SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Burton*, 2018 NSSC 245

Date: 2018-10-10
Docket: *Syd*, No. 468343
Registry: Sydney

Between:

Her Majesty the Queen

v.

Shane Burton

Judge:	The Honourable Justice Robin C. Gogan
Heard:	July 23, 24, 30 and September 24, 2018, in Sydney, Nova Scotia
Counsel:	Darcy MacPherson, for the Crown Darlene MacRury, for the Defence

By the Court:

Introduction

[1] In the early hours of July 31, 2016, a cottage near South Harbour, Nova Scotia was destroyed by fire. Items had been removed from inside the cottage prior to the fire and left strewn about the surrounding property. The cottage belonged to Carla Turner.

[2] Shane Burton was arrested in relation to these events and stands charged as follows:

> Count 1
>
> That he did break and enter a certain place to wit: a cottage situate at 625 Shore Road, South Harbour, Nova Scotia, contrary to Section 434 of the Criminal Code.
>
> Count 2
>
> And furthermore on or about the same date and at or near the same place did intentionally or recklessly cause damage by fire to a cabin the property of Carla Turner situate at 625 Shore Road, South Harbour, Nova Scotia contrary to Section 434 of the Criminal Code.

[3] At the conclusion of the evidence, the accused moved for a directed verdict. This motion was dismissed on procedural grounds. What follows is a

decision as to whether the Crown has proven the offences beyond a reasonable doubt.

Background and Evidence

[4] This is a circumstantial evidence case. The Crown presented evidence from a number of witnesses along with a significant number of exhibits. The witnesses included caretaker Alex Dunphy, cabin owner Carla Turner, Nova Scotia Power linesman Jeff Gillis, and Sgt. Tyson Nelson. The exhibits included photos of the Carla Turner's cottage both before and after the fire, as well as video from the local agency liquor store, items of real evidence seized from various locations, and forensic analysis reports relating to various pieces of evidence. The accused called no evidence.

[5] Alex Dunphy is a local resident and he runs a seasonal campground business in the Ingonish area. He knows the accused. He identified him. Shane Burton had been friends with his sons in the distant past. He also knows Carla Turner and testified to knowing her and her husband Bill Turner for the better part of two decades. Bill Turner passed away several years ago and Carla continued to visit the cottage on the Shore Road in Ingonish. Alex Dunphy described the cottage and confirmed that he and his son (also Alex Dunphy) did work on the cottage for

Carla. He had a key to the cottage that he kept in his campground office. Alex Sr. looked in on the Turner property almost every day. He discovered the burned out cottage on the morning of July 31, 2016.

[6] Alex Dunphy described that morning. He had been riding his bicycle and rode down the cabin driveway between 7 and 8 a.m. He said that the site was still smouldering, the cottage was "100% burned to the ground" and he noticed scorched trees around the perimeter of the area. After observing the scene, he returned home on his bicycle and called the police.

[7] Sometime later, perhaps an hour, Alex Dunphy met Sgt. Tyson Nelson and they went to the scene together. Alex Dunphy reviewed photographs from Exhibit 1 and confirmed that they represented the scene as he observed it on that day. He confirmed the location of beer cans as shown in the photographs along with a mattress from the cabin that was then out in the yard. He also testified that about 300 meters away from the cottage on the Shore Road there was an area where tire tracks went into the bushes and the bushes were flattened. He brought this secondary scene to the attention of Sgt. Nelson.

[8] Alex Dunphy said that he had seen Shane Burton in the area the evening before the fire. At about 6 p.m. on that day, he had observed Shane Burton at his

son's place. He was about 100 meters from Shane Burton when he first saw him. His son and friends were drinking and Alex went over and asked Shane Burton and another man to leave. He admitted not being sure at the time it was Shane Burton. He observed the person he thought was Shane Burton and the other man leave in a brown vehicle but wasn't sure of the make or model of vehicle and he couldn't say who was driving.

[9] On cross-examination, Alex Dunphy was asked about the Shore Road area. He confirmed that the area was frequented by those going to Burton's Beach. The Shore Road had a three pronged fork at one point. On the right, you could walk about 100 - 150 meters to Burton's beach. The middle prong would take you to the rear of the Turner cabin. There were no street lights and the road to the Turner cabin was very dark at night. The cottage was serviced by an underground electrical service that ran from a pole located on a neighboring property. The last prong on the left from the Shore Road would take you to the neighboring Cosman property. Exhibit 2 is Alex Dunphy's sketch of the general area.

[10] Mr. Dunphy was asked to describe the scene as he first observed it. He said there were still pockets of open flame at that time. When he returned with the police, he said he stayed only 15 or 20 minutes. He didn't recall being there when photographs were taken. It wasn't until later in the day that he called Carla Turner.

[11] He was asked about the key he kept for the Turner property. He confirmed that the key was labelled to identify it, but was kept in a part of the business office which had no public access.

[12] The next witness was Carla Turner. She is the owner of the cabin property in question. She is a resident of the State of Maine. She testified to the history of the property and construction of the cabin. In the period just prior to the fire, she said that she was spending less than three months a year at the cottage. When she was not there, Alex Dunphy and his son had her permission to be on the property, enter it as required, and to do maintenance work. She reviewed the photographs in Exhibit 1.

[13] Carla Turner recalled getting a call from Alex Dunphy about five hours after the fire was discovered. She testified that the call came about 11 am EST. She said that call came the morning after she arrived back home in Maine, a trip that she thought took her one day on that occasion due to a family emergency. She said that she left "abruptly" before the seasonal plywood boards were put on the cabin, but advised Alex Dunphy that she was leaving.

[14] When she left the property, there were no beer cans or ball caps in the yard as shown in photo 8 of Exhibit 1. She testified that she didn't drink beer. Nor was

there a mattress in the yard as shown in photos 13 and 16 of Exhibit 1. When she left the cottage, the mattress was on top of a brass bed inside the cabin. She further identified the items in photos 27, 28, and 29, all contents of the cabin when she was last there. Finally, she confirmed that she doesn't smoke and had no explanation for the cigarette butts around the charred remains of the cabin.

[15] The cabin was uninsured and she estimated that it would cost her about $40,000 to rebuild it, a process that was ongoing as of the date of trial.

[16] When cross-examined, Carla Turner confirmed that the electrical service was working and on when she left the cabin. Heat came from two small electrical space heaters. As part of the regular closing of the cabin, she would unplug everything but not turn off the main breaker. About ten days prior to leaving the cabin due to a family emergency, a bathroom renovation had been finished, which was the first indoor plumbing service to the cabin. A pump serving the plumbing was located under the kitchen sink. This pump was hardwired into the electrical system but only ran when the system called for water. The faucets were all off and no water running when she left. Alex Dunphy had done all the recent renovation work. She wasn't aware of whether any inspections were required or had taken place.

[17] The next witness was Jeff Gillis. He testified that he was called to a power outage at the property adjacent to the Turner cabin in July of 2016. The call came at about 7 a.m. When he arrived to the call he realized that two properties were impacted. When he went to inspect the Turner cabin, he observed the charred remains. This was sometime after 8:30 a.m.

[18] The last witness for the Crown was Sgt. Tyson Nelson. At the time of the Turner cabin fire, he was a Corporal working in the Ingonish Beach detachment. On July 31, 2016, at 8 a.m., he received a dispatch call to go and see Alex Dunphy about a cabin fire. Sgt. Nelson met Alex Dunphy and they drove to the Turner cabin. They arrived around 8:35 a.m. On arrival at the scene, he observed the flattened and smouldering remains of the cabin. He subsequently walked around the scene and took photos which are contained in Exhibit 1. He recalled Alex Dunphy being with him for about two hours after which he drove Dunphy home and returned to the scene. He was at the cabin fire scene a total of three to four hours.

[19] Sgt. Nelson reviewed the photos in Exhibit 1 in detail. He testified that he took all but three of the photos in the presence of Alex Dunphy at the scene. He noted the Moosehead Dry Ice beer cans in photos 1, 2, 3 and 5, the Under Armour ball cap in photos 3 and 8, and the cigarette butts in photos 11 and 14. He noted

the mattress in photos 13 and 16 and estimated its location as 45 feet from the remains of the cabin. He noted that the ball cap (in evidence as Exhibit 11) was found at the scene about 35 to 40 feet from the cabin ash pile. The ball cap had hairs on it and it was partially seared.

[20] Sgt. Nelson also took photos of what he called a secondary location located about a quarter of a kilometer west from the Cosman driveway. Photos 15 and 19 to 22 showed this location on the Shore Road. Sgt. Nelson testified that this site had tire tracks running into the bushes and the bushes were matted down. Photo 23 showed an Adidas sneaker (male left shoe, size 10.5) in that location, and photo 24 showed a foam cushion. Sgt. Nelson testified that the burlap sack shown in photo 27 (a cover for the foam cushion) was found in the secondary location in the area shown in photo 22. He also testified that he collected three empty beer cans (Busch Ice brand) from Alex Dunphy's son's residence (photo 30).

[21] There were a number of other items found at the location of the Turner cabin. Exhibit 3 is Sgt. Nelson's sketch of the scene providing his depiction of the location of various things. Notably, the sketch includes the location of an empty beer can collected from the scene that was not photographed. This was a Moosehead Dry Ice beer can.

[22] Sgt. Nelson described his investigation. He sent a number of items for forensic testing. He was unable to find anyone who witnessed the fire, or who saw anyone coming or going from the scene. On July 31, 2016, he went to the local agency liquor store location at Cape North Grocery and reviewed video footage. This store is located about five kms from the location of the Turner cabin. He was looking for someone purchasing Moosehead Dry Ice beer.

[23] Video footage from Cape North Grocery was played in court. It showed activity in the store on July 30, 2016. The thumb drive on which it was saved is Exhibit 10. Sgt. Nelson testified that the various video clips taken from the security cameras showed a brown vehicle pulling into the parking lot of the store. He further testified that the video clips showed two individuals coming and going from the store multiple times. One individual is shown purchasing a pack of twelve cans of Moosehead Dry Ice beer. In the video, both individuals are wearing dark hats. Further footage shows a brown car leaving the store and travelling in the direction of Shore Road. Sgt. Nelson identified the individuals in the video clips as Shane Burton and Alvin Campbell. These identifications were not contested. In the video footage, the individual identified as Shave Burton is wearing white flip flops on his feet.

[24] Sgt. Nelson went on to testify about the results of the forensic testing. Exhibits 6, 7, 8 and 9 were reviewed. A DNA sample had been obtained from Shane Burton further to a warrant. On the basis of the testing, Shane Burton was a match to the samples taken from the ball cap, one of the beer cans, and the Adidas sneaker found at the secondary location. The beer can which contained Shane Burton's DNA was the Moosehead Dry Ice beer can that was not photographed but was indicated on Sgt. Nelson's sketch of the scene (Exhibit 3) in a location closest to the cabin driveway. The forensic testing further indicated that DNA collected from other items at the scene belonged to another male and a female.

[25] When cross-examined, Sgt. Nelson testified that he had called the Fire Marshal from the scene on July 31, 2016 but the Fire Marshal didn't come or do any fire investigation. Sgt. Nelson was asked how he ruled out accidental fire. He said he didn't do anything to rule out accidental fire. He admitted that he was not aware of the fact that Carla Turner had to leave her cabin suddenly and left the main power on. He further admitted that he never met Shane Burton or Alvin Campbell before and had no previous knowledge of their appearance. He said that he had searched Facebook profiles for their pictures and was assisted in this endeavour by the store clerk on July 31, 2016. He admitted that there was no confirmation of this aspect of his investigation in his notes. He explained that his

focus in reviewing the security video was to see who purchased Moosehead Dry Ice beer. Although there are several liquor store locations in the area, he only checked the Cape North Grocery location to see who had purchased that brand of beer on July 30, 2016. He didn't know whether any Moosehead Dry Ice beer was sold at any other liquor store location in the area.

[26] Sgt. Nelson testified that the DNA evidence of the unknown male at the Turner cabin scene did not belong to Alvin Campbell. He also acknowledged that there is no way to connect the Moosehead Dry Ice beer purchased by Shane Burton on the video with the same brand beer cans found at the Turner fire scene. He confirmed that there were no reports of smoke or fire before Alex Dunphy and Jeff Gillis reported on the morning of July 31, 2016. He admitted to not knowing when the fire began, and not being able to say whether the fire was already burning at the time that Shane Burton and Alvin Campbell were seen on the Cape North Grocery security video.

[27] On re-direct, Sgt. Nelson confirmed that Shane Burton was seen in the video wearing a dark ball cap.

Position of the Parties

[28] In terms of the positions of the parties, there is agreement that this case is circumstantial. There is disagreement as to the inferences to be drawn from the evidence, and whether any such inferences assist to discharge the burden on the Crown.

Motion for Directed Verdict

[29] I note at the outset that after electing not to call evidence, the accused moved for a directed verdict of acquittal on both counts. This was dismissed on procedural grounds. The point made however, was that the evidence offered by the Crown did not establish that the accused committed the offences as charged. On the motion for directed verdict, the accused referenced the decision of the Supreme Court of Canada in ***R. v. Cooper***, [1978] 1 S.C.R. 860, 74 D.L.R. (3d) 731, 14 N.R. 183, 34 C.C.C. (2d) 18, 37 C.R.N.S. 1.

The Crown Position

[30] It is the Crown submission that burden has been discharged and convictions should be entered on both counts in the Indictment.

[31] The Crown presented a number of authorities, including various references to Chapter 16 of Ewaschuk, J.'s *Criminal Pleadings and Practice in Canada*, (2nd ed. 2014). Although these authorities were helpful, I note references cited from Ewaschuk predate the decision of the Supreme Court of Canada in ***R. v. Villaroman,*** 2016 SCC 33, a decision I will say more about later in these reasons.

[32] The Crown acknowledged the largely circumstantial nature of the case. It submitted however, that the DNA evidence on the beer can, ball cap, and Adidas sneaker, served as the basis for the reasonable inference that Shane Burton was at the Turner cabin property. This is further supported by the fact that empty beer can at the fire scene is the same brand as the accused was seen purchasing the evening before the burned out cabin was discovered.

[33] It is the Crown position that the evidence clearly established that the mattress, bag of bread ties, foam pillow insert and burlap cover were removed from the cabin before the fire. It was further submitted that the proximity of the items containing the accused's DNA to the items removed from the cabin, is the basis for inferring that the accused was present on the Turner property before the fire started. The searing on the ball cap (which was not contested) is the basis to infer that the accused remained at the scene until after the fire began. At one point, it

was submitted that the ball cap was likely scorched as Shane Burton exited the burning cabin.

[34] The Crown theory continued with the submission that it was rational to infer that Shane Burton committed the break and enter offence as one of a group of people connected to the scene with DNA evidence. If he committed the break and enter offence and the fire occurred at some point thereafter, the seared hat, and the evidence as a whole, supports the only reasonable inference that the accused set fire to the cabin.

[35] Finally, the Crown submission concluded with reliance upon of the Ontario Court of Appeal decision in ***Rex v. Binder***, [1948] O.R. 607, the Nova Scotia Court of Appeal decision in ***R. v. Diggs***, [1987] N.S.J. No. 143, and the decision of the Supreme Court of Canada in ***R. v. Vezeau***, [1977] 2 S.C.R. 277, to the cumulative effect that the trier of fact can draw an adverse inference from the failure of the accused to testify. In this case, the Crown submits that the adverse inference to be drawn is that the accused set fire to the Turner cabin.

The Defence Position

[36] The Defence reminds the court of the burden on the Crown to establish the elements of the offences beyond a reasonable doubt. All inferences must be

reasonable and logical and the trier of fact must not speculate. It was submitted that there is no evidence as to when the fire began, the nature of the fire, or the speed at which it destroyed the cabin. The presence of the DNA of the accused on a ball cap and a beer can at the scene does not take Crown from speculation to reasonable inference. The theory of the Crown is conjecture and does not discharge the burden on the Crown to prove the offences beyond a reasonable doubt.

[37] In response to the Crown's invitation to draw an adverse inference against the accused, Defence counsel urged consideration of the fact that the accused is not compellable under s. 11(c) of the *Charter*. Reference was also made to the commentary of Ewaschuk, J. in *Criminal Proceedings and Practice*, *supra*, at 16-126.4 as follows:

> A trier of fact is not entitled to speculate on "conjectural possibilities", not reasonably inferable from the evidence and, more so, must not speculate on the evidence not called, e. g. , by the accused to contradict the Crown's case.

[38] The Defence submits that the only appropriate verdict is acquittal on both counts in the Indictment.

Analysis

[39] The Crown must prove all elements of the offences charged beyond a reasonable doubt. The main issue in this case is whether the Crown has discharged its burden. Even more to the point, the issue is whether the cabin was intentionally destroyed by fire and whether the accused is the person who broke into the cabin and then set it on fire. The accused is presumed innocent throughout until such time as the Crown has proven otherwise.

[40] The evidence provided by the Crown came from four witnesses. This is not a case about the credibility or reliability of the evidence offered by any of the witnesses. This is a case about whether circumstantial evidence establishes that the accused committed the offences beyond a reasonable doubt. There is no evidence as to when, even approximately, the fire started. There is no evidence as to the cause or origin of the fire. Having said that, it must be recognized that circumstantial evidence can have the same probative value as direct evidence and it can be the basis for convictions in cases of this kind.

The Use of Circumstantial Evidence Generally

[41] In ***R. v. Cooper***, *supra*, the Supreme Court of Canada reiterated that a finding of guilt based on circumstantial evidence requires being satisfied beyond a

reasonable doubt that the guilt of the accused is the only reasonable inference available on the proven facts.

[42] More recently, the use of circumstantial evidence and its relationship to the burden of proof was reviewed by the Supreme Court of Canada in ***R. v. Villaroman***, 2016 SCC 33. In that case, Justice Cromwell reiterated the concerns about the misuse of circumstantial evidence in order to bridge gaps in the evidence to infer guilt. He reminded us that reasonable doubt represents a state of mind – the degree of persuasion that entitles and requires a finding of guilt – and that such a doubt must not be frivolous and it must be logically connected to the evidence or absence of evidence. However, reasonable doubt is not an inference or finding of fact requiring support in the evidence.

[43] By contrast, the proper use of circumstantial evidence requires understanding that the inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits. Such inferences must be considered in light of all the evidence, and the absence of evidence, assessed logically, in light of human experience and common sense.

[44] Justice Cromwell then went on to discuss inference drawing in greater detail at paras 35 – 43:

[35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, 1965 CanLII 26 (ONCA), [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point 1996 CanLII 6 (SCC), [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4 (CanLII), [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370 (CanLII), 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614 (CanLII), 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, 1938 CanLII 14 (ONCA), [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd 1938 CanLII 7 (SCC), [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28 (CanLII), 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (CanLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, 1971 CanLII 13 (SCC), [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable

possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[39] I have found two particularly useful statements of this principle.

[40] The first is from an old Australian case, *Martin v. Osborne* (1936), 55 C.L.R. 367 (H.C.), at p. 375:

> In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed. [Emphasis added.]

[41] While this language is not appropriate for a jury instruction, I find the idea expressed in this passage — that to justify a conviction, the circumstantial evidence, assessed in light of human experience, should be such that it excludes any other reasonable alternative — a helpful way of describing the line between plausible theories and speculation.

[42] The second is from *R. v. Dipnarine*, 2014 ABCA 2014 (CanLII), 584 A.R. 138, at paras. 22 and 24-25. The court stated that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences"; that the trier of fact should not act on alternative interpretations of the circumstances that it considers to be unreasonable; and that alternative inferences must be reasonable, not just possible.

[43] Where the line is to be drawn between speculation and reasonable inferences in a particular case cannot be described with greater clarity than it is in these passages.

(Emphasis Added)

[45] Justice Cromwell's instruction in ***Villaroman*** has been cited on numerous occasions in Nova Scotia and other jurisdictions since it was delivered in 2016.

Circumstantial Evidence and Arson

[46] One of the issues raised by the Defence was whether the Crown had proven that the fire was an intentional fire. There was evidence that Carla Turner had left her cabin urgently, with the main power still connected, and recent renovations just completed. More significantly perhaps, was the evidence of Sgt. Nelson that the Fire Marshal was called but did not investigate the fire. And Sgt. Nelson could not say when, or why the fire had started, or exclude an accidental fire as a cause.

[47] In response, the Crown submitted that the finding of arson can be based upon an inference available from all the circumstances, including the fact that the accused had not testified or provided evidence to negative otherwise reasonable inferences.

[48] There are a number of decisions which provide guidance. In ***R. v. Monteleone***, (1983), 67 C.C.C. (2d) 489, [1982] O.J. No. 3466, affirmed, [1987] 2 S.C.R. 154, the Ontario Court of Appeal overturned a directed verdict of acquittal in an arson case. The case for the prosecution was entirely circumstantial. There was no evidence to explain the cause of the fire. But there was evidence of motive

and opportunity and other inculpatory evidence. Lacourciere, J.A., speaking for a unanimous Court, concluded, at para. 6:

> In most prosecutions for arson, the Crown must depend on circumstantial evidence. The circumstances must be sufficient to exclude every reasonable hypothesis other than a wilful and intentional burning in order to rebut the presumption that the burning was of accidental or natural origin. However, the facts and circumstances which tend to prove the incendiary origin of a fire are often interwoven, as in the present case, with other facts and circumstances which tend to connect the accused with the crime such as the presence of motive, and the clear opportunity of the accused together with his subsequent incriminatory statement.

[49] On appeal to the Supreme Court of Canada, the appellant maintained (as in the present case) that the absence of evidence as to the cause of the fire was tantamount to the absence of evidence of the commission of a crime. MacIntyre, J. disagreed, concluding that the incendiary origin of the fire can be inferred from other inculpatory circumstances which could link the accused to the fire. He explained, beginning at para. 13 (***R. v. Monteleone***, [1987] 2 SCR 154):

> 13 …The courts have frequently recognized the fact that the *corpus delicti*, that is, the act which constitutes the crime, in this case the setting of the fire, may be proved by circumstantial evidence. This subject is dealt with at Chapter 17, and following chapters of McWilliams, *Canadian Criminal Evidence* (2nd ed. 1984). At page 541, the author refers to the words of Wills, *An Essay on the Principles of Circumstantial Evidence* (6th ed. 1912), at p. 326:
>
> > It is clearly established law that it is not necessary that the *corpus delicti* should be proved by direct and positive

> evidence, and it would be most unreasonable to require such evidence. Crimes, and especially those of the worst kinds, are naturally committed at chosen times, and in darkness and secrecy; and human tribunals must act upon such indications as the circumstances of the case present.

In *R.v. Girvin* (1911), 2 Alta. L.R. 387 (S.C. *en banc*), Beck, J. recognized the application of this principle to the crime of arson. He said, at p. 398:

> [T]here is no proof here of the *corpus delicti*, that it, that the cause of the fire was otherwise than accidental. Fires occurring accidentally are common, and any given fire must be assumed to have been accidental until evidence is adduced of intention…No doubt, the evidence of the *corpus delicti* and the evidence of the guilt of the accused may often be more or less inseparable, and that is quite properly suggested as the case here.

[50] The reasons in ***Monteleone***, *supra*, were followed in ***R. v. Nendick***, 2017 BCPC 252. In ***Nendick***, much like the present case, the accused argued that incendiary fire had not been proven beyond a reasonable doubt. The trial judge specifically rejected the requirement for expert evidence to rebut the presumption of accidental or natural fire and found that circumstantial evidence established the fire was deliberately set. The trial judge went on to find that the accused had set the fire on the basis of video footage of a suspect in proximity to the time and place of the fire, and DNA evidence linking a soda bottle near the scene to the accused.

[51] Reference is also made to ***R. v. Gellvear***, 2017 ONSC 1131, ***R. v. Bou-Daher***, 2013 NSPC 108, ***R. v. Bou-Daher***, 2013 NSPC 114, ***R. v. Bou-Daher***, 2015 NSCA 97, and the authorities considered in those decisions.

[52] Before leaving this portion of the reasons, I note that some care must be taken with decisions that precede the decision of the Supreme Court of Canada in ***Villaroman***, *supra*. ***Villaroman*** confirmed that the inferences of innocence no longer need to be based upon proven facts. Inferences other than guilt must not be speculative but based upon logic and experience applied to the evidence or the absence of evidence. If reasonable inferences other than guilt exist, then the Crown has not met the standard of proof beyond a reasonable doubt.

Decision

[53] Shane Burton is charged with two offences. The first is break, enter and theft, contrary to s. 348(1)(b) of the *Criminal Code*, and the second is damaging the property of Carla Turner by fire contrary to s. 434 of the *Criminal Code.*

[54] On the basis of the evidence presented, I find the following facts:

(a) Carla Turner is the owner of a cabin on the Shore Road, or Burton's Beach Road, near Ingonish, Nova Scotia;

(b) The cabin is located on a road that also leads to another cottage property and a popular local beach. The Turner cabin driveway is in excess of one hundred meters long and has no street lights or any other illumination;

(c) Carla Turner left her cabin for the last time on the morning of July 30, 2016. She left "abruptly" due to a family emergency and drove all the way to her home in Hollis, Maine (775 miles) in one day, receiving the call about the cabin fire the morning after she arrived home;

(d) When Carla Tuner left, all contents of the cabin were inside, and there were no beer cans of any kind or cigarette butts on the property;

(e) The Turner cabin was discovered burned to the ground on July 31, 2016. It was discovered by Alex Dunphy and Jeff Gillis (separately) between 7 a.m. and 8:30 a.m. on the morning of July 31, 2016. The fire was still smoldering with some open flame. Alex Dunphy called police. Carla Turner was advised by telephone on the afternoon on July 31, 2016;

(f) Sgt. Nelson of the local RCMP attended the fire scene with Alex Dunphy. They arrived on scene by about 8:30 am on July 31, 2016. Sgt.

Nelson photographed the scene and seized various pieces of evidence (black Under Armour baseball cap, Moosehead Dry Ice and Busch Ice beer cans, cigarette butts, and various cabin contents) during the following three to four hours;

(g) Contents of the cabin had been removed prior to the fire. Items included a mattress, a bag of bread ties, a foam pillow and a burlap pillow cover. The foam pillow and burlap cover were discovered several hundred meters away on the side of the Shore Road in proximity to an Adidas sneaker;

(h) Shane Burton's DNA was found on the Under Armour ball cap and 1 Moosehead Dry Ice empty beer can from the fire scene. His DNA was also on the Adidas sneaker found at the secondary location;

(i) The Under Armour ball cap found at the scene was seared or fire damaged;

(j) Other DNA evidence from the scene came from an unknown male and unknown female. Alvin Campbell was excluded as the unknown male;

(k) The day the cabin fire was discovered was a Sunday during a long holiday weekend in Nova Scotia;

(l) It is not known when the fire began or the exact cause and origin of the fire;

(m) The main power connection to the cabin was on at the time of the fire and renovations to the cabin had recently been completed;

(n) Alex Dunphy had a key to the cabin and checked it almost every day. The key was labelled and kept in a private area of his business office;

(o) Shane Burton purchased Moosehead Dry Ice beer on the evening of July 30, 2018. At the time, he was with Alvin Campbell and was wearing a dark ball cap and white flip flops.

(p) The beer was purchased from Cape North Grocery, an agency liquor store located about five kilometers from the Turner cabin; and

(q) Shane Burton and an unidentified man were drinking with others at the home of Alex Dunphy's son in Ingonish in the early evening of July 30, 2016, before being asked to leave.

[55] Further to these facts, it is significant to note that the evidence disclosed no relationship between Shane Burton and the Turner property. There was no suggestion that the accused knew Carla Turner, that he had been to the cabin

property at any point, or that he knew there was a cabin at that location, inhabited or otherwise. Neither were there any witnesses who saw Shane Burton, or anyone else, at or anywhere in the immediate vicinity of the Turner cabin at any relevant point.

[56] In terms of access to the Turner property, I find that it was easily accessible. There was no driveway barrier of any kind, no security system or video surveillance, and the driveway was long and dark. Anyone driving down the Shore Road could have accessed the property either intentionally (looking for a secluded location) or unintentionally (looking for access to Burton's beach or the neighboring cabin). And I consider that this was a holiday weekend. Common sense says that a holiday weekend would increase the traffic to and from a local beach. This not a case of exclusive opportunity. Quite the contrary.

[57] I also note that but for Carla Turner's family emergency, she would have been in her cabin on the night of July 30, 2016. The evidence was that the only person who knew Carla Turner had left for the season was Alex Dunphy.

[58] There was no direct evidence as to when the fire began. It was clearly of sufficient intensity to completely destroy the cabin. The photographs in evidence show nothing left save the remains of some metal objects. The fire would have

been burning for some period through the preceding evening. But no one was alerted to it before it was discovered on the morning of July 31, 2016. In the absence of any expert evidence, or eyewitness testimony, it is impossible to say when the fire began. Any conclusions on this point would be pure conjecture.

[59] I must consider that the fire followed upon items being removed from the cottage. I consider it significant that all of the alleged criminal activity must have occurred after Carla Turner left the cabin urgently on the morning of July 30, 2016. That means that within roughly 24 hours of Carla Turner's departure, her cabin was broken into, various items removed, and then completely burned to the ground.

The Break, Enter and Theft

[60] In terms of the break, enter and theft charge, I readily infer from all the evidence that someone entered the cabin without consent prior to the fire, removed items from the cabin, and left those items outside the cabin in various locations on and off the Turner property. I find this inference is the only reasonable inference in the circumstances.

[61] The more challenging question is whether the evidence offered by the Crown proves that Shane Burton was that person. More will be said about that possibility later in these reasons.

Arson

[62] In terms of the arson charge, one of the only things that can be concluded with certainty is that the cabin was completely destroyed by fire by the time it was discovered on the morning of July 31, 2016. The trier of fact in such cases must presume that the origin of the fire is accidental or natural until the evidence establishes otherwise. Circumstantial evidence may be sufficient to prove an incendiary fire but such evidence must exclude every other reasonable hypothesis. I am of the view that the evidence, considered as a whole, does not rebut the presumption of an accidental or natural cause of the fire.

[63] In coming to this conclusion, I consider that the cabin had been vacant most of the day on July 30, 2016. The only two people aware of this were Carla Turner and Alex Dunphy. Carla Turner had left the cabin "abruptly" due to a family emergency. In the normal course, she would not have left until she put the winter boards on the cabin and gone through a series of steps to close it for the winter. Her evidence was that she left quickly and didn't follow her normal closing

routine. The main power was still on when she left. While she was clear that her normal routine involved unplugging all appliances, she did not confirm that she did this before leaving on July 30, 2016. She testified that the only source of heat for the cabin were several space heaters that plugged into the electrical system. She also testified that a bathroom renovation had just been completed prior to her departure. All of this evidence falls short of establishing the cause or origin of the fire, but it is part of the evidentiary landscape that must be considered.

[64] I also consider that although the cabin was in a secluded location, it was on the road to a popular local beach. It was a long weekend and it is reasonable to consider that there would have been more traffic than usual on the Shore Road.

[65] Against this landscape, the Crown maintains that the circumstantial evidence offered supports arson as the only reasonable conclusion. The Crown says that there is evidence that the accused, and others were at the scene, broke into the cabin, and then set fire to it in order to cover up the break in. I agree with the Crown that the break in prior to the fire, and evidence of multiple people being at the scene after Carla Turner departed, provides some evidence rebutting the presumption of accidental or natural fire. In my view however, it falls short of establishing that arson was the only possibility.

[66] In terms of the identification issue, the strongest evidence advanced by the Crown came in the form of the DNA analysis. The Under Armour hat and Moosehead Dry Ice empty beer can found at the scene contained DNA from the accused. On the basis of this evidence, combined with the video security footage, and some other collateral evidence, I am urged to infer that the Shane Burton was at the Turner property, broke into the cabin, removed items, and then set the cabin on fire.

[67] The cases are full of cautionary tales about the use of DNA evidence to establish identification. In ***R. v. O'Brien***, 2010 NSCA 61, a store had been robbed by a person wearing a blue and black Halloween mask. A blue and black Halloween mask was found near the scene. The mask contained DNA matching that of the accused. The accused was convicted. On appeal, the conviction was overturned. In so doing there was considerable analysis of the role of DNA evidence as the circumstantial basis for identification. Beveridge, J. A. for the majority said:

> [18] It is well established that DNA evidence is simply a piece of circumstantial evidence. Like fingerprint evidence, it merely indicates that a person's DNA somehow got to where it was found, not that a person committed the crime. (see *R. v. Terciera* (1998), 1998 CanLII 2174 (ONCA), 123 C.C.C. (3d) 1, [1998] O.J. No. 428 (C.A.), aff'd 1999 CanLII 645 (SCC), [1999] 3 S.C.R. 866). The Crown acknowledged that the DNA evidence in this case was the equivalent of a fingerprint. That is, if accepted, it is established

> that at some point in time, the appellant had handled, or even worn the mask. It did not, without more, establish that the appellant had committed the robbery.

[68] After reviewing a number of cases illustrating the point, Beveridge, J.A. concluded:

> [24] Evidence of DNA on items found at the scene of crimes has been relied on in a number of cases to support an inference that the accused participated in the offence. (see the review by C. Hill in *R. v. Foster*, [2008] O.J. 827.) It is clear that proof that DNA was found on items associated with a crime is not the end of the inquiry – the next step, and the crucial one, is whether the trier of fact can then draw the inference that the accused was a party to the offences charged. The Crown here concedes that the fact that DNA was found on the blue/black mask does not, on its own, establish the appellants culpability.

[69] The Court of Appeal decision in ***R. v. O'Brien***, *supra* was subsequently overturned on other grounds and the trial conviction restored (See ***R. v. O'Brien***, 2011 SCC 29). Subsequently, in ***R v. Henderson***, 2012 NSCA 53, a burglary conviction was upheld on the basis that DNA evidence had been considered properly, "as part of the totality of evidence; one strand that along with many others, formed a tight web ensnaring the appellant". See also ***R v. Clarke***, 2016 NSSC 357, where the accused was acquitted notwithstanding his DNA being found on a lighter at the scene of the robbery.

[70] The cases reveal that DNA evidence can be the cornerstone or the only stone. And of course, there are many places to be found in between. But the burden remains on the Crown to prove the elements of each offence and the identity of the perpetrator. In circumstantial cases of identity, DNA evidence must be considered in the context of all the evidence offered. A piecemeal analysis is not appropriate.

[71] Some focus should be given to the Under Armour baseball cap. There is significance in the fact that it was found at the scene, that it was seared or scorched, and contained DNA from the accused. There was some suggestion that this was the same hat that Shane Burton was wearing in the video footage from Cape North Grocery. The video footage does show Shane Burton wearing a dark baseball cap. Although the hats appear similar, I am unable to find that they are the same. It is safe ground to say that there are very many dark ball caps in the world.

[72] The best that can be said is that Shane Burton was wearing a dark baseball cap when he bought beer at Cape North Grocery on the evening of July 30, 2016. On the morning of July 31, 2016, a dark baseball cap was found at the Turner fire scene. That hat contained Shane Burton's DNA. On its own, the presence of the

accused's DNA on a hat at the scene does not even establish that the accused was present at the scene. It only proves that his DNA was there.

[73] The Crown urged consideration of the DNA evidence and the seared dark ball hat in conjunction with the empty beer can. The beer can was the same brand that Shane Burton was seen buying the night before. The Crown acknowledged that there was no way to prove that the empty beer can at the scene was one of those Shane Burton purchased on the evening of July 30, 2016. I agree with the Crown that the presence of both a hat and a beer can at the scene with Shane Burton's DNA increases the likelihood that he was at the scene himself at some point. But there is no other evidence connecting Shane Burton to the scene and an absence of evidence about what Shane Burton was doing after he bought beer on July 30, 2016.

[74] It seems to me that the high water mark of the Crown's case is that Shane Burton was at the scene at some point between the time Carla Turner left her cabin on the morning of July 30, 2016 and the time it was discovered burned to the ground on the morning of July 31, 2016. Assuming (without finding) that he was present between those times, there is little other evidence to establish the timing of his presence, or what he did, or did not do, when he was there. On the basis of the

evidence offered, I find it fruitless to try and assess his opportunity or analyze whether probative evidence of a motive exists to set the Turner cabin on fire.

[75] The Crown submitted that I should draw an inference from the fact that the hat and beer can were found in the midst of the items removed from the cabin. On this basis, it was the view of the Crown that it was reasonable to infer that Shane Burton was there when the break in occurred. I do not find that submission persuasive. There were only a few items from the cabin found on the surrounding property. The location of these items appeared completely random. And there did not appear to be a connection between the location of the cabin contents, the hat, and the beer can, that had any evidentiary significance.

[76] The possible exception was at the secondary location where the foam pillow and burlap cover were found in proximity to a sneaker containing Shane Burton's DNA. The trouble here is that there is no evidence that Shane Burton was wearing those sneakers on the night of the fire. To the contrary, the video footage from Cape North Grocery shows Shane Burton wearing white flip flops.

[77] Finally, the Crown invited me to consider that the accused had not testified and that it was appropriate to draw an adverse inference. In support of this submission, the Crown relied on the decision of the Nova Scotia Court of Appeal

in ***R. v. Diggs***, [1987] N.S.J. No. 143, (1987) N.S.R. (2d) 432, 57 C.R. (3d) 163, 1 W.C.B. (2d) 429, and the Ontario Court of Appeal decision in ***Rex v. Binder*** [1948] O.R. 607. I note more relevant comments along these lines coming from Saunders, J.A. in ***R. v. Henderson***, *supra*, at para. 39:

> [39] Given the strength of the circumstantial evidence gathered by the investigators following the burglary, the Crown's case "cried out for explanation". His choosing not to testify in the face of such strong evidence could not, of course, be used to infer or confirm his guilt, but it meant that he had failed to provide the trier of fact with any basis for concluding otherwise. And that is something we are entitled to take into account when considering the reasonableness of the verdict.

[78] Two comments can be made in response to this position advanced by the Crown. First, I would exercise considerable caution in the application of this reasoning in the wake of the decision in ***Villaroman***, *supra*, decided subsequently. Second, even if this approach is appropriate, I am unable to find that the evidence advanced by the Crown in this case "cried out for explanation". I decline to infer anything from the decision of the accused not to call evidence.

Conclusion

[79] This is a circumstantial evidence case. Circumstantial evidence can be the basis of convictions in cases like this one. But the court must be satisfied that the guilt of the accused is the only reasonable conclusion flowing from the evidence. I

do not find the evidence presented in this case capable of supporting such a conclusive inference. I find the evidence, considered as a whole, raises a suspicion that the accused was at the scene of the Turner cabin fire. Beyond that, I left with nothing more than speculation at what may have unfolded.

[80] I find therefore that the Crown has not proven the case on either count beyond a reasonable doubt.

[81] As a result, I find the accused, Shane Burton, not guilty of either offence charged in the Indictment. Acquittals are entered on both counts.

Gogan, J.