SCC File No: 39006

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

BETWEEN:

RANDY DESMOND RILEY

APPELLANT
(Appellant)

– and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPELLANT'S FACTUM
(RANDY DESMOND RILEY, APPELLANT)

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

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

Lee V. Seshagiri
Tel.: (902) 420-6583
Fax: (902) 420-1260
Email: lee.seshagiri@nslegalaid.ca

Roger A. Burrill
Tel.: (902) 420-6583
Fax: (902) 420-1260
Email: roger.burrill@nslegalaid.ca

Counsel for the Appellant,
Randy Desmond Riley

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Thomas Slade
Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: tslade@supremeadvocacy.ca

Ottawa Agent for Counsel for the
Appellant, Randy Desmond Riley

PUBLIC PROSECUTION SERVICE
Maritime Centre
1225-B – 1505 Barrington Street
Halifax, NS B3J 3K5

James A. Gumpert, Q.C.
Tel: (902) 424-8734
Fax: (902) 424-4484
Email: james.gumpert@novascotia.ca

Counsel for the Respondent,
Her Majesty the Queen

GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlings.com

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

TABLE OF CONTENTS

PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

Overview of Appellant's Position

1. This appeal is about giving a *Vetrovec* caution against a Crown witness who provides exculpatory evidence in favour of the defence.

2. The Appellant was charged with first degree murder. The Crown's central theory was that the Appellant killed the victim, with planning and deliberation, for revenge. The Crown called an uncharged but suspected accomplice of the Appellant who supported that theory.

3. The Crown also called a second previously-convicted accomplice to testify. The second accomplice disavowed the Crown theory. He confessed under oath to committing the murder by himself, without planning or deliberation, in the context of collecting on a drug debt. He testified that the Appellant was not present for the murder and had nothing to do with it.

4. Both witnesses were subjected to strong *Vetrovec* cautions before the jury. Defence counsel at trial did not object. The jury convicted the Appellant of second degree murder.

5. The Appellant appealed his conviction, arguing that the *Vetrovec* caution against the exculpatory witness shifted the onus of proof and undermined the presumption of innocence.

6. The Court of Appeal dismissed the conviction appeal. The majority characterized the confessed murderer as a "mixed witness", and held that it was not improper for a *Vetrovec* warning to be imposed against him. Alternatively, the majority would have applied the *proviso* to save the conviction from the "harmless" error. The dissent found a clear error of law in giving a *Vetrovec* caution against an exculpatory witness. Furthermore, it was not the role of an appeal court to weigh conflicting evidence on appeal in order to uphold the conviction via the *proviso*.

7. The Appellant appeals, relying on the principled *Vetrovec* framework established by this Honourable Court. The jurisprudence confirms that *Vetrovec* cautions were never intended to prejudice the defence, and serve no purpose when applied to exculpatory evidence. The fact that a witness is called by the Crown, or is described as a "mixed witness", does not change these fundamental principles. A *Vetrovec* caution should not have been given against the exculpatory witness in this case. The error cannot be cured by the *proviso*. A new trial is required.

Concise Statement of Facts

8. Donald Chad Smith (hereinafter Chad Smith) was killed while delivering pizza to a residential address in Dartmouth, Nova Scotia, shortly before 9:26 p.m. on October 23, 2010.

Procedural History

9. An Indictment charging the Appellant with first degree murder (s. 235 of the *Criminal Code*), and a second count of unauthorized possession of a firearm (s. 92(1) of the *Criminal Code*), was presented in the Nova Scotia Supreme Court on May 27, 2017.

10. A trial was heard before Nova Scotia Supreme Court Justice James Chipman and a jury over sixteen days between March 26, 2018 and April 16, 2018.

11. The jury returned a verdict of not guilty to first degree murder, but guilty of second degree murder. The Appellant was also found guilty of the firearm charge.

12. On March 20, 2019, the Appellant was sentenced to life imprisonment with a 15 year parole ineligibility period. He received 24 months concurrent for the firearm conviction.[1]

13. A conviction appeal was heard in the Nova Scotia Court of Appeal on May 28, 2019.

14. On December 5, 2019, Beveridge J.A. upheld the conviction, dismissing the appeal for a majority of the Court. Scanlan J.A., in dissent, would have ordered a new trial on both charges.

The Issues at Trial

15. The Crown called eighteen witnesses before the jury. The defence did not call evidence.

16. The evidence established that at 9:26 p.m. on October 23, 2010, police responded to an emergency call on Joseph Young Street, in the Highfield Park area of Dartmouth. They arrived at the scene in under a minute.[2] Officers located Chad Smith's body in the exterior front

[1] *R. v. Riley*, 2019 NSSC 92, paras. 31, 32.
[2] Trial Transcript, p. 298, line 7; p. 248, line 8 [Appellant Record ("AR"), Vol. IV, Tab 38].

entranceway to apartment #3, 15 Joseph Young Street. He had been shot once in the right upper chest/armpit/bicep area.[3] He was deceased by the time police arrived.

17. At issue in the trial was who shot Chad Smith, and why. The most significant evidence on these questions came from Paul Smith (no relation to Chad Smith) and Nathan Johnson.

The Testimony of Paul Smith

18. Paul Smith testified that on October 23, 2010, around 7:00 p.m., he received a phone call. His close friend, the Appellant, was looking for a ride. Paul Smith drove to the Appellant's girlfriend's home on Trinity Avenue, also in the Highfield Park area of Dartmouth. The Appellant was waiting outside with a third party, Nathan Johnson. Upon instructions from the Appellant, Paul Smith drove the Appellant and Nathan Johnson to an apartment building in Dartmouth near the Micmac Hotel – about fifteen minutes away.[4]

19. According to Paul Smith, the Appellant made several admissions to him during the drive about an altercation that occurred "years prior".[5] He testified that the Appellant told him that "years back him and this guy got into a fight or something and the guy ended up beating him up with like an object or something."[6] Smith explained that the Appellant "knew where this guy was working and he was just going to deal with it and he had to get a gun or whatever so."[7] According to Smith, the Appellant said "just that he had to go take care of it really".[8]

20. Paul Smith testified that when they arrived at the apartment building the Appellant exited the vehicle for approximately five minutes. Nathan Johnson stayed in the back seat. Paul Smith described the Appellant as carrying something in his pants and limping slightly upon his return. Paul Smith believed that the Appellant was carrying a gun, though he could not see what it actually was. The Appellant was also wearing a pair of "doctor gloves" when he returned, and

[3] Trial Transcript, p. 289, line 3 [AR, Vol. IV, Tab 38]; p. 488, line 1 [AR, Vol. V, Tab 39]; Trial Exhibit 2, photos 1 – 4 [AR, Vol. II, Tab 11].
[4] Trial Transcript, p. 619, line 8 [AR, Vol. VI, Tab 40].
[5] Trial Transcript, p. 618, line 5 [AR, Vol. VI, Tab 40].
[6] Trial Transcript, p. 617, lines 20 – 21 – p. 618, line 1 [AR, Vol. VI, Tab 40].
[7] Trial Transcript, p. 617, line 8 [AR, Vol. VI, Tab 40].
[8] Trial Transcript, p. 619, lines 14 – 15 [AR, Vol. VI, Tab 40].

gave a second pair to Nathan Johnson in the back seat. Paul Smith testified that the first thing the Appellant said when he got back in the vehicle was "he was just taking care of this tonight".[9]

21. Paul Smith explained that he then drove back to Highfield Park and dropped off both the Appellant and Johnson at the Highfield Park bus terminal. After that he went home. All of this took "about an hour".[10] Later that night he went out alone to buy cigarettes. He saw a "bunch of police" in the Highfield area and thought "it really happened".[11]

22. Paul Smith testified that he had a telephone conversation with the Appellant the next day. He said that the Appellant "told me that he made… made a call to a pizza place to a phony address to set it up or whatever".[12] According to Smith, the Appellant told him that "[i]t had to be done, he had to deal with it".[13]

23. Paul Smith further testified that, almost three years later, on July 23, 2013, the police arrived unannounced at his home in Calgary, Alberta. According to Smith, Constable Steve Fairbairn spent an hour with him, telling him what the police knew had happened in the case, that they suspected the Appellant for the murder, and that they wanted help. It was suggested to Paul Smith that he drove the Appellant and Nathan Johnson to get a gun on October 23, 2010, and that he could either be "a witness" or "an accused" in the homicide investigation.[14]

24. Paul Smith declined to provide Cst. Fairbairn any information during their first meeting. The next day, July 24, 2013, he was arrested for Chad Smith's murder. According to Paul Smith, Cst. Fairbairn was waiting for him at the police station and reminded him that he could be "a witness" or "an accused".[15] Smith testified that he did not think he could remain silent lest he be charged.[16] He provided a videotaped statement to the police which eventually led to charges against both the Appellant and Nathan Johnson for first degree murder.[17]

---

[9] Trial Transcript, p. 624, line 12 [AR, Vol. VI, Tab 40].
[10] Trial Transcript, p. 632, line 13 [AR, Vol. VI, Tab 40].
[11] Trial Transcript, p. 632, line 20 – p. 633, line 3 [AR, Vol. VI, Tab 40].
[12] Trial Transcript, p. 634, line 19 [AR, Vol. VI, Tab 40].
[13] Trial Transcript, p. 635, line 5 [AR, Vol. VI, Tab 40].
[14] Trial Transcript, p. 661, lines 6 – 8 [AR, Vol. VI, Tab 40].
[15] Trial Transcript, p. 709, lines 12 – 15 [AR, Vol. VI, Tab 40].
[16] Trial Transcript, p. 709, line 16 – p. 710, line 20 [AR, Vol. VI, Tab 40].
[17] Trial Transcript, p. 792, line 21 – p. 793, line 11 [AR, Vol. VII, Tab 41].

The Testimony of Nathan Johnson

25. On December 4, 2015, Nathan Johnson was convicted, at a separate trial, of the first degree murder of Chad Smith. Paul Smith testified against Nathan Johnson. Nathan Johnson did not testify at his own trial.

26. At the Appellant's trial, the Crown subpoenaed Nathan Johnson and called him to the stand. He testified, however, to a different version of facts about the murder than those described by Paul Smith.

27. Nathan Johnson explained that he and the Appellant grew up together. On the afternoon of October 23, 2010, he had been "hanging out" with the Appellant before Paul Smith picked them up to go to a card game.[18] The three of them went to play cards elsewhere in Dartmouth before returning to Highfield Park.[19]

28. When the three men returned back to the neighbourhood, Paul Smith dropped the Appellant off on Trinity Avenue.[20] Paul Smith then dropped off Nathan Johnson, on his own, at the top of Highfield Park.[21]

29. Nathan Johnson testified that he then went to a pay phone to call "Jiggy". "Jiggy" was the nickname provided by Nathan Johnson for the deceased, Donald Chad Smith.[22]

30. Nathan Johnson said he was a drug dealer at this time in his life. He explained that he had known Chad Smith for a couple of weeks and supplied drugs to Chad Smith. Chad Smith owed him money and had been "ducking" his calls. He wanted to collect the debt. He tried calling Chad Smith's personal phone but no one answered.[23]

31. According to Nathan Johnson, he knew Chad Smith worked as a pizza delivery driver. Nathan Johnson decided to call and place a fake order for pizza, knowing that Chad Smith would

---

[18] Trial Transcript, p. 884, line 13 – p. 886, line 6 [AR, Vol. VII, Tab 41].
[19] Trial Transcript, p. 886, line 6 – p. 888, line 16 [AR, Vol. VII, Tab 41].
[20] Trial Transcript, p. 888, line 12 – p. 889, line 17 [AR, Vol. VII, Tab 41].
[21] Trial Transcript, p. 889, line 19 [AR, Vol. VII, Tab 41].
[22] Trial Transcript, p. 890, lines 10 – 13 [AR, Vol. VII, Tab 41].
[23] Trial Transcript, p. 890, line 15 – p. 891, line 12 [AR, Vol. VII, Tab 41].

deliver it. This would allow Nathan Johnson to confront him about his debt. Johnson testified that he made the call to the pizza shop and ordered the delivery to 15 Joseph Young Street.[24]

32. Nathan Johnson said he dealt drugs in the Highfield Park area and had a shotgun stashed in the woods, for security, behind Joseph Young Street in Dartmouth – this is why he arranged to have a pizza delivered to the area. He explained that he had the gun when Chad Smith arrived at 15 Joseph Young Street to deliver the pizza. He approached Smith, put the barrel of the gun to his arm, and demanded his money.[25]

33. Nathan Johnson described a short confrontation. They both froze. Johnson started to put the gun down. Chad Smith turned to run. Nathan Johnson fired. He explained that he intended on shooting the victim in the arm:

> A. And then he just, like turned to run, and I just intended on shooting him in the arm.
> Q. You intended on shooting him in the arm?
> A. Yeah. So I shot, and then I just ran.[26]

34. After the shooting, Johnson ran into the woods and hid the shotgun in an open drainpipe. He then ran to his aunt's residence nearby and changed out of his muddy clothes. Thereafter he called a friend and learned that someone had died on Joseph Young Street.[27]

35. According to Nathan Johnson, he then messaged his girlfriend, Kaitlin Fuller, to come pick him up. They returned to his residence in Halifax and spent the night there. He testified that he told Ms. Fuller "a cover story" to divert responsibility from himself.[28] "I added Randy's name and I added Paul's name…I basically just blamed everything on them and just said I was there."[29] He described starting a rumour about the murder in an effort to deflect the blame from himself. He reiterated to the Crown, however, that he was the only one involved in the death:

> Q. Okay. Was anyone else involved in this murder?
> A. No.

---

[24] Trial Transcript, p. 891, line 13 – p. 894, line 3 [AR, Vol. VII, Tab 41].
[25] Trial Transcript, p. 896, lines 5 – 10 [AR, Vol. VII, Tab 41].
[26] Trial Transcript, p. 896, line 20 – p. 897, line 2 [AR, Vol. VII, Tab 41].
[27] Trial Transcript, p. 905, line 18 – p. 906, line 4 [AR, Vol. VII, Tab 41].
[28] Trial Transcript, p. 920, line 2 [AR, Vol. VII, Tab 41].
[29] Trial Transcript, p. 920, lines 7, 9 – 10 [AR, Vol. VII, Tab 41].

Q. Okay, it was just you.

A. Yeah.[30]

36. In light of this testimony, the Crown applied to cross-examine Nathan Johnson as an adverse witness under s. 9(1) of the *Canada Evidence Act*. After a *voir dire*, Chipman J. had "no hesitation in determining, within the meaning of Section 9(1) of the *Canada Evidence Act* that Mr. Johnson is a witness adverse to the Crown."[31] The Crown was permitted to cross-examine him on six topics arising from his prior statements to Ms. Fuller inculpating the Appellant.

37. Despite the Crown cross-examination, Nathan Johnson's exculpatory testimony was unshaken on the core issues of who shot Chad Smith, and why. It culminated in the following exchange with defence counsel, exonerating the Appellant of any involvement:

> Q. The Crown asked you to be here. They subpoenaed you and they brought you in here, right?
>
> A. Yeah.
>
> Q. And just to be as clear as possible, Mr. Johnson, this incident, the shooting and the death of Chad Smith, [the Appellant] had nothing to do with that, did he?
>
> A. No.[32]

The Mid-trial Vetrovec Caution

38. Notwithstanding that his evidence was exculpatory for the defence, Nathan Johnson's testimony was the subject of a mid-trial *Vetrovec* caution along with the evidence of Paul Smith. The idea of a mid-trial *Vetrovec* caution against Nathan Johnson was raised by the Trial Judge

---

[30] Trial Transcript, p. 921, lines 18 – 21 [AR, Vol. VII, Tab 41].

[31] Trial Transcript, p. 1405, lines 2 – 5 [AR, Vol. IX, Tab 44]. See also: the subsequent written judgment in *R. v. Riley*, 2018 NSSC 94 [AR, Vol. I, Tab 3]. The Crown was also denied permission to introduce Mr. Johnson's hearsay statements via Ms. Fuller. See: A.R., Part V, Trial Transcript, p. 1543, and the subsequent written judgment in *R. v. Riley*, 2018 NSSC 95 [AR, Vol. I, Tab 4].

[32] Trial Transcript, p. 1472, lines 4 – 10 [AR, Vol. X, Tab 45].

during the s. 9(1) adversity *voir dire*.[33] The Trial Judge canvassed the issue with the parties.[34] Neither the Crown,[35] nor the defence,[36] took issue with the proposed instruction.

39. The Trial Judge delivered his mid-trial *Vetrovec* caution in the middle of the Crown's direct examination of Nathan Johnson. He instructed the jury as follows:

> Now before Mr. Johnson is called back to the witness stand, there is another mid-trial instruction I must read to you. I would add that upon reflection, I have determined that this instruction must also be considered with respect to Paul Smith's evidence.
>
> The title of this mid-trial instruction provides a clue as to what it is all about, and I quote: Crown Witnesses of Unsavoury Character, closed-quote. I will now read this mid-trial instruction as it pertains Paul Smith and Nathan Johnson.
>
> Paul Smith testified for the Crown and Nathan Johnson is testifying for the Crown. There is a special instruction that has to do with their evidence. It is an instruction that you must keep foremost in your mind when you are considering how much or little you will believe of or rely upon their evidence in making your decision in this case.
>
> There are characteristics of these witnesses and other circumstances that require the evidence of Paul Smith and Nathan Johnson to be treated with caution. Experience teaches us that testimony from a Crown witness of this kind must be approached with the greatest care and caution.
>
> In this regard you will recall both individuals have criminal records and Mr. Johnson has actually been convicted of first degree murder. Common sense tells you that, in light of these circumstances, there is good reason to look at the evidence of Mr. Smith and Mr. Johnson with the greatest care and caution.
>
> You are entitled to rely on the evidence of Mr. Smith and/or Mr. Johnson, however, even if it is not confirmed by another witness or other evidence, but it is dangerous for you to do so. Accordingly, you should look for some confirmation of the evidence of Mr. Smith or Mr. Johnson from somebody or something other than Mr. Smith or Mr. Johnson before you rely upon the evidence of Mr. Smith or Mr. Johnson in deciding whether Crown counsel has proven the case against Mr. Riley beyond a reasonable doubt.[37]

The Vetrovec Caution in the Jury Charge

40. *Vetrovec* was discussed again at the pre-charge conference. Counsel were provided with a draft charge on the issue and an opportunity to comment thereupon. Defence counsel did not

---

[33] Trial Transcript, p. 592, line 21 – p. 595, line 21 [AR, Vol. V, Tab 39]; p. 1327, line 9 – p. 1328, line 3 [AR, Vol. IX, Tab 44].
[34] Trial Transcript, p. 1408, line 20 – p. 1409, line 14 [AR, Vol. IX, Tab 44].
[35] Trial Transcript, p. 1413, lines 18 – 19 [AR, Vol. IX, Tab 44].
[36] Trial Transcript, p. 1417, lines 9 – 11 [AR, Vol. IX, Tab 44].
[37] Trial Transcript, p. 1425, line 13 – p. 1427, line 5 [AR, Vol. X, Tab 45].

object to the applicability of *Vetrovec* to Nathan Johnson, but sought additional clarification for the jury as to the caution's application as between Paul Smith's evidence and Nathan Johnson's.[38] The Crown did not comment on the issue.

41. Defence counsel also requested a *W.(D.)* instruction to the jury with respect to Mr. Johnson's exculpatory testimony.[39] The Crown took issue with the timing of this request and offered no position on its merits.[40] The Trial Judge queried how a *W.(D.)* instruction would fit with the *Vetrovec* caution.[41] He indicated that he wanted additional time to research the issue and that he would contact counsel by email that night.[42] In follow-up correspondence, the Trial Judge agreed to provide an additional paragraph on reasonable doubt in relation to Nathan Johnson's evidence.[43] The proposed wording, which was to follow the *Vetrovec* instruction, was agreed upon via email by both Crown and defence.[44]

42. The next morning the parties delivered their closing addresses. The Trial Judge then gave his charge to the jury. The charge included a *Vetrovec* caution against Paul Smith and Nathan Johnson. The caution spanned 22 pages in (transcription) length and included a recitation of the testimony of both witnesses. The core of the caution against Mr. Johnson's evidence, along with the reasonable doubt paragraph added the night before, instructed:

> Common sense tells you that in light of these circumstances, there is good reason to look at Nathan Johnson's evidence with the greatest care and caution. You are entitled to rely on Nathan Johnson's evidence, however, even if it is not confirmed by another witness or other evidence. But it is dangerous for you to do so.
>
> Accordingly, you should look for some confirmation of Nathan Johnson's evidence from somebody or something other than Nathan Johnson before you rely upon his evidence in deciding whether Crown counsel has proven the case against Mr. Riley beyond a reasonable doubt.
>
> To be confirmatory of the evidence of Nathan Johnson, evidence must be independent of him. To be independent, confirmatory evidence must come from another witness or

---

[38] Trial Transcript, p. 1718, line 10 – p. 1726, line 3 [AR, Vol. XI, Tab 47].
[39] Trial Transcript, p. 1736, line 4 – p. 1737, line 18 [AR, Vol. XI, Tab 47].
[40] Trial Transcript, p. 1738, lines 10 – 18 [AR, Vol. XI, Tab 47].
[41] Trial Transcript, p. 1739, line 13 – p. 1740, line 2 [AR, Vol. XI, Tab 47].
[42] Trial Transcript, p. 1740, lines 2 – 15; p. 1750, line 11 – p. 1751, line 17 [AR, Vol. XI, Tab 47].
[43] Exhibit J-4 [AR, Vol. III, Tab 34].
[44] Exhibit J-4 [AR, Vol. III, Tab 34].

> witnesses other than Nathan Johnson. Evidence that is tainted by connection to Nathan Johnson cannot be confirmatory of his evidence because it lacks the essential quality of independence. To be confirmatory of Nathan Johnson's testimony, the testimony of another witness or other witnesses or other evidence must also tend to show that Nathan Johnson is telling the truth about Mr. Riley's lack of involvement.
>
> To be confirmatory, the testimony of another witness or other witnesses or other evidence need not itself implicate Nathan Johnson in the commission of the offence, but it must give you the comfort that Nathan Johnson can be trusted when he says that he, Nathan Johnson, committed the offence.
>
> Nathan Johnson, in the circumstances in which he testified, might well make you wish that somebody or something else confirmed what he said. You may believe Nathan Johnson's testimony, however, if you find it trustworthy, even if no one or nothing else confirms it. When you consider it, however, keep in mind who gave the evidence and the circumstances under which Nathan Johnson testified.
>
> You may find that there's some evidence in this case that confirms or supports some parts of Nathan Johnson's testimony. It is for you to say whether this or any evidence confirms or supports his testimony and how that affects whether or how much you will believe of or rely upon his testimony in deciding this case.[45]
>
> …
>
> Now on the vital issue in this case raised by Nathan Johnson's evidence that it was he who shot Chad Smith without the knowledge or participation of Randy Riley, you have credibility findings to make. That is to say, you will have to consider his evidence and the other evidence, including Paul Smith's evidence. If, after considering all the evidence at this trial, you are left in a state of doubt as to Mr. Riley's guilt, you must find him not guilty.[46]

43. Neither the Crown nor the defence commented further on this instruction.

44. The Trial Judge completed his charge to the jury on the afternoon of April 12, 2018. Four days later, on April 16, 2018, the jury acquitted the Appellant of first degree murder but convicted him of second degree murder and unlawful possession of the firearm.

45. The Appellant appealed his convictions. He argued, among other things, that "[t]he trial judge erred in providing the jury with a *Vetrovec* caution with respect to the evidence of Nathan Johnson."[47] The concern on appeal was that the *Vectovec* caution impaired important exculpatory evidence and undermined the presumption of innocence by shifting a burden of proof of exculpatory facts to the accused.

---

[45] Charge to Jury, pp. 55 – 56 [AR, Vol. I, Tab 2].
[46] Charge to Jury, pp. 58 – 59 [AR, Vol. I, Tab 2].
[47] Notice of Appeal to Nova Scotia Court of Appeal [AR, Vol. I, Tab 7].

The Majority Decision of the Nova Scotia Court of Appeal

46. On December 5, 2019, the Court of Appeal dismissed the conviction appeal.[48]

47. The bulk of the Court's reasons focused on the *Vetrovec* issue.

48. Writing for the majority, Beveridge J.A. stressed that Nathan Johnson was a Crown witness. As such, "[t]he cases that clearly say a *Vetrovec* warning is legally wrong for a defence witness do not directly govern."[49] He also rejected the suggestion that Johnson was a wholly exculpatory Crown witness. Instead, Beveridge J.A preferred to rely on "mixed witness" case law calling for deference to *Vetrovec* decisions.[50] He pointed to defence counsel's failure to object to the caution in this case,[51] and highlighted prior decisions "…where Crown witnesses have been held not to adopt their prior inculpatory statements yet a *Vetrovec* warning upheld or found harmless."[52] He concluded that the reasonable doubt paragraph requested by defence counsel had a curative effect on any potential shift in the onus of proof. Accordingly, "if the trial judge erred by giving a *Vetrovec* warning in relation to Nathan Johnson the error was harmless."[53]

49. In the alternative, the majority applied the s. 686(1)(b)(iii) curative *proviso* to uphold the conviction in the face of a harmless error. In Beveridge J.A.'s view, the balance of the charge correctly instructed the jury on how to decide the case. Furthermore, there was no prejudice to the defence under the circumstances because "[a] jury would have to suspend all belief for [the testimony of Nathan Johnson] to raise a reasonable doubt."[54] After canvassing the conflicting evidence in the case, he agreed with the Crown that "no reasonable jury would have believed Johnson or would have had a reasonable doubt based on his evidence."[55]

---

[48] Judgment of the Nova Scotia Court of Appeal, Dec. 5, 2019 [Appeal Decision] [AR, Vol. I, Tab 6].
[49] Appeal Decision, at para. 80 [AR, Vol. I, Tab 6].
[50] Appeal Decision, at paras. 82 – 83 [AR, Vol. I, Tab 6].
[51] Appeal Decision, at paras. 79, 86, 87 [AR, Vol. I, Tab 6].
[52] Appeal Decision, at para. 83 [AR, Vol. I, Tab 6].
[53] Appeal Decision, at para. 13 [AR, Vol. I, Tab 6].
[54] Appeal Decision, at para. 109 [AR, Vol. I, Tab 6].
[55] Appeal Decision, at para. 110 [AR, Vol. I, Tab 6].

The Dissenting Reasons of the Court of Appeal

50. Writing in dissent, Scanlan J.A. would have allowed the appeal and ordered a new trial. He summarized his reasons for this position as follows:

> 1. The *Vetrovec* instruction was developed as a jury instruction in an effort to decrease the chance of wrongful conviction. That instruction has been viewed as having a real impact on how juries weigh evidence of unsavoury Crown witnesses. The importance of giving a *Vetrovec* instruction, even though it has been described as discretionary, can be measured by the number of convictions that have been set aside when a *Vetrovec* instruction has not been given. Convictions have also been set aside when a *Vetrovec* instruction has been given, and it should not have been. This is one such case.
> 2. Those who crafted the *Vetrovec* instruction would likely give pause if they were to now find that a rule intended to limit the risk of wrongful conviction was used in a way that may well have increased the risk of wrongful conviction. The jury, in this case, had been instructed that it should look for confirmatory evidence related to the testimony of Mr. Johnson, and that it would be dangerous to rely upon his evidence if there was no confirmatory evidence. That inappropriately discounts the weight to be given to his evidence in the absence of corroboration. The problem stems from the fact that Mr. Johnson's evidence was exculpatory and it should not have been subjected to a *Vetrovec* instruction.
> 3. I do not accept that the mere fact a witness has been called by the prosecution determines whether a *Vetrovec* instruction should be given. The necessity of the instruction is to be determined based upon the nature of the evidence, not who called the witness. In this case the prosecution called the witness, but the evidence of Nathan Johnson was exculpatory. He said he killed Mr. Smith during an attempt to collect on a drug debt.
> 4. All participants at trial: defence counsel, Crown counsel, and the trial judge, mistakenly believed that a *Vetrovec* instruction was required in relation to Nathan Johnson even though he was an exculpatory witness. I am not convinced that the fact defence counsel at trial agreed, even encouraged the instruction be given, is sufficient reason to deny the appeal in this case. I will discuss this in greater detail below.
> 5. My colleague says the Crown would not argue that the evidence against the appellant was overwhelming (see para 97 above). With the greatest respect, I suggest that is a generous descriptor as to the strength of the prosecution's case. The removal of the *Vetrovec* instruction as related to Mr. Johnson's evidence may well have caused the jury to attribute more weight to his evidence.
> 6. I cannot agree with my colleague that the error was harmless. It is impossible to determine how the jury determined the guilt of the accused. There is no written decision to allow us to discern the jury's path of reasoning.[56]

[56] Appeal Decision, at para. 131 [AR, Vol. I, Tab 6].

PART II – QUESTIONS IN ISSUE

51. As per the Notice of Appeal filed on January 6, 2020, the decision of the Court of Appeal of Nova Scotia is appealed on the following grounds:

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

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

PART III – STATEMENT OF ARGUMENT

52. It is the position of the Appellant that the *Vetrovec* caution against Nathan Johnson's exculpatory evidence constituted a fatal legal error in this case. The Trial Judge's instructions to the jury undermined the presumption of innocence by imposing a burden upon the accused to corroborate Mr. Johnson's exculpatory testimony. The error strikes at the heart of trial fairness and cannot be cured. A new trial is required.

53. The argument that follows is divided into six sections. The first two sections expand upon the reasoning of Scanlan J.A., in dissent, that a *Vetrovec* caution is inappropriate for exculpatory testimony. The Appellant starts by canvassing the principled framework for unsavoury accomplice warnings established by this Honourable Court in *Vetrovec, Brooks,* and *Khela*. Thereafter, the framework is applied to Nathan Johnson's testimony. It is argued that a *Vetrovec* caution was unnecessary, inappropriate, and prejudicial in this case because Nathan Johnson's evidence was exculpatory and thus posed little risk of wrongful conviction.

54. The next four sections address the various holdings used by the majority of the Court of Appeal to either justify the *Vetrovec* error or minimize its seriousness. It is argued that even if Nathan Johnson was a "mixed witness", as suggested by Beveridge J.A., the *Vetrovec* caution was nevertheless in error because it failed to delineate between Johnson's exculpatory and inculpatory testimony. Furthermore, it is argued that neither the charge read as a whole, nor the addition of an extra paragraph on reasonable doubt, operated to cure the problematic caution. Next, it is argued that the failure of trial counsel to object to the charge is not determinative of

the seriousness of the error, particularly in light of a concession made by counsel at the appeal hearing below. Finally, it is submitted that the *proviso* cannot apply in light of the severity of the error in this case. Each issue is discussed in turn.

1. The Principled Framework of Vetrovec

55. Contrary to the majority's holding below, the principled framework established in *R. v. Vetrovec* does not hinge on the fact that a witness is called by the Crown. As Dickson J. (as he then was) highlighted, "credibility will vary with the facts of the particular case."[57]

56. This context-driven approach stems from *Vetrovec's* key holding: that the categorical requirement for accomplice cautions was unwieldy and unhelpful to the administration of justice. Dickson J. explained that "[s]ome accomplices do indeed attempt to minimize their involvement in the crime; but experience has shown this is not always the case."[58] However, "where an accomplice openly acknowledges his participation, there should be no need for a warning."[59]

57. Following *Vetrovec*, the pigeon-holing of a Crown witness as an accomplice – along with the concomitant need for corroboration in all cases – was abandoned. It is the facts that govern:

> …To construct a universal rule singling out accomplices, then, is to fasten upon this branch of the law of evidence a blind and empty formalism. Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness….[60] [Emphasis added]

58. This principled analytical framework was further refined in *R. v. Brooks*.[61] Writing for the majority, Justice Bastarache highlighted that a *Vetrovec* caution is intended to protect an accused's right to a fair trial, not undermine it. Where a corroboration warning may prejudice an accused's case, it ought not be given:

> …[T]he trial judge is not required to give a "clear and sharp" warning on the dangers of convicting on the impugned evidence where, in the circumstances, the trial judge believes that there is no such danger. Similarly, the trial judge may properly decline to give a

---

[57] *R. v. Vetrovec*, [1982] 1 S.C.R. 811 at 822 [*Vetrovec*].
[58] *Vetrovec*, *supra* at 822.
[59] *Vetrovec*, *supra* at 822.
[60] *Vetrovec*, *supra* at 823.
[61] *R. v. Brooks*, 2000 SCC 11 [*Brooks*].

> warning if the warning may prejudice the accused's case rather than assist it.…[62] [Emphasis added]

59. The dissenting judgment in *Brooks* was equally clear on this point. Justice Major explained: "This new approach, while a change, was not intended to prejudice the accused."[63]

60. The practical import of these holdings is that a *Vetrovec* caution is only necessary where the impugned witness is important *to the prosecution's case*. Major J. recognized this in *Brooks:* "[T]wo main factors are relevant when deciding whether a *Vetrovec* warning is necessary: the witness's credibility, and the importance of the witness's testimony to the Crown's case. [64]

61. This principled analytical framework was affirmed in the leading case of *R. v. Khela*.[65] The majority in *Khela* drew an explicit link between the risk of wrongful convictions and the need for *Vetrovec* cautions against unsavory witnesses.[66] Justice Fish stressed that: "The danger of a miscarriage of justice is to be borne in mind in crafting and in evaluating the adequacy of a [*Vetrovec*] caution."[67] He quoted approvingly from commentary by Marc Rosenberg (as he then was), which predicated *Vetrovec* warnings upon the degree to which a witness offers proof of guilt:

> …"[T]he trial judge must assess the importance of the witness to the Crown's case. If the witness plays a relatively minor role in the proof of guilt it is probably unnecessary to burden the jury with a special caution and then review the confirmatory evidence. However, the more important the witness the greater the duty on the judge to give the caution. At some point, as where the witness plays a central role in the proof of guilt, the warning is mandatory. This, in my view, flows from the duty imposed on the trial judge in criminal cases to review the evidence and relate the evidence to the issues.[68]

62. The Appellant submits that these principles are directly applicable to the present case. A *Vetrovec* caution should never have been applied to Nathan Johnson's exculpatory testimony. Instead of offering proof of the Appellant's guilt, Nathan Johnson's evidence undercut it.

---

[62] *Brooks, supra* at para. 4.
[63] *Brooks, supra* at para. 69 [Emphasis added].
[64] *Brooks, supra* at para. 80 [Emphasis added].
[65] *R. v. Khela*, 2009 SCC 4 [*Khela*].
[66] *Khela, supra* at para. 12.
[67] *Khela, supra* at para. 12.
[68] *Khela, supra* at para. 35 [Emphasis added].

2. Nathan Johnson Should Not Have Received a Vetrovec Warning

63. Nathan Johnson provided a full confession before the jury to the killing of Chad Smith. He explained to the jury that he was attempting to collect a drug debt.[69] He confessed to pulling the trigger intentionally.[70] He testified about running away, his fear of getting caught, and how he tried to get away with the crime by telling his then girlfriend of six months that the Appellant and Paul Smith were the ones who did it.[71] He repeatedly explained, under oath, that this was a cover story – a fabrication – and that the Appellant neither knew about nor participated in the homicide.[72]

64. It hardly needs stating that Mr. Johnson's testimony, if believed, was highly probative evidence. It addressed who shot the victim, and why. As recognized by Scanlan J.A. in dissent:

> [146] …One could hardly imagine a more crucial witness for the defence than Mr. Johnson. He was convicted for murdering Chad Smith. He said that the murder occurred while he was attempting to collect a drug debt. Mr. Johnson now takes full and sole responsibility for the murder, saying the appellant did not commit the murder. In an agreed statement of facts there was an admission that in a search of the victim's car, after his death, the police found a small amount of marijuana, a digital scale, dime bags and a firearm. This is consistent with the evidence of Nathan Johnson saying he was attempting to collect on a drug debt.[73] [Emphasis added]

65. The law is both long-settled and clear that if Nathan Johnson had been called to the stand by the defence, it would have been a serious legal error to give a *Vetrovec* warning against him.[74]

---

[69] Trial Transcript, p. 890, line 20 – p. 891 – line 16; p. 896, lines 5 – 10; p. 897, lines 9 – 12; p. 899, lines 1 – 17; p. 901, lines 2 – 6 [AR, Vol. VII, Tab 41].
[70] Trial Transcript, p. 896, line 20 – p. 897, line 2 [AR, Vol. VII, Tab 41].
[71] Trial Transcript, p. 897, line 2; p. 901, lines 14 – 16; p. 902, line 18 – p. 903, line 4; p. 905, lines 11 – 21; p. 910, line 7 – p. 911, line 6; p. 919, line 18 – p. 923, line 7; p. 925, lines 16 – 21 [AR, Vol. VII, Tab 41]; p. 1030, lines 15 – 16 [AR, Vol. VIII, Tab 42]; p. 1442, line 14 – p. 1443, line 15; p. 1444, lines 8 – 10 [AR, Vol. X, Tab 45].
[72] Trial Transcript, p. 919, line 18 – p. 923, line 7 [AR, Vol. VII, Tab 41]; p. 1444, lines 8 – 10; p. 1458, lines 5 – 11, p. 1467, lines 17 – p. 1468, line 5; p. 1472, lines 7 – 10 [AR, Vol. X, Tab 45].
[73] Appeal Decision, at para. 146 [AR, Vol. I, Tab 6].
[74] *R. v. Frechette*, [1920] O.J. No. 98 (S.C.A.D.); *R. v. Cavanaugh and Donaldson* (1976), 15 O.R. (2d) 173 (C.A.); *R. v. Tzimopoulos*, [1986] O.J. No. 817 (C.A.), leave to appeal ref'd, 54 C.R. (3d) xxvii [*Tzimopoulos*]; *R. v. Hoilett*, [1991] O.J. No. 715, at paras. 7 – 9 (C.A.); *R. v. Wristen*, [1999] O.J. No. 4589, at para. 44 (C.A.), leave to appeal ref'd, [2000] S.C.C.A. No. 419; *R. v. Pilotte*, [2002] O.J. No. 866, at para. 92 (C.A.), leave to appeal ref'd, [2002] S.C.C.A. No. 379.

The law takes this position for good reason. As highlighted by Watt J.A. in *R. v. Murray*: "The rationale that underlies this principle is that any instruction that invites the jury to look for confirmation of evidence adduced or relied upon by the defence impermissibly transfers a burden of proof to an accused and is contrary to the commands of *R. v. W.(D.)*..."[75]

66. The Appellant submits that the fact that Nathan Johnson was called by the Crown does nothing to change the risk to trial fairness in delivering a *Vetrovec* caution against him. Indeed, the timing and substance of the *Veterovec* caution against Mr. Johnson strongly suggests that the presumption of innocence and the principles in *W.(D.)* were undermined in this case.

67. The jury was first warned against Nathan Johnson's evidence in a mid-trial caution delivered during his Crown examination in chief.[76] He was identified by the Trial Judge, along with Paul Smith, as falling into the category of "Crown Witness of Unsavoury Character".[77] It was repeatedly emphasized that Nathan Johnson's evidence was to be approached "with the greatest care and caution".[78] Jurors could rely upon his evidence but were told "it is dangerous for you to do so"[79] and "you should look for some confirmation of the evidence of Mr. Smith or Mr. Johnson from somebody or something other than Mr. Smith or Mr. Johnson before you rely on the evidence of Mr. Smith or Mr. Johnson in deciding whether Crown counsel has proven the case against [the Appellant] beyond a reasonable doubt."[80] Lest they miss its significance, jurors were told they "must" keep the caution "foremost in your mind".[81]

68. The *Vetrovec* caution against Nathan Johnson was even stronger in the final jury charge. It repeated all of the aforementioned elements of the mid-trial instruction, including the requirement to keep the caution "foremost in your mind", the need for the "greatest care and caution" before accepting Nathan Johnson's testimony, and fact that it was "dangerous" to rely

---

[75] *R. v. Murray*, 2017 ONCA 393, at para. 123 [*Murray*] [Emphasis added].
[76] Trial Transcript, p. 1425, line 13 – p. 1427, line 5 [AR, Vol. X, Tab 45]. As noted by the majority below, a mid-trial *Vetrovec* may itself be problematic: Appeal Decision, at para. 53 [AR, Vol. I, Tab 6].
[77] Trial Transcript, p. 1425, lines 19 – 20 [AR, Vol. X, Tab 45].
[78] Trial Transcript, p. 1426, lines 9, 11, 16 – 17 [AR, Vol. X, Tab 45].
[79] Trial Transcript, p. 1426, lines 20 – 21 [AR, Vol. X, Tab 45].
[80] Trial Transcript, p. 1426, line 21 – p. 1427, line 5 [AR, Vol. X, Tab 45].
[81] Trial Transcript, p. 1426, line 4 [AR, Vol. X, Tab 45].

on his evidence.[82] Furthermore, the Trial Judge specifically directed the jury to look for confirmatory evidence *in relation to Nathan Johnson's exculpatory testimony that only he, and not the Appellant, was involved in the crime*:

> To be confirmatory of the evidence of Nathan Johnson, evidence must be independent of him. To be independent, confirmatory evidence must come from another witness or witnesses other than Nathan Johnson. Evidence that is tainted by connection to Nathan Johnson cannot be confirmatory of his evidence because it lacks the essential quality of independence. To be confirmatory of Nathan Johnson's testimony, the testimony of another witness or other witnesses or other evidence must also tend to show that Nathan Johnson is telling the truth about [the Appellant's] lack of involvement.
>
> To be confirmatory, the testimony of another witness or other witnesses or other evidence need not itself implicate Nathan Johnson in the commission of the offence, but it must give you the comfort that Nathan Johnson can be trusted when he says that he, Nathan Johnson, committed the offence.[83] [Emphasis added]

69. With greatest respect to the majority of the Nova Scotia Court of Appeal, the prejudice of such an instruction is patent on its face. The jury was told that confirmatory evidence should be sought before relying upon the single most exculpatory piece of evidence before the court: Nathan Johnson's testimony about the Appellant's "lack of involvement." They were told to use the greatest care and caution in accepting Nathan Johnson's evidence and that it would be dangerous to rely on him without additional corroboration. The Appellant respectfully submits that this was a serious error of law. The jury should never have received a *Vetrovec* warning in relation to Nathan Johnson's evidence because it was strongly exculpatory for the defence. The plain wording of the instruction shifted an onus of proof against the defence in this case.

70. It is anticipated that the Respondent will challenge the above argument by suggesting that Mr. Johnson's testimony was not *fully* exculpatory, that he was therefore a "mixed witness", and that different considerations – including greater deference to the Trial Judge – apply as such.

71. This position would mirror the majority reasons of the Court of Appeal. Beveridge J.A. suggested that Nathan Johnson was a mixed witness because "it was up to the jury to find as a fact whether Nathan Johnson adopted any of his prior inconsistent statements."[84] He also suggested that "despite Mr. Johnson's attempts to exonerate the appellant, he confirmed certain

---

[82] Charge to Jury, pp. 36, 54, 55 [AR, Vol. I, Tab 2].
[83] Charge to Jury, pp. 55 – 56 [AR, Vol. I, Tab 2].
[84] Appeal Decision, at para. 83 [AR, Vol. I, Tab 6].

aspects of Paul Smith's evidence, and the jury could draw certain inculpatory inferences based on what Johnson admitted was true about their pre- and post-offence contact."[85]

72. With respect, this holding should be rejected for at least four reasons.

73. First, it is not without irony that Beveridge J.A. suggests on one hand, "it was up to the jury to find as a fact whether Nathan Johnson adopted any of his prior inconsistent statements",[86] and on the other hand, that "no reasonable jury would have believed Johnson or would have had a reasonable doubt based on his evidence."[87] The majority seems to want it both ways.

74. Second, the idea that the jury could rely upon Nathan Johnson's adoption of his prior hearsay statements to Ms. Fuller runs directly counter to the procedural and evidential realities of the case. Had adoption been in play, the Crown would not have needed to pursue its (unsuccessful) *Bradshaw* application. But they did.[88] They did so because Nathan Johnson testified that the Appellant was not involved in the homicide – that he (Nathan Johnson) committed the murder alone.[89] Thus, the Crown at trial recognized that "[Nathan Johnson] certainly did not adopt the contents of what he said to Ms. Fuller which is that this all stemmed from [the Appellant] being hit on the head with something years before…"[90]

75. Third, Nathan Johnson specifically testified that he "made up a cover story" involving the Appellant and Paul Smith, and perpetuated this fabrication as a rumour in an attempt to escape criminal liability for his actions.[91] It should go without saying that a jury cannot lawfully rely upon out of court statements that a witness testifies *are made up*. In the context of this trial, the idea that Johnson adopted his prior statements is "fanciful", to borrow the majority's term.

76. Fourth and finally, the majority's conclusion that Nathan Johnson was a "mixed witness" decontextualizes the evidence in the case and ignores the core purpose of *Vetrovec*: to protect an

---

[85] Appeal Decision, at para. 83 [AR, Vol. I, Tab 6].
[86] Appeal Decision, at para. 83 [AR, Vol. I, Tab 6].
[87] Appeal Decision, at paras. 13, 98, 109, 110 [AR, Vol. I, Tab 6].
[88] Trial Transcript, pp. 1493 – 1543 [AR, Vol. X, Tab 45].
[89] Trial Transcript, p. 921, lines 18 – 21 [AR, Vol. VII, Tab 41]; p. 1498, lines 14 – 21 [AR, Vol. X, Tab 45].
[90] Trial Transcript, p. 1501, line 20 – p. 1502, line 1 [Emphasis added] [AR, Vol. X, Tab 45]. See also: Trial Transcript, p. 1503, line 21 – p. 1540, line 6 [AR, Vol. X, Tab 45].
[91] Trial Transcript, p. 920, lines 2 – 14 [AR, Vol. VII, Tab 41].

accused from wrongful conviction because of the historically recognized risks associated with certain problematic evidence of guilt.

77. The determination of whether a witness is exculpatory, inculpatory, or mixed, must obviously be a fact-specific and context-specific determination. But, it is a determination that must also keep in mind the purpose of a *Vetrovec* caution within the overarching principled framework. A witness need not be characterized as "mixed" just because the Crown relies on their evidence to any degree, no matter how slight. Instead, trial judges should look at a witness's evidence as a whole, within the context of the issues and other evidence adduced at trial, and consider whether a *Veterovec* caution would do more harm than good. If so, the caution should not be given. Such an approach was commended by the English Court of Appeal in *Reg. v. Royce-Bentley*.[92] Lord Widgery C.J. explained:

> Cases will obviously arise in which a witness who gives evidence of these two different characters may wish to be upheld by the defence because, on the whole, he is more favourable to them, and cases will therefore arise where the defence do not want the credibility of the witness attacked by an accomplice direction because they attach too much importance to that evidence themselves.
>
> In our judgment, where a trial judge is faced with the situation which arises here, he should of course consult counsel in the absence of the jury before taking any final decision, but having done that, he ought to consider whether on the whole, more harm to the defence would be done by giving the accomplice direction than by not giving it, and if he comes to the conclusion that on the whole more harm would be done in that way, then it is no irregularity on his part in the conduct of the trial if he decides not to give the accomplice direction.[93] [Emphasis added]

78. The same analytical framework has been adopted by the High Court of Australia. In *Jenkins v. The Queen*,[94] a unanimous panel including Gleeson C.J. cited *Royce-Bentley* for the proposition that "it was regarded in England as self-evident that the law only requires a direction on corroboration in relation to evidence of an accomplice that is adverse to an accused."[95] The Court in *Jenkins* further explained that a caution is unnecessary in relation to undisputed evidence, and entirely inappropriate in relation to evidence favouring the defence:

---

[92] *R. v. Royce-Bentley* [1974] 1 WLR 535 [*Royce-Bentley*] [Book of Authorities, ("BOA"), Tab 1].
[93] *Royce-Bentley, supra* at 538 – 539 [BOA, Tab 1].
[94] *Jenkins v. The Queen*, [2004] HCA 57 [*Jenkins*].
[95] *Jenkins, supra* at para. 31.

> [31] …Nor is a direction required in relation to undisputed evidence. It often happens in a criminal trial that a witness who is technically an accomplice is called to give evidence of some fact which is not formally admitted but which, once proved, is not challenged by the defence. Judges are not obliged to warn of a supposed danger of accepting such evidence. It is an aspect of the adversarial system of criminal justice that an accused person may put the prosecution to proof of facts yet, once some evidence of those facts is given, it will emerge that they are not then disputed. If such evidence is given by an accomplice, but is unchallenged, then there may be no occasion for an accomplice warning. In some cases, an accomplice might give evidence, some of which is in contest and some of which is not. The direction would then need to be related to the disputed evidence. Characterising evidence as favourable or unfavourable to an accused may not always be easy. On the other hand, there may be cases where the prosecution, in performance of its duty of fairness, calls an accomplice whose evidence is wholly favourable to, and accepted by, an accused. It would be absurd, and contrary to the rationale of the rule, to require the trial judge, in such a case to give an accomplice warning, sending the jury off on a search for corroboration of evidence on which the accused relies.[96] [Emphasis added]

79. Returning to the facts of the present case, the Appellant would agree with Justice Beveridge that the Crown was prepared to accept and rely upon at least *some* of Nathan Johnson's evidence. The Crown's closing submissions to the jury were specific on this point:

> Now we're not suggesting to you that you need to outright just reject all of the evidence that Nathan Johnson provided to you. You're free to accept all, part, or none of a witness' evidence. And in this case, I would suggest to you that some of what Nathan Johnson told you is true. Nathan Johnson and Randy Riley were very clearly together that day and Mr. Johnson clearly communicated repeatedly with Kaitlin Fuller that day over Randy Riley's phone.
>
> I would suggest that Mr. Johnson did see Paul Smith that day, as well, when Mr. Smith came to pick up the duo. We would also suggest that Mr. Johnson was one of the people present when the call from the payphone at Highfield Park Drive was made to Panada Pizza. I would suggest that after the murder, Nathan Johnson was the one who ran through the woods behind Joseph Young and stashed the murder weapon in a pipe.
>
> Finally, we also accept that Mr. Johnson ran to his Aunt Veronica's house where he was later picked up by Kaitlin Fuller and Raymond. The trio went to Mr. Johnson's place where he proceeded to tell Ms. Fuller what happened that night. Later that night, we do accept that Mr. Johnson called Mr. Riley and the next day, Mr. Riley called Mr. Johnson.[97]

80. But the real question is: what is the impact of this Crown position in terms of the propriety of a *Vetrovec* warning under the principled framework? Does the Crown's willingness

---

[96] *Jenkins*, *supra* at para. 31.
[97] Trial Transcript, p. 1785, line 9 – p. 1786, line 8 [AR, Vol. XI, Tab 48].

to accept certain components of Nathan Johnson's otherwise exculpatory confession necessarily brand him as a mixed witness, deserving of a *Vetrovec* caution?

81. The Appellant submits that the answer is no. The predominant tenor of Nathan Johnson's testimony was exculpatory. It was highly exculpatory on the core questions of who shot Chad Smith and why. And, it was this highly exculpatory evidence that the Crown denied and attacked as unreliable and unbelievable.

82. The Crown told jurors that Mr. Johnson's failure to previously disclose his potential evidence "should give you very serious concern about Mr. Johnson's credibility and his desire to tell the truth and participate candidly in this entire process."[98] After summarizing Nathan Johnson's evidence, the Crown told the jury that "we know for sure that a good portion of this testimony is not true."[99] The Crown specifically rejected the idea that the Appellant had gone to a card game and then been dropped off before the shooting as "ludicrous":

> So to suggest, ladies and gentlemen, as Mr. Johnson did, that he and Mr. Riley remained in one place in North End Dartmouth for several hours on the ... on October 23rd, 2010, when they, along with Paul Smith, drove to one location 10 to 15 minutes away where they also remained for several hours until they came back and dropped Mr. Riley off in the North End is nothing short, I would suggest, of ludicrous.[100]

83. The Crown steadfastly relied on the evidence of Paul Smith, suggesting to the jury that he was "a believable witness" and that his evidence told them "everything that you need to know about Chad Smith's murder."[101] The Crown's theory of the case in the jury charge maintained the revenge-motive narrative which the Crown relied upon throughout the trial.

84. Within this evidential context, the labelling of Nathan Johnson as a "mixed witness" is artificial at very best. *Khela* teaches that the need for a *Vetrovec* caution is commensurate with the importance of the witness testimony to proof of guilt, keeping in mind the objective of avoiding wrongful convictions based on unreliable evidence. The core of Nathan Johnson's evidence was exculpatory, and the Crown asked the jury not to believe it. In the words of *Royce-Bentley*, more harm to the defence would be done by giving the accomplice direction than by not

---

[98] Trial Transcript, p. 1785, lines 4 – 6 [AR, Vol. XI, Tab 48].
[99] Trial Transcript, p. 1776, lines 20 – 21 [AR, Vol. XI, Tab 48].
[100] Trial Transcript, p. 1780, line 18 – p. 1781, line 3 [AR, Vol. XI, Tab 48].
[101] Trial Transcript, p. 1758, lines 7 – 8, p. 1768, line 12 [AR, Vol. XI, Tab 48].

giving it. The Appellant was simply not at risk of wrongful conviction by the Crown's reliance upon tangential or non-contentious portions of Nathan Johnson's testimony.

85. *Khela* confirms that intervention on appeal is warranted where "the cautionary instruction that was given failed to serve its intended purpose."[102] In this case, the core purpose of *Vetrovec* was undermined by an instruction to jurors to seek confirmation before relying on important exculpatory evidence. As Justice Scanlan highlighted below: "The objective of a *Vetrovec* instruction is to put in place safeguards to protect against wrongful convictions, not to shift the burden of proof to an accused when it comes to an unsavoury exculpatory witness."[103] The *Vetrovec* caution against Nathan Johnson was unnecessary, highly prejudicial, and legally wrong. Appellate intervention is both necessary and justified.

3. The Caution Was Wrong Even If Nathan Johnson Was A Mixed Witness

86. What if Nathan Johnson is legitimately characterized as a mixed witness? In the Appellant's respectful submission, the result remains the same. The Trial Judge's *Vetrovec* caution in this case still contains a serious legal error.

87. The problem with the *Vetrovec* instruction is its failure to delineate and limit its applicability to Nathan Johnson's inculpatory testimony *only*. As recently explained by Justice Watt in *R. v. Murray*: "[W]here a *Vetrovec* caution is given for a "mixed" witness called by the Crown, a trial judge should make it clear that the desirability of confirmatory evidence applies only to the inculpatory aspects of the witness' testimony, not to its exculpatory features."[104]

88. The idea that a "mixed witness" should get a mixed *Vetrovec* caution was developed by Justice Doherty in *R. v. Rowe*.[105] In that case, the application of an unconstrained *Vetrovec* caution against a mixed witness constituted a reversible error of law, because it required the jury "to approach all facets of [the mixed witness's] evidence with caution and to search for confirmatory evidence of [his] testimony before relying on any part of it."[106] Doherty J.A. explained that the better approach is to demarcate the inculpatory evidence from the exculpatory

---

[102] *Khela, supra* at para. 13.
[103] Appeal Decision, at para. 137 [AR, Vol. I, Tab 6].
[104] *Murray, supra* at para. 125.
[105] *R. v. Rowe*, 2011 ONCA 753 [*Rowe*].
[106] *Rowe, supra* at para. 42.

evidence. Only the inculpatory evidence should be subject to a *Vectrovec* caution suggesting the need for confirmatory evidence as a prerequisite to accepting dangerous testimony:

> [33] …[A] *Vetrovec* caution will often be appropriate in respect of the testimony of a "mixed witness". The specifics of that caution and the format of the instruction are left very much in the discretion of the trial judge. The jury instruction will be sufficient if, considered in its entirety, that instruction makes clear to the jury both that it is dangerous to rely on the inculpatory portion of the *Vetrovec* witness's evidence without confirmatory support, and that the jury must acquit if the exculpatory portions of that witness's evidence, alone or taken in combination with the rest of the evidence, leave the jury with a reasonable doubt. …
>
> …
>
> [34] Where, as in this case, the inculpatory portions of the witness's testimony are easily demarcated from the exculpatory portions, the best course is to specifically refer the jury to the exculpatory portions and to instruct the jury that with respect to those portions, the question is not whether the evidence is confirmed by other evidence, but rather whether the evidence alone or in combination with the other evidence heard in the case leaves the jury with a reasonable doubt.[107] [Emphasis added]

89. The reasoning in *Rowe* makes good sense, and has been followed repeatedly.[108]

90. Unfortunately, in the present case the Trial Judge failed to distinguish, delineate or demarcate *Vetrovec*'s application to Nathan Johnson's inculpatory versus exculpatory testimony. Instead, the jury was repeatedly told that the *Vetrovec* caution directly applied to the exculpatory portion of his testimony, as well as his evidence as a whole.

91. For example, jurors were told to seek independent confirmatory evidence which would "tend to show that Nathan Johnson is telling the truth about [the Appellant's] lack of involvement."[109] Independent confirmatory evidence was also to be sought to give "comfort that Nathan Johnson can be trusted when he says that he, Nathan Johnson, committed the offence."[110]

92. Furthermore, the charge to the jury sandwiched the Trial Judge's full review of Mr. Johnson's testimony into the body of the *Vetrovec* warning. This included Nathan Johnson's

---

[107] *Rowe*, *supra* at paras. 33 – 34.
[108] See for example: *R. v. Ranglin*, 2018 ONCA 1050 at para. 43; *R. v. T. Riley,* 2017 ONCA 650 at para. 276; *R. v. Ryan*, 2014 ABCA 85 at para. 25, leave to appeal ref'd, [2014] S.C.C.A. No. 296; *R. v. Searay,* 2018 ONCJ 644 at para 87.
[109] Charge to Jury, p. 56 [AR, Vol. I, Tab 2].
[110] Charge to Jury, p. 56 [AR, Vol. I, Tab 2].

clearly exculpatory evidence that "nobody else was involved, just him",[111] and his testimony agreeing that the Appellant "had nothing to do with the shooting and death."[112]

93. Finally, if there were any doubt in the jury's mind that Nathan Johnson's entire testimony was subject to a full *Vetrovec* caution, the mid-trial and final warnings explicitly and repeatedly connected Nathan Johnson and Paul Smith as *both* being full *Vetrovec* witnesses. For example, the Trial Judge introduced his mid-trial caution to jurors "as it pertains [to] Paul Smith and Nathan Johnson."[113] He then continued this pattern of linking both witnesses to the caution:

> Paul Smith testified for the Crown and Nathan Johnson is testifying for the Crown. There is a special instruction that has to do with their evidence. It is an instruction that you must keep foremost in your mind when you are considering how much or little you will believe of or rely upon their evidence in making your decision in this case.
>
> There are characteristics of these witnesses and other circumstances that require the evidence of Paul Smith and Nathan Johnson to be treated with caution. Experience teaches us that testimony from a Crown witness of this kind must be approached with the greatest care and caution.
>
> In this regard, you will recall both individuals have criminal records, and Mr. Johnson has actually been convicted of first-degree murder. Common sense tells you that in light of these circumstances, there is good reason to look at the evidence of Mr. Smith and Mr. Johnson with the greatest care and caution.
>
> You are entitled to rely on the evidence of Mr. Smith and/or Mr. Johnson, however, even if it is not confirmed by other witnesses or other evidence, but it is dangerous for you to do so. Accordingly, you should look for some confirmation of the evidence of Mr. Smith or Mr. Johnson from somebody or something other than Mr. Smith or Mr. Johnson before you rely on the evidence of Mr. Smith or Mr. Johnson in deciding whether Crown counsel has proven the case against [the Appellant] beyond a reasonable doubt.[114] [Emphasis added]

94. The final charge to the jury was somewhat less intertwined, but no less clear in the fact that the *Vetrovec* caution applied to both men, as unsavoury Crown witnesses:

> Now I want to talk to you about the unsavory character warning that I touched on when I gave you mid-trial instructions earlier on. Paul Smith and Nathan Johnson testified for the Crown. There is a special instruction that has to do with their evidence. It is an instruction that you must keep foremost in your mind when you are considering how much or little you will believe of or rely upon their evidence in making your decision in this case.

---

[111] Charge to Jury, p. 48 [AR, Vol. I, Tab 2].
[112] Charge to Jury, p. 54 [AR, Vol. I, Tab 2].
[113] Trial Transcript, p. 1425, line 21 [AR, Vol. X, Tab 45].
[114] Trial Transcript, p. 1426, line 1 – p. 1427, line 5 [AR, Vol. X, Tab 45].

> I am now going to read you my summaries of the evidence of these witnesses. Once again, this is simply my review of the evidence and you should always rely on your memory of what witnesses said. After I review the evidence of these witnesses, I will read you a special caution regarding how to consider the evidence of Paul Smith and Nathan Johnson.
>
> …
>
> Now given the circumstances and evidence of Mr. Johnson and Mr. Smith, their evidence must be treated with caution. And experience teaches us that testimony from Crown witnesses of this kind in these circumstances with their background must be approached with the greatest care and caution. I will now continue with my cautionary words regarding these two unsavory witnesses. In order for you to properly grasp what I will say, I have decided to read a similar instruction for each of Paul Smith and Nathan Johnson. And I will start with Mr. Johnson.[115] [Emphasis added]

95. The effect of this interconnection between Paul Smith and Nathan Johnson is that Johnson was treated like a standard prosecution witness – like Paul Smith – as opposed to a mixed witness. As Justice Scanlan recognized below, this is an error of law:

> [138] …Even if…Mr. Johnson were described as a mixed witness, the jury instruction did not identify the exculpatory versus inculpatory evidence and explain the proper way to apply *Vetrovec* to the different types of evidence. The instruction in relation to the evidence of Nathan Johnson was an error in law.[116] [Emphasis added]

96. As a result of this legal error, the full weight of the *Vectrovec* caution was made applicable to the most exculpatory evidence. The Trial Judge's approach denigrated Nathan Johnson's exculpatory testimony and shifted a burden of proof to the defence. The Appellant submits that in the context of this case, the error is both significant and fatal to trial fairness.

97. It is anticipated that the Respondent will suggest that this "mixed witness" error is minor, or harmless, in accordance with the reasons of the majority of the Court of Appeal below.[117] In advancing a similar argument before the Court of Appeal, the Respondent relied heavily if not exclusively on *R. v. Gelle*.[118] That case grants considerable deference to trial judges in their discretionary choice to give a *Vetrovec* caution to a mixed witness. Presumably, the Respondent

---

[115] Charge to Jury, pp. 35 – 36, 54 – 55 [AR, Vol. I, Tab 2].
[116] Appeal Decision, at para. 134 [AR, Vol. I, Tab 6].
[117] Appeal Decision, at paras. 79 – 85 [AR, Vol. I, Tab 6].
[118] *R. v. Gelle*, 2009 ONCA 262 [*Gelle*]. Transcript of Nova Scotia Court of Appeal hearing, *Randy Desmond Riley v. HMQ*, C.A.C. No. 475857 [Appeal Hearing], p. 39, line 21 – p. 40, line 5; p. 41, lines 8 – 12; p. 43, lines 3 – 10 [AR, Vol. XI, Tab 53].

may argue that this Honourable Court should defer to the Trial Judge's delivery of a *Vetrovec* caution against Nathan Johnson on the basis that he can be characterized as a mixed witness.

98. The majority below adopted this reasoning. Beveridge J.A. relied significantly on *Gelle,* as well as *R. v. Tran,*[119] and *R. v. Shand,*[120] which followed it. Pointing to those decisions, he noted that, "there are a number of cases where Crown witnesses have been held not to have adopted their prior inculpatory statements yet a *Vetrovec* warning upheld or found harmless".[121]

99. In *Gelle,* MacPherson J.A. upheld a *Vetrovec* caution against a mixed witness on the basis that it was within the discretion of the trial judge,[122] the defence did not object,[123] and the witness was called by the Crown.[124] *Shand* upheld a *Vetrovec* caution in a case involving a co-accused and pointed to *Gelle* for the proposition that "the trial judge retains discretion over the decision whether to give a warning in the case of mixed witnesses".[125] In *Tran*, Epstein J.A. cited *Gelle* and concluded: "There is no authority that suggests that a trial judge must give a 'mixed instruction' with respect to a 'mixed witness'."[126]

100. The Appellant offers three points in response to *Gelle* and the cases which follow it.

101. First, *Gelle, Tran* and *Shand* were decided prior to, and thus and without the benefit of, the 2011 decision in *Rowe*. Accordingly, these cases must be read with the recognition that a subsequent panel of the same court held it to be an error of law to give a full *Vetrovec* warning against a mixed Crown witness who provided exculpatory evidence in favour of the defence.

102. Second, all three decisions are factually distinguishable from the present case. *Gelle* and *Tran* are different because the accomplices in those cases provided inculpatory out of court statements which were admissible for their truth and relied upon by the Crown as proof of

---

[119] *R. v. Tran*, 2010 ONCA 471 [*Tran*].
[120] *R. v. Shand*, 2011 ONCA 5, leave to appeal dismissed, [2011] S.C.C.A. No. 270 [*Shand*].
[121] Appeal Decision, at para. 83 [AR, Vol. I, Tab 6].
[122] *Gelle, supra* at para. 14.
[123] *Gelle, supra* at para. 15.
[124] *Gelle, supra* at para. 16.
[125] *Shand, supra* at para. 215.
[126] *Tran, supra* at para. 26.

guilt.[127] *Shand* is different because the accused's interest in avoiding a *Vetrovec* warning "conflicted with the interests of his co-accused" and required the trial judge "to balance the trial rights" of both.[128] Unlike the present case, there was good justification in these cases to provide a caution to the jury to avoid a wrongful conviction based upon suspect accomplice evidence.

103. Third, the most up to date case law from the Ontario Court of Appeal is somewhat more nuanced than *Gelle* and its progeny. It recognizes that where mixed witnesses are called by the Crown, "a trial judge has a discretion, but not a duty, to give a *Vetrovec* instruction."[129] Significantly, however, that discretion does not negate the importance of properly delineating the inculpatory versus exculpatory evidence vis-à-vis a *Vetrovec* caution.[130] The position of the parties is relevant, but in each case the question is whether the charge as a whole accomplishes the proper demarcation.[131] The Appellant turns to the balance of the jury charge now. The actions of defence counsel, Crown counsel, and the Trial Judge, are considered thereafter.

4. The Erroneous Caution Was Not Cured by W.(D.) or the Charge as a Whole

104. The majority of the Court of Appeal admitted that, without some form of curative instruction, "it would be difficult not to say that the onus of proof had been misplaced".[132] According to Justice Beveridge, however, the following three paragraphs cured the error:

> Now on the vital issue in this case raised by Nathan Johnson's evidence that it was he who shot Chad Smith without the knowledge or participation of Randy Riley, you have credibility findings to make. That is to say, you will have to consider his evidence and the other evidence, including Paul Smith's evidence. If, after considering all the evidence at this trial, you are left in a state of doubt as to Mr. Riley's guilt, you must find him not guilty.[133]
>
> …
>
> Now the concept of reasonable doubt should remain foremost in your mind. A criminal trial is not a contest of credibility. Be careful not to start to see it as a choice between

---

[127] *Gelle, supra* at paras. 5 – 6; *Tran, supra* at para. 27.
[128] *Shand, supra* at paras. 216, 218. See also: *R. v. Oliver*, [2005] O.J. No. 596, at paras. 50 – 60 (C.A.), leave to appeal ref'd, [2006] S.C.C.A. No. 458.
[129] *Murray, supra* at para. 124, *per* Watt J.A., citing *Gelle* and *Tzimopoulos*.
[130] *Murray, supra* at para. 126.
[131] *R. v. Ranglin*, 2018 ONCA 1050, at para. 43; *R. v. T. Riley*, 2017 ONCA 650, at para. 276.
[132] Appeal Decision, at para. 90 [AR, Vol. I, Tab 6].
[133] Appeal Decision, at para. 91 [AR, Vol. I, Tab 6]; Charge to Jury, pp. 58 – 59 [AR, Vol. I, Tab 2].

> what Paul Smith said and whatever evidence you find that confirms that on one hand and what Nathan Johnson said and whatever evidence confirms that on the other hand.
>
> It is not a choice between those two things. You should not just decide that one story is more believable than the other. Remember, the Crown has to prove guilt beyond a reasonable doubt. That doubt can come from the evidence or lack of evidence led by the Crown. It can come from any other evidence, as well.[134]

105. Do these three paragraphs really solve the problem? The Appellant submits they do not.

106. First, as recognized by Justice Scanlan below,[135] there is skepticism in the case law that a *W.(D.)* or "*W.(D.)*-like" instruction is sufficient to cure a shift in the onus of proof arising from an improper *Vetrovec* caution against exculpatory testimony. Such an argument was rejected by the Ontario Court of Appeal in *R. v. Chenier*.[136] Justice Blair explained that *Vetrovec* cautions and *W.(D.)* instructions serve different purposes. A *Vetrovec* caution is an instruction to help jurors assess the credibility of a particular witness. In contrast, a *W.(D.)* charge is an instruction to help juries arrive at the correct verdict once credibility assessments have been made. Given these different purposes, it is not clear that the latter can cure the former:

> [46] I do not accept this argument either. The rationale behind the principle that a *Vetrovec* warning is not to be given in connection with defence evidence is that the instruction to look for confirmatory/corroborative evidence impermissibly transfers a burden to the accused and is contrary to the requirements of *W.(D.)*. Defence evidence need only raise a reasonable doubt. In spite of this relationship between *Vetrovec* and *W.(D.)* in the context of defence evidence, however, the purpose of a *Vetrovec* warning and the purpose of a *W.(D.)* instruction are quite different. The former is designed to help equip the jury to assess the reliability of, and the weight to be given to, the testimony of a disreputable or unsavoury witness called to advance the Crown's case. The latter is designed to help equip the jury to assess whether the Crown has met its onus of proving the case beyond a reasonable doubt on all of the evidence, once the reliability or non-reliability of the defence evidence has been determined. Thus, where the charge goes beyond what is permissible commentary on the credibility of an unsavoury defence witness and directly or implicitly instructs the jury to find independent confirmation of the witness' testimony, it is unlikely that coupling such a direction with a specific *W.(D.)*-like directive will mitigate the erroneous *Vetrovec* warning respecting the defence witness. Such was the case here.[137] [Emphasis added]

---

[134] Appeal Decision, at para. 92 [AR, Vol. I, Tab 6]; Charge to Jury, p. 85 [AR, Vol. I, Tab 2].
[135] Appeal Decision, at para. 165 [AR, Vol. I, Tab 6].
[136] *R. v. Chenier*, [2006] O.J. No. 489 (C.A.) [*Chenier*].
[137] *Chenier, supra* at para. 46.

107. Second, even if the analysis in *Chenier* is rejected, (such that a *W.(D.)* charge could cure an improper *Vetrovec* error),[138] the curative effect of a *W.(D.)* charge is inapplicable on the facts of this case. It is inapplicable because, despite a defence request for it, the Trial Judge *did not actually give a W.(D.) charge, or a reasonable facsimile thereof.*

108. *W.(D.)* instructs on the circumstances mandating a not guilty finding. It explains how the Crown's burden of proof and the presumption of innocence operate to *require* an acquittal:

> First, if you believe the evidence of [the exculpatory witness], obviously you must acquit.
>
> Secondly, if you do not know whether to believe [the exculpatory witness] or a competing witness, you must acquit.
>
> Thirdly, if you do not believe the testimony of [the exculpatory witness] but you are left in a reasonable doubt by it, you must acquit.
>
> Fourthly, even if you are not left in doubt by the evidence of [the exculpatory witness], that is that his or her evidence is rejected, you must ask yourself whether, on the basis of the evidence that you accept you are convinced beyond reasonable doubt by that evidence of the guilt of the accused.[139]

109. The defence sought a *W.(D.)* charge for Nathan Johnson at the pre-charge conference:

> MR. McGUIGAN: So that type of ... that instruction, *W.(D.)* instruction, again having broader application to, for instance, Defence witnesses but also Crown witnesses who are favourable to the Defence and this is a situation where that would apply actually very explicitly because <u>if you go through the steps in *W.(D.)*, as it pertains to the testimony of Nathan Johnson, it would apply without ... without question. If they believed Nathan Johnson then they must find [the Appellant] not guilty. The second step being if they do not believe Nathan Johnson but are left in a state of reasonable doubt by his evidence about the guilt of [the Appellant], they must acquit. And further, if they don't believe, you know, the third W.(D.) prong, if they disbelieve him, his evidence did not raise a reasonable doubt pertaining to [the Appellant], then they assess the remaining evidence to determine ... if they're left in a reasonable doubt by the remaining evidence or lack of evidence they must acquit</u>.[140] [Emphasis added]

---

[138] See for example *Murray*, *supra* at para. 131, decided without addressing the *Chenier* analysis.

[139] This formulation of *W.(D.)* incorporates the law from *R. v. J.H.S.*, 2008 SCC 30, at para. 11. See: *R. v. P.D.B.*, 2014 NBQB 213 at para. 67, *per* Ferguson J.

[140] Trial Transcript, p. 1736, line 17 – p. 1737, line 11 [AR, Vol. XI, Tab 47].

110. The Trial Judge queried whether a *W.(D.)* instruction would confuse the *Vetrovec* caution.[141] He wanted time to consider it and said he would respond by email later that night.[142] The Crown was critical of the timing of the request and did not offer a substantive position.[143]

111. In the Trial Judge's email response to counsel he proposed inserting the first of the three supposedly curative paragraphs rather than a full *W.(D.)* instruction.[144] Defence counsel replied that it "sounds fine from the defence perspective".[145]

112. With greatest respect to the Trial Judge and counsel below, it was not fine. Far from it. Despite trial counsel's failure to object – which will be addressed below – the paragraph added by the Trial Judge, as well as the additional instructions pointed to the by the Court of Appeal, simply do not communicate what is required to cure an erroneous shift in the burden of proof.

113. Most crucially, none of the supposedly curative paragraphs single out Nathan Johnson's testimony as exculpatory evidence which can lead to an acquittal by being believed, by being as believable as Paul Smith's, or by raising a doubt despite being disbelieved.

114. In the first paragraph, it is a far cry from *W.(D.)* to instruct jurors that they "*have credibility findings to make*" on "*the vital issue in this case raised by Nathan Johnson's evidence that it was he who shot Chad Smith without the knowledge or participation of [the Appellant]*". Nor is the instruction clarified by the further qualifier: "*That is to say, you will have to consider his evidence and the other evidence, including Paul Smith's evidence*." This instruction once again connects Nathan Johnson's evidence to that of Paul Smith. The importance of Nathan Johnson's exculpatory testimony is then further diminished by subsuming it within consideration of the entirety of the evidence adduced at trial: "*If, after considering all the evidence at this trial, you are left in a state of doubt as to [the Appellant's] guilt, you must find him not guilty*." While this instruction is not wrong in law, it does nothing to disavow jurors from the idea that it is

---

[141] Trial Transcript, p. 1737, line 19 – p. 1738, line 8, p. 1739, lines 13 – 20 [AR, Vol. XI, Tab 47].
[142] Trial Transcript, p. 1740, lines 1 – 14 [AR, Vol. XI, Tab 47].
[143] Trial Transcript, p. 1738, lines 10 – 18 [AR, Vol. XI, Tab 47].
[144] Exhibit J-4 [AR, Vol. III, Tab 34].
[145] Exhibit J-4 [AR, Vol. III, Tab 34].

dangerous to rely upon Nathan Johnson's exculpatory evidence without seeking additional independent confirmatory evidence.

115. The second and third paragraphs relied upon by the majority of the Court of Appeal are no better. While it is correct to recognize that "*the Crown has to prove guilt beyond a reasonable doubt*" and that "*doubt can come from the evidence or lack of evidence led by the Crown*", the Trial Judge's instruction actually reinforced the need for corroboration under *Vetrovec*. It did so by telling the jury to avoid seeing the trial "*as a choice between what Paul Smith said and whatever evidence you find that confirms that on one hand and what Nathan Johnson said and whatever evidence confirms that on the other hand*." [Emphasis added] Jurors were thus reminded of the importance of confirmatory evidence for both of the key witnesses at trial, even if it was not a credibility contest between them.

116. With respect, the idea that these instructions cured the *Vetrovec* error is unfounded. The caution against Nathan Johnson improperly devalued his exculpatory testimony and shifted an onus onto the defence. To cure such an error would require a clear and specific direction, running counter to a *Vetrovec* instruction which was to be "foremost" in the jury's mind. The Trial Judge's confused instructions simply did not accomplish this necessary task.

5. Counsel's Erroneous Position is Not Determinative

117. The remaining consideration from the case law, and the elephant in the room on this appeal, is defence counsel's conduct at trial. Counsel's failure to object is a relevant factor in assessing the seriousness of legal errors generally,[146] and *Vetrovec* errors in particular.[147]

118. The record shows that it was the Trial Judge that initially proposed the *Vetrovec* caution against Nathan Johnson in this case.[148] However, it is equally clear that the Appellant's trial counsel repeatedly followed the Trial Judge's lead,[149] or failed to object thereto.[150]

---

[146] *R. v. Calnen*, 2019 SCC 6, at paras. 38 – 40 [*Calnen*].
[147] *Brooks, supra* at paras. 17 – 19, 99 – 101; *R. v. Figueroa*, 2016 ONCA 645, at paras. 46 – 47.
[148] Trial Transcript, p. 1327, line 5 – p. 1328, line 4 [AR, Vol. IX, Tab 44].
[149] Trial Transcript, p. 1408, line 20 – 1409, line 6; p. 1417, lines 9 – 11 [AR, Vol. IX, Tab 44]; p. 1420, line 12 – p. 1421, line 5; p. 1425, line 13 – p. 1427, line 5 [AR, Vol. X, Tab 45]; p. 1718, line 10 – p. 1726, line 3 [AR, Vol. XI, Tab 47]; p. 1807, lines 19 – 21 [AR, Vol. XI, Tab 48].

119. The Appellant leaves it to the Respondent to quote each passage of agreement or lack of objection. The record is as it reads, and none of it is disputed. The sole question before this Honourable Court is the effect of trial counsel's failure to properly uphold his client's rights.

120. In the ordinary course, the Appellant might have retained alternate counsel for his appeal, and then alleged ineffective assistance of trial counsel to rid him of his former lawyer's failures. That did not happen in this case. Instead, defence counsel at trial acted as counsel on appeal too.

121. Fortunately for the Appellant, the trial lawyer did not minimize his misunderstanding of the law. Instead, he candidly admitted at the appeal hearing that he had made a mistake:

> JUSTICE BEVERIDGE: But if this was a central issue, as you say, and the law is as clear as you say, at the time the *Vetrovec* caution was given, Nathan Johnson had already testified and given what you say is entirely exculpatory evidence.
>
> MR. MCGUIGAN: Yes
>
> JUSTICE BEVERIDGE: So why would there be any need to have a *Vetrovec* warning?
>
> MR. MCGUIGAN: There wouldn't be. There wouldn't be, My Lord.
>
> JUSTICE BEVERIDGE: So why did you agree … to happen?
>
> MR. MCGUIGAN: I can address that now. It's certainly a topic I planned to address. It was missed, Justice. It was missed by trial counsel. That was me, of course…[151]
> [Emphasis added]

122. The majority of the Court of Appeal nevertheless keyed in on counsel's failure to object, stressing: "Defence counsel did not just remain silent or acquiesce on this issue – he actively encouraged the jury be told that Nathan Johnson was an unsavoury witness and a warning be given."[152] Beveridge J.A. further emphasized: "appellant's counsel not only raised no objection to the approach taken by the trial judge, he was engaged in helping the trial judge craft the jury instructions he now says are critically wrong."[153] Justice Beveridge also pointed to case law which suggested that the failure to object "takes on added significance where counsel has been

---

[150] Trial Transcript, p. 1823, line 7 – p. 1824, line 6 [AR, Vol. XI, Tab 48]; Charge to Jury, p. 29 – 30 [AR, Vol. I, Tab 2].
[151] Appeal Hearing, p. 12, lines 1 – 13. See also: p. 12, lines 13 – 15; p. 14, line 1 – p. 19, line 16; p. 24, line 8 – p. 25, line 21 [AR, Vol. XI, Tab 53].
[152] Appeal Decision, at para. 79 [AR, Vol. I, Tab 6].
[153] Appeal Decision, at para. 104 [AR, Vol. I, Tab 6].

given a full copy of the proposed instructions and ample opportunity to vet them…"[154] Not a mention is made by the majority of trial counsel's admission that he missed the issue at trial.

123. In dissent, Justice Scanlan recognized that trial counsel acted as counsel on appeal, and that his trial position on the *Vetrovec* caution arose from an erroneous understanding of the law. On the basis of the record, he concluded that neither defence counsel, nor Crown counsel, nor the Trial Judge, knew the applicable law. Given the circumstances, trial counsel's failure to object did not attenuate the Trial Judge's responsibility to properly instruct the jury:

> [157] In this case, neither Crown or defence counsel objected to the jury instruction. Counsel for the appellant was also the defendant's trial counsel. He explained on appeal that his failure to object was an error in his understanding of the law. I take no comfort from the fact that appellant counsel was also trial counsel for the accused. There is no application here for ineffective counsel. That said, I am not convinced that an error by trial counsel should alone be the reason this appeal should be dismissed. The fact that trial counsel erred in his understanding of the law does not automatically result in a forfeiture of an accused's right to a trial in accordance with the applicable rules.
>
> [158] It was incumbent upon all of the participants, defence counsel, the Crown and the trial judge, to ensure that the jury was properly instructed on the law. If the judge erred in the instruction, both Crown and defence had an opportunity and duty to highlight the error. There is no explanation from the respondent as to why Crown counsel did not point out the error in the instruction. The most likely explanation is that none of the participants appreciated that there was an error. As I mentioned, at the end of the day the responsibility to properly instruct the jury falls upon the trial judge (*R. v. MacLeod* and *R. v. Pickton*). As part of his instructions, the trial judge told the jury they must take their instructions on the law from him.[155] [Emphasis added]

124. In reaching this conclusion, Justice Scanlan specifically addressed the reasoning in *R. v. Calnen*.[156] He considered whether there was some benefit derived by the defence which might signal that the failure to object was a tactical choice. He concluded there was not:

> [161] During this appeal I asked all counsel to advise as to whether there could have been any tactical advantage to the accused to allow the trial judge to erroneously give the *Vetrovec* instruction in relation to Mr. Johnson's evidence. Like me, they could not identify any discernable advantage to the accused in having the *Vetrovec* instruction as it related to Mr. Johnson.[157] [Emphasis added]

---

[154] Appeal Decision, at para. 107 [AR, Vol. I, Tab 6].
[155] Appeal Decision, at paras. 157 – 158 [AR, Vol. I, Tab 6].
[156] *Calnen, supra*; Appeal Decision, at paras. 159 – 160 [AR, Vol. I, Tab 6].
[157] Appeal Decision, at para. 161 [AR, Vol. I, Tab 6].

125. The Appellant relies upon and commends Justice Scanlan's reasoning to this Honourable Court. In the Appellant's respectful submission, his view on the issue accords with the underlying purpose of assessing the positions of trial counsel on appeal.

126. Appeal courts often examine the positions of trial counsel to glean the seriousness of an error or the prejudice arising therefrom. As LeBel J. noted in *R. v. Van*: "A failure to object to an error may suggest that the error was not serious or that it did not result in an unfair trial"[158] Likewise, in the *Vetrovec* context, Major J. stressed in *Brooks*: "[I]t has often been recognized that once non-direction or misdirection has occurred, the absence of a request from counsel to correct it is a factor to be considered in evaluating the prejudice that has been occasioned."[159]

127. The basis for this appellate consideration is that competent trial counsel – as legal professionals who are duty-bound to protect their client's interests – are presumed to be in the best position to recognize and object to legal errors and prejudicial rulings which impact their client's rights.[160] A defence lawyer's failure to object can thus be seen as a lens, or an analytical tool, by which legal error and/or prejudice is assessed.

128. But what if the tool admits to being broken? What if defence counsel falls on his sword at the Court of Appeal, and admits, as an Officer of the Court, risking professional and civil sanction, to having missed the issue? What if he admits to having erred in his failure to object?

129. The Appellant submits that in these unique circumstances, the utility of counsel's failure to object is significantly diminished as an analytical tool. While undeniably still a "factor" in the analysis on appeal, it should by no means be determinative.[161] As Justice Scanlan observed, "[t]he fact that trial counsel erred in his understanding of the law does not automatically result in a forfeiture of an accused's right to a trial in accordance with the applicable rules."[162]

---

[158] *R. v. Van*, 2009 SCC 22, at para. 43 [*Van*].
[159] *Brooks*, *supra* at para. 99.
[160] *Calnen*, *supra* at paras. 37 – 39.
[161] See, by analogy, *R. v. Pham*, 2013 SCC 15, at paras. 5, 24, 25, in the sentencing context, and *R. v. Wong*, 2018 SCC 25, at paras. 24, 60, in the context of the withdrawal of a guilty plea.
[162] Appeal Decision, at para. 157 [AR, Vol. I, Tab 6].

130. Trial judges fundamentally bear responsibility for the correctness of a jury charge.[163] As such, it is respectfully submitted that the assessment of prejudice in this case should focus primarily on the charge to the jury and the evidence, not trial counsel's admitted shortcomings. At its core, the Appellant ought not be punished for the sins of his counsel.

6. The Proviso Does Not Apply

131. As recognized by all Justices below, this was not an overwhelming Crown case.[164] Accordingly, the conviction can only be saved if the error can be described as "so harmless or minor that it could not have had any impact on the verdict."[165] As LeBel J. explained in *R. v. Van*: "The overriding question is whether the error on its face or in its effect was so minor, so irrelevant to the ultimate issue in the trial, or so clearly non-prejudicial, that any reasonable judge or jury could not possibly have rendered a different verdict if the error had not been made.[166]

132. The Appellant offers two submissions on the *proviso* within that context.

133. First, s. 686(1)(b)(iii) does not apply because of the importance of Nathan Johnson's evidence and the severity of the *Vetrovec* error.

134. Nathan Johnson's testimony spoke directly to identity, causation, murderous intent, planning and deliberation (or lack thereof), party liability (or lack thereof), and motive. It would be a gross mischaracterization to suggest that his exculpatory testimony was a minor, trivial or tangential feature of the trial.

135. Likewise, the *Vetrovec* caution against Nathan Johnson was weighty. It stressed the dangerousness of relying on Nathan Johnson's unconfirmed evidence, urged the greatest care and caution in analyzing it, and emphasized the importance of independent confirmatory evidence before accepting it. Justice Scanlan aptly described the caution as a "full throttle *Vetrovec* instruction".[167]

---

[163] *R. v. Pickton*, 2010 SCC 32, at para. 27.
[164] Appeal Decision, at paras. 97 – 98, 131 [AR, Vol. I, Tab 6].
[165] *Van, supra* at para. 34.
[166] *Van, supra* at para. 35.
[167] Appeal Decision, at para. 139 [AR, Vol. I, Tab 6]. In contrast, see: *R. v. Vassel*, 2018 ONCA 721, at paras. 144, 163 – 166.

136. Read together, the *Vetrovec* cautions against Nathan Johnson and Paul Smith spanned approximately twenty percent of the jury charge (22 of 103 transcribed pages). The jury could not have missed it. They were duty bound not to ignore it.

137. The improper caution had the erroneous effect of undermining exculpatory evidence and shifting the onus of proof. Both errors strike at the heart of trial fairness. The *proviso* cannot apply under such circumstances.

138. Second, the majority's *proviso* reasoning is legally dubious at best.

139. The logic underlying the majority reasoning is that the improper *Vetrovec* caution had no impact on the verdict *because Nathan Johnson's testimony was otherwise unbelievable*. Justice Beveridge suggested that Johnson had woven a "fanciful exculpatory tale"[168] and pointed to eight factors supposedly undermining Nathan Johnson's credibility so as to support this conclusion.[169] He applied the *proviso* on the basis that: "The evidence of Nathan Johnson was like a Hail Mary pass with no one in the end zone to catch it. To say it was unsatisfactory would be kind. A jury would have to suspend all belief for it to raise a reasonable doubt."[170]

140. Respectfully, the majority fumbled its *proviso* holding by improperly re-weighing the evidence on appeal, contrary to the teachings of this Honourable Court. It is the jury who acts as factual referee for the case, not the Court of Appeal. As Justice Scanlan correctly observed:

> [165] …It is not for this Court to weigh the evidence now on appeal and say it was capable of belief or not, and on that basis accept the verdict. In paragraph 29 above my colleague referenced the evidence of Nathan Johnson as "the fanciful exculpatory tale woven by Nathan Johnson." I resile from making such finding of fact as that is not my role on appeal. I limit myself to considering the evidence at face value and ask, if it was properly considered, in accordance with the law, could it have made a difference in the verdict. To that my answer is yes. It should be for a properly instructed jury to decide if it was a 'fanciful tale', or evidence which may have, when considered with the evidence as a whole, left the jury with a reasonable doubt.[171] [Emphasis added]

---

[168] Appeal Decision, at para. 29 [AR, Vol. I, Tab 6].
[169] Appeal Decision, at para. 109 [AR, Vol. I, Tab 6].
[170] Appeal Decision, at para. 109 [AR, Vol. I, Tab 6].
[171] Appeal Decision, at para. 165 [AR, Vol. I, Tab 6].

141. Justice Scanlan's reasoning is supported by both the law and the facts in this case. The case law establishes that the question of whether an error is trivial "should be answered without reference to the strength of the other evidence presented at trial."[172] While the surrounding circumstances may be considered for context, this Honourable Court has repeatedly stressed that appeal courts ought not retry cases on appeal. As Justice Rothstein explained in *R. v. White*:

> [93] …[T]he first category of error that satisfies the requirements of the curative proviso is that of "minor" or "harmless" errors. In determining whether or not an error had only a minor effect, the court may look at the entirety of the case for context, but should not assess the strength of the evidence against the accused (*Van*, at paras. 35 and 37). For example, an error that appears significant in isolation may be minor because, in context, it only related to "a very minor aspect of the case that could not have had any effect on the outcome" or concerned "issues that the jury was otherwise necessarily aware of" (*Khan*, at para. 30).[173]

142. The Appellant submits that the majority of the Court of Appeal went well beyond a legitimate contextual analysis in this case. Instead, it usurped the jury's function by weighing and prejudging the jury's credibility findings on Nathan Johnson.

143. It was for the jury to weigh the impact of Nathan Johnson's prior convictions.[174] It was for the jury to assess whether Nathan Johnson's silence at his own trial impacted his credibility at the Appellant's trial.[175] It was for the jury to consider the impact of Nathan Johnson's telecommunication and self-protection choices.[176] It was for the jury to assess when Nathan Johnson was at the payphone,[177] and whether he tried calling Chad Smith's personal phone but instead dialed the wrong number.[178] It was for the jury to consider whether cell phone tower

---

[172] *Van, supra* at para. 35.
[173] *R. v. White*, 2011 SCC 13, at para 93.
[174] Appeal Decision, at para. 109(a) [AR, Vol. I, Tab 6]; Trial Transcript, p. 928, line 13 – p. 930, line 21 [AR, Vol. VII, Tab 41].
[175] Appeal Decision, at para. 109(b) [AR, Vol. I, Tab 6]; Trial Transcript, p. 1468, line 1 – p. 1470, line 9 [AR, Vol. X, Tab 45].
[176] Appeal Decision, at paras. 109(c), (d) [AR, Vol. I, Tab 6]; Trial Transcript, p. 931, line 2 – p. 932, line 6 [AR, Vol. VII, Tab 41]; p. 1435, lines 5 – 16; p. 1451, lines 5 – 9 [AR, Vol. X, Tab 45]; p. 894, line 6 – p. 895, line 15 [AR, Vol. VII, Tab 41].
[177] Appeal Decision, at para. 109(e) [AR, Vol. I, Tab 6]; Trial Transcript, p. 448, lines 9 – 13; p. 459, line 17 – p. 460, line 3; p. 470, line 13 – p. 471, line 14 [AR, Vol. V, Tab 39].
[178] Appeal Decision, at para. 109(e) [AR, Vol. I, Tab 6]; Trial Transcript, p. 953, lines 7 – 14 [AR, Vol. VII, Tab 41]; p. 1462, line 21 – p. 1463, line 16 [AR, Vol. X, Tab 45]; p. 1561, lines 2 – 13 [AR, Vol. X, Tab 46].

pings, which were consistent with Nathan Johnson's testimony about the Appellant's whereabouts at the time of the homicide, were outweighed by cell phone tower pings which arguably contradicted Nathan Johnson's pre- and post-offence testimony.[179] It was for the jury to weigh Nathan Johnson's evidence that he intentionally pulled the trigger but only intended on shooting Chad Smith in the arm.[180] It was for the jury to assess the weight of Paul Smith's evidence and the degree to which it was corroborated by independent facts.[181] The Appellant was statutorily required to be tried by judge and jury, not the Court of Appeal.

144. We will of course never know exactly what happened in the jury room on any of the above issues. But in the absence of the improper *Vetrovec* caution, the jury might reasonably have relied upon Nathan Johnson's exculpatory testimony to an even greater degree. They might have done so without fear of dangerous unsavoury evidence. They might have done so without the circumspection of applying the greatest care and caution. They might have done so without being restricted by a search for independent confirmation. They might have had a doubt.

145. The *proviso* only applies where an error is so harmless or minor that it could not have had any impact on the verdict. This stringent legal standard is not met on the facts of this case.

146. The Appellant respectfully asks this Honourable Court to allow the appeal, quash the convictions, and order a new trial in this case.

PART IV – SUBMISSIONS CONCERNING COSTS

147. The Appellant does not seek costs and makes no submissions as to costs.

PART V – ORDERS SOUGHT

148. The Appellant requests that this appeal be allowed, the convictions quashed, and that a new trial be ordered.

---

[179] Appeal Decision, at para. 109(f) [AR, Vol. I, Tab 6]; Trial Transcript, p. 884, line 5 – p. 890, line 3 [AR, Vol. VII, Tab 41]; p. 1464, line 18 – p. 1467, line 16 [AR, Vol. X, Tab 45]; p. 1646, line 17 – p. 1661, line 20; p. 1662, line 4 – p. 1663, line 10; p. 1663, line 11 – p. 1666, line 6; p. 1668, line 8 – p. 1683, line 20 [AR, Vol. X, Tab 46].

[180] Appeal Decision, at para. 109(g) [AR, Vol. I, Tab 6]; Trial Transcript, p. 896, line 16 – p. 897, line 2; p. 901, line 11 – p. 902, line 16; p. 922, lines 10 – 11; p. 933, lines 2 – 16 [AR, Vol. VII, Tab 41].

[181] Appeal Decision, at para. 109(h) [AR, Vol. I, Tab 6].

PART VI – SUBMISSIONS ON CASE SENSITIVITY

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of March, 2020.

NOVA SCOTIA LEGAL AID
Lee V. Seshagiri
Roger A. Burrill
Counsel for the Appellant

PART VII – TABLE OF AUTHORITIES

Para.

Cases