SCC File No.: 34980

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

BETWEEN:

MATTHEW JAMES MURPHY

APPELLANT
(APPELLANT)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(RESPONDENT)

APPELLANTS' FACTUM
(MATTHEW JAMES MURPHY, APPELLANT)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

NOVA SCOTIA LEGAL AID
400 - 5475 Spring Garden Road
Halifax, Nova Scotia, B3J 3T2

Roger A. Burrill
Tel.: (902) 420-6580
Fax: (902) 420-1260
Email: roger.burrill@nslegalaid.ca

Counsel for the Appellant, Matthew James Murphy

SUPREME ADVOCACY LLP
397 Gladstone Avenue, Suite 100
Ottawa, Ontario, K2P 0Y9

Marie-France Major
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Appellant, Matthew James Murphy

PUBLIC PROSECUTION SERVICE OF NOVA SCOTIA
1225 - 1505 Barrington Street
Halifax, Nova Scotia, B3J 3K5

William D. Delaney, Q.C.
Tel.: (902) 424-6795
Fax: (902) 424-0653
Email: delanewd@gov.ns.ca

Counsel for the Respondent, Her Majesty the Queen

GOWLING LAFLEUR HENDERSON LLP
2600 - 160 Elgin St
P.O. Box 466, Stn "D"
Ottawa, Ontario, K1P 1C3

Henry S. Brown, Q.C.
Tel.: (613) 233-1781
Fax: (613) 788-3433
Email: henry.brown@gowlings.com

Ottawa Agent for Counsel for the Respondent, Her Majesty the Queen

TABLE OF CONTENTS

PAGE

PART I -- STATEMENT OF FACTS

OVERVIEW

1. --"Gimme, gimme the gat."

2. --"Blaze the Cherokee."

3. -- One minute, and eighteen seconds.

4. Two verbal expressions, and one very short period of time -- this evidence fundamentally accounted for the appellant's conviction in the Nova Scotia Supreme Court on charges of conspiracy to commit murder and attempt murder. It must be acknowledged that this evidence was not all that was before the trial judge – far from it – but it was surely the pivotal information that led to the convictions. The appellant was sentenced to a total of five years incarceration. He appealed to the Nova Scotia Court of Appeal partially on the basis that this was a verdict that no properly instructed jury, acting judicially, could reasonably render.

5. The majority of the Nova Scotia Court of Appeal dismissed the appeal. The majority felt that there was enough evidence to find that the trial judge had rendered a reasonable verdict. The dissenting Justice indicated otherwise and would have acquitted the appellant. This case comes to this Court, as of right, to determine whether the conviction upheld by the majority of the Nova Scotia Court of Appeal should be overturned and the dissenting judgment endorsed.

CONCISE STATEMENT OF FACTS

6. This case involved a fairly notorious shooting incident at the entrance to the I.W.K. Children's Hospital in Halifax, on November 18th, 2009. The victim was shot in the wrist while he sat in the passenger seat of a vehicle around supper time near the entrance of the hospital. It was an extremely dangerous situation. It had all the hallmarks of a brazen, if not desperate act, with at least three people engaged in a "shocking" example of thugs settling their "petty criminal grudges in a public setting".[1] Jeremy Alvin LeBlanc was found guilty of conspiracy to commit murder and attempt to murder in the same proceeding before the trial judge. He was sentenced to serve ten years incarceration concurrent on both counts.[2] Aaron Gregory Marriott, at the

[1] *R. v. Murphy*, 2012 NSCA 92, paragraph 98, Record, Vol. I [Tab 4]
[2] *R. v. LeBlanc*, 2011 NSSC 412 [Book of Authorities "BA" Tab 5]

outset of the scheduled trial, entered a guilty plea to attempt to murder and was ordered to serve fifteen years in jail.[3] Shaun Ryan Smith entered a guilty plea to one count of conspiracy to murder Jason Hallett and was sentenced to ten years in custody.[4]

7. But four people were charged. And, as it turned out, four were convicted. The validity of the fourth conviction is challenged in this appeal.

8. By all accounts, Matthew James Murphy's involvement in this whole affair was "short".[5] The trial judge characterized the appellant's role somewhat poetically in the sentencing judgment:

> I compare Mr. Murphy to the mythological Icarus who flew too close to the sun and his wings melted from the heat.
>
> It is likely that this marginal contact with the criminal element was the cause of his involvement with the three others, and it is also likely that this factor was the reason he did not abandon the enterprise as soon as he was aware of what was happening.
>
> Mr. Murphy's involvement obviously grew out of his desire to play with the big boys. Now all the so-called big boys are falling and Mr. Murphy is following them.[6]

9. The Crown's case consisted primarily of a series of private communication interceptions.[7] The police had also secured the video surveillance footage from the hospital that evening. When dovetailed together, this evidence presented a compelling picture of what went on in the moments before, during, and after the shooting outside the hospital. The substance of the interceptions was outlined in the majority judgment:

> [3] On November 18, 2008, Aaron Marriott, at the direction of his friend Jeremy LeBlanc, shot and wounded Jason Hallett outside Halifax's IWK Health Centre. All three men were known to the police. In fact, earlier that very day, an integrated police task force known as "Operation Intrude" had secured a judicial authorization to tap the phones of certain individuals known to be involved in Halifax's illegal drug trade. Marriott and LeBlanc were both primary targets of this investigation. The police also knew that,

---

[3] *R. v. Marriott*, 2011 NSSC 414 [BA Tab 6]
[4] *R. v. Smith*, 2011 NSSC 413 [BA Tab 9]
[5] (paragraph 58 of Trial Judgment), Record, Vol. I [Tab 2]
[6] Sentencing Transcript, paragraphs 17 – 19, Record, Vol. I [Tab 3]
[7] See paragraph 63 of the Court of Appeal Judgment for a synopsis of additional witnesses and evidence called at trial, Record, Vol. I [Tab 4]

although LeBlanc and Hallett had been lifetime friends, by that time Hallett was "on the wrong side of the fence of Jeremy LeBlanc". So when the wiretap monitors heard LeBlanc and Marriott talking on their cell phones about a potential encounter with Hallett at the hospital, the quick response unit was immediately dispatched. They were too late to prevent the shooting but their intercepted recordings represented powerful Crown evidence in the ensuing conspiracy to murder and attempted murder charges. Specifically, they revealed the following narrative.

[4] Around 6:00 p.m. on November 18th, LeBlanc and the appellant were driving in LeBlanc's Ford Mustang when LeBlanc's girlfriend, Jennifer Hachey, called him. She called from the IWK where she worked to report that Hallett and his friends were there. He was apparently visiting his newborn child. She told LeBlanc that Hallett's presence made her uncomfortable. As the following interception reveals, LeBlanc tried to comfort her; telling her to call him back "if he says something":

LeBlanc:	(Sniffs) Yeah, so what? He ain't saying nothin' to you
Hachey:	He's gonna see me all night, he's like, in a parent room right by my desk
LeBlanc:	Yeah, that's all right, well, well, well, what do ya, what can ya do? If he says somethin', call me back. He ain't gonna say nothin'
Hachey:	He won't say anything, eh?
LeBlanc:	No, he won't say nothing to you, trust me
Hachey:	What if he goes to like, my boss and says
LeBlanc:	He's probably gonna leave if you see you
Hachey:	Okay
LeBlanc:	Thinkin' that you're gonna call me
Hachey:	'Kay, anyway. I'm goin' back up, fuck. They're staying' right in a room here. There must be somethin'
LeBlanc:	I don't ____
Hachey:	Wrong with the baby
LeBlanc:	Hon, I don't care, just do your job, okay?
Hachey:	Then bye
LeBlanc:	Love you. Call me back right away if anyone says anything to you
Hachey	Okay. He's with like, five guys.
LeBlanc:	Oh yeah?
Hachey:	(Sighs)
LeBlanc:	Okay, I love you
Hachey:	Bye

[5] A couple of minutes later, LeBlanc phoned Marriott to tell him about Hallett's presence at the hospital. More calls and text messages followed, culminating in four people heading to the IWK to find Hallett - LeBlanc and

the appellant in the Mustang with Marriott and another associate, Shaun Smith, in a second vehicle.

[6] LeBlanc and the appellant arrived first at approximately 6:40 p.m. After seeing Hallett outside the hospital, LeBlanc called the second car and gave driving directions to Smith:

Smith:	Hello
LeBlanc:	I'm watchin' Hallett, his cousin, ____
Smith:	Say what?...
LeBlanc:	I'm watchin' them right now, I'm lookin' at them walkin' right past me
Smith:	Where at, I'm on, I'm right on Robie Street
LeBlanc:	Just come down here
Smith:	Say what?
LeBlanc:	____ down here
Smith:	Where you at parked though, watchin' them?
LeBlanc:	Right there, like around, how you go around the loop
Smith:	What, they're sittin' right there?
LeBlanc:	Hmm
Smith:	Where you sittin' at, so we can come to you and see?
LeBlanc:	You'll see me
Smith:	What, so, do I, you don't wanna pull right in the hospital, do 1?
LeBlanc:	Fuck, they're goin' in the underground parking lot actually
Smith:	They're goin' to the underground parking lot?
LeBlanc:	As if they're gonna pull out
Smith:	So is there any way I can block 'em?
LeBlanc:	Just ah, just sec. Just come down, you'll see me
Smith:	Yeah, I won't see ya buddy, I'll stay on the phone right with ya...
LeBlanc:	Hold up

[7] Then the appellant took LeBlanc's phone and continued to guide Smith and Marriott to the right location. LeBlanc can be heard in the background. Notice that when Smith and Marriott arrived, Smith says: "Gimme, gimme the gat". This is significant because, as I will later discuss, the judge concluded that this reference to the "gat" was to a gun:

Murphy:	Hello
Smith:	Hello
Murphy:	Hey, what's up?
Smith:	What's up buddy?
Murphy:	Yeah. You know where we're at. Hello?
Smith:	Yeah, I know where you're at, but

Murphy: Ah, well, they're right there. In that loop around
Smith: Right in the loop?
Murphy: Yeah
LeBlanc: (Background: Walking ____ underground)
Smith: But does the underground gonna come that way?
Murphy: Yeah, they're goin, that's where they're goin' now
Smith: Do they, do they gotta come out on Robie?
Murphy: They gotta come, I don't know what street they gotta come out on, but they're lookin'. We see them right now. ____
Smith: We're right around the corner bud, we're just at a
LeBlanc: (Background: You go on the straight street and just ____)
Murphy: Go on, go on the straight street and you'll pull over
LeBlanc: (Background: Like, don't pull into the hospital)
Murphy: Don't pull into the hospital
LeBlanc: (Background: Pass like, all the universities)
Murphy: Go past all the universities
Smith: So, take a left right at the. Hey, we're right at the top of the place. I see you guys right now
Murphy: ____
Smith: You're in front of me
Murphy: All right, well we're, we're stopped
(Background: Yeah, they see us right now)
Smith: What?
Murphy: Do you see us loopin' around?
Smith: Yeah
Murphy: Yeah, they're well, they're right there on the right
Smith: Right there on the right?
Murphy: Yeah
Smith: (Background: ____ right here)
Murphy: ____
Smith: (Background: Gimme, gimme the gat)

[8] A minute or so later, LeBlanc spotted Hallett near the Tim Horton's shop. LeBlanc then narrated Hallett's exact movements, which in turn were relayed to Marriott and Smith by the appellant. Among other things, he relayed that Hallett had jumped into a Jeep Cherokee:

Murphy: Yeah, they're back in front
Smith: What?
LeBlanc: (Background: ____ at Tim Horton's)
Murphy: Tim Horton's there
Smith: Turn around?
Murphy: Yeah
LeBlanc: (Background: Actually Hallett's right outside)

Murphy:	Right in the loop
Smith:	Stay on the phone with me
Murphy:	Yeah
LeBlanc:	(Background: They're talkin' to someone in a truck)
Murphy:	Hello
Smith:	Yo
Murphy:	Yeah
LeBlanc:	(Background: Hey, tell them they're jumpin' in the Cherokee)
Murphy:	They're jumpin' in the Cherokee
LeBlanc:	(Background: They're jumpin' in the Cherokee)
Smith:	So are they going to be pullin' out on Robie, ask him
Murphy:	Yeah, they're gonna be pullin' right out on that street that we were just on
Smith:	They're gonna be pulling out here, on the street we were just on?
LeBlanc:	(Background: Tell him to come into the hospital ____)
Murphy:	Come in, come in
LeBlanc:	(Background: ____ we're goin' into Tim Horton's ____)
Murphy:	Come in, yeah, we're goin' in Tim Horton's, come in.

[9] Then seconds later LeBlanc gave Marriott the order to "blaze the Cherokee":

(Background noise and conversation through intercept)	
Smith:	(Background: ____ Cherokee)
Murphy:	Hello
Smith:	Hello
Murphy:	Yeah, is that you guys pulling in or?
Smith:	Yeah, where's the Cherokee? Is that the Cherokee?
LeBlanc:	____ in the Cherokee right in front. See it over to the right?
Smith:	(Background: Here, get out and blaze the Cherokee. Get out and blaze that Cherokee)
Marriott:	(Background: That one right there?)
Smith:	(Background: Go, yeah)
Marriott:	(Background: ____)
Smith:	(Background: I don't give a fuck. Go)
LeBlanc:	Blaze the Cherokee, the Cherokee

[10] Marriott promptly complied with this order by getting out of his vehicle and firing several shots into the Cherokee. Only one hit its target, striking Hallett in the wrist. All four men then rapidly fled the scene in the same two cars.[8]

[8] *R. v. Murphy*, 2012 NSCA 92, paragraphs 3 – 10, Record, Vol. I [Tab 4]

10. The exact timing of the intercepts is notably absent in the majority judgement. The dissenting judgment, however, provides fine tuning of the timing of the comments, and action taken thereafter.[9]

11. For both judgments, two expressions found in the intercepts were pivotal:

1. "Gimme, gimme the gat" – this was said by Smith to Marriott in their vehicle and picked up on the intercept at 6:42:45 p.m.

2. "Blaze the Cherokee" – this comment marked the final comment before the shooting and is said in the background by Smith, and repeated on the phone by LeBlanc, at 6:45:49 p.m.

12. For the trial judge as well, these expressions were fundamental to the inferences that were drawn.[10]

13. The appellant emphasizes the importance of the timing. That is, at MOST, the trial court determined that the appellant formed the intent to assist in murder and participated in a conspiracy to commit murder within one minute and eighteen seconds of "gimme, gimme the gat." The manifestation of this intent, as determined by the trial judge, was the assistance provided to the eventual shooter (Marriott), through a third party (Smith), in locating the vehicle of the victim at the direction of LeBlanc.

PART II – STATEMENT OF ISSUES

14. This appeal highlights one issue:

> Did the majority of the Nova Scotia Court of Appeal err in determining that the trial judgment was reasonable and that convictions for attempted murder and conspiracy to commit murder could be supported by the evidence within the meaning of s. 686(1)(a) of the *Criminal Code*?

[9] *R. v. Murphy*, 2012 NSCA 92, paragraphs 75 – 82; 85, Record, Vol. I [Tab 4]
[10] Trial Judgment, paragraphs 58 and 68, Record, Vol. I [Tab 3]

PART III – STATEMENT OF ARGUMENT

UNREASONABLE VERDICT

15. Well after the decisions in *Yebes,*[11] *Biniaris,*[12] and *Barrett,*[13] this area of law remains a fertile ground of appeal. The parameters of appellate review are well known and oft-stated. However, the application of the principles has proven to be much more difficult. This appeal demonstrates how the courts below struggle with the concept of the reasonable jury, acting judicially, and its proper instruction.[14] A conflict in approach to an unreasonable verdict appeal is manifested in the responses by the court below to the argument.

16. The majority viewed its fundamental role as follows:

> [21] Therefore, turning to our role, we must decide whether, based on the evidence presented, the judge could have reasonably inferred this knowledge (of murder) upon the appellant.[15]

17. This statement of law does not offend its jurisprudential roots, but really says very little other than acknowledging, quite rightly, a deferential standard of review.

18. The dissenting judgment agreed in principle but was careful to add an important caveat:

> [59] As a practical matter, if an appeal court judge concludes that a verdict is unreasonable, he or she *a priori* has concluded that he or she would not have convicted. Such a conclusion is a necessary, but manifestly insufficient basis to intervene. What more is required? In my view, a judge must conclude that the conviction is not reasonably available on the evidence adduced, keeping in mind what the Crown was required to prove beyond a reasonable doubt in order to establish the accused's guilt.[16]

19. The crux of the defence at trial, and the review on appeal, was whether a trier of fact could reasonably infer that the appellant knew he was a party to an activity that had the specific

---

[11] *R. v. Yebes* [1987] 2 S.C.R. 168 [BA Tab 10]
[12] *R. v. Biniaris*, 2000 SCC 15 [BA Tab 2]
[13] *R. v. Barrett*, 2004 NSCA 38 [BA Tab 1]
[14] see also *R. v. R.P.*, 2012 SCC 22 [BA Tab 8]; *R. v. Eastgaard*, 2012 SCC 11 [BA Tab 4]; *R. v. P.D.T.*, 2012 SCC 62 [BA Tab 7]
[15] *R. v. Murphy*, 2012 NSCA 92, paragraph 21, Record, Vol. I [Tab 4]
[16] *R. v. Murphy*, 2012 NSCA 92, paragraph 59, Record, Vol. I [Tab 4]

design and intent to murder Jason Hallett. The majority of the Court of Appeal,[17] determined that the trial judge could reasonably infer that "murder was in the air" because:

> 1. "gat" means gun;
>
> 2. the appellant heard the words "gimme the gat";
>
> 3. that the appellant would, therefore, have been aware at this time that the goal was to shoot Hallett; and
>
> 4. despite this knowledge, chose to assist the shooter by identifying the location of the victim for him.[18]

20. Simple as that.

21. Yet, it can't be this simple if one breaks down the requirements of proof -- as found in the dissenting judgment. Both the majority and dissenting judgments acknowledge the high onus of proof upon the Crown in attempt murder and conspiracy to commit murder allegations.[19] But it is only the dissenting judgment that actually considers the elements of the offence in the context of the established evidence regarding conspiracy:

> [85] There was not one word uttered during the intercepted communications that spoke of or hinted at a plan to murder Jason Hallett. No threats were made. The very first time that the presence of a gun was mentioned was at 6:42:45. One minute and eighteen seconds later Murphy describes to Shaun Smith the present location of Jason Hallett. The call ends with Murphy telling Smith that he and LeBlanc are going into Tim Horton's and to come in. Within seconds, Smith says to Marriott to "get out and blaze the Cherokee". LeBlanc is then heard seconds later repeating the phrase "Blaze the Cherokee, the Cherokee".
>
> [86] Prior to the actual unfolding of events, including the uttering of the "blaze the Cherokee" comments, it was certainly open for the trial judge to conclude that Murphy knew that LeBlanc, Smith and Marriott wanted to confront Jason Hallett and that at least Smith and/or Marriott were armed. But this reasonable inference does not, with respect, lead to a reasonable inference that Murphy knew that Smith and/or Marriott had the specific intent to kill Hallett. Not all of the knowledge possessed by LeBlanc, Smith and Marriott can be visited on Murphy. Recall that the trial judge found as a

---

[17] *R. v. Murphy*, 2012 NSCA 92, paragraphs 22 – 24, Record, Vol. I [Tab 4]
[18] *R. v. Murphy*, 2012 NSCA 92, paragraph 23, Record, Vol. I [Tab 4]
[19] *R. v. Murphy*, 2012 NSCA 92. Majority judgment, paragraph 20; Dissenting judgment, paragraphs 40 - 52, Record, Vol. I [Tab 4]

> fact that prior to being in the car with LeBlanc, the appellant had no knowledge of any plot or plan to kill Hallett.[20]

22. This is also seen in the trial judge's conclusions about whether the appellant acted as a party to attempt murder within the established principles of law:[21]

> [90] The trial judge found there was ample evidence that Murphy was an abettor. With respect, there was no evidence that Murphy encouraged, instigated, promoted or procured the attempted murder of Jason Hallett. There was evidence that Murphy did and said things that could be said to have assisted or aided Smith and/or Marriott to murder Hallett. Perhaps the reference to being an abettor was a slip and he meant to say aider. I will assume that to be the case.
>
> [91] Nevertheless, I find the conclusion of criminal liability as an aider to attempted murder to be unreasonable. The trial judge acknowledged that the key time was after LeBlanc handed the phone to Murphy during the 6:40 intercept. During that call, Murphy relayed the information from LeBlanc to Smith about their location and how to find them and that Hallett was present. At the end of it, Smith says to Marriott "Gimme, gimme the gat". From this evidence, the trial judge says it was a clear indication "murder was in the air" and the "gat" reference a clear indication that a gun was in play. Notwithstanding these indications, Murphy continued to direct Smith about Hallett's location. It was during these short minutes that the trial judge said Murphy became a party.
>
> [92] Nowhere does the trial judge consider whether the actions of the appellant were done with the subjective intention of aiding Aaron Marriott or Shaun Smith to murder Jason Hallett with the knowledge that he or they had the specific intent to kill Jason Hallett. Having knowledge that a gun was in play does not, without more, equate to a reasonable inference that Murphy knew that Aaron Marriott or Shaun Smith intended to kill Jason Hallett. There was nothing said about "we're going to blow his head off" or "we're going to waste him".
>
> [93] It is a reasonable inference that Murphy knew that there was to be a confrontation, if possible. If Murphy heard the reference to a "gat", and an inference is drawn that he knew it meant a gun, then it is also a reasonable inference that it would be an armed confrontation. But, in my opinion, this does not permit a reasonable inference that the appellant knew that Marriott and/or Smith intended to kill Hallett and that his actions were done with the subjective intention of aiding them to kill Hallett.

---

[20] *R. v. Murphy*, 2012 NSCA 92, paragraphs 85, 86, Record, Vol. I [Tab 4]
[21] See *R. v. Briscoe*, 2010 SCC 13, paragraphs 13 – 18 [BA Tab 3]

…

> [97] With the benefit of hindsight as to what eventually transpired, the intentions of Smith and Marriott are not open to serious question. But based on the evidence at trial, in my opinion, it is not a reasonable inference that at the time Murphy spoke on the phone he knew Smith and/or Marriott had the specific intent to kill Jason Hallett, and his acts were done for the purpose of aiding them to do so.[22]

23. By contrast, the majority judgment simply refers to paragraph 68 of the trial court judgment and states: "In my view, these are all reasonable inferences to draw from this evidence."[23]

24. This Court, recently, in *R. v. Eastgaard*[24] had an opportunity to review an unreasonable verdict. At first blush, the one paragraph dismissal by the Chief Justice would seem problematic for the appellant.

25. But, contextualizing the Chief Justice's reasons for dismissal is helpful. That is, *Eastgaard* was a case where the appellant, while under surveillance by the police, was watched as he stashed an item under some bushes after leaving a car. After Mr. Eastgaard's arrest, the police searched these bushes and discovered that the stashed item was a loaded firearm. The issue was whether a trial judge could reasonably conclude that the appellant knew, or was wilfully blind to the fact, that the gun was loaded. He had been charged under s. 95(1) of the *Criminal Code*. A constituent element of the offence was knowledge, or willful blindness, by the accused that the firearm was loaded.

26. The trial judge convicted. The Alberta Court of Appeal (M.B. Bielby J.A. dissenting) upheld the conviction. The appellant argued, before this Court, that it was unreasonable to find that possession of a firearm for two or three seconds and the act of hiding it in the bushes was enough to prove knowledge that the gun was loaded. That is, there were other inferences reasonably available on the evidence.

---

[22] *R. v. Murphy*, 2012 NSCA 92, paragraphs 90-93 and 97, Record, Vol. I [Tab 4]
[23] *R. v. Murphy*, 2012 NSCA 92, paragraph 24, Record, Vol. I [Tab 4]
[24] *R. v. Eastgaard*, 2012 SCC 11 [BA Tab 4]

27. Interestingly enough, the majority of the Court of Appeal agreed that if this was the only evidence of knowledge of the firearm, then the conviction would be unreasonable.[25] However, this Court agreed that there was much more evidence making the trial judge's conclusion not unreasonable – i.e., the appellant was arrested wearing a bulletproof vest, he had been shot two months earlier, and he was under a weapons prohibition:

> [T]he facts show that the appellant operated in a milieu in which he could be expected to be involved in confrontations and was no stranger to confrontations involving gun.[26]

28. Therefore, it was not unreasonable for the trial judge to infer knowledge that the handgun was loaded.

29. The comments by the Alberta Court of Appeal in *Eastgaard* illuminate the lack of substantive evidence as to intent in the case at bar:

> There is no evidence that Mr. Murphy was a member of this conspiracy before getting into Mr. LeBlanc's Mustang. There is no evidence that he did anything in furtherance of the conspiracy after leaving the scene with Mr. LeBlanc.[27]

30. In contrast to Mr. Eastgaard, the appellant was "just a nobody, really".[28]

31. Further, unlike in *Eastgaard,* the Crown did not advance the concept of wilful blindness to uphold the conviction in the court below.[29]

32. There is a difference between a deferential standard of review, and a non-interventionist standard of review. The appellant says that the majority of the court below adopted a non-interventionist standard of review.

33. The appellant urges this Court to adopt the reasons of the dissenting judgment. In essence, it gives some context to the oft-recited mantra from *Yebes/Biniaris*: "the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered". Given the nature of the charges here, the requisite elements of the offence(s), and the burden of proof,

---

[25] *R. v. Eastgaard,* 2011 ABCA 152, paragraph 20 [BA Tab 4]
[26] *R. v. Eastgaard,* 2011 ABCA 152, paragraphs 13, 14 [BA Tab 4]
[27] Trial Judgment, paragraph 52, Record, Vol. I [Tab 2]
[28] NSCA Paragraphs 67, 68, Record, Vol. I [Tab 4]
[29] Court of Appeal, paragraph 97, Record, Vol. I [Tab 4]

"judicial experience" dictates that an acquittal be entered. The dissenting judgment properly constitutes the *Yebes/Biniaris/Barrett* standard of review within the unique nature of this case. And, respectfully, it is for this reason that the conviction cannot stand: "(t)he issue is not therefore whether a verdict was *possible*, but whether it was reasonably available on the evidence".[30]

34. Without more evidence against the appellant, there are other reasonable inferences to be drawn from the evidence: most notably "something bad was going to happen" short of attempted murder. The mere presence of the appellant in the motor vehicle of Mr. Leblanc and the trial judge's finding that the appellant knew nothing of a conspiracy until hearing "gimme the gat" such that he knew a "gun was in play" are pivotal. It was unreasonable to conclude that the only reasonable inference available on this evidence, with these serious charges, was the clear knowledge of an intent to murder Jason Hallett.

35. The convictions for attempt murder and conspiracy to commit murder should be overturned for the reasons provided by Justice Beveridge in dissent.

PART IV – SUBMISSIONS WITH RESPECT TO COSTS

36. No costs are being sought.

PART V – NATURE OF ORDER SOUGHT

37. The appellant requests that the appeal be allowed and acquittals entered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day of December, 2012.

_____
Roger A. Burrill
Counsel for the Appellant

[30] *R. v. Murphy*, 2012 NSCA 92, paragraph 54, Record, Vol. I [Tab 4]

PART VI – TABLE OF AUTHORITIES

CASE **PARA. NO.**

PART VII – STATUTORY PROVISIONS

***Criminal Code*, R.S.C., 1985, c.C-46, s. 95(1), 686(1)(a)**

95. (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

(*a*) an authorization or a licence under which the person may possess the firearm in that place; and

(*b*) the registration certificate for the firearm.

95. (1) Sous réserve du paragraphe (3), commet une infraction quiconque a en sa possession dans un lieu quelconque soit une arme à feu prohibée ou une arme à feu à autorisation restreinte chargées, soit une telle arme non chargée avec des munitions facilement accessibles qui peuvent être utilisées avec celle-ci, sans être titulaire à la fois :

a) d'une autorisation ou d'un permis qui l'y autorise dans ce lieu;

b) du certificat d'enregistrement de l'arme.

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

(*a*) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

686. (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'inaptitude à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel :

a) peut admettre l'appel, si elle est d'avis, selon le cas :

(i) que le verdict devrait être rejeté pour le motif qu'il est déraisonnable ou ne peut pas s'appuyer sur la preuve,

(ii) que le jugement du tribunal de première instance devrait être écarté pour le motif qu'il constitue une décision erronée sur une question de droit,

(iii) que, pour un motif quelconque, il y a eu erreur judiciaire;