

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. McDonald, 2025 ONCA 807

DATE: 20251125

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Fairburn A.C.J.O., Paciocco and Harvison Young JJ.A.

BETWEEN

His Majesty the King

Respondent

and

William Dwayne McDonald

Appellant

Erin Dann and Paul Socka, for the appellant

Gregory J. Tweney and Dana Achtemichuk, for the respondent

Heard: April 17, 2025

On appeal from the conviction entered by Justice Jonathon C. George of the Superior Court of Justice, sitting with a jury, on June 13, 2019, and from the sentence imposed on January 23, 2020.

Fairburn A.C.J.O.:

I. OVERVIEW

[1] Emmanuel Awai was murdered in his own apartment, shot twice in the head.

The sole issue at trial was the identity of the shooter.

[2] Mr. Awai and the appellant were friends. Both were involved in the drug business. There was strong evidence placing the appellant at Mr. Awai's apartment around the time of death. The defence position was that the appellant was there to conduct a drug transaction and left while Mr. Awai was still alive. The Crown position was that the appellant was the killer.

[3] Khasheequia Gregory, the appellant's former intimate partner, testified at trial. She was a highly reluctant Crown witness who was eventually the subject of a successful application under s. 9(2) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5. On cross-examination by the Crown, she adopted as true large portions of a statement she had made to the police, including that the appellant had called her shortly after the murder and confessed to shooting Mr. Awai.

[4] Defence counsel cross-examined Ms. Gregory about various inconsistencies between her police statement, preliminary inquiry evidence and trial evidence, but did not explicitly put to her that she was fabricating the confession. Accordingly, Crown counsel objected to defence counsel's suggestion in his closing address that Ms. Gregory made up the confession. Leaning on the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L. (Eng.)), the Crown asked for a corrective instruction from the trial judge.

[5] The trial judge agreed with the Crown's objection, concluding that the defence had breached the rule in *Browne v. Dunn* by failing to specifically confront

Ms. Gregory with the suggestion that she was fabricating her evidence. Accordingly, he concluded that a corrective instruction was required, and he instructed the jury that in evaluating Ms. Gregory's evidence, they were not permitted to find that she "fabricated her story." Although the defence objected to that instruction, nothing was done because, ultimately, defence counsel said that he was "instructed just to leave it totally." The jury found the appellant guilty of second- degree murder later the same day.

[6] The appellant appeals on two grounds. The first ground is that the trial judge erred in finding defence counsel breached the rule in *Browne v. Dunn* and in responding to that alleged breach with an unduly restrictive corrective instruction. The second ground involves an allegedly erroneous third-party suspect instruction that is said to have reversed the burden of proof.

[7] I would allow the appeal. As I will explain, there was no breach of the rule in *Browne v. Dunn* and, even had there been, the corrective instruction went too far. I decline the Crown's request to apply the curative proviso. In light of these conclusions, it is unnecessary to deal with the third-party suspect issue.

II. BACKGROUND

1. The Circumstances Surrounding the Shooting

[8] On December 28, 2016, Mr. Awai was shot in the head in circumstances that made clear this was an intentional killing. Accordingly, the sole issue at trial was the identity of the shooter.

[9] There was no dispute that the appellant was at Mr. Awai's apartment building on the night of the murder. The real question was whether he went there to conduct a drug deal and left while Mr. Awai was still alive, or whether he killed Mr. Awai while there.

[10] The appellant communicated with a man named Eliase Surafel on the day of the murder. Text messages between them suggest a dispute between the appellant and one of his friends. Ultimately, Mr. Surafel arranged for a driver by the name of Tyler Lamantia to take the appellant to Mr. Awai's apartment. Mr. Surafel told the appellant by text not to tell Mr. Lamantia that he was "going to do dirt": "Don't show him ur going to do dirt ... Just show him u gotta handle sum ... His name tyler." A police officer testified at trial that "dirt" is a reference to a "serious type of criminal offence, robbery or rip-off, home invasion, assault, murder, or kidnappings".

[11] The appellant contacted Mr. Lamantia, who picked him up and drove him to Mr. Awai's apartment building. A third person, Jake Thompson, was also in the vehicle. Mr. Thompson and Mr. Lamantia stayed in the car while the appellant

entered the building. Cell phone records place the appellant's phone in the vicinity of Mr. Awai's apartment at 9:42 p.m. Gunshots were heard about 20 minutes later, around 10:00 p.m.

[12] Shortly after the shots, a man in a black hoodie was seen walking fast, away from the apartment building, and entering a silver or grey or light tan coloured SUV. Mr. Lamantia was driving a grey Dodge Durango. The witness who observed the man entering the SUV testified that he thought the man entered the driver's seat of the vehicle. The witness did not see any other people in the vehicle.

[13] Mr. Thompson testified at trial that when the appellant returned to Mr. Lamantia's vehicle, he seemed calm but said: "Get me home, I think my face might be on the news". He was also wearing two gold necklaces that he had not been wearing previously.

[14] At 10:08 p.m., the appellant texted Mr. Surafel one word: "Done".

[15] The Crown conceded that Mr. Awai's younger brother Abraham Awai¹ was likely present at the time of the shooting. At trial, the defence advanced a third-party suspect defence, pointing at Abraham.

[16] Abraham's cell phone placed him in the vicinity of his brother's apartment at the time of the shooting, and his brother's cell phone, which was being used up to minutes before his death, was later found in the home where Abraham was living.

¹ Given that Abraham shares the same surname as the deceased, I refer to him by his first name.

At almost exactly the same time that the appellant was texting to Mr. Surafel the word “done”, Abraham was calling and texting his brother’s best friend, Marchell Davis: “Yo fam call me emergency!”

[17] Mr. Davis went to Mr. Awai’s apartment and found his body there. He called 9-1-1 and performed CPR.

[18] Abraham testified for the Crown. He denied being at his brother’s apartment the night of the murder. He initially said he could not recall why he sent Mr. Davis the “emergency” text, but later suggested he sent it because he had his brother’s phone with him. Mr. Awai’s phone was found inside a shoe near Abraham’s room when the police executed a search warrant at his home. He denied taking the phone from the crime scene and denied killing his brother. An agreed statement of fact filed at trial said Mr. Awai had his phone when he died and that it was a “reasonable inference” Abraham was present in the apartment when his brother was killed.

2. Ms. Gregory’s Testimony

[19] Ms. Gregory, who was a key witness at trial, was asked in examination-in-chief whether she had “ever” talked with the appellant about “Emmanuel’s death”. She first responded that she and the appellant had texted one another and that he told her “your boy is gone.” He apparently told her by text message that Mr. Awai

was shot with “two to the head.” She denied that the appellant told her who had shot Mr. Awai.

[20] According to Ms. Gregory, a friend then called her around 3:00 or 4:00 a.m. to tell her Mr. Awai was dead.

[21] Ms. Gregory was eventually given an opportunity to review the entire video statement she had provided to the police. This was done in the absence of the jury. She confirmed that reviewing the statement refreshed her memory. She then testified that she “wasn’t sober” when she received the information from the appellant. She also said that she heard from the appellant by way of a phone call and not text messages. She also testified that the appellant told her Mr. Awai had been shot in the head, but she denied that the appellant told her who had fired the shots.

[22] In the absence of the jury, the Crown then brought an application for leave to cross-examine Ms. Gregory on prior inconsistent statements under s. 9(2) of the *Canada Evidence Act*. The application was granted, and the Crown proceeded to cross-examine her by confronting her with the parts of her police statement where she suggested that the appellant had confessed to her.

[23] Those parts of her statement were read to her, and she confirmed they were correct and true, including that the appellant said to her “you didn’t think I was going to kill him, I bodied him.” She responded “[y]ou want a gold sticker, do you

want a cookie. What did you accomplish? You killed your best friend.” He then said he had given Mr. Awai a “dome shot”.²

[24] Ms. Gregory admitted that she had been drinking the night she received the call and that she was hungover when she gave her police statement.

[25] Ms. Gregory further agreed under cross-examination that she had been scared to testify and that she had received a call from the appellant, who did not want her to testify. She agreed the call affected how she had testified at the outset and that it led her to minimize the appellant’s involvement as much as possible.

[26] Defence counsel then cross-examined Ms. Gregory. This cross-examination is central to this appeal.

[27] Ms. Gregory first confirmed that she told police that the appellant had called her from his usual number. Other than a few digits, she could not recount that number.

[28] She was unable to explain why she testified at the preliminary inquiry that the appellant told her that he had taken three shots and then she changed that number to two at trial. All she could say was that she thought she “could be wrong.” She admitted that she was “drunk” when she received the call.

² Mr. Awai died from two gunshots to the head.

[29] Defence counsel also took Ms. Gregory to the portion of her police statement where she was asked by the interviewing officer whether her phone records would “a hundred percent” confirm she received the appellant’s call at 3:00 a.m., and she confirmed that they would, but to her knowledge, those records had never been obtained.

[30] Ms. Gregory was also questioned by defence counsel about some aspects of her preliminary inquiry testimony, including that she did not tell the police that the appellant had said “your boy is gone” and yet she testified to that effect at the preliminary inquiry. She also agreed that at the preliminary inquiry she was asked whether she remembered when she spoke with the appellant about having shot Mr. Awai, and she had said she could not remember the day that conversation took place.

3. The Pre-Charge Conference

[31] During the pre-charge conference, defence counsel asked the trial judge to caution the jury concerning Ms. Gregory’s sobriety during her police statement and to note that there were no phone records to corroborate her testimony about the appellant’s call after the murder. Crown counsel responded that the defence had not laid a foundation for the caution and had mischaracterized the evidence about Ms. Gregory’s drinking, and that the police had attempted to obtain her phone records but the phone company no longer had them.

[32] The trial judge stated he was reluctant to provide a caution and reminded counsel they could make arguments about whether or not Ms. Gregory should be believed.

4. The Closing Submissions

[33] In closing submissions, Crown counsel noted that Ms. Gregory initially tried to minimize her evidence but ultimately told the truth, testifying that the appellant had confessed to her that he killed Mr. Awai. In anticipation of the defence closing, Crown counsel said she expected the defence to argue that the jury should not rely on Ms. Gregory's evidence because she was drunk when she received the appellant's call and hungover when she gave her statement, and because she testified the appellant shot Mr. Awai twice despite telling the police he shot three times. But Crown counsel urged the jury to consider the context of the call and "the fact that the call happened":

But remember also when you think about this, remember the context of that call from the accused, he was bragging about what he had done, it's entirely possible he exaggerated and said three times when it was only two. Or because she was drunk Khasheequia thought she heard him say three times. Regardless, it doesn't change the fact that the call happened, and that he told her what he had done. And the fact that she was telling the truth about that was never challenged by the defence in cross-examination. [Emphasis added.]

[34] In his closing submissions, defence counsel noted it was for the jury to decide if Ms. Gregory was reliable. He challenged inconsistencies in her testimony and stated that she was “making it up”:

She said she received a call. She began her evidence at this trial that it was a text, and that at 3:00 in the morning, after communicating with [the appellant], she called a friend of hers. The Crown asked her if viewing her statement would help her refresh her memory, she thought it might, so the judge gave her an opportunity to do precisely that. When she returned in this trial from that review, she still didn't get it right. At the preliminary hearing she was asked, “Did he tell you how many shots were fired?” Her first response was, no. Then there was a break and she returned, and she had a number, and the numbers varied.

But she, in her evidence, would have you believe that [the appellant] called and confessed to her. If he was confessing from being a braggart, he would have said, “I shot him in the face”, not, three times in the back of the head, which we all know is not so anyway.

Ms. Gregory's testimony – first of all, her memory of what she said the first time [the police], what she said the second time [at the preliminary inquiry], and what she said the third time [at trial], is not a memory problem, she's making it up. She was making that up. And with no confession there's no need for this alleged three-way call to try to persuade her to not to testify, because there's been no confession.

You've got to decide the credibility, the reliability, the accuracy, the truthfulness of what Ms. Gregory said. There are too many versions particularly of her statement to the police to the preliminary hearing. [Emphasis added.]

5. The Post-Closing Procedural Discussion

[35] Following the closing submissions, Crown counsel took issue with defence counsel's submission that Ms. Gregory was making up the "conversation that she reported having with the accused." The Crown suggested this could probably be dealt with by "just pointing out that ... that was never suggested to her", that being the contention that she had made up the conversation with the appellant. The trial judge noted there was "some obligation" on the part of the defence to have challenged the witness in that way. The defence asked for the night to respond to the Crown's objection.

[36] The next morning, Crown counsel asked the trial judge to include an instruction as follows: "[defence counsel] suggested you could conclude that Khasheequia Gregory was making it all up but he did not cross-examine her about that or give her a chance to respond to that allegation."

[37] Defence counsel, however, made no further comment on the issue in his additional submissions during the conference before the jury was charged.

[38] Counsel were not provided with the amended draft charge prior to its delivery.

6. The Jury Charge

[39] The trial judge provided the standard jury charge respecting how to evaluate the credibility and reliability of a witness's evidence, including that they could

believe some, none or all of any witness's testimony. He outlined questions the jury might consider in evaluating how much or how little to believe of a witness's testimony. He told the jury that it was up to them to decide whether they believed the appellant made the statements attributed to him, including by Ms. Gregory.

[40] As for Ms. Gregory's evidence, the jury was instructed that the defence position was that she should not be believed and that she was an unreliable historian when it came to the alleged confession. At the same time, the trial judge underscored that she was not given an opportunity to respond to the assertion that she was making up her testimony:

To decide the reason for what [the appellant] did or said afterwards you should consider all the evidence. As it relates to Ms. Gregory, the defence position is that you should not believe her and that you should find her account unreliable.

[Defence counsel] yesterday suggested that she made up her account. However, I must point out to you that she was not challenged in cross-examination in that way. She was not given an opportunity to explain any assertion that she was making up her testimony and as such, it is not open to you to conclude that she made it up for one reason or another.

Her reliability, and whether or how much of her evidence you will accept, is up to you but you cannot base that decision on a determination that she fabricated her story. That was not put to her. [Emphasis added.]

[41] The jury retired to deliberate at 2:10 p.m.

[42] Following the jury charge, defence counsel objected to the instruction, noting his concern that the charge effectively told the jury that they were not permitted to find Ms. Gregory had fabricated her evidence regarding the call in which the appellant allegedly confessed, leaving the jury with only two options: (i) Ms. Gregory was telling the truth; or (ii) Ms. Gregory was mistaken. The exchange between counsel and the court follows:

[Defence counsel]: ...but there's one thing that I do need to address and that was Khasheequia Gregory and the whole lying aspect.

THE COURT: So where is that?

[Defence counsel]: Sorry, paragraph 128 of your charge.

THE COURT: Okay.

[Defence counsel]: We totally agree that it was improper for the suggestion to be made to the jury that Ms. Gregory was lying, that was an error on the part of the defence. However, we are concerned that in that paragraph what you've just told the jury is that "you cannot determine that she was lying".

THE COURT: Is that what I...?

[Defence counsel]: It says, "Her reliability and whether or how much of her evidence you will accept is up to you but you cannot base that decision on a determination that she fabricated her story."

THE COURT: Right.

[Defence counsel]: Obviously, for example someone like Jake Thompson, they're going to assume that he was lying that he didn't remember. And that was never put to him in cross or direct whether he was lying or not. And it certainly wasn't proper to say to Ms. Gregory – sorry, to say in closings that she was lying. But if they can't come to the determination that she was lying on their own, based on what they saw, they're pretty much being told, "You either have to accept her testimony as true or that she was mistaken". And so if those are the only two determinations which the jury can come to, she's certainly not mistaken that Mr. McDonald confessed to her. The only thing would be is she mistaken that he said three times or two times or one time? So we're just concerned that that charge is pretty much telling the jury that he confessed to her and either she said that truly, or her description of the confession was wrong. [Emphasis added.]

[43] The trial judge said it was not his intention to leave the jury with the impression that they were barred from finding that Ms. Gregory was not telling the truth:

THE COURT: I understand your concern. Okay. ... That was not my intention to lay it out that way.

[Crown counsel]: Mm-hmm.

THE COURT: You'll recall we had a very specific discussion about the whole suggestion that she made it up and you don't have to agree with me, but I ultimately determined that for the jury to come to the conclusion that she made it up, that she had to be challenged in that particular way. So that was my intention, so I'm happy you raised it. [Emphasis added.]

[44] Crown counsel immediately recognized the defence point: “I can see my friend’s point that the jury could conclude from her demeanour or from the inconsistencies, that they could have a reasonable doubt about whether or not she was telling the truth.” The Crown initially said that it was not clear how to go about fixing the issue without drawing more attention to it. Upon more reflection, she suggested that the trial judge could bring the jury back, repeat the impugned instruction and then explain that it remained open to them to determine whether Ms. Gregory was a credible witness and whether to believe or disbelieve any part of her testimony “based on how she testified and what she actually testified to”.

[45] Defence counsel reiterated his concern about the trial judge’s instruction that the jury could not assess Ms. Gregory’s evidence based on a “determination that she fabricated her story”, but the trial judge declined to take out that part of his instruction. He stated that he was prepared to add a clarifying instruction like Crown counsel suggested, but defence counsel, after a private off-the-record conversation, informed the court that he had been “instructed just to leave it totally” and stated that he was “satisfied that with the instructions that the jury need not be called back in.”

7. The Jury Question

[46] The jury asked one question during their deliberations, and it was about Ms. Gregory’s evidence:

Was Ms. Gregory's testimony at the police station entered into evidence? If not, are you able to read us her testimony?

[47] After a discussion with counsel, the trial judge informed the jury that the police statement was not in evidence, but that he would play a recording of Ms. Gregory's testimony before the court in its entirety. The play back was completed at 8:15 p.m., at which time the jury was excused for further deliberations. The jury returned their verdict at 8:53 p.m. They found the appellant guilty of second-degree murder.

III. THE PARTIES' POSITIONS

1. The Appellant

[48] The appellant advances two principal arguments regarding the perceived *Browne v. Dunn* difficulty that developed in the late stages of this trial.

[49] First, the appellant submits the rule in *Browne v. Dunn* was not breached and a corrective instruction was unwarranted. Although the appellant concedes the defence did not explicitly suggest to Ms. Gregory that she was making up her evidence about the confession, he submits that it was obvious she was being challenged on this very point. The appellant makes the point that defence counsel drew out inconsistencies and weaknesses in her recollection of the content of the alleged call, to ground an argument that she could not keep her details straight because her account was a fabrication, not to quibble with the accuracy or

reliability of her recall. In other words, defence counsel functionally suggested there was no confession, and so no unfairness arose from the defence closing in which counsel suggested that Ms. Gregory made up her account of the confession.

[50] Second, the appellant argues, in the alternative, that if there was a violation of the rule in *Browne v. Dunn*, the remedy crafted to address the matter was inappropriate and highly prejudicial to the defence. Although the appellant recognizes that the appropriate remedy for a breach of the rule is a matter of discretion, directing the jury that it could not reject Ms. Gregory's testimony on the basis that she fabricated her evidence improperly fettered the jury's task in assessing the credibility of this important Crown witness.

2. The Respondent

[51] The respondent argues the rule in *Browne v. Dunn* was engaged after defence counsel, for the first time in his closing address, suggested that Ms. Gregory made up the fact that the appellant had confessed to her. The respondent argues that defence counsel never suggested to Ms. Gregory that she was lying about the fact of the confession, which was central to her evidence, and that she was entitled to respond to such an allegation. Moreover, the respondent points out that, unlike in this court, the appellant did not dispute at trial that the rule in *Browne v. Dunn* was violated, only that the trial judge's response to the breach of the rule was erroneous.

[52] The respondent further submits that the corrective *Browne v. Dunn* instruction given by the trial judge did not usurp the jury's function; the impugned instruction affirmed the jury's role in assessing Ms. Gregory's credibility and reliability, even though it removed the suggestion of deliberate fabrication from the jury's consideration. The respondent also points out that it was defence counsel who asked that the matter be left alone at the end of the day.

[53] Lastly, if the trial judge erred in his instruction on *Browne v. Dunn*, this, contends the respondent, is an appropriate case in which to apply the curative proviso since the case against the appellant was very strong.

IV. ANALYSIS

[54] I first set out the general principles governing the *Browne v. Dunn* issue. I then apply those principles to this case, explaining why I have concluded there was no violation of the rule in *Browne v. Dunn* and that, even if there was, the corrective instruction went too far. I then explain why the curative proviso does not apply.

1. The Governing Principles

[55] Although more than a century old now, the rule in *Browne v. Dunn* "remains a sound principle of general application" rooted in considerations of fairness: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 65.

[56] The fact is that too much ink has been spilled on *Browne v. Dunn*, and too many cases have found themselves in difficulty because of perceived breaches and overreach in terms of the need for perceived remedies.

[57] Broadly speaking, the rule requires the cross-examiner to confront the witness on matters of true substance upon which the cross-examiner intends to impeach the witness's credibility so that the witness is afforded an opportunity to explain: *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81, at para. 81, leave to appeal refused, [2016] S.C.C.A. No. 203; *R. v. Vorobiov*, 2018 ONCA 448, at para. 43, leave to appeal refused, [2019] S.C.C.A. No. 440. This is a "confrontation principle in the context of cross-examination of a witness for a party opposed in interest on disputed factual issues": *Quansah*, at para. 76. The rule applies when counsel intends to challenge the witness's credibility either by calling contradictory evidence or making submissions to the trier of fact that tease out contradictions: *Quansah*, at para. 79; *R. v. McCarroll*, 2008 ONCA 715, 238 C.C.C. (3d) 404, at paras. 107-9.

[58] At its core, *Browne v. Dunn* comes down to a reminder that cross-examinations must be conducted fairly. Where the cross-examining party wants to challenge a witness's credibility on a core point, the witness should be given the opportunity to comment. Not only is this fair to the witness, it is also fair to the opposing party who can respond as appropriate while time still permits, and it is

fair to the trier of fact who is ultimately charged with the responsibility of making the credibility assessment.

[59] Yet flexibility, not rigidity, informs the proper approach to this rule, meaning that only matters of true substance come within its reach: *Quansah*, at para. 81; *R. v. Mohamed*, 2025 ONCA 611, at para. 217. And when it comes to those matters of substance, even then, specific confrontation may be unnecessary if it is apparent from the tenor of counsel's cross-examination that they do not accept the witness's version of events, the confrontation is general and known to the witness, and the witness's view on the contradictory matter is apparent: *Mohamed*, at para. 217; *Quansah*, at para. 82; and *Vorobiov*, at para. 43. Quite simply, common sense demands that where the witness's view of the alleged contradiction is clear, then a specific attempt to put the contradiction to the witness is unnecessary: *Mohamed*, at para. 217.

[60] As for remedying those situations where there was a failure to confront in circumstances where it was required, there is no universal approach. The remedy called for will depend upon many factors, such as the seriousness of the breach, the context in which it occurred, the timing of the objection, the position of the offending party, any request to permit recall of the witness and their availability, and the adequacy of any corrective jury instruction: *Quansah*, at para. 117; *R. v. Dexter*, 2013 ONCA 744, 313 O.A.C. 226, at para. 20. If a corrective instruction is required, no specific formula is mandated, but "the jury should be told that in

assessing the weight to be given to the uncontradicted evidence, they may properly take into account the fact that the opposing witness was not questioned about it”: *R. v. McNeill* (2000), 48 O.R. (3d) 212 (C.A.), at para. 49; see also *Quansah*, at paras. 121, 128; *R. v. Cameron*, 2017 ONCA 150, at paras. 8-9; and *McCarroll*, at para. 111.

[61] On appeal, a trial judge’s decision about whether the rule in *Browne v. Dunn* was breached and the remedy required are entitled to deference.

2. Application of the Rule in *Browne v. Dunn*

[62] Despite the wide margin of deference operative in this area of the law, I conclude that there was no breach of the rule in *Browne v. Dunn*.

[63] Read in context, the overall tenor of the cross-examination made clear that the appellant was not simply challenging the accuracy of Ms. Gregory’s recall of the alleged confession, but her credibility as to whether he had in fact confessed. To this end, she was directly questioned on numerous issues in what could only be seen as a challenge to her evidence that she had received a call from the appellant in which he confessed to killing Mr. Awai.

[64] For example, she was asked about the phone number that the appellant called from, and she was unable to recount the entire number.

[65] She was also challenged on whether the police had ever obtained her phone records to confirm that the call happened, and she thought they had not. This is

despite the fact that, as defence counsel pointed out in cross-examination, the police had asked her during her interview whether her phone records would “a hundred percent” confirm that she received the call from the appellant. The appellant maintains this was functionally equivalent to being challenged on whether the call actually happened. Although I would not go as far as the appellant on this point, this line of questioning certainly alerted the witness and all to the fact that the defence saw the lack of corroboration of the call as a weakness in Ms. Gregory’s evidence. Indeed, so clear was the defence position on this point that, as previously pointed out, defence counsel proactively asked the trial judge during the pre-charge conference to caution the jury that there were no phone records to corroborate Mr. Gregory’s testimony about the alleged call, a request that was ultimately declined.

[66] Ms. Gregory was also cross-examined about the content of the call and the inconsistencies in her recollection as between the police statement, preliminary inquiry and trial, including on details as essential as the number of gunshots that the appellant purportedly told Ms. Gregory he inflicted on Mr. Awai.

[67] Although there is no question that the cross-examination could have been clearer, more direct, and blunter, it is clear, having read the entirety of Ms. Gregory’s trial evidence, that the overall tenor of the cross-examination was to suggest that the call did not happen and, even if it did, that the appellant did not confess. This only makes sense. After all, it was an alleged confession. Without

shaking the jury's confidence in Ms. Gregory's suggestion that the appellant had confessed to her, the result of this trial would have been nearly a foregone conclusion. Attacking the witness's recollection of particular details – for instance, whether she was accurately recounting whether the appellant said he shot the victim two or three times in the head - was peripheral to the point the defence needed to make. The defence needed to shake the jury's confidence, not in the accuracy of the nuanced details of the confession, but in Ms. Gregory's suggestion that there had even been a confession in the first place.

[68] The fact that defence counsel appears to have eventually accepted that he breached the rule in *Browne v. Dunn* does not mean that he was right to concede that point. Recall that the concession came only after the trial judge had decided that there was a breach of the *Browne v. Dunn* rule and taken steps to remedy that breach. In acknowledging that he had breached the rule, it may be that defence counsel was simply acquiescing to the trial judge's earlier ruling.

[69] Respectfully, I conclude that there was no breach of the *Browne v. Dunn* rule because it should have been clear to Ms. Gregory, to the Crown and to the jury that her credibility was being challenged, not on the details around the confession (e.g., two shots to the head vs. three shots to the head), but on whether there had even been a confession. To suggest that the defence had to challenge Ms. Gregory on the fact of the confession – “I suggest to you that there was no

confession” – in order for the defence position to become clear, is not realistic. Quite simply, no one ambushed her.

[70] I would simply add the following. Unfortunately, this case is not unique. There are far too many occasions where purported breaches of the rule in *Browne v. Dunn* have led to cases going awry. This case is one of them. To require the cross-examiner to suggest to the witness that they are fabricating, just to have the witness respond that they are not, does nothing to advance the fairness of the case. To avoid these problems in the future, it is helpful to keep clearly focussed on the animating principle underlying the rule: fairness. An assertion that a witness is lying is not aimed at a contradiction in their evidence, but a conclusion to be drawn from their evidence. Provided that it is clear, as it was in this case, that the credibility of the witness is being challenged, it is open to the opposing party to encourage the trier of fact to come to that conclusion.

3. The Corrective Instruction

[71] Even if one were to accept that there was a breach of the rule in *Browne v. Dunn*, which I do not, there remains an insurmountable difficulty with the way in which the perceived problem was remedied. Although the remedy for a breach of the rule in *Browne v. Dunn* is a matter of discretion, I am of the view that the corrective instruction provided to the jury contains an error in principle.

[72] For ease, I repeat that instruction here:

To decide the reason for what Mr. McDonald did or said afterwards you should consider all the evidence. As it relates to Ms. Gregory, the defence position is that you should not believe her and that you should find her account unreliable.

[Defence counsel] yesterday suggested that she made up her account. However, I must point out to you that she was not challenged in cross-examination in that way. She was not given an opportunity to explain any assertion that she was making up her testimony and as such, it is not open to you to conclude that she made it up for one reason or another.

Her reliability, and whether or how much of her evidence you will accept, is up to you but you cannot base that decision on a determination that she fabricated her story. That was not put to her. [Emphasis added.]

[73] In my view, this instruction went too far because it inhibited the jury from considering whether Ms. Gregory fabricated her evidence about the phone call and, if there was a call, the contents of that call. Therefore, even if there had been a breach of the rule in *Browne v. Dunn*, the corrective instruction went too far.

[74] Instead, assuming a breach, at most, the jury should have been told that they could take into account the fact that Ms. Gregory was not questioned about fabricating the call or its contents when deciding the weight, if any, to be given to her evidence about the confession: see e.g., *McNeill*, at para. 49. Instead, consideration of fabrication was erroneously removed entirely from the calculus. The effect of the impugned instruction was to direct the jury that they had to treat Ms. Gregory's evidence about the call as credible and could only reject it on

reliability grounds. Respectfully, this was an error. The jury was not required to accept Ms. Gregory's evidence about the call as true simply because it was not suggested to her that she was making it up or, to put it another way, "fabricating" the fact that the appellant had confessed. As before, the rule in *Browne v. Dunn* is one of fairness, not admissibility.

[75] Although the trial judge stated that it "was not [his] intention to lay it out that way", and it undoubtedly was not his intention, the effect of this instruction, given in the real-time speed of a jury trial, was profound. The jury was essentially instructed that they could not find Ms. Gregory had been intentionally untruthful, leaving them only to deliberate about whether she had trouble recalling the details of the confession, but not whether it had been fabricated.

[76] Although the trial judge offered to re-read the instruction with an added clarification that the jury could believe or disbelieve any part of Ms. Gregory's testimony, he declined to take out the erroneous part of the instruction that the jury could not base its decision on whether to accept Ms. Gregory's evidence on a determination that she had fabricated her story. Accordingly, it is unsurprising that defence counsel was instructed "just to leave it totally", a decision that was undoubtedly rooted in a desire to not draw more attention to the matter than necessary.

[77] The respondent emphasizes that the jury received correct instructions regarding how to approach each witness's evidence, and that they could believe some, none or all of a witness's testimony. This, however, is no answer to the difficulty that arose from the impugned instruction. This general instruction was inconsistent with, and undermined by, the trial judge's specific instruction that the jury could not conclude Ms. Gregory made up the confession: "you cannot base that decision on a determination that she fabricated her story." In these circumstances, the jury would not have understood that it was open to them to find Ms. Gregory's evidence about the call was not credible. As a result, the trial judge's general instruction about how much or how little to believe a witness's testimony did not overcome and remedy his specific instruction erroneously telling the jury it could not consider whether Ms. Gregory fabricated the confession.

[78] Of course, appellate courts are not to review jury instructions against a standard of perfection. Instead, they are to ask whether the instructions, when read as a whole, equipped the jury to decide the case according to the law and the evidence: *R. v. Lozada*, 2024 SCC 18, 436 C.C.C. (3d) 76, at para. 14. Unfortunately, that standard is not met in this case: the *Browne v. Dunn* instruction usurped the jury's function by prohibiting the jury from finding the confession was fabricated because that suggestion was not put to Ms. Gregory in exactly that way.

a. The Curative Proviso

[79] In the alternative, the respondent asks this court to apply the curative proviso: *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii). The Crown bears the burden of showing why, despite the error, there is no substantial wrong or miscarriage of justice. In my view, the Crown has fallen short of the mark. Quite simply, when considered against the entire context, the error was not harmless in the sense that it could not have impacted the verdict, and the Crown's case is not so overwhelming that a conviction was inevitable: *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at paras. 34-36.

[80] The respondent argues the case against the appellant was "very strong" and that no miscarriage of justice resulted from any error in the impugned instructions. The respondent highlights the text messages exchanged before the murder, the evidence of the appellant's location at the time of the murder, and the evidence of the appellant's conduct after the murder. The respondent further submits that Ms. Gregory's evidence was admissible and there is no dispute the jury was entitled to hear it.

[81] This was indeed a strong Crown case. But it was a largely circumstantial one. Ms. Gregory's evidence was central to the prosecution's case. She was a reluctant witness, who ultimately drew a s. 9(2) ruling. Only after the ruling was the confession elicited. There were inconsistencies and weaknesses in her evidence.

[82] If her evidence were to be believed, the Crown's case would be very strong. But whether her evidence was to be believed goes to the heart of the problem on appeal. The fact that the jury asked questions about Ms. Gregory's police statement and that her evidence had to be replayed for them just prior to the jury returning the verdict of guilt demonstrates the centrality of her evidence to their deliberations.

[83] There were also reliability concerns with Ms. Gregory's evidence that the jury had to grapple with.

[84] I would add to the mix the fact that there was a third-party suspect defence advanced at trial, in which the defence pointed to Mr. Awai's brother, Abraham, as the possible killer. Abraham was a proven and repeated liar, clearly lying before the jury in what was said to be an effort to conceal his own involvement in the killing. Although the Crown argued that Abraham lied because he was fearful of the appellant, there was no dispute that there was a reasonable inference to be drawn that Abraham was in his brother's apartment when his brother was murdered. And Mr. Awai's phone, which he was just before the time of the murder, was later found secreted at Abraham's home.

[85] All of this is to say that although this was undoubtedly a strong Crown case, it was not so overwhelming that a conviction from a reasonable and properly instructed jury was inevitable.

[86] In my view, this is not an appropriate case to apply the proviso.

V. DISPOSITION

[87] I would set aside the conviction and order a new trial.

Released: "November 25, 2025 JMF"

"Fairburn A.C.J.O."

"I agree. D. Paciocco J.A."

"I agree. A. Harvison Young J.A."