

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v*. Kelsie, 2019 SCC 17, [2019] 2 S.C.R. 101 | **Appeal Heard:** March 27, 2019  **Judgment Rendered:** 27, 2019  **Docket:** 38129 |

Between:

**Her Majesty The Queen**

Appellant

and

Dean Daniel Kelsie

Respondent

- and -

Director of Public Prosecutions,

Attorney General of Ontario and

**Criminal Lawyers’ Association**

Interveners

**Coram:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Martin JJ.

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| **Reasons for Judgment:**  (paras. 1 to 7) | Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Côté, Rowe and Martin JJ. concurring) |

R. *v.* Kelsie, 2019 SCC 17, [2019] 2 S.C.R. 101

Her Majesty The Queen Appellant

v.

Dean Daniel Kelsie Respondent

and

Director of Public Prosecutions,

Attorney General of Ontario and

Criminal Lawyers’ Association Interveners

**Indexed as:** R. ***v.*** Kelsie

2019 SCC 17

File No.: 38129.

2019: March 27.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Martin JJ.

on appeal from the court of appeal for nova scotia

*Criminal law — Charge to jury — Accused convicted of first degree murder and conspiracy to commit murder — Court of Appeal setting aside convictions and ordering new trial — Court of Appeal correct in finding that trial judge’s instructions on party liability for first degree murder were in error — Court of Appeal erred in finding that trial judge was required to charge jury on manslaughter as evidence did not meet air of reality test — Court of Appeal erred in interfering with conviction for conspiracy to commit murder as trial judge did not err in evidence he left for jury to consider as part of third prong of Carter test for admissibility of co-conspirator hearsay — Conspiracy conviction restored and second degree murder conviction entered.*

**Cases Cited**

**Referred to:** *R. v. Carter*, [1982] 1 S.C.R. 938.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(b)(i), (3).

APPEAL from a judgment of the Nova Scotia Court of Appeal (Farrar, Bourgeois and Van den Eynden JJ.A.), 2017 NSCA 89, 358 C.C.C. (3d) 75, [2017] N.S.J. No. 467 (QL), 2017 CarwswellNS 884 (WL Can.), setting aside the convictions of the accused for conspiracy to commit murder and first degree murder and ordering a new trial. Appeal allowed in part.

Jennifer A. MacLellan, Q.C., and Mark Scott, Q.C., for the appellant.

R. Philip Campbell and Matthew S. Estabrooks, for the respondent.

Amber Pashuk and François Lacasse, for the intervener the Director of Public Prosecutions.

John Neander and Michael Bernstein, for the intervener the Attorney General of Ontario.

Ian R. Smith, for the intervener the Criminal Lawyers’ Association.

The judgment of the Court was delivered orally by[[1]](#footnote-1)

[1] Karakatsanis J. — We agree with the conclusion of the Court of Appeal that the trial judge’s instructions on party liability for first degree murder were in error. As a result, the conviction for first degree murder cannot stand.

[2] We do not, however, agree with the Court of Appeal that the trial judge was required to charge the jury on manslaughter. While not determinative, we agree with defence counsel’s position at trial that there was no basis to leave it with the jury as an available verdict. In our view, the evidence was, at best, tenuous and speculative, and did not meet the air of reality test.

[3] With respect to the conspiracy charge, we do not agree with the Court of Appeal. In the particular circumstances of this case, we are not persuaded that the trial judge erred in the evidence he left for the jury to consider as part of the third prong of the *Carter* test for the admissibility of co-conspirator hearsay (*R. v. Carter*, [1982] 1 S.C.R. 938). We note, in this regard, that the defence of the accused to the charge of conspiracy is that he did not know the nature and scope of the alleged conspiracy. Accordingly, we would not have interfered with the conviction for conspiracy to commit murder.

[4] Given our conclusions, the parties agree that it would be appropriate to substitute a verdict of second degree murder in place of the verdict for first degree murder. We are satisfied that such a verdict is appropriate in the circumstances.

[5] As a result, pursuant to s. 686(1)(b)(i) and s. 686(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, we would have dismissed the appeal and substituted a conviction for second degree murder.

[6] Therefore, the appeal is allowed in part. The conspiracy conviction is restored and a second degree murder conviction is entered.

[7] Counsel are encouraged to agree on the appropriate sentence regarding eligibility for parole. The matter is remitted to the trial court for sentencing.

*Judgment accordingly.*

Solicitor for the appellant: Nova Scotia Public Prosecution Service, Halifax.

Solicitors for the respondent: Lockyer Campbell Posner, Toronto; Gowling WLG, Ottawa.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Brampton.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the Criminal Lawyers’ Association: Fenton, Smith, Toronto.

1. The judgment pronounced at the hearing was amended. [↑](#footnote-ref-1)