



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

Citation: *R. v. Templeman*, 2018 NLCA 44

Date: July 24, 2018

Docket Number: 201601H0054

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BETWEEN:

WILFRED TEMPLEMAN

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: White, Hoegg and O'Brien, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201401G7934

Appeal Heard: October 11, 2017

Judgment Rendered: July 24, 2018

Reasons for Judgment by: O'Brien J.A.

Concurred in by: White and Hoegg JJ.A.

Counsel for the Appellant: Robby Ash

Counsel for the Respondent: Sheldon Steeves

O'Brien J.A.:

INTRODUCTION

[1] On April 29, 2016, following a trial by judge and jury in the Supreme Court of Newfoundland and Labrador, Wilfred Templeman was convicted of a number of offences under the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] Mr. Templeman has appealed the convictions on the basis that the trial judge made errors in his charge to the jury, and has requested that this Court quash the convictions and order a new trial.

[3] For the reasons set out below, I would dismiss the appeal.

BACKGROUND

[4] There were two complainants in this matter, namely Ms. M and Mr. O.

[5] Mr. Templeman and Ms. M had been in a domestic relationship from some time in 2013 until February 2014, at which time Mr. Templeman was incarcerated for a conviction unrelated to the present matter. Following Mr. Templeman's incarceration, Ms. M entered into a new domestic relationship with Mr. O. The two later married.

[6] On April 25, 2014, Mr. Templeman was released from prison. The criminal charges in this matter arose from activities which occurred on April 26 and 27, 2014, the two days immediately following Mr. Templeman's release.

[7] The evidence at trial indicates that on April 25, 2014, the day Mr. Templeman was released from prison, Ms. M and Mr. O drove from their home in Carbonear, NL and picked up Mr. Templeman in St. John's, NL, where he had been incarcerated. Ms. M and Mr. O spent the day in St. John's with Mr. Templeman, attending to errands, purchasing groceries for Mr. Templeman and visiting various people in the St. John's area. Later that day, Ms. M and Mr. O drove back to Carbonear and Mr. Templeman remained in St. John's.

[8] Ms. M and Mr. O spent the evening of April 25, 2014 together, at Ms. M's residence in Carbonear. They were awoken early in the morning of April 26, 2014 when they heard the sound of broken glass, and saw that Mr. Templeman had entered the residence.

[9] A summary of what occurred next in this matter was provided by the trial judge in his reasons for judgment on sentencing of Mr. Templeman (see *R. v. Templeman*, 2016 NLTD(G) 114):

[7] On 26 April 2014, sometime between 6:00 and 6:30 a.m. Mr. Templeman smashed the back door window to BM's residence, cutting his hand in the process. He then opened the door, gaining entry to the residence. BM and DO were in the bedroom at the time. Mr. Templeman met BM in the hall, as she got up to investigate the sound of breaking glass. He grabbed her by the two arms and pushed her back into the bedroom, where she struck her lower back on a TV stand. He then proceeded to drag DO out of bed by his ankles and punched him several times in the face and head area. Mr. Templeman appeared to BM to be under the influence of alcohol at the time, as she observed later that same day that he had "sobered" up.

[8] BM received a bruise to her left arm. DO suffered a small abrasion to his forehead and some redness to the left side of his face. Neither BM nor DO required medical attention for these injuries.

[9] Mr. Templeman then ordered BM and DO to get dressed, as they were going for a drive. With DO at the wheel and Mr. Templeman and BM in the back seat, DO drove BM's car two minutes up the hill to where another car was waiting. In that car was an acquaintance of Mr. Templeman. At Mr. Templeman's direction, DO then drove the four to St. John's, a journey of approximately one hour, where the acquaintance was dropped off. Mr. Templeman and BM sat in the back seat during this drive. At Mr. Templeman's direction DO then drove the three back along the Trans-Canada Highway ("TCH") towards Carbonear, with Mr. Templeman and BM remaining in the back seat.

[10] On route, Mr. Templeman ordered DO to turn off the TCH onto the Witless Bay Line, and from there onto a dirt road, where they stopped. Mr. Templeman then directed DO to get in the trunk of the vehicle. Fearing for his safety, DO complied. He was there for approximately 10 – 15 minutes, during which time Mr. Templeman and BM engaged in sexual intercourse on the front seat of the vehicle.

[11] Mr. Templeman then let DO out of the trunk, and with BM in the front passenger seat and DO in the rear seat, drove down another dirt road for 4-5 minutes. Mr. Templeman stopped the vehicle and again ordered DO to get into the trunk. Again DO complied, and after driving for 5 – 10 minutes with DO in the trunk, Mr. Templeman stopped the vehicle on a dirt road. Here Mr. Templeman and BM again engaged in sexual intercourse.

[12] After 10 – 15 minutes Mr. Templeman let DO out of the trunk. The three then went for a short walk, during which Mr. Templeman told DO to pack his belongings and leave BM's residence. DO then drove the three back to Carbonear where, after helping Mr. Templeman clean up the glass from the broken door, DO packed his belongings and left.

[13] No weapons were used by Mr. Templeman in the kidnapping of DO. Nor did he threaten, or apply force to DO to ensure his compliance. Rather, DO did as directed out of fear for his safety.

[14] After DO left, Mr. Templeman and BM again drove to St. John's, this time with BM at the wheel. The two spent the day socializing with mutual friends, after which they returned to BM's residence for the evening. The next morning BM drove Mr. Templeman to the hospital in Carbonear to get his hand stitched. She then filed a complaint with the police, as a consequence of which the police contacted DO. The charges against Mr. Templeman were the result.

[15] By Order, dated 24 February 2014, Mr. Templeman had been prohibited from driving a motor vehicle for a period of three years. This order arose as a consequence of his conviction for dangerous operation of a motor vehicle on that same date, for which he received 91 days' incarceration. He was serving this sentence when BM started seeing DO.

[16] Mr. Templeman was also placed on probation on 24 February 2014 for a period of one year, during which time he was obliged to keep the peace and be of good behavior.

[17] Mr. Templeman was arrested on 27 April 2014 and has been in custody since that date. He applied for, but was denied bail.

The *Criminal Code* charges and convictions

[10] Mr. Templeman was charged with the following offences under the *Code*:

1. Breaking and entering into the residence of Ms. M and committing an indictable offence therein, contrary to section 348(1)(b);
2. Assaulting Ms. M, contrary to section 266;
3. Assaulting Mr. O, contrary to section 266;
4. Sexually assaulting Ms. M, contrary to section 271;
5. Kidnapping Ms. M, with intent to cause her to be confined or imprisoned against her will, contrary to section 279(1)(a);
6. Kidnapping Mr. O, with intent to cause him to be confined or imprisoned against his will, contrary to section 279(1)(a);
7. Possessing property obtained by crime, contrary to section 354(1);

8. Uttering a threat to cause death to Mr. O, contrary to section 264.1(1)(a);
9. Uttering a threat (to Ms. M) to cause death to Mr. O, contrary to section 264.1(1)(a);
10. Operating a motor vehicle while disqualified, contrary to section 259(4); and
11. Failing to comply with a probation order, contrary to section 733.1(1).

[11] Mr. Templeman elected trial in the Supreme Court by judge and jury.

[12] At the beginning of the trial, the Crown withdrew the charge relating to possessing property obtained by crime (#7 above), and the trial proceeded on the other charges. Four witnesses were called on behalf of the Crown, namely Ms. M, Mr. O and two police officers. No evidence was called on behalf of Mr. Templeman.

[13] The jury convicted Mr. Templeman on the charges relating to breaking and entering into Ms. M's residence and committing an indictable offence therein (#1 above), assaulting Ms. M (#2 above), assaulting Mr. O (#3 above), kidnapping Mr. O (#6 above), operating a motor vehicle while disqualified (#10 above), and failing to comply with a probation order (#11 above), respectively.

[14] The jury acquitted Mr. Templeman on the other charges.

Mr. Templeman's appeal of the convictions

[15] The appeal was argued with regard to Mr. Templeman's convictions only.

[16] While Mr. Templeman's original notice of appeal had indicated an intention to appeal the sentence as well as the convictions, amended grounds of appeal filed subsequently by counsel on behalf of Mr. Templeman dealt solely with an appeal of the convictions.

[17] At the appeal hearing, there were no submissions (nor indeed any reference made whatsoever) regarding an appeal of the sentence, and there was no indication that a sentence appeal was ongoing. The written and oral arguments made on behalf of Mr. Templeman and the Crown focused solely on the convictions.

ISSUES

[18] Mr. Templeman raises three issues on appeal. All three relate to errors which Mr. Templeman alleges the trial judge made in his charge to the jury.

The three issues on appeal are as follows:

1. Did the trial judge err in his charge to the jury with respect to the burden of proof? (*This ground of appeal relates to all convictions*).
2. Did the trial judge err in his charge to the jury with respect to the analysis of circumstantial evidence? (*This ground of appeal relates only to the conviction for breaking and entering into the residence of Ms. M and committing an indictable offence therein, contrary to section 348(1)(b)*).
3. Did the trial judge err in his charge to the jury by not directing the jury to consider the defence of colour of right as a legal justification? (*Again, this ground of appeal relates only to the conviction for breaking and entering into the residence of Ms. M and committing an indictable offence therein, contrary to section 348(1)(b)*).

Issue 1: Did the trial judge err in his charge to the jury with respect to the burden of proof?

[19] Mr. Templeman argues that the trial judge made an error in instructing the jury regarding the burden of proof.

[20] Specifically, Mr. Templeman points to one particular reference, near the beginning of the trial judge's charge to the jury, where the trial judge indicated that the jury's concern is "whether there is a finding of guilt or a finding of innocence".

[21] The trial judge stated:

And as I mentioned to you at the beginning, it's only the evidence you hear in this courtroom that counts. So there-I don't think there's been a lot outside the courtroom on this matter, but anything you might hear outside the courtroom is, does not form part of your decision, and nor does the-any potential sentence that might arise from a finding of guilt. ... The punishment is my, my concern, not yours. Yours is simply whether there is a finding of guilt or a finding of innocence.

(Emphasis added.)

[22] Mr. Templeman argues that this reference to “a finding of innocence” in the trial judge’s jury charge is a fundamental error and offends the well-established tenet of Canadian criminal law that a jury’s role, as a finder of fact, is to determine whether an accused person is guilty or not guilty (as opposed to innocent) with respect to the respective charge(s).

[23] Mr. Templeman further argues that the trial judge’s reference to a “finding of innocence” was more than merely innocuous, and could be interpreted by a jury to mean that a finding of factual innocence was required in order to acquit. In Mr. Templeman’s submission, this “may have resulted in a miscarriage of justice on all counts”, and “runs contrary to the notion that the Crown is required to prove each element of each count beyond a reasonable doubt and that an accused is not required to show that he is innocent.”

[24] A trier of fact is not required to conclude that an accused is innocent in order to find the accused not guilty of an offence; being not guilty and innocent are not synonymous in this regard. On this point, the Supreme Court of Canada in *R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316, noted at para. 135:

... Because the burden of proof in a criminal trial is beyond a reasonable doubt, a verdict of “not guilty” encompasses a broad range of circumstances, from factual innocence to proof just short of beyond a reasonable doubt. ...

[25] Apart from the trial judge’s mention of a “finding of innocence”, Mr. Templeman had no other concerns with the trial judge’s charge on the issue of the burden of proof and the presumption of innocence. Counsel for Mr. Templeman agreed that the trial judge otherwise correctly summarized the law relating to the Crown’s onus to prove guilt beyond a reasonable doubt, and further agreed that the trial judge accurately stated that this onus remained with the Crown throughout the trial.

Considering the words “finding of innocence” in context

[26] The potential impact of the reference to a “finding of innocence” must not be considered in isolation, but rather in the context of the trial judge’s entire charge to the jury and other trial proceedings.

[27] The Supreme Court, in *R. v. Araya*, 2015 SCC 11, [2015] 1 S.C.R. 581 at para. 39, recognized the importance of context:

When considering an alleged error in a trial judge's jury instructions, "[a]n appellate court must examine the alleged error in the context of the entire charge and of the trial as a whole": *R. v. Jaw*, 2009 SCC 42, [2009] 3 S.C.R. 26, at para. 32, per LeBel J. ...

[28] The trial judge's reference to a "finding of innocence" did not constitute the entirety of the trial judge's charge on this issue. The trial judge instructed the jury, first in general terms, on the presumption of innocence and the requirement for proof beyond a reasonable doubt, as follows:

Let me turn now to some of the legal principles involved in the various charges for which Mr. Templeman is facing and once again I want to remind you of the fundamental legal principles, the sheet that I passed out at the beginning of this trial that Mr. Templeman has pled not guilty and he is presumed to be innocent of each of the charges or of any lesser offence included in the offence charged.

The Indictment is only the formal accusation of a charge. It is not evidence, and it is not proof of guilt. The presumption of innocence remains with Mr. Templeman throughout the trial. And it is-which means that Mr. Templeman does not have to testify or call any evidence. The onus is not his, so you are not to draw any adverse inference from the fact Mr. Templeman chose not to testify in this case, or from the fact that the defense did not call any evidence in this case. They do not have to do so. The onus remains with the crown from the beginning to the end to establish beyond a reasonable doubt that Mr. Templeman is guilty of one or more or all of the charges that he is facing.

The phrase beyond a reasonable doubt, as I mentioned in the beginning is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence or lack of evidence. So it is not enough for you to believe that Mr. Templeman is probably or likely guilty. In those circumstances, you must find him not guilty because the Crown counsel would have failed to satisfy you of his guilt beyond a reasonable doubt. Proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

You should also remember that it's nearly impossible to prove anything with absolute certainty and Crown counsel is not required to do so. Absolute certainty is a standard of proof that's impossibly high. Proof beyond a reasonable doubt falls much closer to absolute certainty than to proof of probability or likely guilt. So if at the end of the case based on all the evidence you're sure that Mr. Templeman committed an offense, you should find him guilty of it. If at the end of the case based on all the evidence or lack of evidence, you're not sure that Mr. Templeman committed an offence, you should find him not guilty of it. ...

You'll need to sit back at the end of the day, and consider the evidence as a whole in asking yourself whether or not the crown has made its case beyond a reasonable doubt.

You also, of course, need to look at the elements of each of the offences and whether or not the crown has proven these elements beyond a reasonable doubt.

So let me turn to each of the-with that- let me turn to each of the offences in turn. So I've given you a decision tree on each of the various counts. ...

[29] After providing these general instructions on the burden of proof and the presumption of innocence, the trial judge next instructed the jury with respect to each specific charge against Mr. Templeman. In doing so the trial judge reviewed the elements of each offence, and reminded the jury that the charges must be proved by the Crown beyond a reasonable doubt.

[30] For example, the trial judge's instructions relating to the offence of breaking and entering into Ms. M's residence included the following statement on reasonable doubt:

The, if you are not satisfied beyond a reasonable doubt that Mr. Templeman broke into [Ms. M's residence], then that is the end of your discussions of the matter, you must find him not guilty.

[31] With regard to the assault on Mr. O, the trial judge's instructions included the following reference to reasonable doubt:

So you have to decide whether or not the Crown has satisfied you beyond a reasonable doubt and really in the context of this case is a question of whether or not as suggested by the Crown that Mr. Templeman-when he entered the property of [Ms. M] whether he, whether you're satisfied beyond a reasonable doubt that he grabbed [Mr. O] by the ankle or ankles, hauled him out of bed and punched him around the head. Are you satisfied beyond a reasonable doubt that that is what happened, and that [Mr. O] was not consenting to that. If you're satisfied of that beyond a reasonable doubt, then the result is a finding of guilt.

[32] Similarly, with regard to the assault on Ms. M, the trial judge's instructions referenced reasonable doubt as follows:

So once again, you have to ask yourself whether you are satisfied beyond a reasonable doubt that Mr. Templeman grabbed [Ms. M] in the manner she indicated and pushed her back into the bedroom.

[33] A review of the specific instructions relating to the other offences reveal similar references to the requirement of proof beyond a reasonable doubt.

[34] As noted above the Supreme Court of Canada in *Araya* at para. 39 indicated that, when considering whether a trial judge erred in instructing a jury,

the alleged error must be considered in the context of the entire charge and of the trial as a whole.

[35] In this respect the trial judge's opening address, in which he provided preliminary instructions to the jury, is also instructive. In the opening address, the trial judge made several comments regarding the presumption of innocence and proof beyond a reasonable doubt. For example, he stated at one point: "It is not Mr. Templeman's job to prove that he is innocent."

[36] Further, in the opening address, the trial judge also noted:

Because accused persons are not required to prove they're innocent-their innocence, they are not obliged to testify or present evidence. It is the Crown counsel's job to prove the charges beyond a reasonable doubt, and this rule never changes, and I'll talk to you about reasonable doubt in a moment.

Later in the opening address to the jury, the trial judge again referenced the presumption of innocence and the burden of proof, stating:

So, Mr. Templeman has pleaded not guilty. He's presumed to be innocent of each crime charged, and of any lesser offence, included in the offence charged. ... The presumption of innocence means that Mr. Templeman starts the trial with a clean slate. That presumption stays with him throughout the case, including your deliberations at the end of the trial. It is only defeated if, and when, Crown counsel satisfies you beyond a reasonable doubt that Mr. Templeman is guilty of the crimes charged. The presumption of innocence also means that Mr. Templeman does not have to testify, present evidence, or prove anything in this case. From start to finish, it is Crown counsel who must prove the guilt of Mr. Templeman beyond a reasonable doubt; not Mr. Templeman who must prove his innocence. ... If, at the end of the case, based on all of the evidence or the lack of evidence, you are not sure that Mr. Templeman committed an offence, you should find him not guilty of it.

Was the jury properly instructed on this issue?

[37] The focus in an appeal concerning a judge's instructions to a jury is on whether the jury has been properly instructed.

[38] The Supreme Court of Canada in *R. v. Jacquard*, [1997] 1 S.C.R. 314, with Chief Justice Lamer writing for the majority, indicated at pages 320 to 321:

This Court has stated on repeated occasions that accused individuals are entitled to properly instructed juries. There is, however, no requirement for perfectly instructed juries. As I specifically indicated at the hearing of this case, a standard of perfection

would render very few judges in Canada, including myself, capable of charging juries to the satisfaction of such a standard.

(Emphasis in original.)

[39] At page 349, Chief Justice Lamer reiterated:

As I discussed at the outset of my reasons, appellate courts must adopt a functional approach to reviewing jury charges. The purpose of such review is to ensure that juries are properly – not perfectly – instructed.

[40] In *R. v. Araya*, at paragraph 39, the Supreme Court of Canada referred to its earlier decision in *Jacquard*. Justice Rothstein, writing for a unanimous Court in *Araya*, affirmed that, while the instructions must properly and “adequately” prepare a jury to discharge its responsibilities, the instructions need not be perfect. Justice Rothstein stated:

... While trial judges must seek to ensure that their instructions adequately prepare the jury for deliberation, the standard for jury instructions is not perfection. Appellate review of jury instructions is meant to “ensure that juries are properly — not perfectly — instructed”: *R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 62, per Lamer C.J. This Court has emphasized that the charge generally should not be “endlessly dissected and subjected to minute scrutiny and criticism”: *R. v. Cooper*, [1993] 1 S.C.R. 146, at p. 163. As Bastarache J. has summarized it in *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 30:

The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.

Appellate courts should not examine minute details of a jury instruction in isolation. “It is the overall effect of the charge that matters”: *Daley*, at para. 31.

[41] Notably, there was no further reference to a “finding of innocence” in the trial judge’s opening address, in the trial judge’s charge relating to proof beyond a reasonable doubt and the presumption of innocence, or in the components of the charge relating to the individual offences.

[42] When considered in the context of the trial judge’s entire charge to the jury (and indeed the trial as a whole, as *Araya* suggests), I would conclude that the trial judge’s reference to a “finding of innocence” did not result in the jury being improperly charged. The inadvertent reference in the charge to a “finding

of innocence”, when considered in the context of the judge’s entire instructions to the jury, did not result in the jury being improperly instructed.

[43] It was not fatal, in this circumstance, to an otherwise comprehensive and proper charge regarding the burden of proof and the presumption of innocence, and would not have rendered the trial unfair.

[44] Any potential for confusion or misapprehension arising from the reference to a “finding of innocence” would have been addressed and offset by the detailed instructions in the charge with respect to the presumption of innocence and the Crown’s requirement to prove guilt beyond a reasonable doubt.

[45] I would dismiss this ground of appeal.

Issue 2: Did the trial judge err in his charge to the jury with respect to the analysis of circumstantial evidence?

[46] The second ground of appeal relates solely to the conviction for breaking and entering into the residence of Ms. M, and concerns the trial judge’s charge to the jury regarding circumstantial evidence.

[47] Mr. Templeman argues that the element of “breaking” in respect of the breaking and entering charge was based on circumstantial evidence. It is argued that there was no direct evidence, and only circumstantial evidence, that Mr. Templeman broke into Ms. M’s residence.

[48] As such, Mr. Templeman argues that the trial judge had a duty to provide appropriate instructions to the jury regarding the proper analysis and use of circumstantial evidence, and that the trial judge failed to do so. As a result, Mr. Templeman’s position is that the trial judge did not properly instruct the jury with regard to circumstantial evidence, and that this was an error in law.

[49] As noted in the trial judge’s summary of the facts, above, Ms. M and Mr. O were asleep at Ms. M’s residence in the early morning of April 26, 2014, when they heard the sound of broken glass and awoke to find Mr. Templeman in the residence. The evidence at trial was that a glass window in the back door of the residence had been broken to facilitate entry. Mr. Templeman appeared in the residence immediately after the glass window was broken. His hand was cut and he was bleeding. Mr. Templeman then proceeded to commit several indictable offences (including assaulting Ms. M and Mr. O and kidnapping Mr. O) for which he was later convicted.

[50] The identity of Mr. Templeman as the person who entered the residence was not contested, and indeed was admitted by Mr. Templeman's counsel at trial. The jury was advised that identity would not be an issue in the trial. Ms. M and Mr. O testified at trial and provided direct evidence relating to all elements of the offence of breaking and entering with the exception of the "breaking into" the residence.

[51] They did not actually witness Mr. Templeman breaking into the residence, as they were sleeping. However, they heard the noise of glass breaking and saw Mr. Templeman in the residence immediately thereafter. There was no evidence or suggestion that any person other than Mr. Templeman, Ms. M, and Mr. O was present in the residence or in the general vicinity at the time the break and entry occurred.

[52] The trial judge discussed direct and circumstantial evidence in both the opening address, at the beginning of the trial, and in the charge to the jury at the end of the trial. As the trial judge's charge to the jury on this issue refers to comments he previously made during his opening address, it might be helpful to consider both.

[53] In the opening address to the jury the trial judge discussed direct and circumstantial evidence as follows:

At trial, witnesses sometimes tell the court what they have personally seen or heard, for example, a witness might say that he or she has seen it, I'll say raining, but snowing might be a better example from what I understand of the forecast, if you see it snowing outside, and you come in and say I see it snowing, that's called direct evidence. However, often witnesses will say things which-from which you might be able-asked to draw inferences. We refer - certain conclusions, and we refer to those conclusions as inferences. For example, an inference is a deduction of fact; a conclusion that might reasonably be drawn from one or more items of evidence. For example, a witness might say that she or he has seen someone enter the courthouse lobby wearing a raincoat and carrying an umbrella, both dripping wet, if you believe that witness you might infer or conclude that it's raining outside, even though the evidence is indirect. So indirect evidence is sometimes called circumstantial evidence; and exhibits, like witnesses, may provide direct or circumstantial evidence. In the trial, both kinds of evidence count. The law treats both equally. Neither is necessarily better than the other. In each case, your job is to decide what conclusions you will reach based upon the evidence as a whole, direct and circumstantial. To make that decision, use your common sense and experience. Consider the evidence with an open mind.

[54] In his charge to the jury relating to the offence of breaking and entering, the trial judge stated the following on the issue of direct and circumstantial evidence:

There's a series of questions you need to ask yourself and answer...

The first is whether or not Mr. Templeman - did he break into [the residence]. ...

... You have the photographs-there is photographs of the broken window at the back of the property. There's photographs of what appears to be blood, there is some evidence that Mr. Templeman, Mr. Templeman had received a cut to his hand. This is what I said to you at the beginning of the trial would - if you accepted amount to circumstantial evidence, nobody actually saw the window being broken. Okay you didn't actually see it raining but you have circumstances which if you accept them could lead to the conclusion that Mr. Templeman broke the window with his hand and entered the property, it's circumstantial evidence, which again the Crown would have to satisfy you beyond a reasonable doubt. If you're satisfied of that beyond a reasonable doubt, that it was Mr. Templeman, who broke the window and entered the-use that by means, as a means by which to enter the property then [your] question becomes was there an offence committed in the property and that's the assaults that I talked about earlier."

[55] Mr. Templeman argues that the trial judge's charge to the jury on this issue was insufficient in that it failed to draw a distinction with respect to direct and circumstantial evidence, and failed to provide adequate instruction regarding the proper analysis of circumstantial evidence.

[56] Mr. Templeman suggests that the trial judge should have cautioned the jury about the danger of jumping to unwarranted conclusions or too readily drawing inferences of guilt from circumstantial evidence.

[57] Having not been properly instructed in this respect, Mr. Templeman argues, there was a risk the jury might have drawn an inappropriate inference that Mr. Templeman broke into the residence (based on the circumstantial evidence of his presence in the home, the broken glass, his cut hand, the blood, etc.) while potentially overlooking other alternative inferences.

[58] Some of the potential dangers noted by Mr. Templeman were discussed in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, wherein the Supreme Court of Canada considered the issue of properly instructing a jury on circumstantial evidence.

[26] ... There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the

blanks” or bridge gaps in the evidence to support the inference that the Crown invites it to draw. Baron Alderson referred to this risk in *Hodge’s Case*. He noted the jury may “look for — and often slightly . . . distort the facts” to make them fit the inference that they are invited to draw: p. 1137. . . .

[27] While this 19th century language is not suitable for a contemporary jury instruction, the basic concern that Baron Alderson described — the danger of jumping to unwarranted conclusions in circumstantial cases — remains real. . . .

[59] The Crown’s position is that the trial judge’s instructions on circumstantial evidence were sufficient in the circumstances of this case, and no specific form of instruction to the jury was warranted. The Crown notes that the jury was properly charged in the language of proof beyond a reasonable doubt which was sufficient and appropriate on the facts and evidence in this case.

[60] The Crown argues that there was no evidence from which other reasonable inferences could be drawn which might account for the broken window and Mr. Templeman’s contemporaneous appearance in the residence, bleeding from a hand wound.

[61] There is support for the Crown’s position in *Villaroman*. The Court in *Villaroman* discussed the rule in *Hodge’s Case* which states that a jury has to be instructed in a specific manner with respect to circumstantial evidence. The Court noted the evolution in the law in this area and the more modern view, which rejects the “formulaic approach” taken in *Hodge’s Case* regarding the instruction of a jury regarding circumstantial evidence. The Court in *Villaroman* stated on this point:

[17] In *Hodge’s Case*, the evidence of identification was made up entirely of circumstantial evidence: p. 1137. Baron Alderson, the trial judge, instructed the jury that in order to convict, they must be satisfied “not only that those circumstances were consistent with [the accused] having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the [accused] was the guilty person”: p. 1137. This sort of jury instruction came to be required in circumstantial cases: see, e.g., *McLean v. The King*, [1933] S.C.R. 688.

[18] Over time, this requirement was relaxed: see, e.g., *R. v. Mitchell*, [1964] S.C.R. 471; *R. v. Cooper*, [1978] 1 S.C.R. 860. It is now settled that no particular form of instruction to the jury is required where the evidence on one or more elements of the offence is entirely or primarily circumstantial. As Charron J. writing for a majority of the Court put it in *R. v. Griffin*, [2009] 2 S.C.R. 42, at para. 33:

We have long departed from any legal requirement for a “special instruction” on circumstantial evidence, even where the issue is one of identification: *R. v. Cooper*, [1978] 1 S.C.R. 860. The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. ...

[62] Further, there is also authority in *Villaroman* supporting the view that the trial judge’s charge on the breaking and entering offence, (which used the “traditional language of proof beyond a reasonable doubt”), was appropriate, even where there was circumstantial evidence on the “breaking” element of the offence.

[63] The Court in *Villaroman* indicated that the use of this “traditional language of proof beyond a reasonable doubt” is available to a judge when charging a jury in cases with circumstantial evidence. The Court indicated that the use of “traditional language of proof beyond a reasonable doubt” was one of several options in cases involving circumstantial evidence, stating:

[20] In the above passage, Charron J. cited with approval *R. v. Fleet* (1997), 120 C.C.C. (3d) 457 (Ont. C.A.), at para. 20. It is worth quoting that paragraph at length as in my view it makes Charron J.’s meaning clear:

... We read the object of both judgments in *Cooper* to be the eradication of any formulaic approach to such cases so long as the jury is clearly made aware of the necessity to find the guilt of the accused to be established beyond a reasonable doubt. This object may be achieved in more ways than one. Thus, the trial judge, reviewing the evidence and setting out the position of the defence and relating the substantial parts of the evidence to that position, may frame the requisite instruction in the manner he or she considers most appropriate in the circumstances, for example, by:

(a) charging the jury in accordance with the traditional language of proof beyond a reasonable doubt (per Laskin C.J.C. in *Cooper*):...

[21] Charron J. also cited with approval *R. v. Tombran* (2000), 142 C.C.C. (3d) 380 (Ont. C.A.), (a decision in which she participated as a member of the Ontario Court of Appeal), at para. 29. Once again, it is worth quoting that paragraph:

The modern approach to the problem of circumstantial evidence, enunciated clearly in *Cooper, supra*, and reiterated and reinforced by *Fleet, supra*, is to reject a formulaic approach and to deal with all the evidence in terms of the general principles of reasonable doubt. Trial judges are given a degree of latitude to formulate the appropriate instruction as befits the circumstances of

the case. Trial judges are not required to adopt any specific language or wording, provided the charge conveys to the jury in a clear fashion the central point, namely, the necessity to find the guilt of the accused beyond a reasonable doubt. ...

(Emphasis added.)

[64] A judge, charging a jury regarding circumstantial evidence, should provide instructions which are appropriate and fitting to the circumstances of the given case. The circumstances will always be important in determining whether a charge “in accordance with the traditional language of proof beyond a reasonable doubt” is sufficient or whether some further admonition or caution would be useful or necessary to alert the jurors of “the danger of jumping to unwarranted conclusions in circumstantial cases” (see *Villaroman*, at paragraph 79).

[65] Much will depend on the nature of the circumstantial evidence, the position of the parties and the reasonable inferences which might be drawn from the evidence. A trial judge must also have a “degree of latitude to formulate the appropriate instruction as befits the circumstances of the case” so as to “frame the requisite instruction in the manner he or she considers most appropriate in the circumstances” (see *Villaroman*, at paragraphs 20-21).

[66] In the present case, mindful of the specific fact circumstances of this break and entry and the evidence which the trial judge would have had to consider in formulating his instructions, I would conclude that the trial judge’s charge to the jury respecting circumstantial evidence was not deficient or otherwise erroneous.

[67] No further instruction was required in this particular factual and evidential circumstance.

[68] I would dismiss this ground of appeal.

Issue 3: Did the trial judge err in his charge to the jury by not directing the jury to consider the defence of colour of right as a legal justification?

[69] The third ground of appeal also relates solely to the conviction for breaking and entering into the residence of Ms. M., and concerns Mr. Templeman’s argument that the trial judge erred in not putting a possible defence to the jury.

[70] Specifically, the trial judge did not instruct the jury to consider whether Mr. Templeman had an honest belief in his right to enter Ms. M's residence. Mr. Templeman argues that the trial judge erred by not doing so.

[71] Mr. Templeman contends that the evidence showed he had an honest belief that Ms. M's residence was also his residence, or alternatively that he had an invitation to enter the residence. As a result, he argues that he established a so-called "colour of right" to enter the residence when he did, and therefore that he had a legal justification for entering the residence and a defence to the charge of breaking and entering.

[72] Mr. Templeman's position is that the trial judge should have instructed the jury to consider whether a colour of right existed in this circumstance (based on his asserted honest belief that he had a right to enter the residence) and that the trial judge erred by not instructing the jury on this defence.

[73] The Crown's position is that the trial judge made no error, as there was insufficient evidence regarding Mr. Templeman's honest belief to put this issue to the jury.

[74] The Crown further argues that, before the defence of colour of right can be put to a jury, there must be a sufficient evidentiary basis to conclude that there was an "air of reality" to the defence. In this case, the Crown submits, this evidentiary basis did not exist.

Air of reality

[75] The Supreme Court of Canada in *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, stated that a defence should be put to a jury only where there is an evidentiary basis for the defence. The trial judge's inquiry into whether there is or is not an evidentiary basis for a defence, in this respect, has been referred to as the "air of reality" test, as noted at paragraph 50 of *Cinous*:

50 The principle that a defence should be put to a jury if and only if there is an evidential foundation for it has long been recognized by the common law. This venerable rule reflects the practical concern that allowing a defence to go to the jury in the absence of an evidential foundation would invite verdicts not supported by the evidence, serving only to confuse the jury and get in the way of a fair trial and true verdict. Following *Pappajohn*, *supra*, the inquiry into whether there is an evidential foundation for a defence is referred to as the air of reality test. See *Park*, *supra*, at para. 11.

[76] The Court in *Cinous* also stated, at paragraph 51, that a trial judge must put to the jury any defence with an evidentiary foundation (i.e. where there is an air of reality to the defence). Conversely, a trial judge must keep from the jury any defence without an evidentiary foundation (i.e. where there is no air of reality to the defence). The Court stated:

51. The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury. *Wu, supra; Squire, supra; Pappajohn, supra; Osolin, supra; Davis, supra*. This is so even when the defence lacking an air of reality represents the accused's only chance for an acquittal, as illustrated by *R. v. Latimer*, [2001] 1 S.C.R. 3.

[77] The reason for requiring that there be an air of reality (that is, an evidentiary foundation) to a defence before it is presented to a jury was also considered in *Cinous*. At paragraph 84, the Supreme Court of Canada cautioned that putting defences to a jury without an evidentiary basis might confuse or mislead the jury.

84 The whole edifice of air of reality analysis is built upon the premise that putting outlandish defences to the jury would be confusing and would invite unreasonable verdicts. This is the practical basis for the trial judge's duty to keep from the jury defences that are fanciful or far-fetched in relation to the evidence adduced at trial. As L'Heureux-Dubé J. stated for the Court in *Park, supra*, at para. 11:

The common law has long recognized that a trial judge need not put to the jury defences for which there is no real factual basis or evidentiary foundation. Courts must filter out irrelevant or specious defences, since their primary effect would not be to advance the quest for truth in the trial, but rather to confuse finders of fact and divert their attention from factual determinations that are pertinent to the issue of innocence or guilt.

The role of the jury is of paramount importance in the common law tradition. It is in keeping with the solemnity of the jury's task that frivolous questions are not put to it. Inviting the jury to solemnly consider that which is plainly unworthy of solemn consideration would in effect be to mislead the jury. The jury must not be diverted from the real issues in a case by defences that the evidence cannot reasonably support.

[78] In *R. v. Pappas*, 2013 SCC 56, [2013] 3 S.C.R. 452 at para. 26, the Supreme Court of Canada stated, perhaps more forcefully, this requirement of

an evidentiary basis for defences, and noted that bald assertions that a defence exists are inadequate:

26 ... The fact remains that the trial judge exercises a gatekeeper role in keeping from the jury defences that have no evidential foundation. Defences supported only by bald assertions that cannot reasonably be borne out by the evidence, viewed in its totality, should be kept from the jury.

[79] The test of whether there is an air of reality was set out by the Supreme Court of Canada in *Cinous* at paragraph 49:

... The correct approach to the air of reality test is well established. The test is whether there is evidence on the record upon which a properly instructed jury acting reasonably could acquit. See *Wu v. The King*, [1934] S.C.R. 609; *R. v. Squire*, [1977] 2 S.C.R. 13; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *Osolin, supra*; *Park, supra*; *R. v. Finta*, [1994] 1 S.C.R. 701. This long-standing formulation of the threshold question for putting defences to the jury accords with the nature and purpose of the air of reality test. ...

[80] This Court has frequently applied the air of reality test set out in *Cinous*. See for example *R. v. Chubbs*, 2013 NLCA 60, 341 Nfld. & P.E.I.R. 346 at para. 8; *R. v. Best*, 2016 NLCA 10, 375 Nfld. & P.E.I.R. 89 at para. 11; *R. v. Pardy*, 2017 NLCA 49 at para. 15.

The colour of right defence

[81] The trial judge in the present case had to determine whether, based on the evidence, there was an air of reality to the colour of right defence. If so, the defence should have been put to the jury; if not, it should not.

[82] The Supreme Court of Canada in *R. v. Simpson*, 2015 SCC 40, [2015] 2 S.C.R. 827, noted that the colour of right defence can apply to the offence of breaking and entering, and that the defence operates where an accused has “an honest belief in a state of facts which, if it actually existed, would at law justify or excuse the act done”.

[31] The colour of right defence is most commonly invoked in relation to the offence of theft under s. 322 of the *Code*, which prohibits the taking of an object or its conversion “fraudulently and without colour of right”. In *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.), at p. 372, Martin J.A. described the term “colour of right” in that section as follows:

The term “colour of right” generally, although not exclusively, refers to a situation where there is an assertion of a proprietary or possessory right to the

thing which is the subject-matter of the alleged theft. One who is honestly asserting what he believes to be an honest claim cannot be said to act “without colour of right”, even though it may be unfounded in law or in fact. ... The term “colour of right” is also used to denote an honest belief in a state of facts which, if it actually existed would at law justify or excuse the act done. ... The term when used in the latter sense is merely a particular application of the doctrine of mistake of fact. [Citations omitted.]

The colour of right defence would also appear to apply to other property-related offences, including breaking and entering: *R. v. Adgey*, [1975] 2 S.C.R. 426, at pp. 432-33; *R. v. Charters*, 319 N.B.R. (2d) 179, at para. 12.

[83] This Court in *R. v. Watson*, (1999) 176 Nfld. & P.E.I.R. 263, 177 D.L.R. (4th) 403, highlighted the fact that the defence of colour of right is grounded in the subjective, “honest belief” of an accused. The Court noted four aspects of the defence at paragraph 10, as follows:

(1) that the defence is based on the *honest belief* of the accused that, at the time the offence was committed, he had a colour of right (*Creaghan*);

(2) that the test is a subjective one (*R. v. Howson*, [1966] 3 C.C.C. 348, 55 D.L.R. (2d) 582 (Ont. C.A.));

(3) that while the belief does not have to be a reasonable one the reasonableness of the belief is a factor for consideration by the jury in determining if there is an honest belief (*R. v. Ninos and Walker*, [1964] 1 C.C.C. 326 (N.S.C.A.); see also Laskin J.A. in *Howson*); and

(4) that it is not sufficient that the accused had a moral belief in a colour of right (*R. v. Hemmerly* (1976), 30 C.C.C. (2d) 141 (Ont. C.A.), *R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que. C.A.), and *Gamey*).

(Emphasis in original.)

[84] The Supreme Court of Canada in *Simpson* stated that it is the accused (in this case Mr. Templeman) who has the onus to demonstrate there is an air of reality to the defence of colour of right, before the defence can be considered by a jury. If this onus is met, the Crown must disprove the defence. The Court stated:

[32] To put the defence of colour of right into play, an accused bears the onus of showing that there is an “air of reality” to the asserted defence — i.e., whether there is some evidence upon which a trier of fact, properly instructed and acting reasonably, could be left in a state of reasonable doubt about colour of right: *R. v. Cinous*, [2002] 2

S.C.R. 3, at paras. 49-53 and 83. Once this hurdle is met, the burden falls on the Crown to disprove the defence beyond a reasonable doubt. ...

[85] In *Cinous*, at paragraph 53, the Supreme Court of Canada stated that a court may consider the evidence in totality in considering whether the evidentiary foundation exists to support a defence. Further an accused, such as Mr. Templeman, is not required to testify in order to establish this; the evidentiary foundation to support a defence can be found to exist in the evidence of other witnesses or in the record. The Court stated:

53 In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin, supra*; *Park, supra*. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross-examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin, supra*; *Park, supra*; *Davis, supra*.

Pre-charge discussion regarding colour of right

[86] It is notable that there was some discussion between the trial judge and counsel concerning the colour of right issue at a pre-charge meeting, before the trial judge gave his charge to the jury.

[87] At one point in this pre-charge discussion with counsel, the trial judge indicated that, in his view and based on the evidence, it would be a “stretch” to conclude that Mr. Templeman had a colour of right. The trial judge stated:

...Now colour of right is a stretch because there was no evidence from Mr. Templeman so we're not – it's hard to get a subjective belief. What is the – there was evidence that his belongings were in the premises...but is that a justification for if, if the jury accepts that he smashed the rear window of the house and entered by, by smashing the window ...personally it seems to me as a stretch... .

[88] The trial judge asked for Mr. Templeman's counsel's view on the issue, and counsel indicated: “I'd like to leave the door open. I'd like to be able to make those arguments even if tenuous at best”.

[89] The trial judge indicated he would agree to “leave it open”. On appeal, there were submissions by counsel as to whether this meant the trial judge was indicating his willingness to give the issue further consideration, whether he was simply agreeing to allow counsel to make this argument, or whether he was

signaling his intention to put the issue to the jury and, inadvertently, failed to do so.

[90] Regardless, what is clear is that the trial judge did not provide any explicit assurance that the colour of right issue would be included in his charge to the jury. There was no assertion to counsel that it would be included and, based on the trial judge's views above, it seemed unlikely he would have been inclined to put the issue of colour of right to the jury. In this context, failure to include it was likely not surprising to counsel.

[91] The issue was ultimately not included in the trial judge's charge to the jury or in the decision tree provided to the jury as a deliberation aid.

[92] No objection was made about the failure to put the colour of right issue to the jury. The Supreme Court of Canada in *Jacquard* at paragraph 38 stated that, while the failure to object or comment on a jury charge is not determinative, it is "worthy of consideration" and it is "not irrelevant".

[93] A similar view was stated by the Supreme Court in *Araya*, where counsel did not object to "allegedly confusing and insufficient instruction at trial". The Court noted, at paragraph 51:

This Court has stated that while defence counsel's failure to object to jury instructions is not determinative on appeal, it nonetheless "says something about both the accuracy of the jury instructions and the seriousness of the alleged misdirection." *Jacquard* at para. 38.

Was there an air of reality to Mr. Templeman's asserted colour of right defence?

[94] As noted above, an accused (in this case Mr. Templeman) must establish that there was an air of reality to the asserted colour of right defence (*Simpson*, paragraph 32).

[95] The asserted defence requires evidence that the accused held an honest belief that he had a colour of right which would excuse or justify an otherwise wrongful act (in this case the breaking and entering into Ms. M's residence) (*Simpson*, paragraph 31).

[96] Further, the accused's honest belief must exist "at the time the offence was committed" and the test is a subjective one (*Watson*, paragraph 10).

[97] A trial judge applying the air of reality test must consider the totality of the evidence (*Cinous*, paragraph 53), and defences that cannot “reasonably be borne out by the evidence, viewed in its totality” are not to be put to the jury (*Pappas*, paragraph 26).

[98] Mr. Templeman’s asserted defence, then, must be viewed in the context of the evidence as a whole.

[99] In assessing the totality of the evidence, I would conclude that the trial judge did not err by failing to instruct the jury regarding the asserted colour of right defence, in respect of the offence of breaking and entering into Ms. M’s residence, and committing an indictable offence therein.

[100] This is because, based on the totality of the evidence at the trial, Mr. Templeman had not met the requirement set out in *Simpson*, at paragraph 32, of “showing that there is an ‘air of reality’ to the asserted defence” that he honestly believed he had a right to enter Ms. M’s residence at the time he broke the window, forcibly entered the residence and assaulted Ms. M and Mr. O.

[101] There was no onus on Mr. Templeman to testify at trial, and he did not do so. Therefore there was no direct evidence from Mr. Templeman regarding his honest belief that he was lawfully exercising his right to enter the residence. Such direct evidence would have been relevant to the trial judge’s application of the air of reality test. (In this regard, see for example *R. v. Foidart*, 2005 MBCA 104, 203 C.C.C. (3d) 529).

[102] The evidentiary foundation to ground a colour of right defence, however, need not be derived from the accused’s direct testimony; rather, it can be found in the evidence of other witnesses or in the evidentiary record at trial (*Cinous*, paragraph 53).

[103] In this case, Mr. Templeman must rely on the evidence of other witnesses or the record to demonstrate that he honestly believed that Ms. M’s residence was also his residence, or that he was invited to enter when the offence was committed.

[104] Counsel for Mr. Templeman noted there was evidence that Mr. Templeman had previously lived at Ms. M’s residence for some time while they were in a domestic relationship (before Mr. Templeman went to prison in February 2014), and that he had left his personal belongings in Ms. M’s residence when he went to prison. Also, Mr. Templeman and Ms. M spoke frequently on the telephone, she visited Mr. Templeman twice while he was in

prison and she had said that she would “be there for” Mr. Templeman when he was released from prison and she would be “getting rid of” Mr. O (with whom she entered into a domestic relationship after Mr. Templeman went to prison), and Mr. Templeman would be coming home with her following his release from prison. This, it is submitted, created an air of reality regarding Mr. Templeman’s honest belief that he had a lawful right to enter the residence when he did.

[105] However, as noted above, the trial judge’s responsibility is to consider the totality of the evidence when applying the air of reality test. In this case, an air of reality cannot “reasonably be borne out by the evidence, viewed in its totality” (*Pappas*, paragraph 26). A review of the evidence, as a whole, does not reveal that an air of reality was established in this case.

[106] Ms. M testified that Mr. Templeman did not live at her residence at the time the break and entry occurred and she further testified that she had not invited him to the residence. Ms. M also indicated that Mr. Templeman would not have had a key to the residence, as she had not given him one.

[107] The evidence is clear that Ms. M reported the break and entry to the police at the earliest practicable opportunity, when Mr. Templeman went to hospital to have his cut hand treated. Mr. Templeman was arrested shortly thereafter, while receiving treatment at the hospital.

[108] While Mr. Templeman did stay at Ms. M’s residence previously, when they were in a domestic relationship, the evidence was that Ms. M was in a relationship with Mr. O. when Mr. Templeman was released from jail. Mr. Templeman would have been aware of this as both Ms. M and Mr. O drove to St. John’s to meet him when he was released from prison.

[109] Despite any indication that Ms. M would be “getting rid of” Mr. O, and that Mr. Templeman would be going home with her when released from jail, this did not occur. Rather, Mr. Templeman stayed in St. John’s following his release from jail, and Ms. M and Mr. O returned together to Ms. M’s residence in Carbonear. Again, Mr. Templeman would have been aware of this. Ms. M and Mr. O were both present in Ms. M’s residence, asleep, when Mr. Templeman entered the residence.

[110] The manner in which Mr. Templeman entered the residence (smashing a window and immediately assaulting Ms. M and Mr. O) is also not indicative of an honest belief in the legal right of entry into the residence “at the time the

offence was committed” (*Watson*, paragraph 10). As the trial judge noted in his sentencing decision, “a knock on the door would have sufficed”.

[111] It is a trial judge’s duty to keep from the jury defences that are “fanciful or far-fetched in relation to the evidence adduced at trial” (*Cinous*, paragraph 84) as well as defences “supported only by bald assertions...” which are otherwise unsupported by the evidence (*Pappas*, paragraph 26). This was the duty of the trial judge in this circumstance.

[112] As the evidence, in its totality, did not establish the required air of reality that Mr. Templeman honestly believed Ms. M’s residence was his residence, or that he otherwise had a right to enter the residence at the time the offence was committed, the trial judge did not err by not instructing the jury to consider this asserted defence.

[113] Absent an air of reality, based on the evidence and record at trial, the defence of colour of right was, correctly, not put to the jury.

[114] I would dismiss this ground of appeal.

SUMMARY

[115] For the reasons provided above with respect to the three grounds of appeal considered in this matter, I would dismiss the appeal.

F. P. O’Brien J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

L. R. Hoegg J.A.