NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Kelsie*, 2017 NSCA 89

Date: 20171208
Docket: CA 211631
Registry: Halifax

Between:

Dean Kelsie

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Farrar, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	October 13, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, convictions set aside and a new trial ordered per reasons for judgment of Farrar, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring.
Counsel:	Philip Campbell, for the appellant James A. Gumpert, Q.C. and Peter Craig, for the respondent

Reasons for judgment:

Overview

[1] Dean Kelsie was tried on charges of first degree murder and conspiracy to commit murder before Justice Felix Cacchione and a jury. On March 2, 2003, he was convicted on both counts. He was sentenced on the count of first degree murder to life imprisonment with no parole for 25 years. On the conspiracy count he was sentenced to three years imprisonment to run concurrently with the murder sentence.

[2] He appealed to this Court from both convictions by a Prisoner's Notice of Appeal dated March 7, 2007 and an Amended Notice of Appeal dated April 30, 2017.

[3] For the reasons that follow I would allow the appeal, set aside the convictions, and order a new trial.

Background (According to this Record)[1]

The Murder of Sean Simmons

[4] At around 3:30 p.m. on October 3, 2000, Sean Simmons, age 31, was shot in the lobby of 12 Trinity Avenue, a small apartment building in Dartmouth. He was taken by ambulance to the Queen Elizabeth II Hospital with his condition deteriorating en route. He was pronounced dead at 11:27 p.m., approximately eight hours after the shooting.

[5] On post-mortem examination, it was determined that Mr. Simmons had been shot twice - once in the right forearm and once in the head. No gunshot residue was found on the wounds but residue on Mr. Simmons' clothing suggested that he had been shot from close range - less than three feet.

[6] Shortly after the gunshots, a witness heard the back door of the apartment building slam. Another witness, hearing the gunshots, looked out his bathroom

[1] I have borrowed liberally from the appellant's factum which sets out the important details from the evidentiary record.

window and saw a man "abruptly walking away" from 12 Trinity Avenue in the direction of nearby Spring Avenue. He saw this man mostly from behind and observed him to be wearing a jacket with a "panther" on the back and a baseball cap beneath which he wore a "fairly long" ponytail.

[7] It was accepted by both parties at trial that the man seen leaving the building was Steven Gareau who wore a Hamilton Tiger Cats jacket and had a ponytail. Gareau was also observed at the Speedy Muffler shop around the corner from 12 Trinity Avenue, wearing the jacket with the cat logo. Gareau cut off his ponytail shortly after the homicide.

Relationship Between the Accused and Witnesses

[8] Paul Derry and Tina Potts were a couple who, at the time of Mr. Simmons' murder, were partners in a life of crime. They each had a serious criminal record: Derry's included several fraud convictions, one of which led to a sentence of seven years in prison. Potts had already been convicted and imprisoned as an accessory to murder.

[9] In 2000, they were living in Brockville, Ontario where Derry trafficked in speed, cocaine and heroin, and Ms. Potts performed frauds with bank cards. They also illegally possessed, and sometimes sold, firearms. They had three children.

[10] In June, 2000, Derry and Potts came to Halifax for a vacation, accompanied by Gareau, a friend from Brockville. During the vacation, they socialized with Wayne James, a relative of Derry's through marriage, and met Neil Smith, a member of the Hells Angels. Derry said that he also met Kelsie at some point during the vacation, though he could not recall the circumstances. Derry, James and Smith discussed plans for transporting guns and cocaine from Brockville to Halifax. The vacation lasted for about two weeks.

[11] In late July or August, 2000, Potts and Derry moved their family to Halifax. The move reflected their desire to get away from Ontario. Again, they came with Gareau who drove a U-Haul vehicle while Derry and Potts travelled, separately, in their car. They were supporting themselves by bankcard frauds and had about $12,000 saved for the transition to Nova Scotia. Upon arrival, they moved into an apartment in Dartmouth at 31 Albro Lake Road.

[12] Both Derry and Potts gave evidence about their relationship with Gareau. They had met him a few years earlier in Ontario. Gareau purchased drugs - mainly speed - from Derry and used it with Potts. He became good friends with both of them, though he was perhaps closer to Potts whom he would "check on" when Derry was away. Besides moving together and living together, they registered their apartment and car in Gareau's name and shared drugs with him while providing him some income as a trafficker. When Gareau was arrested shortly after the murder, Potts and Derry were both concerned that he receive personal and financial support in custody.

[13] Derry and Potts brought firearms to Nova Scotia from Brockville, including the .32 calibre handgun used to shoot Mr. Simmons. Derry soon established himself as a partner of James in selling cocaine in Halifax. The two men obtained their supply of the drug, in powder form, from Neil Smith. It would then be cooked by Potts and James to form crack for sale to customers.

[14] The cocaine was "fronted" by Smith to Derry and James. This meant they maintained a running debt to Smith which mounted over the fall of 2000. According to Derry, by the time of Mr. Simmons' murder, the debt was in the range of $80,000, which was making James "a little nervous". Derry said the debt was rising because James' "lifestyle was more than his income".

[15] Gareau sometimes helped Derry and Potts with their continuing bankcard frauds. He also was given crack to sell but became addicted to the drug quite early in their time in Halifax. This led to his "acting really stupid" and eventually being asked to leave the apartment he shared with Derry and Potts.

[16] According to Potts and Derry, Kelsie’s primary role in the drug enterprise was to stand guard with a gun, when the cooking of crack was taking place, either in the Albro Lake Road apartment or at Wayne James' apartment at Uniacke Square. Kelsie also delivered drugs for Wayne James and collected money. Only once did he traffic drugs at Derry's direction. Kelsie and Gareau became friends as well and smoked crack together.

The Direction to Kill Sean Simmons

[17] Mr. Simmons, in the early 1990s, had been closely affiliated with the Halifax Hells Angels and hoped to become a member. By 1993, however, he was

targeted for violence by the club and was beaten up twice. The evidence suggested that this was the result of a belief among Hells Angels members that he had had an affair with the mistress of Michael McCrea, the then president of the Halifax chapter.

[18] As a result, Mr. Simmons and his wife left Halifax and spent several years in New Brunswick, returning at the end of 1998. The defence contended that Simmons and the appellant were friends, eliciting from Simmons' wife that on one occasion Simmons was staying with the appellant when she delivered a suit to Simmons for a court appearance.

[19] According to Derry, it was he who unwittingly drew the attention of the Hells Angels to the presence of Simmons in Halifax. In early September, 2000, he met Mr. Simmons, by chance, at 12 Trinity Avenue, in an apartment owned by someone else. They began to speak about people they knew in common from prison and then about the possibility that Mr. Simmons could sell quaaludes, of which Derry and James were then in possession. When Derry reported on this conversation to James, he was told to do nothing with Simmons until Simmons was cleared with the Hells Angels "clubhouse".

[20] After consulting the clubhouse, James told Derry that Simmons was not "in good standing" and was "probably going to get hurt". James told Derry to advise him when Simmons reappeared at the 12 Trinity Avenue apartment.

[21] The report that Simmons was in Halifax led to a meeting among Derry, James and Neil Smith at the Corner Pocket bar. Upon being told that they knew where Simmons was hanging out, Smith "said he wanted him whacked and made a motion across his throat". James said to Derry, "You heard him". The Corner Pocket meeting took place a few weeks before the October 3 killing.

[22] Derry asked Gareau to find Simmons at the Trinity Avenue apartment and report back on him. This effort to locate Simmons went on, according to Derry, "from the day I met him pretty much until the day he died". Derry "left the onus" to locate Simmons on Gareau. Derry himself, however, also went to Trinity Avenue in search of Simmons.

[23] In the period before October 3, 2000, Derry was in daily contact with Gareau about the effort to find Simmons. He was "pushing" Gareau to take more active measures to locate him in the days before the killing. Gareau began to make phone

calls in an attempt to locate Simmons (who was, for a time, in hospital after a car accident). He made calls to Simmons' wife, Jylene, who testified that she was receiving very frequent calls from "Steve", including six to eight in the few days leading up to October 3.

[24] In these calls, Gareau said he was looking for Simmons and asking where he was. He left messages saying that Simmons should call Derry about "some work to do or something". Derry agreed that he had actively participated in setting Simmons up to be killed and that Gareau did the same; Gareau, Derry testified, was told that the purpose of hunting for Simmons was to kill him. Gareau attended three to five meetings with Derry and James where this was discussed. He also agreed that the appellant was not, as far as he knew, aware of or involved in the effort to find and murder Simmons.

The Events of October 3, 2000

[25] In the afternoon of October 3, Derry and Potts were at Uniacke Square following some bankcard frauds earlier in the day. They met with Wayne James and gave him his share of the fraud proceeds. While the three were together, Gareau telephoned Derry. He said that Simmons was in Dartmouth. Derry handed the phone to James who spoke to Gareau for a short time and then James went inside to get a gun. When he returned, the appellant was with him. The gun was a .32 calibre revolver that had belonged to Tina Potts and been lent by her to James sometime earlier when he needed it for an altercation at Uniacke Square.

[26] The four people then entered Derry's Toyota Cressida and drove to Dartmouth. Derry was behind the wheel with James in the front passenger seat. The appellant was in the left rear seat and Potts was beside him.

[27] Derry and Potts testified there was no conversation in the car on the way to Dartmouth about Simmons or the purpose of the trip. Once in Dartmouth, they drove past 12 Trinity Avenue where Derry said to James that it would be "crazy" for James, a six-foot black man, to commit the murder. He warned James "that he was going to be recognized and he probably shouldn't be doing it". This advice prompted James, according to Derry, to decide that the appellant should do the shooting. James passed the gun to Kelsie in the rear seat.

[28] Derry claimed to be "kind of speechless" at this turn of events; he had thought that by persuading James not to commit the murder, he had ended the mission. Derry said James was "coaching" the appellant in words he cannot recall. He did not remember the appellant saying anything. Potts testified that when James passed the gun to the appellant and said, "You're going to have to do it then", the appellant agreed and asked Potts for gloves. She provided him latex gloves from a "streaking kit" and helped him put them on but they ripped. She also gave the appellant the green vest she was wearing, to keep up the hood on his hoodie.

[29] The group drove to a muffler shop around the corner from 12 Trinity Avenue. There they met Gareau and spoke to him briefly. Derry testified that James gave twenty dollars to Gareau and instructed him to go with the appellant to 12 Trinity Avenue, leave through the back door after the murder, and then go to a bar called the Ship Victory to meet them later. Potts recalled that Gareau was wearing her football jacket with an emblem on its back which she never saw again after that day. Gareau asked for a drug "fix" but was refused by James.

[30] After Gareau and the appellant headed toward 12 Trinity Avenue, with the appellant carrying the handgun, Derry drove the car a short distance up the street and parked near some bushes. Derry estimated that five minutes later the appellant ran back to the car and got in the rear seat. He was described as "excited", "anxious", "panicky", "out of breath" and "adrenaline-pumped". Derry gave evidence that Kelsie said, in response to a question from James, "I shot him three times", mentioning that one shot "creased his head like a watermelon". The appellant handed the gun to Potts who checked the cylinder and confirmed that it had been fired.

[31] The group then drove to 31 Albro Lake Road. James proposed that Potts get rid of the gun by walking across a bridge and dropping it in the harbour but she refused. Derry and Potts then drove to Lawrencetown with the gun and the vest that Potts said the appellant had worn. They emptied the gun cylinder and placed dirt over it and threw the vest in the water.

[32] From there, Potts and Derry drove back into Halifax and met Wayne James and the appellant at the Players Club. The two men had a "kit bag" containing some clothing, sneakers said to have been worn by the appellant, and a sawed-off shotgun. Derry and Potts drove with the kit bag to Beechville, picking up a bottle of fondue fluid along the way as an accelerant. They burned the clothing and

attempted to burn the sneakers in Beechville, where they also disposed of the shotgun.

[33] The next day, October 4, Derry acquired the distinctive football jacket from Gareau and disposed of it in a dumpster. By this time, Gareau had cut off his ponytail. Later, the car used in the homicide was abandoned by Derry and Potts after it broke down in Amherst. The police eventually located and searched the car, finding in it, among other things, a newspaper from which a story about the killing of Simmons had been cut out.

[34] After their cooperation with Derry and Potts began, the police were able to recover the .32 calibre handgun from the beach in Lawrencetown and burned clothing, including the sneakers, in Beechville.

[35] Potts testified that she met the appellant in the period after the murder around Uniacke Square. Potts said the appellant was upset because he had shot Simmons but James was "taking the credit for it". She found out from the appellant that he had known Simmons personally and that Simmons had had two children.

Arrests and Immunity

[36] Gareau, who had been seen by a witness leaving 12 Trinity Avenue, was arrested by the police five days after the murder, while Derry and Potts were visiting Potts' family in Prince Edward Island. The police had seized guns from the Albro Lake Road apartment and, as a result, Potts and Derry lost custody of their children - though they had not yet been arrested. Derry decided that he would turn himself in to the police and did so on October 14, 2000. He gave the police a false statement and was released with only a weapons charge against him.

[37] Derry related a complicated story about his dealings with the police. Because of his history of work as a police agent in Ontario, he had a "handler" in the RCMP in Ottawa named Mike Cabana. He said that he had spoken to Cabana in the week before the murder in an attempt to encourage an "operation" in which he would try to stop the murder and assist with the apprehension of those involved. Cabana had placed him in contact with two Halifax officers but as the murder drew closer they did not return his calls.

[38] In late October when he reported on his bail for the weapons offences, Derry was arrested again, this time with Potts. They were both questioned and gave false

information, and were then released without charges. A week later, an investigating officer on the case came to their apartment to speak with Derry. They began "building a relationship of trust" through November and December which led, on February 1, 2001, to a formal immunity agreement for Derry. Under this agreement, he would consent to interceptions of his private communications with suspects and to monitoring of his telephone. He was expected to maintain his criminal relationship with those involved and report to the police. In exchange, besides immunity, he received $500 weekly, a new apartment and eventual placement in the Witness Protection Program.

[39] Potts eventually received immunity as well and gave what she said were truthful statements, though she was not engaged as a police agent. Both Derry and Potts said that they were motivated in part by the hope that they would be able to regain custody of their children through their work with the police.

[40] While building their relationship with the police, Derry and Potts continued their work as drug dealers with James and Smith. This lasted until Christmas 2000 when, concerned about the mounting debt to Smith, Derry ended his partnership with James and began to work with another man; Bobby Milton. Derry described a meeting before Christmas at the Corner Pocket bar in which he told Neil Smith that James had not personally committed the murder of Simmons. Smith was upset by this since he had reduced the drug debt from James by $25,000.

[41] Derry and Potts eventually moved in with Bobby Milton and, for a time, the appellant joined them. According to Derry, the appellant said that he had received 3/8 of an ounce of crack for shooting Simmons, though James had promised him $5000. Derry said that he and the appellant discussed the shooting of Simmons frequently until the appellant was arrested in March, 2001 on drug charges.

Surveillance and Interceptions

[42] With Derry cooperating with the police, investigators began to surveil meetings among people in the Wayne James and Neil Smith circle. On six dates between January 31 and April 6, 2001, officers observed a series of meetings involving, in different combinations, Paul Derry, Tina Potts, Wayne James, Neil Smith, Bobby Milton and other men. The appellant was not seen at any of these meetings.

[43] Derry gave evidence about three intercepted communications with the appellant, two telephone calls from jail and a third during a visit to the jail.

[44] At trial, the Crown highlighted the following features of a call which occurred on March 2, 2001, between Derry at his apartment and the appellant in jail:

- The appellant confirmed to Derry that Gareau, also in jail, "still seemed kosher" and had had no visits.
- Derry suggested that he had heard the appellant had been speaking to a third man about the shooting. The appellant denied it.
- Derry said that he had reported to Neil Smith that "credit was given where credit wasn't deserved" (for the shooting, according to Derry) and the appellant replied "Yeah". When Derry asked "Who has the balls?" The appellant replied "You know".

[45] On March 5, 2001, Derry visited the appellant at the Halifax County Correctional Centre, wearing a body pack. At trial, the Crown emphasized the following passages from this conversation:

- When Derry asked if James had given the appellant anything, the appellant replied, "No". Derry said that James "told me he gave you four ounces", and the appellant replied, "He gave me two balls man… two, maybe three".
- When Derry said, "But then he changed his mind. I don't think he had any intentions of it in the first place", the appellant replied, "I don't think he did either". According to Derry, this was an exchange about James deciding not to shoot Simmons.
- When Derry said he would be going to see Neil Smith that day, the appellant responded, "Tell him what's up… he told me, man, you can have it all right now." Derry said this was a reference to the appellant's role in the murder, and that he answered, "You could, though, because he knew you had the balls".
- The appellant, in a low voice, described how he had demanded from Wayne James his payment of three 8-balls; he had said, "Give them to me".

- The appellant raised the question of whether the shotgun and sneakers were burned in Beechville. Derry said they had been.
- Derry said to the appellant that "everything was burned", and testified that he meant the murder weapon. The appellant asked, "There's nothing, right?"
- In a discussion of Gareau, Derry suggested, "He's the only one that seen you" and the appellant answered, "I don't even think he did." The appellant said, "The first one went" and Derry replied, "Right after the first shot he was gone?" The appellant answered, "He left then. Chicken".

[46] Finally, the jury heard a March 6, 2001 telephone call:

- The appellant spoke disparagingly of Wayne James, saying he was "a piece of shit" and "bit the hand that fed him."
- In recounting a call he made to James, the appellant said, "I wasn't callin' for money… I wasn't callin' for no fucken…no… nothing for the hit or nothin'".
- Referring to Neil Smith as "the source", the appellant said, "I'm sure the source will come to me when I get out".
- In an exchange that Derry claimed was about the murder weapon, the appellant said, "It'd never feel the same in my hand as that did that night. That's like I married that motherfucker without you knowing".

The Appellant's Statement to the Police

[47] The investigation of Mr. Simmons' murder culminated on April 17, 2001 with the arrests and detention of Wayne James, Neil Smith and the appellant. Gareau was already in jail on the murder charge.

[48] The appellant was at Springhill Institution on the day of the arrests. When invited by the police to make a statement - he spoke at length. His statement confirmed the evidence of Derry and Potts that they had accompanied Wayne James and the appellant to Dartmouth, that James had handed him the gun, and that he had gone to 12 Trinity Avenue with Gareau. But he denied either shooting Simmons or intending to do so. Kelsie said that when he told Gareau he couldn't

do it, Gareau took the gun from him and committed the murder inside the building. Gareau then returned the gun to the appellant who returned to the waiting vehicle.

[49] The statement recounts what the appellant expected would happen as the car headed to 12 Trinity Avenue and what took place after their arrival:

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

[50] When questioned about the details of this account, the appellant said:

> Mr. Kelsey: I just….I just remembered they ummm….picked me up….and then drove over to Dartmouth and ummm….you know, s's'said whatever….the guy needed to be taught a lesson. Ummm….that's about it. They just drove me to the spot where Mr. GAREAU met

> me and then I….he said, yeah, some guy named SIMMONS? And I said the first (1st) name, I said, Sean….SIMMONS?
>
> He's like….yeah. And I'm like, I can't do this. He's like, you know we gotta do this….that's what….you know. And I said, I can't do it. And he just said, it's just another day. I don't rem'….I went in after him, he took the….I said, I can't do it. And he took the gun. I didn't….I didn't go away because I was scared that maybe, you know, he'd put one (1) in me. So I follow….I followed him. Ummm….he went in first (1st). Sean open'….Sean had the door still open for me. He recognized it was me. He gave me a hug. I turned to go up the stairs after Mr. GAREAU and I heard the shots. As I went down back to the front door Mr. GAREAU came down by the front door. I heard another shot and the gun was more or less tossed at me, like, it was more or less pressed on me and I was in shock. I….he ran. He was the first (1st) one to run. I will still standing there, like….just realized what happened and I just, you know. I was scared and I ran.

[51] The appellant said he was initially given the gun in the car by Derry and returned it to Potts after the shooting. With regard to his purpose in going to 12 Trinity Avenue, he told the officers:

> S/Sgt. Mosher: When you got outta the car….
>
> Mr. Kelsey: Yeah.
>
> S/Sgt. Mosher: ….and you and Mr. GAR….and you and Stephen GAREAU were walkin' toward the apartment building….did you have….were you carrying the gun then?
>
> Mr. Kelsey: Well, til we got….maybe ten (10) fifteen (15) feet from the building, that's when he took it from me.
>
> S/Sgt. Mosher: And why did he take it from you?
>
> Mr. Kelsey: Cause I couldn't do it. I said I couldn't do it. He s'said we're in this together.
>
> S/Sgt. Mosher: And what did you say?
>
> Mr. Kelsey: I said, I can't do it.

S/Sgt. Mosher: And what did he say?

Mr. Kelsey: He just t'….just took the gun. …

S/Sgt. Mosher: So you didn't know who they were going to….

Mr. Kelsey: No sir.

S/Sgt. Mosher: ….to do anything with? As far as you were concerned they were just goin' to either beat him up, tune him up, whatever ya….

Mr. Kelsey: That's what….

S/Sgt. Mosher: ….whatever terminology you want to use.

Mr. Kelsey: Learn the less….a lesson, that's all I figured, you know.

S/Sgt. Mosher: Did you know what they were goin' to teach him a lesson?

Mr. Kelsey: No sir.

S/Sgt. Mosher: No one ever told you?

Mr. Kelsey: No sir.

[52] The jury trial took place over 30 days between October 11, 2002 and February 25, 2003. The jury deliberated for five days before returning guilty verdicts on first degree murder and conspiracy to commit murder.

[53] Mr. Kelsie appealed his convictions, and after retaining counsel, filed an Amended Notice of Appeal on May 10, 2017.

Issues

[54] The issues raised in the Amended Notice of Appeal are as follows:

1. Did the trial judge err in his charge to the jury on the mental state required for first degree murder on the part of an aider to the offence?
2. Did the trial judge err in declining to leave manslaughter as a verdict?
3. Did the trial judge err in instructing the jury that co-conspirators' hearsay evidence against the Appellant was capable of supporting his guilt?

4. Did the trial judge err in instructing the jury that out-of-court statements of alleged co-conspirators were admissible evidence on the issue of planning and deliberation of murder without reference to the criteria for admitting evidence under the co-conspirators exception to the hearsay rule?
5. Did the trial judge err in allowing the out-of-court statements of Paul Derry, a man who was not part of a conspiracy, to be used as evidence against the Appellant?
6. Did the trial Judge err in leaving with the jury the offence of conspiracy to commit murder or in failing to direct the jury as to the serious frailties of the evidence on the charge?
7. Did the trial judge err in failing to direct the jury on the issue of abandonment, which arose directly on the evidence of the Appellant's statement?
8. Did the trial Judge err in instructing the jury that a failure to reach a verdict, rather than a miscarriage of justice due to an erroneous verdict, was the "most undesirable" outcome of a trial?

[55] At the outset of the appeal hearing the appellant abandoned Ground #6. It is only necessary to address Grounds 1, 2, 3 and 5. I will address Grounds 3 and 5 together.

Standard of Review

[56] Grounds 1, 2, 3 and 5 all arise from the trial judge's instructions to the jury. In charging a jury, the trial judge explains legal principles to the jury so they will understand how to apply the law to the facts. The trial judge's instructions on the law must be correct. In an appellate assessment of instructions to a jury, the standard of review is correctness (*R. v. Miller*, 2009 NSCA 71, ¶14)

[57] In determining whether the charge is correct some general principles apply. When reviewing a jury charge an appellate court is required to take a functional approach to the review. An accused is entitled to a properly instructed jury, not a perfectly instructed jury (*R. v. Jacquard*, [1997] 1 S.C.R. 314, ¶32)

[58] In *R. v. G.K.N.*, 2016 NSCA 29, this Court explained how courts of appeal should review a jury charge:

> [30] Before considering G.K.N.'s complaints in this context it is useful to consider how courts of appeal should review a jury charge. In *R. v. Araya*, 2015 SCC 11, the Supreme Court cautioned:
>
> > [39] When considering an alleged error in a trial judge's jury instructions, *"[a]n appellate court must examine the alleged error in the context of the entire charge and of the trial as a whole"*. Further, trial judges are to be afforded some flexibility in crafting the language of jury instructions. While trial judges must seek to ensure that their instructions adequately prepare the jury for deliberation, the standard for jury instructions is not perfection. Appellate review of jury instructions is meant to "ensure that juries are properly - not perfectly - instructed". This Court has emphasized that the charge generally should not be "endlessly dissected and subjected to minute scrutiny and criticism". As Bastarache J. has summarized it:
> >
> > > The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.
> >
> > Appellate courts should not examine minute details of a jury instruction in isolation. "It is the overall effect of the charge that matters".
> >
> > […]
> >
> > [52] Parsing the language in one particular sentence to determine whether it was sufficient to warn of an impermissible line of reasoning, without taking into consideration the greater context of the jury instructions and the trial itself, represents the kind of dissection and minute scrutiny this Court warned against…
> >
> > [Emphasis added; citations omitted]

[59] With these principles in mind, I now turn to the issues raised on this appeal.

Issue #1 Did the trial judge err in his charge to the jury on the mental state required for first degree murder on the part of an aider to the offence?

[60] To address this ground of appeal, some further context is necessary.

[61] The Crown evidence and the appellant's April 17, 2001 police statement correspond on most issues other than the events of the shooting itself.

[62] Derry and Potts, like the appellant's statement, place the appellant in the car on the drive to Dartmouth, the gun in his hand as he left the car and returned to it, and him in the company of Gareau as they entered 12 Trinity Avenue.

[63] However, Derry and Potts did not see the shooting. They offered circumstantial evidence about it. In particular, they gave evidence about the appellant's possession of the gun before and after the murder occurred and the appellant's admission of the shooting when he returned to the car and in later conversations.

[64] I will come back to Derry and Potts' evidence later.

[65] Section 21(1) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 provides:

> 21 (1) Every one is a party to an offence who
>
> (a) actually commits it;
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (c) abets any person in committing it.

[66] Beveridge, J.A. undertook an extensive review of s. 21(1) of the *Code* in *R. v. N.T.J.*, 2017 NSCA 64 concluding:

(i) Because of the parity among principals and aiders where the offence is committed, there is no legal requirement for the Crown to specify in the Information the accused's precise mode of participation in the alleged crime (¶61); and

(ii) A jury need not be unanimous as to which mode of participation led to the finding of party liability, i.e., as a principal or an aider, only that the jury be unanimous that guilt had been established beyond reasonable doubt (¶64).

[67] At trial, the Crown argued that the appellant should be convicted of first degree murder as a principal. In the alternative, it argued that even if the jury accepted the appellant's statement that it was Gareau, not he, who fired the fatal

shots, he would still be guilty as a party. The Crown put the issue to the jury as follows:

> We suggest to you, ladies and gentlemen, that the overwhelming volume of the evidence that's been put before you is that the accused, Mr. Kelsie, is the principal in the murder of Sean Simmons.
>
> However, even if you accept it, that part of his statement with respect to the issue that he didn't know Sean Simmons was going to be killed, he's still guilty as a party. And I'll discuss this specific evidence on this shortly.

The Crown's theory being that whether Kelsie did the shooting himself or gave the gun to Mr. Gareau to commit the murder, he was guilty of first degree murder.

[68] A day into the deliberations and four days before returning their guilty verdicts, the jury asked the following question:

> Must the identity of a principal be determined to find someone a party or is it sufficient to find that a person was either a party or a principal?

[69] The jury was correctly instructed that they did not have to agree on a path to a verdict of first degree murder, just on the verdict itself. The trial judge then reread his charge to the jury on what was necessary for the Crown to prove to convict Mr. Kelsie of first degree murder as an aider. I will set out his charge in more detail below.

[70] At this point it would be helpful to point out the difference between first degree murder, second degree murder and manslaughter as they apply to this case. Homicide is any human death. To be culpable homicide, the death must have been caused by the unlawful act of one or more accused.

[71] For manslaughter, it is only necessary to prove:

(i) that the accused caused the victim's death; and

(ii) that the accused caused the victim's death unlawfully (Watts, *Manual of Criminal Jury Instructions*, 2nd ed. Carswell 2015, 637).

[72] For second degree murder, the Crown must prove each of the following elements beyond a reasonable doubt:

(i) that the accused caused the victim's death;

(ii) that the accused caused the victim's death unlawfully;

(iii) that the accused had a state of mind required for murder (Watts, 655).

[73] To be first degree murder, the Crown must prove each of the following elements beyond a reasonable doubt:

(i) that the accused caused the death of the victim;

(ii) that the accused caused the death of the victim unlawfully;

(iii) that the accused had the state of mind required for murder; and

(iv) that the accused's murder of the victim was both planned and deliberate (Watts, pp. 687,688).

[74] In *R. v. N.T.J.*, Justice Beveridge explained what was necessary for a murder to be "planned and deliberate":

> [67] To attract liability for first degree murder, the trier of fact must be satisfied beyond a reasonable doubt that the murder was both planned and deliberate. The suggested wording to explain these requirements to a jury are found in *Watt's*, *supra*, p. 691:
>
> > A *planned* murder is one that it is committed as a result of a scheme or plan that has been previously formulated or designed. It is the implementation of that scheme or design. A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is *not* a planned murder.
> >
> > "Deliberate" is *not* a word that we often use when speaking to other people. It means "considered, not impulsive", "carefully thought out, not hasty or rash", "slow in deciding", "cautious".
> >
> > A deliberate act is one that the actor has taken time to weigh the advantages and disadvantages of. The deliberation must take place *before* the act of murder (*briefly describe*) starts. A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is *not* a deliberate murder.

[75] To understand why the appellant complains the judge's charge was problematic, it is first necessary to consider the possible pathways to criminal liability for first degree murder on the evidence before the jury:

1. The appellant could have been guilty of planned and deliberate murder if he found out that Simmons was to be killed when James handed the gun to him in Dartmouth, minutes before the shooting took place. This would require the jury to conclude that the appellant formulated or participated in a plan to kill Simmons and, in the minutes between being given the gun and the shooting, planned and deliberated on the murder before personally committing it;

2. The second pathway to liability for first degree murder through planning and deliberation is as a party to that offence. This would require that the events described in the appellant's statement are substantially true, and the Crown's argument about them is also correct: the appellant gave Gareau the gun as they approached 12 Trinity Avenue, aware that it would be used by Gareau to carry out the planned and deliberate murder of Simmons.

[76] It is on the second pathway to liability that the appellant says the trial judge failed to properly instruct the jury on the mental element for a finding of guilt for first degree murder as a party.

[77] The evidence on this pathway has Gareau as the principal and the appellant, at some point before the shooting, turning over the gun to him, aware that Gareau was going to commit the murder that the appellant either never intended to commit (as his statement asserts), or decided on the way not to commit. The jury's focus regarding planning and deliberation would have to be on this specific issue: did the appellant know, when he turned over the gun to Gareau, that Gareau himself had planned and deliberated the murder?

[78] The liability of an aider of a planned and deliberate murder depends on two things: (i) whether the principal had in fact planned and deliberated on the murder; and (ii) whether the aider knew of the planning and deliberation by the principal. The Court of Appeal for Ontario in *R. v. Maciel*, 2007 ONCA 196 explained:

> [78] The trial judge instructed the jury that it must consider the appellant's potential liability for first degree murder both as a perpetrator and as a secondary party (an aider). With respect to the appellant's potential liability as an aider, the trial judge told the jury:
>
> > For the accused to be guilty as a secondary party to the first degree murder committed by someone else, presumably by his father, the Crown must

> prove beyond a reasonable doubt that the accused, Richard Maciel, participated in the planning and deliberation leading up to the intentional killing of Emel Silva or that he knew that the actual shooter, again presumably his father, had planned and deliberated over the killing of Emel Silva. The accused must then have aided or abetted his father for the purpose that Emel Silva be murdered. [Emphasis added]

[79] The appellant submits that a person can be convicted of first degree murder that is planned and deliberate only if he or she was actually involved in the planning and deliberation. He submits that the trial judge erred in telling the jury that it could convict the appellant of first degree *murder as long as he knew that the person he was aiding, presumably his father, had planned and deliberated the murder*.

…

[88] The knowledge component of the fault requirement flows from the intention component. An aider can only intend to assist the perpetrator in the commission of the crime if the aider knows the crime that the perpetrator intends to commit. While the aider must know the crime the perpetrator intends to commit, the aider need not know the details of that crime: *Dunlop and Sylvester v. The Queen* (1979), 47 C.C.C. (2d) 93 at 110 (S.C.C.); *Regina v. Yanover and Gerol* (1985), 20 C.C.C. (3d) 300 at 329-30 (Ont. C.A.); V. Gordon Rose, *Parties to an Offence* (Toronto: Carswell, 1982) at 11. Consequently, a person who is said to have aided another in the commission of an attempted murder must know that the perpetrator intended to kill the victim: *R. v. Adams* (1989), 49 C.C.C. (3d) 100 at 110 (Ont. C.A.). Similarly, a person who is alleged to have aided in a murder must be shown to have known that the perpetrator had the intent required for murder under s. 229(a): *R. v. Kirkness* (1990), 60 C.C.C. (3d) 97 at 127 (S.C.C.).

[89] The same analysis applies where it is alleged that the accused aided a perpetrator in the commission of a first degree murder that was planned and deliberate. The accused is liable as an aider only if the accused did something to assist the perpetrator in the planned and deliberate murder and if, when the aider rendered the assistance, he did so for the purpose of aiding the perpetrator in the commission of a planned and deliberate murder. Before the aider could be said to have the requisite purpose, the Crown must prove that the aider knew the murder was planned and deliberate. Whether the aider acquired that knowledge through actual involvement in the planning and deliberation or through some other means, is irrelevant to his or her culpability under s. 21(1).

[original underlining; italics added]

See also *R. v. N.T.J.*, ¶*75-79.*

[79] In *R. v. N.T.J.*, after canvassing the law, Beveridge, J.A. provides a useful summary of what is necessary for a trial judge to convey to a jury regarding the requirements of an aider's potential liability for a planned and deliberate first degree murder:

> [80] From this brief canvas of the law, there are some fundamental principles that emerge. In the context of an aider's potential liability for a planned and deliberate first degree murder, a trier of fact must be satisfied beyond a reasonable doubt that the accused:
>
> - did or omitted to do something that aided another person to unlawfully cause the victim's death
> - did those things (or at least one of them) for the purpose of aiding that other person to unlawfully cause the victim's death
> - when he did those things (or at least one of them) he either had the requisite intent for murder or knew that the principal offender had the requisite intent for murder
> - when he did those things (or at least one of them), he did so for the purpose of aiding the principal offender to commit a planned and deliberate murder
> - when he did those things, he planned and deliberated the murder, or knew that the murder was planned and deliberate

[80] In this case, the trial judge's only instruction on the knowledge that an aider must have of a principal's state of mind was as follows:

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

[81] The trial judge was directing the jury's attention to what state of knowledge the appellant was required to have of Gareau's intention in order to make him liable for murder as an aider. This instruction related to murder in general, not first degree murder. Without more, simply telling the jury that "knowledge of the type of offence Gareau would commit" would make the appellant a party to the offence, was an improper instruction.

[82] On the evidence in this case, the jury should have been instructed that when Kelsie gave the gun to Gareau:

- He either had the requisite intent for murder or knew that Gareau had the requisite intent for murder;
- He did so for the purpose of aiding Gareau to commit a planned and deliberate murder; and
- He planned and deliberated the murder or knew that Gareau had planned and deliberated the murder.

[83] For jurors who might have attached weight to the appellant's statement, the trial judge’s instructions could have led them to convict Kelsie when he did not possess the requisite *mens rea* for first degree murder. The jury could easily conclude that Gareau planned and deliberated the murder, since Derry testified Gareau was told the purpose of hunting for Simmons in the week before the shooting was to murder him.

[84] On the Crown's theory of the appellant's statement, when the appellant backed out of the murder but gave the gun to Gareau, his own liability for planned and deliberate murder turned on what he then knew of Gareau's state of mind at that time. There was no evidence that the appellant knew Gareau had been part of the murder plot for a week or more. If the appellant did not know that Gareau had planned and deliberated the murder, he would not be guilty of first degree murder even if Gareau was guilty. The jury charge provided no instruction along these lines.

[85] On the instructions the jury received, there is a real danger that if they concluded Gareau planned the killing and the appellant handed him the gun aware that he would likely use it to kill, the appellant would be guilty of planned and deliberate first degree murder. This was incorrect.

[86] The Crown acknowledged the trial judge did not refer to the mental element of first degree murder in this portion of his charge but suggested he, elsewhere in his charge, defined the elements of planning and deliberation and, this was sufficient instruction. In its factum it says:

> 91. In regard to the mental element required for proof of "aiding", the trial judge gave the jury a careful definition of what was required to prove that the Appellant aided Steven Gareau in committing the offence of murder.
>
> 92. Although the trial judge did not refer to the mental element of first degree murder in this portion of his charge and recharge, he had clearly defined the requirements of "planning" and "deliberation" earlier in his charge.
>
> 93. When the charge is read in its entirety, it educated the jury on the need for proof beyond a reasonable doubt that aiding in first degree murder required knowledge by the Appellant of planning and deliberation by Steven Gareau. The charge therefore was functionally correct.
>
> [Emphasis added]

[87] With respect, I disagree. The trial judge only defined the requirements of "planning" and "deliberation" in respect to whether a principal is guilty of first degree murder. This was not sufficient. In *R. v. N.T.J.*, this Court makes it clear that the *actus reus* and *mens rea* for liability as an aider or abettor are different than for a principal (¶70). Again citing Beveridge, J.A:

> [71] *R. v. Briscoe*, 2010 SCC 13 firmly established that the knowledge component of the *mens rea* for party liability can be satisfied by the doctrine of wilful blindness. Before coming to that conclusion, the Court canvassed the cardinal principles of party liability.
>
> [72] Charron J. wrote for the unanimous court. After referring to the parity for criminal liability between one that aids a murder with anyone that actually commits it, she stressed: "The *actus reus* and *mens rea* for aiding or abetting, however, are distinct from those of the principal offence" (para. 13).
>
> [Emphasis added]

[88] It is not sufficient for the trial judge to have charged on planning and deliberation as a principal and then, without the jury being told, assume that they would necessarily come to the conclusion that aiding first degree murder required the appellant to have knowledge of planning and deliberation by Gareau.

[89] The danger with this approach is, as I have set out above, the jury could have been satisfied that Gareau planned and deliberated the murder and that Kelsie, by giving him the gun, aided in the commission of that murder without the knowledge that Gareau had planned and deliberated the murder.

[90] Even applying a functional and contextual approach, I cannot conclude that the jury would have been aware that in order to convict the appellant of first degree murder that he would have had to know that Gareau had planned and deliberated the murder.

Defence Counsel's Failure to Object

[91] The Crown invites us to consider that there was no objection to this aspect of the charge by defence counsel. It is well settled that defence counsel's failure to comment on the jury charge at the trial is worthy of consideration when determining the seriousness of the misdirection (*R. v. Jacquard, supra*, ¶38).

[92] Despite our ability to take trial counsel's failure to object into consideration, we cannot lose sight of the fact that the jury charge is the responsibility of the trial judge, not defence counsel (*R. v. Jacquard, supra*, ¶37 citing *R. v. Arcangioli*, [1994] 1 S.C.R. 129).

[93] The trial judge's error goes directly to the *mens rea* requirement for an aider to a first degree murder. It was not a minor error; to the contrary, it is fundamental to a finding of guilt for first degree murder.

[94] Trial counsel's failure to object, in the circumstances of this case, does not diminish or allow us to excuse the seriousness of the misdirection.

The Curative Provision

[95] Finally, the Crown asks that if we are of the view that the trial judge erred in his charge on *mens rea* for an aider, we should apply the curative provision in s. 686(1)(b)(iii) of the *Criminal Code* which allows us to dismiss the appeal where there has been no substantial wrong or miscarriage of justice:

> **686** (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

> **…**
>
> (b) may dismiss the appeal where
>
> …
>
> (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
>
> (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;
>
> [Emphasis added]

[96] The test we are to apply when determining whether there has been no substantial wrong or miscarriage of justice as a result of the trial judge's error, is to determine whether there is any reasonable possibility that the verdict would have been different had the error not been made (*R. v. Bevan*, [1993] 2 S.C.R. 599).

[97] The Crown says the evidence is overwhelming against the appellant. It cites evidence which would implicate the appellant as the principal in the murder. I will now return to the evidence of Derry and Potts which the Crown cites in support of its position:

> 1. The Appellant was involved in Wayne James' and Paul Derry's drug operation;
>
> 2. The Appellant drove with Derry, Potts and James to the vicinity of 12 Trinity Avenue in Dartmouth;
>
> 3. The proposed murder was discussed during the drive and Derry suggested to James that he should not do the murder. The handgun was passed by James to the Appellant. James told the Appellant "You're going to have to do it then". The Appellant agreed, was given directions by James, and asked for gloves;
>
> 4. Tina Potts gave the Appellant gloves from a hair streaking kit but they ripped when he tried them on;
>
> 5. Tina Potts also gave the Appellant her vest in order to assist the Appellant's hood staying up on his head;

> 6. The Appellant and Steven Gareau left the car and walked in the direction of Trinity Avenue. The Appellant had the gun in his possession when he left the car;
>
> 7. Five to ten minutes later the Appellant, by himself, ran back to the car and got in. He was very excited. He told Wayne James, Tina Potts and Paul Derry that he had shot the victim three times and one shot creased the victim's head like a "watermelon";
>
> 8. At Wayne James' instructions, Tina Potts checked the gun the Appellant passed to her and saw that there were three empty casings in the gun;
>
> 9. Tina Potts received her vest that the Appellant passed back to her. When she disposed of the vest later that day she noticed there were blood spots on it. They had not been on the vest before she gave it to the Appellant; and
>
> 10. About three months after the murder the Appellant admitted to Tina Potts that "…I shot him and you know Wayne is taking credit for it".

[98] At trial, the defence mounted an argument that Derry and Potts were dangerous witnesses, in view of their criminal histories, extraordinary immunity and cooperation deals with the Crown. The defence argued Derry and Potts were likely to invent evidence to deflect blame from their close friend Gareau, of whom they were protective.

[99] When considering the broader context of this trial, to say that the people involved, including Derry and Potts, were unsavoury characters would be an understatement. They lived a life of crime. They admitted to being fraud artists and drug dealers. Derry and Potts by all outward appearances, were involved in the planning and deliberation of Mr. Simmons' death. It would not be unusual for them to say whatever was necessary to deflect the blame from themselves and their friend, Gareau. It would be extremely dangerous to rely on the evidence of Derry and Potts to conclude the case against the appellant was overwhelming. I would decline to do so.

[100] The Crown refers to two other instances where they say that the evidence overwhelmingly proves the guilt of Kelsie as a principal. They are:

> 1. About five months after the murder Paul Derry, using a body pack recorder, recorded a face-to-face conversation he had with the Appellant when he visited the Appellant at the Halifax County Correctional Centre. The Appellant recounted a conversation he had with Neil Smith where Smith expressed

> displeasure at finding out that Wayne James took credit for something he did not do. In the conversation, the Appellant implied that he killed Sean Simmons
>
> 2. On March 6, 2001, the Appellant spoke to Paul Derry in a recorded telephone call to the Halifax Correctional Centre. Appeal Book, Vol. VI, p. 2362, line 15 refers to this as Intercept 41. In the recorded call the Appellant told Paul Derry that he wanted Paul Derry to tell Wayne James that he just called him to hear his voice. Most importantly, the Appellant admitted that he was not calling for money for the "hit".

[101] This evidence is far from an express admission or acknowledgement that the appellant committed the murder. If the evidence was so overwhelmingly convincing that Kelsie personally committed this murder, one has to ask the question why the Crown put Kelsie's statement into evidence where he denies having committed the crime. If this was such a "cut and dried case", why raise the spectre that he may have been an aider instead of the principal.

[102] Finally, we cannot ignore the question the jury asked the trial judge. For ease of reference, I will repeat it here:

> Must the identity of a principal be determined to find someone a party or is it sufficient to find that a person was either a party or a principal?

[103] Questions from a jury must be assumed to be of significance and importance (*R. v. Miller*, *supra*).

[104] This question, which arose a day into deliberations, indicates the jury was considering the possibility that the appellant was an aider as opposed to the principal and wanted to understand the ramifications of such a finding.

[105] I am not satisfied that the verdict would have been the same despite the error. In these circumstances, I would not apply the curative provision.

[106] I would allow this ground of appeal.

Remedy

[107] Both the appellant and the Crown suggest that if we were to allow this ground of appeal, and dismiss the others, we could substitute a verdict of second degree murder.

[108] For reasons that will become apparent, I am also of the view that the trial judge erred in failing to leave the lesser, included offence of manslaughter to the jury. Therefore, it is necessary to order a new trial as opposed to substituting a second degree murder conviction.

Issue #2 Did the trial judge err in declining to leave manslaughter as a verdict?

[109] The appellant argues that for jurors who accepted the appellant's statement as substantially true, or had a reasonable doubt based upon it, a finding that Gareau shot Simmons with a gun given to him by the appellant demanded consideration of manslaughter as a potential verdict.

[110] The Crown takes issue with the characterization of Kelsie's statement in the appellant's factum. In particular, it says Kelsie did not say that he gave the gun to Gareau but rather that Gareau "took it from him". Therefore, if Gareau took the gun from Kelsie it cannot be said he gave him the gun with which he committed the murder.

[111] The problem with this type of analysis is apparent on its face. First of all, Crown counsel's theory of the case at trial was that Kelsie could be convicted as an aider because he gave the gun to Gareau.

[112] In final argument the Crown, in addressing Kelsie's statement with respect to the gun passing between him and Gareau, says:

> And again, I'll repeat: "I went in after him. He took – I said I can't do it, and he took the gun." Ladies and gentlemen, look at that statement closely and determine for yourself if he's referring there to the gun being taken from - - the gun passing from him to Gareau within the building.
>
> Then look at page 3 and 8 of the statement. The accused says the gun is taken from him by Gareau when they were ten to 15 feet from the building. And his use of words, ladies and gentlemen, in describing how this gun gets passed is important, I suggest to you.
>
> He uses the words "taken from him" when describing how the gun is passed from himself to Gareau. He uses the same words to describe how he supposedly receives the gun back from Gareau after Simmons is shot; this is at page 3 of his statement. This is what he said: "He goes, passes me the gun." And then shortly later, "I take the gun."

> What's interesting here is that there's no evidence anywhere of any struggle, any physical confrontation between Gareau and the accused at the point when the accused says Gareau takes this gun. There's no evidence of anything of that nature.
>
> [Emphasis added]

[113] Although the reasoning is somewhat tortured, the Crown is suggesting that the jury should interpret the words "he took the gun" as contained in the statement, as Kelsie passing the gun to Gareau. The Crown says this because of the words Kelsie uses when he gets the gun back from Gareau: "He goes, passes me the gun" and "I take the gun".

[114] The Crown invites the jury to interpret the words "take" and "passes" as synonyms because of the manner in which they are used by Kelsie.

[115] The trial judge's characterization of the evidence in his charge to the jury is also problematic for the Crown's position. When addressing this issue he says:

> …You can see that the aider can assist the principal offender without actually being present when the offence is committed. In this case, it is alleged that Kelsie aided Gareau by providing the gun, going to the scene with Gareau, fleeing the scene with the gun after Gareau had shot Simmons.
>
> It is important to understand that the Crown does not have to prove any agreement between Kelsie and Gareau. In fact, it does not matter whether or not Gareau was aware that Kelsie was helping him. What the Crown must prove is that the act of Kelsie, in fact, helped or aided Gareau in committing the offence of murder.
>
> You must decide whether the act of Dean Kelsie aided Gareau in the sense of assisting, helping, facilitating or making it easier for Gareau to commit the offence of murder.
>
> You can find that Kelsie's conduct aided Gareau, even if Gareau could have committed the offence without Kelsie's act of assistance. It is sufficient that Kelsie's conduct assisted or facilitated the commission of the murder by Gareau. Again, as far as the evidence on this point is concerned I refer you to the statement of Mr. Kelsie, and I have already reviewed that for you.
>
> [Emphasis added]

[116] In the original charge on aiding, the trial judge refers to Kelsie aiding Gareau by providing the gun to him. He does not indicate the manner by which the gun gets from Kelsie to Gareau.

[117] When the trial judge earlier reviewed Kelsie's statement, he did not indicate that Kelsie said he had given the gun to Gareau, but rather Kelsie said Gareau "took it from him".

[118] For completeness, I will include the earlier portion of the judge's charge relating to Kelsie's statement:

> However, the Crown also argued that if Mr. Kelsie was not the person who shot Sean Simmons, then he is still liable for this offence because the Crown says that Dean Kelsie did something for the purpose of aiding another person, that is, Gareau, to commit it. This arises because in Mr. Kelsie's statement to the police of April 17th where he indicated that he had the gun, Gareau took it from him when said he (sic) could not do it, Gareau shot Mr. Simmons, and then passed the gun and ran away. Mr. Kelsie says in the statement that he did not intend to hurt anyone, just wanted to frighten someone. Later on in his statement he says that Gareau took the gun, and later he, Kelsie, did not go away because he was scared that he would be shot. In this case, Gareau is not being tried with Dean Kelsie. Therefore, the Crown must prove that Gareau committed the offence of murder before you can convict Dean Kelsie of aiding Steven Gareau.
>
> [Emphasis added]

[119] In his recharge to the jury, after the jury question with respect to parties to the offence, the trial judge, although indicating to counsel that he was going to reread his charge added one important detail not given in his original charge. For context, I will start with the same line as set out in the original charge above:

> You can see that the aider can assist the principal without actually being present when the offence is committed. In this case, the Crown alleges that Kelsie aided Gareau by providing the gun, going to the scene with Gareau and fleeing the scene with the gun after Gareau shot Simmons.
>
> It is important to understand that the Crown does not have to provide any agreement between Dean Kelsie and Steven Gareau. In fact, it does not matter whether or not Steven Gareau was aware that Dean Kelsie was helping him.
>
> What the Crown must prove is that the act of Dean Kelsie, in fact; helped or aided Gareau in committing the offender of murder. You must decide whether

> the act of Dean Kelsie aided Gareau in the sense of assisting, helping, facilitating, or making it easier for Gareau to commit the offence of murder.
>
> You can find that Kelsie's conduct aided Gareau, even if Gareau could have committed the offence without Kelsie's acts of assistance. It is sufficient that Kelsie's conduct assisted, facilitated or made easier the commission of the murder by Gareau.
>
> You could consider the following evidence when you decide whether or not the Crown has proved that Dean Kelsie did something and that act aided Gareau to commit the offence of murder.
>
> I refer you to Mr. Kelsie's statement to the police on April 17th, 2001, where he says that he either passed the gun to Gareau or that Gareau took the gun from him when Kelsie indicated that he could not do it and that Kelsie did not leave the scene because he feared he would be shot by Gareau.
>
> Let me emphasize that aiding requires more than just standing by and watching someone commit an offence. Mere presence at the scene of an offence is not sufficient to make a person an aider. An onlooker is not an aider unless he actually does something to help the principal offender. The Crown must prove beyond a reasonable doubt that the accused did something and that the act, and that act, actually aided the principal offender to commit the offence.

[120] As can be seen, the portion which I have underlined above is not in the original charge to the jury. The original charge simply refers to the trial judge's earlier reference to his review of the statement.

[121] The recharge says that Kelsie said in his statement that he either passed the gun to Gareau or Gareau took it. At no time did Kelsie say he passed the gun to Gareau. The judge instructed the jury, as the Crown at trial suggested, that they could interpret Kelsie's statement as passing the gun to Gareau.

[122] On appeal, Crown counsel asks us to ignore what the trial judge and Crown may have said, and simply concentrate on what was actually said in the statement. In light of what was said in the statement, i.e., Gareau took the gun, the Crown argues manslaughter does not arise on these facts; it does not have an air of reality.

[123] It is difficult to accept this argument. First of all, the passing of the gun to Gareau is the basis upon which the Crown argued Kelsie could be an aider. If Gareau took the gun from Kelsie, arguably there would be no basis upon which the trial judge could find an air of reality to him being an aider. Second, we cannot

ignore what occurred at trial and the characterization of Kelsie's statement by both the Crown and the trial judge.

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

[125] In my view, the trial judge erroneously eliminated manslaughter as a verdict, which was available on a characterization of the evidence in Kelsie's statement.

[126] The required charge in such a case was set out in *R. v. Cribbin* (1994), 17 O.R. (3d) 548 (C.A.):

> The proper instructions with respect to the application of s. 21(1)(b) and (c) and 21(2) require that a distinction be drawn again between the appellant's possible liability for murder or for manslaughter with respect to his participation in the murder of Ginell by Reid. The jury should have been instructed that the appellant could only be found guilty of murder as Reid's accomplice if he knew of Reid's intention to kill Ginell or to cause him bodily harm that he knew was likely to cause death, and if he, Cribbin, intended to aid or abet Reid. Alternatively, under s. 21(2), Cribbin could be found guilty of murder if the jury were satisfied beyond a reasonable doubt that he formed an intention in common with Reid, or with Reid and others, to rob Ginell, and that Cribbin knew that the commission of murder would be a probable consequence of carrying out that intention. More specifically, under subsection (2), the jury would have to be instructed that Cribbin's liability for the murder committed by Reid would only arise if Cribbin knew that Reid would probably kill Ginell, in circumstances amounting to murder.

> The jury should then have been instructed about the possibility of Cribbin being guilty only of manslaughter, although as an aider and abetter to the murder committed by Reid*: R. v. Davy*, S.C.C., December 16, 1993 [now reported [1993] 4 S.C.R. 573, 86 C.C.C. (3d) 385*]*. If the jury were left in doubt about Cribbin's knowledge of Reid's intention to kill Ginell, or to cause him bodily harm that he knew was likely to cause death, Cribbin could be convicted of manslaughter if he intended to aid or abet Reid in assaulting Ginell, and if a reasonable person in the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertake*n: R. v. Davy, supra,* per McLachlin J. at p. 9.
>
> [Emphasis added]

[127] The jury received no such instruction and was left only with first degree murder, second degree murder or acquittal as available verdicts.

[128] It was an error for the trial judge not to leave manslaughter to the jury as an available verdict based on the Crown's theory and the trial judge's own characterization of the evidence.

[129] The Crown correctly points out that defence counsel did not object to the trial judge not instructing on manslaughter. In fact, trial counsel agreed that it did not arise on these facts. I cannot explain why, in light of the characterization of the evidence, trial counsel would make such an acknowledgement. I have already set out the law on a trial counsel's failure to object in the first issue on this appeal.

[130] The possibility of a verdict of manslaughter was available. Failure to charge the jury on manslaughter cannot be excused by the conduct of counsel. To do so would be a grave injustice.

[131] As the Supreme Court of Canada held in *R. v. Jackson*, [1993] 4 S.C.R. 573:

> It is true that the trial judge charged the jury clearly and correctly on the mental state required to find Davy guilty of murder. It is also true that the jury found Davy guilty of murder. Nevertheless, I agree with the Court of Appeal that one cannot be satisfied the verdict is just, given the failure of the trial judge to set out the basis for convicting Davy of manslaughter under ss. 21(1) and 21(2) and the absence of any instruction that a party may be guilty of manslaughter even though the perpetrator is guilty of murder. As Lord Tucker stated in *Bullard v. The Queen*, [1957] A.C. 635, at p. 644:

> Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.
>
> I cannot but conclude that Lord Tucker's admonition has not been followed in this case and the issue of manslaughter was not properly left to the jury. (p. 593)

[Emphasis added]

The Curative Provision

[132] Once again, the Crown asks us, if we find legal error, to apply the curative provision.

[133] In light of my finding that manslaughter was an available verdict, this is not a proper issue for finding there was no substantial wrong or miscarriage of justice, based on the verdict returned by the jury. I, again, refer to *R. v. Jackson*:

> *(2) Whether Section 686(1)(b)(iii) of the Criminal Code Applies*
>
> I am not satisfied that it is clear that a jury, properly instructed, would necessarily have returned a verdict of second degree murder against Davy. He was entitled to have the verdict of manslaughter clearly put to the jury. We cannot be certain that if this had been done, and notwithstanding the correct instruction on murder, that the verdict might not have been different. This is, consequently, not a proper case for the application of s. 686(1)(b)(iii). (pp. 593-94)

[134] Similarly, the appellant was entitled to have the issue of manslaughter left to the jury. Had the trial judge done so, I am not satisfied the verdict would have been the same.

[135] I would also allow this ground of appeal.

Issue #3 Did the trial judge err in instructing the jury that co-conspirators' hearsay evidence against the Appellant was capable of supporting his guilt?

Issue #5 Did the trial judge err in allowing the out-of-court statements of Paul Derry, a man who was not part of a conspiracy, to be used as evidence against the Appellant?

[136] In its factum the appellant raises as Issue #5, the trial judge's improper use of the acts and declarations of Derry when charging the jury on both the murder and conspiracy counts. As that issue is closely related to Issue #3, insofar as it relates to the conspiracy count, I will address them together. As I have already found there should be a new trial on the murder charge, it is not necessary to address whether the use of Derry's evidence in that aspect of the trial judge's charge was in error.

[137] From a factual point of view, there is nothing to implicate the appellant in any conspiracy to murder Sean Simmons prior to the drive to Dartmouth on October 3. In fact, the evidence of Derry was that the ride was conducted in silence. Nothing was said about violence or gunplay until Derry dissuaded James from going to the apartment building and James handed the gun to the appellant.

[138] Before that, Derry testified he had extensive contact and discussions with James and Gareau about the homicide but none with the appellant.

[139] The appellant says the trial judge erred in his instruction to the jury on what use could be made of the acts and declarations of co-conspirators when determining whether Kelsie was a member of that conspiracy. In particular, the appellant says that the trial judge erred in his instructions on what is known as the co-conspirators exception to the hearsay rule. Before addressing these arguments and the trial judge's charge, it is useful to set out the law with respect to the admissibility of evidence when a conspiracy is alleged.

[140] In *R. v. Carter*, [1982] 1 S.C.R. 938, the Court set out a 3-step process for the admissibility of hearsay evidence and the use of that evidence by the trier of fact, when deliberating on a conspiracy charge. *Carter* was summarized by the Ontario Court of Appeal in *R. v. Gagnon*, 2000 O.J. No. 3410 as follows:

> 50 In *R. v. Carter* (1982), 67 C.C.C. (2d) 568, the Supreme Court of Canada set out the following three-tiered approach to apply in conspiracy cases:
>
> > Considering all the evidence, the trier of fact must conclude beyond a reasonable doubt that the conspiracy charged in the indictment existed. This determination is independent of any consideration as to whether an

> indicted or unindicted conspirator is actually a member of the conspiracy charged.
>
> Once the trier of fact is satisfied beyond a reasonable doubt that the conspiracy charged existed, the trier of fact must determine, exclusively on the basis of "evidence directly receivable against the accused", whether the accused was probably a member of the conspiracy. The trier of fact is not to consider co-conspirator hearsay evidence at this stage of deliberations.
>
> If the trier of fact concludes that an accused was probably a member of the conspiracy, the trier of fact must determine whether the Crown has proven that accused's membership in the conspiracy beyond a reasonable doubt. At this stage of deliberations, the trier of fact is entitled to consider hearsay acts and declarations of co-conspirators made in furtherance of the objects of the conspiracy. The trier of fact must be cautioned that the mere fact that the conclusion has been reached that an accused is probably a member of a conspiracy does not make a conviction automatic.
>
> [Emphasis added]

[141] In *R. v. Mapara*, 2005 SCC 23, the Supreme Court of Canada affirmed the 3-step process set out in *Carter* and defined the co-conspirators' exception to the hearsay rule as follows:

> 8 The co-conspirators' exception to the hearsay rule may be stated as follows: "Statements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the accomplishment of the common object" (J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 303). Following *Carter*, co-conspirators' statements will be admissible against the accused only if the trier of fact is satisfied beyond a reasonable doubt that a conspiracy existed and if independent evidence, directly admissible against the accused, establishes on a balance of probabilities that the accused was a member of the conspiracy.
>
> [Emphasis added]

[142] Step 1 in *R. v. Carter* is concerned with whether the Crown has proven the existence of the conspiracy. At this stage, it is not concerned with who the members of the conspiracy were. McIntyre, J. explained in *R. v. Barrow*, [1987] 2 S.C.R. 694:

> 74 … It may often be true, that in determining beyond a reasonable doubt the existence of a conspiracy one may also determine the identity of some of the members. On some occasions and in respect of some conspirators it may not be necessary to have resort to the hearsay exception, but this is not always so. It is entirely possible, and not uncommon, to be satisfied beyond a reasonable doubt on all the evidence that a conspiracy for the purposes alleged in the indictment existed while still being uncertain as to the identity of all the conspirators. Once this is understood it becomes evident that there is no substance to the appellant's argument. On this first step what is considered is the existence of the conspiracy, not individual membership. At this point the hearsay exception is inapplicable. This is in accordance with the view expressed by Martin J.A. in *R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525, in reference to the conspirator's exception to the hearsay rule, where he said, at p. 544:
>
> > It only comes into play, however, where there is evidence fit to be considered by the jury that the conspiracy alleged between A and B exists. It is clear that where the fact in issue to be proved is whether a conspiracy exists between A and B, A's acts, or declarations implicating B cannot be used to prove that B was a party to the conspiracy, in the absence of some other evidence admissible against B to bring him within the conspiracy: see *Savard and Lizotte v. The King* (1945), 85 C.C.C. 254 at p. 262, [1946] 3 D.L.R. 468, [1946] S.C.R. 20 at p. 29.
>
> [Emphasis added]

[143] Of similar effect is the decision of *R. v. Jamieson*, [1989] N.S. J. No. 158 (N.S.S.C.A.D.) where Macdonald, J.A. held:

> The co-conspirator's exception to the hearsay rule can only be applied when it is first established beyond a reasonable doubt that a conspiracy existed and, on a balance of probabilities on evidence directly admissible against the accused, that he was a member of the conspiracy. It is therefore obligatory that a trial judge instruct the jury that the hearsay evidence which was introduced pursuant to the co-conspirator's exception to the hearsay rule can be considered by them only after:
>
> 1. They are satisfied beyond reasonable doubt that the alleged conspiracy existed;
> 2. That, on a balance of probabilities based on evidence directly admissible against the accused, he was a member of the conspiracy.

[144] It is important to recognize that at Step 1 of the *Carter* analysis, the acts and declarations of what others may have said are not introduced for the truth of their

contents but rather as circumstantial evidence of the existence of the conspiracy. This was explained by Cromwell, J.A. (as he then was) in *R. v. Smith; R. v. James*, 2007 NSCA 19:

> 189 The distinction between hearsay and non-hearsay is both critical and difficult in conspiracy cases. The gist of the offence is the agreement to perform an illegal act or to achieve a result by illegal means: *R. v. Douglas*, [1991] 1 S.C.R. 301 at p. 316. The agreement can rarely be proved by direct evidence. As Rinfret, J. said for the Supreme Court in *R. v. Paradis*, [1934] S.C.R. 165 at p. 168:
>
> > The actual agreement must be gathered from "several isolated doings", ... having possibly little or no value taken by themselves, but the bearing of which one upon the other must be interpreted; and their cumulative effect, properly estimated in the light of all surrounding circumstances, may raise a presumption of concerted purpose entitling the jury to find the existence of the unlawful agreement.
>
> 190 It follows from this that in many instances, acts and declarations of alleged co-conspirators may not be hearsay but original circumstantial evidence of the existence of the conspiracy, but these same acts and declarations may be hearsay for the purpose of showing who were members of the conspiracy: [Authorities omitted].

[145] It is only at the third step of *Carter* that out-of-court statements by persons who have been proven to have been members of the conspiracy and which are made in furtherance of it are admissible against other probable members (*R. v. Smith*, ¶195).

[146] With this backdrop I now turn to the trial judge's charge to the jury on the conspiracy count. For context, I set out his charge in some detail.

[147] Before giving the jury the *Carter* instruction, the trial judge instructed the jury they would have to be satisfied beyond a reasonable doubt about the identity of the co-conspirators. He said the following:

> It is not always easy to decide whether or not a conspiracy exists because no one would expect that this type of an agreement be in writing. You will, therefore, have to look at all the surrounding circumstances in order to decide whether or not the agreement existed. In particular, you should look for evidence that the accused or a co-conspirator, or co-conspirators, did or said something with another person, or other person, towards committing the indictable offence of murder.

The Crown alleges that Dean Kelsie was involved in the conspiracy together with James, Gareau and Smith. Before you can consider the acts of James, Gareau and Smith for the purpose of assessing guilt against Mr. Kelsie, you must be satisfied beyond a reasonable doubt that the identity of the particular separately indicted co-conspirator, or co-conspirators, has been proven to your satisfaction. If the identity of a co-conspirator is not proven beyond a reasonable doubt, then anything that he said or did is irrelevant, and cannot be used to establish the complicity of this accused. In the present case, with respect to the identification of the separately indicted co-conspirators, you have the evidence of Derry and Potts, that they were in the drug-dealing business with Wayne James, that they moved here in July or August with Steve Gareau, July/August of 2000, that Mr. James and Mr. Derry became drug-dealing partners, and that their supplier was Mr. Smith. Mr. Derry told you that he met Simmons at 12 Trinity, and that initially Mr. Simmons gave him a false name, but once he learned that Derry had been in prison with James, then Simmons properly identified him.

Derry was interested in selling some Quaaludes to Mr. Simmons, and advised Mr. James of this. Mr. James told Derry that he would have to check Simmons out at the clubhouse. Derry's evidence is that sometimes later he learned through James that the clubhouse was looking for Simmons. Derry testified that he was present at a meeting with Wayne James and Neil Smith, where he overheard Smith say to James that he wanted Simmons whacked, and saw Smith make a motion across his throat with his finger. Derry told you that he contacted Gareau, had him go to 12 Trinity with a view to advising him if and when Sean Simmons returned there. Derry's evidence is that it was his and Wayne James idea that Gareau should call Sean Simmons' wife to try to track Sean. His evidence also indicates that at some point Gareau was told why James and Derry were looking for Simmons. However, Kelsie was not present when this was discussed, and Mr. Derry never discussed with Mr. Kelsie why Simmons was being looked for. Mr. Derry was never present at any time when Wayne James discussed this subject with Mr. Kelsie.

Mr. Derry had no recollection of any conversation between James and Kelsie on October the 3rd when they drove from Halifax to Dartmouth. Derry also testified about a meeting after the shooting of Mr. Simmons where a reduction in the drug debt owed to Mr. Smith was discussed.

Although I have reviewed just part of the evidence applicable to this element, it is for you to consider all of the evidence to determine if the identity of the co-conspirator, or co-conspirators, has been proven beyond a reasonable doubt. As I stated previously, if the identity of a co-conspirator is not proven beyond a reasonable doubt, that anything that that co- conspirator said or did is irrelevant, and cannot be used by you to establish the complicity of Mr. Kelsie.

On the other hand, if you are satisfied beyond a reasonable doubt that proof of the identity of any one or more of the separately indicted co-conspirators

> has been made, you may then consider the acts and declarations of that or those separately indicted co-conspirators for the purpose of assessing guilty (sic) against the accused.
>
> [Emphasis added]

[148] The trial judge instructed the jury that they must determine who were the members of the conspiracy (which presumably would include Kelsie) before instructing them on Step 1 in *Carter*, that is, whether the conspiracy existed at all. In doing so, he recites the evidence that they can use to determine who were the members of the conspiracy. It included the acts and statements of James, Gareau, Smith and Derry.

[149] Although the appellant does not take particular issue with this aspect of the trial judge's charge, I included it for context and to show the type of evidence the trial judge was suggesting to the jury that they could use at various stages of the *Carter* analysis. As will be seen, he directs the jury that they can use the same evidence to find who was a member of the conspiracy, whether the conspiracy existed, and whether it proved Kelsie was a member of the conspiracy beyond a reasonable doubt.

[150] Furthermore, I included it to illustrate the structuring of the instruction had to be somewhat confusing to the jury. They are first told they need to determine who was a member of the conspiracy beyond a reasonable doubt before being instructed on how to determine, and what evidence to use to determine, whether there was a conspiracy.

[151] Next, the trial judge starts his *Carter* instruction. At this point he instructs the jury that the members of the conspiracy need not be known before they come to a determination as to whether there was a conspiracy:

> I must emphasize the necessity of an agreement. At this stage, you are not deciding who was and who was not a member of the alleged conspiracy. You are simply deciding whether or not the conspiracy as alleged existed. If you decide beyond a reasonable doubt that the conspiracy as alleged did exit (sic), then you will move on to consider who was a member of that conspiracy. On the other hand, if you decide that there is a reasonable doubt about whether the conspiracy alleged existed, you must return a verdict of not guilty.
>
> I refer you again to the same evidence, the meeting where Mr. Smith comments, his action, the fact that Derry and James discussed with Gareau efforts

> to locate Simmons, the telephone call on October 3rd from Gareau to Mr. Derry was then passed to Mr. James regarding the presence of Mr. Simmons at 12 Trinity Avenue, the shooting of Sean Simmons, Mr. Kelsie's own words in the intercept of March the 5th, Exhibit 46, where when talking about Wayne James not calling him, Mr. Kelsie states,
>
> > Tell him one thing, tell him when I called I was not calling for money, I was not calling for no nothing, for to hit - - no nothing.
>
> You have, as well, Mr. Derry's evidence concerning the alleged reduction of the drug debt following the shooting of Sean Simmons.

[Emphasis added]

[152] He then instructs the jury that they can use the same evidence he recited in instructing them on deciding who were co-conspirators to determine if a conspiracy actually existed:

> I refer you again to the same evidence, the meeting where Mr. Smith comments, his action, the fact that Derry and James discussed with Gareau efforts to locate Simmons, the telephone call on October 3rd from Gareau to Mr. Derry which was then passed to Mr. James regarding the presence of Mr. Simmons at 12 Trinity Avenue, the shooting of Sean Simmons, Mr. Kelsie's own words in the intercept of March the 6th, Exhibit 46, where when talking about Wayne James not called him, Mr. Kelsie states,
>
> > Tell him one thing, tell him when I called I was not calling for money, I was not calling for no nothing, for to hit – no nothing.
>
> You have, as well, Mr. Derry's evidence concerning the alleged reduction of the drug debt following the shooting of Sean Simmons.

[153] The trial judge then moved on to Step 2 of *Carter* and directed the jury, correctly, that only direct evidence against Kelsie was admissible to show that he was a probable member of the conspiracy.

[154] He then itemized for the jury the evidence directly admissible against the appellant. This evidence arose entirely from events on or after October 3 including his presence in the car on the way to Dartmouth and the intercepted communications with Derry while he was in jail. Here is what the trial judge said:

> The following evidence is directly admissible against Mr. Kelsie on the threshold issue of probable membership in the conspiracy.

> His presence in the vehicle with Wayne James, Paul Derry and Tina Potts on October 3rd.
>
> His words as contained in Exhibit 45 were in reference to Mr. James, he said, "He gave me two - - two balls, man, maybe three."
>
> His words in Exhibit 46, again referring to Mr. James, Mr. Kelsie says,
>
> Tell him his words ain't no good to me, no more, man, nothing, man.
>
> As well, tell him one thing, when I called I wasn't calling for for money, I wasn't calling for no fucken - - no… nothing, for the hit or nothing.

[The last sentence is incorrectly transcribed in the Appeal Book. However, it was correctly quoted by the trial judge in his charge to the jury.]

[155] The trial judge then instructs the jury that if they are satisfied on the direct evidence admissible against Kelsie that he was a probable member of the conspiracy, they could move on to the next step (*Carter*, third step). In that step they could consider all of the evidence including what other members of the conspiracy said or did. His charge on that point is as follows:

> To determine whether you are satisfied beyond a reasonable doubt that Dean Kelsie was a member of the conspiracy you are entitled to consider all of the evidence. You are not limited, at this stage, to Mr. Kelsie's own words and conduct. Beside that evidence you can take into account that other members of the conspiracy said or did while the conspiracy was ongoing, and for the purpose of achieving its object or purpose. It is not everything that is said or done by any member of the conspiracy whether charged or uncharged, on trial or not on trial, on which you may rely to decide whether the Crown has proven that Mr. Kelsie was, in fact, a member of that conspiracy. There are two requirements:
>
> (1) The words and acts must be done while the conspiracy remains in existence;
>
> (2) they must be done in furtherance of the object of the conspiracy.
>
> To be in furtherance of the object or purpose of the conspiracy, the words or acts must be for the purpose of advancing the object of the conspiracy, carrying forward the common design, or taking steps in order to achieve its purpose, recruiting others to join, obtaining any necessary funds or equipment, arranging for the delivery of items required, checking out escape routes, are examples of words or acts in furtherance of the object or purpose of a conspiracy.
>
> The acts do not have to be unlawful, but what is said must not be solely a recounting of previous events or a reference to other crimes unrelated to the conspiracy.

> It is not necessary that Mr. Kelsie be the person who actually did the acts in furtherance of the conspiracy, or even that he understood it or knew about it. Similarly, it is not necessary that Dean Kelsie be the person who actually spoke the words in furtherance of the conspiracy, or even that he was there when they were spoken. A conspiracy is like a partnership in crime. Each member is an agent or a partner of every other member, and is bound by, and responsible for the words and conduct of every other member spoken or done to further their unlawful scheme.
>
> [Emphasis added]

[156] The trial judge then goes on to give examples of the acts and declarations that could be said to be in furtherance of the object of the conspiracy including hearsay evidence and Derry's evidence:

- Wayne James telling Paul Derry that "the clubhouse" (of Hells Angels) was looking for Sean Simmons and wanted to know when he returned to 12 Trinity Avenue;
- Neil Smith indicating to James and Derry at the Corner Pocket meeting, with the throat-cutting gesture, that Simmons should be "whacked";
- Wayne James and Paul Derry directing Steven Gareau to notify them when Simmons returned to the apartment at 12 Trinity Avenue;
- The efforts by Paul Derry and Wayne James to locate Simmons, by having Gareau call Simmons's home;
- Gareau's messages to Jylene Simmons saying that Derry had work for him;
- Gareau notifying Derry and James on October 3 that Simmons was at 12 Trinity Avenue;
- James obtaining the handgun from the residence before the drive to Dartmouth;
- Gareau meeting the car at the muffler shop after the group's arrival in Dartmouth;
- Gareau walking with the appellant to 12 Trinity Avenue.

[157] After giving these examples the trial judge says the following:

> Members of the Jury, these examples are not exhaustive, but merely serve to give you an indication of the statements and actions which can be considered as being a furtherance of the conspiracy to murder Sean Simmons.

[158] By instructing the jury these were mere examples of the evidence they could take into account, the trial judge invited the jury to consider and use anything which Derry said or did against Kelsie to prove he was a member of the conspiracy beyond a reasonable doubt.

[159] Later in his charge, the trial judge references other evidence that could prove Kelsie's involvement in the conspiracy, including:

- Kelsie going on the drive to Dartmouth
- Kelsie getting the gun from James or Derry;
- Kelsie left the vehicle with the gun and Gareau;
- The intercept referred to earlier; and
- Kelsie's statement.

[160] I will now return to the two issues the appellant identifies with the trial judge's charge:

(i) The trial judge invited the jury to rely on the acts and declarations of Derry as admissions against Kelsie to prove his membership in the conspiracy beyond a reasonable doubt;

(ii) The hearsay evidence which he references does not in any way implicate Mr. Kelsie in the conspiracy. These events all occurred before Kelsie could possibly have been a member of the conspiracy and there was no hearsay evidence that would implicate him in it.

I agree with the appellant on both of these points.

[161] Step 3 of the *Carter* analysis allows the trier of fact to consider hearsay acts and declarations of co-conspirators made in furtherance of the objects of the conspiracy. Derry was not a member of the conspiracy. He was not charged as a conspirator or named as an unindicted co-conspirator. So nothing he said or did

could be in furtherance of the conspiracy. There was no basis in law upon which his acts and declarations could be evidence against Kelsie.

[162] I appreciate that the trial judge indicated the potential members of the alleged conspiracy were Smith, James, Gareau and Kelsie. However, he never instructed the jury that they could not use the acts and declarations of Derry as admissions against Kelsie because Derry was not a co-conspirator. He did the opposite. He invited the jury to use Derry's acts and declarations to prove Kelsie was a member of the conspiracy. In doing so he erred.

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

[164] The only evidence upon which the jury could come to the conclusion that Kelsie was involved in the conspiracy starts with the car ride to Dartmouth. It consists of direct evidence and admissions by the appellant.

[165] From the instructions given by the trial judge, the jury would be left with the impression that there was something in the extensive hearsay evidence that was likely to take them from the appellant's probable membership in the conspiracy to his membership beyond a reasonable doubt when it could not. Again, this was in error.

[166] In these circumstances, the determination of Mr. Kelsie's involvement in the conspiracy depended entirely on the evidence of his own acts and declarations.

[167] Once again, the Crown invites us to discount the seriousness of these errors by the failure of trial counsel to object to the charge. I decline to do so. As with the first two grounds of appeal, it goes to the heart of the trial judge's charge on the conspiracy count. It left the jury with the mistaken impression that it could use evidence which was not admissible to determine Kelsie's involvement in the conspiracy.

[168] In my view, this was highly prejudicial to the appellant and constitutes reversible error.

[169] I would allow this ground of appeal and order a new trial on the conspiracy charge as well.

Conclusion

[170] It is not necessary to address the other grounds of appeal to dispose of the appeal. The appeal is allowed and a new trial ordered.

[171] Before closing I would like to add that despite the outcome of this appeal, this was a complex trial which was handled very adeptly by an experienced trial judge who was required to make a number of difficult decisions.

Farrar, J.A.

Concurred in:

Bourgeois, J.A.

Van den Eynden, J.A.