

Ontario Superior Court of Justice

A.M. Molloy J.

Heard: March 7-9, 2018.

Judgment: May 16, 2018.

Court File No.: CR-16-50000631-0000

[2018] O.J. No. 2611 | 2018 ONSC 3060 | 410 C.R.R. (2d) 146

Between Her Majesty the Queen, and Curtis Murray and Corey Murray, Defendants

(59 paras.)

Case Summary

Criminal law — Evidence — Admissibility — Prejudicial evidence — Motion by accused to lead evidence at trial as to two alternate sets of suspects dismissed — Accused charged with first degree murder — Accused now suggested that A killed victim out of jealousy or the associates of C, who had a grudge against the accused, committed the murder to frame the accused — There was no air of reality to these defences — The evidence of motive for A was extremely weak — There was no evidence that A had any tendencies towards violence at all — There was nothing whatsoever to connect the associates of C to the murder.

Motion by the accused to lead evidence at trial as to two alternate sets of suspects. The accused brothers were charged with first degree murder. The victim was stabbed and shot outside an apartment building. The attack was captured on surveillance video but the faces of the attackers were not visible. A large part of the Crown's case consisted of connecting the clothing worn by the assailants to the accused brothers. The accused now wanted to lead evidence that A killed the victim out of jealousy or that unknown associates of C, who had a grudge against the accused Curtis, and who, it was suggested, dressed in clothing stolen from the accused and committed the murder in order to frame them.

HELD: Motion dismissed.

While there was evidence that A was behaving in a manner that was possessive or controlling, it was a huge leap from there to first degree murder, a leap that was not based on any evidence whatsoever. On the evidence available, it would have been impossible for A to know that the victim was coming to see Ms. I. The evidence of motive was extremely weak. There was no evidence that A had any tendencies towards violence at all. There was no air of reality to this defence. The accused had not identified any particular associates of C as being the perpetrators. Merely a possibility of being in the area did not constitute a nexus with the offence.

itself. There was no evidence of any connection between C or any of his associates and the victim. There was nothing whatsoever to connect the associates of C to the murder.

Counsel

Michael Wilson and Michael Coristine, for the Crown.

D. Sid Freeman, for Curtis Murray.

Boris Bytensky and Brittany Smith, for Corey Murray.

REASONS FOR DECISION

(Alternate Suspects)

A.M. MOLLOY J.

A. INTRODUCTION

1 Curtis Murray and Corey Murray are brothers. They are charged with first degree murder in connection with the death of 17-year-old Trevor Seraphine ("Trevor") in the early morning hours of March 21, 2015. The killing took place in the lobby area of an apartment building at 44 Willowridge Road. Video surveillance cameras show two men running towards Trevor as he approached 44 Willowridge Road and one of them started shooting at him. Trevor ran into the lobby area of the apartment building, but could not get past the foyer as the door to the elevator lobby was locked and he did not have a key. Five shots had been fired, all of which missed. The two assailants followed Trevor into the lobby, where the gunman shot at him again, this time wounding him in the chest, but not killing him. The other assailant then pulled a knife and stabbed Trevor a number of times, including a fatal stab wound into his heart. Some of the interaction outside and all of the activity in the apartment foyer was recorded by video surveillance cameras. However, the faces of the assailants cannot be seen on the video. The central issue at trial will be the identity of the two assailants. The Crown seeks to establish that Curtis Murray fired the shots and his brother Corey Murray did the stabbing. A large part of the Crown's case consists of connecting the clothing worn by the assailants to the Murray brothers.

2 The two accused seek to lead evidence at trial as to two alternate sets of suspects: (1) a young man known by the nickname "Ammo," who it is suggested had a jealousy motive to kill Trevor; and (2) unknown associates of a man named Rushaune Champagne, who had a grudge against Curtis Murray and who, it is suggested, dressed in clothing stolen from Curtis and Corey Murray and committed the murder in order to frame them.

3 After hearing evidence and argument on the application, I ruled that there was no air of reality to either theory and that the evidence relating to these alternate suspects could not be lead at trial. I advised that written reasons would follow. Those reasons are set out below.

B. LEGAL PRINCIPLES

4 There is no dispute between the parties as to the applicable legal principles to be applied. The test has been well-established in the jurisprudence.

5 It is open to a person charged with murder to seek to defend himself by pointing to evidence supporting the theory that somebody else committed the murder. However, before such evidence can be introduced, the evidence must "meet the test of relevancy and must have sufficient probative value to justify its reception." This can be done by either direct or circumstantial evidence.¹

6 Such evidence often consists of showing that the third party had a motive to commit the murder or had made threats against the deceased. However, the third party must be shown to be "sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value."²

7 Similarly, evidence of the third party's propensity for violence may be admissible. Again, however, "unless the third person is connected with the crime under consideration by other circumstances, evidence of such person's disposition to commit the offence is inadmissible on the grounds of lack of probative value."³

8 As with any other defence, a third party suspect defence will only be permitted to go before the jury where an "air of reality" has been demonstrated. In *R. v. Grandinetti*,⁴ the Supreme Court of Canada specifically endorsed this principle as applying to a third party suspect defence, citing its earlier decision in *R. v. Cinous*,⁵ in which the Supreme Court held (at paras. 50-54):

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*, [\[1980\] 2 S.C.R. 120](#), *supra*, the inquiry into whether there is an evidential foundation for a defence is referred to as the air of reality test. See *Park*, [\[1992\] 2 S.C.R. 871](#), *supra*, at para. 11.

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*, [\[1934\] S.C.R. 309](#), *supra*; *Squire*, [\[1977\] 2 S.C.R. 13](#), *supra*; *Pappajohn*, *supra*; *Osolin*, [\[1993\] 4 S.C.R. 595](#), *supra*; *Davis*, [\[1999\] 3 S.C.R. 759](#), *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](#), [2001 SCC 1](#).

It is trite law that the air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive. Dickson C.J. drew attention to the distinction between these two types of burden in *R. v. Schwartz*, [\[1988\] 2 S.C.R. 443](#), at p. 466:

Judges and academics have used a variety of terms to try to capture the distinction between the two types of burdens. The burden of establishing a case has been referred to as the "major burden," the "primary burden," the "legal burden" and the "persuasive burden." The burden of putting an issue in play has been called the "minor burden," the "secondary burden," the "evidential burden," the "burden of going forward," and the "burden of adducing evidence." [Emphasis added.]

The air of reality test is concerned only with whether or not a putative defence should be "put in play", that is, submitted to the jury for consideration. This idea was crucial to the finding in *Osolin* that the air of reality test is consistent with the presumption of innocence guaranteed by s. 11(d) of the *Canadian Charter of Rights and Freedoms*.

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*.

9 In *R. v. Grant*,⁶ the Supreme Court of Canada summarized the "air of reality" test as follows (at para. 20):

In order for the judge to put a defence to the jury, the accused must point to evidence on the record that gives the defence an air of reality (*R. v. Cinous*, [2002 SCC 29](#), [\[2002\] 2 S.C.R. 3](#)). The trial judge must determine whether there is some evidence that is "reasonably capable of supporting the inferences required for the defence to succeed" (*ibid.*, at para. 83). The air of reality test applies to all defences, and acts as a threshold to ensure that "fanciful or far-fetched" defences are not put before the trier of fact (para. 84). When applying this test, the trial judge must take the evidence to be true and must not assess credibility or make other findings of fact (para. 54).

10 An assessment as to whether the proposed defence has an air of reality will typically involve considering the proposed evidence as to motive, opportunity and propensity. However, it is not simply a question of "some evidence" or "any evidence" -- the evidence to be called by the defence must be sufficient to show some basis upon which a reasonable jury, properly instructed, could acquit the accused based on the evidence relating to the third party suspect. While reasonable inferences can be drawn, speculation and conjecture will not be enough.⁷

11 Finally, as noted in *Grant*, it is not only the rights of the accused that are at stake. Karakatsanis J. observed (at para. 4):

. . . The integrity of the administration of justice requires that the proceedings stay focused on the indicted crime and not devolve into trials within a trial about matters that may not be sufficiently connected to the case. Such tangents risk causing delays, confusion and distractions that undermine the trial's truth-seeking function. This risk is especially heightened where the defence seeks to introduce other alleged suspects or crimes into the trial.

12 Therefore, there is a balancing exercise, as stated in *Grant*: "The value of the evidence must be balanced against the risks posed to the integrity of the trial when a party seeks to expand the ambit of the trial to individuals or events not directly related to the crime indicted."⁸ The question that must be determined is whether the prejudicial effects substantially outweigh the probative value.⁹

C. FACTUAL CONTEXT

Trevor's Movements Before the Killing

13 Trevor had previously lived in the Willowridge area. He had moved away the previous year, but still had friends there.

14 On the evening of March 20, 2015, Trevor had been visiting one of those friends, Elyon, at his apartment at 10 Willowridge Road, hanging out and playing video games. At about 1:00 a.m. Elyon's mother told Trevor it was time for him to leave. Trevor left the apartment but was still inside the building on his phone for close to an hour, using the internet connection from Elyon's apartment.

15 Starting at about 1:20 a.m. Trevor exchanged text messages with another friend, Alexandra Ionescu, who lived across the road at 44 Willowridge. They arranged to meet.

16 Ms. Ionescu was a close friend of both Trevor and Trevor's brother, both of whom had stayed with her in her apartment for a period of time just prior to when they moved away from Willowridge. For a brief period in 2014, the relationship between Ms. Ionescu and Trevor had turned sexual. She ended that aspect of their relationship, but they still remained friends. Prior to March 2017, the last time Ms. Ionescu had contact with Trevor was in December of 2014.

17 Elyon did not tell anyone that Trevor had left his apartment. Neither Trevor nor Ms. Ionescu communicated to anyone about their plans to meet at her apartment.

18 Trevor left 10 Willowridge shortly before 2:00 a.m. and headed across the road towards 44 Willowridge. Before leaving 10 Willowridge, he can be seen in the lobby looking out the window and coming back, and then deciding to leave.

The Conflict Between Curtis Murray and the Rushaune Champagnie Group

19 In March 2015, Curtis Murray was living in an apartment building at 7 Ridgegrove Drive, located approximately 500 meters from 44 Willowridge Road (where Trevor was killed).

20 For several days prior to the murder, there were a series of confrontations between Curtis Murray and Rushaune Champagnie and a group of men associated with Mr. Champagnie. Samelia Wiltshire (Curtis Murray's girlfriend at the time) described the first of these incidents, which occurred on March 18, 2015 in a plaza near 7 Ridgegrove Drive. Curtis Murray was out of the car and she could see him involved in an angry confrontation with a man later identified as

Rushaune Champagnie. Ms. Wiltshire ran into the Hasty Market, seeking refuge. She saw the group of men (Mr. Champagnie and other men with him) chase Curtis Murray out of the parking lot and then go into Mr. Murray's car and steal clothing, shoes, and sunglasses. Mr. Champagnie then came into the Hasty Market, asked her if that was her boyfriend, and made various threatening gestures and remarks, including saying, "This is my town." Mr. Champagnie and his associates were in a red Mazda hatchback. Ms. Wiltshire recognized the vehicle as belonging to a Somalian man, one of the members of the group with Mr. Champagnie. She said the Somalian man lived in the apartment building at 7 Ridgegrove Drive. There will be evidence at trial connecting this vehicle to Abu Mohammed.

21 At about midnight that same day March 18-19, 2015, a witness saw two men, whom he identified as Corey and Curtis Murray, banging on a red Mazda hatchback in the parking lot of 7 Ridgegrove Drive, while the driver of the car was still inside. Later that night, video surveillance footage shows Curtis Murray engaged in activity with the Mazda that appears to be slashing the tires, while Corey Murray can be seen watching and waiting from the apartment building stairwell exit.

22 At about 10:00 a.m. on the morning of March 19th, Abu Mohammed discovered the damage to his car and it is left in the parking space and towed from there later that day. At 10:37 a.m., while the red Mazda and Mr. Mohammed were still in the parking lot, Curtis Murray arrived in his car. He and Mr. Mohammed have a heated and lengthy exchange which included Mr. Mohammed repeatedly pointing at his damaged vehicle. Immediately after that exchange, Curtis Murray went into the apartment building and met up with his brother Corey. The brothers went back into the parking lot and chased Abu Mohammed through the parking lot. Mr. Mohammed ran in the direction of Willowridge Road.

23 At 6:58 p.m. that same night, Ms. Wiltshire arrived at the parking lot of 7 Ridgegrove and was parking her car when the red Mazda, driven by Mr. Mohammed, arrived and partially blocked her in. She could see Mr. Champagnie sitting in the rear seat of the Mazda. A third man got out and approached her window, asking where her boyfriend was. She was able to drive away. She then called Curtis Murray and told him what had happened.

24 Later that night, Mr. Champagnie and another man (identified by police as Bryan Agyie), broke into Curtis Murray's apartment at 7 Ridgegrove Drive. They trashed the place, throwing things all over, slashing the living room furniture and carving the letter "X" into doors and walls. They then stole substantial quantities of Curtis Murray's belongings, including shoes and clothing.

25 On Friday, March 20, 2015, Bryan Agyie and some other men began putting up posters advertising a "Block Friday Sale" of clothing and shoes in the lobby of 44 Willowridge between 2:30 and 5:30 p.m from Friday to Monday that weekend. The sale proceeded that afternoon, conducted by Rushaune Champagnie, Bryan Agyie, and others. There is video footage of the event from various cameras in the lobby. Many of the items on sale were identified as belonging to Curtis Murray and having been stolen from his apartment the previous night.

26 Coincidentally, on March 20, 2015, while the Block Friday Sale was underway, officers from

the Guns and Gangs Unit of the Toronto Police Service arrived at 44 Willowridge Road looking for Rushaune Champagnie, whom they intended to arrest on charges of robbery and failing to comply with a probation order. They were not operating on a tip that he was there. They simply knew that he often frequented 44 Willowridge. They saw Mr. Champagnie in the lobby, but decided not to arrest him there because of the number of people around. They waited for him to leave, which he did at 7:35 p.m. in the red Mazda driven by Abu Mohammed. He was immediately arrested and remained in custody until long after the murder of Trevor Seraphine.

27 Ultimately, Mr. Champagnie was charged with break and enter and theft with respect to this incident involving Mr. Murray's apartment and belongings. He pleaded guilty. The Crown called him as a witness at the preliminary hearing in this matter. He did not provide any evidence to support a theory that he was arrested as a result of a tip from someone in the community. He testified that he had never met and had no knowledge of Trevor Seraphine.

Movements of the Murray Brothers on March 20-21 Before the Killing

28 At 1:17 a.m. Curtis and Corey Murray arrived at the front doors of 44 Willowridge Drive. Curtis can be seen on the video footage from the lobby cameras speaking to an unidentified man who was loitering in the elevator lobby along with a few other young men. They seem to be discussing the "Block Friday Sale" flyer that is taped to the front door. Curtis can then be seen tearing the flyer off the door and leaving the building with Corey, with the flyer in his hand. They returned to a waiting vehicle driven by an unknown person and drove back to 7 Ridgewood Drive. The vehicle was a four-door grey or silver sedan.

29 Their vehicle parked beside 7 Ridgewood at 1:23 a.m. and Corey and Curtis Murray went inside. The driver remained in the vehicle with the engine running. Inside the building, they headed up the south stairwell.

30 At 1:45 a.m., the Murray brothers came back down the south stairwell. Both were carrying backpacks. Curtis Murray was carrying a pair of beige-coloured pants over one arm. They left the building and got back into the waiting car. The car then drove in the direction of Willowridge Road, which is 500 meters away.

31 At 1:47 a.m. a car arrived at 43 Willowridge Road, directly across the street from 44 Willowridge. The car was parked there for 7 minutes at which point (1:54 a.m.) an interior light came on, suggesting that a door or doors had been opened. The vehicle then drove off.

32 At 1:57 a.m. the two men who later attacked Trevor walked around the north side of Willowridge and headed to the rear of the building. They came back around one minute later, heading towards the front of the building. At 1:59 a.m. they reached the east corner of the building and turned towards the front entrance. Parts of their journey can be seen on video surveillance footage. However, they are wearing hoodies with the hoods up and are hunched over. Their faces are not visible.

33 At that same moment, Trevor Seraphine was approaching the building. The two men ran after him and one of them fired five shots from a handgun. They followed him into the building,

and the gunman shot at him one more time, this time wounding him. Then, the other man stabbed him to death. They fled to a waiting vehicle which was described by witnesses as having four doors and being grey or silver in colour.

D. ANALYSIS: AMMO AS ALTERNATE SUSPECT

Factual Context

34 Alexandra Ionescu testified at the preliminary hearing that she had no idea Trevor Seraphine was in the neighbourhood that night until she received his first Facebook text message at 1:21 a.m. They arranged to meet after that.

35 A few minutes prior to receiving that first text message from Trevor, Ms. Ionescu had a visitor at her apartment door. This was a man she had first met in February or March 2015. She knew him by the nickname "Ammo" and never knew his real name. They had a brief sexual relationship for about three or four weeks, which did not involve sexual intercourse. Ms. Ionescu was not interested in continuing the relationship and told Ammo that. She said that he would show up at her apartment and would make comments about her not letting other guys into the apartment if he was there.

36 On the night in question, when Ammo showed up at her door, Ms. Ionescu would not let him in. She told him she was tired and was going to sleep. He accused her of having someone in the apartment. She told him that there was nobody there and that it was none of his business in any event. He told her that she was "dissing him" and she told him to leave. He left, as he had done on prior occasions when she had taken the same position with him. He clearly was not happy about it though, and she could hear him "cussing her" as he was walking away. She said the whole incident lasted mere minutes.

37 The defence suggests that Ammo is an alternate third party who could have killed Trevor out of jealousy.

No Motive

38 In my view, based on Ms. Ionescu's testimony, it would be fair to describe Ammo as behaving in a manner that was possessive or controlling. It is a huge leap from there to first degree murder, a leap that is not based on any evidence whatsoever.

39 There is no evidence that Ammo knew who Trevor was, or about any relationship he had with Ms. Ionescu. He had never before mentioned Trevor Seraphine. On the evidence available, it would have been impossible for Ammo to know that Trevor was coming to see Ms. Ionescu. Those arrangements were only made after Ammo left Ms. Ionescu's apartment door, were private messages between Ms. Ionescu and Trevor, and their phone records indicate that neither of them had any contact with anyone else after the arrangements were made.

40 Ammo had at most a casual relationship with Ms. Ionescu, not one that would logically

suggest he would fly into a murderous rage at the thought of another "suitor." The evidence of motive is extremely weak. Indeed, in my view, it is nothing more than speculation.

No Propensity

41 Ms. Ionescu testified that she had never seen Ammo in the possession of weapons, much less a gun. He had never threatened her, nor had he ever threatened to harm anyone else. His sexual advances towards Ms. Ionescu had been rebuffed several other times before this and there had been no consequences. Ammo had never assaulted Ms. Ionescu. On the night in question, Ms. Ionescu opened her door wide to speak with Ammo. He did not attempt to force his way in, even though he accused her of having someone in the apartment. He left when she told him to leave. There is no evidence that he had any tendencies towards violence at all. He would not only have had to be prepared to commit murder with virtually no motive, but also have enlisted another person to assist him in that task. This carries with it a degree of cold-bloodedness that does not fit at all with the known conduct of Ammo.

No Opportunity

42 Ms. Ionescu described Ammo as being a Somali male in his twenties, approximately 5'6" in height with a skinny build and no facial hair. She estimated that Ammo and Trevor were about the same size, both in height and physical build.

43 All of the entrances and exits from 44 Willowridge Road are monitored by surveillance video cameras. It is not possible to exit from the first floor, without being caught on video. The murder of Trevor Seraphine started from the outside of the apartment building. I am fully satisfied from a thorough review of every man coming and going on the first floor of the building and parking garage that Ammo never left the building prior to the shooting. Nobody matching his description left the building, or went into any first floor units from which he could have left the building.

44 The defence is left with the explanation that Ammo could have gone into a second floor apartment and jumped from the balcony. That is nothing more than wild speculation. If Ammo was intent on killing Trevor out of jealousy and was trying to avoid surveillance cameras by jumping two storeys from a balcony, why would he then commit the murder in the lobby of the apartment building right in front of surveillance cameras? He could much more easily and plausibly have waited on the floor where Ms. Ionescu's apartment was and where there were no video cameras at all.

45 Further, Ms. Ionescu reviewed all of the footage of people coming and going during the relevant period. She said none of them were Ammo and she gave reasons for eliminating each possibility. The defence suggests she is lying. Again, this is fanciful. The entire jealous lover theory depends on the evidence of Ms. Ionescu. It is, of course, possible to accept some evidence and reject other evidence. However, there is no rational reason why Ms. Ionescu would lie about this detail.

No Nexus and No Air of Reality

46 There is nothing beyond conjecture connecting Ammo to this offence. He has no plausible motive and had no opportunity to commit the crime. There is also no evidence of propensity. Further, he is of the same physique and height as Trevor. Both attackers are considerably bigger than Trevor. That means neither of these men could have been Ammo, both because they are too big to be him and because he was still inside the building.

47 There is no air of reality to this defence and permitting the jury to hear it would not advance the interests of truth, but merely divert them from the issues that are relevant to their task. I adopt the words of my colleague, C.D.A. McKinnon J. as follows at para. 24 in *R. v. Tehrankari*.¹⁰

The defence is not permitted to merely speculate or engage in a fishing expedition for other possible perpetrators. The evidence it wishes to advance must be relevant, probative and its value must outweigh its costs, in terms of the time it takes to explore it, the distractions to the central issues it may engender and the extent to which it might reasonably assist the jury in reaching a just verdict.[citation omitted]

48 There is no evidence to support the theory that Ammo was one of the murderers, or had directed two other people to kill Trevor. There is no air of reality to the defence raised. The admission of this evidence would be prejudicial to the proper operation of the trial by diverting and possibly confusing the jury as to the task before it. It has virtually no probative value. If anything about this theory could be said to be relevant or probative, it is far outweighed by the likely prejudice.

49 This evidence is not admissible.

E. ANALYSIS: CHAMPAGNIE GROUP AS ALTERNATE SUSPECTS

Factual Context

50 The defence theory as to the murderers being associates of Mr. Champagne is based on the series of altercations between them and the Murray brothers during the few days leading up to the killing of Trevor Seraphine. The theory is that two of these associates dressed themselves in clothes stolen from Curtis Murray's apartment in order to frame the Murray brothers for murder.

No Opportunity

51 Clearly Mr. Champagne was not one of the murderers. He had been in police custody for several hours before the killing occurred.

52 The defence has not identified any particular associates of Mr. Champagne as being the perpetrators. There is therefore no evidence as to whether any of them had an opportunity to commit the murder. Evidence that they sometimes hung out around 44 Willowridge Road is simply not sufficient for this purpose. Merely a possibility of being in the area does not constitute a nexus with the offence itself.

No Motive

53 There is no evidence of any connection between Mr. Champagnie or any of his associates and Trevor Seraphine. It is clear from the "Block Friday Sale" video footage that Trevor was not there. There is nothing at all to suggest that Mr. Champagnie was arrested because of a tip to police as to his whereabouts, whether from Trevor or Curtis Murray or anyone else, nor is there any evidence that Mr. Champagnie believed that to be the case.

54 Clearly there was animosity between Mr. Champagnie and Curtis Murray. Given the involvement of Corey Murray in some of the incidents, it is fair to say this animosity could extend to him as well. It is also fair to say that Mr. Champagnie's friends might share similar feelings about the Murray brothers.

55 However, it is simply far-fetched and irrational to suggest that associates of Mr. Champagnie would murder a 17-year-old complete stranger on the chance that wearing clothing belonging to Curtis Murray in the process of committing the murder would result in the Murray brothers being charged with the offence. Indeed, the very conduct of the perpetrators is inconsistent with such a motive. It is apparent from the video footage that the perpetrators took steps to cover up their distinctive footwear with some type of material. Also, at least one of them is wearing a sweater turned inside out. Mr. Champagnie and his associates had access to lots of distinctive clothing and footwear belonging to Mr. Murray. If their intention was to frame him, they would have been flaunting those items instead of trying to cover them up. This theory makes no sense at all.

Propensity

56 There is *some* evidence of propensity given the criminal activities of Mr. Champagnie and those around him. However, it is somewhat limited because the defence have not pin-pointed which associates they say are the perpetrators. In any event, evidence of propensity by itself is never sufficient to provide an air of reality to a third party suspect defence. There must also be evidence actually connecting the suspects in some way to the crime itself. There is nothing of that nature in this case.

No Air of Reality

57 There is nothing whatsoever to connect the associates of Mr. Champagnie to the murder of Trevor Seraphine. Indeed, I find the suggestion nonsensical.

58 I have the same concerns with respect to the proper conduct of the trial and the prejudicial effect of this kind of evidence as I have already reviewed with respect to the potential defence based on Ammo as the suspect, and will not repeat them here.

59 This evidence is not admissible.

A.M. MOLLOY J.

R. v. Murray

- 1 *R. v. McMillan* (1975), 7 O.R. (2d) 750 at paras. 23-24, [1975] O.J. No. 2247, (Ont. C.A.); aff'd [1977] 2 S.C.R. 824, [1977] S.C.J. No. 32.
- 2 *Ibid* at para. 24.
- 3 *Ibid* at paras. 25-29.
- 4 *R. v. Grandinetti*, 2005 SCC 5 at para. 48, [2005] 1 S.C.R. 27, [Grandinetti].
- 5 *R v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3.
- 6 *R. v. Grant*, 2015 SCC 9, [2015] 1 S.C.R. 475, [Grant]
- 7 *Grandinetti*, *supra* note 4 at paras. 46-61; *R. v. Tehrankari*, 2012 ONCA 718 at paras. 35-36, [2012] O.J. No. 5030, leave to appeal refused, [2012] S.C.C.A. No. 547; *Grant*, *supra* note 6 at paras. 25, 28, 44-45, and 54.
- 8 *Grant*, *supra* note 6 at para. 42.
- 9 *Ibid* at para. 41
- 10 *R. v. Tehrankari*, [2008] O.J. No. 5651, 2008 CanLII 74556 (S.C.J.) at para. 24; aff'd, 2012 ONCA 718, [2012] O.J. No. 5030.