellant's Record, Vol. VI, Tab 40,
[26] Appellant's Record, Vol. II, Tab 19
[27] Trial Transcript, p. 623, lines 3 – 20, Appellant's Record, Vol. VI, Tab 40

- When the Appellant got back into the vehicle, he said that he was taking care of this tonight.[28]

- Smith told the Appellant that they were putting him into a crazy situation.[29]

- Smith then drove the Appellant and Johnson to the bus terminal in Highfield Park. The drive would have taken about 20 minutes. During the drive the Appellant said that he had to "take care of business" and that he "was going to handle this".[30]

- The time from initially picking up the Appellant and Johnson at 7:00 p.m. to dropping them off at the bus terminal was about one hour.[31]

- Paul Smith met the Appellant a day or two after the murder. The Appellant told Paul Smith that he had taken care of the problem he had mentioned a couple days before.[32]

51. Joseph Sadoun was qualified to give expert opinion evidence as a wireless network engineer.[33]

52. Mr. Sadoun carried out an analysis of the locations that the Appellant's cell phone (902-233-6280) was used on October 23, 2010. He did this through showing which cell phone towers were used each time the Appellant's cell phone sent or received a telephone call.

53. Mr. Sadoun concluded that it was inconsistent with the cell phone usage data to say that the Appellant's cell phone was in one single residence on October 23, 2010 for several hours during the day at which time it was taken to a location 10 to 15 minutes' drive away, where it remained for several more hours until approximately 8:30 pm when it went back to its original site.[34]

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[28] Trial Transcript, p. 624, lines 6 – 12, Appellant's Record, Vol. VI, Tab 40
[29] Trial Transcript, p. 624, lines 13 – 17, Appellant's Record, Vol. VI, Tab 40
[30] Trial Transcript, p. 624, line 21 to p. 625, line 13, Appellant's Record, Vol. VI, Tab 40
[31] Trial Transcript, p. 632, lines 9 – 17, Appellant's Record, Vol. VI, Tab 40
[32] Trial Transcript, p. 703, line 15 to p. 704, line 14, Appellant's Record, Vol. VI, Tab 40
[33] Trial Transcript, p. 1624, line 8 to p. 1625, line 7, Appellant's Record, Vol. X, Tab 46
[34] Trial Transcript, p. 1665, line 7 to p. 1666, line 6, Appellant's Record, Vol. X, Tab 46

54. Mr. Sadoun noted that on October 23rd the Appellant's cell phone accessed 10 different cell phone towers.[35] The cell phone made calls at 7:03 pm, 7:51 pm and 7:57 pm on October 23 using cell phone towers located at Franklyn Court and Tacoma Drive in Dartmouth. At 8:03 pm the cell phone made a call using a cell phone tower located on Barrington Street in Halifax which had coverage in Dartmouth. From 8:36 pm to 8:59 pm, six more calls were made using a cell phone tower located at 4 Franklyn Court in Dartmouth.[36]

55. Most importantly, the call that came into the Appellant's cell phone at 7:57 p.m. used cell tower J0-406 which was located at 73 Tacoma Drive in Dartmouth.[37] Cell tower J0-406 is close to the location where Paul Smith dropped off the Appellant so the Appellant could get a "thing".[38]

56. Nathan Johnson testified that he had "hung out" with the Appellant on October 23, 2010, during the afternoon.

57. He had first gone to the Appellant's house for a "while".[39]

58. Mr. Johnson then testified that Paul Smith arrived at the Appellant's house and that Smith, Johnson and the Appellant went to another house up the street and played cards.[40]

59. Mr. Johnson testified that they played poker for "hours" at this house. They stayed at the house until after it turned dark outside. When they left the house, he and Paul Smith dropped the Appellant off at the Appellant's house. The Appellant had a cell phone at the time.[41]

60. Mr. Johnson testified that after Paul Smith dropped off the Appellant, Paul Smith then dropped him off in Highfield Park. He then went to a payphone and called the victim's cell phone and got no answer.[42]

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[35] Trial Transcript, p. 1665, lines 1 – 6, Appellant's Record, Vol. X, Tab 46
[36] Trial Transcript, p. 1659, line 3 to p. 1863, line 9, Appellant's Record, Vol. X, Tab 46 and Vol. XI, Tabs 47 – 49
[37] Trial Transcript, p. 1660, lines 2 – 3, Appellant's Record, Vol. X, Tab 46
[38] Trial Transcript, p. 637, line 3 to p. 639, line 7, Appellant's Record, Vol. VI, Tab 40
[39] Trial Transcript, p. 885, lines 1 – 11, Appellant's Record, Vol. VII, Tab 41
[40] Trial Transcript, p. 885, line 20 to p. 886, line 16, Appellant's Record, Vol. VII, Tab 41
[41] Trial Transcript, p. 887, line 6 to p. 889, line 18, Appellant's Record, Vol. VII, Tab 41
[42] Trial Transcript, p. 903, line 15 to p. 904, line 20, Appellant's Record, Vol. VI, Tab 4

61. Mr. Johnson's testimony of the Appellant staying in one place during the afternoon and evening of October 23 is contradicted by Mr. Sadoun's testimony that the Appellant's cell phone was moving from place to place that day.

62. Mr. Johnson's testimony that he phoned the victim's cell phone is contradicted by Sgt. Royce Macrae's evidence. Sgt. Royce Macrae was in charge of the RCMP Tech Crime Unit. He examined the victim's cell phone. He recovered the call history, missed calls and outgoing calls. Sgt. Macrae testified that there were no calls to the victim's cell phone from a payphone or a blocked number. Nor were there any calls to the victim's cell phone around the time that the call was made to Panada Pizza to order the pizza.[43]

63. However, Mr. Johnson's testimony did confirm some of Paul Smith's testimony. In particular, that Mr. Johnson was with the Appellant and Paul Smith on the day of the murder. And that Paul Smith's testimony was correct in saying that the victim worked as a pizza deliverer.[44]

64. Kaitlin Fuller, the girlfriend of Nathan Johnson, testified that she had dated Nathan Johnson for roughly six months prior to the murder.[45]

65. Ms. Fuller testified that she had never been given reward money for her testimony in any of the proceedings involved in this murder case.[46]

66. Ms. Fuller indicated that on October 23, 2010, Nathan Johnson had called her and they had planned to meet up later that day. They were texting and messaging throughout the day. Nathan Johnson was messaging to her from the Appellant's cellphone.[47] Later in the day, Ms. Fuller could not reach Nathan Johnson so she called the Appellant's cell phone. She spoke to the Appellant and told him that she needed Nathan Johnson to call her back right away.[48]

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[43] Trial Transcript, p. 1557, line 9 to p. 1562, line 7, Appellant's Record, Vol. X, Tab 46 and p. 448, lines 1 - 16, Appellant's Record, Vol. V, Tab 39
[44] Trial Transcript, p. 885, line 20 to p. 886, line 16, Appellant's Record, Vol. VII, Tab 41 and p. 616, line 4 to p. 617, line 11, Appellant's Record, Vol. VI, Tab 40
[45] Trial Transcript, p. 1577, lines 9 – 15, Appellant's Record, Vol. X, Tab 46
[46] Trial Transcript, p. 1610, lines 1 – 4, Appellant's Record, Vol. X, Tab 46
[47] Trial Transcript, p. 1577, lines 5 – 11, Appellant's Record, Vol. X, Tab 46
[48] Trial Transcript, p. 1579, lines 13 – 20, Appellant's Record, Vol. X, Tab 46

67. At around 11 p.m. on October 23, 2010, Ms. Fuller had a conversation with Nathan Johnson in Mr. Johnson's residence on Creighton Street. She also observed Nathan Johnson make a telephone call.[49]

68. Ms. Fuller stayed with Nathan Johnson at Creighton Street over the night of October 23 to 24, 2010.[50]

69. On the morning of October 24, 2010, Ms. Fuller was standing next to Nathan Johnson in the kitchen when he made a telephone call on the Creighton Street house telephone. She heard the Appellant on the other end of the telephone conversation. The Appellant told Nathan Johnson he would talk about what happened, but he would not discuss it over the telephone.[51]

70. In his testimony at the Appellant's trial, Mr. Johnson said that it was he who shot the victim with a shotgun.[52] Mr. Johnson testified that after the murder he made up a story that Paul Smith and the Appellant were involved in the murder.[53] However, he testified that the Appellant, in fact, had nothing to do with the murder.[54]

71. The Appellant chose not to testify at his trial.

[49] Trial Transcript, p. 1591, line 2 to p. 1592, line 10, Appellant's Record, Vol. X, Tab 46
[50] Trial Transcript, p. 1595, lines 5 – 8, Appellant's Record, Vol. X, Tab 46
[51] Trial Transcript, p. 1605, line 19 to p. 1607, line 14, Appellant's Record, Vol. X, Tab 46
[52] Trial Transcript, p. 896, line 5 to p. 897, line 2, Appellant's Record, Vol. VII, Tab 41
[53] Trial Transcript, p. 920, lines 1 – 17, Appellant's Record, Vol. VII, Tab 41
[54] Trial Transcript, p. 1472, lines 7 – 10, Appellant's Record, Vol. X, Tab 45

PART II - QUESTIONS IN ISSUE

72. In his Notice of Appeal to this Court, the Appellant states the following as his grounds of appeal:

1. That a **Vetrovec** caution should not have been provided to the jury regarding the exculpatory evidence of a Crown witness.

2. That the curative proviso, per s. 686(1)(b)(iii) of the **Criminal Code of Canada** should not have been applied to dismiss the appeal.

PART III – STATEMENT OF ARGUMENT

Ground of Appeal Number 1 – that a *Vetrovec* caution should not have been provided to the jury regarding the exculpatory evidence of a Crown witness.

73. The Majority of the Nova Scotia Court of Appeal made no error in upholding the giving of a **Vetrovec** warning in the context of the trial judge's entire jury instruction.

74. The Majority was mindful of the purpose of a **Vetrovec** warning and the role the warning plays in protecting against wrongful convictions.[55]

Nathan Johnson was a "mixed witness"

75. Nathan Johnson testified that he had been a long-time friend of the Appellant.[56] He also testified that he had a criminal record for attempted robbery, robbery, assaulting and resisting peace officers, drug possession and breaches of recognizance.[57] He testified that he had been found guilty of first degree murder and that his appeal from conviction had been dismissed.[58] He testified that he lured the victim to Joseph Young Street and shot the victim when he arrived.[59] Finally, he testified that he was a drug dealer and that the victim owed him money for crack.[60]

76. His trial testimony, exculpating the Appellant was in marked contrast to the story Johnson said in his testimony he told his girlfriend Kaitlin Fuller after the victim was murdered. He told Ms. Fuller that he did not shoot the victim and that the Appellant was involved in the shooting.[61] Johnson testified that he told Ms. Fuller that he had no level of participation in the murder. The jury therefore heard his previous completely opposite statement inculpatory of the Appellant

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[55] **R. v. Riley**, 2019 NSCA 94 at paras. 74 - 78
[56] Trial Transcript, p. 883, line 3 to p. 884, line 4, Appellant's Record, Vol. VII, Tab 41
[57] Trial Transcript, p. 928, line 13 to p. 930, line 21, Appellant's Record, Vol. VII, Tab 41
[58] Trial Transcript, p. 1429, lines 13 – 15 and p. 1433, lines 2 – 8, Appellant's Record, Vol. X, Tab 45
[59] Trial Transcript, p. 891, line 13 to p. 896, line 4 and p. 896, line 16 to p. 897, line 2, Appellant's Record, Vol. VII, Tab 41
[60] Trial Transcript, p. 894, line 15 to 17 and p. 897, line 7 to p. 899, line 17, Appellant's Record, Vol. VII, Tab 41
[61] Trial Transcript, p. 920, lines 2 to 14, Appellant's Record, Vol. VII, Tab 41 and p. 1441, line 17 to p. 1442, line 1, Appellant's Record, Vol. X, Tab 45

during his testimony when he attempted to exculpate the Appellant.[62] He was clearly in the category of a "mixed witness".

77. The Majority ruled that Johnson was in the category of a "mixed witness". In its decision the Majority held:

> 81 A Crown may call a witness whose evidence tends to inculpate an accused but also in other respects exculpates an accused. Where there is such a "mixed witness", the trial judge should demarcate, if it is possible, the inculpatory from the exculpatory portions and charge the jury accordingly. That is, why it is dangerous to rely on the inculpatory aspects to convict, but to acquit they need only have a reasonable doubt based on the exculpatory portions, alone or in combination with other evidence (see: *R. v. Rowe*, 2011 ONCA 753 (Ont. C.A.) at para. 34).
>
> 82 The appellant argues that Nathan Johnson was not a "mixed witness" because in the cold light of the transcript, he did not expressly adopt any of his prior oral statements to Kaitlin Fuller that inculpated the appellant in the murder of Chad Smith.
>
> 83 I am not persuaded by this argument. First, it was up to the jury to find as a fact whether Nathan Johnson adopted any of his prior inconsistent statements. Second, despite Mr. Johnson's attempts to exonerate the appellant, he confirmed certain aspects of Paul Smith's evidence, and the jury could draw certain inculpatory inferences based on what Johnson admitted was true about their pre- and post-offence contact. Third, there are a number of cases where Crown witnesses have been held not to have adopted their prior inculpatory statements yet a *Vetrovec* warning upheld or found harmless (see: *R. v. Gelle*, 2009 ONCA 262 (Ont. C.A.); *R. v. Tran*, 2010 ONCA 471(Ont. C.A.) at paras. 27-28; *R. v. Shand*, 2011 ONCA 5 (Ont. C.A.), leave to appeal denied, (2012), [2011] S.C.C.A. No. 270 (S.C.C.); *R. v. Murray*, 2017 ONCA 393 (Ont. C.A.) at paras. 128-132). [63]

78. The Majority was correct in finding Johnson to be a "mixed witness".

79. Johnson's testimony confirmed that he was with the Appellant and Paul Smith on the day of the murder.[64] This testimony confirmed Paul Smith's testimony that he was with the Appellant and Johnson in Dartmouth.

80. Johnson's testimony also confirmed that the victim worked for Panada Pizza as a pizza deliverer.[65] This testimony confirmed Paul Smith's testimony that the Appellant stated that the

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[62] Trial Transcript, p. 1442, lines 12 – 15, Appellant's Record, Vol. X, Tab 45
[63] **R. v. Riley**, 2019 NSCA 94 at paras. 81 - 83
[64] Trial Transcript, p. 885, line 20 to p. 886, line 16, Appellant's Record, Vol. VII, Tab 41
[65] Trial Transcript, p. 891, line 11 to p. 893, line 13, Appellant's Record, Vol. VII, Tab 41

victim worked as a pizza deliverer. The Appellant stated this in Paul Smith's vehicle with Johnson also in the vehicle.[66]

81. As noted by the Majority at paragraph 83 of the decision, Johnson confirmed certain aspects of Paul Smith's evidence. The jury could have drawn inculpatory inferences based on what Johnson admitted was true.

82. In his testimony, Johnson said that he had told his girlfriend, Kaitlin Fuller, after the victim was killed that he had not been involved in the murder. He fully blamed the murder on Paul Smith and the Appellant. One of them had made the phone call and one of them shot the victim.[67]

83. Johnson also testified that he told Kaitlin Fuller that he heard a "bang" and then Paul Smith and the Appellant came running to him. He also told her that he grabbed the gun and hid it.[68]

84. As noted by the Majority at paragraph 83 of the decision, it was up to the jury to find as a fact whether Johnson adopted any of his prior inconsistent statements.

85. If he had adopted any of these statements, this would have been inculpatory evidence against the Appellant.

86. Such an adoption would have put Johnson in the category of a "mixed witness".

Discretion of trial judge to give a Vetrovec warning in relation to a Crown witness who falls into the category of a mixed witness

87. It is clear that it is in the discretion of the trial judge to give a **Vetrovec** warning in relation to a Crown witness who falls into the category of a "mixed witness". In **R. v. Gelle** it was held:

> 5 Daniel Abreha, one of the robbers, pleaded guilty at his own trial. While in police custody, he gave a videotaped statement to police identifying the appellant as one of his accomplices in the robbery. The statement was admitted as evidence at the appellant's trial.
>
> 6 Abreha was also called as a Crown witness at the appellant's trial. His testimony, however, directly contradicted his prior statement to the police. Whereas in his statement

[66] Trial Transcript, p. 616, line 4 to p. 617, line 11, Appellant's Record, Vol. VI, Tab 40
[67] Trial Transcript, p. 920, lines 1 – 17 and p. 925, lines 16 – 21, Appellant's Record, Vol. VII, Tab 41
[68] Trial Transcript, p. 927, line 7 to p. 928, line 12, Appellant's Record, Vol. VII, Tab 41

he identified the appellant as one of his accomplices, he testified at trial that the appellant was not one of the robbers. Further, he did not identify the appellant in court and said that he had never seen the appellant before.

7 Abreha had a long criminal record, which included one conviction for armed robbery, three for robbery, eight for assault, and one for sexual assault. His criminal record, coupled with the stark contrast between his statement to the police and his testimony in court, easily qualified him as an "unsavoury witness". Accordingly, in her charge to the jury, the trial judge gave a *Vetrovec* warning in relation to Abreha. This cautionary instruction forms the basis for the appellant's sole ground of appeal to this court from his conviction of the two offences with which he was charged.

…

12 The appellant submits that no *Vetrovec* warning should have been given by the trial judge in relation to Abreha's evidence because, although Abreha was called as a Crown witness, his testimony at trial was exculpatory of the appellant; he was, therefore, in effect, a defence witness. In support of this submission, the appellant relies on the decisions of this court in *R. v. Tzimopoulos* (1986), 29 C.C.C. (3d) 304 (Ont. C.A.), and *R. v. Chenier* (2006), 205 C.C.C. (3d) 333 (Ont. C.A.). In *Chenier*, at pp. 352-353, Blair J.A. said the following with respect to giving a *Vetrovec* warning in relation to a defence witness:

> It is not permissible to give a *Vetrovec* warning in relation to a defence witness; the warning should only be given where a witness is giving evidence that assists in the demonstration of guilt.
>
> . . . . .
>
> The rationale behind the principle that a *Vetrovec* warning is not to be given in connection with defence evidence is that the instruction to look for confirmatory/corroborative evidence impermissibly transfers a burden to the accused and is contrary to the requirements of *W. (D.).* Defence evidence need only raise a reasonable doubt. [Citations omitted.]

13 For several reasons, I do not agree with the appellant's submission in this regard.

…

16 Third, and crucially, unlike the witnesses in *Tzimopoulos* and *Chenier*, Abreha was not a defence witness. The reality is that his statement to the police was entirely inculpatory of the appellant, whereas his testimony at the trial was largely, although not exclusively, exculpatory. In short, Abreha was a "mixed witness". For such a witness, the trial judge was not precluded from giving a *Vetrovec* warning if the trial judge, in the exercise of her discretion, "deemed it necessary": see *Tzimopoulos* at p. 341.

17 For these reasons, and bearing in mind both Abreha's lengthy and serious criminal record as well as the inconsistencies between his statement to the police and his testimony at trial, I cannot say that the trial judge erred by exercising her discretion to give a *Vetrovec* warning to the jury in relation to Abreha. Further, and perhaps more importantly, common

> sense dictates that a *Vetrovec* warning was entirely appropriate in this case — Abreha was indisputably a very unsavoury witness. [69]

88. It is submitted that Nathan Johnson is exactly the type of witness for which the **Vetrovec** warning was designed. He had overwhelming credibility issues. He was a drug dealer with a criminal record. He was a long-time friend of the Appellant's and he completely changed his previous version of events in which he implicated the Appellant in the murder. He was also convicted of the murder of the victim and the jury was aware of this. He was serving a life sentence in the penitentiary and common sense dictates that he would not have wanted to return to the penitentiary after testifying against the Appellant being labelled a "rat". Rather, by changing his story, he would return to the penitentiary as a type of "hero".

89. In confirming that it had been appropriate for the first trial judge to issue the Vetrovec warning, the Majority relied on **Gelle**. The Majority held:

> 84 In *R. v. Gelle*, the sole ground of appeal was the *Vetrovec* warning given in relation to one Abreha, a Crown witness, who recanted his police statement that had inculpated the appellant and swore the appellant was not involved in the crime. The trial judge ruled that the prior inconsistent statement could not be played for the jury because the witness had refused to adopt it as true (*R. v. Gelle*, [2004] O.J. No. 5044(Ont. S.C.J.)).
>
> 85 MacPherson J.A., for the majority, found no legal error. He stressed that: Abreha was a Crown witness; a trial judge's discretion as to the existence and content of a *Vetrovec* warning should be respected; prior to the jury charge, defence counsel accepted the plan to give a *Vetrovec* warning and did not object to instructions given; the jury was told they may believe Abreha's testimony if they found it trustworthy even if no one or nothing else confirmed it. Armstrong J.A. in concurring reasons would have upheld the conviction because there was no reasonable possibility that the verdict would have been different in light of the strength of the Crown's case. [70]

90. In **Gelle**[71] the prior inconsistent statement was not played for the jury because the witness refused to adopt it as true. However, the witness was still found to be in the category of a "mixed witness".

91. **Gelle** was referred to in **R. v. Rowe**, 2011 ONCA 753 with approval:

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[69] **R. v. Gelle**, 2009 ONCA 262 at paras. 5, 6, 7, 12, 13, 16 and 17
[70] **R. v. Riley**, 2019 NSCA 94 at paras. 84 - 85
[71] **R. v. Gelle**, 2009 ONCA 262

> 32 Andrade was clearly an unsavoury witness. Part of his testimony, specifically the excerpts from his preliminary inquiry testimony, implicated the appellant. Other parts of his testimony, specifically his evidence at trial, exculpated the appellant. For the purpose of determining whether a *Vetrovec* instruction should be given, Andrade was what this court has come to refer to as a "a mixed witness", that is, an unsavoury witness called by the Crown whose testimony in part supports the accused's defence: see *R. v. Gelle*, 2009 ONCA 262, 244 C.C.C. (3d) 129 (Ont. C.A.), at para. 16; *R. v. Tran*, 2010 ONCA 471, 103 O.R. (3d) 131 (Ont. C.A.), at paras. 27-28; and *R. v. Shand*, 2011 ONCA 5 (Ont. C.A.), 104 O'M. & H. 491, leave to appeal to S.C.C. requested (2012), [2011] S.C.C.A. No. 270 (S.C.C.), at para. 215.
>
> 33 The above-cited cases indicate that a *Vetrovec* caution will often be appropriate in respect of the testimony of a "mixed witness". The specifics of that caution and the format of the instruction are left very much in the discretion of the trial judge. The jury instruction will be sufficient if, considered in its entirety, that instruction makes clear to the jury both that it is dangerous to rely on the inculpatory portion of the *Vetrovec* witness's evidence without confirmatory support, and that the jury must acquit if the exculpatory portions of that witness's evidence, alone or taken in combination with the rest of the evidence, leave the jury with a reasonable doubt. In upholding an instruction directed at a witness much like Andrade, this court said in *Tran*, at para. 28:
>
> The jury would have been aware of the conflicting statements made by these witnesses. The evidence they gave at trial was essentially exculpatory while their pre-trial statements implicated the accused. *It would have been apparent to the jury that the trial judge's* Vetrovec *warning amounted to an instruction to exercise considerable caution before convicting the appellants on the basis of the inculpatory evidence given by these witnesses and upon which the Crown relied*. The exculpatory evidence was simply the flip side of the same coin. Reading the charge as a *whole, I am entirely satisfied that the jury would have understood that if that "mixed" evidence left them with a reasonable doubt they would have to acquit the appellants*.
> [Emphasis added.] [72]

92. It is submitted that **Rowe**[73] does not overturn the decision in **Gelle**.[74]

93. It is submitted that the decisions in **Reg. v. Royce-Bentley**[75] and **Jenkins v. The Queen**[76] referred to in the Appellant's factum at paras. 77 and 78, do not assist the Appellant. The law is

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[72] **R. v. Rowe**, 2011 ONCA 753 at paras. 32 and 33
[73] **R. v. Rowe**, 2011 ONCA 753
[74] **R. v. Gelle**, 2009 ONCA 262
[75] **Reg. v. Royce-Bentley,** [1974] 1 WLR 535, Appellant's Book of Authorities, Tab 1
[76] **Jenkins v. The Queen**, [2004] HCA 57, referred to in the Appellant's factum at paras. 77 and 78

clear in Canada. It is in the discretion of a trial judge to give a **Vetrovec** warning in the case of a "mixed witness".

94. A trial judge should consult with defence counsel to decide if a **Vetrovec** warning is appropriate. In this case, defence counsel at trial was in favour of giving the **Vetrovec** warning.

95. The Ontario Court of Appeal explained in **R. v. Murray**:

> 124 Third, in the case of "mixed" witnesses, that is to say, witnesses called by the Crown who give evidence that is partially inculpatory and partially exculpatory, a trial judge has a discretion, but not a duty, to give a *Vetrovec* instruction: *Tzimopoulos,* at p. 341; *R. v. Gelle*, 2009 ONCA 262, 244 C.C.C. (3d) 129 (Ont. C.A.), at paras. 14, 16; *R. v. Tran*, 2010 ONCA 471, 257 C.C.C. (3d) 18 (Ont. C.A.), at para. 27.
>
> 125 Fourth, where a *Vetrovec* caution is given for a "mixed" witness called by the Crown, a trial judge should make it clear that the desirability of confirmatory evidence applies only to the inculpatory aspects of the witness' testimony, not to its exculpatory features: *R. v. Rowe*, 2011 ONCA 753, 281 C.C.C. (3d) 42 (Ont. C.A.), at paras. 33-34. To fail to mark out this distinction risks an impermissible transfer of a burden of proof to the accused and a compromise of the principles in *W. (D.)*: *Chenier*, at p. 353.
>
> 126 Finally, where a trial judge gives a *Vetrovec* caution in connection with exculpatory evidence, or where the instruction given is unclear in its scope, a reviewing court may look to the balance of the charge and the conduct of the parties to determine whether a substantial wrong or miscarriage of justice has occurred: *R. v. Shand*, 2011 ONCA 5, 104 O.R. (3d) 291 (Ont. C.A.), at para. 221, leave to appeal to S.C.C. refused, (2012), [2011] 1 S.C.R. xii (note) (S.C.C.).
>
> ***The Principles Applied***
>
> 127 For several reasons, I would not accede to this ground of appeal.
>
> 128 First, T.J-D. was a "mixed" witness called by the Crown. He gave evidence that included some inculpatory features, but was largely exculpatory of the appellant on the critical issue of knowledge. In practical terms, the exculpatory aspect of T.J-D.'s evidence afforded the only sustenance for the appellant's denial of complicity in the murder of the deceased.
>
> 129 Second, as a consequence of T.J-D.'s status as a "mixed" witness, the trial judge had a *discretion* to give a *Vetrovec* caution in relation to T.J-D.'s evidence, likewise in the language used to convey that caution. In addition, as I will discuss later, the *Vetrovec* caution was requested by trial counsel for the appellant.
>
> 130 Third, the trial judge's error was *not* in including a *Vetrovec* caution in connection with the evidence of T.J-D., but in failing to distinguish between its inculpatory aspects, where confirmation was desirable, and its exculpatory components, where it was not.

> 131 Fourth, the functional approach to the assessment of the adequacy of a jury charge and the obligation to view it as a whole makes it clear that the vice of a *Vetrovec* instruction that includes exculpatory evidence may be alleviated by other parts of the charge. In this case, that task was completed by a *W.(D.)* instruction expressly relating to the exculpatory aspects of T.J-D.'s evidence.
>
> 132 Finally, it was the defence position at trial that the trial judge should give a *Vetrovec* instruction with respect to the evidence of T.J-D. Counsel did not seek an instruction distinguishing between the inculpatory and exculpatory components of T.J-D.'s testimony; did not complain about its omission; was satisfied that any reference to the desirability of confirmatory evidence should be omitted; and offered no dissent from the language used in the instruction given by the trial judge. [77]

96. Based on **Murray**,[78] it is clear that if a trial judge gives a **Vetrovec** warning in relation to exculpatory evidence, a court of appeal may look at the balance of the charge and the conduct of the parties.

97. It is submitted that is exactly what the Majority in the case at Bar did in its review of the trial judge's charge to the jury.

Balance of the charge to the jury

98. It is agreed that in the case of a "mixed witness" a trial judge should make it clear that the desirability of confirmatory evidence applies only to the inculpatory aspects of the witness testimony, not to its exculpatory features.

99. In the case at bar, the Majority held:

> 90 I have highlighted the most troubling aspect of the trial judge's approach to Mr. Johnson's evidence. If that is how it had been left, it would be difficult not to say that the onus of proof had been misplaced. However, that is not how it was left.
>
> 91 The trial judge shortly thereafter added:
>
> > Now on the vital issue in this case raised by Nathan Johnson's evidence that it was he who shot Chad Smith without the knowledge or participation of Randy Riley, you have credibility findings to make. **That is to say, you will have to consider his evidence and the other evidence, including Paul Smith's evidence. If, after considering all the evidence at this trial, you are left in a state of doubt as to Mr. Riley's guilt, you must find him not guilty.**

[77] **R. v. Murray**, 2017 ONCA 393 at paras. 124 - 132
[78] **R. v. Murray**, 2017 ONCA 393

[Emphasis added]

92 Later, when the trial judge stressed the Crown's obligation to prove all of the essential elements beyond a reasonable doubt, he added:

> Now the concept of reasonable doubt should remain foremost in your mind. A criminal trial is not a contest of credibility. Be careful not to start to see it as a choice between what Paul Smith said and whatever evidence you find that confirms that on one hand and what Nathan Johnson said and whatever evidence confirms that on the other hand.
>
> It is not a choice between those two things. You should not just decide that one story is more believable than the other. Remember, the Crown has to prove guilt beyond a reasonable doubt. That doubt can come from the evidence or lack of evidence led by the Crown. It can come from any other evidence, as well. [79]

100. It is submitted that the balance of the charge made it clear to the jury that if any of Nathan Johnson's exculpatory evidence gave them a reasonable doubt as to guilt they must acquit the Appellant.

Defence counsel at trial was content with the Vetrovec warning given regarding Nathan Johnson

101. The trial judge had given Crown and defence counsel a copy of his entire proposed charge to the jury. It included a **Vetrovec** warning for Nathan Johnson.[80] The proposed charge relating to the **Vetrovec** warning appeared to meet with the approval of defence counsel.[81]

102. Later in the proceedings but prior to the jury being charged, Crown and defence counsel were provided with a copy of the **Vetrovec** portion of the judge's proposed charge.[82] The trial judge asked counsel to review this portion of the charge. Defence counsel made no comment on the proposed **Vetrovec** warning for Nathan Johnson.[83]

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[79] **R. v. Riley**, 2019 NSCA 94 at paras. 90 - 92
[80] Appellant's Record, Vol. II, Tab 33
[81] Trial Transcript, p. 1720, line 20 to p. 1725, line 17 and p. 1737, line 1 to p. 1740, line 15, Appellant's Record, Vol. XI, Tab 47, and Vol. III, Tab 34
[82] Appellant's Record, Vol. III, Tab 34
[83] Trial Transcript, p. 1823 and 1824, Appellant's Record, Vol. XI, Tab 48

103. This proposed charge was also discussed in an exchange of emails between Crown counsel, defence counsel and the trial judge.[84]

104. Defence counsel, in his closing address to the jury, described Nathan Johnson as an unsavoury witness deserving of a warning.[85]

105. After the jury was charged the trial judge asked counsel if there was anything to recall the jury. Defence counsel indicated there was nothing.[86]

Conduct of Defence Counsel at Trial

106. There is abundant case law to the effect that the conduct of defence counsel is relevant in deciding whether the giving of, or wording of, a **Vetrovec** caution amounted to an error.

107. In **Gelle** it was held:

> 15 Second, the trial judge provided a draft of the jury charge to and consulted with counsel in relation thereto on the morning before delivering it. During the pre-charge conference, defence counsel raised five concerns about the draft charge. None related to the *Vetrovec* warning. Nor did defence counsel object on this issue after the charge. Although the absence of an objection is not conclusive, it is an important consideration in such a common and well-known area of criminal law: see *R. v. Harriott* (2002), 58 O.R. (3d) 1 (Ont. C.A.), at para. 41, aff'd [2003] 1 S.C.R. 39 (S.C.C.).
>
> …
>
> 21 Second, defence counsel was informed about, accepted (pre-charge), and did not object (post-charge) to the contents of the Vetrovec warning. As noted above, these are important factors which support the appropriateness and sufficiency of the trial judge's instructions in this case: see Harriott at para. 41. [87]

108. In **Murray** it was held at paragraph 132:

> 132 Finally, it was the defence position at trial that the trial judge should give a *Vetrovec* instruction with respect to the evidence of T.J-D. Counsel did not seek an instruction distinguishing between the inculpatory and exculpatory components of T.J-D.'s testimony; did not complain about its omission; was satisfied that any reference to the

[84] Trial Transcript, p. 1750, line 11 to p. 1751, line 17, Appellant's Record, Vol. XI, Tab 47
[85] Trial Transcript, p. 1807, Appellant's Record, Vol. XI, Tab 48
[86] Trial Transcript, p. 1826, lines 2 and 3, Appellant's Record, Vol. XI, Tab 48
[87] **R. v. Gelle**, 2009 ONCA 262 at paras. 15 and 21

> desirability of confirmatory evidence should be omitted; and offered no dissent from the language used in the instruction given by the trial judge. [88]

109. In **R. v. Ranglin** it was held at paragraph 43:

> 43 The appellant argues that the case for a *Vetrovec* caution for Moy-Lingomba was weakened by the fact that his evidence was important to the defence in its third party suspect claim. The trial judge acknowledged that Moy-Lingomba was a "mixed" *Vetrovec* witness. As he said at para. 46 of his ruling on the issue: "Without the *Vetrovec* caution, the jury will not be told, understand or apply the appropriate legal assessment to Mr. Moy-Lingomba's inculpatory evidence and the less stringent assessment of his exculpatory evidence." The trial judge provided a "mixed" *Vetrovec* caution in which he conveyed the complexity of the situation to the jury. No objection is taken to the correctness of this instruction: see *R. v. Rowe*, 2011 ONCA 753, at para. 32; and *R. v. Gelle*, 2009 ONCA 262, at para. 16. [89]

110. In **R. v. Figueroa** it was held at paragraph 47:

> 47 As observed by MacPherson J.A. in *R. v. Gelle*, 2009 ONCA 262, 244 C.C.C. (3d) 129, whether or not to give a *Vetrovec* warning is "very much within the discretion of the trial judge". Where there is a foundation for the judge's exercise of discretion, as there was in this case, appellate courts should not interfere. Further, although the absence of an objection is not conclusive, it is an important consideration in this context. This ground of appeal cannot succeed. [90]

111. In the case at bar, counsel for the defence at trial agreed with the giving of and the wording of the **Vetrovec** warning. Counsel for the defence did not seek an instruction distinguishing the inculpatory and exculpatory components of Johnson's testimony, did not complain about its omission and offered no dissent from the language of the **Vetrovec** warning used in the instruction given by the trial judge.

112. If this Court concludes that the **Vetrovec** warning included a caution in connection with exculpatory evidence, this Court ought to consider the tactical conduct of defence counsel and conclude that no substantial wrong or miscarriage of justice occurred.

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[88] **R. v. Murray**, 2017 ONCA 393 at para. 132
[89] **R. v. Ranglin**, [2018] O.J. No. 6633 at para. 43
[90] **R. v. Figueroa**, [2016] O.J. No. 4491 at para. 47

No ineffective assistance of counsel ground of appeal had been raised in the appeal to the Nova Scotia Court of Appeal

113. The jury had heard Johnson change his story from what he told his girlfriend after the murder was committed. The story changed from implicating the Appellant in the murder to completely exonerating him.

114. For the reasons described above, Johnson was a very unsavoury witness.

115. In his closing address to the jury, defence counsel recognized that it would require real convincing to have the jury believe Johnson's evidence. In his address he labelled Johnson as "… equally an unsavoury witness deserving such a warning."[91]

116. Common sense dictated that Johnson was a very unbelievable witness. Not to have acknowledged his unsavouriness as a witness would have ignored reality.

117. What defence counsel was arguing was that while Johnson was unsavoury, his testimony could nonetheless raise a reasonable doubt.

118. Acknowledgement of Johnson's unsavoury character was a tactical decision made at trial by defence counsel. He did more than simply not object to a **Vetrovec** warning. He actively encouraged it to be given.

119. In the Appellant's factum at paragraph 122 he notes that the Majority keyed in on counsel's failure to object. The Appellant then complains that the Majority made no mention of trial counsel's admission at the hearing of the appeal that he had missed the issue.

120. In his factum in the Nova Scotia Court of Appeal, the Appellant characterized trial counsel's failure to object to the **Vetrovec** warning as essentially a regrettable error. He argued that there was no possible tactical advantage to the defence for inclusion of a **Vetrovec** warning.

121. This argument raised the spectre of ineffective assistance of counsel. The Appellant was essentially saying his trial counsel made a grave error in his conduct of the defence case.

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[91] Trial Transcript, p. 1807, lines 20 and 21, Appellant's Record, Vol. XI, Tab 48

122. However, the Appellant said this without an evidentiary basis to support his argument and without including ineffective assistance of counsel as a ground of appeal.

123. The only way such an evidentiary basis could come before the Nova Scotia Court of Appeal is if the Appellant had included an ineffective assistance of counsel ground of appeal. The Appellant could then have brought in fresh evidence that his trial counsel had provided ineffective assistance.

124. Without such fresh evidence it must be assumed that trial defence counsel acted competently and in his client's best interest in his conduct of the defence at trial.

125. It is submitted that there was no fresh evidence before the Nova Scotia Court of Appeal to show that counsel had made an error at trial.

Ground of Appeal Number 2 – that the curative proviso in section 686(1)(b)(iii) of the Criminal Code should not have been applied to dismiss the appeal.

126. The law regarding the application of the curative proviso in section 686(1)(b)(iii) is well-settled by decisions of this Court.

127. In **R. v. Van** it was held:

> 35 In *Khan*, this Court reviewed these two categories of error and explained the basis for upholding convictions in the face of these errors. An error falling into the first category is an error that is harmless on its face or in its effect. The proviso ensures that an appellate court does not need to overturn a conviction solely on the basis of an error so trivial that it could not have caused any prejudice to the accused, and thus could not have affected the verdict. Indeed, it would detract from society's perception of trial fairness and the proper administration of justice if errors such as these could too readily lead to an acquittal or a new trial (e.g. *Chibok v. R.* (1956), 24 C.R. 354(S.C.C.), at p. 359). This is consistent with Lamer C.J.'s pronouncement in *R. v. Jacquard*, [1997] 1 S.C.R. 314 (S.C.C.), that, in respect of errors in a trial judge's charge to the jury, "accused individuals are entitled to *properly* instructed juries. There is, however, no requirement for *perfectly* instructed juries" (para. 2 (emphasis in original)). Thus, a slight deviation from the standard of a perfect jury charge is likely to constitute a harmless error that could justify upholding a conviction. Errors might also be characterized as having a minor effect if they relate to an issue that was not central to the overall determination of guilt or innocence, or if they benefit the defence, such as by imposing a more onerous burden on the Crown (*Khan*, at para. 30). The question of whether an error or its effect is minor should be answered without reference to the strength of the other evidence presented at trial. The overriding question is

> whether the error on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial, that any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made.
>
> …
>
> 37 In this appeal, the error lies in the trial judge's failure to include a limiting instruction in his charge to the jury concerning the permissible use of Det. Sgt. Nealon's testimony. I believe that while this error might not seem trivial when considered in isolation, its effect was sufficiently harmless in context that no prejudice was caused to the accused and the verdict would necessarily have been the same absent the error. [92]

128. These two paragraphs were referred to with approval by this Court in **R. v. White**:

> 93 Thus, the first category of error that satisfies the requirements of the curative proviso is that of "minor" or "harmless" errors. In determining whether or not an error had only a minor effect, the court may look at the entirety of the case for context, but should not assess the strength of the evidence against the accused (*Van*, at paras. 35 and 37). For example, an error that appears significant in isolation may be minor because, in context, it only related to "a very minor aspect of the case that could not have had any effect on the outcome" or concerned "issues that the jury was otherwise necessarily aware of" (*Khan*, at para. 30). [93]

129. The Majority of the Court of Appeal properly applied the law in its consideration of whether the curative provision should be applied in the case at bar.

130. In applying the curative proviso, the Majority focused on three factors:[94]

1. Position of the parties at trial;
2. Balance of the jury charge; and
3. There was no prejudice in the circumstances.

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[92] **R. v. Van**, 2009 SCC 22 at paras. 35 and 37
[93] **R. v. White**, 2011 SCC 13 at para. 93
[94] Decision of Majority at paragraph 98, Appellant's Record, Vol. I, Tab 6

Position of the Parties

131. The Majority considered the position of the parties at trial. It had to decide if there was an error in giving the **Vetrovec** warning, was that error so clearly non-prejudicial that no reasonable jury could possibly have rendered a different verdict if the error had not been made.

132. Defence counsel at trial was also appellate counsel for the Appellant on his appeal to the Nova Scotia Court of Appeal.

133. The Majority held at paragraph 106 of its decision that a failure to object has long been recognized as relevant, but not determinative, on appeal. It can be indicative that the error was not serious.

134. The Majority noted at paragraph 107 of its decision that trial counsel's express agreement is even more relevant to the seriousness or impact of the improper instruction, particularly where counsel had full opportunity over many days to consider the instruction now said to be fatal to the conviction. This is exactly what occurred here.

135. The Majority also noted at paragraph 103 of its decision that in their closing addresses to the jury, neither Crown nor defence counsel suggested that it would be dangerous to rely on Johnson's evidence unless they found independent confirmatory evidence. Instead, the focus in the addresses was where it should be: whether the Crown had proven its case beyond a reasonable doubt.

Balance of the Charge

136. The Majority correctly considered the impugned **Vetrovec** warning in the context of the trial judge's entire instructions to the jury.

137. The Majority held:

> 79 It is easy to now say, with the clarity of hindsight, that it would have been better had the trial judge not lumped Paul Smith and Nathan Johnson together. In the circumstances of this case, if the trial judge erred in his instruction, the error was harmless. I say this for the following reasons:

> 1. It was for the jury to decide if a witness such as Nathan Johnson adopted as true any part of his prior inculpatory statements;
>
> 2. The trial judge clearly instructed the jury that should they have a doubt based on all of the evidence, including in particular that of Nathan Johnson, they must acquit the appellant;
>
> 3. Defence counsel did not just remain silent or acquiesce on this issue — he actively encouraged the jury be told that Nathan Johnson was an unsavoury witness and a warning be given;
>
> 4. The Crown summation to the jury in no way invited the jury to disregard Nathan Johnson's evidence because it was dangerous to rely on it in the absence of independent confirmatory evidence;
>
> 5. There is no reasonable possibility that a jury could reasonably believe or have a reasonable doubt based on Nathan Johnson's evidence.
>
> …

91 The trial judge shortly thereafter added:

> Now on the vital issue in this case raised by Nathan Johnson's evidence that it was he who shot Chad Smith without the knowledge or participation of Randy Riley, you have credibility findings to make. **That is to say, you will have to consider his evidence and the other evidence, including Paul Smith's evidence. If, after considering all the evidence at this trial, you are left in a state of doubt as to Mr. Riley's guilt, you must find him not guilty.**
>
> [Emphasis added]

92 Later, when the trial judge stressed the Crown's obligation to prove all of the essential elements beyond a reasonable doubt, he added:

> Now the concept of reasonable doubt should remain foremost in your mind. A criminal trial is not a contest of credibility. Be careful not to start to see it as a choice between what Paul Smith said and whatever evidence you find that confirms that on one hand and what Nathan Johnson said and whatever evidence confirms that on the other hand.
>
> It is not a choice between those two things. You should not just decide that one story is more believable than the other. Remember, the Crown has to prove guilt beyond a reasonable doubt. That doubt can come from the evidence or lack of evidence led by the Crown. It can come from any other evidence, as well.
>
> …

108 I have quoted above the judge's instructions that twice emphasized that the fundamental question was whether they had a reasonable doubt as to the appellant's guilt.

These instructions correctly guided the jury on how to decide the case (*R. v. Shand, supra* at para. 221). [95]

No Prejudice in the Circumstances

138. Even if the **Vetrovec** warning for Johnson was given in error, that error was harmless in its effect.

139. The Majority held as follows:

> 93 Furthermore, even if the trial judge erred in law in giving a *Vetrovec* warning in relation to the evidence of Nathan Johnson, this Court has the power under s. 686(1)(b)(iii) of the *Criminal Code* to dismiss the appeal if the Crown can establish that the error did not cause a substantial wrong or miscarriage of justice.
>
> …
>
> 96 The modern interpretation of this power requires the Court to focus on whether there is any reasonable possibility that the verdict would have been different without the error (*R. c. Charlebois*, 2000 SCC 53 (S.C.C.); *R. v. Bevan, supra*). As explained in *R. v. Van*, 2009 SCC 22 (S.C.C.), absent an element of trial unfairness, the error may be excused if harmless on its face or in its effect, or where the case against the appellant is so strong that a jury would inevitably have convicted.
>
> 97 The burden is on the Crown to establish the *proviso* on a balance of probabilities. Here, the Crown does not suggest that the case against the appellant was overwhelming. It asks for the *proviso* to be invoked because the error was harmless in its effect.
>
> --
>
> 109 The evidence of Nathan Johnson was like a Hail Mary pass with no one in the end zone to catch it. To say it was unsatisfactory would be kind. A jury would have to suspend all belief for it to raise a reasonable doubt. Consider:
>
> > (a) Nathan Johnson was an unsavoury witness. He had convictions for attempted robbery, armed robbery, assaulting and resisting peace officers, drug possession and breach of recognizance;
> >
> > (b) Johnson had been tried and convicted of first degree murder of Chad Smith, where he declined to testify to even try to refute the version of events he had given to Kaitlin Fuller which inculpated himself and the appellant in the first degree murder of Chad Smith;

[95] **R. v. Riley**, 2019 NSCA 94 at paras. 79, 91, 92 and 108

> (c) He claimed to be a drug dealer with Chad Smith as his client, yet Johnson had no cell phone;
>
> (d) Johnson claimed that he kept a sawed-off shotgun stowed in the woods for protection due to his claimed drug business;
>
> (e) Johnson said that he alone had called Chad Smith, first to Mr. Smith's cell phone to try to reach him to collect a drug debt. An independent eyewitness described two people at the Aliant pay phone from which the fake pizza delivery order was placed. More importantly, objective independent evidence demonstrated no such call was made;
>
> (f) Johnson claimed that he had spent the afternoon with the appellant, only going to another close-by Dartmouth home where they played cards for "hours" and did not leave until it was dark; yet the Crown expert demonstrated that the appellant's cell phone (which Johnson admitted he had used throughout the day) went to a variety of locations, including an area in close proximity to where Paul Smith testified he had driven Johnson and the appellant to pick up the shotgun;
>
> (g) Johnson explained that he had not told anyone before the appellant's trial he had shot the victim because he would have had to admit he had murdered the victim. However, his trial testimony was in fact not just exculpatory of the appellant, Johnson repeatedly claimed the shooting was accidental;
>
> (h) Paul Smith's testimony, which was almost completely at odds with Nathan Johnson's exculpatory tale, was corroborated by independent objective evidence.
>
> 110 I agree with the Crown that no reasonable jury would have believed Johnson or would have had a reasonable doubt based on his evidence. [96]

140. Following the decision in **Van**[97] the Majority therefore concluded that if the **Vetrovec** warning was in error, its effect was so clearly non-prejudicial that it could not have had any effect on the outcome.

141. It is submitted that the harmless error rule should apply whether or not Johnson was in the category of a “mixed witness”.

142. As the Majority of the Nova Scotia Court of Appeal concluded, Johnson’s evidence, in the context of the entire case, was unbelievable. If the giving of a **Vetrovec** warning was in error, its effect was so clearly non-prejudicial that it could not have affected the outcome of the trial.

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[96] **R. v. Riley**, 2019 NSCA 94 at paras. 93, 96, 97, 109 and 110
[97] **R. v. Van**, 2009 SCC 22

Decision of Dissenting Justice

143. In order to properly analyze whether to apply the curative proviso a court of appeal must consider the factors referred to in **Van**.[98]

144. A court of appeal should examine the entirety of the case for context in determining whether an error had only a minor effect.[99]

145. While the Majority properly considered these factors, the dissenting justice did not.

146. At paragraph 165 of the dissenting justice's decision, it is said that the Majority erroneously weighed evidence in holding that Johnson's evidence was beyond belief.

147. At paragraphs 109 and 110 of its decision, the Majority reviewed Johnson's evidence in the context of the entire case. The Majority was entitled to conduct this review as held in **Van**.[100]

148. It is submitted that by failing to review Johnson's evidence in the context of the entire case, the dissenting justice erred in law in his consideration of the curative proviso.

[98] **R. v. Van**, 2009 SCC 22
[99] **R. v. Van**, 2009 SCC 22, at para. 93
[100] **R. v. Van**, 2009 SCC 22

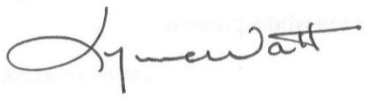
PART IV - SUBMISSIONS WITH RESPECT TO COSTS

149. This is a criminal case and therefore the Respondent is not seeking costs.

PART V – NATURE OF ORDER SOUGHT

150. The Respondent asks this Court to dismiss the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



For:

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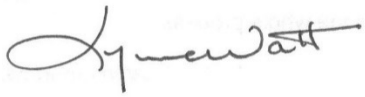
James A. Gumpert, Q.C.
Counsel for the Respondent



For:

_____

Melanie Perry
Counsel for the Respondent

June 3, 2020
Halifax, Nova Scotia

PART VI – SUBMISSIONS ON CASE SENSITIVITY

There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation or restriction on public access to information in the file that could have an impact on the publication of the Court's reasons in the appeal.

PART VII – TABLE OF AUTHORITIES & STATUTORY PROVISIONS

STATUTORY PROVISIONS

Criminal Code of Canada, R.S.C. 1985, c.C-46 – Section 686 (1)(b)(iii)

Code criminel L.R.C. 1985, ch. C-46 – Section 686 (1)(b)(iiii)

Powers	**Pouvoir**
686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal	686 (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'inaptitude à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel:
…	…
(b) may dismiss the appeal where	b) peut rejeter l'appel, dans l'un ou l'autre des cas suivants :
…	…
(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is	(iii) bien qu'elle estime que, pour un motif mentionné au sous-alinéa a)(ii), l'appel pourrait être décidé en faveur de l'appelant, elle est d'avis qu'aucun

of the opinion that no substantial wrong or miscarriage of justice has occurred, or	fait partie celle dont l'appelant a été déclaré coupable et elle est d'avis qu'aucun préjudice n'a été causé à celui-ci par cette irrégularité; …