

Case Name:

R. v. Villaroman

Her Majesty The Queen, Appellant;

v.

**Oswald Oliver Villaroman, Respondent, and
Attorney General of Ontario, Attorney General of British
Columbia and Criminal Lawyers' Association (Ontario),
Intervenors**

[2016] S.C.J. No. 33

[2016] A.C.S. no 33

2016 SCC 33

[2016] 1 S.C.R. 1000

[2016] 1 R.C.S. 1000

2016EXP-2458

J.E. 2016-1352

338 C.C.C. (3d) 1

130 W.C.B. (2d) 627

2016 CarswellAlta 1411

30 C.R. (7th) 223

486 N.R. 360

401 D.L.R. (4th) 385

File No.: 36435.

Supreme Court of Canada

Heard: March 21, 2016;
Judgment: July 29, 2016.

**Present: McLachlin C.J. and Abella, Cromwell, Moldaver,
Karakatsanis, Wagner, Gascon, Côté and Brown JJ.**

(73 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Criminal law -- Appeals -- Grounds -- Unreasonable verdict -- Appeal by the Crown from a judgment of the Court of Appeal setting aside Villaroman's conviction for possession of child pornography and entering an acquittal, allowed -- The mainly circumstantial evidence against the accused proved his guilt on the charge of possession of child pornography beyond a reasonable doubt -- The trial judge's reasons, read as a whole, did not contain any legal errors and his finding of guilt was reasonable -- The acquittal entered by the Court of Appeal was set aside and the conviction was restored.

Criminal law -- Evidence -- Methods of proof -- Circumstantial evidence -- Inferences -- From possession -- Of fact -- Appeal by the Crown from a judgment of the Court of Appeal setting aside Villaroman's conviction for possession of child pornography and entering an acquittal, allowed -- The mainly circumstantial evidence against the accused proved his guilt on the charge of possession of child pornography beyond a reasonable doubt -- The trial judge's reasons, read as a whole, did not contain any legal errors and his finding of guilt were reasonable -- The acquittal entered by the Court of Appeal was set aside and the conviction was restored.

Appeal by the Crown from a judgment of the Alberta Court of Appeal setting aside Villaroman's conviction for possession of child pornography and entering an acquittal. Villaroman was having problems with his laptop computer, so he left it with a repair shop. The repair technician found child pornography on the laptop. He called the police, whose search of the laptop confirmed the presence of child pornography. Villaroman was charged with a number of pornography-related offences, including possession of child pornography contrary to s. 163.1(4) of the Criminal Code. The main factual issue at trial in relation to the possession of child pornography charge was whether the evidence established that Villaroman had been in possession of the child pornography. This required the Crown to prove that he knew the nature of the material, had the intention to possess it, and had the necessary control over it. The Crown's case depended on the circumstantial evidence provided by the technician and the forensic analyst. At trial, the judge found that the mainly circumstantial evidence against the accused proved his guilt on the charge of possession of child pornography beyond a reasonable doubt. The Court of Appeal found that the trial judge had

"misstated the current law" on weighing circumstantial evidence and that the verdict was unreasonable. The conviction was set aside and an acquittal entered. The main issues for determination in this appeal were whether the Court of Appeal erred in finding a legal error in the trial judge's analysis in relation to the circumstantial evidence and whether the guilty verdict was unreasonable.

HELD : Appeal allowed, conviction restored. No particular form of instruction to the jury was required where the evidence on one or more elements of the offence was entirely or primarily circumstantial. However, where proof of one or more elements of the offence depended solely or largely on circumstantial evidence, it could be helpful for the jury to receive instructions that would assist them to understand the nature of circumstantial evidence and the relationship between proof by circumstantial evidence and the requirement of proof beyond reasonable doubt. A view that inferences of innocence must be based on proven facts was no longer accepted. The issue with respect to circumstantial evidence was the range of reasonable inferences that could be drawn from it. If there were reasonable inferences other than guilt, the Crown's evidence would not meet the standard of proof beyond a reasonable doubt. The judge did not make any legal error in relation to his assessment of the circumstantial evidence. The judge's conclusions that a user of Villaroman's computer knowingly downloaded pornography, and that Villaroman was knowingly in possession of the child pornography that had been saved on his computer, were reasonable. The trial judge's reasons, read as a whole, did not contain any legal errors and his finding of guilt was reasonable. The appeal was allowed, the acquittal set aside and the case remanded to the Court of Appeal for hearing and disposition of the ss. 8 and 24(2) Charter issues.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, s. 8, s. 24(2)

Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(4)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Criminal law -- Evidence -- Circumstantial evidence -- Inferences -- Reasonable verdict -- Accused found guilty on charge of possession of child pornography -- Whether trial judge erred in his analysis of circumstantial evidence by requiring that inference supporting conclusion other than guilt be based on evidence rather than upon lack of evidence -- Whether guilty verdict was unreasonable.

Court Summary:

V was having problems with his laptop computer, so he left it with a repair shop. The repair technician found child pornography on the laptop. He called the police, whose search of the laptop confirmed the presence of child pornography. V was charged with a number of pornography related offences, including possession of child pornography. The trial judge found that the mainly circumstantial evidence against V proved guilt on the charge of possession of child pornography beyond a reasonable doubt. The trial judge also disagreed with V that the police search of the laptop violated s. 8 of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal concluded that the judge had misstated the current law respecting circumstantial evidence and that the verdict of guilt based on that evidence was unreasonable. The Court of Appeal therefore set aside the conviction and entered an acquittal. The Court of Appeal declined to consider the *Charter* issues because its acquittal of V made those issues academic.

Held: The appeal should be allowed, the acquittal set aside and the case remanded to the Court of Appeal for hearing and disposition of the *Charter* ss. 8 and 24(2) issues.

No particular form of instruction to the jury is required where the evidence on one or more elements of the offence is entirely or primarily circumstantial. However, where proof of one or more elements of the offence depends solely or largely on circumstantial evidence, it may be helpful for the jury to receive instructions that will assist them to understand the nature of circumstantial evidence and the relationship between proof by circumstantial evidence and the requirement of proof beyond reasonable doubt.

An explanation of the difference between direct and circumstantial evidence is included in most criminal jury charges and rarely causes difficulty. An instruction concerning the use of circumstantial evidence and the reasonable doubt instruction have different, although related, purposes. The reasonable doubt instruction describes a state of mind -- the degree of persuasion that entitles and requires a juror to find an accused guilty. An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. While this Court has used the words "rational" and "reasonable" interchangeably to describe the potential inferences, there is an advantage of using the word "reasonable" to avoid the risk of confusion between the reasonable doubt standard and inferences that may arise from circumstantial evidence. However, using the traditional term "rational" is not an error as the necessary message may be imparted in different ways.

A view that inferences of innocence must be based on proven facts is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from

proven facts. 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 proof beyond the reasonable doubt standard. 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. When assessing circumstantial evidence, the trier of fact should consider other plausible theories and other reasonable possibilities which are inconsistent with guilt. The Crown thus may need to negative these reasonable possibilities, but certainly does not need to disprove every possible conjecture which might be consistent with innocence. 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.

The Court of Appeal found that the trial judge erred because he failed to consider reasonable inferences inconsistent with guilt that could have arisen from a lack of evidence. While there are certainly some problematic statements in the trial judge's reasons, when the reasons are read as a whole and these passages are read in their proper context, he made no reversible error. The judge correctly stated the law in relation to circumstantial evidence. Contrary to V, the judge did not lose sight of proper process of inference-drawing, the overall burden of proof, or the difference between the standard applied to a committal for trial and the reasonable doubt standard applied to a finding of guilt.

The judge's conclusions that a user of V's computer knowingly downloaded pornography and that V was knowingly in possession of the child pornography that had been saved on his computer were reasonable. While there were gaps in the Crown evidence about V's possession and control of the computer, the Court of Appeal's analysis of these gaps in effect retried the case. It was for the trial judge to decide whether the evidence of V's possession and control, when considered in light of human experience and the evidence as a whole and the absence of evidence, excluded all reasonable inferences other than guilt. While not every trier of fact would inevitably have reached the same conclusion as did the trial judge, that conclusion was a reasonable one.

Cases Cited

Considered: *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136; **approved:** *R. v. Dipnarine*, 2014 ABCA 328, 584 A.R. 138; **referred to:** *R. v. Daniels*, 2004 NLCA 73, 242 Nfld. & P.E.I.R. 290; *R. v. Lifchus*, [1997] 3 S.C.R. 320; *R. v. Morrissey* (1995), 22 O.R. (3d) 514; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5; *McLean v. The King*, [1933] S.C.R. 688; *R. v. Mitchell*, [1964] S.C.R. 471; *R. v. Cooper*, [1978] 1 S.C.R. 860; *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42; *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162; *R. v. Fleet* (1997), 120 C.C.C. (3d) 457; *R. v. Tombran* (2000), 142 C.C.C. (3d) 380; *John v. The Queen*, [1971] S.C.R. 781; *Mezzo v. The Queen*, [1986] 1 S.C.R. 802; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *Boucher v. The Queen*, [1955] S.C.R. 16; *Fraser v. The King*, [1936] S.C.R. 1; *Lizotte v. The King*, [1951] S.C.R. 115; *R. v.*

McIver, [1965] 2 O.R. 475, aff'd [1966] S.C.R. 254; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104; *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149; *R. v. Comba*, [1938] O.R. 200, aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11; *R. v. Mitchell*, [2008] QCA 394; *R. v. Bagshaw*, [1972] S.C.R. 2; *Martin v. Osborne* (1936), 55 C.L.R. 367; *R. v. Paul*, [1977] 1 S.C.R. 181; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Mars* (2006), 205 C.C.C. (3d) 376; *R. v. Liu* (1989), 95 A.R. 201; *R. v. S.L.R.*, 2003 ABCA 148; *R. v. Cardinal* (1990), 106 A.R. 91; *R. v. Kaysaywaysemat* (1992), 97 Sask. R. 66; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(4).

Authors Cited

Berger, Benjamin L. "The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated" (2005), 84 *Can. Bar Rev.* 47.

Canadian Judicial Council. *Model Jury Instructions*, 10.2 Direct and Circumstantial Evidence (online: <https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/>, last updated June 2012).

Canadian Oxford Dictionary, 2nd ed., by Katherine Barber, ed. Don Mills, Ont.: Oxford University Press, 2004, "rational", "reasonable".

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Gans, Arthur M. "Hodge's Case Revisited" (1972-73), 15 *C.L.Q.* 127.

Scott, Eric. "Hodge's Case: A Reconsideration" (1965-66), 8 *C.L.Q.* 17.

Wills, William. *Wills' Principles of Circumstantial Evidence*, 7th ed. London: Butterworth & Co., 1937.

History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Côté and O'Ferrall JJ.A. and Macleod J. (*ad hoc*)), 2015 ABCA 104, 599 A.R. 294, 13 Alta. L.R. (6th) 369, 320 C.C.C. (3d) 50, 643 W.A.C. 294, [2015] A.J. No. 293 (QL), 2015 CarswellAlta 436 (WL Can.), setting aside the conviction for possession of child pornography entered by Yamauchi J., 2013 ABQB 279, 562 A.R. 105, 83 Alta. L.R. (5th) 297, [2013] A.J. No. 538 (QL), 2013 CarswellAlta 857 (WL Can.), and entering an acquittal. Appeal allowed.

Counsel:

Jolaine Antonio and Jason Wuttunee, for the appellant.

Ian D. McKay and Heather Ferg, for the respondent.

Matthew Asma, for the intervener the Attorney General of Ontario.

Written submissions only by Daniel M. Scanlan, for the intervener the Attorney General of British Columbia.

Sharon E. Lavine and Naomi M. Lutes, for the intervener the Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

CROMWELL J.:--

I. Introduction

1 The respondent, Mr. Oswald Villaroman, was having problems with his laptop computer, so he left it with a repair shop. The repair technician found child pornography on the laptop. He called the police, whose search of the laptop confirmed the presence of child pornography. Mr. Villaroman was charged with a number of pornography-related offences, including possession of child pornography contrary to s. 163.1(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, the only charge relevant to this appeal.

2 At trial, Yamauchi J. found that the mainly circumstantial evidence against the accused proved guilt on the charge of possession of child pornography beyond a reasonable doubt: 2013 ABQB 279, 562 A.R. 105. The Court of Appeal, however, concluded that the judge had misstated the current law respecting circumstantial evidence and that the verdict of guilt based on that evidence was unreasonable: 2015 ABCA 104, 599 A.R. 294, at paras. 20 and 38. The Court of Appeal therefore set aside the conviction and entered an acquittal. The Crown appeals, submitting that the Court of Appeal erred by requiring the Crown in effect to disprove all innocent possibilities and, more specifically, by requiring the Crown to prove either that the accused had downloaded the pornography or that he had exclusive access to the computer where it was stored. The Crown maintains that the judge did not make any legal error in his treatment of the circumstantial evidence and that the verdict of guilt was reasonable. The respondent supports the decision and reasoning of the Court of Appeal and points to a number of what he says are clear legal errors in the trial judge's analysis.

3 I would allow the appeal. As I see it, the trial judge's reasons, read as a whole, do not contain any legal errors and his finding of guilt was reasonable.

II. Issues

4 The Court of Appeal found that the case law in relation to circumstantial evidence "may not be readily consistent" and "seems to have changed in very recent years": paras. 8 and 20. This appeal is an opportunity to provide any needed clarification. For the purposes of my analysis, I have found it helpful to approach the case by answering two questions:

1. Did the Court of Appeal err in finding a legal error in the trial judge's analysis in relation to the circumstantial evidence?

2. Was the guilty verdict unreasonable?

5 Some issues related to whether the police search of the laptop violated s. 8 of the *Canadian Charter of Rights and Freedoms* were argued at trial and before the Court of Appeal. The trial judge found that the police search was lawful (2012 ABQB 630, 557 A.R. 1), while the Court of Appeal declined to consider the search issues because its acquittal of Mr. Villaroman made those issues academic: paras. 38-39. On appeal before this Court, the parties agreed that if we accept the Crown's position with respect to the circumstantial evidence, the case should be remanded to the Court of Appeal to deal with those issues. I accept the parties' position and would remand these issues back to the Court of Appeal.

III. Overview of the Facts and Decisions

A. *Background*

6 Mr. Villaroman took his laptop computer to a MyMacDealer shop for repairs to the power button and battery. (While it was not conceded at trial that Mr. Villaroman was the person who delivered the computer, it is for the purposes of this appeal.) He provided his name, address, and telephone number to the repair shop. The technician, Alan Sopczak, examined the computer, which was not password-protected, and identified the necessary repairs. He then telephoned Mr. Villaroman, who authorized the work.

7 After completing some repairs, Mr. Sopczak checked some files randomly to test whether the computer's software was operating properly. While checking the music files, he discovered child pornography files in the music folder of the iTunes library folder. He thought the number of files ruled out a random occurrence and called the police, who seized the computer. Days later, when Mr. Villaroman came to the shop to get the laptop, Mr. Sopczak informed him that the police had seized it.

8 Mr. LaFontaine, a forensic analyst, testified that there was only one user account associated with the computer, named "oswaldvillaroman". The user account was set up on the computer on

July 1, 2007 and there had been almost daily activity on it from that date until November 29, 2009, a couple of days before the computer was brought to the shop.

9 Mr. LaFontaine's evidence was that the computer's hard drive contained 36 child pornography files: one picture and 35 videos. Two of the file names appeared to be in an Asian language, but all of the rest suggested or expressly described underage pornographic content. The files were downloaded using a peer-to-peer downloading software called "Limewire". Eighteen of the videos were partial or incomplete downloads located in the Limewire "incomplete" folder. Seventeen were complete downloads that were found, along with the one picture, in the computer's music folder. The user had viewed some videos from each folder using two different media-playing programs.

10 Mr. Villaroman admitted that the computer was his and that the 36 files found on it constituted child pornography as defined in the *Criminal Code*. The main factual issue at trial in relation to the possession of child pornography charge was whether the evidence established that Mr. Villaroman had been in possession of the child pornography. As the trial judge noted, this required the Crown to prove that he knew the nature of the material, had the intention to possess it, and had the necessary control over it: para. 26, citing *R. v. Daniels*, 2004 NLCA 73, 242 Nfld. & P.E.I.R. 290.

B. *Trial Findings*

11 The trial judge noted that the Crown's case depended on the circumstantial evidence provided by the technician, Mr. Sopczak, and the forensic analyst, Mr. LaFontaine. Asking himself whether the inferences drawn from the evidence satisfied him beyond a reasonable doubt that Mr. Villaroman had committed the offence: para. 43, citing *R. v. Lifchus*, [1997] 3 S.C.R. 320, the trial judge concluded that they did. He found that Mr. Villaroman "knew the nature of the material, had the intention to possess it, and had the necessary control over it": para. 68.

C. *Court of Appeal Decision*

12 The Court of Appeal found that the trial judge had "misstated the current law" on weighing circumstantial evidence and that the verdict was unreasonable: para. 20. In the Court of Appeal's opinion, there was not sufficient evidence to raise a case for the defence to answer: para. 38. The conviction was set aside and an acquittal entered.

IV. Analysis

A. *First Question: Did the Court of Appeal Err in Finding a Legal Error in the Trial Judge's Analysis in Relation to the Circumstantial Evidence?*

(1) The Alleged Errors

13 At the core of the errors identified by the Court of Appeal, and elaborated upon by the respondent, is that the trial judge erred in his treatment of circumstantial evidence, a subject that

dates back at least to *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136. That case contains a jury instruction about how the jury should assess circumstantial evidence of identity. The jury was told that in order to convict, they must be satisfied not only that the circumstantial evidence was consistent with guilt but rationally inconsistent with any other conclusion than guilt. The nub of the issue in this case is whether the trial judge erred by requiring that "any other conclusion than guilt" be based on the evidence.

14 The Court of Appeal, as I read its reasons, found that the trial judge erred by requiring that an inference or hypothesis supporting a conclusion other than guilt be based on evidence rather than upon a lack of evidence: para. 10. The respondent (as he is entitled to do in seeking to uphold the Court of Appeal's order), relies on what he claims are additional errors made at trial: that the trial judge relied on inapplicable sources; erroneously analyzed the requirement of proof beyond reasonable doubt; and wrongly reversed the burden of proof. But at the core of all of these alleged errors is the point taken by the Court of Appeal: that the trial judge was wrong to exclude from consideration innocent explanations which had no foundation in the evidence.

15 Before turning to a more detailed analysis, it is important to remember that a trial judge's reasons for judgment should not be "read or analyzed as if they were an instruction to a jury": *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at p. 525. Rather, the reasons must be "read as a whole, in the context of the evidence, the issues and the arguments at trial, together with 'an appreciation of the purposes or functions for which they are delivered'": *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16, citing *R. v. R.E.M.*; 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 16; see also *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at para. 11.

(2) Did the Trial Judge Err by Requiring Innocent Explanations to be Based on the Evidence?

16 The Court of Appeal's concern with the trial judgment arises from some ongoing difficulties caused by the old rule in *Hodge's Case*. While that case was not mentioned by name, the principle that it enunciated cast a long shadow over the judgments at trial and on appeal. I will turn first to some of the troublesome aspects of the jurisprudence flowing from *Hodge's Case* and then return to the errors of law the trial judge is alleged to have committed.

(a) *The Current Status of the "Rule" in Hodge's Case*

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

18 Over time, this requirement was relaxed: see, e.g., *R. v. Mitchell*, [1964] S.C.R. 471; *R. v. Cooper*, [1978] 1 S.C.R. 860. It is now settled that no particular form of instruction to the jury is required where the evidence on one or more elements of the offence is entirely or primarily circumstantial. As Charron J. writing for a majority of the Court put it in *R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42, at para. 33:

We have long departed from any legal requirement for a "special instruction" on circumstantial evidence, even where the issue is one of identification: *R. v. Cooper*, [1978] 1 S.C.R. 860. The essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. Imparting the necessary message to the jury may be achieved in different ways: *R. v. Fleet* (1997), 120 C.C.C. (3d) 457 (Ont. C.A.), at para. 20. See also *R. v. Guiboche*, 2004 MBCA 16, 183 C.C.C. (3d) 361, at paras. 108-10; *R. v. Tombran* (2000), 142 C.C.C. (3d) 380 (Ont. C.A.), at para. 29. [Emphasis added.]

19 There may be some tension between the first and the second sentence of this passage from *Griffin*: see, e.g., L. Dufraimont, "*R. v. Griffin and the Legacy of Hodge's Case*" (2009), 67 C.R. (6th) 74. While the first sentence states that there is no required special instruction, the second sentence makes it an "essential component" of a jury instruction to ensure that the jury understands that they must be persuaded beyond reasonable doubt that the only rational inference is guilt. However, the cases cited with approval by Charron J. in this passage and our subsequent decision in *R. v. Mayuran*, 2012 SCC 31, [2012] 2 S.C.R. 162, at para. 38, clear up any doubt about what was intended.

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

... It will be recalled that, in *Cooper*, Ritchie J. specifically rejected the necessity for any formula of words to be used in a case of circumstantial evidence of identity. In our view, he can hardly have intended to reject the mandatory recitation of one formula only to substitute another in its place. We read the object of both judgments in *Cooper* to be the eradication of any formulaic approach to such cases so long as the jury is clearly made aware of the necessity to find the guilt of the accused to be established beyond a reasonable doubt. This object may be achieved in more ways than one. Thus, the trial judge, reviewing the evidence and setting out the position of the defence and relating the substantial parts of the evidence to that position, may frame the requisite instruction in the manner he or she considers most appropriate in the

circumstances, for example, by:

- (a) charging the jury in accordance with the traditional language of proof beyond a reasonable doubt (*per* Laskin C.J.C. in *Cooper*);
- (b) charging the jury in accordance with that language and pointing out to the jury the other inferences that the defence says should be drawn from the evidence and the necessity to acquit the accused if any of those inferences raises a reasonable doubt (as the trial judge did in *Cooper* in the final portion of his recharge); or
- (c) charging the jury that it must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts (*per* Ritchie J. in *Cooper* and Dubin J.A. in *Elmosri*, [1985] O.J. No. 253).

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

... The modern approach to the problem of circumstantial evidence, enunciated clearly in *Cooper, supra*, and reiterated and reinforced by *Fleet, supra*, is to reject a formulaic approach and to deal with all the evidence in terms of the general principles of reasonable doubt. Trial judges are given a degree of latitude to formulate the appropriate instruction as befits the circumstances of the case. Trial judges are not required to adopt any specific language or wording, provided the charge conveys to the jury in a clear fashion the central point, namely, the necessity to find the guilt of the accused beyond a reasonable doubt. In particular, trial judges are not required to deliver to the jury a general, abstract lecture on the nature of circumstantial evidence or on the steps of logic to be followed in assessing circumstantial as distinct from direct evidence. An academic exercise along those lines may well confuse rather than assist the jury. Trial judges are entitled to conclude that the essential message of the need to establish guilt beyond a reasonable doubt can be better conveyed in other ways.

22 These paragraphs, quoted with approval in *Griffin*, are consistent with what Charron J. conveyed in her reasons. This reading of the judgment is confirmed by our subsequent decision in *Mayuran* in which the Court reiterated the statement from *Griffin* that "[w]e have long departed from any legal requirement for a 'special instruction' on circumstantial evidence": *per* Abella J., writing for a unanimous Court, at para. 38. There is therefore no particular form of mandatory instruction. However, where proof of one or more elements of the offence depends solely or largely on circumstantial evidence, it may be helpful for the jury to receive instructions that will assist them to understand the nature of circumstantial evidence and the relationship between proof by

circumstantial evidence and the requirement of proof beyond reasonable doubt. I will touch briefly on both of these aspects.

(i) An Explanation of the Difference Between Direct and Circumstantial Evidence

23 An explanation of the difference between direct and circumstantial evidence is included in most criminal jury charges and rarely causes difficulty. One example of how this distinction may be conveyed to a jury is found in s. 10.2 of the *Model Jury Instructions* prepared by the National Committee on Jury Instructions of the Canadian Judicial Council:

- [1] As I explained at the beginning of the trial, you may rely on direct evidence and on circumstantial evidence in reaching your verdict. Let me remind you what these terms mean.
- [2] Usually, witnesses tell us what they personally saw or heard. For example, a witness might say that he or she saw it raining outside. That is called direct evidence.
- [3] Sometimes, however, witnesses say things from which you are asked to draw certain inferences. For example, a witness might say that he or she had seen someone enter the courthouse lobby wearing a raincoat and carrying an umbrella, both dripping wet. If you believed that witness, you might infer that it was raining outside, even though the evidence was indirect. Indirect evidence is sometimes called circumstantial evidence.

24 While there is no particular required form of explanation, something along these lines will usually be helpful when one or more elements of the Crown's case depends solely or mainly on circumstantial evidence.

(ii) The Relationship Between Circumstantial Evidence and Proof Beyond Reasonable Doubt

25 The Court has generally described the rule in *Hodge's Case* as an elaboration of the reasonable doubt standard: *Mitchell; John v. The Queen*, [1971] S.C.R. 781, per Ritchie J., at pp. 791-92; *Cooper; Mezzo v. The Queen*, [1986] 1 S.C.R. 802, at p. 843. If that is all that *Hodge's Case* was concerned with, then any special instruction relating to circumstantial evidence could be seen as an unnecessary and potentially confusing addition to the reasonable doubt instruction.

26 However, that is not all that *Hodge's Case* was concerned with. There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw. Baron Alderson referred to this risk in *Hodge's Case*. He noted the jury may "look for -- and often slightly ... distort the facts" to make them fit the inference that they are invited to draw: p. 1137. Or, as his remarks are recorded in another report, the danger is that the mind may "take a pleasure in adapting circumstances to one another, and even straining them a

little, if need be, to force them to form parts of one connected whole": W. Wills, *Wills' Principles of Circumstantial Evidence* (7th ed. 1937), at p. 45; cited by Laskin J. in *John*, dissenting but not on this point, at p. 813.

27 While this 19th century language is not suitable for a contemporary jury instruction, the basic concern that Baron Alderson described -- the danger of jumping to unwarranted conclusions in circumstantial cases -- remains real. When the concern about circumstantial evidence is understood in this way, an instruction concerning the use of circumstantial evidence and the reasonable doubt instruction have different, although related, purposes: see B. L. Berger, "The Rule in Hodge's Case: Rumours of its Death are Greatly Exaggerated" (2005), 84 *Can. Bar Rev.* 47, at p. 60-61.

28 The reasonable doubt instruction describes a state of mind -- the degree of persuasion that entitles and requires a juror to find an accused guilty: Berger, at p. 60. Reasonable doubt is not an inference or a finding of fact that needs support in the evidence presented at trial: see, e.g. *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at pp. 600-610. A reasonable doubt is a doubt based on "reason and common sense"; it is not "imaginary or frivolous"; it "does not involve proof to an absolute certainty"; and it is "logically connected to the evidence or absence of evidence": *Lifchus*, at para. 36. The reasonable doubt instructions are all directed to describing for the jurors how sure they must be of guilt in order to convict.

29 An instruction about circumstantial evidence, in contrast, alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence: Berger, at p. 60. This is the danger to which Baron Alderson directed his comments. And the danger he identified so long ago -- the risk that the jury will "fill in the blanks" or "jump to conclusions" -- has more recently been confirmed by social science research: see Berger, at pp. 52-53. This Court on occasion has noted this cautionary purpose of a circumstantial evidence instruction: see, e.g., *Boucher v. The Queen*, [1955] S.C.R. 16 per Rand J., at p. 22; *John*, per Laskin J., dissenting but not on this point, at p. 813.

30 It follows that in a case in which proof of one or more elements of the offence depends exclusively or largely on circumstantial evidence, it will generally be helpful to the jury to be cautioned about too readily drawing inferences of guilt. No particular language is required. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. It may be helpful to illustrate the concern about jumping to conclusions with an example. If we look out the window and see that the road is wet, we may jump to the conclusion that it has been raining. But we may then notice that the sidewalks are dry or that there is a loud noise coming from the distance that could be street-cleaning equipment, and re-evaluate our premature conclusion. The observation that the road is wet, on its own, does not exclude other reasonable explanations than that it has been raining. The inferences that may be drawn from this observation must be considered in light of all of the evidence and the absence of evidence, assessed

logically, and in light of human experience and common sense.

31 I emphasize, however, that assistance to the jury about the risk of jumping to conclusions may be given in different ways and, as noted in *Fleet*, trial judges will provide this assistance in the manner they consider most appropriate in the circumstances: p. 549.

(iii) "Rational" v. "Reasonable" Inferences

32 I have suggested the use of the word "reasonable" to describe the potential inferences rather than the word "rational" used by Baron Alderson in *Hodge's Case* and in many other cases including *Griffin*. Which of these words should be used was one of the issues touched on by the Court of Appeal (at para. 9) and I should explain why I think that the word "reasonable" is preferable. The following comments also apply to the adjective "*logique*", which has been frequently used in the French version of this Court's jurisprudence on this issue.

33 The words "rational" and "reasonable" are virtually synonyms: "rational" means "of or based on reasoning or reason"; "reasonable" means "in accordance with reason": *Canadian Oxford Dictionary* (2nd ed. 2004). While some have argued that there is a significant difference, I do not find that position convincing: see, e.g., E. Scott, "Hodge's Case: A Reconsideration" (1965-66), 8 *C.L.Q.* 17, at p. 25; A. M. Gans, "Hodge's Case Revisited" (1972-73), 15 *C.L.Q.* 127, at p. 132. It seems that our jurisprudence has used the words "rational" and "reasonable" interchangeably with respect to inferences: see *McLean*; *Fraser v. The King*, [1936] S.C.R. 1, at p. 2; *Boucher*, at pp. 18, 22 and 29; *John*, at p. 792; *Cooper*, at p. 881; *Lizotte v. The King*, [1951] S.C.R. 115, at p. 132; *Mitchell*, at p. 478; *Griffin*, at para. 33. This, in addition to the dictionary definitions, suggests that there is no difference in substance between them.

34 There is an advantage of using the word "reasonable". It avoids the risk of confusion that might arise from using the word "reasonable" in relation to "reasonable doubt" but referring to "rational" inferences or explanations when speaking about circumstantial evidence: see *John*, per Laskin J., dissenting but not on this point, at p. 815. In saying this, I do not suggest that using the traditional term "rational" is an error: the Court has said repeatedly and recently that the necessary message may be imparted in different ways: see, e.g., *Griffin*, at para. 33.

(iv) Whether the Inference Must Be Based on "Proven Facts"

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] 2 O.R. 475, at p. 479 (C.A.), aff'd without discussion of this point [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, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 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] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), 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*, [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*, 55 C.L.R. 367, at p. 375:

In the inculcation 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 328, 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.

(b) *Did the Trial Judge Err?*

44 I return to the question of whether the Court of Appeal was wrong to find a legal error in relation to circumstantial evidence in the trial judge's reasons.

45 The Court of Appeal found that the trial judge erred because he failed to consider reasonable inferences inconsistent with guilt that could have arisen from *a lack of evidence*. The court found that, by failing to give the accused the benefit of "gaps" in the evidence, the trial judge had, in effect, put a burden on the accused to prove something: paras. 19-20. The respondent supports that conclusion and makes two additional points. He submits that the trial judge erred in relying on *McIver* which wrongly required inferences alternative to guilt to be supported by the evidence and that the trial judge relied on inapplicable sources -- *certiorari* applications to quash committals to stand trial, where the beyond a reasonable doubt standard does not apply. In doing so, it is submitted, the judge failed to appreciate the burden of proof on the Crown and the difference between the standard applied when deciding to commit someone to stand trial at a preliminary inquiry and the reasonable doubt standard applied at trial.

46 I respectfully disagree with the Court of Appeal's conclusion and I cannot accept the respondent's submissions.

47 There are certainly at first glance some problematic statements in the trial judge's reasons. He mentions that "inferences are drawn from the evidence that the Crown presents to [the court]": para. 45; that speculation is "forming a theory or conjecture without factual basis": para. 46; and that "it is evidence that 'bridges' the inferential gap": para. 49. He cites a number of cases which state that inferences must be drawn from facts or evidence: paras. 45-49. He cites *McIver*, which states that conclusions alternative to guilt must be founded on proven facts: para. 49. And he wrote that the "Court has no evidence before it that would support these hypothetical scenarios [of innocence]": para. 81 (emphases added above).

48 However, when the trial judge's reasons are read as a whole and these passages are read in their proper context, I am not persuaded that he made any reversible error.

49 For example, most of the references to the effect that inferences must arise from evidence concern the *Crown's* burden to prove guilt beyond a reasonable doubt. Of course, there is no error in

this regard as the Crown cannot rely on a gap in the evidence to prove an element of the offence.

50 When dealing with the defence position, the judge correctly stated the law, in my opinion. The judge properly noted that "the accused cannot ask this Court to rely on supposition or conjecture, that flows from a purely hypothetical narrative to conclude that the Crown has not proven he is guilty of the offences with which the Crown has charged him": para. 47. The judge's citation of *McIver* was intended to make the same point, i.e. that a reasonable doubt cannot arise from speculation or conjecture. This is perfectly correct. As the Court said in *Lifchus*, "a reasonable doubt must not be imaginary or frivolous"; need not be proof to an absolute certainty; and must be based on "reason and common sense": paras. 31 and 36. The burden on the Crown does not extend to "negating every conjecture": *R. v. Paul*, [1977] 1 S.C.R. 181, at p. 191.

51 The respondent submits that the judge erred by relying on a number of cases dealing with committals for trial at a preliminary inquiry, a context in which the reasonable doubt standard does not apply. However, the judge referred to these authorities in relation to his assessment of the range of available and reasonable inferences. He did not, as the respondent claims, fail to recognize and apply the beyond reasonable doubt standard of proof. The trial judge stated the proper standard in his reasons, and there is nothing in his reasons to show that he departed from this standard:

The Crown's counsel and the accused spent a great deal of time arguing about the inferences that this Court may or may not draw from the evidence that Mr. Sopczak and Mr. LaFontaine provided. Essentially, the arguments may be boiled down to the simple question of whether the totality of the evidence that the Crown has presented to this Court supports an inference that the accused committed the offences with which the Crown has charged him. Of course, the inferences that this Court draws from the evidence must satisfy it beyond a reasonable doubt that the accused committed the offences with which the Crown has charged him [Emphasis added; para. 43.]

52 Finally, the respondent submits that, by misapprehending the law in relation to innocent inferences and in applying the law relating to committals to trials, the trial judge improperly reversed the burden of proof and applied the wrong standard of proof. For the reasons I have just given, the trial judge did not apply the wrong law in these areas, and properly put the burden of proof beyond a reasonable doubt solely on the Crown.

53 A fair reading of the judge's reasons as a whole does not support the respondent's position that the judge somehow lost sight of proper process of inference-drawing, the overall burden of proof, or the difference between a committal for trial and a finding of guilt. The judge did not err in this regard.

54 I conclude that the judge did not make any legal error in relation to his assessment of the circumstantial evidence.

B. *Second Question: Was the Verdict of Guilt Reasonable?*

(1) Legal Principles

55 A verdict is reasonable if it is one that a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381. Applying this standard requires the appellate court to re-examine and to some extent reweigh and consider the effect of the evidence: *R. v. Yeves*, [1987] 2 S.C.R. 168, at p. 186. This limited weighing of the evidence on appeal must be done in light of the standard of proof in a criminal case. Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence: *Yeves*, at p. 186; *R. v. Mars* (2006), 205 C.C.C. (3d) 376 (Ont. C.A.), at para. 4; *R. v. Liu* (1989) 95 A.R. 201 (C.A.), at para. 13; *R. v. S.L.R.*, 2003 ABCA 148 (CanLII); *R. v. Cardinal* (1990), 106 A.R. 91 (C.A.); *R. v. Kaysaywaysemat* (1992), 97 Sask. R. 66 (C.A.), at paras. 28 and 31.

56 The governing principle was nicely summarized by the Alberta Court of Appeal in *Dipnarine*, at para. 22. The court noted that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences" and that a verdict is not unreasonable simply because "the alternatives do not raise a doubt" in the jury's mind. Most importantly, "[i]t is still fundamentally for the trier of fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt."

(2) Analysis

57 In order to establish possession of child pornography, the Crown had to prove beyond reasonable doubt that the respondent was aware that he had physical custody of the pornography and that he was aware of what it was: see, e.g., *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 16 and 136. There can be no serious question about the fact that the respondent had physical possession of the material in the sense discussed by the majority of the Court in *Morelli*: it had been downloaded on to his computer and he had physical possession of the computer. The real question is whether it was reasonable for the judge to find that the respondent knew that he had physical possession of the pornography that was in fact in his computer's memory.

58 I have found it helpful to consider this issue in two steps. At the first, the question is whether a user of the respondent's computer knowingly downloaded pornography. The judge found that a user of this computer had done so and, in my view, that conclusion was reasonable: para. 67.

59 The evidence was that Limewire, a file-sharing software, was installed on the computer on the same day that the only user account (named "oswaldvillaroman") was created. Limewire, the evidence disclosed, does not download files or other material without the user taking some action to download the file or material. The user must enter keywords and double click on the desired search

result. The evidence further showed that a user of this computer had changed the default saved folder so that completed files would be saved in the computer's iTunes music folder. A user of the computer had viewed some of the videos from both the Limewire "incomplete" folder and iTunes music folder through two different media-playing programs. These viewed files were not automatically opened by either of these media-playing programs. The evidence was also to the effect that the titles of downloaded files were "explicit, disturbing, and would logically indicate that the associated files are child pornography: para. 62." All of this evidence tended to show that the offending material would not be downloaded and viewed without the user's consent or knowledge, and that the nature of the material would be obvious to the user.

60 These facts were recited in the trial judge's reasons, and his conclusion at para. 67 that the "oswaldvillaroman" user account downloaded the child pornography onto the computer using the Limewire program was reasonable.

61 The second step is to ask whether it was reasonable to conclude that the respondent was knowingly in possession of the child pornography that had been saved on his computer.

62 The trial judge found that the respondent was the user who had downloaded the material, but I agree with the Crown that this finding was not essential to proof of the respondent's knowledge. The judge also found -- and this is the critical finding -- that the respondent was aware of the pornography on his computer: para. 85. The trial judge considered and rejected the respondent's submission that the evidence was not sufficient to establish the respondent's knowledge of the nature of the material on his computer. Noting that the Crown does not have to negative every conjecture, he found that the evidence as a whole persuaded him beyond a reasonable doubt that the respondent "was aware that the child pornography resided on the Computer": para. 85.

63 Contrary to the respondent's submission, the trial judge did not merely consider the fact that the accused owned the computer in coming to this conclusion. He relied on the evidence of Mr. LaFontaine and Mr. Sopczak, and referred to the following pieces of evidence before the court in particular, at paras. 82 and 83:

- (a) two people with whom the accused lives did not download child pornography to the Computer;
- (b) the child pornography was in the iTunes music folder, which is accessible to the Computer's user;
- (c) the Computer belongs to the accused;
- (d) the Computer was used "almost daily" from July 1, 2007, to November 29, 2009;
- (e) the user name that was established on the same day that Limewire was installed is "oswaldvillaroman";
- (f) the Computer was left at the MyMac on December 2, 2009, and the accused's name and home address are shown on the Service Repair Order;

- (g) the specific problems that the Computer was suffering are listed under "Problem Description" on the Service Repair Order and specifically refers to the fact that the "client reports" the problems; and
- (h) the clock on the computer was accurate which meant that some of the pornography had been on the computer for about three months before Mr. Villaroman took the computer in for repairs.

64 Was the conclusion that the respondent knew this material was on his computer reasonable? In my view, it was.

65 As noted, Mr. Villaroman admitted that the laptop was his. He had possession and control of it for the purposes of having it repaired. He delivered it to the shop, paid for the repairs, tried to pick it up, stated that he was the person who could authorize the work and authorized the required repairs. The only user account on the computer, "oswaldvillaroman", was created using his name. The Limewire software was installed on the computer the same day. There had been almost daily use of the computer since. Some of the pornography had been stored on the computer for about three months before Mr. Villaroman took it in for repairs. As discussed earlier, the nature of the material would be obvious to a user of the computer who saw the file names. Mr. Villaroman admitted that he resided at the same address as Benigno and Maxima Villaroman, and that neither of them had put the child pornography on the computer. There was no evidence that anyone else lived there or that anyone else had the opportunity to download pornography onto the computer. While the accused need not lead evidence to show that another person had such access to his laptop, based on the evidence and lack of evidence before the Court, it is speculative to consider whether another person had such an opportunity, let alone to assume that Mr. Villaroman would be ignorant of the presence of the material on his computer.

66 The judge did not ignore hypothetical alternative explanations advanced by the respondent's counsel. He found that they were speculative, noting that the Crown does not have the burden "of negating every conjecture to which circumstantial evidence might give rise and which might be consistent with the innocence of the accused": para. 81; citing *Paul*, at p. 191.

67 The Court of Appeal, in my respectful view, erred by focusing on hypothetical alternative theories and, at times, engaging in speculation rather than on the question of whether the inferences drawn by the trial judge, having regard to the standard of proof, were reasonably open to him.

68 It is true, as the Court of Appeal noted, that there was no evidence about where the computer was kept or used and that anyone who had temporary physical access to the laptop computer could work the laptop, and could access or transmit the child pornography on it: paras. 25-26. The Court of Appeal found that the pornography was not "accompanied by any email or similar communication", nor was there any evidence about whether an ordinary user of the computer would notice the child pornography in the music folder: paras. 34-35. It further found that the pornography was not downloaded very frequently, at an average of a little over one file per month, which does

not "make actions by another user impossible, nor even highly unlikely": para. 32. I note that this last point is not only speculative, but inaccurate. The evidence shows that the pornography was downloaded over a three month period.

69 These were gaps in the Crown evidence about Mr. Villaroman's possession and control of the computer that the trial judge had to take into account in weighing the evidence. However, the Court of Appeal, in its analysis of these gaps, in effect retried the case. It was for the trial judge to decide, as he did, whether the evidence of Mr. Villaroman's powers of control and direction over the computer; the coincidence of his name and the only user name on the computer; the file names descriptive of their pornographic contents; the admission in relation to the non-involvement of two other people with whom he lived; and the length of time the pornography had been on the computer, when considered in light of human experience and the evidence as a whole and the absence of evidence, excluded all reasonable inferences other than guilt. In my view, while not every trier of fact would inevitably have reached the same conclusion as did the trial judge, that conclusion was a reasonable one.

70 At certain points in its analysis, the Court of Appeal crossed the line from considering the effects of gaps in the Crown evidence to raising purely speculative possibilities. For example, the Court of Appeal considered questions such as whether the "laptop ... [went] to work" or "during the day to a school, college or university" or "may have sat much of each day in a location or locations frequented by many friends, coworkers, or fellow student: paras. 28 and 31." These particular factual scenarios are purely speculative and postulating them goes beyond the bounds of properly considering the impact of the gaps in the Crown evidence about the physical location of the laptop.

71 The Court of Appeal's analysis overlooks the important point made in *Dipnarine* that it is fundamentally for the trier of fact to draw the line in each case that separates reasonable doubt from speculation. The trier of fact's assessment can be set aside only where it is unreasonable. While the Crown's case was not overwhelming, my view is that it was reasonable for the judge to conclude that the evidence as a whole excluded all reasonable alternatives to guilt.

72 In my view, the judge's finding that this evidence proved that Mr. Villaroman had possession of the child pornography found on his computer was not unreasonable.

V. Disposition

73 I would allow the appeal, set aside the acquittal entered by the Court of Appeal and remand the case to the Court of Appeal for hearing and disposition of the *Charter* ss. 8 and 24(2) issues raised by Mr. Villaroman.

Appeal allowed.

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Solicitor for the appellant: Attorney General of Alberta, Calgary.

Solicitors for the respondent: Evans Fagan Rice McKay, Calgary.

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

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

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