

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Ladelpha*, 2021 NSSC 324

Date: 20211130

Docket: CRH 498473

Registry: Halifax

Between:

Her Majesty the Queen

v.

Colin Eric Ladelpha, Kirk Kenman Carridice, Jacob Matthew Lilly,
Wesley Todd Hardiman, Omar Orlando McIntosh, and Matthew Ross Lambert

TRIAL DECISION

Judge: The Honourable Justice Jamie Campbell

Heard: September 22, 23, 24, 27, 28 and 29, 2021,
in Halifax, Nova Scotia

Counsel: Rick Woodburn and Scott Morrison, for the Crown
Billy Sparks, for the Defence of Colin Ladelpha
Kyle Williams, for the Defence of Kirk Carridice
Ian Hutchison, for the Defence of Jacob Lilly
Pavel Boubnov, for the Defence of Wesley Hardiman
Patrick Eagan, for the Defence of Omar McIntosh
Brian Church, Q.C. and Madeline Smillie-Sharp, for the Defence
of Matthew Lambert

By the Court (Orally):

[1] On December 2, 2019, Stephen Anderson, an inmate at the Central Nova Scotia Correctional Facility in Burnside was stabbed and beaten. He had arrived at the jail only minutes before. This is the decision with respect to the first case arising from that incident.

[2] Fifteen inmates were originally charged and were to be tried before a jury. Public health restrictions put in place in response to the Covid-19 pandemic limited the number of people who could gather in any space. All parties agreed that the trial could proceed before a judge sitting without a jury. It was also agreed that the group could be severed so that two trials could be held. This first trial was held at the Halifax Convention Centre to allow for social distancing as required by the public health regulations.

[3] One person in this group had his charges severed because of a medical condition. This case involved charges against 6 people. The charges are conspiracy to commit murder, attempted murder, unlawful confinement, aggravated assault, assault with a weapon, and obstruction of a peace officer. One person is charged with assaulting a peace officer.

[4] The trial concluded on September 29, 2021. It was agreed that a decision would not be delivered until both trials had been heard. The decisions were to be delivered on or about the same day. Evidence from this trial could not be used in the second trial. Evidence from that trial could not be used in reaching a decision with respect to these charges. And the accused in one trial could not be called to give evidence against the accused in the other trial.

PowerPoint Presentation

[5] In final argument Crown counsel used a PowerPoint presentation and provided paper copies of that presentation to both the court and Defence counsel. The entire presentation was not made orally in court and counsel left the document with the court to review. It was not made an exhibit at the trial. Now it has been made a judge's exhibit (Exhibit J1), because it was not part of the evidence at the trial but may be relevant as part of the court record for purposes of appellate review.

[6] The practice of using a PowerPoint or similar technique can be helpful. But it can also secure an unfair advantage. If the presentation is made in court and the

visual presentation acts as an aid to understanding, it is helpful. If opposing counsel have an issue with facts as asserted by the Crown to have been in evidence, they can raise that in response, in court. When a substantial amount of material is provided to the court, in a written form without being presented in court, Defence counsel do not have a full opportunity to review the details and offer comments. The judge is left with what amounts to a Crown brief, with no response.

[7] In this case I did not refuse to accept the written materials from Crown counsel. I indicated that I would not use them as a substitute for my recollection of the evidence as aided by my notes. I have reviewed the materials and while they assist in providing a detailed chronology, I have checked that chronology against the video that was in evidence at the trial. When words were alleged to have been said, I have not relied on the written materials but checked my notes to satisfy myself that the words asserted by counsel to have been reported by a witness as having been said, were reported by a witness in court as having been said.

[8] The legal arguments set out in the written materials were addressed by Defence counsel and in any event, there was no disagreement regarding the substantive law to be applied. There was disagreement regarding evidentiary matters, specifically the application of the co-conspirators' exception to the hearsay rule. The evidence that would have been admitted under that exception, were it to be applied, would not have changed the outcome with respect to any of the charges.

North 3

[9] Mr. Anderson and all the accused were inmates in the North 3 Wing at Burnside. It is a two-tiered living area with cells lining the perimeter on those levels. They front onto a dayroom on the first level. That is accessed by staircases from the second level. A railing runs around the second level creating the effect of a balcony.

[10] There are 32 cells in total and while some have two bunks most were occupied by one inmate. At the time of the incident there were 34 inmates on North 3. The cells have a basic bed, a desk and chair, and a metal toilet and sink unit. When inmates are locked down, they are locked inside those cells. The cell doors have a slot for food and a small window looking out to the dayroom.

[11] The dayroom is a large space with some cafeteria-style built-in tables and either 4 or 6 attached stools. There are two sets of molded plastic seats by the side of the opposite walls near two sets of telephones. There are also two sets of molded plastic seats in front of two televisions at opposite ends of the room. There is what appears to be a bookcase. There is nothing “homey” about the environment. It is functional, with hard seating, and resembles an older bus station waiting room more than the common space in a communal residence.

[12] Two correctional officers sit at a station in the dayroom.

[13] The dayroom is under constant video surveillance from cameras placed on the wall facing the staircases and cells. Those cameras recorded much of what happened in the moments leading up to and following the assault on Stephen Anderson. There are no surveillance cameras inside the individual cells, but the dayroom cameras can provide a glimpse into some of the cells when there is a clear line of sight. The technology that supports the cameras allows for the video to be slowed and stopped. There is a zoom feature that allows for a much more detailed view and the quality of the picture remains reasonably good after even quite substantial magnification.

Bouncing

[14] Reference was made to the jail practice of “bouncing”. Because it is an informal practice, not surprisingly there are no precise rules about what it means or how it is carried out. Generally, it involves inmates wanting to get another inmate, whom they deem unacceptable, out of their living environment and moved somewhere else. Prison authorities check each inmate for “incompatibles” or those with whom they could not be safely housed before they are placed in a unit.

[15] Sometimes an unacceptable person arrives whom some of the others want to have removed. That can be because of a “street beef”, which is an issue among two or more inmates that has been taken in from the outside, because the person is suspected of having been an informer, or because the person was convicted of a sexual offence. Those people might be considered unacceptable by the others. The bouncing can happen in a few ways. They can be asked to leave. They can be threatened with violence if they do not ask to leave the unit. Or they might just be assaulted on arrival. There was no clear evidence as to how severe an assault might be used to send that message.

[16] The practice became an issue at the trial because it might be used to support an inference that there was no intent to kill Stephen Anderson because the assault on him arose from an effort to bounce him from North 3. There was no evidence as to any motive for the assault.

Timing

[17] At the most, the “incident” with which this case deals took place over a period of less than 30 minutes.

[18] Stephen Anderson was admitted to North 3 on December 2, 2019 and entered the dayroom at 7:24 pm. He was assigned to Cell 8, under the middle staircase on the first level. He can be seen on the video wandering around the dayroom in an apparent state of some agitation. He was looking for medications that he wanted to have administered after his admission.

[19] There is no question about whether the person who goes into the cell is Mr. Anderson. He was identified. The quality of the video is good. It can be magnified without losing much by way of clarity. As with all the individuals named in the indictment he was identified on the video. Their movements can be followed over the course of hours. This is not a situation in which the video provides a quick glimpse of an otherwise unidentified person.

[20] At 7:49 pm Stephen Anderson went into his cell. About 13 seconds later, the first of the other inmates entered that cell.

[21] Mr. Lambert, one of the accused on this indictment, was the second person into the cell. He entered about 14 seconds after Mr. Anderson. He looked toward Cell 8 as Stephen Anderson went in, and he stood up almost immediately and started making his way toward the door. Others stood up at the same time and moved in the same direction. It is not difficult to trace Mr. Lambert’s movements in the minutes before he went into the cell. He was assigned to Cell 32. He can be followed on the video leaving that cell at 7:06 pm. He can be followed right up to the time when he entered Stephen Anderson’s cell and picked up again after he left.

[22] It is abundantly clear that Mathew Lambert entered Cell 8, occupied by Stephen Anderson and that he did so along with two other inmates in the space of 3 seconds. Three more arrived in the 4 seconds that followed. Six inmates entered Cell 8 in 7 seconds. Five of them had been together just outside the cell, and they

arrived together. The sixth, Colin Ladelpha, ran from upstairs. A seventh inmate, Kirk Carridice, arrived about 10 seconds later. There is no indication that they were at cross purposes. Mr. Lambert was not trying to stop anyone from going into the cell. They quickly filed in. The last members of the group appeared to be pushing their way in. There was no time for much of an exchange of views about whether Stephen Anderson should consider asking to leave North 3.

[23] Mr. Hardiman can be identified on the video as well. He, like Mr. Lambert, can be followed in the minutes leading up to the incident. It is not merely a matter of catching a glimpse of him. He was identified as the person assigned to Cell 10 and went into the cell after having a shower at 7:26 pm. His movements can be followed. Mr. Hardiman stood up from the table where he was sitting and moved toward Cell 8. Mr. Hardiman went into the cell as part of the group of who entered together.

[24] The video evidence shows that Mr. Ladelpha arrived from his cell upstairs and went into Cell 8. As he looked toward Cell 8 and appeared to notice people entering the cell, he picked up his pace as he made his way directly toward the door of the cell. He got there at about the same time as Mr. Hardiman, and just 4 or 5 seconds after the first person entered. Colin Ladelpha's movements can be followed in the time before he goes into Cell 8. He was assigned to Cell 17. He can be seen leaving that cell at about 7:13 pm and eating a meal. He can be followed to Cell 28, leaving Cell 28, and sitting at a table outside Cell 8. There is no question that the person on the video is Colin Ladelpha.

[25] Mr. Carridice's movements can also be traced in the time before the incident. He was assigned to Cell 26. He came out of that cell after Stephen Anderson entered Cell 8. He ran down the stairs. He arrived at Cell 8 and entered about 10 seconds after the last of the other 6 had gone in. He can be seen outside at first and then striking at someone in Cell 8. The body being struck appears to be shirtless. Mr. Carridice got into the cell with the others.

[26] By that time in the cell, were Matthew Lambert, Colin Ladelpha, Wesley Hardiman, Kirk Carridice and three others, Andriko Crawley, Austin Mitton and Kevin Clarke-McNeil, along with Stephen Anderson himself.

[27] At around 7:52 pm the doors to the cell opened.

Inside Cell 8

[28] There was no clear and unobstructed view into Stephen Anderson's cell. The door was closed for most of the time.

[29] When the door was opened after 3 minutes, Mr. Lambert, Mr. Ladelpha, Mr. Hardiman, Mr. Carridice and others walked out. There is no evidence to suggest that any of them were injured in an altercation. There was no blood identified as being theirs found inside the cell. There was no behaviour amongst them that would be consistent with some of them having gone into the cell to confront the others or to prevent Mr. Anderson from being assaulted. No one had to break up a fight amongst them.

[30] Seven people had immediately entered a confined space and as soon as they did that, the cell door was closed and held closed behind them. It would be a very large delegation of inmates if the purpose were to tell Mr. Anderson that he was not welcome on North 3. It is not reasonable to infer that the purpose was conversation or the delivery of a threat or ultimatum. It does not take 7 people to do that. It does not have to be done in a confined space. And the people doing it do not have to rush into the space and have the door shut behind them.

[31] And it is not reasonable to infer that Mr. Anderson acted aggressively toward those who came into his cell, requiring them to act in self defence. There were 7 of them in a small space. The door closed as soon as they made entry. None of them left. They remained in the cell for about three minutes. None of that is consistent with self defence.

[32] When Stephen Anderson came out of the cell he was injured. He had not been injured before the incident. The injuries were sustained within Cell 8 between 7:49 pm and 7:52 pm. It is not reasonable to infer that he already had puncture wounds that were hidden by his clothing and the wounds and the blood coming from them were just not visible when he entered the cell. His condition going into the cell at 7:49 pm was dramatically different from his condition leaving the Cell 3 minutes later.

[33] It is not reasonable to infer that Mr. Anderson injured himself. His injuries, including several puncture wounds, would not have come from a slip and fall or other accident. Sounds could be heard coming from inside Cell 8. Correctional officers heard slapping, punching, scuffling, kicking, and moaning.

[34] It is not reasonable to infer that after Mr. Anderson went into his cell, others arrived and a consensual fight happened to break out. It is a confined space. It is

small and cramped, especially with 8 adult men in it. It would be a very awkward spot in which to hold a fight and an even more awkward space in which to watch one.

[35] There is strong circumstantial evidence to support the inference that Stephen Anderson sustained the injuries in the cell at the hands of one or more of the individuals who were in the cell with him. There is no other reasonable inference that can be made about what happened inside Cell 8.

[36] Stephen Anderson was assaulted.

Outside Cell 8

[37] Just as the first people entered Mr. Anderson's cell, Jacob Lilly came from the bottom of the stairs and closed the door of Cell 8. Omar McIntosh walked over to join him, and they can both be seen holding the door closed. That was being done with some force. They were working against something. Mr. Lilly remained there, holding the door for a few seconds, then left and intercepted the correctional officers who had arrived about 20 seconds later and were making their way toward Cell 8. Omar McIntosh opened the door to allow Kirk Carridice to enter. Mr. McIntosh entered the cell himself a few seconds later and can be seen kicking. He came out 10 seconds after that and did something to his shoe.

[38] Mr. Lilly took a position next to B.J. Marriott, appearing to block access by the correctional officers. The correctional officers at this stage were aware that the use of any physical force by them could make a bad situation worse. They were trying to convince the inmates gathered around to disperse to allow them to get into the cell. They were not successful. They avoided making any physical contact with the inmates.

[39] Mr. Lilly can be seen moving to the other side of the staircase and blocking other officers from reaching the cell from that side.

[40] While the cell door was closed Mr. Lilly took his shirt off and used it to cover the small window of the cell.

[41] The video did not record sound. However, the witnesses said that the situation was chaotic and noisy. People were shouting. It was difficult in that environment to remember or even to hear precisely what each person was saying. The phrase that was repeated by the correctional officers as having come from the

crowd of inmates gathered in front of them was that, “This needs to happen.” It was not clear who said it and at what precise point it was said. If the phrase cannot be attributed to a person identified as being part of the common plan or joint enterprise, it should not be used to infer an intent or purpose on the part of any member of the group.

[42] Of the 6 individuals charged on this indictment, 4 went directly into the cell in which Stephen Anderson was being assaulted. They were Matthew Lambert, Wesley Hardiman, Kirk Carridice, and Colin Ladelpha. The other two, Jacob Lilly and Omar McIntosh were outside the cell, holding the door closed.

Lockdown

[43] Correctional Officer Grant Cook was called to North 3 with the rest of the staff. He could see activity in front of Cell 8 and a large gathering of inmates. He could see through the small cell door window and observed heads moving. He could not see what was happening, just that heads were moving. Like the other officers he was trying to get access to the cell and could not. They were concerned that someone was being assaulted. Correctional Officer Cook noticed at one point that the heads stopped moving and the people inside the cell appeared to be standing still. He said, “Look guys, it’s over.” He said that one of the inmates looked into the cell at around the same time and also said “It’s over.” It was at that time that the door opened and inmates inside the cell started to come out.

[44] Correctional Officer Cook could see inside and saw an inmate kick Mr. Anderson in the head as he was leaving the cell. He escorted that inmate to his cell and came back to find Mr. Lilly who was assigned to the same cell. He found Mr. Lilly who was at that time standing on top of a table. Correctional Officer Cook walked by Cell 8 and could see Mr. Anderson sitting on the floor, hunched over, bruised, and covered in blood. Mr. Anderson was in the cell with two correctional officers.

[45] The evidence of Correctional Officer Shane Kent was similar. He said that what he heard was “It’s over. It’s done.” and because it was muffled, he believed the words were spoken inside the cell, but he could not be sure. It was at that time that the inmates began to vacate the cell.

[46] Inmates were gradually locked into their cells. That was not done upon command. Some were escorted quickly while others roamed about the dayroom exchanging “props”, which were various types of greetings and eventually

meandered to their cells. There is a habit in North 3, if not in the entire facility, for inmates to exchange greetings before a lockdown. Some witnesses said that what happened during this lockdown was not typical in terms of the extent and nature of the exchanges while others said they noticed nothing out of the ordinary about it.

[47] As with any after the fact conduct, it is circumstantial evidence with respect to the offences charged. The Crown argued that it was evidence of the conspiracy to kill Stephen Anderson or of the common plan to assault him. It can be used but regard should be had to other potential inferences that might be drawn. In this situation, the exchanges could be consistent with the normal routine, though features of it were out of the ordinary. No one suggested that Jacob Lilly's standing on the table was a feature of the normal lockdown routine on North 3.

[48] In this case, that conduct should not be used to form any inferences about the nature or extent of the injuries that anyone intended to inflict upon Stephen Anderson. It should not be used to make inferences about the existence of a conspiracy or a plan amongst those present to kill or assault Mr. Anderson. It can be reliably used to infer that the inmates involved were behaving normally toward each other and had not been involved moments before in a confrontation with each other. Before going into Stephen Anderson's cell, they were behaving cordially toward each other. Those who entered together did so in a way that was purposeful, not random, and consistent with people functioning together on good terms. After they left Cell 8 and after the assault on Stephen Anderson, those who went into the cell and those who remained outside standing in front of the correctional officers were not confronting each other or behaving violently toward each other.

Stephen Anderson's Injuries

[49] Fern Hatcher was a Licensed Practical Nurse employed by the Nova Scotia Health Authority and working with Correctional Health Services at the Burnside facility. She responded to a medical distress code at North 3. She made sure that the medic on duty had received the code and she took the cart with emergency supplies to North 3. She could not go into the dayroom immediately. The safety and security protocols in place require that all inmates be locked in their cells before medical personnel can attend.

[50] Ms. Hatcher said that she waited 10 to 15 minutes outside while inmates were locked into their cells. She had no idea what she would be required to do but

had to wait while inmates gradually made their way into their cells after exchanging props.

[51] Correctional Officer Cook said that as Stephen Anderson stood up he held Mr. Anderson's arm. As can be seen from the video, Mr. Anderson left the cell under his own power and made a hand gesture over his head as he walked out.

[52] Ms. Hatcher said that when Mr. Anderson got into the hallway where she had been waiting, he slid himself down along the wall. She noticed that he was in considerable distress. He was having extreme difficulty breathing. He was bleeding from his nose and ear. His left eye was swollen shut. He had a bruise on top of his head. And he had several puncture wounds on his chest and back. Pressure was applied to the wounds. He was given an oxygen mask. And the medic started an IV to deal with the blood loss.

[53] Emergency Health Services were dispatched. Sometimes medical issues can be dealt with on site. This was not one of those times. Ms. Hatcher said that she knew that Mr. Anderson's injuries were going to require emergency medical treatment.

[54] EHS arrived in about 30 minutes. Mr. Anderson was handed over to EHS and transported to the hospital. The EHS dispatcher identified a puncture trauma and notified the Provincial Trauma Team.

[55] Dr. Michael Biddulph is a Provincial Trauma Team Lead. He was qualified as an expert in trauma medicine. He was the one who got the call. Trauma medicine is a separate branch of medicine dealing with trauma injuries and the team is called out when a trauma is deemed to be significant enough to require specialized attention. Dr. Biddulph got the call and his role was to organize the team for intake and assessment.

[56] The Trauma Team was activated to respond to this situation. They arrived at the hospital and began planning to deal with the injuries based on the information proved by EHS which was on the way with Mr. Anderson. When the Trauma Team arrived, a survey was undertaken to identify any potentially life-threatening injuries. Mr. Anderson was in distress. He could move air but complained of pain in his chest. There was penetrating trauma to his right side and Mr. Anderson was experiencing distress from not being able to oxygenate himself. With the penetrating trauma on one side of his chest, less mobility and more expansion on

that side and no sounds of breathing from that side the team diagnosed a pneumothorax. Air was getting into the chest cavity.

[57] This was a tension pneumothorax because there were higher pressure areas where there should be no air. It is a more severe and life-threatening form of pneumothorax. The person breathes in, and the air goes into the chest, but it can't get out. That puts pressure on the entire cardiovascular system. If untreated, a tension pneumothorax has an extremely high rate of mortality.

[58] The first treatment was the insertion of a needle into the chest wall to decompress it. When that was done there was air released and Mr. Anderson's vital signs began to improve. A chest tube was inserted between the ribs and a big gush of air came out. The chest x-ray did not show anything other than a pneumothorax at that time.

[59] Mr. Anderson was eventually treated for multiple contusions. The puncture wounds were treated. They were cleaned and repaired. It was not possible to determine how deep they were. The lung was in good condition and there was no evidence of lacerations or tears on the lungs.

[60] Mr. Anderson was bandaged to create a seal for the chest cavity and the tube was left in his chest. He was handed off by the Trauma Team to General Surgery.

[61] Mr. Anderson remained in hospital for 40 hours. Without treatment he would very likely have died. But his injuries were resolved, and he was released from hospital without an extended stay.

Conspiracy to Commit Murder – Section 465(1)(a) of the *Criminal Code*

[62] All of the accused are charged that they conspired to kill Stephen Anderson.

[63] A conspiracy means that there must have been an agreement between two or more people, to commit a criminal offence, in this case murder, an intention of two or more people to agree, and the intention to put the common design into effect. They need not have put the plan into effect and do not have to have done anything to further the plan. The crime is the making and agreeing upon the plan with the intent of carrying it out.

[64] It is not enough to prove that a person knew about the plan and may even have done some things in furtherance of the plan. They must have been part of a consensus to achieve the mutual criminal object here, murder. What a person does

can be used to support an inference that they were part of that agreement, but the acts themselves are not part of the offence.

[65] A conspiracy need not be complex. It does not have to be created over months, weeks, days or even hours. It can be quickly devised and poorly executed or not even executed at all. It does not have to be a clever or even sensible plan. A really foolish plan can still be part of a conspiracy.

[66] The Crown must prove the specific conspiracy named on the indictment. It is not enough to prove that the individuals charged had a plan to commit any unlawful act or an unlawful act not specified in the indictment. In this case, the Crown must prove beyond a reasonable doubt that there was a plan to kill Stephen Anderson or to wound him so severely that his death would be the likely result. If the Crown can only prove that there was a plan to assault or to cause bodily harm to Stephen Anderson, the conspiracy specified on the indictment has not been proven, so there is no conspiracy. There may be a plan in that case, but there is no conspiracy. To allow the Crown to prove that there was a plan to do something other than what is specified in the indictment would undermine the purpose of providing the particulars. That is to give the accused person information about what is being alleged so that he can have an opportunity to mount a defence.

[67] The Crown contends that the conspiracy began at around 7:28 pm when Jacob Lilly and Brian James Marriott were on the telephones in the dayroom. Mr. Marriott was on the telephone. His conversation was recorded but it is difficult to determine exactly what he said. It was words to the effect of “take care of that right now” or “go figure that out”, and “get 4 or 5 guys”. The reference to getting 4 or 5 guys is clearer on the recording.

[68] Jacob Lilly, when those words are spoken, told the person to whom he was speaking on the phone that something was going to happen and that he would call them back. It is not made clear that Mr. Marriott was directing Mr. Lilly but the timing suggests that Mr. Lilly’s actions were in response to Mr. Marriott’s request.

[69] Mr. Marriott is not named on this indictment. He was not a witness. The Crown says that his statement is admissible under the co-conspirators exception to the hearsay rule. It is also arguable that the statement is not hearsay at all because it is not a declarative statement intended to convey a statement of fact. It is an order or request that would address Mr. Marriott’s state of mind. Even if Mr. Marriott’s statement is admitted, it does not change the outcome.

[70] The Crown says that Mr. Marriott directed Mr. Lilly to get 4 or 5 guys to deal with something or take care of something. Mr. Lilly moved about the dayroom speaking to a few inmates and motioning to others to come to Cell 28. That was the cell assigned to Kaz Cox. Jacob Lilly went into Cell 28 at 7:28 pm. Mr. Cox was in that cell with 2 other inmates. Mr. Marriott ended his telephone call at 7:29 pm and stopped at Wesley Hardiman's cell. Mr. Marriott went to Cell 28 and was followed by Mr. Hardiman. At 7:32 pm Jacob Lilly waved to another inmate to come into Cell 28. That inmate went into the cell. Other inmates made their way toward Cell 28. Mr. Lilly waved to Mr. Lambert who then went to Cell 28. The last inmate arrived at 7:44 pm.

[71] There is a formal rule within the facility that prohibits inmates from going into each other's cells. The evidence about the enforcement of that rule did not provide a clear answer to whether the rule was consistently enforced. Sometimes two or more inmates can be in the same cell and there are no disciplinary consequences. Inmates might gather inside a cell for several reasons. Sometimes that is to avoid being seen and sometimes it is not.

[72] The group did not arrive in Cell 28 by happenstance. Most of them were called there. Jacob Lilly, Matthew Lambert, Wesley Hardiman, and Colin Ladelfa were in Cell 28 with 7 others in the minutes before the assault on Stephen Anderson. Omar McIntosh and Kirk Carridice were not part of that gathering.

[73] Those who were there were in a small space in which there was already a bed, a desk, and a toilet and sink unit. There would be no question that it was cramped with 11 adult men in it. There would be no reason to have 11 people in such a small space but to achieve a purpose. It would be a remarkably uncomfortable way to carry out a routine or friendly conversation. It is possible that the purpose of the gathering was to do something that they wanted to keep hidden from the correctional officers and the surveillance cameras, and that had nothing to do with the assault on Stephen Anderson that started about 3 minutes after the group filed out of Cell 28.

[74] Several of the inmates from Cell 28 moved to a group of tables close to the base of the stairs under which Cell 8 is located. There was some question as to which direction they were facing. The Crown contended that they were facing Cell 8. Defence counsel said that they were not. From the video evidence, they were not lined up in a rank facing Cell 8. But it is evident that their attention was drawn to

the area of Cell 8. Mr. Lambert was able to observe Stephen Anderson as soon as he entered Cell 8.

[75] When one group of inmates went from Cell 28 to the area at the base of the staircase, a smaller group of three, Mr. Cox, Mr. Fraser, and Mr. Marriott, went to the area around the phones across the dayroom from Cell 8. They had a line of sight to Cell 8.

[76] When Stephen Anderson went into his cell a group of 3 inmates followed him. That group included Matthew Lambert. Colin Ladelpha came down the stairs from his cell and entered Cell 8. He was joined by Wesley Hardiman and later by Kirk Carridice. Jacob Lilly came directly over to the cell door and closed it. Omar McIntosh did so as well. Mr. Lilly held the door for some seconds, then Mr. McIntosh did that on his own until the door was eventually opened.

[77] Mr. Marriott, Mr. Cox and Mr. Fraser, who were by the phones, walked over to the cell. The way they approached was not casual. It does not even seem to have been particularly rushed. They did not run. They walked purposefully and as a group. They kept close to each other so that they arrived as an identifiable group. They were joined by Mr. Lilly.

[78] The inmates prevented the correctional officers from gaining access to Cell 8 by impeding their progress. Their posture was defiant. They faced the correctional officers. They were not crowding toward the cell to see what was happening inside. Mr. Lilly was reported to have said “Nobody move”, “We’re not moving”, and “No one goes until it’s done”. That provides evidence of Jacob Lilly’s state of mind. But not of anyone else’s. He may have been speaking entirely for himself. The words do not provide any evidence of the nature of a plan or even the existence of a plan.

[79] The circumstantial evidence of a plan is substantial. Immediately after the gathering in Cell 28, inmates were in a position to observe Cell 8 and gain quick access to it. As soon as Stephen Anderson entered Cell 8, without any apparent signal being given, other than the entry of Stephen Anderson into his cell, the others entered behind him. Some entered, some closed the door of the cell and others blocked access of the correctional officers. Individuals acted independently in a way that was inconsistent with their actions being random, unplanned or spontaneous. The effort by inmates acting together allows for the reasonable inference that the effort was coordinated, with people having assigned roles discussed in the minutes before the assault took place.

[80] It is not reasonable to infer that the inmates gathered at random in Cell 28, just happened to congregate near Cell 8 and several of them, unbeknownst to the others, just decided to enter Stephen Anderson's cell, while others, without prompting or planning, closed the door and others blocked access to the cell by correctional officers.

[81] There was a plan. It was simple and perhaps hastily conceived. It did not consider the certainty that much of the activity would be recorded on video. But it was a plan.

[82] The Crown has not proven that there was a conspiracy to kill Stephen Anderson. Even if Mr. Marriott's words spoken at the phone and apparently acted upon by Mr. Lilly and Mr. Lilly's words to the effect that something was happening, were admitted in evidence for this purpose, they do not provide proof that any plan included an intention to kill. There is no indication that grabbing four or five guys would involve killing anyone. There is no evidence from what was said in Cell 28 to indicate that anyone discussed the potential that they would kill Stephen Anderson. There is no evidence from the preparation leading up to the assault that anyone intended that Stephen Anderson be killed or that part of the plan involved wounding him so severely that his death was the likely result.

[83] During the chaos, just as things were ending, Jacob Lily was reported to have said "I hope you fucking die" and referred to the maximum-security federal institution at Renous, New Brunswick. Even if Jacob Lilly expressed the hope after the event that Mr. Anderson would die, it is hardly strong evidence that killing Mr. Anderson was part of the plan and that anyone had the intention of fulfilling such a plan. It is equally consistent with a statement of bravado made during the chaos of the moment. He did not say anything to indicate that Mr. Anderson's death was part of Mr. Lilly's plan, much less that of anyone else.

[84] The assault that did take place was serious and the evidence of the assault that did take place can be used to make inferences about whether there had been a plan to kill Stephen Anderson. Stephen Anderson was wounded but he was not killed. He was stabbed in the chest by a weapon of some kind. He was cut and bruised. But his lungs were not injured. He was not stabbed in such a way that he suffered serious or any injuries to his internal organs. The group left him conscious on the floor and stopped the assault before anyone was able to intervene. The reasonableness of the inference that there was an intent to wound Stephen

Anderson as opposed to kill him has not been negated by the evidence of the assault itself.

[85] There was a plan. And the only reasonable inference was that the plan involved assaulting Stephen Anderson. The way the assault took place, in a confined space, with 7 individuals, with the cell door held closed, and physical injury being sustained by Mr. Anderson, does not allow for the reasonable inference that the plan was simply to commit a technical assault on Mr. Anderson without causing him bodily harm. The plan involved hurting him and causing him physical or bodily harm. The inference does not have to go further than that.

[86] The evidence does not establish beyond a reasonable doubt that the plan involved killing Stephen Anderson or injuring him so severely that his death was likely. The reasonableness of the inference that the plan involved causing bodily harm means that even if the inference that the plan involved killing him were reasonable it would not support the conviction. The existence of a plan to murder Mr. Anderson must have been the only reasonable inference.

[87] Each of the accused is not guilty on the first count of the indictment charging conspiracy to commit murder.

Attempted Murder – Section 239 of the *Criminal Code*

[88] All of the accused are charged with the attempted murder of Stephen Anderson.

[89] The charge of attempted murder is particularly difficult to prove. As my colleague Justice Hunt noted in *R. v. Baxter*, 2019 NSSC 274, at para. 104, it can be harder for the Crown to prove attempted murder than to prove murder itself. That is because of the requirement for the proof of the mental element of intent. It is the specific intent to kill. If the victim dies, there are some mental elements other than the intent to kill that can lead to a conviction. If a person is reckless as to consequences of an assault or anticipates that their actions may or probably will result in the victim's death, they can be found guilty of murder. But for attempted murder there must be the specific intent to kill. *R. v. Ancio*, [1984] 1 S.C.R. 225, at page 248.

[90] The fact that a person stabs another with life threatening results is not, alone, evidence of an intent to kill that person. It is not enough for the Crown to prove that the assailant intended to cause bodily harm that they knew was likely to cause

death and were reckless as to whether the victim died. The specific intent to kill must be proven. The evidence of that specific intent can be drawn by inference from circumstantial evidence. There must be some evidence, from which the trier of fact can infer that the stabber intended something more than the actual consequence of the wound.

[91] Repeated stab wounds to a vital area might provide circumstantial evidence of an attempt to kill even though the victim of the stab wounds survived. The inference can be drawn that the person who did the stabbing wanted to kill the victim but was not successful. In that situation the inference that a result other than death was intended would have to be found to be unreasonable.

[92] In this case, there is no evidence apart from the assault itself that supports the inference that those involved in the assault intended to cause the death of Stephen Anderson. There is no evidence that anyone said anything about killing him or used coded language to that effect. He was clearly assaulted. Had he not received treatment he likely would have died. But he did not.

[93] It could be argued that the severity of his wounds, which included puncture wounds to the chest and back, with lacerations and bruises to his head, would be such that would allow for the inference to be made that the people who inflicted those wounds wanted him to die. The evidence is also consistent with the inference that those who wounded Stephen Anderson wanted him to be wounded. The evidence shows that at some point, when Stephen Anderson was still conscious and sitting on the floor, those inside the cell stopped. Nothing had intervened to prevent them from continuing with the assault. They could have continued. They did not. That is consistent with the inference that they did not intend to kill him.

[94] Mr. Anderson was stabbed in the chest by using something. A weapon was not recovered. Whatever it was, it was sturdy enough to inflict puncture wounds to the chest and back. It may be reasonably inferred that if someone were seeking to inflict injuries that would result in the highest probability of death the target would be the neck. If a large group of men entered a small space intent on killing another and they were armed with even a rudimentary weapon intended to make a puncture wound, it would be reasonable to assume that they would have achieved their purpose. The fact that Mr. Anderson was not killed, and the fact that the assault stopped without any external cause, support the inference that the intent was not to kill him.

[95] As with conspiracy to commit murder, attempted murder does not allow for any included offences.

[96] Each of the accused is not guilty of attempted murder.

Aggravated Assault – Section 268(1) of the *Criminal Code*

[97] All of the accused are charged with committing aggravated assault. Aggravated assault involves an assault by which the person is wounded, maimed, disfigured, or has their life endangered. To be convicted of the offence the person does not have to have intended to wound or disfigure or endanger the life of the other person. They must only have intended to assault them with the “objective foresight of bodily harm”. *R. v. Godin*, [1994] 2 SCR 484. The offence is proven if the assault has the consequence of wounding, maiming, disfiguring, or endangering the life of the other person in circumstances in which it is reasonable to foresee the infliction of bodily harm.

[98] It has been proven beyond a reasonable doubt that the assault on Stephen Anderson involved at the very least wounding. He was beaten when attacked by several men in a confined space. Anyone involved in the plan to have one person assaulted in a cell by a group of 7 others, behind a door held closed, over a period of time permitted by preventing correctional officers from intervening, could not have reasonably foreseen anything less than bodily harm. It is not reasonable to infer that the intent of the plan was simply to assault Mr. Anderson in a way that involved a use of force that did not extend to causing bodily harm. Those involved need not have precisely calibrated the anticipated level of bodily harm. There is a broad range of injuries within the scope of bodily harm. But when bodily harm would be reasonably foreseen, and the person is wounded, that is an aggravated assault.

[99] The assault was undertaken as part of a coordinated effort or joint enterprise that had been planned minutes before. While the words spoken by Mr. Marriott and Mr. Lilly at the telephones do not support the inference of an intent to kill, they could be interpreted as the start of plan to assault Stephen Anderson. The “co-conspirators’ exception to the hearsay rule” may apply in prosecutions for substantive offences alleged to have been committed in concert. The safer course however is to not make use of them in determining whether there was a plan. The existence of a plan to assault Stephen Anderson can be reasonably inferred from the gathering in Cell 28 and the coordinated actions of those involved leading up to the assault. Those involved in giving effect to that plan were working together

toward a purpose. Section 21(1) of the *Criminal Code* makes anyone a party to an offence if they actually commit the offence, do anything to aid the person committing it or “abet” the person committing the offence. To abet includes encouraging, instigating, promoting or procuring the crime.

[100] With respect to each of the individuals named in the indictment who entered Cell 8, it can be said that, except for Mr. Carridice who can be briefly seen on the video engaging in the assault, no one else can be seen hitting, kicking, punching or doing anything to Stephen Anderson. They entered, with others, the door was closed, they came out a few minutes later and Mr. Anderson was left bleeding on the floor. Because no one saw which one of them administered the blows, on this theory none of them can be guilty. It would make it an astonishingly simple, perfect crime.

[101] The argument was made that had they been involved they each would had a noticeable amount of blood on them, just like Mr. Anderson. But Mr. Anderson was the only one with a significant amount of blood on his body and clothes. And it is not at all reasonable to suggest that he inflicted the injuries on himself while others stood at a distance in the small cell avoiding contact with the blood spatter. One or more of the people inside the cell caused Mr. Anderson’s injuries.

[102] It is not reasonable to infer from the evidence that Mr. Ladelpha was in the cell as a bystander who came to watch a fight. His involvement is well beyond mere presence. He was involved in the gathering in Cell 28, came down to the area outside Cell 8, returned to his cell briefly and when the assault started, promptly made his way into Cell 8. By entering the cell as part of a group in a small space he was facilitating and assisting in the assault of Mr. Anderson even if he never physically touched Mr. Anderson. The presence of each person would help to overcome Mr. Anderson. It is not reasonable to infer that he was there by chance, there to intervene to help Mr. Anderson, there to watch a fight in a small cell or defending himself from an attack by Mr. Anderson. Mr. Ladelpha is guilty of the offence of aggravated assault.

[103] Mr. Carridice was not part of the gathering in Cell 28. But he went directly from his cell on the second level down to Cell 8 and pushed his way in with the others. It was clear, once again, that he was not merely there as an observer. The timing of his arrival makes it unreasonable to infer that he happened upon an assault or came to Mr. Anderson’s aid. He can be seen on the video striking a person inside the cell. It is not reasonable to infer that he was there for any purpose

other than to participate in, facilitate or encourage the assault. He is guilty as a party to the aggravated assault.

[104] Mr. Hardiman was part of the gathering in Cell 28. He also remained outside Cell 8 until the moment when the first inmates entered the cell. He went into that small and confined space and remained there, where an assault was clearly taking place. He went into the cell in furtherance of the plan to assault Stephen Anderson. It is not reasonable to infer that he just happened to be in the cell or that he entered the cell to help Mr. Anderson or that he went in just to see what was going on. His presence facilitated the assault, and he is guilty as a party to the aggravated assault.

[105] Mr. Lambert was one of the first group to enter Cell 8. He too had been part of the gathering in Cell 28. He did not hesitate but was in Anderson's cell within seconds of Stephen Anderson entering. As soon as he arrived the altercation began. The way he entered the space with others was not consistent with his being just a visitor or someone who had dropped in to talk. Whether or not his hands had blood on them when he left, it is not reasonable to infer that he was in the cell while Stephen Anderson was being beaten and stabbed merely to watch or to try to intervene to protect him. His presence in that small space was part of the plan and he is guilty as a party to the aggravated assault of Stephen Anderson.

[106] Mr. Lilly and Mr. McIntosh held the door while those inside assaulted Stephen Anderson. They were aiding in the commission of the offence. They could see the offence taking place and their part in facilitating it was to prevent Mr. Anderson from leaving and to prevent correctional staff from intervening. Mr. McIntosh was not part of the gathering in Cell 28. But he could clearly see what was happening inside Cell 8 and was an active participant in holding the door shut then opening it for Mr. Carridice to enter. Mr. Lilly and Mr. McIntosh are guilty as parties to the offence of aggravated assault.

Unlawful Confinement – Section 279(2) of the *Criminal Code*

[107] Each of the accused is charged with unlawful confinement of Stephen Anderson.

[108] Mr. Ladelpha, Mr. Carridice, Mr. Hardiman and Mr. Lambert were inside Cell 8 when the assault was taking place. They had Mr. Anderson inside that small space for about three minutes. The confinement in this case cannot be separated from the assault. There is no evidence that Mr. Anderson was confined before he was assaulted. He was not confined after the assault. He just happened to have

been assaulted in a confined space. The purpose was not to restrict or limit his ability to move, it was to assault him.

[109] Stephen Anderson's inability to escape from the assault was integral to the assault itself. It was part of the assault. When a person is beaten in that way, their movement is restrained by the fact of the assault itself not by the commission of a separate offence. Jacob Lilly and Omar McIntosh were present at the door immediately after the others entered. They held the door shut and prevented Mr. Anderson from leaving. There was pressure being exerted on the door and they were clearly using force to keep it closed. That was part of the assault and they have been convicted as parties to the aggravated assault.

[110] Because there was no unlawful confinement as an offence separate from the aggravated assault, none of the accused can be found guilty of that offence.

Obstruction – Section 129(a) of the *Criminal Code*

[111] All those named on the indictment have been charged with obstructing the correctional officers engaged in the lawful execution of their duties.

[112] The officers who responded to the scene were functioning in the lawful execution of their duties.

[113] Mr. Lilly was one of the inmates who stood in front of the cell area and impeded the access to that area by the correctional officers. He can be seen on the video forming part of a group that clearly had as its purpose preventing the officers from getting to Cell 8 to intervene. The officers could theoretically, have deployed pepper spray (OC spray) or started to push inmates out of the way. That could have resulted in making matters worse and the judgement exercised was to use other means of moving the inmates first. But they were clearly obstructed by Mr. Lilly and some others. Mr. Lilly is guilty of the offence of obstruction.

[114] The circumstances of this event make it unusual. Mr. Lilly was found guilty as a party to the aggravated assault, in part because he held the cell door closed but also because he blocked access to the cell by correctional officers. A person inside the cell with Mr. Anderson would also be convicted of aggravated assault. It would not be fair to face conviction on two criminal offences based on his level of involvement in the same incident. A stay will be entered with respect to the obstruction charge.

[115] The other inmate on this indictment who was outside the cell for some of the time when the assault was taking place was Mr. McIntosh. He came down to Cell 8 and held the door closed with Mr. Lilly. He went into the cell around 7:49:39 and is in for about 10 seconds. He walked away from the crowd and watched as the other inmates blocked the correctional officers. He did not participate in that.

[116] It is difficult to see how Omar McIntosh could be found guilty of obstruction when what he did was participate in the assault and unlawful confinement. His actions did not make him a party to the offence of obstruction. He did nothing to obstruct the officers and did nothing to assist others in the obstruction of officers. After holding the cell door, he moved away and remained on the periphery.

[117] Mr. Ladelpha, Mr. Carridice, Mr. Hardiman and Mr. Lambert were in the cell with Mr. Anderson. They were doing nothing themselves to obstruct the officers in the performance of their duties. They were not a party to that offence because they did not encourage, facilitate, or assist in any way the others who were obstructing the officers. They are not guilty of that offence.

Assault with a Weapon – Section 267(a) of the *Criminal Code*

[118] No weapon was found that could be associated in any way to the assault on Stephen Anderson. Three short ceramic rods were found hidden in a bar of soap. No traces of blood were found on them, and the Crown did not assert that they were weapons used in the commission of these offences.

[119] The injuries on Mr. Anderson's body include puncture wounds. It would not be reasonable to infer that the wounds could have been inflicted by some part of the body. The only way that they could have been made was using an object of some kind, which if used for that purpose would be a weapon. Mr. Anderson was assaulted using a weapon of some kind.

[120] There is no evidence as to which of the individuals inside the cell used the weapon. And there is no evidence as to whether anyone knew that one of the others planned to use a weapon or had produced a weapon. There was a plan to assault Stephen Anderson but there was no evidence that the plan included a weapon or that any of the individuals on the indictment knew that a weapon was to be used.

[121] They are not guilty of assault with a weapon.

Assault of Correctional Officer – Section 270(1)(a) of the *Criminal Code*

[122] Jacob Lilly is charged with the assault of Correctional Officer Matthew Hicks while Mr. Hicks, as a peace officer, was engaged in the lawful performance of his duties.

[123] Correctional Officer Hicks was engaged in the lawful exercise of his duties when he responded to the incident on North 3. He said he was confronted by Mr. Lilly who saw him with his hand on his pepper spray cannister. He said that Mr. Lilly told him not to deploy it. He said that he felt his hand being swatted or batted away from the cannister.

[124] Correctional Officer Hicks did not see Mr. Lilly himself strike him. He was the person with whom he was engaged at the time, but he could not say that it was Mr. Lilly who struck his hand. He allowed that his hand might have been hit by someone else, either intentionally or by accident. That does not establish proof beyond a reasonable doubt.

Summary

[125] Colin Ladelpha:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Not Guilty

[126] Kirk Carridice:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Not Guilty

[127] Jacob Lilly:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Conviction Stayed

Count 7: Assault of a Peace Officer - Not Guilty

[128] Wesley Hardiman:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Not Guilty

[129] Omar McIntosh:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Not Guilty

[130] Matthew Lambert:

Count 1: Conspiracy to commit murder - Not Guilty

Count 2: Attempted murder - Not Guilty

Count 3: Unlawful confinement - Not Guilty

Count 4: Aggravated assault - Guilty

Count 5: Assault with a weapon - Not Guilty

Count 6: Obstruction - Not Guilty

Campbell, J.