



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Strongitharm*, 2016 NLCA 7

Date: February 19, 2016

Docket: 201301H0059

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

JULIAN STRONGITHARM

RESPONDENT

Coram: Rowe, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
Trial Division 2012 01G 0424
2013 NLTD(G) 53 and 2013 NLTD(G) 97

Appeal Heard: November 16, 2015

Judgment Rendered: February 19, 2016

Reasons for Judgment by Rowe J.A.

Concurred in by White and Hoegg JJ.A.

Counsel for the Appellant: Paul Adams

Counsel for the Respondent: John Lavers

Rowe J.A.:

INTRODUCTION

[1] This is an appeal by the Crown against the acquittal of the respondent, Julian Strongitharm, on a charge of possession of cocaine for the purpose of trafficking. The Crown submits that the trial judge made errors of law regarding the evidence, resulting in an acquittal that was unsound.

[2] In its factum, the Crown gave an “Overview” of the case as follows:

1. The Respondent was acquitted after trial of a charge that he possessed cocaine for the purpose of trafficking (s. 5(2) *Controlled Drugs and Substances Act*) on or about January 12, 2010.
2. The investigation revealed a sophisticated drug trafficking enterprise bringing kilograms of cocaine from British Columbia to St. John’s, NL, for distribution over the 4.5 month period from September 2009 to January 2010. The Crown case alleged that, as part of this common enterprise, the Respondent, together with his brother, Ben Strongitharm, delivered kilograms of cocaine from Victoria, BC, to St. John’s, NL, in January 2010. The cocaine was transported to St. John’s in the Respondent’s vehicle which had a hidden compartment in which Police found 6 kilograms of cocaine and approximately \$250,000.00 in cash.
3. From the onset of proceedings, the Trial Court consistently held that detailed direct evidence of the ongoing drug trafficking activities of members of the common enterprise (including the Respondent’s brother, Ben Strongitharm) gathered between September 2009 and early January 2010 was neither relevant nor material to the charge against the Respondent (*R. v. Blok-Andersen*, 2013 NLTD(G) 118 at paragraph 31; 39). With respect, excluding this evidence from consideration for purposes of deciding various issues at trial, including the verdict itself, constituted a fundamental error.
4. To properly understand and assess the relevance and probative value of the evidence against the Respondent specifically, it has to be understood with reference to the nature and extent of the related criminal enterprise and the roles and methods of those involved in it. The evidence of the activities of the ongoing drug trafficking enterprise between September 2009 and early January 2010 was “necessary to understand the unfolding events surrounding the offence” *R. v. Magloir*, 2003 NSCA 74 at paragraph 23). The Crown was entitled to lead “evidence that tells the story of a crime in a manner that makes it possible for the jury to properly carry out its fact finding function”. (*R. v. Riley*, [2009] O.J. No. 1374 (SCJ) at paragraph 60).

5. The Trial Judge's ruling had the effect of artificially isolating the evidence against the Respondent from the context providing its meaning. Doing so distorted the Trial Judge's analysis of the evidence against the Respondent. By ignoring its factual context, the Trial Judge misapprehended the probative value of that evidence. The result was a consistent failure on the part of the Trial Judge to recognize the reasonable inferences to be drawn from the totality of the evidence presented.
6. This error permeated what the Appellant submits were a series of erroneous decisions by the Trial Judge with respect to the sufficiency of grounds for the Respondent's arrest; the sufficiency of grounds for a Warrant to search the Respondent's hotel room, the existence of exigent circumstances justifying the warrantless entry and the securing of the hotel room while a Warrant was obtained; the exclusion of evidence seized pursuant to s. 24(2) of the *Charter*; and the admissibility of text messages pursuant to the Co-conspirators Exception to the Hearsay Rule. It also impacted on the verdict itself, in particular, the Trial Judge's decision with respect to whether essential elements of the offence charged (possession and knowledge) had been proven.
7. The Trial Judge's failure to appreciate the relevance and materiality of the evidence gathered between September 2009 and early January 2010 was compounded by several additional errors. These additional errors included a failure to apply the correct standard of review with respect to the sufficiency of grounds for both the Respondent's arrest and the search warrant for his hotel room; the erroneous interpretation and application of the Co-conspirator's Exception to the Hearsay Rule; and a failure to properly interpret and apply the doctrine of willful blindness.
8. For these and additional reasons to be addressed herein, the Appellant asks that the verdict of acquittal be quashed and a new trial ordered.

[3] The respondent takes issue with all the foregoing. As well, the respondent submits that even if the trial judge erred, nonetheless the test for setting aside the acquittal and ordering a new trial (as set out in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609) has not been met.

FACTS

[4] I would rely on the statement of facts set out in the Crown's factum:

9. In early September 2009, the Royal Newfoundland Constabulary (RNC) began an investigation, *Operation Razorback*, of a number of individuals from British Columbia believed to be involved in trafficking cocaine, marihuana, and other drugs in the St. John's, NL, area. Investigation determined that these individuals were bringing drugs to NL, distributing

them to known local drug dealers, and shipping cash back to British Columbia by wire transfer, body pack or in luggage on return flights to BC. The group carried out its drug trafficking activities until a Police takedown on January 12, 2010.

10. Investigation indicated the leader of the group was Peter Blok-Andersen (Blok-Andersen). Other central participants in the group included Evan Brennan-Smith (Brennan-Smith), Jacob Hauge (Hauge), Ricco Zanolli (Zanolli), Zach Hill (Hill), and Ben Strongitharm (Ben), the Respondent's brother.

September 2009 - Early January 2010

11. Evidence of the group's activities between September 2009 and early January 2010 is set out in detail in the "*Agreed Statement of Uncontested Facts*" (Appeal Book at Tab 9) filed before the Trial Court. The following summaries that evidence:
 - Initial targets of the investigation included Brennan-Smith (alias "Mike Smith" or "Mikey"); Hauge (alias "Brody"), Zanolli (alias "Antonio"), and Ben Strongitharm (alias "Jay"), the Respondent's brother.
 - Throughout this timeframe, the group used several premises as "stash houses". Brennan-Smith was observed attending at the various "stash houses" on numerous occasions with others including Hauge, Zanolli, Chris Webster and Ben Strongitharm.
 - Beginning in September 2009, Ben Strongitharm was observed associating the Brennan-Smith, Hauge, and Zanolli. In October 2009, Brennan-Smith and Ben Strongitharm (sometimes with Hauge) with observed attending at several of the "stash houses" on a number of occasions.
 - Covert entries (authorized by Warrant) into these "stash houses" in October and November 2009 confirmed the presence of large quantities of cocaine, crack cocaine, plastic bags believed to have contained cocaine, marihuana, digital scales, a vacuum sealer, a money counter, and bundles of cash.
 - Ben Strongitharm left St. John's, on a flight to Victoria, BC, on October 31, 2009. Police had no further contact with Ben Strongitharm until his return to St. John's in January 2010.
 - In November 2009, Brennan-Smith, Hauge, and Webster were observed attending at a "stash house" on a number of occasions. Covert entries (pursuant to Warrant) into this "stash house" confirmed the presence of bundles of cash (November 8th – 2 bundles of cash in a suitcase; five bundles of vacuum sealed cash; November 14th – 7 bundles of cash estimated at \$35,000.00; November 17th – 8 bundles of cash totaling approximately \$50,000.00; November 19th – bundles and bags containing in excess of \$100,000.00 in cash). Also on November 19th, 2

bricks of cocaine (weighing approximately 6 pounds) were observed in the “stash house”.

- On November 23, 2009, Hauge paid cash for an Air Canada ticket from St. John’s to Vancouver, BC, for a Brad Kavanagh departing November 24. At the airport, Police seized \$195,135.000 in cash found in vacuum sealed bags in a suitcase checked by Kavanagh.

Money Transfers

12. On November 17, 2009, Webster transferred \$3,000.00 to a BMO account in the name of Julian Zande Strongitharm, the Respondent.
13. On November 26, 2009, Hauge transferred \$4,000.00 to a BMO account in the name of Julian Xande Strongitharm, the Respondent.
14. On January 4, 2010, Brennan-Smith, a central player in the drug trafficking operation arrived in St. John’s on a flight from Vancouver, BC. On January 5, 2010, Brennan-Smith transferred \$3,000.00 via Western Union to Ben Strongitharm.

January 2010

15. On January 5, 2010, the Respondent registered ownership of a Toyota Cruiser, BC licence plate number 791 TJA (the same date that Brennan-Smith transferred \$3,000.00 to the Respondent’s brother, Ben Strongitharm).
16. On January 8, 2010 the Respondent was issued a speeding ticket in North Western Ontario as the driver of a Toyota Cruiser, BC licence plate number 791 TJA.
17. On January 10, 2010 Blok-Andersen, the apparent leader of the drug trafficking operation, arrived at St. John’s, NL, airport.
18. On the same date (January 10th), the Respondent and his brother, Ben Strongitharm, boarded the overnight Marine Atlantic ferry crossing from North Sydney, NS, arriving in Port Aux Basque, NF, early morning January 11, 2010.
19. On January 12, 2010, the Respondent arrived at the Ramada Inn, St. John’s, NL, at approximately 3:00 a.m. and checked in for two night departing January 14, 2010. The Respondent paid cash for the hotel room.
20. Early afternoon, January 12, 2010, Blok-Andersen and Hill were observed at the Ramada Inn. The Respondent and his brother, Ben Strongitharm, were observed meeting with and getting into a vehicle operated by Blok-

Andersen. During the same time period, Brennan-Smith was observed entering the Ramada Inn before leaving in a vehicle with Blok-Andersen, who had parked in an adjacent lot. Their vehicle was then followed back to 224 Anchorage Road where it remained.

21. At approximately 5:15 p.m. on January 12, 2010, a confidential source, who had provided accurate and reliable information with respect to the drug trafficking operation for several months, advised Police that a shipment of coke had arrived in the city and the “Mikey” (Brennan-Smith) and “Zach” (Hill) would be distributing it.
22. At approximately 5:30 p.m., Police observed Brennan-Smith engaged in what appeared to be two drug transactions while operating a red Ford Taurus before returning to 224 Anchorage Road. Within 10 minutes, Brennan-Smith again left 224 Anchorage Road in the same vehicle and met with the occupant of a pick-up truck (James Cody) who was arrested in possession of a kilogram of cocaine and three ½ pound bags of marijuana. Brennan-Smith was also arrested at the time.
23. Shortly after Brennan-Smith’s arrest, at approximately 5:40 p.m. on January 12, 2010, Police entered 224 Anchorage Road and arrested Blok-Andersen and two other individuals – with 1 kilogram of cocaine in plain view at the residence. Also observed were significant quantities of cash, a money counter, and empty vacuum sealed bags.
24. Police also attended the Ramada Inn and entered room 113 where arrested the Respondent and Ben Strongitharm. The hotel room was secured but not searched at that time. Later that evening, Police obtained a Warrant and searched the room.
25. Police also searched (pursuant to Warrant) 224 Anchorage Road. The Toyota Cruiser, BC licence plate number 791 TJA, registered to the Respondent on January 5, 2010, was located in the garage of the Anchorage Road premises. The Toyota had a hidden compartment that was visible if floor mats in the rear of the vehicle were removed. The mechanical workings of the compartment were wired to the vehicle’s defrost system. From the hidden compartment, police seized 6 kilograms of cocaine and approximately \$250,000.00 in cash.

Respondent’s Arrest and Subsequent Search of Room 113 Ramada Inn

26. At trial, the Court found that the Respondent’s arrest and the subsequent search of Room 113 pursuant to Warrant violated the Respondent’s rights under s. 8 and 9 of the *Charter* and excluded the evidence seized (*R. v. Strongitharm*, 2012 NLTD(G) 55). The evidence seized included:

- From a knapsack belonging to the Respondent, registration in the Respondent's name of the Toyota Cruiser seized at 224 Anchorage Road; receipts from the January 11, 2010, Marine Atlantic ferry crossing with his brother, Ben Strongitharm; a speeding ticket issued to the Respondent on January 8, 2010, a.m. in Northern Ontario while operating the Toyota Cruiser, BC licence plate number 791 TJA; a one-way plane ticket for a return flight to Victoria, BC, departing January 14, 2010; and a bundle of \$6,500.00 in cash.
- In a knapsack belonging to the Respondent's brother, Ben Strongitharm, \$8,440.00 in cash and an LG telephone and a Rogers Blackberry.

Text Messages

27. At trial, the Court also ruled that contents of text messages to and from Ben Strongitharm found on cell phone seized from third parties, including Blok-Andersen and Brennan-Smith, were not admissible against the Respondent under the Co-conspirators Exception to the Hearsay Rule (*R. v. Strongitharm*, 2013 NLTD(G) 53). The relevant text messages were exchanged in the days leading up to January 12, 2010, and are as contained in the Exhibit *Consent No.6* (Appeal Book at Tab 10). The person identified as "Heineken" is Ben Strongitharm, the individual identified as "Dollar" is Brennan-Smith and the individual identified as "Vectra" is Blok-Anderson. The text messages related to the anticipated arrival of the Strongitharms in St. John's, arranging for a stash house with a garage, confirmation of the Strongitharms' arrival in St. John's and the urgency of getting the vehicle they were operating off the road and concerns that third parties may have been "the drivers" and/or "the ride".

Trial Decision

28. In a decision rendered in June 2013 (*R. v. Strongitharm*, 2013 NLTD(G) 97), the Trial Judge acquitted the Respondent on the charge of possession of cocaine for the purposes of trafficking (s. 5(2) *CDSA*). In doing so, the Court reiterated its view that evidence of the activities of members of the joint enterprise from September through December, 2009, inclusive, was neither relevant nor material to the charge against the Respondent. The Court ruled that the remaining evidence was insufficient to prove essential elements of the offence – including possession and knowledge.

ISSUES

[5] The Crown set out the issues as follows:

- (1) Did the Trial Judge err in excluding evidence relating to events between September 2009 and early January 2010 as irrelevant and immaterial to the charge against the Respondent;

- (2) Whether the Trial Judge erred in ruling that there was no reasonable grounds for the arrest of the Respondent and that the arrest therefore constituted a violation of the Respondent's s. 9 *Charter* rights;
- (3) Whether the Trial Judge erred in ruling that there was insufficient grounds for the issuance of the Search Warrant for the Respondent's hotel room and that the ensuing search therefore violated the Respondent's s. 8 *Charter* rights;
- (4) Did the Trial Judge err in ruling that there were no "exigent circumstances" justifying the police entry and securing of the Respondent's hotel room without a warrant pending the obtaining of a Search Warrant and that doing so therefore violated the Respondent's s. 8 *Charter* rights;
- (5) Whether the Trial Judge erred in excluding evidence seized pursuant to the warranted search of the Respondent's hotel room pursuant to s. 24(2) of the *Charter*;
- (6) Did the Trial Judge err in ruling that text messages exchanged by members of the related ongoing criminal enterprise were inadmissible against the Respondent under the "Co-conspirators Exception to the Hearsay Rule";
- (7) Whether the Trial Judge erred in her interpretation and application of the doctrine of willful blindness.

[6] To this list must be added a further issue: if the trial judge erred as to the matters referred to above (or some of them), should the acquittal be set aside and a new trial ordered, having regard to the test set out by the Supreme Court of Canada in *R. v. Graveline, supra*.

ANALYSIS

Agreed Statement of Uncontested Facts

[7] In my view, the key ruling made by the trial judge related to the relevance (or rather the irrelevance) of the "Agreed Statement of Uncontested Facts" set out in 2013 NLTD(G) 53. I reproduce the judge's reasoning on this issue.

20 I now turn to the charge of possession for the purpose of trafficking in order to identify what must be proven. The count for which Julian Strongitharm stands charged in the Indictment filed January 25, 2012 reads:

Julian Strongitharm (of Victoria, British Columbia) stands charged that on or about the 12th day of January, A.D., 2010, at or near Conception Bay South, in the Province of Newfoundland and Labrador, did unlawfully have in his possession, for the purpose of trafficking, cocaine, a substance included in Schedule 1 of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and did thereby commit an indictable offence, contrary to Section 5(2)-5(3)(a) of the said Act.

21 The essential elements of the offence to be established are: the identity of Julian Strongitharm as the individual who committed the offence; the time and place, being January 12, 2010 at or near Conception Bay South in the Province of Newfoundland and Labrador; the drug was, in fact, cocaine; Julian Strongitharm had actual physical possession, knew he had possession and exerted control over the cocaine while he had actual physical possession of it; and finally, Julian Strongitharm had possession for the purpose of trafficking.

22 The Crown raises as its first issue (the preliminary issue herein) whether or not the facts set out in the agreed statement of uncontested facts are relevant to the charge against Julian Strongitharm. In order to arrive at a decision on this point the task is simplified by dividing the timeframe contained therein into three segments: events from September 2009 to January 12, 2010, the "continuing conspiracy"; events from September to December 2009, inclusive, the "broad conspiracy"; and the events in January, 2010, the "narrow conspiracy".

23 The agreed statement of uncontested facts filed by counsel discloses a plethora of evidence relative to the broad conspiracy, proving the existence of a conspiracy and/or common enterprise, beyond a reasonable doubt. But of what relevance (and materiality) is this evidence to the charge faced by Julian Strongitharm? Is he linked in any way to the broad conspiracy?

24 The role, if any, played by Julian Strongitharm in the broad conspiracy is, at best, minimal. Julian Strongitharm was the recipient of two money transfers, one from Jacob Hauge, the other from Chris Webber. Even this latter statement must be somewhat qualified in that the money was transferred to a bank account registered in the name of Julian Strongitharm, however, no particulars of the usage of that account by him were provided. Such usage would show day to day transactions, signature card (if available) and other indicia of ownership or control of it.

25 Julian Strongitharm ranked with many others, none of whom were charged in the broad conspiracy, as recipients of transferred funds. Many of these individuals appear to be relatives of the transferors and/or targets in the investigation. The accused was not a target in the broad conspiracy. Further, there is no evidence he, at any point during the timeframe in question, was in the province of Newfoundland and Labrador; was seen associating with the named

targets in the investigation or with local drug dealers known to police. Despite the many and detailed surveillances of entries into stash houses he was not among those observed and implicated in the conspiracy. Finally, no evidence has been brought forward to show the existence of an agreement to participate in a conspiracy and/or common enterprise or that he had knowledge of such conspiracy and/or common enterprise including knowledge of what the others may have been involved in, that is, trafficking in cocaine.

26 Based on the foregoing, I conclude Julian Strongitharm has no important connection to the broad conspiracy. Therefore, the question must be answered as to how the activities of others in the broad conspiracy are relevant to the sole count in the indictment filed against Julian Strongitharm. In my view, they are not. The admission of this type of evidence only serves to mislead, confuse and deflect the Court's focus away from what must be proven in respect of the charge against Julian Strongitharm. Such evidence can inappropriately influence a trier of fact by attaching blameworthiness to the accused as a result of his minimal association (transference of funds to him) with others involved in or targets in the broad conspiracy.

27 Does the evidence comprising the broad conspiracy assist in proving Julian Strongitharm possessed cocaine for the purpose of trafficking on January 12, 2012? I would answer this question in the negative. There is no relationship between the actions of others during the broad conspiracy and the facts required to be proved against Julian Strongitharm. I say this recognizing that some of the same individuals were involved in both the broad conspiracy, narrow conspiracy and/or continuing conspiracy. Julian Strongitharm was not one of these individuals. In these particular circumstances the approach of the Crown fails to consider that an individual like this accused may have no knowledge of or be a participant in the broad conspiracy but could, at a later date, become either directly or indirectly a participant in the narrow conspiracy, if one existed, and subject to such involvement being proven.

28 There is no direct evidence or nexus arising out of the broad conspiracy which allow for a resolution of matters in issue in this case. Similarly, I do not see that a chain of inferences can be drawn from the broad conspiracy which would link Julian Strongitharm to the narrow conspiracy and ultimately to proof of his possession of cocaine for the purpose of trafficking on January 12, 2010. Both the temporal and substantive connection between the broad conspiracy and the charge faced by the accused are too remote in time and fact.

29 A simple example of where evidence is found wanting can be seen in the factual summary of the headnote in *R. v. Cloutier*, [1979] 2 S.C.R. 709:

...The admissibility of the items tending to establish that the accused was a user of marijuana is determined by the relevance of the evidence or the existence of a connection between the two facts

which makes it possible to infer the existence of one from the existence of the other.

In the case at bar there is no connection between the fact that the accused is a user of marijuana and the fact that he knew or ought to have known that the dresser contained a narcotic at the time it was imported. *Mens rea* is an essential aspect of the crime attributed to the accused, and it must be established beyond all reasonable doubt. The type of evidence which merely raises suspicions against the accused is precisely the type of evidence which cannot be admitted; nor should this evidence be admitted because it may disclose the interest of the accused in the importation. Proof of the motive for a crime is generally admitted as circumstantial evidence, but only if it is relevant. In the case at bar, it cannot be said that the use of marijuana by the appellant is in itself a fact seriously tending to establish motive for the crime of importation with which he is charged.

30 I would close by pointing out this count was severed from the original indictment filed in the matter because the applicant satisfied the Court, at that time, the evidence garnered throughout the autumn of 2009 was of little value to a determination of the guilt or innocence of Julian Strongitharm; it would have been unfair to have the count dealt with along with the other counts which would involve considerably more time to hear and the facts against other individuals charged were viewed as far stronger and could thus prejudice the applicant herein if he were tried together with the other accused. Nothing has changed. Had the evidence been considered relevant the count would not have been severed.

31 Accordingly, I confirm the evidence gathered by police from September to December, 2009, inclusive, is neither relevant nor material to the charge which must be proven against Julian Strongitharm. The evidence excluded does not include particulars of the two money transfers to a bank account in the name of Julian Strongitharm.

32 In the alternative, having found the existence of a broad conspiracy, beyond a reasonable doubt, I am satisfied there is no evidence to show any type of agreement between the applicant and the parties alleged to be participants in the said conspiracy/common enterprise, an element essential to finding Julian Strongitharm was a member of it. The direct evidence against him of the two money transfers is an insufficient basis to establish membership.

[8] If the trial judge was correct that the Agreed Statement of Uncontested Facts was not relevant to the charge against the respondent, then it will be necessary to consider in detail issues #2 to #7 identified by the Crown. However, if the judge erred as regards the relevance of the Agreed

Statement of Uncontested Facts, then it may be that is sufficient to meet the test for a new trial under *R. v. Graveline*.

Relevance

[9] *Sopinka, Lederman & Bryant: The Law of Evidence in Canada (3d)* [citation] at pp. 51-52 deals with relevance as follows:

A traditionally accepted definition of relevance is that in Sir J.F. Stephen's *A Digest of the Law of Evidence*, where it is defined to mean:

... any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

Pratte J. in *R. v. Cloutier*, [1979] 2 S.C.R. 709 accepted a definition from an early edition of *Cross on Evidence*:

For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other. One fact is not relevant to another if it does not have real probative value with respect to the latter.

Although the question of relevance, and admissibility generally, is for the trial judge, whether a fact bears the required relationship to another fact is not usually determined by the application of a legal test. It is an exercise in the application of experience and common sense. Thayer believed that logic (not the logic of deductive reasoning, but of knowledge and experience) provided the best guide to the application of this fundamental principle of evidence law. Doherty J.A. in *R. v. Watson*, [1996] 30 O.R. (3d) 161 (Ont.C.A.) stated that "relevance"

... requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation, then "Fact A" is relevant and *prima facie* admissible.

The first step in determining what is relevant is to identify the facts that are in issue in the case. It is the substantive law relating to the particular charge or cause of action that forms the basis for this identification exercise. ... In a criminal case, the relevance of evidence has to be determined in reference to all the issues which have to be established by the prosecution for the particular offence charged and any defences raised by the defence.

[10] Crown counsel's argument concerning the relevance of the Agreed Statement of Uncontested Facts was as follows:

The Crown case alleged that as part of an ongoing drug trafficking enterprise, the Respondent, together with his brother Ben Strongitharm (an established central player in the enterprise), transported kilograms of cocaine in the Respondent's vehicle from British Columbia to St. John's and delivered it to key members of drug trafficking enterprise for distribution. In other words, the Respondent had both personal and joint possession of the cocaine while he and his brother transported it to St. John's. Further, the Respondent had continued constructive possession of the cocaine when he delivered it and his vehicle into the custody of members of the drug trafficking enterprise for their use and benefit. It was acknowledged that the Respondent's possession of the cocaine, if proven, was for the purpose of trafficking.

Contrary to the Trial Judge's view (*R. v. Strongitharm*, 2013 NLTD(G) 97 at paragraphs 30, 25), it was not necessary to prove the Respondent continued to have some measure of control over the vehicle used to transport and deliver the cocaine while it remained in the custody of members of the common enterprise at 224 Anchorage Road. Even if it could be said the Respondent relinquished any measure of control over the vehicle by the time it was seized by Police on January 12, 2010, it would not constitute a defence. If the Respondent's transport and delivery of the vehicle and cocaine to members of the common enterprise were accepted as proven, he was both a principal and a party to the offence charged (s. 21(1) *Criminal Code*.)

At trial, the Court excluded the considerable direct evidence of the ongoing drug trafficking enterprise gathered between September 2009 and early January 2010 finding that it was "neither relevant nor material to the charge that must be proven against Julian Strongitharm" (*R. v. Strongitharm*, 2013 NLTD(G) 97 at paragraph 2). This finding found its roots at the onset of proceedings in the Court's decision to grant the Respondent's severance application *R. v. Blok-Andersen*, 2013 NLTD(G) 118 at paragraphs 31; 39). It then permeated the Court's decision as to (1) the sufficiency of the ground for both the Respondent's arrest and the subsequent Warrant to search his hotel room *R. v. Strongitharm*, 2012 NLTD(G) 55 at paragraphs 14-16; 50-51) and (2) the Court's decision to exclude text messages exchanged between core members of the drug trafficking enterprise (including the Respondent's brother, Ben Strongitharm) in the time period leading up to the Respondent's arrest *R. v. Strongitharm*, 2013 NLTD(G) 52 at paragraphs 22-32; 46-47), and finally (3) the Trial Court's decision as to whether the remaining evidence was sufficient to prove the essential elements of the offence charged (*R. v. Strongitharm*, 2013 NLTD(G) 97 at paragraph 2).

The Appellant submits that the Trial Court's failure to recognize the relevance and materiality of the direct evidence of the activities of various participants in the ongoing drug trafficking enterprise (including the Respondent's brother, a

central player in the enterprise with whom the Respondent is directly associated) was a fundamental error undermining both its decisions as to the admissibility of important evidence and by extension, the verdict itself.

Courts have consistently recognized the admissibility of evidentiary value of such evidence as “necessary to understand the unfolding events surrounding the offence.” (*Magloir*, supra at paragraph 23). This is because it is often difficult, if not impossible to appreciate the development and probative value of later events without the evidence of events which precede them (*R. v. Ly*, [1996] A.J. No. 1089 at paragraph 3, affirmed *R. v. Ly*, [1997] 3 S.C.R. 698). The Crown was entitled to lead “evidence that tells the story of a crime in a manner that makes it possible for the jury to properly carry out its fact finding function” (*R. v. Riley*, [2009] O.J. No. 1374 (SCJ) at paragraph 60). Nordheimer J. put it this way in *R. v. Skeete*, 2012 ONSC 737 at paragraph 15:

[15] That said, it remains the fact that a “criminal trial is, after all, about the search for truth”. [1] A jury ought to be provided with information that will allow them to put the central facts into context including the nature of the relationships between persons connected to the events that might not otherwise be obvious. Jurors should not be placed in a situation where they are attempting to perform their truth seeking function in what is effectively either a factual vacuum or an artificial one.

The above-noted comments were made in the context of the admissibility of “narrative evidence” which may otherwise have been considered inadmissible hearsay. These principles apply more strongly in the present and since the Crown was not seeking to tender hearsay. Rather, evidence gathered between September 209 and early January 2010 constituted direct and reliable evidence of the ongoing drug trafficking activities of various members of the common enterprise leading up to the January 2010 offence. It established the pattern of drug trafficking activities of those transferring money to the Respondent and who were directly involved in the offence for which the Respondent was charged in January 2010.

Similar principles have been applied with respect to the admissibility of evidence relating to a continuing offence. In *Canadian Criminal Procedure 6th Ed.* the Honourable R.E. Salhany (at 7.90) states that “where the course of conduct is treated as a continuing offence, the Court is entitled to consider those acts outside the limitation period insofar as they form part of and explain the continuous conduct falling within the limitation period”.

Basic principles of relevance and materiality also dictate the admissibility of such evidence. As stated by Justice Binnie in *R. v. J.-L.J.*, [2000] 2 S.C.R. 6—(at paragraph 47), evidence is relevant “where it has some tendency as a matter of logic and human experience to make the proposition for which it is advance more likely than that proposition would appear to be in the absence of that evidence”

(D.M. Paciocco and L. Stuesser, *The Law of Evidence*, (1996) at page 19”. (see also: *R. v. Cloutier*, [1979] 2 S.C.R. 709) Relevance involves probability, not certainty. There is no minimum probative value required before evidence may be considered relevant and admissible *R. v. Corbett*, [1988] SCJ No. 40 (SCC), paragraph 100). As noted in David Paciocco’s test, *The Law of Evidence*, 5th Ed. (Toronto: Irwin Law, 20008) at page 33, “...Relevance may become apparent only when other evidence is adduced, and even then it may depend on a chain of inference”.

In assessing the relevance and materiality of the September 2009 through early January 2010 evidence, the Trial Judge confined her analysis to determining whether the evidence was sufficient to prove the Respondent was part of what it called the “broad conspiracy” during that time period (*R. v. Strongitharm*, 2013 NLTD(G) 53 at paragraphs 22-32). Having found the evidence insufficient to prove the Respondent’s involvement in the “broad conspiracy”, the Court excluded that evidence as irrelevant and immaterial to the charge against the Respondent.

With respect, the Trial Court asked the wrong question. The issue was not proof of the Respondent’s membership or participation in the criminal enterprise between September 2009 and early January 2010. Instead, evidence of the activity and methods of those involved in the ongoing common enterprise was relevant to understanding and appreciating the probative value of evidence of the Respondent’s actions leading up to the offence on or about January 12th, 2010. The Trial Judge’s ruling had the effect of artificially isolating that evidence from the context providing its meaning.

The trial Court’s decision to divide the analysis into three segments – events from the September 2009 to January 12, 2010, the “continuing conspiracy”; events from September to December, 2009, inclusive, the “broad conspiracy”; and the events of January, 2010, the “narrow conspiracy” *R. v. Strongitharm*, 2013 NLTD(G) 53 at paragraph 22) – was artificial. What happened on or about January 12th, 2010, was the culmination of “continuing conspiracy” and all aspects of it were relevant to determining the Respondent’s participation on it.

The Crown submits that the relevance of activities of members of the ongoing drug trafficking enterprise between September 2009 and early January 2010 to proving the specific allegations against the Respondent is readily apparent. To properly understand and assess the probative value of the evidence against the Respondent specifically, it was necessary to understand it in context. To fully appreciate that evidence, it had to be assessed against the nature and extent of the associated criminal enterprise and the roles and methods of those involved in it. The evidence of what took place between September 2009 and early January 2010 was necessary “to explain the significance of other facts” (*R. v. Lo*, 1997 CanLii 3844 (BCCA) at paragraph 7). Absent that evidence, it was not possible to

properly understand and assess the probative import of the evidence against the Respondent.

For example, it would not have been possible to accurately appreciate the evidentiary value of the money transfers to the Respondent by two central participants in the criminal enterprise without understanding the particulars of their deep involvement in the drug trafficking enterprise at the relevant time. Similarly, it would not have been possible to fully appreciate the probative value of the Respondent registering a vehicle and almost immediately travelling across the country from British Columbia with his brother, Ben Strongitharm – arriving in St. John’s simultaneously with other key members of the criminal enterprise – without understanding the continuous drug trafficking activity and the particulars of his brother’s involvement in that activity. Nor would it be possible to fully appreciate the probative significance of the Respondent’s association and interaction with his brother and other key players in the drug trafficking operation at the time of the offence without reference to its context.

Had the totality of the relevant and material evidence been admitted and assessed, the only rational conclusion should have been that the Respondent both committed and assisted members of the common enterprise in committing the offence charged. It would not be reasonable to conclude that the proven sequence of events, considered as a whole, could have been the result of innocent coincidence. Such a conclusion would seem necessarily the product of conjecture and speculation not founded in the evidence.

By excluding the evidence gathered between September 2009 and early January 2010 from consideration, the Court created “either a factual vacuum or an artificial one” (*Skeete, supra* at paragraph 15) that distorted its assessment of the probative value of the evidence against the Respondent. The phrase “out of context” applies directly to the Trial Judge’s assessment of that evidence. For the reasons that follow, the Appellant submits that this distorted analysis impacted significantly on fundamental decisions as to the admissibility of cogent/reliable evidence and, ultimately, on the verdict itself. It was an error of fundamental significance which, in and of itself, justifies overturning the acquittal and ordering a new trial.

I find the foregoing persuasive.

[11] A few salient facts from the Agreed Statement of Uncontested Facts will illustrate why that evidence had probative value. In early January 2010, Julian Strongitharm and his brother, Ben Strongitharm, drove an SUV from British Columbia to St. John’s. The Agreed Statement of Uncontested Facts indicated that since September 2009 Ben Strongitharm had been extensively involved in transporting cocaine from British Columbia to St. John’s. The day that Julian and Ben Strongitharm arrived in St. John’s (January 12,

2010) the SUV was seized by police and found to have a hidden compartment containing a large quantity of cocaine. At the time of the seizure, the SUV was in the possession of Peter Blok-Andersen and other members of the group that had since September 2009 been transporting cocaine from British Columbia to St. John's. Peter Blok-Andersen had flown from British Columbia to St. John's on January 10, 2010. One can readily infer that he did so to await the arrival of the SUV.

[12] There are three possibilities:

- (1) the large quantity of cocaine was placed in the hidden compartment in the SUV in St. John's after the SUV was brought there by Julian and Ben Strongitharm;
- (2) the drugs were in the SUV as Julian and Ben Strongitharm drove it from British Columbia to St. John's, but Julian Strongitharm was unaware of the purpose for which he was driving the SUV from British Columbia to St. John's; or
- (3) Julian Strongitharm traveled from British Columbia with his brother Ben for the purpose of delivering to St. John's the cocaine found in the SUV on January 12, 2010.

What was in the Agreed Statement of Uncontested Facts was relevant because it made (3) more likely and (1) and (2) less likely.

[13] A critical passage in the decision acquitting Julian Strongitharm related to the inferences to be drawn about the seizure of the cocaine in the SUV and the events leading up to it. The trial judge wrote:

[41] The Crown seeks to prove knowledge, consent and control through inferences. The inferences relied upon by the Crown are the fact that the Toyota FJ Cruiser was located at 224 Anchorage Road with a significant quantity of cocaine and money found in the secret compartment of the vehicle; the vehicle was registered to Julian Strongitharm; his brother Ben Strongitharm was known to have been involved with individuals arrested on January 12th, 2010, in relation to 'Operation Razorback'; the arrival of Peter Blok-Andersen and Zachary Hill on January 10th, 2010; the arrival of Julian Strongitharm in St. John's as evidenced by the registration made at the Ramada at 3:00 a.m., January 12th, 2010, and the fact that Ben and Julian Strongitharm were seen in the company of Peter Blok-Andersen and others on January 12th, 2010. The Crown submits this along with the evidence tendered at trial is sufficient to prove Julian Strongitharm was either in constructive or joint possession of the cocaine.

[42] The argument of the Crown gives rise to Application of the rule in *Hodge's* case. This rule presupposes the Crown has through inferences, based on proven facts, shown Julian Strongitharm was either in constructive or joint possession of the cocaine. In order for the Crown to succeed in this submission, the inference drawn must be the only rational inference that can be drawn based on the proven facts. The evidence, however, is equally consistent with others having access to and control of the Toyota FJ Cruiser motor vehicle and being in a position to either install the secret compartment and/or place the cocaine and money in it after the vehicle had been brought to Newfoundland and Labrador. Therefore, on the proven facts it is just as plausible the vehicle may have arrived at 224 Anchorage Road without any drugs contained in the secret compartment. One can only conclude, on proven facts, that the vehicle appears to have been utilized on January 12th, 2010, for purposes of hiding cocaine and money during a period of drug distribution.

(Emphasis added.)

[14] With respect, it seems to me highly implausible (rather than “just as plausible”) that a vehicle containing a secret compartment would be driven from British Columbia to St. John’s by persons with no connection to this province (other than Ben Strongitharm’s drug dealing here) and that within hours of its arrival the secret compartment would be filled with drugs.

[15] This suggestion becomes even more implausible when placed in the context of the facts set out in the Agreed Statement of Uncontested Facts. The logical inference from that context is that the SUV with the hidden compartment was used to deliver the cocaine from British Columbia to St. John’s and that Julian Strongitharm knew that he was helping his brother Ben Strongitharm to do this.

Impact on Other Rulings and on the Verdict

[16] The judge’s ruling that the Agreed Statement of Uncontested Facts was irrelevant affected the outcome of her other evidentiary decisions, as it limited the range of facts that could be relied on by the Crown in seeking to meet the tests for: arrest, search and seizure, the admissibility of certain text messages and the exclusion under s. 24(2) of the *Charter* of evidence seized by police in the hotel room shared by Julian and Ben Strongitharm.

[17] As regards the acquittal, a key passage is contained in paragraph 7 of 2013 NLTD(G) 97, which reads in part:

Based on the various rulings filed in this matter, the majority of the statements made in paragraphs 2 through 8 of the Crown brief are irrelevant and immaterial except for paragraph 2 and the last sentence in paragraph 3.

[18] As the trial judge indicated, the evidence that she considered in acquitting Julian Strongitharm was limited to:

- (1) two money transfers (\$3,000 and \$4,000) in November 2009 to an account in the name of Julian Strongitharm;
- (2) registration in British Columbia of the SUV in the name of Julian Strongitharm; and
- (3) the events on January 12, 2010.

[19] As noted, the judge treated as irrelevant the facts set out in the Agreed Statement of Uncontested Facts. This was a legal error. As noted, this error had a cascading effect contributing to the judge's conclusion that Julian Strongitharm's arrest was illegal, the search of his hotel room was illegal, the evidence seized in his hotel room should be excluded under s. 24(2) of the *Charter* and certain text messages should not be admitted. Each of these further limited the evidence against Julian Strongitharm. In short, his acquittal was based on far less than all the evidence that, as a matter of law, the trial judge should have considered.

Should a New Trial be Ordered?

[20] In *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609 Justice Fish, affirming *R. v. Morin*, [1988] 2 S.C.R. 345, wrote at para. 14:

It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.

[Emphasis added].

[21] In *R. v. Luciano*, 2011 ONCA 89, 267 C.C.C. (3d) 16, the Ontario Court of Appeal dealt with the application of *Graveline* to legal errors in rulings on the admissibility of evidence:

[259] On an appeal from acquittal, the Attorney General cannot succeed simply by demonstrating a legal error in the conduct of the trial, for example, in a ruling about the admissibility of evidence. Nor can the Attorney General succeed on an appeal from an acquittal on the basis of some abstract or purely hypothetical possibility that an accused would have been convicted were it not for the error of law. Something more is required. And that something more is to satisfy the appellate court that the error might reasonably be thought, in the concrete reality of the case, to have had a material bearing on the acquittal: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 14.

[260] It is worth reminder that the appeal of the Attorney General is from the *acquittal*, not the admissibility ruling that is said to constitute an error in law. What is required is a demonstration of a legal error (in the admissibility ruling) and a nexus between the legal error and the verdict rendered (an acquittal). The authorities teach that acquittals are not to be overturned lightly. The Attorney General must establish that the verdict would not necessarily have been the same had the error not been made: *Graveline* at para. 16; *R. v. Sutton*, 2000 SCC 50 (Can LII), [2000] 2 S.C.R. 595, at para. 2; and *R. v. Vezeau*, 1976 Can LII 7 (SCC), [1977] 2 S.C.R. 277, at pp. 291-292.

I would adopt the foregoing.

[22] In the circumstances of this case, the nexus between the legal error to exclude the Agreed Statement of Uncontested Facts (plus the cascading effect this had on other evidentiary rulings) and the judge's acquittal of the accused is abundantly clear.

[23] I am satisfied that the errors of the trial judge dealt with above can reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. Accordingly, I would set aside the acquittal.

[24] Much of the argument set out in the facts of the parties and in their oral submissions was directed to whether the trial judge erred in her decisions that:

- (1) Julian Strongitharm's arrest was illegal;
- (2) the search of his hotel room was contrary to law;
- (3) the evidence seized in his hotel room should be excluded under s. 24(2) of the *Charter*;

- (4) various text messages were inadmissible under the “Co-conspirators Exception to the Hearsay Rule”; and
- (5) the interpretation and application of the doctrine of willful blindness.

[25] Given that I would order a new trial, it is better that this Court not address the five issues noted immediately above. Rather, those issues should be left to the consideration of the judge in the new trial, having regard to relevant precedents, including a considerable body of settled law. That this Court has chosen not to decide this appeal by reference to the five issues referred to above should not be taken as an affirmation of their disposition in the decisions under appeal.

CONCLUSION

[26] I would grant the appeal, set aside the acquittal and order a new trial.

M. H. Rowe J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

L. R. Hoegg J.A.