WARNING

The President of the panel hearing this appeal directs that the following should be attached to this file:

The publication ban and sealing order issued on June 4, 2019 by Justice Robert Clark, pursuant to s. 631(6) of the *Criminal Code* shall continue. The order prohibits the publication of any information that might tend to identify Juror #14 and seals the Notice of Application dated June 3, 2019, and the appended material. A redacted copy of the Notice of Application is publicly available in the Respondent's Appeal Book and Compendium.

2024 ONCA 119 (CanLII)

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Shaw, 2024 ONCA 119
DATE: 20240216
DOCKET: C68060, C68128 & C68233

Harvison Young, Sossin and Copeland JJ.A.

DOCKET: C68060

BETWEEN

His Majesty the King

Respondent

and

Shakiyl Shaw

Appellant

DOCKET: C68128

AND BETWEEN

His Majesty the King

Respondent

and

Mohamed Ali-Nur

Appellant

2024 ONCA 119 (CanLII)

DOCKET: C68233

AND BETWEEN

His Majesty the King

Respondent

and

Lenneil Shaw

Appellant

Dirk Derstine and Geoff Haskell, for the appellant Shakiyl Shaw

Danielle Robitaille and Brandon Chung, for the appellant Mohamed Ali-Nur

Frank Addario and Samara Secter, for the appellant Lenneil Shaw

Matthew Asma and Molly Flanagan, for the respondent

Heard: June 19 and 20, 2023

On appeal from the convictions entered on May 23, 2019 by Justice Robert A. Clark of the Superior Court of Justice, sitting with a jury.

2024 ONCA 119 (CanLII)

Table of Contents

2024 ONCA 119 (CanLII)

Copeland J.A.:

A. INTRODUCTION

[1] The appellants were each convicted of first-degree murder in the shooting death of Jarryl Hagley. They appeal their convictions.

[2] Mr. Hagley was shot in the early morning hours of October 16, 2016, in a Pizza Pizza restaurant on Weston Road in Toronto. In light of the trial evidence and how the case was presented to the jury, the jury must have found that Lenneil Shaw was one of two shooters, Shakiyl Shaw was the getaway driver, and Mohamed Ali-Nur was the second shooter.

[3] The convictions of all three appellants rested on the identification evidence of Winston Poyser. Mr. Poyser was present in the car with the driver and the two shooters. His car was used to drive to and from the Pizza Pizza. He went to the Pizza Pizza with the shooters, standing outside by the door. He ran from the scene with the shooters. His car was visible on surveillance video, and he was the only person whose face was sufficiently visible to be identifiable from the video from outside the Pizza Pizza. He became the centrepiece of the Crown's case against the appellants.

[4] Mr. Poyser had known the Shaw brothers for a significant period of time prior to the night of the shooting. He had dated their sister. Because Mr. Poyser knew

2024 ONCA 119 (CanLII)

the Shaw brothers, and was not purporting to make a stranger identification, the challenge to his evidence raised on their behalf at trial focused on his credibility.

[5] By contrast, Mr. Poyser was not previously acquainted with the second shooter, who he met the day of the shooting and was introduced to by the name of Cron Dog. Mr. Poyser identified Mr. Ali-Nur as Cron Dog. As I will explain in the analysis below, there were significant frailties to Mr. Poyser's identification evidence as it related to Mr. Ali-Nur. Most notably, he was unable to provide a description of Cron Dog with any degree of detail and he was never asked to select Cron Dog from a line-up. Although it is agreed that the police had a photo line-up prepared and available when they interviewed Mr. Poyser, they instead showed him a single photo of Mr. Ali-Nur and asked if he was Cron Dog. A similar one-photo identification process was repeated when Mr. Poyser pled guilty to accessory after the fact to murder, and again at trial, followed by an in-dock identification. Not surprisingly, the challenge to Mr. Poyser's evidence at trial as it related to Mr. Ali-Nur focused on the reliability of his identification evidence, in addition to challenging his credibility.

[6] The appellants raise numerous grounds of appeal, most of which are shared. The common grounds raised are the following:

1. the trial judge provided an inadequate answer to the jury's question about the absence of evidence;

2024 ONCA 119 (CanLII)

2. the trial judge erred in failing to provide a jury instruction on inappropriate comments in the Crown's closing address;
3. the trial judge erred in refusing to admit for the truth of its contents a statement made by Mr. Poyser to his lawyer;
4. the trial judge erred in failing to conduct a jury inquiry or grant a mistrial in relation to an altercation between the Shaw brothers' mother and Mr. Hagley's mother in the hall, which was witnessed by the jury;
5. the trial judge erred in failing to conduct a jury inquiry in relation to information that Juror #14 attended at the scene of the murder during the trial;
6. the trial judge erred in refusing to order the Crown to produce the submissions made to the Attorney General regarding the direct indictment;
7. the trial judge erred in finding that threshold reliability was met regarding the subscriber information for the 226 phone;
8. the trial judge erred in dismissing the application to redact the "Dozey contact" information from the extraction report regarding Mr. Poyser's phone; and,
9. the trial judge erred in his instruction to the jury regarding evidence lost due to police negligence.

[7] In addition, there are four individual grounds of appeal:

2024 ONCA 119 (CanLII)

10. Mr. Ali-Nur argues that the trial judge erred in admitting Mr. Poyser's evidence identifying him as Cron Dog, and in particular the in-dock identification;
11. Mr. Ali-Nur argues that the jury instruction on Mr. Poyser's identification of him as Cron Dog was inadequate;
12. Mr. Ali-Nur argues that the verdict against him is unreasonable; and,
13. Shakiyl Shaw argues that the trial judge erred in dismissing his motion for a directed verdict on murder.

[8] I would allow the appeals of all three appellants. The trial judge erred in his response to the jury's question about the absence of corroborative evidence, in failing to give a corrective instruction to the Crown's inappropriate closing address, and in failing to allow the jury to use the hearsay statement by Mr. Poyser to his own lawyer that he knew the perpetrators of the shooting to carry guns in the past for the truth of its contents.

[9] This trial turned on the credibility and reliability of Mr. Poyser's identification of the appellants as the perpetrators of the murder. Because of significant challenges to the credibility of Mr. Poyser's evidence – and the reliability as it related to Mr. Ali-Nur – both the Crown and defence argued the case to the jury by focusing on whether or not there was evidence corroborating Mr. Poyser's account. The three errors that I identify all bear directly either on the credibility of Mr. Poyser or the extent to which his evidence may have been corroborated by other evidence.

2024 ONCA 119 (CanLII)

In my view, taken cumulatively, these errors had an impact on the tools given to the jury to address the credibility issues they were tasked to decide, and rendered the appellants' trial unfair.

[10] I would order new trials for Lenneil and Shakiyl Shaw. In relation to Mr. Ali-Nur, in addition to the errors that would warrant a new trial, in my view, the verdict against him is unreasonable. As a result, I would enter an acquittal for Mr. Ali-Nur.

[11] These reasons are structured as follows. First, I summarize the central evidence at trial as context for the issues raised on appeal. Second, I address the grounds of appeal that cumulatively rendered the trial unfair and require a new trial. Third, I address Mr. Ali-Nur's argument that the verdict against him is unreasonable and that an acquittal should be entered for him rather than a new trial ordered. Finally, I address the remaining grounds of appeal where I would not find error.

B. FACTUAL BACKGROUND

The shooting

[12] At approximately 1:40 a.m. on October 16, 2016, Jarryl Hagley was shot and killed inside a Pizza Pizza restaurant on Weston Road in Toronto.

[13] Video surveillance captured a group of men arriving in the area of Pizza Pizza in a Toyota RAV4 at around 1:30 a.m. The driver stayed in the vehicle as three men exited and approached the Pizza Pizza on foot. Two of the men entered

2024 ONCA 119 (CanLII)

the restaurant. One man – Winston Poyser – waited outside. Shots were fired from two weapons, one of which – a shotgun blast – hit Mr. Hagley. After fewer than five seconds, the two men ran out of the restaurant, and all three men returned to the vehicle parked nearby and drove away. Two of the three men were not identifiable based on the video evidence from the Pizza Pizza scene. The face of the third man – Winston Poyser – was clearly visible at one point on the videos. The police later traced the RAV4 back to Mr. Poyser's mother.

[14] Forensic evidence from the Pizza Pizza scene and Mr. Hagley's autopsy confirmed that Mr. Hagley was shot in the chest with a shotgun at close range. Shots were also fired from a semi-automatic handgun, but did not hit anyone. Mr. Hagley retreated to the restaurant washroom, but collapsed on the way there. He was without vital signs at the scene and was pronounced dead in hospital that night.

Mr. Poyser's destruction of evidence and internet searches after the shooting

[15] Over the next few days, Mr. Poyser destroyed and disposed of evidence. He wiped the memory of the memory card from the RAV4's dashboard camera, reformatted the memory card, and then threw it down a sewer. He opened the windows and sunroof of the RAV4 when it was raining, allowing the rain to get inside. He disposed of the clothes he had worn the night of the shooting, dumping

2024 ONCA 119 (CanLII)

them in a donation box. He deleted the phone records, call logs, and text messages on his cell phone, and then gave the phone to his girlfriend.

[16] Mr. Poyser began conducting internet searches about murder cases the night of the murder. He checked whether or not the shooting was on the news at around 3:00 a.m. on the morning of October 16. He googled conviction rates in Toronto homicides. He agreed in his trial evidence that he wanted to know the outcomes in those cases in order to decide what to do. He searched “find cameras in area” and “Toronto shooting caught on camera.” He looked at a site called “How to get away with murder”. He searched for the Windsor-Detroit border.

Identification of Mr. Poyser as a suspect and his surrender

[17] Police released surveillance video from the Pizza Pizza scene on October 21, 2016. At that point, Mr. Poyser knew he had been captured on video from the crime scene. He watched the surveillance video four to five times and reviewed the Wikipedia page for Murder (Canadian Law). He also started searching for information about witness protection.

[18] One week after the shooting, Mr. Poyser met with a lawyer, Brian Ross. During that meeting, he authorized Mr. Ross to communicate information to the police to negotiate a deal. The information communicated to police by Mr. Ross included that his client was the person suspected of being the lookout for the Pizza Pizza murder; that his client was in the vehicle before and after the shooting with

2024 ONCA 119 (CanLII)

three other people; that his client heard someone in the vehicle say, “that’s the guy” when Mr. Hagley and his friends were walking along the street, but no-one used names; that his client was scared of the other people involved in the incident; and that his client knew the perpetrators to carry guns in the past. In exchange for his cooperation, Mr. Poyser wanted to receive consideration and witness protection.

[19] Mr. Ross met with officers investigating the Hagley murder regarding Mr. Poyser’s possible surrender and assistance to police on November 14, 29, and 30, 2016. At those times, Mr. Ross did not disclose Mr. Poyser’s identity.

[20] Independent of Mr. Poyser’s efforts to obtain consideration in return for cooperation and arrange his surrender, by November 16, 2016, police had identified the vehicle used to transport the shooters to and from the scene as a RAV4 belonging to Mr. Poyser’s mother. On December 20, 2016, police executed a search warrant at Mr. Poyser’s residence. Mr. Poyser was not home at the time the search warrant was executed.

[21] Mr. Poyser turned himself in to police on December 28, 2016. He had been drinking the entire night before and was too drunk to give a statement at the time he turned himself in. He provided a statement to police the next day. The police told Mr. Poyser, before he gave his statement, that he was not being given any promises about witness protection. In a written agreement signed before

2024 ONCA 119 (CanLII)

Mr. Poyser provided his statement to police, he confirmed that he was making the statement because he wanted to obtain favourable treatment in the first-degree murder charge against him, but that no promises or assurances had been made to him in that regard. The agreement also provided that the statement and any evidence derived from it would not be used against Mr. Poyser in proceedings relating to the shooting of Mr. Hagley.

2024 ONCA 119 (CanLII)

[22] In his police statement, Mr. Poyser identified Lenneil Shaw and a black male he had been introduced to as “Cron Dog” as the shooters, and Shakiyl Shaw as the driver. As for his own role, Mr. Poyser said that he did not know that the men intended to shoot anyone (despite claiming to have seen Lenneil Shaw and Cron Dog handling firearms shortly before). Mr. Poyser claimed that he was with the Shaw brothers and Cron Dog on the night of the shooting. While he previously knew the Shaw brothers, Mr. Poyser said he had never met Cron Dog before the afternoon leading up to the shooting.

Mr. Poyser’s identification of Mr. Ali-Nur as Cron Dog

[23] I review in more detail below the circumstances of Mr. Poyser’s identification of Mr. Ali-Nur as Cron Dog. However, by way of context, I note the following at this stage. Mr. Poyser was never asked to pick Cron Dog out of a photo line-up. Rather, during his interview with police on December 29, 2016, in a leading process, the police directed Mr. Poyser to the issue of Cron Dog’s identity, and then showed

him a single photo of Mr. Ali-Nur, and asked him if he recognized the person in the photo. It was agreed by all parties that, at the time the officers showed Mr. Poyser the single photo, they had an envelope containing a photo line-up in relation to Mr. Ali-Nur in the interview room. Why they chose not to follow proper photo line-up procedure is not explained in the trial record. Mr. Poyser was unable to provide a description of Cron Dog with any level of detail. The most information he provided to police prior to being shown the single photo was that Cron Dog was a Somali male.

2024 ONCA 119 (CanLII)

Mr. Poyser's plea deal and the direct indictment

[24] The appellants and Mr. Poyser were charged with first-degree murder. A preliminary inquiry for all four men was scheduled for April 2018. On February 14, 2018, with the consent of the Attorney General, the Crown preferred a direct indictment, pursuant to s. 577 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. As a result, the appellants' preliminary inquiry was cancelled.

[25] On June 27, 2018, Mr. Poyser resolved his first-degree murder charge by pleading guilty, with the Crown's consent, to the reduced charge of accessory after the fact to murder. Mr. Poyser was placed under oath during the guilty plea proceedings. He identified Lenneil Shaw as one of the shooters and Shakiyl Shaw as the driver. During the guilty plea proceedings, Mr. Poyser was once again shown a single photograph of Mr. Ali-Nur and identified him as Cron Dog. The

murder charge against Mr. Poyser was withdrawn following his guilty plea to accessory after the fact.

[26] Mr. Poyser was sentenced to one day in jail, on top of credit for the equivalent of 27 months of pre-trial custody (18 months actual pre-trial custody), followed by two years probation.

Mr. Poyser's evidence at trial

[27] Mr. Poyser was the only witness to testify to the events leading up to the shooting and the only direct evidence of the appellants' involvement.

[28] Mr. Poyser testified that, on the afternoon of October 15, 2016, he was looking for Lenneil and Shakiyl Shaw to try to get back his cousin's phone, which she had told him someone associated with the Shaw brothers had taken. Mr. Poyser purchased a bottle of vodka[1] at the LCBO and went to the Scarlettwood Crescent complex ("Scarlettwood"), where the Shaw brothers lived, to try to find them. Security video later obtained by police from Scarlettwood shows Mr. Poyser meeting with a male, who Mr. Poyser testified he was introduced to as "Cron Dog" (and who he identified as Mr. Ali-Nur), and a second male, who Mr. Poyser said he did not know. The video does not show Cron Dog's face, as he was wearing a baseball cap and a hoodie with the hood up much of the time.

[1] Mr. Poyser was inconsistent about the size of the bottle, at times saying it was 750 ml (i.e. 26 ounces), at times saying it was 1.14 l (i.e. 40 ounces).

2024 ONCA 119 (CanLII)

[29] Mr. Poyser testified that Cron Dog offered to show him where the Shaw brothers were by having him follow a pick-up truck driven by the second male referred to above, in which Cron Dog was a passenger. By the time they left Scarlettwood, Mr. Poyser had consumed most of his bottle of vodka. Mr. Poyser was inconsistent about how early he started consuming the vodka, which I address further below. Mr. Poyser followed the pick-up truck to the Shendale complex ("Shendale"), where the Shaw brothers were in the basement of a townhouse.

[30] Mr. Poyser testified that he spent the evening in the basement of the Shendale townhouse with the Shaw brothers, Cron Dog, and several other people (women and men). At Shendale, Mr. Poyser, the Shaw brothers, and Cron Dog finished Mr. Poyser's bottle of vodka and smoked marijuana.

[31] Mr. Poyser testified that he took three trips from Shendale during the course of the evening to buy more alcohol, marijuana, and "Molly" (ecstasy/MDMA). He said that, on each trip, Shakiyl Shaw drove (because Mr. Poyser was drunk) and a woman accompanied them. In his trial evidence Mr. Poyser said that the first trip out was to the LCBO to buy alcohol, the second to buy marijuana, and the third to buy MDMA. Mr. Poyser was inconsistent between his police statement and guilty plea, where he said he made two trips out from Shendale to buy alcohol and drugs, and his trial evidence, where he said he made three trips out.

2024 ONCA 119 (CanLII)

[32] Mr. Poyser testified that, on the way back to Shendale from the third trip out to buy drugs, they passed the Scarlettwood complex. There they saw a heavy police presence and ambulances. Mr. Poyser testified that, when they got back to Shendale, he, Lenneil and Shakiyl Shaw, and Cron Dog were “kinda” talking about it. He described them as “kinda troubled about it.”

[33] Mr. Poyser testified that, at some point in the basement at Shendale, Lenneil Shaw took a firearm out of a dark backpack and handed it to Cron Dog. At the same time, Mr. Poyser saw Lenneil partially remove another firearm from the same bag. Mr. Poyser was inconsistent in his description of the firearms and when he saw them.

[34] Mr. Poyser had consumed several substances that night, including alcohol, marijuana, and MDMA. He testified that he was “really drunk and really high.” I review Mr. Poyser’s consumption of drugs and alcohol in more detail below in relation to the reasonableness of the verdict against Mr. Ali-Nur.

[35] Mr. Poyser testified that, shortly after he saw the two firearms in the basement at Shendale, he, the Shaw brothers, and Cron Dog left Shendale in the RAV4 belonging to Mr. Poyser’s mother. Mr. Poyser testified that he had offered to drive the Shaw brothers to the Scarlettwood complex, where they lived. Mr. Poyser testified that Shakiyl Shaw was driving because he was too drunk to

2024 ONCA 119 (CanLII)

drive. Mr. Poyser testified that, rather than drive to Scarlettwood, Shakiyl turned onto Weston Road.

[36] According to Mr. Poyser, they drove past the Pizza Pizza on Weston Road and Cron Dog said, “There’s Jarryl”. However, Mr. Poyser could not recall any other details of conversation in the vehicle because everyone was “high” and talking loudly and he was “really high”.

[37] Mr. Poyser testified that Shakiyl Shaw stopped the car. Lenneil Shaw told him to get out of the car and he, Lenneil, and Cron Dog started walking towards the Pizza Pizza. Mr. Poyser did not know why the men were interested in Mr. Hagley, but said he assumed that because everyone was “high” that nothing “too stupid” was going to happen. Mr. Poyser testified that he did not know that Lenneil Shaw and Cron Dog were carrying firearms – despite his evidence that he had shortly before seen them with firearms in the basement at Shendale. As they reached the Pizza Pizza, Lenneil Shaw and Cron Dog entered the restaurant. Mr. Poyser heard a gunshot. He looked up and saw Lenneil Shaw and Cron Dog running past him, back to the car. Mr. Poyser followed, and the men drove off in the RAV4.

[38] Mr. Poyser testified that Shakiyl drove the car back to Shendale and then he (Mr. Poyser) drove himself home, drunk.

2024 ONCA 119 (CanLII)

[39] At trial, Mr. Poyser made in-dock identifications of the three appellants. For the identification of Mr. Ali-Nur at trial, Mr. Poyser was again shown a single photo of Mr. Ali-Nur and identified him as Cron Dog, following which he made the in-dock identification.

[40] Significant issues were raised regarding Mr. Poyser's credibility and reliability at trial. There were inconsistencies between his trial evidence and his evidence under oath when he pleaded guilty to accessory after the fact to murder, as well as inconsistencies between his trial evidence and the objective evidence. He had a criminal record for break and enter. He admitted that he had previously lied in a different murder trial as a witness (where he denied his involvement in a break and enter that he had, in fact, committed). Some examples of inconsistency in his accounts at different times and inconsistency with objective evidence include the following:

- Cell phone records confirm that Mr. Poyser's phone began pinging off the cell tower across from Shendale at 7:17 p.m. on October 15. Mr. Poyser testified that he was greeted by the Shaw brothers within moments of arriving at Shendale. Yet Mr. Poyser's cell phone records show him texting his cousin (whose cell phone he was trying to retrieve), to tell her "Yo I'm over here in the hood and there [sic] not here" at 7:36 p.m. This text pinged off the same cell tower across from Shendale. Thus, Mr. Poyser sent a text to his cousin 20 minutes after arriving at Shendale saying he was not with the Shaw brothers.
- Mr. Poyser was drunk and high on the night of October 15. He agreed that, by the time he arrived at Shendale, he had consumed large amounts of vodka. He also took MDMA and smoked marijuana. He agreed in his evidence that the alcohol

2024 ONCA 119 (CanLII)

and drugs affected his perception and recollection. His evidence is replete with statements about his poor memory and attributing it to the amount of alcohol and drugs he consumed that afternoon and evening.

- When Mr. Poyser pled guilty to accessory after the fact to murder, he testified under oath that, when he destroyed evidence the day after the shooting, he knew someone had been killed in the course of the shooting at Pizza Pizza. However, in his trial evidence, he tried to back away from his admission under oath at the guilty plea, repeatedly saying that he did not know anyone was shot or that anyone had been killed when he destroyed evidence.

- Mr. Poyser testified at trial that he made three trips out from Shendale to buy alcohol and drugs. However, in his December 29, 2016, statement to police and in his guilty plea, he said he only left Shendale twice. When confronted with the difference, he could only say, “that was the truth [he] knew in the moment.”

- At trial, Mr. Poyser testified that, on the way back from the third trip out from Shendale to get drugs, he noticed a police presence at Scarlettwood. Officer Pak testified and confirmed a police presence at Scarlettwood from 11:30 p.m. on October 15 into the next morning. However, Mr. Poyser’s phone records were inconsistent with him being near Scarlettwood when he said he left Shendale on the third trip. From 11:10 p.m. (October 15) to 12:36 a.m. (October 16), cell tower records show Mr. Poyser’s phone in the vicinity of Shendale, pinging off the tower across the street. All of the calls between 12:37 a.m. and 12:51 a.m. pinged off the cell tower at Weston and Oak (with the 12:51 call finishing at the cell tower across from Shendale). None of the calls was handled by cell towers near Scarlettwood. A Rogers employee (Rogers was Mr. Poyser’s service provider) testified that if a cell signal was handled by the Weston and Oak Street tower, the person making the call was not in the Scarlettwood area.

- At trial, Mr. Poyser testified that, after the third trip out from Shendale, he saw Lenneil Shaw handle two guns from a backpack and hand one to Cron Dog. He first described the guns as a “rifle” and a “smaller rifle”, but then said that the gun that

2024 ONCA 119 (CanLII)

Lenneil handed to Cron Dog was a handgun. This evidence was inconsistent with Mr. Poyser's evidence at his guilty plea. At the guilty plea, he testified that he saw Lenneil Shaw remove a shotgun from his bag an hour before he left to go to the LCBO (Mr. Poyser's first trip out from Shendale).

- In his trial evidence, Mr. Poyser said that in the RAV4, near the Pizza Pizza, Cron Dog said, "there's Jarryl". However, he told his lawyer (according to the agreed statement of facts) that one of the other men in the car said "that's the guy" and specified that no name was used to refer to the victim or any of his friends.

- In his trial evidence, Mr. Poyser said he had never seen the Shaw brothers with firearms and could not think of any reason why they would have a connection to guns. However, he told his lawyer (according to the agreed statement of facts) that he knew the perpetrators of the shooting to have caried guns in the past.

- Mr. Poyser minimized his knowledge of and role in the shooting. He claimed not to know that Lenneil Shaw and Cron Dog were carrying firearms in the RAV4, despite his evidence that he had seen them with firearms in the basement at Shendale shortly before the group left. He testified that he was in the middle of the street at the time of the shooting and did not approach the Pizza Pizza. This was consistent with video footage the police released publicly, which Mr. Poyser admitted he had watched in news stories. However, video evidence obtained by police which was not released to the public showed Mr. Poyser cross the street towards Pizza Pizza and stand right near the door at the time of the shooting. It was suggested to Mr. Poyser that the video did not show him jump (in surprise) or run immediately on hearing the shotgun blast. Mr. Poyser explained this by saying that he was on drugs. Mr. Poyser denied the suggestion put to him in cross-examination that he was acting as the lookout.

Other evidence at trial

[41] There was no physical evidence connecting any of the appellants to the shooting. Police searched the basement at the Shendale townhouse. They found nothing to connect the appellants to the basement. While searching, they found a

2024 ONCA 119 (CanLII)

plastic bag that contained gun parts. The gun parts were sent for forensic testing. No forensic evidence linked to any of the appellants was found on the gun parts.

[42] Police eventually found the two firearms used in the shooting. The firearms were located at a place and time not connected to any of the appellants. No forensic evidence was obtained from either firearm.

[43] Police obtained video evidence from at and near the Pizza Pizza scene and the Scarlettwood complex. The video from near the Pizza Pizza showed the movements of the perpetrators and the RAV4 before and after the shooting. The Crown argued at trial that the movements of the RAV4 showed it to be driving like it was “looking for a target” just prior to the shooting and that, after the three men got out, the driver turned it around in a manner that the jury should find was putting it in position to get away quickly. The videos from the Pizza Pizza scene show Mr. Poyser’s face, but the faces of the shooters and driver are not visible. Cron Dog’s face is not visible on the videos police obtained from the Scarlettwood complex (I discuss the video in more detail in the analysis below).

[44] As noted above, because of the issues with Mr. Poyser’s credibility, the Crown argued to the jury that they should find his evidence credible because of evidence which the Crown argued provided corroboration.

[45] The central evidence which the Crown relied on as corroboration for Mr. Poyser’s testimony was three pieces of phone-related evidence. First, the

2024 ONCA 119 (CanLII)

extraction report of Mr. Poyser's phone showed that there were three calls to his phone by a 226 number[2] the night of the shooting. There was a missed called at 9:42 p.m. on the night of October 15 and two incoming calls at 12:38 and 12:50 a.m. on October 16th. The two incoming calls were 13 seconds and 27 seconds long, respectively. Officer Manual Flores of the Technical Crimes Unit, who performed the data extraction on Mr. Poyser's phone, was unable to say whether the two incoming calls were answered or went to voicemail.

[46] I pause to note that in his trial evidence, Mr. Poyser said he did not recall receiving any phone calls from either the Shaw brothers or Cron Dog the night of the shooting, nor did he see any of them with a cell phone. I note as well that the extraction report from Mr. Poyser's phone showed that between 7:30 p.m. on October 15, 2016 and 3:30 a.m. on October 16, Mr. Poyser's phone made and received 22 calls, associated with 9 different numbers.[3] The 226 phone number was three of those 22 calls.

[47] Second, subscriber information obtained from Freedom Mobile showed that the information provided at the time the 226 phone account was opened was the

---

[2] The entire phone number was extracted from Mr. Poyser's phone and was part of the trial evidence. I refer to the number as "the 226 number" or "the 226 phone" for ease of reference, and because this is how it was referred to for most of the trial.

[3] These included five calls received or made from a contact named "Gman" between 11:46 p.m. and 12:35 a.m., four calls with a contact named "Smokey" between 7:30 p.m. and 11:55 p.m. and four calls with a number ending in "5763" between 7:30 p.m. and 3:35 a.m. Mr. Poyser made or received numerous calls from those three numbers the next day. Mr. Poyser testified that Gman and Smokey were friends of his, but that he did not recognize the number ending in 5763. There were no further contacts between Mr. Poyser and the 226 number.

2024 ONCA 119 (CanLII)

name “Mohamed Alinur”, with an address matching the address of Mr. Ali-Nur, but without the unit number, and a date of birth that matched Mr. Ali-Nur’s.

[48] Third, a contact was extracted from Mr. Poyser’s phone that linked the name “Dozey” to two numbers, one of which was the 226 number. Mr. Poyser testified that Dozey was a nickname for Lenneil Shaw. He also testified that he had several numbers for Lenneil Shaw stored in his phone under “Dozey”, but could not recall the numbers.

[49] The Crown argued at trial that, taking the subscriber information for the 226 phone together with the calls made to Mr. Poyser the night of the murder was corroborative of a link between Mr. Ali-Nur and Mr. Poyser the night of the murder, and, together with the Dozey contact, was also a link to Lenneil Shaw.

[50] I discuss the phone evidence further in the analysis below, both in relation to whether Mr. Ali-Nur’s verdict was unreasonable and the grounds of appeal related to the phone evidence. However, I flag at this stage that there was evidence from representatives of telecommunications companies casting significant doubt on the reliability of subscriber information provided for prepaid phone contracts. Further, because the billing records for the 226 phone were lost due to what the trial judge found was police “negligence” in preserving and obtaining them in a timely way, there was no other information which could cast light on the identity of its user/owner, such as the original contract signed by the subscriber, records of

2024 ONCA 119 (CanLII)

numbers the phone communicated with, or records of cell towers used when it made calls or texts (as evidence of approximate location).

2024 ONCA 119 (CanLII)

Crown and defence theories at trial

[51] The Crown theory at trial was that Lenneil Shaw and Mr. Ali-Nur were the shooters and Shakiyl Shaw drove to and from the Pizza Pizza. Although the Crown could not firmly point to a motive for the shooting, it suggested that it was related to the police presence at Scarlettwood that Mr. Poyser said he and Shakiyl had seen on the way back from one of his trips to buy alcohol and drugs. The Crown acknowledged some difficulties with Mr. Poyser's evidence, but argued in its closing address to the jury that they could rely on Mr. Poyser's evidence to prove the case because it was corroborated by other evidence.

[52] The defence theory at trial was that Mr. Poyser lied to police and pointed the finger at the wrong people to protect the real perpetrators, who he feared. In addition, Mr. Ali-Nur argued that Mr. Poyser's identification of him as Cron Dog was unreliable. As the Crown's case rested on the testimony of Mr. Poyser, which, as noted above, had a variety of frailties, the defence pointed to an absence of corroborative evidence as raising a reasonable doubt.

C. ERRORS WHICH REQUIRE A NEW TRIAL

[53] I address first the three errors which I conclude, cumulatively, rendered the trial unfair: the trial judge's inadequate response to the question from the jury about

the absence of corroborative evidence; the failure to give a corrective instruction to the Crown's inappropriate closing address; and the failure to allow the jury to use for the truth of its contents the hearsay statement by Mr. Poyser to his own lawyer that he knew the perpetrators of the shooting to carry guns in the past.

(1) Inadequate answer to the jury's question about the absence of evidence

[54] During deliberations, the jury asked a question about the absence of corroborative evidence. In my view, in the context of the evidence and arguments in this trial, the trial judge's response was inadequate in its failure to reiterate to the jury that a reasonable doubt may arise from the absence of evidence. Both the Crown and the defence argued their case to the jury focusing on whether there was corroboration for Mr. Poyser's evidence. All parties were alive to the frailties of Mr. Poyser's evidence. As a result, the presence or absence of corroborative evidence was a central issue put before the jury. A significant plank of the defence, in addition to the challenge to Mr. Poyser's credibility, was the frailty of the evidence available to corroborate his evidence and the absence of other evidence to implicate the appellants in the murder. This was a case where the principle that a reasonable doubt may arise from the absence of evidence was important. Further, not only did the trial judge fail to reiterate that a reasonable doubt may arise from the absence of evidence, to the extent that his answer made reference to gaps in the evidence and the principle of reasonable doubt, it did so in a manner

2024 ONCA 119 (CanLII)

favourable to the Crown, only telling the jury that the evidence did not have to answer all the questions.

The jury's question, submissions of counsel, and the trial judge's response

[55] The jury retired to deliberate at the end of the final instructions at 5:30 p.m. on May 21, 2019. After deliberating for approximately one hour, the jury asked the following question:

> In what scenario/s would the Crown elect not to call witnesses that may corroborate key evidence? [Emphasis in original.]

[56] The Crown submitted that the jury should be reminded of the instruction not to speculate and to decide the case on the evidence.

[57] Counsel for the appellants agreed that the jury should be told not to speculate about why evidence was not called, but also asked the trial judge to remind the jury that they are entitled to consider the absence of evidence in deciding whether the Crown has proven the case beyond a reasonable doubt.

[58] In response to the defence submission, the Crown argued that including something about reasonable doubt in the response would "tip the scales" and that it was not necessary to mention reasonable doubt in the response.

[59] The trial judge provided the following instruction to the jury approximately 15 minutes after the question was asked, on the evening of May 21:

2024 ONCA 119 (CanLII)

> As I have already indicated in paragraph 16 of my instructions, which instructions you will have very shortly,[4] the evidence need not answer every question the case raises, and you must not speculate about what other evidence might have been called. I would only add to that that you must not speculate about why evidence was not called. [Emphasis added.]

[60] The jury did not ask any other questions. They returned their verdicts a day-and-a-half later, on the morning of May 23, 2023.

Positions of the parties

[61] The appellants submit that the trial judge's answer to the jury's question was legally incorrect. The jury is entitled to consider the absence of evidence when deciding whether the Crown has met its burden of proof, as per the Supreme Court's decision in *R. v. Lifchus*, [1997] 3 S.C.R. 320. The Crown is not required to call certain witnesses, but the failure to do so may leave a gap in the Crown's case, leaving the burden of proof undischarged.

[62] Here, the trial judge failed to provide a complete answer to the jury's question by focusing only on avoiding speculation, instead of turning to the jury's apparent concern – gaps in the Crown's case. Defence counsel's suggested

---

[4] This is a reference to the jury receiving a written copy of the final instructions. Paragraph 16 of the initial instructions, which the trial judge referred to in the answer to the question, instructed the jury as follows: "Some things are not in dispute in this trial, but those that are in issue will require your careful attention. You are entitled to come to common sense conclusions based on the evidence you accept, but you must not guess or make up theories without evidence to support them. The evidence need not answer every question the case raises and you must not speculate about what other evidence might have been called. You need only decide those matters essential for you to decide whether the Crown has proven the charge against each accused beyond a reasonable doubt."

2024 ONCA 119 (CanLII)

answer to the question would have covered both the requirement not to speculate about evidence not called and the *Lifchus* instruction that the absence of evidence can raise a reasonable doubt. The trial judge's answer failed to provide the jury with guidance on the *Lifchus* absence of evidence point.

[63] The Crown submits that the trial judge's answer to the jury's question was clear, correct, and comprehensive. It was responsive to the jury's question, which was about why the Crown would elect not to call witnesses. The trial judge correctly answered that question in instructing the jury not to speculate. The jury did not ask about specific evidence that was not before them. The jury did not ask about how to assess the absence of evidence.

Analysis

[64] The legal principles applicable to answering questions from a jury are not in dispute. A question from a jury indicates that the jury needs help. A question from a jury usually concerns an important point in the jury's reasoning, identifying an issue on which they require direction. It is an indication of a particular problem the jury is confronting – on which they are focused. Although jury instructions must be read as a whole, courts have recognized that answers to jury questions will be given special emphasis by jurors. As a result, a trial judge has an obligation to fully and properly answer a question posed by the jury. A complete and careful response is necessary even if the subject-matter of the question has been

2024 ONCA 119 (CanLII)

reviewed in the main charge: *R. v. Grandine*, 2017 ONCA 718, 355 C.C.C. (3d) 120, at para. 62; *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521, at pp. 528-30; *R. v. Stubbs*, 2013 ONCA 514, 300 C.C.C. (3d) 181, at para. 95; *R. v. J.B.*, 2019 ONCA 591, 378 C.C.C. (3d) 302, at para. 34.

[65] The answer given to the jury's question by the trial judge was correct as far as it went; however, in my view, given the manner in which this case was put to the jury by both the Crown and defence, it was clear that the jury's question was raising a concern about gaps in the evidence – in particular, gaps arising from lack of corroboration. In the circumstances, a full response required the trial judge to reiterate that a reasonable doubt may arise from an absence of evidence.

[66] The jury's question showed that it was concerned about why the Crown did not call witnesses "that may corroborate key evidence" – in other words, a gap in the evidence.

[67] As I have noted, at trial, both the Crown and the defence argued to the jury that they should assess the evidence by considering whether there was corroboration for Mr. Poyser's evidence. In terms of gaps in the evidence, the defence highlighted in closing submissions the paucity of evidence to link the appellants to the shooting (no forensics pointing to the appellants; no DNA or fingerprints implicating the appellants found in Mr. Poyser's vehicle, at or near the Pizza Pizza scene, on the gun parts later recovered at Shendale, or on the guns

2024 ONCA 119 (CanLII)

later recovered). The defence highlighted potential witnesses referred to by Mr. Poyser, who may have been able to corroborate parts of his account, who were not called by the Crown at trial. These included Farhana Shaw (the Shaw brothers' sister), who Mr. Poyser said he saw and spoke to at Scarlettwood; the individual who drove the truck that Mr. Poyser said led him to Shendale; and, Briana Newton, who Mr. Poyser identified as being in the basement at Shendale; or anyone else from the basement.

[68] In the context of the evidence and arguments at trial in this case, the jury's question could not be understood as mere curiosity about why the Crown had not called certain witnesses. Rather, the question can only be understood as the jury expressing concern about the absence of corroboration – that is, a gap in the evidence. While telling them not to speculate about why witnesses were not called was an appropriate part of the response to the question, it was an insufficient answer.

[69] As I have noted above, Crown counsel at trial argued that including any instruction related to reasonable doubt in response to the question would "tip the scales" in favour of the defence. I disagree. The trial judge could have repeated a full *Lifchus* instruction, which would have alleviated any concern about balance. The jury's question showed that it had concerns about the absence of corroborating evidence. It was essential that, beyond just being told not to speculate about what other evidence might have been called or why it was not

2024 ONCA 119 (CanLII)

called, the jurors understand the relationship between gaps in the evidence and the Crown's burden to prove the charge beyond a reasonable doubt.

[70] Indeed, the answer the trial judge gave the jury implicitly recognized that the question was about gaps in the evidence, but gave an incomplete answer that was one-sided and favoured the Crown. Although the trial judge failed to tell the jury that a reasonable doubt may arise from the absence of evidence, he told them that "the evidence need not answer every question the case raises". In other words, he told them that some gaps in the evidence are not a concern. While it is certainly true that a jury does not have to answer all questions arising out of the evidence – their task is to decide if the Crown has proven the elements of the offence beyond a reasonable doubt – the response to the jury's question was incomplete and unbalanced in the context of how the issues in this trial were presented to the jury by counsel.

[71] On appeal, the Crown relied on this court's decision in *R. v. MacKenzie*, 2020 ONCA 646, 395 C.C.C. (3d) 421, to argue that the answer provided was sufficient. In my view, *MacKenzie* does not assist the Crown.

[72] I summarize the decision in *MacKenzie* in some detail, given its centrality to the arguments on this ground. *MacKenzie* was a sexual assault trial. The central issue in dispute was proof of non-consent.[5] The complainant had consumed

[5] The Crown had not argued lack of capacity to consent.

2024 ONCA 119 (CanLII)

alcohol prior to the alleged assault. There was disputed evidence about her level of intoxication. But it was common ground that the complainant's level of intoxication was relevant to assessing the credibility and reliability of her account, as it was relevant to her memory and as context for assessing her actions during and after the sexual contact. The jury heard evidence that blood samples were taken from the complainant as part of her sexual assault examination. They also heard evidence that such samples are typically sent to the Centre for Forensic Science ("CFS") to test for drugs and/or alcohol. No evidence was led at trial about whether the samples taken from the complainant were actually sent to the CFS or tested for drugs or alcohol levels. In the main jury instruction, the trial judge included instructions on the absence of hospital records or testing to show her blood alcohol level at the time of the offence. In giving this instruction, he underlined that the burden of proof is at all times on the Crown to prove the elements of the offence beyond a reasonable doubt and alerted the jury to the absence of evidence that could affect their assessment of the complainant's state of intoxication at the time of the sexual contact.

[73] In *MacKenzie*, during deliberations, the jury asked two questions together: "Was [the complainant's] blood/alcohol ever tested/taken? If so, why wasn't it presented as evidence?" The trial judge's answer, which this court found to be "responsive and correct", answered the factual question that there was no evidence that the complainant's blood alcohol level was tested, repeated his

2024 ONCA 119 (CanLII)

instruction that the absence of evidence could impact on whether the Crown had met its onus, and told the jury it must decide the case on the evidence presented, and not speculate about why evidence was not called: *MacKenzie*, at paras. 48-58.

[74] In this appeal, the Crown argues that the first question in *MacKenzie* was the “what” question and the second question was the “why”, and that the trial judge in *MacKenzie* repeating the instruction that an absence of evidence could impact on whether the Crown had met its onus was only in response to the first question – the “what” question. The Crown argues that this case only has a “why” question, like the second question in *MacKenzie* – “why” wasn’t certain evidence led. Based on separating the two questions from *MacKenzie*, and isolating portions of the response, the Crown argues that it was not necessary in this case to reiterate to the jury that a reasonable doubt may arise from an absence of evidence.

[75] I do not agree. In my view, the questions in *MacKenzie* cannot be viewed in isolation in the manner the Crown proposes. As in this case, the questions posed by the jury in *MacKenzie* raised a concern about gaps in the evidence and why the Crown may not have called certain evidence. Indeed, repeating the instruction that reasonable doubt may arise from an absence of evidence was not responsive to either of the questions in *MacKenzie* as read *literally*. However, the trial judge in *MacKenzie* recognized, based on the evidence and issues at trial, that the jury questions raised a concern about a gap in the evidence. That is why a recharge

2024 ONCA 119 (CanLII)

on the relationship between a gap in the evidence and reasonable doubt was required. In my view, *MacKenzie* supports the conclusion in this case that, where the jury asked a question about why corroborating evidence was not called, a full answer required not only instructing the jury not to speculate about why particular evidence was not called, but also a reiteration of the principle that reasonable doubt can arise from the absence of evidence.

[76] In the circumstances of this trial, a full and correct response to the question posed by the jury required two elements: first, an instruction to the jury not to speculate about why a witness or witnesses were not called; and second, an instruction linking their concern about absence of corroborating evidence to the burden of proof and the principle that a reasonable doubt may arise from the absence of evidence. In substance, this is the instruction the defence requested at trial, but for purposes of balance, with the full *Lifchus* instruction, rather than isolating the absence of evidence aspect of *Lifchus*. The trial judge gave the jury the first instruction, but failed to give the second.

[77] The trial judge's failure to fully and correctly answer the jury's question was prejudicial to the appellants. The Crown's case depended on the evidence of Mr. Poyser. There were serious challenges to Mr. Poyser's credibility. The Crown sought to support Mr. Poyser's credibility by relying on other evidence that it argued provided corroboration. The defence challenged the reliability of the corroborative evidence and pointed to gaps in the evidence. The absence of

2024 ONCA 119 (CanLII)

evidence was a significant plank of the defence case for all of the appellants as argued to the jury. The jury's question showed that they were concerned about gaps in the evidence. The failure to reiterate that reasonable doubt could be based on an absence of evidence was prejudicial in the circumstances.

(2) The failure to provide a jury instruction on inappropriate comments in the Crown's closing address

[78] In his closing address to the jury, Crown counsel (not counsel on appeal) made comments that I conclude were not supported by the evidence at trial and crossed the line from forceful advocacy into giving evidence and personal opinion to the jury. The core of the impugned comments, which I outline in more detail below, were that Mr. Poyser did not get a benefit for testifying for the Crown and that there was not evidence sufficient to support a case against him for murder.

[79] The inappropriate comments bore directly on the credibility of Mr. Poyser's evidence and were used by the Crown to rebut a central thrust of the defence challenge to Mr. Poyser's credibility – that he was an accomplice to the shooting of Mr. Hagley and became a Crown witness in order to get the benefit of avoiding a trial for first-degree murder. The unfairness in the Crown's closing address and the failure of the trial judge to correct it in the jury instruction had the effect of leaving the issue of Mr. Poyser's credibility – the central issue in the trial – with the

2024 ONCA 119 (CanLII)

jury in a manner which undermined the fairness of the trial. In combination with the two errors I identify in these reasons, it requires a new trial.

2024 ONCA 119 (CanLII)

Impugned elements of the Crown's closing

[80] In his closing to the jury, Crown counsel outlined a case to the jury as to why Mr. Poyser's testimony should be believed. As part of that argument, the Crown made repeated references to Mr. Poyser's guilty plea to accessory after the fact to murder and asserted that he had not received a benefit as a result of his guilty plea and testifying for the Crown. Crown counsel buttressed this argument by asserting that there was "no case against him for murder or manslaughter":

> And no doubt counsel will raise this point with you in his submissions and suggest that because of this he got a great deal on his guilty plea as an accessory after the fact, suggesting that he got some benefit for his cooperation with authorities.
>
> . . .
>
> His plea to accessory after the fact was supported by the evidence against him. He got the sentence that he deserved for what he did. There was no deal in place forcing him to testify in front of you here. He was given no special favours. This is important, as the defence will suggest that he is lying in order to get a deal.
>
> What would have happened to him if he had not given a statement to police? I suggest he would have seen the same outcome in his case. There's no case against him for murder or manslaughter. Did not do anything to assist in these crimes. He was merely present. Remember that the Crown has to prove the case against him beyond a reasonable doubt as well. His only fault lies in what he did after the murder. He got no favours from the Crown

> or the police. He simply came in and did the right thing, pointing out those responsible for this crime to the police and coming to court and telling the truth about a terrible situation that he got caught up in. [Emphasis added]

[81] In addition, the Crown asked the jury to take into account, in assessing Mr. Poyser's credibility, evidence that he had potentially developed PTSD as a result of seeing his friend shot to death years earlier:

> …please remember a few things about Winston Poyser and his evidence. First, he did not finish high school. He has very little formal education and does temporary work as a general labourer. The reason for him not finishing high school was that his best friend was shot and killed in front of him. This emotionally scarred him, leading him to depression and anxiety issues. I suggest he probably has some form of PTSD from this event. [Emphasis added.]

However, there was no evidence that Mr. Poyser had PTSD.

[82] The Crown also asserted that Mr. Poyser did not live a criminal lifestyle, deal drugs, or have any involvement with any gangs, and that these were factors that supported his credibility.

> His criminal record, apart from the involvement here, is very minor. He had one conviction previously for break-and-enter, committed when he was a young adult. He is not someone who lives a criminal lifestyle. He does not deal drugs. He's not involved in guns and street gangs. [Emphasis added.]

However, there was no evidence one way or the other on this issue.

2024 ONCA 119 (CanLII)

Defence objection and failure of the trial judge to provide a corrective instruction

[83] Following the Crown's closing address to the jury, defence counsel objected to specific portions of the closing and requested that a corrective instruction be given to the jury. The defence objections at trial focused on Crown counsel's assertion that there was "no case" for murder or manslaughter against Mr. Poyser. The defence argued that Crown counsel was inappropriately giving evidence and legal opinion evidence to the jury and that what mattered was not counsel's legal opinion, but Mr. Poyser's perception of his jeopardy. Further, counsel objected to the assertion that Mr. Poyser did not receive a benefit from pleading guilty and becoming a Crown witness, noting that it was clear that he did, both from the chronology of events and from the transcript from his guilty plea. During the guilty plea sentencing proceedings, Crown counsel (the same trial counsel who made the closing submissions to the jury) made submissions to the judge sentencing Mr. Poyser that he was getting consideration in the form of a reduced Crown position on sentence for his cooperation with police, as did Mr. Poyser's counsel at the guilty plea.

[84] Defence counsel also objected to the comment that Mr. Poyser probably had PTSD, as the Crown was "not in a position to diagnose Mr. Poyser". However, it was conceded that was a more minor point. Lastly, counsel objected to the Crown comments about Mr. Poyser not living a criminal lifestyle, dealing in drugs, or being

2024 ONCA 119 (CanLII)

involved in gangs, on the basis that Mr. Poyser was not asked about any of these things, so there was no evidence before the jury on this issue.

[85] The trial judge declined to give an immediate corrective instruction, stating that his “present inclination [was] that it’s not as grievous – so grievous as to require immediate correction.” While he noted that he would consider the issue of whether a correction was warranted following all the closing submissions, ultimately, he decided not to give the jury a corrective instruction.

Positions of the parties

[86] The appellants submit that the trial judge erred by not correcting misleading statements and comments that were not supported by the trial evidence made during the Crown’s closing address because they were sufficiently prejudicial to undermine trial fairness. The focus of the appellants’ arguments are the comments in the Crown closing that Mr. Poyser was not given any special favours by the Crown – effectively telling the jury that Mr. Poyser received no benefit from cooperating and becoming a Crown witness – and the related comment that there was “no case” for murder or manslaughter against Mr. Poyser. The appellants argue that these comments were misleading and contrary to the trial evidence. The appellants also object to the comments in the Crown closing in relation to Mr. Poyser suffering from PTSD and about his character – not living a criminal

2024 ONCA 119 (CanLII)

lifestyle. The appellants argue that these statements are not based on the trial evidence.

[87] The appellants argue that, because these comments by Crown counsel in his closing address were not based in the trial evidence, and in some cases were actively misleading, they required correction by the trial judge. They represented an unfair attempt by the Crown to bolster the credibility of their main witness in a manner not based in the evidence and inconsistent with the Crown's duty to present the evidence fairly and dispassionately. The credibility of Mr. Poyser was central to the Crown's case, not only regarding the identity of the perpetrators, but with respect to the elements of first-degree murder. Aside from the video surveillance, Mr. Poyser's evidence was essential to a finding that the murder was planned and deliberate. Given the importance of Mr. Poyser's evidence, it cannot be said that a failure to correct the Crown's closing was insignificant.

[88] In addition to the challenge raised by all of the appellants to the Crown's closing and the trial judge's failure to give a corrective instruction, Shakiyl Shaw raises an issue particular to him. He argues that the comments in the Crown's closing address about there not being a case for murder against Mr. Poyser are objectionable because the same evidence that purportedly showed that Mr. Poyser could not possibly be guilty of murder was simultaneously being presented as evidence of Shakiyl's guilt.

2024 ONCA 119 (CanLII)

[89] The Crown argues that the Crown's closing submissions at trial were within the bounds of fair advocacy and did not impair the fairness of the trial. Both defence and Crown advocates are permitted rhetorical latitude in their closing arguments, provided their rhetoric does not distort the fact-finding process. Counsel may, and indeed are expected to, advocate for inferences that are available on the evidence. No correction by the trial judge was required. The Crown argues that the submission about Mr. Poyser receiving no special favours for his cooperation was supported by the evidence, as was the statement that there was "no case against him for murder or manslaughter". Other interpretations of the evidence were available; the defence appropriately advocated as much. However, all of the impugned Crown submissions were fair advocacy.

[90] The isolated "PTSD" comment was made in passing while summarizing Mr. Poyser's traumatic past. While there was no medical evidence of a diagnosis of PTSD, there was evidence of Mr. Poyser's anxiety, depression, and alcohol abuse. Further, the Crown's submission that Mr. Poyser lacked a "criminal lifestyle" was supported by the evidence.

Analysis

[91] A trial is an adversarial process. Like defence counsel, Crown counsel are permitted to advance their positions forcefully to a jury: *R. v. Daly* (1992), 57 O.A.C. 70, at p. 76. However, there are limits to proper advocacy. A closing address by

2024 ONCA 119 (CanLII)

Crown counsel must be neither inflammatory nor unfair. Counsel must base their submissions on the evidence at trial. This means that counsel cannot supplement the trial evidence by effectively giving evidence in their closing submissions. Nor are counsel permitted to misstate the trial evidence. Further, counsel are not permitted to put before the jury in closing submissions matters which are based on counsel's personal experience or observations, rather than the evidence at trial: *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 107; *R. v. Pisani*, [1971] S.C.R. 738, at p. 740; *R. v. B.E.M.*, 2023 SCC 32.

[92] Not every improper address to a jury will require a corrective instruction. Not every improper address where no corrective instruction is given will render a trial unfair such that a retrial is required. Some deference is accorded to the assessment by a trial judge as to whether a corrective instruction is required. However, a trial judge has a duty to present the case fully and fairly to the jury. Where an improper address by Crown counsel bears directly on the central issue in a trial and no corrective instruction is given by the trial judge, it may render the trial unfair and require a new trial: *Rose*, at paras. 124-27; *Pisani*, at pp. 740-41.

[93] In my view, the Crown's closing address in this case crossed the line from forceful advocacy into giving evidence and personal opinion. The improper comments in Crown counsel's closing submissions were particularly problematic because, not only were they not based on the trial evidence, but on the issue of the Crown stating that Mr. Poyser received no benefit from becoming a Crown

2024 ONCA 119 (CanLII)

witness and that there was “no case against him for murder or manslaughter”, the Crown’s closing was *contrary* to the trial evidence.

[94] First, the Crown’s comments to the jury that Mr. Poyser did not receive a benefit from becoming a Crown witness were contrary to the evidence and involved the Crown offering his personal opinion in closing submissions. Indeed, the trial judge agreed that Mr. Poyser received a benefit from becoming a Crown witness. During the defence objections to the Crown’s closing, the trial judge stated:

> I don’t disagree that he got a benefit [from cooperating and the guilty plea to accessory after the fact]. You don’t have to persuade me of that. I think he got a very handsome benefit.

[95] While it is true that Mr. Poyser was never promised any particular consideration before agreeing to cooperate with police and provide a statement, the suggestion that he received no benefit whatsoever was misleading to the jury. The chronology of events involved in Mr. Poyser becoming a Crown witness and the evidence potentially available in a prosecution against Mr. Poyser make clear that he obtained a benefit.

[96] As noted above, Mr. Poyser was the only person identifiably visible in the videos from the Pizza Pizza scene when the shooting took place. His initial actions after the shooting were to destroy evidence. He only came forward when he saw television news stories about the shooting which made clear that he was

2024 ONCA 119 (CanLII)

identifiable by both his face and his car. He contacted counsel and tried to obtain immunity from prosecution.

[97] It is true that the police did not make any promises to him at the time he gave his statement. When he surrendered to police, he was charged with first-degree murder. He then signed a detailed agreement with police before giving a statement. The agreement stated that he desired favourable treatment, but was receiving no concessions, promises, or guarantees in return for his statement to police. He would be immune from having his statement used against him, but not immune from prosecution. He acknowledged that he would be tried separately and could be compelled to testify at the trial of anyone else charged.

[98] However, the subsequent events are clear that Mr. Poyser did obtain a benefit. He was charged initially with first-degree murder, but ultimately pled guilty, with the Crown's consent, to accessory after the fact to murder, and the first-degree murder charge was withdrawn. There is no question that he received a benefit in his sentencing for accessory after the fact to murder. As noted above, the transcript of Mr. Poyser's guilty plea was clear that, when he pleaded guilty, his counsel asked for credit for cooperation. Crown counsel agreed he should have a sentencing credit for cooperation and the sentencing judge agreed.[6] It was

[6] The guilty plea transcript was not before the jury, However, extensive reference was made to it – including quoting significant portions – during the objections to the Crown's closing and at other points in the trial. The trial transcript is clear that all counsel and the trial judge had a copy of Mr. Poyser's guilty plea transcript. It should have been made a lettered exhibit.

2024 ONCA 119 (CanLII)

misleading for Crown counsel to make the submission to the jury that Mr. Poyser "received no special favours" and to suggest that he obtained no benefit from cooperating with the police and becoming a Crown witness when the transcript of his guilty plea establishes that he was given sentencing credit for his cooperation.

[99] Crown counsel on appeal sought to justify the statement that Mr. Poyser "received no special favours" by arguing, in effect, that he received *appropriate* consideration for his cooperation; thus it was accurate to say he received no "special" favours. With respect, this is parsing and would not have been understood this way by the jury. Crown counsel's submission before the jury was designed to leave them with the impression that Mr. Poyser received no benefit from cooperating with the police and becoming a Crown witness. That was not the case.

[100] Second, on the objective evidence available from the trial record in this case, it would be difficult to conclude that there was not a triable case against Mr. Poyser for murder or manslaughter. In other words, he also received the benefit of not being tried for murder. Although that issue was for the jury to weigh, in my view, the statement in the Crown's closing that there was "no case" against Mr. Poyser for murder or manslaughter is contrary to the evidence. The objective evidence was further bolstered by Mr. Poyser's own admissions. Whether or not such a prosecution would ultimately succeed is not the issue. The issue is whether it was

2024 ONCA 119 (CanLII)

incorrect on the record before the jury to assert that there was “no case” against Mr. Poyser for murder or manslaughter.

[101] Mr. Poyser admitted to seeing firearms in the basement at Shendale shortly before the group got into his car and drove to Pizza Pizza. His car was used to travel to and from the scene. His car was identifiably caught on video near and at the Pizza Pizza scene. He testified to hearing someone in the car say, “There’s Jarryl.” He got out of the vehicle with the shooters and attended the Pizza Pizza, just outside the door. He was identifiably caught on video outside the Pizza Pizza with the shooters at the time of the shooting. When he heard the shots, he did not distance himself from the event, but rather fled with the shooters in the car – and his flight was captured on video. Mr. Poyser destroyed evidence after the shooting, including wiping the memory card from his car’s dash camera and throwing it down a sewer, discarding the clothes he had been wearing, and wiping the contents of his cell phone and giving the phone to his girlfriend.

[102] It was misleading to assert that there was “no case” for murder or manslaughter against Mr. Poyser. The only way one could reach that conclusion was by accepting the credibility of his account of the events leading up to the shooting – the issue the jury had to decide. Yet Crown counsel asserted that there was “no case” for murder or manslaughter against Mr. Poyser as if it was objective legal fact.

2024 ONCA 119 (CanLII)

[103] As noted above, Shakiyl Shaw also argues that the Crown's statement about there being "no case" for murder against Mr. Poyser is inconsistent with the evidence it relied on to argue that he was guilty of first-degree murder. In my view, it is not the inconsistency that makes the Crown's closing improper. However, the inconsistency underlines that the argument made by the Crown in its closing that there was "no case" against Mr. Poyser for murder depended on accepting the credibility of Mr. Poyser's evidence that he was not aware of a plan to shoot anyone when he allowed his car to be used to drive to Pizza Pizza and got out of the vehicle to stand outside the store as the shooting took place. The Crown's case at trial against Shakiyl was based on Mr. Poyser's evidence that Shakiyl was present in the basement at Shendale when Lenneil handled firearms (and the inference that Shakiyl saw them), that Shakiyl drove Mr. Poyser's vehicle to and from Pizza Pizza, and that someone in the car said, "there's Jarryl". There was also the video evidence of the manner in which the vehicle was driven near the Pizza Pizza. Except that he was not the driver, substantially the same elements of proof were available against Mr. Poyser. But in addition, Mr. Poyser's car was used to get to and flee the scene, Mr. Poyser got out of the vehicle at Pizza Pizza and was clearly identifiably visible on video, and Mr. Poyser destroyed evidence after the shooting.

[104] In sum, the Crown's comments in its closing address that Mr. Poyser received "no special favours" for cooperating with police and testifying and that

2024 ONCA 119 (CanLII)

there was “no case against him for murder or manslaughter” were not based on the trial evidence and represented improper personal opinion by Crown counsel.

[105] I address briefly the comments in Crown counsel’s closing address about Mr. Poyser having PTSD and saying that he did not deal drugs, live a criminal lifestyle, or have any gang affiliation.

[106] There was no evidentiary support for the assertion that Mr. Poyser had PTSD. While Mr. Poyser testified to experiencing depression, anxiety, and problems with his use of alcohol, he did not say he had PTSD. There was no medical evidence that he had PTSD.

[107] There was no evidence about Mr. Poyser’s lifestyle. While it is true that there was no affirmative evidence that he dealt drugs, lived a criminal lifestyle, or had any gang affiliation, there was no evidence negating these propositions. Mr. Poyser was never asked about these things. While it would have been accurate to say that there was no evidence that Mr. Poyser lived a criminal lifestyle, for the Crown to positively assert that he did not do so was making an assertion of good character for which there was no evidence. It was a rhetorical overstatement.

[108] If they stood alone, the PTSD comment and the comments about Mr. Poyser not living a criminal lifestyle may not have required a corrective instruction. In the defence objections at trial to the Crown’s closing address, these issues were given less prominence. In submissions on appeal, Mr. Derstine conceded that the PTSD

2024 ONCA 119 (CanLII)

comment was less consequential and that, if the Crown had said there was “no evidence” that Mr. Poyser lived a criminal lifestyle, that would have been unobjectionable.

[109] But taken together with the comments about Mr. Poyser not receiving a benefit from becoming a Crown witness and there being “no case against him for murder or manslaughter”, these issues are part of a pattern of the Crown overreaching in its closing address and making comments not supported by the trial evidence in a bid to unfairly bolster the credibility of Mr. Poyser.

[110] In my view, the comments in Crown counsel’s closing that Mr. Poyser received no benefit for his cooperation and becoming a Crown witness and that there was “no case for murder or manslaughter” against him were prejudicial and required a corrective instruction. The trial judge gave none – despite accepting that Mr. Poyser received “a handsome benefit” for his cooperation with police and becoming a Crown witness.

[111] It was, of course, open to the Crown to argue that, despite Mr. Poyser receiving the benefit of a reduced sentence for his cooperation and not facing the jeopardy of a prosecution for murder or manslaughter (which may or may not have been successful), his evidence should be accepted as truthful. But it was not open to the Crown to argue that Mr. Poyser received no benefit for his cooperation or that there was “no case” against him for murder or manslaughter.

2024 ONCA 119 (CanLII)

(3) Error in refusing to admit hearsay statement of Mr. Poyser to his lawyer

[112] I would accept the appellants' submission that the trial judge erred in refusing to allow Mr. Poyser's statement to his lawyer that he knew the perpetrators of the shooting to carry guns in the past to be used for the truth of its contents. In my view, the trial judge failed to consider all of the circumstances bearing on threshold reliability. In particular, he limited his consideration of substantive guarantees of reliability to whether Mr. Poyser was disinterested at the time he made the statement. He failed to consider as a procedural guarantee of reliability the fact that Mr. Poyser testified at trial and, thus, was available for cross-examination. A proper analysis leads to the conclusion that threshold reliability was sufficiently established and that the jury should have been allowed to consider the statement for the truth of its contents.

The trial judge's ruling

[113] At trial, an agreed statement of facts was filed regarding events leading up to Mr. Poyser turning himself in to police and cooperating by providing a statement. The agreed statement of facts included facts about statements Mr. Poyser had made to his lawyer, Mr. Ross, in a meeting one week after the shooting.[7] The

[7] Solicitor-client privilege was not an issue in relation to the statements which the defence sought to use for the truth of their contents, as they were statements by Mr. Poyser to his lawyer containing information which he authorized his lawyer to provide to police and which his lawyer did provide to police.

2024 ONCA 119 (CanLII)

agreed statement of fact specified that the statements or utterances described in it were “not intended to be exact quotations; however, it is agreed that either these exact words or words substantially similar to those below were in fact used.” During the meeting, Mr. Poyser authorized his lawyer to communicate information to the police to negotiate a deal. The information that Mr. Poyser provided to his lawyer and authorized him to communicate to police included that he was scared of the shooters and that he knew they carried guns in the past (Mr. Poyser did not identify the shooters in the information in the agreed statement of facts). Mr. Poyser’s statement to Mr. Ross that he knew the shooters to carry guns contradicted his trial evidence. At trial, he agreed that he had never seen the Shaw brothers with firearms “ever in [his] life” and could not think of any reason why they would have a connection to guns. Mr. Poyser was cross-examined on this contradiction and said that he did not recall making this statement to his lawyer, but did not deny that he made it.

[114] The appellants were permitted to use Mr. Poyser’s statement to his lawyer for its inconsistency with his trial evidence. However, prior to the final instructions being given to the jury, they applied to the trial judge to admit the statement for the truth of its contents, pursuant to the principled exception to the hearsay rule, or in the alternative, on the basis of principles allowing a relaxed application of the hearsay rule to defence evidence. I pause to note that, although the application was styled as being about “admissibility” of the statement for the truth of its

2024 ONCA 119 (CanLII)

contents, it was really about use, since the statement was already before the jury, but for a more limited purpose.

[115] The appellants argued that Mr. Poyser's statement to his lawyer was exculpatory in that it supported that other people – people who were known to carry guns – committed the shooting. They argued that necessity was established because of Mr. Poyser's evidence that he did not recall making the statement to his lawyer about knowing the perpetrators to carry guns in the past. They argued that threshold reliability was also established. The fact that the statement was made to Mr. Ross was not in dispute, as it was agreed to by the Crown in the agreed statement of facts. The appellants argued that there was no realistic possibility that Mr. Poyser misperceived that the people who he said were with him at the time of the shooting had carried guns in the past, and that there was no realistic possibility that he lied to his own lawyer.

[116] The trial judge gave brief oral reasons dismissing the application. He ruled that threshold reliability – either procedural or substantive – was not established, and that Mr. Poyser's statement to his lawyer about the perpetrators being known to carry guns could only be used as a prior inconsistent statement. At the time the trial judge gave the oral reasons, he indicated that he may provide more complete reasons later, but no other reasons were subsequently provided. Given the brevity of the oral reasons, it is difficult to say precisely why the trial judge found that threshold reliability was not met. However, based on a passage he cited from *R. v.*

2024 ONCA 119 (CanLII)

Finta, [1994] 1 S.C.R. 701, referring to reliability being proven where the person making the statement is “disinterested” and comments made by the trial judge during submissions, it appears the trial judge found that Mr. Poyser was not disinterested when he made the statements to Mr. Ross about knowing the perpetrators to carry guns in the past because he did so in the context of seeking witness protection. It also appears that the trial judge had concerns about whether procedural reliability was established.

2024 ONCA 119 (CanLII)

Positions of the parties

[117] The appellants argue that the trial judge made three errors in his analysis of the use of Mr. Poyser’s statement to his lawyer for the truth of its contents. First, he unduly narrowed his analysis of threshold reliability by only considering whether Mr. Poyser was disinterested at the time he made the statement. Second, even if there was a realistic possibility that Mr. Poyser had an interest in making the statement, that did not end the threshold reliability analysis. The trial judge was required to assess all of the circumstances in deciding whether threshold reliability was met. The appellants submit that Mr. Poyser’s statement to his lawyer displayed sufficient indicators of reliability that it ought to have been admitted. Third, the trial judge erred in the circumstances of this case in not exercising his discretion to admit the statement for the truth of its contents by relaxing the rules for defence-led evidence, relying on *Finta* and *R. v. Williams* (1985), 18 C.C.C. (3d) 56 (Ont. C.A.). The appellants submit that fairness demands that the

statement be admitted as its admission was necessary to prevent a miscarriage of justice.

[118] The Crown argues that the trial judge did not err in ruling that Mr. Poyser's out-of-court statement was inadmissible for the truth of its contents and that it could only be used as a prior inconsistent statement to challenge Mr. Poyser's credibility. That decision is owed deference.

[119] The Crown does not take issue that necessity is established by Mr. Poyser's lack of memory of telling Mr. Ross that the perpetrators were known to him to carry guns in the past, but argues that threshold reliability was not established. The Crown argues that Mr. Poyser was motivated to tell his lawyer that the perpetrators were dangerous because Mr. Poyser was seeking witness protection at the time he made the statement. He was not disinterested. Further, while there is no question about what Mr. Ross told the police, this does not provide any comfort with regards to threshold reliability about what Mr. Poyser told Mr. Ross. The statement by Mr. Poyser to Mr. Ross was not made under oath, was not recorded, and the information given to police was not a verbatim account of what Mr. Poyser told Mr. Ross.

[120] The Crown accepts that trial judges have the discretion to relax the rules of evidence as they apply to defence evidence where doing so is necessary to

2024 ONCA 119 (CanLII)

prevent a miscarriage of justice; however, the Crown argues that the trial judge's decision not to do so is owed deference on appeal.

Analysis

[121] In my view, the trial judge erred in failing to allow Mr. Poyser's statement to Mr. Ross that he knew the perpetrators of the shooting to carry guns in the past to be used for the truth of its contents. The trial judge failed to consider indicia of both substantive and procedural reliability that were present in the circumstances in which the statement was made and the fact that Mr. Poyser testified at trial.

[122] The issue of admissibility of a hearsay statement for the truth of its contents is a question of law, and thus reviewable on a standard of correctness. However, part of the admissibility inquiry requires a trial judge to weigh various factors pointing towards and against admissibility. As long as a trial judge addresses the factors relevant to the admissibility inquiry, does not materially misapprehend the evidence relevant to the admissibility inquiry, and reasonably weighs the factors, an appellate court should defer to a trial judge's weighing of the factors: *R. v. S.S.*, 2008 ONCA 140, 232 C.C.C. (3d) 158, at paras. 29-30.

[123] In my view, in the circumstances of this case, deference is not warranted due to the incomplete and unduly narrow nature of the trial judge's analysis of substantive and procedural guarantees of threshold reliability. The trial judge erred in limiting his analysis of substantive guarantees of reliability to whether the

2024 ONCA 119 (CanLII)

appellant was disinterested at the time he made the statement. He further erred in failing to consider the impact of a significant procedural guarantee of reliability – Mr. Poyser's availability for cross-examination at trial.

[124] The only factor the trial judge considered in assessing substantive reliability was whether Mr. Poyser was disinterested at the time he gave the statement – that is, whether he may have had some oblique motive in making the statement. Although not spelled out in the ruling, based on the colloquy with counsel during submissions, the trial judge was concerned that he could not rule out a realistic possibility that Mr. Poyser told his lawyer that he knew the perpetrators of the shooting to carry guns in the past in an attempt to gain the benefit of witness protection. The trial judge took this factor from the Supreme Court decision in *Finta*, at pp. 854-55.

[125] It is, of course, correct that a witness' disinterest or interest – their motivation – at the time of making a hearsay statement is a factor relevant to substantive reliability; however, that factor standing alone is an incomplete analysis of substantive threshold reliability. The reference to the witnesses being disinterested in *Finta* was one factor on the record that the court found supported threshold reliability. But *Finta* does not represent a statement that disinterestedness is the full substantive reliability analysis. Rather, a trial judge must examine all of the circumstances surrounding the making of the statement to determine if they provide sufficient threshold guarantees of inherent trustworthiness: *R. v.*

2024 ONCA 119 (CanLII)

Bradshaw, 2017 SCC 35, [2017] 1 S.C.R. 865, at paras. 30-31; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para 62.

2024 ONCA 119 (CanLII)

[126] Even accepting some deference to the factual finding by the trial judge that he could not rule out the possibility that Mr. Poyser was motivated to obtain witness protection when he made the statement to his lawyer, the trial judge was required to consider all of the circumstances in assessing whether there were substantive guarantees of threshold reliability. The trial judge failed to consider other substantive guarantees of reliability. These included:

- the statement was made soon after the events of the shooting, when events were fresh in Mr. Poyser's mind;
- the statement was made by Mr. Poyser to his lawyer, who, on his trial evidence, he trusted; and,
- the statement was made in the knowledge, authorized by Mr. Poyser, that it would be provided to police in aid of negotiating a deal in relation to his involvement in the shooting of Mr. Hagley. In that context, knowingly providing false information to police would constitute a criminal offence.[8]

[127] My point is not to show that substantive guarantees of reliability could be a basis in this case, standing alone, to find threshold reliability. They were insufficient standing alone. However, the complete picture in terms of substantive guarantees of reliability was not as one-dimensional as the trial judge's reasons suggest. While

[8] I acknowledge that at the time the initial approach was made to police by counsel for Mr. Poyser, his name was not disclosed. However, as the goal was to negotiate a favourable resolution for Mr. Poyser, it was intended that his identity would ultimately be linked to the statements he made to his lawyer and authorized to be provided to police.

the substantive guarantees of reliability were equivocal, there was a significant procedural guarantee of reliability – cross-examination of Mr. Poyser as a witness at trial.

[128] In terms of the trial judge's assessment of procedural guarantees of threshold reliability, the reasons contain a conclusory assertion that none were present. Reading the reasons in the context of comments by the trial judge during submissions, he appears to have been concerned about the absence of the types of guarantees present in many cases, including, the absence of an oath, videotaping of the statement to the lawyer, and cross-examination of Mr. Poyser at the time the statement was made. The trial judge failed entirely to consider a significant procedural guarantee of reliability – Mr. Poyser's presence as a witness at trial, subject to cross-examination.

[129] In *Bradshaw*, Karakatsanis J., writing for the majority, recognized that procedural guarantees of threshold reliability are not limited to circumstances existing at the time the hearsay statement at issue is made. Cross-examination at trial is a significant procedural guarantee of reliability: at paras. 26, 28; see also *R. v. Pan*, 2014 ONSC 3800, at para. 53, rev'd on other grounds, 2023 ONCA 362, leave to appeal granted, [2023] S.C.C.A. No. 303; *R. v. Jama*, 2023 ONSC 2375, at para. 148.

2024 ONCA 119 (CanLII)

[130] The central concern behind the hearsay rule is the inability or reduced ability of the trier of fact to assess the credibility and reliability of a hearsay statement because of the absence of cross-examination: *Bradshaw*, at para. 26; *Khelawon*, at paras. 2, 35 and 76; *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520, at para. 32. Where the witness is available for cross-examination at trial, the trier of fact is afforded the opportunity to see and hear cross-examination of the declarant about the hearsay statement, so that the credibility and reliability of the witness may be tested. It is important to recall that in *Bradshaw* the hearsay declarant had refused to be sworn and testify at trial. As a result, cross-examination at trial was not available as a procedural guarantee of reliability on the facts in *Bradshaw*.

[131] In my view, the Crown's concern about the statement not being recorded is overstated in the circumstances of this case. The substance of Mr. Poyser's statement to his lawyer was clear – that he knew the perpetrators of the shooting to carry guns in the past. This directly contradicted his equally clear trial evidence that, having known the Shaw brothers for years, he had never seen them with firearms. This is not an issue of nuance. And as noted, Mr. Poyser was available for cross-examination. I acknowledge that, given his asserted lack of memory of telling his lawyer that he knew the perpetrators to carry guns in the past, there were limits to the ability to cross-examine. But his overall credibility and reliability were very much in issue, and the jury had the tools to assess that, including the truth of his statement to his lawyer.

2024 ONCA 119 (CanLII)

[132] The ultimate concern in the threshold reliability analysis is whether the circumstances of the statement, including cross-examination at trial, will give the trier of fact sufficient tools to rationally assess its ultimate reliability and credibility. The substantive guarantees of reliability were equivocal in this case, but not as one-sided as the trial judge's reasons suggest. However, Mr. Poyser's presence as a witness at trial subject to cross-examination was a sufficient procedural guarantee of reliability in the circumstances to permit the jury to rationally assess factors relevant to his credibility and reliability, including perception, memory, narration, and sincerity. I conclude that threshold reliability was met to permit the jury to use the statement for the truth of its contents (subject, of course, to the jury's assessment of its ultimate reliability).

[133] Finally, to the extent one might view the use of Mr. Poyser's statement to his lawyer that he knew the perpetrators of the shooting to have carried guns in the past for the truth of its contents as a close call, in my view, in the circumstances of this case, fairness dictated that it be admissible for the truth of its contents.

[134] It is well-established that, where necessary in order to ensure a fair trial, a court may relax the rules of evidence in favour of admitting defence-led evidence. In the context of defence-led evidence, while a showing of some reliability must be satisfied, the strict standard applied to evidence led by the Crown to incriminate an accused does not apply: *Finta*, at pp. 854-55; *R. v. G.F.* (1999), 132 C.C.C. (3d)

2024 ONCA 119 (CanLII)

14 (Ont. C.A.), at p. 32; *Williams*, at p. 378; *Pan*, at paras. 54-70; *Jama*, at para. 155.

[135] Although the decision to relax the admissibility standard for defence-led evidence is a discretionary one, in this case, no deference is owed to the trial judge in light of his errors in the threshold reliability analysis. The trial judge declined to admit Mr. Poyser's statement to his lawyer that he knew the perpetrator to have carried guns in the past because of the possibility that he made an untrue statement in order to obtain witness protection. Yet the Crown argued its case to the jury on the basis that Mr. Poyser was a credible and reliable witness. Mr. Poyser's motivations for his evidence at various times – when he spoke to police and when he testified under oath both at his guilty plea and at trial – were at the heart of this trial. In the circumstances of this trial, it was unfair to the defence to shield the Crown from the use of a statement by Mr. Poyser for its truth, which was helpful to the defence, on the basis of being unable to rule out a possible motive to lie at the time the statement was made. Mr. Poyser testified at trial and could be cross-examined. As a matter of fairness, the appellants ought to have been allowed to ask the jury to accept Mr. Poyser's earlier statement to his lawyer for the truth of its contents – a statement which was inconsistent with his evidence

2024 ONCA 119 (CanLII)

identifying the Shaw brothers as involved in the shooting in light of his evidence at trial that he had never seen them with firearms.[9]

[136] The error of not permitting Mr. Poyser's statement to his lawyer that he knew the perpetrators to carry guns in the past to be used for the truth of its contents would not, standing alone, have warranted a new trial. This is particularly so given that the statement was before the jury for its inconsistency with his trial evidence. However, I find that, with the first two errors I have identified, the cumulative effect was to render the trial unfair. The hearsay statement by Mr. Poyser about having known the perpetrators to carry guns in the past was evidence which was favourable to the defence. Mr. Poyser had known the Shaw brothers for a number of years and agreed at trial that he had never seen them with firearms. Mr. Poyser testified that he had never met Cron Dog, who he identified as Mr. Ali-Nur, before the afternoon preceding the shooting. If the jury had been permitted to use his statement to his lawyer that he knew the perpetrators of the shooting to have carried guns in the past for the truth of its contents and the jury accepted that evidence, it was exculpatory in relation to the appellants.

2024 ONCA 119 (CanLII)

---

[9] Indeed, although this ground was more focused on the Shaw brothers because of Mr. Poyser's evidence that he had never seen them with firearms or known of any reason for them to be connected to firearms, it had implications for Mr. Ali-Nur as well. In light of Mr. Poyser's evidence that he had never met Cron Dog prior to the afternoon of the shooting, his statement to his lawyer that he had known the perpetrators to carry guns in the past was also inconsistent with his evidence that Mr. Ali-Nur was Cron Dog and the second shooter.

(4) Conclusion on cumulative impact of these errors

[137] I am of the view that cumulatively, the three errors I have identified denied the appellants a fair trial. The Crown's case was far from overwhelming. It depended on the jury accepting the credibility of Mr. Poyser's evidence. There were serious challenges to his credibility. The Crown asked the jury to accept Mr. Poyser's evidence based on a limited body of corroborating evidence. There were significant gaps in the evidence. This court cannot have any confidence that the verdicts would have been the same absent the errors identified.

D. THE VERDICT AGAINST MR. ALI-NUR IS UNREASONABLE

[138] Mr. Ali-Nur is entitled to a new trial on the basis of the errors I have outlined above. However, he also argues that the verdict against him was unreasonable and that he should therefore be acquitted. I would accept this argument.

[139] The case against Mr. Ali-Nur differed from that against the Shaw brothers. Mr. Poyser had known the Shaw brothers for years. His identification of them was not a stranger identification. By contrast, Mr. Poyser testified that he only met Cron Dog on the day of the shooting. His identification of Mr. Ali-Nur as Cron Dog was a stranger identification. As such, although Mr. Ali-Nur joined his co-accused in challenging the credibility of Mr. Poyser's evidence at trial, he also squarely raised reliability issues regarding Mr. Poyser's identification of him as Cron Dog that were not at play in relation to the Shaw brothers.

2024 ONCA 119 (CanLII)

[140] As I will explain, there are significant frailties in Mr. Poyser's identification of Mr. Ali-Nur as Cron Dog and the identification procedure employed by the police. In my view Mr. Poyser's identification of Mr. Ali-Nur as Cron Dog, standing alone, would unquestionably be an insufficient basis for a properly instructed jury, acting judicially, to reasonably find beyond a reasonable doubt that Mr. Ali-Nur was Cron Dog and was guilty of murder.

[141] The Crown rests its argument that the verdict is not unreasonable on evidence that it argues corroborates Mr. Poyser's identification evidence.

[142] In my view, there is one piece of evidence capable of providing some corroboration of Mr. Poyser's identification evidence – the subscriber information for the 226 phone in the name of "MOHAMED ALINUR". However, as I will explain, this evidence also has significant frailties. I reject the Crown's submission that there are other aspects of the evidence that corroborate Mr. Poyser's identification of Mr. Ali-Nur as Cron Dog.

[143] Taken together, Mr. Poyser's identification evidence and the 226 phone subscriber information do not provide a basis on which a properly instructed jury, acting judicially, could reasonably conclude beyond a reasonable doubt that Mr. Ali-Nur was Cron Dog.

2024 ONCA 119 (CanLII)

(a) Law in relation to unreasonable verdict

[144] A jury's verdict is entitled to deference. However, s. 686(1)(a)(i) of the *Criminal Code* requires an appellate court to review the trial record to determine whether a conviction "is unreasonable or cannot be supported by the evidence." Review of verdicts for reasonableness recognizes that, even where a trial is error-free and there is some evidence against an accused, appellate intervention is sometimes necessary to avoid an injustice: *R. v. Yebes*, [1987] 2 S.C.R. 168, at pp. 180-81; 183-86; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at paras. 36, 38-42; *R. v. Tat* (1997), 35 O.R. (3d) 641 (C.A.), at paras. 97-98; *R. v. Phillips*, 2016 ONCA 651, 364 C.C.C. (3d) 220, at para. 51.

[145] The question on reviewing the reasonableness of a verdict is not whether there is *any* evidence capable of supporting the conviction, but rather, considering the evidence as a whole, whether the verdict was one that a properly instructed jury, acting judicially, could reasonably have rendered. This assessment necessarily involves some assessment of the evidence – although cognizant of the disadvantage of an appellate court that does not see and hear the witnesses: *Biniaris*, at paras. 36, 38-42; *Tat*, at paras. 97-98; *Phillips*, at para. 67.

[146] One aspect of the assessment of a verdict's reasonableness by an appellate court is considering the trial record "through the lens of judicial experience", alive to features of a case that may give experienced jurists cause for concern: *Biniaris*,

2024 ONCA 119 (CanLII)

at paras. 40-41. Judicial experience has shown that cases involving eyewitness identification evidence given in circumstances which raise fundamental questions about its reliability are well-suited to review for reasonableness of the verdict under s. 686(1)(a)(i) of the *Criminal Code*: *Biniaris*, at para. 41. This was explained by Doherty J.A. in *Tat*, at paras. 99-100:

> While recognizing the limited review permitted under s. 686(1)(a)(i), convictions based on eyewitness identification evidence are particularly well-suited to review under that section. This is so because of the well-recognized potential for injustice in such cases and the suitability of the appellate review process to cases which turn primarily on the reliability of eyewitness evidence and not the credibility of the eyewitness.
>
> The extensive case-law arising out of the review of convictions based on eyewitness identification reveals that the concerns about the reasonableness of such verdicts are particularly high where the person identified is a stranger to the witness, the circumstances of the identification are not conducive to an accurate identification, pre-trial identification processes are flawed and there is no other evidence tending to confirm or support the identification evidence. [Citations omitted.]

[147] I would add that the issue in relation to the reliability of the subscriber information for the 226 phone is also an issue of reliability, not credibility, of evidence. Thus, both Mr. Poyser's evidence identifying Mr. Ali-Nur as Cron Dog and the value of the 226 phone subscriber information as evidence of identification of Mr. Ali-Nur as Cron Dog raise issues about the nature and quality – the reliability – of the identification evidence, rather than the credibility. These are the types of

2024 ONCA 119 (CanLII)

issues an appellate court is well-placed to review when assessing the reasonableness of a verdict.

(b) Circumstances of Mr. Poyser's identification of Mr. Ali-Nur as Cron Dog

[148] Mr. Poyser's evidence identifying Mr. Ali-Nur as Cron Dog bears many of the hallmarks of unreliable stranger identification evidence, including his consumption of drugs and alcohol leading to significant impairment, at times bearing on his opportunity to observe; his inability to provide a description of Cron Dog with any level of detail; improper and leading police identification procedures involving showing a single photo of Mr. Ali-Nur in circumstances that suggested the photo was of Cron Dog; the absence of a photo line-up at any time; and an in-dock identification. These frailties are evident from a chronological review of the circumstances of the identification.

[149] Mr. Poyser arrived at Scarlettwood at 5:35 p.m. with a bottle of vodka. Mr. Poyser was not entirely consistent about the size of the bottle. At times he said it was a 750 ml bottle (26 ounces). In cross-examination he agreed that he purchased that bottle of vodka for $40 and that it was a 1.14 litre bottle (40 ounces). He was consistent that it was a "big" bottle. The Scarlettwood video shows him to be holding a bottle. Mr. Poyser's evidence was that he was at Scarlettwood with Cron Dog for between 30 minutes and one hour before he followed the pick-up

2024 ONCA 119 (CanLII)

truck to Shendale. The Scarlettwood video shows the time to be just over 50 minutes. Mr. Poyser testified that he drank “most of” the bottle of vodka he had brought with him by the time he left Scarlettwood. Cron Dog had some of the vodka, but “not as much” as Mr. Poyser. Mr. Poyser was inconsistent about when he had started drinking the bottle of vodka. At one point, he said he had not consumed alcohol before arriving at Scarlettwood. However, in examination-in-chief, Crown counsel showed Mr. Poyser a portion of the Scarlettwood video from three minutes after Mr. Poyser is seen to meet Cron Dog. Crown counsel then asked Mr. Poyser who the second man with Mr. Poyser was and whether he spent any time with the second man that day. Mr. Poyser said he did not know him and did not know if he had spent time with him, because he was halfway through the bottle of vodka by that point. Mr. Poyser also testified that at some point at Scarlettwood, he was already drunk.

[150] Cron Dog’s face was visible to Mr. Poyser at Scarlettwood (but not on the videos in evidence at the trial). However, Cron Dog was wearing a baseball cap with a hoodie over it, so his whole head was not visible.

[151] Mr. Poyser continued consuming alcohol and also consumed drugs through the evening.

[152] Mr. Poyser testified that, when he arrived at Shendale after following Cron Dog there (i.e., within a bit longer than 50 minutes of meeting Cron Dog), he “was

2024 ONCA 119 (CanLII)

drunk". He agreed in cross-examination that because of his level of intoxication, he could not say how long the drive from Scarlettwood to Shendale took. He also testified to speaking to one of the Shaw twins upon his arrival at Shendale, but because of his level of intoxication, he was unable to say which of the twins he spoke to.

[153] They were smoking marijuana when they got to Shendale. At some point, Mr. Poyser left Shendale to go to the LCBO to get more alcohol. He testified that he could not drive because he "was already drunk", so Shakiyl Shaw drove and there was a woman with them. In cross-examination he adopted his statement to police that at the time they went out to the LCBO he "was stumbling". They bought a larger bottle of alcohol. Mr. Poyser was not sure what kind of alcohol, but it was 40 percent (alcohol). They returned to Shendale, but then left to buy more marijuana (again with Shakiyl and the woman). They returned again to Shendale and continued to drink alcohol and smoke marijuana. Shakiyl and Mr. Poyser then went out a third time – Mr. Poyser could not recall where – and got MDMA. They returned to Shendale, "took the Molly" (MDMA) and continued to drink. Mr. Poyser was unable to provide time estimates for events during the time he was at Shendale because he was "just really drunk and really high". Mr. Poyser described the amount of alcohol he had had to drink by some point in the evening when he was at Shendale (the time frame was unclear) as "most of the first bottle of vodka"

2024 ONCA 119 (CanLII)

and “at least a quarter” of the second bottle of vodka. Mr. Poyser described his state just prior to the shooting as “pretty intoxicated”.

[154] Mr. Poyser testified that he wears glasses and has since seventh grade. His glasses are for distance. He requires them to drive. He agreed in cross-examination that, if he is not wearing them, the details of things even a couple of metres away become blurry. He agreed that, if it is dark or he is in a dimly lit room and not wearing his glasses, it is more difficult for him to see details. Mr. Poyser initially said in cross-examination that he had his glasses with him on October 15-16, 2016, but that he was “taking them on and off”. However, he agreed, when shown the videos of him at Scarlettwood and Pizza Pizza, that he was not wearing glasses. He further agreed that he could not recall putting on his glasses at Shendale.

[155] Mr. Poyser agreed in cross-examination that his consumption of alcohol that night affected his vision, his perception of things around him, and his perception of time.

[156] I turn now to the circumstances of Mr. Poyser’s first identification of Mr. Ali-Nur as Cron Dog, in his police interview on December 29, 2016. The interview was videotaped and portions of it were exhibited at trial.

2024 ONCA 119 (CanLII)

[157] The only description of Cron Dog that Mr. Poyser was able to provide to police in the interview prior to the problematic identification procedure, which I describe below, was that he was "a Somali male".[10]

[158] The portion of the video with the identification procedure shows the following. After being shown a single photo of Shakiyl Shaw and identifying him, the officers turn to the subject of Cron Dog. Officer Worden says to Mr. Poyser and Officer Shankaran, "We don't know Cron Dog's name, right?" Officer Worden then turns to Mr. Poyser and says, "You'd recognize Cron Dog if you saw – a picture of him?" Mr. Poyser responds, "Yeah." Officer Worden then says to Mr. Poyser, "I don't know if you're going to recognize this photo or not, but if you do, just tell me." He then shows Mr. Poyser a single photo (a photo of Mr. Ali-Nur, exhibit 64(b), which was a youth booking photo). Mr. Poyser replies, "Yeah, that's Cron Dog."

[159] I pause to note that although the police chose to show Mr. Poyser a single photo of Mr. Ali-Nur, in the interview video, shortly prior to the single-photo identification procedure, Officer Shankaran states that envelopes, which at the

[10] By the time he testified at trial, two-and-a-half years after the murder, Mr. Poyser provided the following description of Cron Dog: a slim, fair-skin, African male, roughly six feet tall, with a short afro. Slim, fair-skin, the hairstyle, and the height estimate were all new details that Mr. Poyser had not previously provided to police. However, he was still unable to provide any description of Cron Dog's face. When asked in re-examination to explain what features he meant when he told police that Cron Dog was Somali, Mr. Poyser could not provide any description, saying that it looked like "the same features as every other black person". In any event, this description that was provided years after the event, and after the suggestive identification procedure employed by police in Mr. Poyser's December 29, 2016 interview, and the further suggestive identification procedure during Mr. Poyser's June 2018 guilty plea proceedings, were irremediably tainted.

2024 ONCA 119 (CanLII)

time were being held by Officer Worden, contained photo line-ups “for each person”. All counsel agreed at the appeal hearing that the officers had a photo line-up in relation to Mr. Ali-Nur in one of the envelopes that can be seen on the table and being handled by the officers during the interview. The trial evidence provides no explanation as to why the officers did not follow well-established procedure and use the photo line-up.

[160] Mr. Poyser pleaded guilty to the offence of accessory after the fact to murder on June 27, 2018. During the guilty plea proceedings, Mr. Poyser was placed under oath. Mr. Poyser was again shown a single photo of Mr. Ali-Nur by Crown counsel (exhibit 34, the booking photo taken at the time of Mr. Ali-Nur’s arrest) and identified it as Cron Dog.

[161] The identification during the trial did nothing to improve the reliability of Mr. Poyser’s identification evidence. Not only was there an in-dock identification, but it was preceded by Crown counsel once again showing Mr. Poyser a single photo of Mr. Ali-Nur. Just before the end of Mr. Poyser’s examination-in-chief, Crown counsel showed Mr. Poyser a single photo of Mr. Ali-Nur (exhibit 34) and asked if he recognized that person. Mr. Poyser said that he did and that the person was Cron Dog. Crown counsel then asked Mr. Poyser if he saw that person in the courtroom, and Mr. Poyser indicated Mr. Ali-Nur, who at the time was in the prisoner’s box with the other appellants.

2024 ONCA 119 (CanLII)

[162] At no point, either during the investigation or during the trial, was Mr. Poyser shown a photo line-up.

(c) The verdict against Mr. Ali-Nur is unreasonable

[163] Mr. Ali-Nur argues that the verdict of guilt against him is unreasonable. He argues that the circumstances of his conviction bear many of the hallmarks of wrongful convictions. He focuses in particular on the unreliability of the identification evidence against him – Mr. Poyser's evidence identifying him as Cron Dog and the subscriber information for the 226 phone. Mr. Ali-Nur argues that Mr. Poyser's evidence identifying him as Cron Dog – an unreliable stranger identification, for several reasons which I discuss below – was irremediably tainted by the police identification procedure which involved directing Mr. Poyser's attention to the issue of Cron Dog's identity and then showing him a single photo of Mr. Ali-Nur and asking if he could identify the person. This flawed identification was reinforced by Mr. Poyser again being asked to identify a single photo of Mr. Ali-Nur when he pleaded guilty to accessory after the fact to murder, and by again being shown a single photo of Mr. Ali-Nur in court before being asked to make an in-dock identification. Mr. Ali-Nur argues that the nature and quality of Mr. Poyser's evidence identifying him as Cron Dog is so unreliable that it cannot support the conviction. Mr. Ali-Nur argues that the 226 phone subscriber information, which the Crown relies on as corroborating Mr. Poyser's identification evidence, is itself unreliable as evidence connecting Mr. Ali-Nur to that phone.

2024 ONCA 119 (CanLII)

[164] The Crown argues that four bodies of evidence taken together were sufficient such that a properly instructed jury, acting judicially, could conclude that Mr. Ali-Nur was Cron Dog and was one of the shooters. The four bodies of evidence relied on by the Crown are the following:

- Mr. Poyser's identification of Mr. Ali-Nur as Cron Dog;
- the subscriber information for the 226 phone (in combination with that phone making calls to Mr. Poyser's phone the evening prior to the murder);
- comparing the videos of Cron Dog at the Scarlettwood and Pizza Pizza scenes with Mr. Ali-Nur's appearance in the courtroom during the trial; and,
- comparing the clothing worn by Mr. Ali-Nur in a youth booking photo (exhibit 64(b)) with clothing worn by Cron Dog in two photos extracted from the videos of the Scarlettwood scene on the afternoon preceding the murder (exhibits 44 and 90(e)).

[165] Crown counsel conceded that a single-photo identification procedure, such as that used by the police in this case, was not good practice and was a "dangerous" procedure. But he argued that there was sufficient reliable identification evidence that the verdict of guilty against Mr. Ali-Nur is not unreasonable, in particular, because it is not a "fleeting glance" case, because Mr. Poyser initially saw Cron Dog in daylight and before he had started drinking alcohol, and because of the evidence above that the Crown argues corroborates Mr. Poyser's identification of Mr. Ali-Nur as Cron Dog.

2024 ONCA 119 (CanLII)

[166] In my view, two of the categories of evidence relied on by the Crown provided identification evidence of Mr. Ali-Nur as one of the shooters: Mr. Poyser's evidence identifying Mr. Ali-Nur as Cron Dog and the subscriber information for the 226 phone. However, given very serious frailties in both of these bodies of identification evidence, the verdict in relation to Mr. Ali-Nur is unreasonable. A properly instructed jury, acting judicially, could not reasonably conclude beyond a reasonable doubt on this body of evidence that Mr. Ali-Nur was Cron Dog and one of the shooters.

[167] I will first address Mr. Poyser's identification evidence and the 226 phone subscriber information. I will then consider the other bodies of evidence that the Crown argues are corroborative of Mr. Poyser's identification of Mr. Ali-Nur as Cron Dog, but which, in my view, do not add anything of evidentiary weight. Although I discuss each body of evidence separately for clarity of analysis, I underline that the assessment of the verdict's reasonableness must be based on considering the evidence as a whole, and in particular, all of the evidence bearing on the identification of Mr. Ali-Nur as Cron Dog.

(i) The unreliable identification evidence of Mr. Poyser

[168] I conclude that Mr. Poyser's identification of Mr. Ali-Nur as Cron Dog is irremediably tainted and bears many of the hallmarks of unreliable identification evidence which have led to wrongful convictions. While it is true that Mr. Poyser

2024 ONCA 119 (CanLII)

had a longer opportunity to observe Cron Dog than a fleeting glance, the evidence shows strong concerns about his ability to observe. He requires glasses for distance beyond a couple of metres. He agreed that if he is not wearing his glasses, it impacts is ability to see detail – it becomes blurry. A reasonable assessment of the evidence is that Mr. Poyser was not wearing his glasses that afternoon and evening. The objective record of the videos from Scarlettwood and the Pizza Pizza scene show him not to be wearing his glasses. I pause to underline that the start of the time at Scarlettwood is the only time that Mr. Poyser was not significantly impaired, and he is not wearing his glasses there.

[169] Mr. Poyser testified that, without his glasses, it is hard for him to see details. He said that it is more difficult for him to see details without his glasses if he is in a dimly lit room. The evidence at trial showed the basement at Shendale to be dimly lit.

[170] Mr. Poyser was significantly impaired for the majority of the time he spent with Cron Dog. He agreed that his impairment affected his vision and his ability to perceive things around him.

[171] During the time at Scarlettwood, the only time before Mr. Poyser was significantly intoxicated, Cron Dog had the hood of his sweatshirt on over a baseball cap. This can be seen on the videos from Scarlettwood. This further limited Mr. Poyser's ability to observe Cron Dog's features.

2024 ONCA 119 (CanLII)

[172] The problems with Mr. Poyser's ability to perceive events around him are clear from his inability to give a description with any detail to the police in his December 29, 2016 interview – he was only able to say that Cron Dog was Somali.

[173] Stranger identification evidence carries with it well-known risks in terms of reliability and danger of wrongful convictions: *R. v. Mills*, 2019 ONCA 940, 151 O.R. (3d) 138, at paras. 184-86; *R. v. Hibbert*, 2002 SCC 39, [2002] 2 S.C.R. 445, at para. 51; *R. v. Biddle*, 2018 ONCA 520, 141 O.R. (3d) 401, at para. 31; *R. v. M.B.*, 2017 ONCA 653, at paras. 29-31; *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.), at pp. 421-22; *Tat*, at paras. 99-100; The Hon. Peter de C. Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) (the "*Sophonow Inquiry*"), at pp. 31-34.

[174] Particular dangers that may cause concern for reliability of identification evidence include: inability of the witness to provide a description of the person; lack of distinctive features of the person; the conditions under which the observations are made, such as lighting, distance; factors affecting the ability of the witness to perceive, such as a need for glasses, intoxication; and, a short time to observe: *Miaponoose*, at p. 424. In addition, identification procedures employed by police can impact the reliability of identification evidence, which I discuss further below.

2024 ONCA 119 (CanLII)

[175] While not all of the risks of reliability discussed in the case law are present in this case (indeed, it is rare that all of the risks are present in a particular case), many are – inability to provide a description with any level of detail, intoxication at the time of observation, not wearing glasses. I acknowledge that concerns about reliability of eyewitness identification evidence can usually be addressed by a strong caution to a jury. Reliability issues in relation to identification evidence will not always impact the reliability of a verdict. But in this case, they form the starting point from which improper identification procedures were employed that fundamentally undermined the reliability of Mr. Poyser's evidence identifying Mr. Ali-Nur as Cron Dog.

[176] The initial frailties of Mr. Poyser's evidence were significantly compounded by the suggestive identification procedures used by police and reinforced during Mr. Poyser's guilty plea and during the trial. Mr. Poyser had not previously met Cron Dog before the afternoon/evening of the murder. How the identification procedures were conducted mattered. But rather that conduct a photo line-up, the police chose to show Mr. Poyser a single photo of Mr. Ali-Nur in circumstances which clearly suggested to Mr. Poyser that it would be a photo of Cron Dog.

[177] As the dangers of this type of suggestive identification procedures are well-known, and have been for many years, I will not belabour them. Two brief quotations from decisions of this court make the point:

2024 ONCA 119 (CanLII)

If a witness has no previous knowledge of the accused person, so as to make him familiar with that person's appearance, the greatest care ought to be used to ensure the absolute independence and freedom of judgment of the witness. His recognition ought to proceed without suggestion, assistance or bias created directly or indirectly. Conversely, if the means employed to obtain evidence of identification involve any acts which might reasonably prejudice the accused, the value of the evidence may be partially or wholly destroyed. Anything which tends to convey to a witness that a person is suspected by the authorities, or is charged with an offence, is obviously prejudicial and wrongful. Submitting a prisoner alone for scrutiny after arrest is unfair and unjust. Likewise, permitting a witness to see a single photograph of a suspected person or of a prisoner, after arrest and before scrutiny, can have no other effect, in my opinion, than one of prejudice to such a person. [*R. v. Smierciak* (1946), 87 C.C.C. 175 (Ont. C.A.), at p. 177]

———

Later in the reasons for decision, the Court reiterates the need for constant watchfulness on the part of judges and Crown counsel to see that nothing unfair to an accused person is done or put in evidence in connection with identification procedure. I would add that it is clear that the police also have a duty to ensure the integrity of the identification process. Their role indeed may be most important of all since they are usually in control of the methods chosen to recall or refresh the memory of eye witnesses. While it may not be possible to improve upon the reliability of a witness's original perception of a person, it is crucial that procedures which tend to minimize the inherent dangers of eyewitness identification evidence be followed as much as possible in any given case. Irreversible prejudice to an accused may flow from the use of inappropriate police procedure and, unless adequately counterbalanced during the course of the judicial process, may result in a serious miscarriage of justice. [*Miaponoose*, at pp. 424-25]

2024 ONCA 119 (CanLII)

See also *Biddle*, at paras. 32, 39-44; *Phillips*, at paras. 20, 23, 28 and 33; *Sophonow Inquiry*, at p. 32; *R. v. Bao*, 2019 ONCA 458, 377 C.C.C. (3d) 218, at para. 27.

[178] It is difficult to imagine that the officers who interviewed Mr. Poyser were not aware of proper identification procedures. However, my concern is the unreliability of Mr. Poyser's evidence identifying Mr. Ali-Nur as Cron Dog, not whether the police intentionally chose not to follow established line-up procedures designed to safeguard the reliability of identification evidence.

[179] Further, in this case, the initial suggestive identification process with a single photo was reinforced at Mr. Poyser's guilty plea when Crown counsel again showed him a single photo of Mr. Ali-Nur, and yet again at trial, prior to the in-dock identification. By this point, there was a real danger that Mr. Poyser was simply recalling the earlier times he had been shown Mr. Ali-Nur's photo. Mr. Poyser's identification of Mr. Ali-Nur as Cron Dog was never subjected to the test of a photo line-up. Rather, it was initially made in the suggestive, single-photo circumstances of the December 29, 2016 police interview, and then repeatedly reinforced to confirm the Crown theory of identification. Mr. Poyser was only ever shown one option – a photo of Mr. Ali-Nur.

[180] The problems with Mr. Poyser's identification evidence are such that in my view, standing alone, it could not reasonably support a finding of guilt against

2024 ONCA 119 (CanLII)

Mr. Ali-Nur. The question is then whether there was sufficient other evidence, such that the verdict is not unreasonable.

(ii) The 226 phone subscriber information

[181] The trial judge admitted into evidence a business record from Freedom Mobile for a phone with a number beginning with 226. The 226 number made three calls to Mr. Poyser's phone the night of the shooting. There was a missed call at 9:42 p.m. on the night of October 15 and two incoming calls at 12:38 and 12:50 a.m. on October 16. The two incoming calls were 13 seconds and 27 seconds long, respectively. Officer Flores, who performed the data extraction of Mr. Poyser's phone, was unable to say if the second and third calls were answered or went to voicemail. The Crown argues that, taking the subscriber information for the 226 phone together with the calls from the 226 phone to Mr. Poyser shortly before the murder, is corroborative of a link between Mr. Ali-Nur and Mr. Poyser the night of the murder.

[182] I discuss the admissibility of this evidence further below, as the appellants raise it as a ground of appeal. At this point, it suffices to say that I find no error in the trial judge's decision to admit the subscriber information for the 226 phone evidence. It met the threshold for admissibility as a business record.

[183] The subscriber information from Wind Mobile (subsequently acquired by Freedom Mobile) showed that, at the time of the offence, the 226 phone was a pre-

2024 ONCA 119 (CanLII)

paid phone registered under the name “MOHAMED ALINUR” with a date of birth of “19/05/1998”, and an address on Richview Road in Etobicoke (with no unit number). There was a secondary phone number listed with the subscriber information as a contact. The secondary number could not be linked to Mr. Ali-Nur or to any other person. An agreed statement of facts filed at trial confirmed that, at the time of the offence, Mr. Ali-Nur lived in a unit at the same address on Richview Road and that his date of birth was May 19, 1998. The subscriber information for the 226 phone was the only record retained by Freedom Mobile in relation to that phone. As discussed further below in relation to the lost evidence application and instruction, by the time the police sought a production order for the Freedom Mobile records relating to the 226 phone, most of the records had already been purged by Freedom. The trial judge characterized the police failure to preserve and obtain the records in relation to the 226 phone in a timely way as “unacceptably negligent”.

[184] Although, on its face, the subscriber information for the 226 phone connected Mr. Ali-Nur to that phone (which in turn was connected to Mr. Poyser by the phone calls from the 226 phone on the night of the murder), there were significant frailties with the subscriber information for the 226 phone. The evidence from telecommunication company witnesses who testified at trial was that a person opening a pre-paid phone account may not be required to provide identification when the account is created, and that after an account is created, there is no way

2024 ONCA 119 (CanLII)

to verify the accuracy of the information that was given when the account was created. Service providers do not do credit checks or verify a subscriber's identity when selling pre-paid phones because they take on no financial risk. One of the phone service provider witnesses testified that many fictitious names and numbers are associated with pre-paid phone accounts and agreed that fictitious names and numbers are "probably more the norm than the exception." Further, Mr. Poyser gave evidence which showed that subscriber information for pre-paid phones was unreliable. He testified that he and others purchased pre-paid phones at various locations using fake information, and that phones were regularly passed around between individuals.

[185] I acknowledge that some evidentiary weight could be given to the nature of the subscriber information for the 226 phone in that it not only included the name "Mohamad Alinur", but also a date of birth and street address corresponding to Mr. Ali-Nur (without the unit number). However, although there is a level of specificity to that information, it is not so personal that it would be unavailable to others besides Mr. Ali-Nur. Further, the limited content of the subscriber information must be considered in the context of the evidence lost because of police negligence in not securing the records for the 226 phone before the billing records were purged by Wind/Freedom Mobile as part of their routine purging of records. The original contract, which would have been signed by the person who opened the account, was not available. The billing records, which would have

2024 ONCA 119 (CanLII)

shown the numbers the 226 phone communicated with and had potential use to either confirm or refute an association with Mr. Ali-Nur, were not available. And the records of the cell sites the 226 phone pinged off when it was in use at various times, which could have provided evidence of its approximate location at the time of various calls (in particular, on the night of murder), was not available. Had the Freedom Mobile billing information been available, it likely would have been capable of either affirming or disproving the link between the 226 phone and Mr. Ali-Nur.

2024 ONCA 119 (CanLII)

[186] In sum, while the 226 subscriber information had some evidentiary value, there were serious frailties with the inferences that could be drawn from it.

(iii) The scene videos and comparison of clothing worn by Mr. Ali-Nur in youth booking photo

[187] I turn now to the two other bodies of evidence relied on by the Crown as evidence that Mr. Ali-Nur is Cron Dog – comparison of the videos of Cron Dog from the Scarlettwood and Pizza Pizza scenes with Mr. Ali-Nur's appearance in court, and comparison of the clothing in a youth court booking photo of Mr. Ali-Nur (exhibit 64(b)) and a still photo of Cron Dog extracted from the Scarlettwood video (exhibit 44).

[188] The primary problem with the Crown's argument that the jury could have compared the appearance of Cron Dog in the Scarlettwood and Pizza Pizza scene

videos to Mr. Ali-Nur's appearance in court is that Cron Dog's face is not visible in any of the videos. Cron Dog's face is obscured by the hoodie of his sweatshirt and darkness on the Pizza Pizza scene videos. His face is also not visible in the Scarlettwood scene videos. Most of the time, this is because it is obscured by the hood of the sweatshirt he is wearing. Three or four times on the Scarlettwood video, Cron Dog's face is turned towards a camera for one or two seconds; however, because of the distorted quality of the video, it is not possible to discern his features other than that he is Black. Crown counsel conceded in submissions on the appeal that Cron Dog's face is not visible in any of the videos. As a result, there was simply no basis to compare Cron Dog's face to Mr. Ali-Nur's face because there was no photographic or video evidence before the jury of Cron Dog's face.

[189] Further, the videos were not capable of supporting anything but the most generic comparison to Mr. Ali-Nur's body type or build. A review of the transcript shows that the accused, who were in custody during the trial, were always in the courtroom (presumably in the prisoners' dock) before the jury was brought in. The jury would not have been in a position to, for example, compare Mr. Ali-Nur's movement in the courtroom to Cron Dog's movement in the video. At best, the jury may have been able to observe a similar build between Cron Dog in the videos and Mr. Ali-Nur – i.e., tall and slim. But this is too generic to add meaningful corroboration to the tainted identification evidence of Mr. Poyser. In sum, the

2024 ONCA 119 (CanLII)

possibility that corroboration of the identification of Mr. Ali-Nur as Cron Dog could be obtained by comparing Cron Dog's appearance in the videos to Mr. Ali-Nur's in court is illusory.

[190] The second problem with this argument is that the jury was not instructed that they could compare Cron Dog's appearance in the videos to Mr. Ali-Nur's appearance in the courtroom as part of their assessment of whether Mr. Ali-Nur was Cron Dog. Although the trial judge instructed the jury that it was for them to determine who the individuals in the Scarlettwood and Pizza Pizza videos were, he did not at any point instruct them that, in considering that issue, they could compare the accused's appearance in the courtroom to the people on the videos and make their own assessment of whether the accused were any of the people in the videos. Rather, the trial judge told the jury that in deciding whether the accused were any of the individuals in the videos, they could ask "whether his appearance in the video is similar to or different from what you know from other evidence about the appearance of that accused at that time" (emphasis added). In other words, there was no *Nikolovski* instruction given to the jury.

[191] This brings me to the last body of identification evidence relied on by the Crown, which was relied on for the first time on appeal. The Crown argues that, if one compares two still photos of Cron Dog extracted from the Scarlettwood video (exhibits 44 and 90(e)) to the youth booking photo of Mr. Ali-Nur (exhibit 64(b)), the clothing worn in both photos is the same. The Crown argues that, if a trier of

2024 ONCA 119 (CanLII)

fact accepted that the clothing was the same, it would be further circumstantial evidence that Cron Dog and Mr. Ali-Nur are the same person and would be corroborative of Mr. Poyser's identification evidence.

[192] I have some concern about the appropriateness of allowing the Crown to rely on this evidence as corroborative of Mr. Poyser's identification evidence for the first time on appeal. Because this argument was not raised below, there was no opportunity for the defence to cross-examine or make argument to the jury about the similarities or differences between the sweatshirts in the two photos. But I need not reach a firm conclusion on the propriety of this issue being raised for the first time on appeal.

[193] Reviewing the photos, within the scope of assessing the reasonableness of the verdict, in my view, the clothing depicted in each photo is not the same and could not be reasonably found to be the same. I do not place weight on the slight differences in the reddish colour on the sleeves of both sweatshirts (which counsel for Mr. Ali-Nur argued on appeal). In my view, given that colours sometimes appear different in different lighting or when a different camera is used, that would be a questionable basis to conclude that the clothing is different.

[194] However, two differences between the clothing in the two photos lead me to conclude that they are not the same clothing, and could not reasonably be found to be the same clothing. What the Crown argues is similar about the two outfits is

2024 ONCA 119 (CanLII)

that both have reddish sleeves and grey bodies. However, there are clear differences between the sweatshirts in the two photos. First, in the stills taken from the Cron Dog video at Scarlettwood, it is clear that the sweatshirt is one garment. It has a grey body and red sleeves. By contrast, in the youth booking photo of Mr. Ali-Nur, the reddish shoulder/sleeve portion of the clothing appears to be a vest of some kind overlaid over a grey hoodie. Second, the red sleeves on the Cron Dog photo are raglan style – that is, they extend in a diagonal seam from the neck to the underarm, like an old-style baseball t-shirt. By contrast, in the youth booking photo of Mr. Ali-Nur, even if one were to conclude that the sweatshirt is one garment (and not a separate vest on top), the way the reddish sleeves join the grey body is different than the hoodie in the Cron Dog photo. The sleeves attach vertically from the shoulder straight down – a set-in or drop sleeve. I would tend to conclude that the difference in the sleeves is because, as I have already noted, the reddish sleeve part of the sweatshirt in the youth booking photo of Mr. Ali-Nur is a vest overlaid, rather than part of the same garment. But in any event, the manner in which the reddish sleeves connect with the grey body is different in the two photos.

[195] I understand the Crown's argument regarding the clothing in these photos to be that it could be found by a trier of fact to be *the same* clothing, and as such is probative of identification on the basis that wearing *the same* clothing makes it more probable it is the same person. I do not understand the Crown to be making

2024 ONCA 119 (CanLII)

a similar act or propensity argument that it is *similar* clothing (grey body, reddish sleeves) and Mr. Ali-Nur has a propensity to wear that type of clothing, and thus it is probative of identification.[11] As I have explained, in my view, a review of the photos shows sufficient differences in the clothing that it is not the same clothing. If it is not the same clothing, it has no probative value in relation to identification in the factual matrix of this case.

2024 ONCA 119 (CanLII)

(iv) Conclusion on unreasonable verdict in relation to Mr. Ali-Nur

[196] I return to whether the verdict against Mr. Ali-Nur is unreasonable. The only identification evidence of Mr. Ali-Nur as Cron Dog was Mr. Poyser's identification evidence and the 226 phone subscriber information. As I have explained, both of these bodies of evidence are extremely flawed.

[197] There was no physical or forensic evidence connecting Mr. Ali-Nur to any of the scenes relevant to the shooting.

[198] The Crown argues that the flaws in Mr. Poyser's eyewitness identification evidence should not lead the court to find the verdict unreasonable because the 226 phone subscriber information (combined with the calls from that phone to Mr. Poyser on the night of the murder) provides some corroboration for Mr. Poyser's identification evidence. The difficulty in this case is that the evidence

---

[11] I am not suggesting that such an argument would provide a basis for admissibility. I make the point simply to show that if the photos cannot reasonably support a conclusion that *the same* sweatshirt is worn in both photos, it is not probative of identifying Mr. Ali-Nur as Cron Dog.

said to corroborate Mr. Poyser's flawed identification evidence – the 226 phone subscriber information – is itself deeply flawed. It is, of course, the case that the evidence must be considered as a whole. A corollary of this is that, in some cases, the sum of various pieces of evidence will be greater than the individual parts. However, in this case, the two pieces of evidence said to inculpate Mr. Ali-Nur are each simply too flawed to come together to allow a reasonable conclusion beyond a reasonable doubt that Mr. Ali-Nur is Cron Dog. The verdict is unreasonable.

[199] The Crown argues that Mr. Ali-Nur choosing not to testify is a factor that militates against finding the verdict unreasonable. Although I accept that an accused's decision not to testify may be a relevant consideration in assessing whether a verdict is unreasonable, the fact that Mr. Ali-Nur chose not to testify does not change my conclusion in this case. The case against Mr. Ali-Nur was a weak case built on Mr. Poyser's unreliable identification evidence and the flawed 226 phone subscriber information. It is not a case where the evidence cried out for an explanation that only the appellant's testimony could provide: *Phillips*, at para. 69; *R. v. Metzger*, 2023 SCC 5, 423 C.C.C. (3d) 300, at para. 7.

[200] In light of my conclusion that the evidence available in relation to Mr. Ali-Nur is insufficient to support a verdict of guilt, in allowing the appeal against him, I would enter an acquittal. As the issue on which the verdict is unreasonable is identification, this is not a case where a jury could reasonably find guilty on an included offence.

2024 ONCA 119 (CanLII)

[201] As I would find that the verdict in relation to Mr. Ali-Nur is unreasonable and would enter an acquittal, it is not necessary to address Mr. Ali-Nur's arguments that the trial judge erred in admitting Mr. Poyser's evidence identifying him as Cron Dog and that the jury instructions in relation to Mr. Poyser's identification evidence were insufficient.

E. REMAINING GROUNDS OF APPEAL

[202] I see no error regarding the remaining grounds of appeal.

(1) The trial judge did not err in failing to grant a mistrial or conduct jury inquiries

[203] The appellants argue that the trial judge erred in failing to grant a mistrial and/or conduct a jury inquiry in relation to two events during the trial. We did not call on the Crown to respond to these grounds at the appeal hearing. I address each in turn.

[204] The first incident involved an altercation between Mr. Hagley's mother and the mother of Lenneil and Shakiyl Shaw. Counsel for the appellants advised the trial judge of the altercation and the jury's presence, and sought a mistrial on the basis that some or all of the jurors witnessed the interaction.

[205] Mr. Derstine, who was also trial counsel for Shakiyl Shaw, was also in the hall and witnessed the events. The trial judge, with the concurrence of all counsel, permitted Mr. Derstine, as an officer of the court, to recount what he observed, and

2024 ONCA 119 (CanLII)

that was relied on as the factual basis for the ruling. Mr. Hagley's mother yelled words such as "murderers", "killed my son", and "should be ashamed" at the mother of the Shaw brothers. At one point, Mr. Hagley's mother rose out of her chair and strode toward the mother of the Shaw brothers until a man interposed himself and physically restrained her. While the altercation continued, the jurors entered the public hallway on their way to leave the building for the day, with Mr. Hagley's mother still yelling "murderers", "killed my son", and "should be ashamed." Mr. Derstine indicated that some of the members of the jury appeared "startled" as they looked towards the altercation.

[206] The trial judge reviewed, in open court, the CCTV recording of the incident on the courthouse security system, which does not have audio. The trial judge noted in his ruling that, based on the jurors' head movements, some of them appeared to look over to the altercation, but that "none appeared to exhibit any shock or look particularly disturbed."

[207] The trial judge denied the mistrial application. He found that the jurors would not be prejudiced by witnessing the altercation because they possess the intelligence and life experience to understand that a murder trial can be emotionally charged for the families involved; that people who have lost a loved one may lose their composure from time to time; and that the mother of a victim might well think the accused are guilty. In his view, a firm mid-trial instruction reiterating the presumption of innocence and explaining the jurors' duty to decide the case fairly

2024 ONCA 119 (CanLII)

and impartially would be sufficient to overcome any risk of prejudice. He gave the jury a strong mid-trial instruction to caution them in relation to the altercation. In giving the mid-trial instruction, the trial judge referenced the incident in the hallway and recognized that a criminal trial may often invoke strong emotions for people closely associated with victims of the alleged events or participants in the trial. The crux of the instruction was as follows:

> … you are judges of the Superior Court of Ontario whose task it is to decide whether these three accused are guilty or not guilty. As I have already instructed you, each of the accused is presumed to be innocent and you must operate under that presumption for the rest of this trial, including, as I have earlier said, during your deliberations…. [Y]ou are not permitted to allow your emotions to influence you. Rather, you must approach your task in a detached and objective fashion. In fulfilling that task, you must not allow yourself to be influenced in any degree whatsoever by anything you have seen or heard outside of this courtroom.

[208] The appellants argue that the trial judge erred in failing to grant a mistrial. They argue that the incident witnessed by some or all of the jury members was so serious as to destroy the appearance of justice and fairness of the trial, and that the caution to the jury was insufficient to address the issue. In the alternative, the appellants argue that the trial judge's failure to conduct a jury inquiry was an error of law.

[209] I see no error in the trial judge's denial of the mistrial application. The standard for whether a mistrial should be granted is whether there is a real danger

2024 ONCA 119 (CanLII)

of prejudice to the accused or of a miscarriage of justice: *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857, at para. 74; *R. v. Lessard* (1992), 74 C.C.C. (3d) 552 (Que. C.A.), leave to appeal refused, [1992] S.C.C.A. No. 312. A mistrial should only be granted where less extreme remedies, such as a mid-trial instruction, have been considered and rejected as inadequate: *R. v. Chiasson*, 2009 ONCA 789, 258 O.A.C. 50, at para. 14; *R. v. Jeanvenne*, 2010 ONCA 706, 261 C.C.C. (3d) 462, at para. 58. Further, a trial judge's decision whether to declare a mistrial is discretionary and subject to considerable deference on appeal: *R. v. Wise*, 2022 ONCA 586, 417 C.C.C. (3d) 297, at para. 21; *R. v. Kum*, 2015 ONCA 36, 320 C.C.C. (3d) 190, at para. 49; *Jeanvenne*, at para. 58.

[210] I have no difficulty in concluding that jurors would have the common sense and life experience to understand that the mother of the deceased in a murder trial may react emotionally to the case and that she may hold views about the guilt of the accused, regardless of the evidence. I do not see any realistic risk that witnessing the altercation would distract jurors from their sworn duty to decide the case based on the evidence. Thus, I agree with the trial judge's conclusion that there was no real risk of prejudice or of a miscarriage of justice. The mid-trial instruction given by the trial judge shortly after the incident reemphasized the jurors' duty to decide the case based on the evidence, and not be influenced by their emotions or anything they saw or heard outside the courtroom. In the circumstances, the mid-trial instruction was sufficient to address any impact.

2024 ONCA 119 (CanLII)

[211] Nor would I give effect to the appellants' submission that the trial judge ought to have conducted a jury inquiry in relation to what the jurors saw of the altercation. No request was made at trial for a jury inquiry and all parties were content to rely on Mr. Derstine, as an officer of the court, recounting what he observed, and the trial judge viewing the incident on the courthouse CCTV.

[212] The second incident involved Juror #14. After the verdict was rendered, counsel became aware from a social media website that, prior to verdict, Juror #14 had cycled to the Pizza Pizza scene and past Scarlettwood Court. Juror #14 used an app called "Strava" to track his cycling and posted information about the trip on the app under the title "2-4 Ride for Pizza. Nice!". The trial judge found that the map on the app, taken together with a number of selfies posted, including one taken outside the Pizza Pizza, established that Juror #14 rode past and stopped for some period of time at the scene of the murder, and also rode nearby and possibly on Scarlettwood Court. The juror's bicycle trip appeared to have occurred following the close of evidence, but before the trial judge's final instructions to the jury.

[213] The appellants brought an application for the trial judge to conduct a post-verdict jury inquiry in order to answer two questions: (1) whether the information collected by the juror was extrinsic to the trial process, and (2) whether any information Juror #14 obtained on his cycling trip was shared with the other jurors during deliberations. The appellants did not seek a mistrial, as it was their position

2024 ONCA 119 (CanLII)

that, as a first step, a jury inquiry should be conducted to create an evidentiary record. I pause to note that, in light of a trial judge's very limited jurisdiction to grant a mistrial post-verdict, had an inquiry been conducted, it is unlikely that the trial court would have been the appropriate forum to seek a further remedy: see *R. v. Henderson* (2004), 189 C.C.C. (3d) 447 (Ont. C.A.), at para. 29.

[214] The trial judge dismissed the application, concluding that an inquiry was unnecessary. He found that the evidence of what Juror #14 posted to the Strava app provided a sufficient record for review. He found that the questioning sought by the appellants about whether extrinsic information had an impact on their deliberations[12] went beyond the scope of permitted inquiry by asking about the effect of extrinsic information on the jury's deliberations: *R. v. Pan*, 2001 SCC 42, [2001] 2 S.C.R. 344, at para. 59. The trial judge found that, given the "copious evidence" before the jury concerning the physical environs of both locations (photos, videos, diagrams, and maps), there was not a basis to believe that Juror

[12] To the extent that the trial judge's reasons could be read as suggesting that the appellants were requesting that jurors be asked about the impact of the information from Juror #14 (if it was conveyed to them) on the jury's deliberations, that suggestion is not accurate. Counsel were clear in submissions that the scope of the inquiry requested was: (1) whether the Juror #14's cycling trip produced information extrinsic to the trial process; and (2) whether extrinsic information was shared with the other jurors during deliberations. In submissions to the trial judge, defence counsel acknowledged that the question of whether the jury relied on the extrinsic information was beyond the permissible scope of inquiry as outlined in *Pan*, at paras. 59 and 77. However, the reasons could be read as raising the valid concern that any jury inquiry, if not carefully conducted, runs the risk of intruding into juror deliberations – and even a carefully conducted inquiry risks inadvertently intruding into deliberations.

2024 ONCA 119 (CanLII)

#14 would have learned any additional information beyond what was already properly in evidence before the jury.

[215] The trial judge also considered the case law regarding the very limited jurisdiction of a trial judge to declare a mistrial after a jury verdict, referring to this court's decision in *Henderson*. Relying on this court's decision in *R. v. Bains*, 2015 ONCA 677, 127 O.R. (3d) 545 (which he referred to as *R. v. Pannu*), the trial judge considered whether the extraneous information from Juror #14's cycling trip, even if assumed to be different from the trial evidence, was information that could be expected to have an effect on the live issues in the trial. He found that it would not. The way the issues were raised at trial, neither Mr. Poyser's identification of the appellants as the perpetrators, nor the issue of whether, if the jury found that the appellants took part in the murder, their actions were planned and deliberate, was affected by the physical layout of the Pizza Pizza scene or the Scarlettwood scene. He also relied on the significant evidence before the jury about both locations in the form of photos, videos, maps, and diagrams, and the fact that he told the jury in the final instructions not to consider in their deliberations any information not in evidence in the trial and tested by the parties.

[216] The appellants argue that the trial judge erred in declining to conduct a post-verdict inquiry regarding the actions of Juror #14 and the decision was unreasonable in the circumstances. They argue that this court is now left without a proper evidentiary record regarding the conduct of a juror who may have

2024 ONCA 119 (CanLII)

introduced extrinsic material into the jury's deliberations. The appellants focus their argument on the adequacy of the record to assess the impact, if any, of Juror #14's cycling trip and do not directly make arguments about the trial judge's ruling that a mistrial was not warranted.

[217] A trial judge's decision whether to conduct a jury inquiry is discretionary and subject to considerable deference on appeal: *Kum*, at para. 49; *R. v. Lewis*, 2017 ONCA 216, 137 O.R. (3d) 486, at para. 35.

[218] I would not interfere with the trial judge's decision not to conduct a jury inquiry or his conclusion that the information from the Strava app about Juror #14's cycling trip was a sufficient record for purposes of review. There was extensive evidence before the jury of both the Pizza Pizza and the Scarlettwood Court scenes in the form of photos, videos, maps, and diagrams. I would not second-guess the trial judge's assessment that there was not a basis to believe that the visit to the two scenes materially added to the visual representations of the scenes that were before the jury. The jury was correctly instructed to decide the case only on the evidence heard in court.

[219] Further, this was not a case where there is a reasonable possibility that the live issues at trial would be impacted by further detail about the layout of either scene. The case against Lenneil and Shakiyl Shaw turned primarily on the jury's assessment of Mr. Poyser's credibility. Although his credibility was vigorously

2024 ONCA 119 (CanLII)

challenged, none of the challenges turned on the layout of the Pizza Pizza or Scarlettwood scenes. The case against Mr. Ali-Nur, in addition to raising Mr. Poyser's credibility, challenged the reliability of his identification of Mr. Ali-Nur as Cron Dog. However, none of these issues turned on the layout of either the Scarlettwood Court or Pizza Pizza scenes.

[220] Finally, I note that the appellants did not seek to invoke this court's powers under s. 683 of the *Criminal Code* to expand the record on appeal. This Court has held that, where an appellant raises a failure to conduct a post-verdict inquiry or challenges the sufficiency of a post-verdict jury inquiry, if there is a sufficient basis to consider that a jury was likely exposed to extrinsic influence, the remedy is to move to expand the record on appeal pursuant to s. 683 of the *Criminal Code*: *Lewis*, at para. 45; *R. v. Phillips*, 2008 ONCA 726, 242 O.A.C. 63, at paras. 46-47; *R. v. Hassan*, 2013 ONCA 238, 305 O.A.C. 89, at para. 5. The appellants complain that the evidentiary record is inadequate because the trial judge did not conduct a jury inquiry. However, the appellants took no steps to invoke this court's powers on appeal to seek to fill any alleged gaps in the record.

[221] Before leaving this ground, I would add one comment. The trial judge referred to this court's powers under s. 683(1) of the *Criminal Code* to conduct an inquiry on appeal, citing the *Hassan* and *Phillips* decisions. To the extent that his reasons could be read as suggesting that a trial judge should consider deferring conducting an inquiry and leaving it to this court on appeal, I would not endorse

2024 ONCA 119 (CanLII)

that approach. If a trial judge has reached the conclusion that an issue raised supports a post-verdict jury inquiry, it is preferable that the trial judge conduct the inquiry so that the evidence is obtained and the record created when the evidence is fresh. The cases cited in the preceding paragraph regarding use of this court's powers under s. 683 to expand the record in relation to post-verdict jury issues should not be read as suggesting it is *preferable* that a jury inquiry be deferred to this court. Where there is a sufficient basis to support the need for a jury inquiry, it is preferable that a jury inquiry be conducted in the trial court, at the time the issue is raised. Conducting the inquiry in the trial court is a more efficient use of institutional resources and preserves evidence while it is fresh – before memories fade.

[222] The trial judge appropriately made an order, pursuant to s. 631(6) of the *Criminal Code*, banning publication of Juror #14's name and any information which might tend to identify him, as well as sealing the Notice of Application (dated June 3, 2019) and the appended Strava app printout related to Juror #14's visit to the scene. The purpose of the sealing order was to protect the identity of Juror #14. I would maintain that order. For greater certainty, the identifying information subject to the sealing order in relation to juror #14 is the Strava printout appended to the Notice of Application and the Strava URL at p. 4 of the Notice of Application. In order to preserve the open court principle to the extent possible in the

2024 ONCA 119 (CanLII)

circumstances, I note that a redacted copy of the Notice of Application is contained in the Crown's Appeal Book and Compendium.

(2) The trial judge did not err in refusing to order the Crown to produce the submissions made to the Attorney General regarding the direct indictment

[223] The appellants argue that the trial judge erred in refusing to order the Crown to produce to the court in sealed form (subject to further order) the submissions made to the Attorney General in support of the direct indictment. We did not call on the Crown to respond to this ground at the appeal hearing.

[224] The appellants made an application at trial for an order that the Crown produce to the court in sealed form the submissions made to the Attorney General in support of the request for a direct indictment. The appellants sought production of this material in order to advance the argument that the Crown had committed an abuse of process by seeking the direct indictment. The appellants relied on the decision of Trafford J. in *R. v. Brown*, [1997] O.J. No. 6163 (Ont. C.J.), in support of their request for production to the court.

[225] The trial judge dismissed the application on the basis that the appellants' assertions of an air of reality of abuse of process to support a production order were speculative. Although the trial judge did not use the "air of reality" formulation relied on by the appellants, he asked whether the circumstances warranted

2024 ONCA 119 (CanLII)

"requiring the Crown to explain its action". He found that they did not because there was "nothing" in the record that reflected "in any degree whatsoever" any improper motive on the part of the Crown in seeking the direct indictment.

[226] On appeal, the appellants make two arguments. First, they argue that the trial judge erred in jumping to the question of whether an abuse of process had been made out. The appellants were seeking production of the submissions to the Attorney General in order to support an argument that there was an abuse of process. Second, they argue that the trial judge erred in declining to follow the approach in *Brown*, that production to the court of submissions in support of a direct indictment should be made where there is an air of reality of abuse of process.

[227] I start by noting that the appellants' reliance on *Brown* is, to some extent, misplaced. In *Brown*, the Crown opposed disclosure of materials related to the direct indictment to the accused, but consented to producing it to the court in sealed form. While the legal principles from *Brown* are of assistance, the fact that an order for production to the court was made in *Brown* is not – because it was based on the Crown's consent. This is clear from the fact that, in *Brown*, Trafford J. found that the defence had not made a threshold showing to warrant production (applying a standard of "credible probability of prosecutorial misconduct"), yet he ordered production to the court despite this, *because the Crown consented*.

2024 ONCA 119 (CanLII)

[228] I would reject this ground of appeal. I do not accept the appellants' characterization of the trial judge's ruling. He did not jump to whether a claim of abuse of process was established. Rather, he engaged in a threshold assessment of whether there was an air of reality to the defence claim of abuse of process that could justify an order for production of the submissions to the Attorney General. In making this threshold assessment, the trial judge considered the high standard for establishing abuse of process in relation to decisions involving prosecutorial discretion, such as preferring an indictment. I see no error in this approach. In order to assess if there was an air of reality to the claim of abuse of process, the trial judge had to turn his mind to the assessment required to show abuse of process.

[229] I note as well that the appellants' claim before the trial judge that there was an air of reality to their proposed claim of prosecutorial misconduct in seeking the direct indictment relied on the argument that there was no apparent reason for the Crown to seek a direct indictment; therefore, by process of elimination, there was an air of reality to the Crown being motivated by improper reasons. I see no error in the trial judge's conclusion on the record before him that this argument did not raise an air of reality of prosecutorial misconduct in seeking the direct indictment.

2024 ONCA 119 (CanLII)

(3) The trial judge did not err in finding that threshold reliability was met with respect to the subscriber information for the 226 phone

[230] The appellants, and in particular Mr. Ali-Nur, argue that the trial judge erred in admitting the subscriber information for the 226 phone into evidence. The appellants argue that threshold reliability required for admissibility was not met.

[231] At trial, the Crown sought to admit subscriber information for the 226 phone number as a business record under s. 30 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, or alternately under the common law business records principles set out in *Ares v. Venner*, [1970] S.C.R. 608. The subscriber information for the 226 phone was the only record retained by Freedom Mobile in relation to that phone. By the time the police sought a production order for the Freedom Mobile records relating to the 226 phone, most of the records had already been purged by Freedom.

[232] As noted above, the subscriber information from Wind Mobile (subsequently acquired by Freedom Mobile) showed that at the time of the offence, the 226 phone was a pre-paid phone registered under the name “MOHAMED ALINUR” with a date of birth of “19/05/1998” and an address on Richview Road in Etobicoke (with no unit number). There was a secondary phone number listed with the subscriber information as a contact. The secondary number could not be linked to Mr. Ali-Nur or to any other person. An agreed statement of facts filed at trial confirmed that, at

2024 ONCA 119 (CanLII)

the time of the offence, Mr. Ali-Nur lived in a unit at the same address on Richview Road and that his date of birth was May 19, 1998.

[233] The Crown's position at trial (maintained on appeal) was that the subscriber information was admissible for the proposition that the information in the record was what was provided by the customer at the time the pre-paid account was created. The Crown then argued before the jury that the subscriber information that was provided when the 226 phone account was created, taken with the two phone calls from the 226 phone to Mr. Poyser's phone the evening of the shooting, and the 226 number being attached to a contact named "Dozey" (recall that "Dozey" was Lenneil Shaw's nickname), was circumstantial evidence that the 226 phone belonged to Mr. Ali-Nur and that he was with Lenneil Shaw the evening of the shooting and, thus, was probative evidence that he was Cron Dog.

[234] Counsel for Mr. Ali-Nur objected to the admission of the subscriber information on the basis that there were no circumstantial guarantees of trustworthiness that would satisfy threshold reliability, given the nature of pre-paid (i.e. "burner") phones. I have summarized above, in addressing the reasonableness of Mr. Ali-Nur's verdict, the evidence at trial which casts doubt on the reliability of the information provided from subscribers at the time pre-paid phone accounts are opened.

2024 ONCA 119 (CanLII)

[235] The trial judge admitted the 226 phone subscriber information. He found that appropriate notice had been given by the Crown as required by s. 30(7) of the *Canada Evidence Act*.[13] He held that the Crown had satisfied threshold reliability required for admission under s. 30 of the *Canada Evidence Act* – that the record was made in the ordinary course of business. He was satisfied that, because the evidence supported that the subscriber information in the Wind/Freedom Mobile records was made in the ordinary course of business, there was sufficient threshold reliability that the subscriber information correctly reflected the information provided by the subscriber at the time the record was created. The various issues that the appellants raised about the unreliability of subscriber information for burner phones and the phone companies not verifying identification were issues for the jury to weigh in the context of the evidence as a whole as to what inferences they could reasonably draw from the subscriber information.

[236] The appellants argue that the trial judge erred in admitting the subscriber information for the 226 phone. They argue that the trial judge erred in his assessment of the material aspect of the hearsay statement. He held that the question at the threshold reliability stage was whether the document correctly reflected the information provided by the subscriber at the time the record was created. The appellants argue that, properly understood, the material aspect of the

[13] The appellants do not challenge the notice finding on appeal.

2024 ONCA 119 (CanLII)

subscriber information was an assertion that the 226 number was Mr. Ali-Nur's phone, not that the record reflected what the customer told the employee when the account was opened. The appellants argue that, if the material aspect of the subscriber information was a statement that the 226 number was Mr. Ali-Nur's phone, for it to be admissible it had to meet the requirements of the principled approach to admissibility of hearsay evidence. They submit that neither procedural nor substantive reliability under the principled approach was met in this case.

[237] In my view, the appellants' submissions on this issue are misconceived, as they rest on the foundation that the subscriber information was admitted for the truth of the statement "This is Mr. Ali-Nur's phone" – in other words, for the truth of the information provided by the customer. That is not the basis on which the Crown sought the admission of the subscriber record, nor on which the trial judge admitted it. Rather, the trial judge admitted the subscriber record for the truth of the (employee's) statement contained in the business records that the customer provided the listed information at the time the pre-paid phone account was opened. Once admitted, the jury could consider the subscriber information with other evidence at trial to decide whether the 226 phone belonged to Mr. Ali-Nur and whether they were satisfied beyond a reasonable doubt that Mr. Ali-Nur was Cron Dog.

[238] The 226 phone subscriber information was admitted as evidence that the customer who obtained the phone – whoever they were – provided as their name,

2024 ONCA 119 (CanLII)

date of birth, and address, Mr. Ali-Nur's name, date of birth, and address. The Crown's position, and the position on which the trial judge instructed the jury, was that this was circumstantial evidence which could be considered with the other evidence at trial to infer that the 226 phone was Mr. Ali-Nur's. In essence, the chain of inference involved weighing the unlikelihood that someone other than Mr. Ali-Nur would provide Mr. Ali-Nur's name, date of birth, and address (minus the unit number) at the time of creating the phone account.

[239] The Crown did not rest its case for admissibility on the principled exception to the hearsay rule; rather, it relied on s. 30 of the *Canada Evidence Act*. Where a statutory or established hearsay exception applies, if the evidence meets the statutory or traditional exception, it is admissible except in "rare" cases: *R. v. Mapara*, 2005 SCC 23, [2005] 1 S.C.R. 358, at para. 15; *R. v. Nurse*, 2019 ONCA 260, 374 C.C.C. (3d) 181, at paras. 61, 63 and 89-93. Under s. 30 of the *Canada Evidence Act*, the threshold for admissibility of the subscriber information was whether the record was made in the ordinary course of business: *R. v. Campbell*, 2017 ONCA 209, at paras. 7-8; *R. v. Chaudry*, 2020 ONSC 7215, at para. 33.

[240] I see no error in the trial judge's conclusion that the 226 subscriber information met the threshold for admissibility under s. 30 of the *Canada Evidence Act* in that it was made in the ordinary course of business. This conclusion was supported by the evidence on the *voir dire*. A representative from Freedom Mobile, which acquired Wind Mobile in 2016, testified that the subscriber information

2024 ONCA 119 (CanLII)

record was kept in the usual and ordinary course of business; that the database for Wind records had not changed since Freedom acquired Wind; that Freedom continued to use the same database that Wind used in its operations at the time of the trial; and that the subscriber information record had not changed since Freedom acquired Wind.

[241] The subscriber information was admissible for the proposition that the information in the subscriber record was what was provided by the customer when the pre-paid account for the 226 phone was opened. This is consistent with the purpose of the business records exception to the hearsay rule – that threshold reliability is established by the recipient of the statement's business duty to record the information accurately. It was part of the staff person at Wind Mobile's job to receive information from the customer and to record it accurately. The reliability concerns raised by the appellants with respect to the problem of people providing false and unverified information at the time of opening a pre-paid phone account bore on the further issue for the jury – whether to draw the inference that the 226 phone belonged to Mr. Ali-Nur based on the information in the subscriber information matching his name, address and date of birth – but not on the issue of threshold reliability of the phone company's subscriber records.

[242] As I have explained above, there were significant reliability issues with using the evidence that certain information was provided at the time the 226 phone account was opened to infer that it was Mr. Ali-Nur who opened the account –

2024 ONCA 119 (CanLII)

because of the evidence of the prevalence of false information being provided at the opening of pre-paid phone accounts and the phone companies not asking for identification when accounts were opened. But these were not issues of threshold reliability for the subscriber information once it was established that the record of the subscriber information was made in the ordinary course of business.

2024 ONCA 119 (CanLII)

(4) The trial judge did not err in dismissing the application to redact the "Dozey contact" information from the extraction report regarding Mr. Poyser's phone

[243] The appellants argue that the trial judge erred in dismissing the application to redact the information about the "Dozey contact" from the extraction report regarding Mr. Poyser's phone.

[244] As noted above, the Crown led evidence from the extraction of data from Mr. Poyser's phone through Officer Flores of the Technical Crimes Unit. The report included the three calls referred to above from the 226 phone to Mr. Poyser's phone (one missed call and two brief calls). The data extraction also disclosed that the 226 number was saved in Mr. Poyser's phone as "Dozey" (the "Dozey contact").[14] Because Mr. Poyser had deleted all the data from his phone after the

[14] Officer Flores testified that two phone numbers were associated with the name Dozey in the contacts on Mr. Poyser's phone. One was the 226 number. The other was a 647 number. Because of the fact that Mr. Poyser had deleted the data on his phone, Officer Flores was unable to say if there was one contact with the name Dozey with two phone numbers, two separate contacts named Dozey each with one number, or two contacts with the name Dozey with one having two numbers and the other no numbers associated with it.

offence date, the data had to be retrieved before the data extraction could be performed. Officer Flores testified that the effect of this was that the ability to analyze some of the data retrieved was somewhat impaired. Of particular relevance for this ground of appeal is that Officer Flores was unable to say when the Dozey contact with the 226 phone number was created.

[245] Mr. Poyser's evidence relevant to the issue of the Dozey contact was as follows. He testified that he had known the Shaw brothers for a number of years. In his experience, they did not have their own cell phones; rather, they were in the habit of using other people's phones. Mr. Poyser testified that he knew Lenneil Shaw as "Dozey". He also testified that, before October 16, 2016, he had "a couple" of numbers for Lenneil in his phone, and that he saved those numbers using the nickname Dozey. However, he could not recall the specific phone numbers that he had saved on his phone for Lenneil Shaw. Mr. Poyser testified that he did not recall receiving calls from anyone on October 15 and 16, 2016, including from Lenneil or Shakiyl Shaw.

[246] At trial, the appellants sought a redaction of the Dozey contact assigned to the 226 number on the grounds that it was hearsay. They argued that it amounted to an implied assertion that Lenneil Shaw made calls from the 226 phone number to Mr. Poyser's phone. In the alternative, the appellants argued that it was not sufficiently authenticated.

2024 ONCA 119 (CanLII)

[247] The trial judge dismissed the application to redact the Dozey contact from the extraction report. He found that the proposed use of the Dozey contact was not a hearsay implied assertion that Lenneil Shaw made calls on the night of the murder from the 226 phone. Had that been the use, the trial judge found there was insufficient authentication for that inference (i.e., the contact was not admissible as direct evidence that Lenneil made the three calls from the 226 number on the night of the murder). Rather, the relevance of the Dozey contact (taken together with the subscriber information for the 226 phone and the three calls from the 226 phone to Mr. Poyser's phone the night of the murder) was that it tended to circumstantially link Mr. Ali-Nur and Lenneil Shaw, and also to link Mr. Ali-Nur and Mr. Poyser, within a short time period prior to the murder. The trial judge found that this was probative evidence, particularly so where all of the appellants' defence was that Mr. Poyser was lying in his identification of them as participants in the murder. The combination of the Dozey contact, the 226 phone subscriber information, and the three calls from the 226 phone to Mr. Poyser's phone on the night of the murder was evidence which was capable of providing some corroboration for Mr. Poyser's identification evidence.

[248] On appeal, the appellants renew the arguments made below that the Dozey contact amounted to a hearsay implied assertion and that the record was insufficiently authenticated. The appellants further argue that in its closing at trial,

2024 ONCA 119 (CanLII)

the Crown urged the jury to use the Dozey contact for a purpose that the trial judge had held was not permitted.

[249] I would reject these submissions. First, I see no error in the trial judge's conclusion that the Dozey contact was not used as an implied hearsay assertion. It was not admitted for use as direct evidence that Lenneil Shaw placed the calls from the 226 number to Mr. Poyser's phone on the night of the murder. Rather, based on the subscriber information for the 226 phone, the three calls from the 226 phone to Mr. Poyser, and the 226 number being saved as a contact under "Dozey", the link between the 226 number and the name Dozey was a piece of circumstantial evidence that the Crown could rely on. In combination with other evidence, the Dozey contact offered some corroboration for Mr. Poyser's identification because it could be used to infer a link between Lenneil Shaw, Mr. Poyser, and Mr. Ali-Nur in the time period shortly preceding the murder. Further, the trial judge's final instructions to the jury instructed them on a non-hearsay use of the Dozey contact evidence, consistent with his admissibility ruling. After summarizing the evidence about the Dozey contact (linking the name to Lenneil Shaw) and the subscriber information for the 226 phone (linking it to Mr. Ali-Nur), he told the jury:

> If you find as a fact that the subscriber Mohamed Ali Nur was the Mohamed Ali-Nur before this Court, then the missed call on October 15 and the two 226 calls to Poyser's phone on the morning of October 16, will be

2024 ONCA 119 (CanLII)

> some circumstantial evidence linking Ali-Nur to Lenneil Shaw and Poyser on that morning.

[250] I also see no error in the trial judge's conclusion that the Dozey contact information was properly authenticated for admissibility purposes.

[251] The threshold for authentication of electronic documents is low. There must be evidence capable of supporting a finding that the electronic document "is that which it purports to be". The threshold evidential burden may be met by direct or circumstantial evidence: *Canada Evidence Act*, s. 31.1; *R. v. C.B.*, 2019 ONCA 380, 376 C.C.C. (3d) 393, at paras. 57, 67-68.

[252] The Dozey contact from the extraction of Mr. Poyser's phone had sufficient markers of reliability to meet the requirement for admissibility under s. 31.1. These included:

- it was not disputed, based on the evidence of Officer Flores, that the extraction report showed that, at some point, Mr. Poyser had a contact on his phone under the name Dozey;
- the name Dozey was connected with two phone numbers, one of which was the 226 phone;
- Mr. Poyser testified that he knew Shakiyl and Lenneil Shaw for several years;
- Mr. Poyser testified that he had several numbers stored in his phone for Lenneil Shaw at the time of the murder;

2024 ONCA 119 (CanLII)

- although Mr. Poyser could not remember the specific phone numbers he had stored on his phone for Lenneil Shaw, he testified that the contact on his phone for those numbers was listed as Dozey;
- Mr. Poyser testified that in his experience, Lenneil Shaw did not have his own phone, but rather was in the habit of using other people's phones;
- that the subscriber information for the 226 number was in the name of "MOHAMED ALINUR" and that the name, address, and date of birth of Mr. Ali-Nur were the same as in the subscriber information for the 226 phone; and,
- that the 226 phone was used by someone to place three calls to Mr. Poyser's phone during the evening prior to the murder.

[253] In my view, these aspects of the evidence taken together are sufficient to establish threshold reliability for admissibility – that the Dozey contact retrieved from Mr. Poyser's phone "is that which it purports to be." The appellants' argument about the opportunity for Mr. Poyser to have added the contact after the offence goes to ultimate reliability, which was for the jury to determine. But it does not undermine threshold reliability for purpose of s. 31.1 of the *Canada Evidence Act*: *C.B.*, at paras. 72.

[254] Nor do I accept the appellants' submission that the Crown in its closing sought to have the jury use the Dozey contact information for a purpose other than that for which it was admitted. The trial judge ruled that the Dozey contact was not

2024 ONCA 119 (CanLII)

direct evidence that Lenneil Shaw called Mr. Poyser using the 226 phone on the night of the murder. That ruling did not prevent the Crown from arguing that the Dozey contact, together with other pieces of evidence, provided a circumstantial basis for an inference connecting Lenneil Shaw, Mr. Ali-Nur and Mr. Poyser in the time shortly prior to the murder. That was the thrust of the Crown's use of this evidence in its closing submissions.

[255] I acknowledge that in one place in the closing submissions, Crown counsel stated that the fact that the 226 number was saved on Mr. Poyser's phone under the name Dozey "proves that Poyser communicated with Lenneil Shaw on October 15 and 16" (emphasis added). This was an overreach. However, this was not the thrust of the Crown's closing. Further, as I have explained above, the trial judge properly instructed the jury that the Dozey contact, the subscriber information for the 226 phone, and the calls from the 226 phone to Mr. Poyser's phone shortly before the murder were "some circumstantial evidence linking Ali-Nur to Lenneil Shaw and Poyser on that morning."

[256] In sum, the trial judge did not err in declining to redact the Dozey contact from the extraction report from Mr. Poyser's phone and properly instructed the jury on the use of that evidence.

2024 ONCA 119 (CanLII)

(5) Error in instruction to the jury regarding evidence lost due to police negligence

[257] The appellants argue that the jury instruction on the loss of the billing information for the 226 phone due to police negligence in preserving and obtaining the evidence was insufficient. I disagree.

[258] The instruction drew the jury's attention to the police failure to follow up on the preservation order in a timely way. It outlined for the jury the specific evidence lost. And it told the jury that it was open to them to find that the lost evidence "would not have supported the case for the Crown" and that it was for the jury to assess the effect of the unavailability of the evidence on the Crown's obligation to prove the case. Although it was open to the trial judge to have given a stronger instruction in relation to the police failure to preserve the evidence, the instruction provided was sufficient.

Facts regarding the lost evidence and the jury instruction

[259] During their investigation, the police took steps to preserve and seek production from the telecom provider of the records in relation to the 226 phone. Police became aware of the relevance of the 226 number by January 2018, when they received and reviewed the extraction results from Mr. Poyser's phone. The report showed the three calls from the 226 phone to Mr. Poyser's phone shortly before the shooting. Officer Shankaran sent a preservation demand to Freedom

2024 ONCA 119 (CanLII)

Mobile regarding the 226 records in January 2018. Shankaran believed that Freedom was a Rogers subsidiary. Despite the 30-day period stated on Freedom's preservation demand form, Shankaran believed it was Rogers' policy to maintain records sought by such demands indefinitely. On this basis, Shankaran thought Freedom would, pursuant to what he understood as Rogers' policy, keep the records indefinitely. Shankaran took no steps to confirm his belief that Freedom was a Rogers subsidiary or that Freedom would observe what he thought was Rogers' policy.

[260] In fact, Freedom Mobile's policy was to maintain records for two years after the closing of an account. Absent unusual or extenuating circumstances, on the second anniversary of the closing of an account, records were routinely purged. There was no evidence as to the exact date the records for the 226 phone were purged. However, given that calls were made from the phone on October 16, 2016 (based on the extraction from Mr. Poyser's phone), they would not have been purged before October 15, 2018. Shankaran began to prepare documentation for a production order for the 226 records in mid-October 2018. On October 30, 2018, he learned that, except for a couple of lines of subscriber information, the Freedom records for the 226 phone no longer existed. That information was subsequently provided to police pursuant to a production order dated January 11, 2019. Thus, police were aware of the relevance of the 226 phone from January 2018, but did not begin steps to obtain a production order until October 2018. As a result, all

2024 ONCA 119 (CanLII)

records relating to the phone had been purged except for two lines of subscriber information. In particular, the information that was lost included the subscriber's signed contract, call logs for the 226 phone, and cell tower data that would reveal where the phone was located when the calls were made to Mr. Poyser on the night of the shooting.

[261] The appellants brought an application seeking a stay of proceedings as a remedy for the lost evidence. However, by the end of submissions on the application, they acknowledged that a stay could not be justified, and sought an instruction to the jury in relation to lost evidence in accordance with this court's decision in *R. v. Bero* (2000), 151 C.C.C. (3d) 545.

[262] The trial judge concluded that the appellants' s. 7 *Charter* rights were infringed by the loss of the Freedom Mobile billing records. He found that Officer Shankaran's belief, in the absence of any inquiry, that Freedom was a Rogers subsidiary was not reasonable. The trial judge also found that it was unreasonable of Officer Shankaran to assume, in the absence of any response from Freedom to the preservation demand, that Freedom would preserve the records relating to the 226 phone indefinitely. He further found that there was "no justification" for the police delay of nine months in seeking a production order for the Freedom records in relation to the 226 phone. The trial judge found that, in the absence of any evidence of an explanation for why Officer Shankaran believed what he did or

2024 ONCA 119 (CanLII)

behaved as he did, the officer was “unacceptably negligent in relation to his duty to preserve the 226 records.”

[263] The trial judge concluded that it was not possible to determine whether the lost records in relation to the 226 phone would have helped the appellants, the Crown, or been neutral. He concluded that an appropriate remedy for the *Charter* breach was an instruction in accordance with this court’s decision in *Bero*.

[264] The trial judge gave the jury the following instruction regarding the police failure to obtain or secure the Freedom Mobile records in relation to the 226 number:

> Apparently, the preservation order was not followed up on by the police in a timely fashion and the records for the 226 number that the Crown attributes to Ali-Nur were purged two years after the contract expired. These records included the original contract that would have had to have been signed to establish the prepaid account.
>
> Thus, Kent [a Freedom Mobile representative] acknowledged that he was not in a position to supply any information about the person who took out that contract. Further, Kent said that the records of the usage of the phone using that number, including other telephone numbers which the 226 phone was in communication with and the cell sites the 226 phone utilized in the course of those communications were also purged.
>
> In weighing the evidence you do have in relation to the 226 number, you are entitled to take into account the failure to preserve this other potential evidence. Kent was not asked to explain why the records were not preserved. In the absence, then, of any explanation, you may find that this evidence would not have supported the case for

2024 ONCA 119 (CanLII)

> the Crown. The effect that the unavailability of this evidence may have on the obligation of the Crown to prove the case against the accused men, in particular Lenneil Shaw and Ali-Nur, will be for you to say.

[265] An earlier draft of the final instructions had not included reference to the police failing to act in a timely way regarding preservation of the billing records, and also had not listed all the areas of evidence lost as a result of the failure of the police to preserve those records. The defence requested a stronger instruction during the pre-charge conference. Although the trial judge initially was hesitant to make the revisions requested by the defence, he ultimately added reference to the police not following up on the preservation order in a timely way, and references to additional areas of lost evidence. In a further pre-charge conference, counsel for Lenneil Shaw (who had taken the lead on the earlier objection) indicated he was content with the revision. No other counsel raised objection to the revision.

Positions of the parties

[266] The appellants submit that the trial judge failed to adequately instruct the jury on the failure to preserve evidence in accordance with *Bero* both in his initial instructions and in his response to the jury question regarding scenarios in which the Crown would elect not to call a witness that may corroborate key evidence. The appellants submit that the jury instruction failed to lay fault at the hands of the police, even though there was evidence demonstrating that the police simply applied too late for the production order. The jury was, likewise, not provided with

2024 ONCA 119 (CanLII)

any guidance on how to assess whether the failure to preserve evidence impacted the Crown's case.

[267] The appellants further submit that the jury's confusion on this issue is not simply speculative. They argue that the jury's question (discussed above) strongly suggests that the trial judge's ruling on this point was insufficient – the jury remained confused about what to infer from the absence of evidence.

[268] The Crown submits that the trial judge's instruction on the failure to preserve the 226 billing records was adequate and consistent with this court's decision in *Bero*. Contrary to the appellants' submission, the trial judge did not fail to lay fault at the hands of the police – in fact, the portion of the jury charge involving police fault was added after defence counsel raised concerns that fault needed to be assigned to the police.

Analysis

[269] In my view, the trial judge's *Bero* instruction on lost evidence was sufficient. I reach this conclusion based on three elements of the instructions. First, it drew the jury's attention to the police failure to preserve the evidence by referring to the fact that the preservation order "was not followed up on by the police in a timely fashion" and linking that failure to the records being purged after two years. Second, the instruction specifically listed the evidence lost as a result of the unavailability of the 226 phone billing records: the original contract that would have

2024 ONCA 119 (CanLII)

been signed by the person who took out the contract; the records for the usage of the 226 phone number, including other numbers it communicated with; and the cell sites the 226 phone used in the course of communications. Third, the instruction told the jury that it was open to them to find that the lost evidence "would not have supported the case for the Crown" and that it was for the jury to decide the effect that the unavailability of this evidence may have on the Crown's obligation to prove the case against the appellants.

2024 ONCA 119 (CanLII)

[270] As I have noted above, it was open to the trial judge to provide a stronger instruction about the police failures with respect to preserving the billing records for the 226 phone and unreasonable delay in obtaining a production order for the records. But the instructions the trial judge gave to the jury on this issue were sufficient and do not constitute reversible error.

(6) The trial judge did not err in refusing to grant a directed verdict of acquittal on murder in relation to Shakiyl Shaw

[271] Shakiyl Shaw argues that the trial judge erred in law in dismissing his application for a directed verdict of acquittal on murder.

[272] At trial, Shakiyl brought an application for a directed verdict of acquittal on murder, seeking only to have manslaughter left to the jury. The basis for the application was that the evidence presented by the Crown did not support an inference that Shakiyl knew that Lenneil or Cron Dog had guns, or that they

intended to harm or kill someone when he drove them to Pizza Pizza. Shakiyl conceded that the *actus reus* for liability was available on the evidence, but argued that the evidence did not support a reasonable inference of the intent for murder or of planning and deliberation for murder. Shakiyl maintains this argument on appeal.

[273] The trial judge dismissed the application. He concluded that the jury could reasonably conclude that Shakiyl Shaw knew that Lenneil and Cron Dog had firearms and intended to shoot someone. The trial judge concluded that it was open to the jury to infer that Shakiyl saw the firearms that Mr. Poyser testified Lenneil Shaw handled in the basement at Shendale, passing one of them to Cron Dog. The trial judge based this conclusion on Mr. Poyser's evidence that Shakiyl was in the basement at the time the firearms were taken out and the photographic evidence showing the basement to be relatively small. He further concluded that taking Mr. Poyser's evidence together with the security video evidence showing that, after Cron Dog said (according to Mr. Poyser), "There's Jarryl" near the Pizza Pizza, Shakiyl drove around the block two or three times, stopping intermittently. He then drove to a secluded spot to park even though there was parking available on the street, which could support an inference of attempting to prevent observation of the car. Then, when the other three men were out of the car, arguably at the same time as the shots were fired, Shakiyl pulled the car out onto the sidewalk, which the jury could infer was to ready it for a getaway. The trial

2024 ONCA 119 (CanLII)

judge also noted the evidence that Shakiyl put the car in motion before the others had returned, but arguably after he would have heard the gunfire. Further, although it was Mr. Poyser's car, Shakiyl started to leave as soon as the shooters returned to the car, initially without Mr. Poyser. The trial judge concluded that, based on the whole of the evidence, the jury could reasonably infer that Shakiyl knew that Lenneil and Cron Dog had guns and intended to shoot someone. He further concluded that, in light of all of the evidence, but in particular the evidence of Shakiyl's manner of driving, the jury could reasonably infer that the murder was planned and deliberate.

[274] The nub of Shakiyl's argument is that there was "no evidence" that Shakiyl saw the firearms in the basement or saw the shooters carry firearms, only a possibility that he did. On this basis, he argues that the inferences necessary to find guilt on murder and planning and deliberation of murder were speculative. In particular, he argues that there is no evidence that Shakiyl saw Lenneil pull out a firearm and hand it to Cron Dog in the basement at Shendale, and Mr. Poyser testified that he did not observe any firearms in the car. Shakiyl further argues that the pattern of driving observed at the scene on the security videos is not probative of the intent for murder, but could only support the inference that Shakiyl knew the others were planning *something* unlawful, but not necessarily murder.

[275] I would reject this ground of appeal. There is no suggestion that the trial judge applied the wrong test in considering the directed verdict application. Nor is

2024 ONCA 119 (CanLII)

there a dispute between the parties about the intent required as an aider for murder and for a planned and deliberate murder – whether he knew or was wilfully blind that the principal(s) had the intent to commit planned and deliberate murder and acted with the intention of assisting the principal(s): *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paras. 16-18, 21. The only issue is whether the inferences that the trial judge found were available with respect to Shakiyl's knowledge or wilful blindness of the plan to commit murder were available based on the evidence or were speculative.

[276] I see no error in the trial judge's conclusion that a reasonable inference was available that Shakiyl knew that the other shooters were armed with firearms when he drove them to the scene of the shooting.

[277] Mr. Poyser testified that, while he was in the basement at Shendale, he observed Lenneil Shaw pick up a dark coloured backpack from somewhere in the basement and there was "some type of rifle in the bag". That firearm was visible, but not removed from the bag. Lenneil then removed a handgun from the bag and passed it to Cron Dog. Mr. Poyser testified at the time he observed the firearms, he was seated at the bottom of the stairs in the basement and "Shakiyl, Lenneil, Cron Dog, [and] the two females" were seated "in the area of the couch and the TV" (also in the basement). In cross-examination, Mr. Poyser was questioned about his memory of where people were when he saw the firearms in light of his own alcohol and drug consumption. In response to a rolled-up question from

2024 ONCA 119 (CanLII)

counsel for Shakiyl, he agreed that he “couldn’t tell” whether Shakiyl “was sitting or standing or in the bathroom”. Given the specificity of Mr. Poyser’s evidence in examination-in-chief about Shakiyl’s location when Poyser observed the firearms – in the immediate vicinity of Lenneil and Cron Dog on the couch – the small size of the basement visible in the photo evidence, and the relatively small number of people in the basement (seven, including Mr. Poyser, on his evidence), it was open to the jury to infer that Shakiyl saw the firearms and knew Lenneil and Cron Dog were armed. Mr. Poyser’s uncertainty about his memory expressed in cross-examination was a matter for the jury. On a motion for a directed verdict, a trial judge must take the evidence at its highest. Shortly after Mr. Poyser saw the firearms, he, Lenneil and Shakiyl Shaw, and Cron Dog left Shendale together in Mr. Poyser’s car, with Shakiyl driving. Mr. Poyser testified that he had offered the group a ride back to Scarlettwood, where the Shaw brothers lived, but rather than driving there, Shakiyl drove to the Pizza Pizza scene. In the circumstances it was open to a reasonable jury, properly instructed, to infer that Shakiyl had seen the guns and knew when the group left Shendale that Lenneil and Cron Dog were armed and intended to shoot someone.

[278] The trial judge’s conclusion that Shakiyl’s manner of driving near the Pizza Pizza, both prior to and after the shooting, supported an inference of planning and deliberation of murder cannot be divorced from his finding that the evidence as a whole could support a reasonable inference that Shakiyl knew that Lenneil and

2024 ONCA 119 (CanLII)

Cron Dog were armed with firearms and intended to shoot someone when he drove them to and from Pizza Pizza. While in the abstract, the manner of driving could support knowledge of a plan to do something other than a shooting, when it is combined with a reasonable inference that Shakiyl knew the others were armed with firearms and intended to shoot someone, the inference that Shakiyl knew the plan was to commit murder was available on the evidence.

2024 ONCA 119 (CanLII)

F. DISPOSITION

[279] I would allow the appeals and set aside the convictions. In the cases of Shakiyl Shaw and Lenneil Shaw, I would order a new trial. In the case of Mohamed Ali-Nur, I would enter an acquittal. I would maintain the order, pursuant to s. 631(6) of the *Criminal Code*, banning publication of Juror #14's name and any information that might tend to identify him, and sealing the Notice of Application regarding the post-verdict inquiry and the appended exhibit (subject to the redacted copy in the Crown's Appeal Book and Compendium).

Released: February 16, 2024 "A.H.Y."

"J. Copeland J.A."
"I agree. A Harvison Young J.A."
"I agree. Sossin J.A."