Citation: R v Giesbrecht, 2019 MBCA 35 Date: 20190402
Docket: AR17-30-08912

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

	)	***G. G. Brodsky, Q.C.*** *and*
	)	***Z. B. Kinahan***
HER MAJESTY THE QUEEN	)	*for the Appellant*
	)	
Respondent	)	***J. M. Mann*** *and*
	)	***M. A. Bodner***
- and -	)	*for the Respondent*
	)	
ANDREA GIESBRECHT	)	*Appeal heard:*
	)	***December 12, 2018***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***April 2, 2019***

NOTICE OF RESTRICTION ON PUBLICATION: An order prohibiting disclosure of the names or identities of the accused's two living children shall continue.

On appeal from 2014 MBPC 58; 2017 MBPC 1; 2017 MBPC 28; 2017 MBPC 30; and 2017 MBPC 41

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MAINELLA JA

Introduction

[1] After a trial in the Provincial Court of Manitoba, the accused was convicted of six counts of concealing the body of a child contrary to section 243 of the *Criminal Code* (the *Code*). While prosecution of this offence is rare, the circumstances here are nothing short of surreal. The accused lived an unassuming suburban life while, at the same time, concealing six pregnancies from friends and family. She did so despite being familiar with her reproductive choices from other pregnancies. After each hidden delivery, she stored the body of the near or full-term child at some location until all six were discovered in her rented storage locker. It is a mystery as to how each of the children died and why the accused decided to conceal the bodies.

[2] The accused's personal circumstances are unlike prior reported cases. She was mature, married, raising two teenage sons and not marginalised. Her efforts to conceal each of the bodies were extensive. There is no suggestion, let alone evidence, of a post-partum psychiatric disorder or other mental illness. In passing sentence, the judge described the accused's moral culpability as being "extremely high" (2017 MBPC 28 at para 38). Although the maximum punishment for the offence is two years' imprisonment, the judge imposed consecutive sentences resulting in a combined sentence of eight and one-half years' imprisonment. To my knowledge, that sentence represents the longest ever in Canada for an offender convicted of this offence alone.

[3] The grounds of the accused's conviction appeal can be stated this

way:

(1) she was denied the opportunity to have a representative observe the autopsies;

(2) she had not "disposed of" the bodies within the meaning of section 243 because her actions were only that of storing, keeping and saving them;

(3) the judge improperly used the evidence across the six counts on the question of fetus viability in the absence of a similar fact evidence application;

(4) the verdicts were unreasonable; and

(5) the judge erred in summarily dismissing her unreasonable delay motion and then improperly issued additional reasons after her appeal was filed.

[4] She also seeks leave to appeal and, if granted, appeals her sentence, saying that the judge made material errors and that the sentence he imposed was demonstrably unfit.

[5] It was observed in an earlier proceeding in this Court that this case "has captivated the attention of the public" (2018 MBCA 40 at para 16). In such a case, careful and dispassionate appellate review is particularly important to ensure the integrity of the criminal justice system. As I will explain, I am satisfied that the conviction appeal should be dismissed; however, I come to a different conclusion as to the sentence appeal.

[6] This was a difficult sentencing decision of first impression for the

judge. He had no guidance from the jurisprudence given the rarity of the offence, together with it being a situation of several children's bodies being concealed in a methodical way. Despite his thoughtful reasons, in my respectful view, he made errors in principle which resulted in a sentence that was too severe for what the accused did, as opposed to what she might have done.

[7] Many may say that no prison term is too long when any grotesque indignity is committed against a child, particularly when it occurs on a large scale as happened here. However, the courts do not dispense punishment based purely on perceptions, even if reasonably held, as to the moral repugnance of certain behaviour. What was alleged by the Crown was the occurrence of significant dishonesty only, not foul play in relation to a living child. A fair and principled application of the law requires that this accused be sentenced not for being criminally negligent in some way or committing culpable homicide; rather, she can only be held accountable for repeated crimes of deceit in relation to the remains of several children. While such conduct is serious, it cannot warrant a sentence and stigma that accompanies a more serious offence.

[8] While I agree with the judge that consecutive sentences are appropriate, I would reduce the accused's combined sentence by five and one-half years and vary it to one of three years' imprisonment as of the date of the original sentencing (less credit for pre-trial custody as calculated by the judge).

Summary of the Evidence

[9] The accused has been married to her husband for over 20 years.

[10] In 1999, she rented a 5’ x 5’ x 8’ storage locker which she represented to others as being where she stored her father’s possessions. On one occasion, employees of the storage company went inside her locker and observed that the contents were essentially only two sealed Rubbermaid containers, as well as a few sealed pails. The containers and pails were not opened. On March 7, 2014, the accused moved her possessions out of the locker. Over the course of the lease, she paid several thousand dollars in rent and related fees.

[11] On March 7, 2014, she rented a 5’ x 5’ x 6’ storage locker at a different storage company. She used her maiden name and a false address in the rental agreement. She told the storage company she was using the locker to store her late father’s possessions. Until the bodies were discovered, she paid $380 to the storage company in rent and related fees.

[12] The accused’s husband and two sons had no involvement with her storage lockers or knowledge that the bodies of children were being stored there.

[13] On October 20, 2014, employees of the storage company cut the lock to the accused’s storage locker and entered it to take an inventory of the contents for possible sale at public auction to pay her rental arrears of $276.20. The locker contained two sealed Rubbermaid containers and three sealed five-gallon plastic pails. As the containers and pails were opened, a strong rotting smell was detected. Once staff discovered the bodies, the police were contacted. The Office of the Chief Medical Examiner (OCME) took custody of the remains at the scene for the purposes of inquiring into the deaths as required by *The Fatality Inquiries Act*, CCSM c F52 (the *FIA*).

[14] One of the two Rubbermaid containers contained two bodies. The other Rubbermaid container and the three pails each contained one body. Four of the six bodies were found inside multiple layers of bags and/or towels. Documents associated to the accused, as well as children's items, were found with these bodies. Bodies #5 and #6 were encased respectively in what appeared to be a concrete-like substance or hardened detergent inside two of the pails. The six bodies were in different stages of decomposition. Autopsies were performed by Dr. Rivera from the OCME and peer reviewed by Dr. Pollanen, the Chief Forensic Pathologist of Ontario. A summary of their findings is as follows:

Body #1 Autopsy #14M811	Male: 38-42 weeks old Decomposed placenta and attached umbilical cord found with body.	No congenital anomalies or tissue/bony injuries.
Body #2 Autopsy #14M814	Male: 35-39 weeks old Attached umbilical cord found with body.	Badly decomposed. No bony injuries.
Body #3 Autopsy #14M815	Undetermined gender: 35-39 weeks old	Complete skeletonization of body. No bony injuries.
Body #4 Autopsy #14M816	Female: 36-40 weeks old Attached umbilical cord found with body.	No congenital anomalies or tissue/bony injuries.
Body #5 Autopsy #14M817	Undetermined gender: 34-38 weeks old	Near complete skeletonization of body. No bony injuries.
Body #6 Autopsy #14M818	Male: 35-39 weeks old Decomposed placenta and detached umbilical cord found with body.	No congenital anomalies or tissue/bony injuries.

[15] A full-term pregnancy is considered to be 37 weeks and above and a near-term pregnancy is 34-35 weeks.

[16] According to Dr. Rivera, evidence of the live birth of a child can take the form of the presence of air in the lungs, food in the stomach, or signs of separation, drying or vital reaction of the umbilical cord. Due to the state of decomposition of each of the six bodies, both he and Dr. Pollanen were of the view that it was impossible to reliably determine whether any of the six deliveries were live births or stillbirths. The state of the decomposed remains also prevented a reliable determination of the cause of death in each of the six cases.

[17] The medical standard for fetal viability in Manitoba is 23 weeks of gestation. Dr. Pollanen was of the opinion that, given the gestational ages of each of the fetuses, all of them would likely have been born alive.

[18] Dr. Narvey, a neonatologist, and Dr. Naugler, an obstetrician, gave further evidence on the viability of each of the six fetuses taking into account the autopsy reports, the likelihood and causes of stillbirths, and the medical history of the accused. Dr. Narvey described all six bodies as that of "structurally normal babies." It was his opinion that "some, if not all of these children would have been born alive." According to Dr. Naugler, there was "absolutely nothing pathological or abnormal" as to any of the six bodies according to the autopsy reports which would suggest any signs of any of the children being "unhealthy". Her opinion was that it was "[h]ighly likely" that all six deliveries were live births.

[19] DNA evidence established that the accused was the mother of the six children. The father was very likely her husband in five of the six cases. In the sixth case, Body #3, the likelihood of him being the father was only "moderately strong". The evidence the judge heard to explain this anomaly was that the DNA sample for Body #3 was only partial and that, during her

marriage, the accused had sexual relations with men other than her husband.

[20] From 1994 to 2014, the accused had at least eight surgical abortions, two spontaneous abortions (i.e., miscarriages) and gave birth to her two sons (born in December 1997 and May 2002). The accused's husband testified that he was aware of the accused's abortions. He testified further that he and the accused agreed to not have any more children after their second son was born in May of 2002. He had a vasectomy in July of 2011, although he did not submit a follow-up semen analysis to confirm sterilisation. Medical records confirmed that the accused was familiar with, and had used, oral contraceptives as early as 1994.

[21] The accused hid the pregnancy of her son born in December 1997 from everyone except a work colleague. Her husband found out about the pregnancy when the accused went into labour. Prior to the birth of her second son in May 2002, the accused had extensive pre-natal care. That pregnancy was not hidden from friends and family. Given the accused's medical history, the gestational ages of the six children in the storage locker, and some of the documents and clothing found with the bodies, the likelihood is that each of the six deliveries would have to have occurred at some point after the birth of her second son in May of 2002.

[22] The accused's husband, eldest son and several of her friends testified to not knowing of the accused being pregnant with any of the children found in the storage locker. The accused's medical records do not account for consultations on pregnancies that did not result in an abortion or the birth of her two living children.

The Allegations

[23] All six counts against the accused are worded identically:

> [T]hat [the accused] between the 7th day of March in the year 2014 and the 20th day of October in the year 2014 at the City of WINNIPEG in the Province of Manitoba did dispose of the dead body of a child with intent to conceal that fact that an UNKNOWN PERSON had been delivered of it, by UNKNOWN MEANS contrary to Section 243 of the [*Code*].

The Offence of Concealing the Body of a Child

[24] Section 243 of the *Code* reads as follows:

> **Concealing body of child**
> **243** Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

[25] The courts have historically struggled with the application of criminal laws to newborn children. The problems are threefold: the legal definition of what constitutes a live birth, forensic difficulties in proof of a live birth, and judicial and public sentiment against the application of severe laws, such as murder, against sympathetic mothers who often acted in conditions of extreme distress (see Glanville Williams, *The Sanctity of Life and the Criminal Law*, 1st ed (New York: Alfred A Knopf, 1957) at 9-10).

[26] While section 223 of the *Code* provides a definition of when a child becomes a human being and, thus, is protected by the law of homicide or one of the crimes of neglect, the application of that statutory definition is not without difficulty. Neonaticide is typically a secret act carried out by a parent.

Therefore, typically, proof of a live birth turns on the results of an autopsy. Dr. Rivera testified that, unless an autopsy is done within a day of death, the process of decomposition inhibits determining whether a child breathed on its own after birth. An additional problem is that, as the child's body decomposes, determinations about the implications of the condition of the umbilical cord become less reliable. Finally, as both pathologists noted in their evidence, advanced decomposition of a child's body makes it impossible to rule out death by natural causes as opposed to a criminal act.

[27] The offence of concealing the body of a child is one of several offences in the *Code* that can arise in relation to childbirth. By virtue of section 662(4) of the *Code*, it is an included offence to a count charging the murder of a child or infanticide. Hill J, in *R v Levkovic* (2008), 235 CCC (3d) 417 (Ont Sup Ct J) (*Levkovic (Sup Ct J #1)*), rev'd 2010 ONCA 830 (*Levkovic (CA)*), aff'd 2013 SCC 25 (*Levkovic (SCC)*), at paras 8-52, provides a meticulous discussion of the history of the offence of concealing the body of a child and how it became a practical, albeit imperfect, solution to dealing with the legal, evidentiary and sentimental difficulties in applying the law of homicide against mothers suspected of killing a newborn infant (see also Constance B Backhouse, "Desperate Women and Compassionate Courts: Infanticide in Nineteenth-Century Canada" (1984) 34 UTLJ 447 at 449-56; and Mark Jackson, ed, *Infanticide: Historical Perspectives on Child Murder and Concealment, 1550-2000* (Aldershot, UK: Ashgate, 2002) at 255-56).

[28] It is important to appreciate that section 243 of the *Code* does not criminalize intimate reproductive decisions. A hidden or failed pregnancy is not a crime. The act of concealing the results of a miscarriage or abortion is not caught by the legislation (see *Levkovic (SCC)* at para 44). The purpose of

the offence is different from failure to meet the administrative requirements under provincial law to promptly register live births and stillbirths (see *The Vital Statistics Act*, CCSM c V60, sections 3, 9). The object of section 243 is to facilitate the investigation of homicides (see *Levkovic (SCC)* at para 58).

[29] Based on the wording of section 243, the comments of Watt JA (*Levkovic (CA)*) and Fish J (*Levkovic (SCC)*) in their respective decisions, and the older authorities applying section 60 of the *Offences Against the Person Act 1861* (UK), 24 & 25 Vict, c 100 (and predecessor legislation) (on which section 243 is largely based), the elements of the offence of concealing the body of a child can be summarised in the following manner.

[30] The *actus reus* of the offence requires proof of:

(i) some act of disposal;

(ii) the matter disposed of was a dead body; and

(iii) the dead body was that of a child (i.e., a child born alive or a fetus that has reached a stage of development where, but for some external event or circumstances, it likely would have been born alive).

See *R v Turner* (1839), 173 ER 704 (QB (Eng)); *Levkovic (CA)* at paras 74-75; and *Levkovic (SCC)* at paras 13, 56, 64.

[31] I will deal with the meaning of "disposes of" later in my reasons in addressing the accused's ground of appeal on that question.

[32] The *mens rea* of the offence requires proof of:

(i) the disposal of the child's body was intentional;

(ii) knowledge by the accused that the child was born alive or would likely have been born alive; and

(iii) the disposal of the child's body was done with the intention of concealing the fact that the child's mother had been delivered of it.

See *Levkovic (CA)* at para 76; and *Levkovic (SCC)* at paras 16, 79.

Issue One—Observation of the Autopsies by the Accused's Expert

Background

[33] After the accused was arrested, her counsel immediately contacted the Chief Medical Examiner (CME) to request that a pathologist retained by the accused be present to observe the autopsies on the six bodies. On October 23, 2014, the CME denied the request absent a court order. The accused then applied in the Provincial Court for an order pursuant to section 490(15) of the *Code* to have her representative observe the autopsies or, alternatively, permit video recording of them. Section 490(15) of the *Code* reads as follows:

> **Access to anything seized**
> **490(15)** Where anything is detained pursuant to subsections (1) to (3.1), a judge of a superior court of criminal jurisdiction, a judge as defined in section 552 or a provincial court judge may, on summary application on behalf of a person who has an interest in what is detained, after three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

[34] The application was denied. The application judge (who did not hear the trial) decided that section 490(15) was not pertinent because the bodies were not seized by the police acting under the search warrant that they obtained for the storage locker, but by the OCME acting pursuant to section 7(5) of the *FIA* which, as it was then worded, required a representative of the CME to "immediately take charge of the body, inform the police of the death and make prompt inquiry" into the death (see 2014 MBPC 58). The accused filed a motion for prerogative relief in the Court of Queen's Bench to challenge the application judge's decision but later abandoned it. During the course of the trial, no complaint was raised with the judge as to the nature of disclosure provided by the Crown as to the autopsies.

[35] The accused argues that her application properly fell under the purview of section 490(15) of the *Code* and, for reasons of fairness, she should have had some ability to observe the bodies during the autopsies, either by having her own expert present or by video recording, as she wanted to contest any suggestion that live births occurred in this case. She says that disclosure of the autopsy reports and cross-examination of the pathologists who examined the bodies were inadequate substitutes.

[36] The Crown submits that the application judge was correct that section 490(15) of the *Code* was not relevant because the police do not seize human remains pursuant to a warrant or otherwise. It says that, because of the *FIA*, the taking custody, handling and examination of human remains is a matter within the exclusive jurisdiction of the CME whose office is independent of the police.

Discussion and Conclusion

[37] The law recognises that the CME and the police have different responsibilities at the scene of a death and, while they may cooperate in their respective inquiries, each is independent of the other. Leaving aside my doubts that section 490 of the *Code* applies to human remains and that the police somehow overstepped their role and detained the bodies under sections 490(1)-(3.1) (as it was undisputed that it was the OCME, not the police, who took custody of the bodies from the storage locker), in my view, this ground of appeal fails because the accused has no right of appeal of the order dismissing her application under section 490(15).

[38] As was observed by McIntyre J in *Mills v The Queen*, [1986] 1 SCR 863, "there is no right of appeal in criminal matters, save as provided by statute" (at p 958). Section 490(17) of the *Code* provides for appeals of a person "aggrieved" by an order made under certain parts of section 490 but not section 490(15). The comments of Maguire JA in *Regina v Stewart*, [1970] 3 CCC 428 (Sask CA), under the predecessor of section 490(15), are equally applicable now to a party disappointed by a decision permitting or refusing an examination of anything detained under sections 490(1)-(3.1) of the *Code* (at p 429):

> The right or rights of appeal in respect to a proceeding authorized or permitted under the *Code* are statutory and as provided by the *Code*. No such right is given in respect to the order in question, and it follows that this Court has no jurisdiction to entertain this appeal.

See also *Canada Revenue Agency v Royal Canadian Mounted Police*, 2016 BCSC 2275 at para 40.

Issue Two—Meaning of "in any manner disposes of"—Section 243 of the *Code*

Background

[39] The accused's position at trial, which is maintained on appeal, was that she could not be convicted of the offences because, while she may have concealed each of the bodies, she did not dispose of any of them. She argued that storing, keeping and saving the body of a child, for whatever reason, is not conduct falling within section 243 of the *Code*. Her submission is that the statutory language of "in any manner disposes of" means that there must, in some way, be an intentional loss of possession of the body of the child.

[40] The judge accepted that the meaning of "in any manner disposes of" could be found in the *obiter* comments of Hill J in *Levkovic (Sup Ct J #1)* (which were not commented on in the subsequent appeals) (at para 120):

> The conduct of disposal ("disposes of["]), on plain meaning and common dictionary definitions, is understood to be an act of getting rid of, throwing away, discarding or destroying (see also *R. v. Byrne*, [199[9]] O.J. No. 3668 (QL) (C.J.), at para. 13). Of course, not all disposition is proscribed — only that with the requisite criminal intent.

[41] The judge was satisfied that, given the objective of section 243, the accused had disposed of each of the bodies because she was destroying them. He reasoned that "[p]lacing a dead child's body in such a way that it will decompose meets that definition" (2017 MBPC 1 at para 27). He found that (at para 62):

> [T]hese bodies were not stored for purposes of preservation, rather the only reasonable and logical inference to be made from the manner in which they were packaged, whether they were bagged,

> sealed, encased in cement or powder, was that it was done in an effort to contain the smell of human decomposition and decay, thereby concealing their existence. As they were decomposing, they were being disposed of.

Alternatively, he concluded that failing to pay rent on the storage locker "triggered termination of the contract, thereby abandoning and forfeiting the contents of the storage locker, including the bodies" (at para 63).

[42] The Crown asserts that there is a broader meaning to the words "in any manner disposes of" in section 243 than what the judge applied in reaching his verdicts. It says that a temporary placement of a child's body is sufficient to satisfy the requirements of "in any manner disposes of". It submits that, at some point after the delivery of each child, the accused intentionally placed the body into a bag(s), towel(s), concrete or detergent and then into a Rubbermaid container or plastic pail. The effect of this conduct, together with ultimately placing each body into a storage locker, defeated the investigation of the possibility of a homicide occurring in relation to each birth.

The Standard of Review

[43] A judicial declaration as to the meaning of an enactment is a question of law and, thus, subject to the strictest standard of appellate review: the standard of correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at para 8).

Discussion and Conclusion

[44] The modern approach to statutory construction requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the

Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87).

Grammatical and Ordinary Sense

[45] The term "disposes of" is not defined in the *Code*. Various dictionaries provide insight into the grammatical and ordinary sense of the words used in section 243.

[46] The *Oxford English Dictionary*, online: <www.oed.com> sub verbo "dispose of", defines to "dispose of" as: "To make a disposition, ordering, or arrangement of; to do what one will with; to order, control, regulate, manage"; "To put or get (anything) off one's hands; to put away, stow away, put into a settled state or position; to deal with (a thing) definitely; to get rid of; to get done with, settle, finish . . . to do away with, 'settle', or demolish . . . to make away with, consume"; "To make over or part with by way of sale or bargain, sell"; and "To make fit or ready".

[47] The *Merriam-Webster* dictionary, (last visited 11 February 2019), online: <www.merriam-webster.com/dictionary/dispose%20of> sub verbo "dispose of", defines "dispose of" as: "to place, distribute, or arrange especially in an orderly way"; "to transfer to the control of another"; "to get rid of"; and "to deal with conclusively".

[48] The language used in the French version of the legislation is "de quelque manière, fait disparaître le cadavre d'un enfant". The dictionnaire *Larousse*, (last visited 11 February 2019), online: <www.larousse.fr/dictionnaires/francais/disparaetre/25922?q=disparaitre#25797> sub verbo "disparaître", defines "disparaître" as: "Ne plus être

perceptible à la vue, à l'ouïe, à l'odorat"; "Être caché, dissimulé par quelque chose"; "Cesser de se trouver quelque part, de s'y manifester"; "Ne plus se trouver quelque part, de manière inexplicable, pour des raisons que l'on suppose être la fuite, le rapt, le vol, etc."; and "Cesser d'être, mourir".

[49] The grammatical and ordinary sense of the words used in section 243 goes beyond the definition used in *Levkovic (Sup Ct J #1)* to describe an act of surrendering possession of the body or destroying it, and also includes an act of dealing with the body by concealing it, for example, by a hidden placement.

Legislative History

[50] Prior to the enactment of the *Code* in 1892, the wording of the Canadian offence prosecuted in this case was based on comparable legislation in the United Kingdom (UK) (see Backhouse at pp 449-50, 454-56). The last iteration of the UK legislation, section 60 of the *Offences Against the Person Act 1861*, which, with minor amendment, remains in force today, requires proof of a "secret [d]isposition" of the body of a child.

[51] Little appellate guidance has been provided on what amounts to a "secret disposition" of the body of a child. In *Reg v Brown* (1870), LR 1 244 (CCR (Eng)), the Court simply stated the issue was a factual one that depended on "the circumstances of each particular case" (at p 246) taking into consideration the likelihood or probability of the body being found. As can be seen in the discussion in *R v Piche*, 1879 CarswellOnt 169 (UC Ct Com Pl), the 19th century English case law produced a series of seemingly irreconcilable decisions as to whether a particular act in relation to the body of a child amounted to a "secret disposition".

[52] Concern about whether the disposition of the body of a child was "secret" ended in Canada in 1892. Parliament removed that requirement from the offence of concealing the body of a child. Under section 243, the act of the disposal of the body of a child can be done "in any manner".

The Jurisprudence

[53] What can be said with more certainty, from a review of the case law, is that whether the child's body is found in a temporary, as opposed to its final, resting place is not relevant. At one time, it was thought that the disposition of the body of a child had to be complete for the offence to have been proven (see J W Cecil Turner, *Russell on Crime*, 12th ed (London, UK: Stevens & Sons, 1964) vol 1 at 609). In *R v Snell* (1837), 174 ER 208 (KB (Eng)), the accused was caught carrying the body of a child as she was walking to the privy to get rid of it. She was acquitted for lack of proof of a disposal of the body. Subsequently, the interpretation of the law given in *Snell* was overruled (see *Regina v Goldthrope* (1841), 169 ER 97 (QB (Eng)). As Patteson J noted in *The Queen v Farnham* (1845), 1 Cox CC 349 (QB (Eng)), it was "common sense" that "any concealment of the body, whether intended to be final or temporary, was within the spirit of the Act" (at p 350). The Court of Appeal of the day, the Court for Crown Cases Reserved, accepted in *Reg v Perry* (1855), 6 Cox CC 531, that the disposal of the body of a child need not be a final one, it can be temporary. In *Perry*, the accused placed the body of the child under a pillow on her bed in order to temporarily hide it when a doctor visited her on the suspicion she had just given birth. That was sufficient conduct to ground a conviction.

Accused's Argument Rejected

[54] I am not persuaded by the accused's submission that one can escape the reach of section 243 if the body of a child is hidden at a place controlled by an accused and, thus, possession of it is never lost. Parliament's drafting of section 243 eliminated the difficulty that has plagued the UK statute of what does a "secret" disposition mean. The use of the statutory language of "in any manner" can be taken to mean that Parliament desired the widest possible understanding of the term "disposes of" to achieve its legislative objective of facilitating the investigation of homicides. In my judgment, the accused's interpretation of the term "disposes of" would lead to the absurd result of encouraging possession of the bodies of children as the way to conceal a birth and avoid any criminal consequences. Such an interpretation cannot be reconciled with Parliament's objective of investigating homicides and, thus, must be avoided (see *Rizzo* at para 27).

Analysis of Judge's Findings of Disposal by Decomposition or Contractual Default

[55] In my view, the judge erred in basing the convictions on the conclusion that this was a case of disposing by storing the bodies in a manner to allow their destruction by decomposition or, alternatively, disposing by abandonment because of default on a rental contract.

[56] In terms of the theory of liability based on destruction by decomposition, under our criminal law, the general rule is that, absent a specific legal duty to act, there is no criminal responsibility for omissions (see Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2014) at 97; Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff:*

Criminal Law, 5th ed (Markham: LexisNexis, 2015) at paras 3.34-3.37; and Kent Roach, *Essentials of Canadian Law: Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 128-30).

[57] There is no common law duty to prevent a body from decomposing. In my view, the wording of section 243 does not create a crime of omission. I fail to see how it can be said that simply letting nature run its course and allowing a body to naturally decompose over time is some positive act by an accused to dispose of a body which is a long-standing requirement of the offence (see *Turner* at p 704; and *R v Coxhead* (1845), 174 ER 964 at 965 (QB (Eng))).

[58] The judge's alternative reliance on whether the accused was in default of her rental contract is also problematic. The criminal consequences of an act are not necessarily determined by one's responsibility under civil law (see *Poitras v The Queen*, [1974] SCR 649 at 653). What is important to understand is that the act of disposal of the body of a child has to be intentional (see *Levkovic (CA)* at para 73).

[59] The difficulty here with saying that the accused abandoned the bodies of the six children by defaulting on her rental contract is that the judge failed to consider whether this was an intentional abandonment, as opposed to one simply arising by operation of the civil law. In making his assessment of whether there was proof of an intentional disposal of the children's bodies by abandonment, because the case was exclusively circumstantial, he had to be satisfied beyond a reasonable doubt that guilt was the only reasonable inference available on the evidence or its absence (see *R v Villaroman*, 2016 SCC 33 at paras 36-37).

[60] While the accused did not testify as to her intentions, representatives of the two storage companies gave evidence as to conversations with her and business records were tendered by the Crown. The records and conversations evidence that the accused was chronically late in paying rent for her storage lockers and that, on multiple occasions, she was told the contents would be sold, to which she always asked that not occur as she fully intended to pay, and eventually did pay, the debt owed. For example, on October 16, 2014, the accused had a conversation with the general manager of the storage company and promised to make four payments on the arrears owing which led to her being told that the contents of her locker would "not be sent to auction." She missed the first payment due two days prior to the discovery of the bodies.

[61] In my view, whether or not the accused had abandoned the contents of the storage locker under the civil law is not determinative of her criminal responsibility on these facts. The question for the judge was not one of contractual interpretation or warehouse liens. Based on the contractual default theory of disposal, he had to be satisfied beyond a reasonable doubt that the accused intended to abandon the bodies of the children by means of defaulting on the rental contract. Given the accused's long history of holding onto the bodies and always coming up with the money owed for their storage at the last minute, I think it cannot be said that a properly instructed trier of fact, acting judicially, could reasonably be satisfied that, on such a theory of liability, guilt was the only reasonable conclusion available on the totality of the evidence (see *Villaroman* at para 55).

[62] However, the Crown's theory of the accused committing an act of disposal in relation to each of the bodies was much simpler and, in my view,

more in conformity with the proper interpretation of the words used in section 243. In her closing submission, the prosecutor stated that the accused's efforts in storing the bodies of the children was the "same thing" as disposing of them. I agree.

[63] It was an undisputed fact that the accused intentionally dealt with each of the six children similarly. After each birth, she placed the body in bags, towels, concrete or a detergent-like substance. The bodies were then each placed into a sealed Rubbermaid container or plastic pail. Finally, each of these receptacles was in turn further placed in a storage locker. Any one of these hidden placements of the body of a child, given the admitted purpose was to conceal each birth, is proof of an intentional act of disposal for the purposes of section 243.

[64] The interpretative error of the judge is harmless in my view. There is no reasonable possibility that the result would have been different had the interpretative error not been made given the undisputed facts previously mentioned. Accordingly, I would apply the curative proviso as I am satisfied the judge's interpretative error had no impact on the verdicts (see section 686(1)(b)(iii) of the *Code*; *R v Khan*, 2001 SCC 86 at para 26; and *R v Van*, 2009 SCC 22 at para 35).

Issue Three—Improper Use of Evidence Across the Six Counts—Fetus Viability

Background

[65] One of the issues in dispute at trial was whether each of the six bodies was that of a "child" within the meaning of section 243. As stated previously, according to *Levkovic (SCC)*, the Crown had to prove, in relation

to each count separately, that the child was born alive or the fetus had reached a stage of development where, but for some external event or circumstances, it likely would have been born alive. In his reasons, the judge noted, "It is important to bear in mind that the Crown did not make a similar fact application and therefore each count must be proven independently of the other, with particular attention to the viability of each fetus" (2017 MBPC 1 at para 8).

[66] The experts all agreed that, due to decomposition, a reliable determination of live birth versus stillbirth could not be made in relation to any of the six bodies. The evidence the Crown relied on to establish that each of the six fetuses had reached a stage of development where, but for some external event or circumstances, it likely would have been born alive was:

- autopsy evidence as to the gestational age of each fetus;
- autopsy evidence noting an absence of obvious congenital anomalies or injuries with respect to Bodies #1, #4 and #6 which were not in a stage of advanced decomposition;
- expert evidence ruling out any of the bodies was that of a spontaneous abortion occurring before 20 weeks;
- expert evidence as to each of the fetuses meeting the medical standard for fetal viability in Manitoba;
- expert evidence as to the significance of the gestational age of each fetus, and at least one of them being a female, in terms of the unlikelihood of common natural causes of fetal death due to abnormal organ development, genetic disorders, congenital

infections and cervical issues with the mother;

- medical history of the accused ruling out possibility of congenital rubella, RH disease, or treatment for a serious infection in her uterus or bleeding from an abnormal placenta;

- absence of medical history of the accused suffering from conditions that could compromise fetal development such as high blood pressure, diabetes or syphilis;

- maternal serum analysis of the accused from her medical records evidencing no increased risk of a fetus developing genetic abnormalities such as Down syndrome;

- statistical evidence as to the incidence of stillbirths occurring generally in the population, as well as re-occurrence of stillbirths; and

- expert opinions from several medical doctors as to the viability of each of the six fetuses.

[67] Some of the statistical evidence on the incidence of stillbirths came from Dr. Naugler. She testified that the overall stillbirth rate in Winnipeg is about 5.5 per thousand. According to her, that would mean that the odds for six stillbirths happening sequentially would be 1.5 in 100 trillion cases. She then went on to opine that, given the autopsy reports and the medical records of the accused, the unlikelihood of six successive stillbirths was actually even greater, 1 in 500 trillion, because the fetuses were full or near term and some of the common causes of stillbirths could be reliably ruled out. She explained that there is a "theoretical" risk of reoccurring stillbirths and a "real" risk of

reoccurrence. When a woman has previously had a stillbirth, efforts are taken by doctors to "manage the patient" through pre-natal care and possible inducement of labour so that the rate of reoccurring stillbirths decreases back to the "baseline risk". Her testimony was that it was "medically impossible" for the accused to have six successive stillbirths. No objection was made to the admissibility of any of Dr. Naugler's opinion evidence by counsel for the accused.

[68] After reviewing a summary of the evidence on the viability of each of the fetuses, the judge stated (2017 MBPC 1 at para 93):

> I accept the expert evidence of Dr. Narvey, Dr. Naugler, Dr. Pollanen and Dr. Gruspier. Their expertise was unchallenged by the Defence. Their evidence was consistent with each of the other experts who testified. I find as a fact that each of these children were likely to have been born alive.

[69] The accused says that the judge did not treat each count separately; rather, he improperly used the evidence across the six counts absent a similar fact evidence application by the Crown. She submits that combining the facts together in reaching the verdicts was a legal error. She argues that reliance on statistical evidence regarding the incidence of stillbirths was not allowed because the Crown did not seek to admit such evidence as similar fact evidence (see *R v Handy*, 2002 SCC 56 at paras 31-36).

[70] The Crown submits that the judge expressly stated he was not treating the evidence as similar fact and, in any event, evidence may relate to more than one count in a multi-count indictment or information without being similar fact evidence. It says the statistical evidence regarding stillbirths was relevant to each count and was not evidence of discreditable conduct falling within the similar fact evidence rule.

The Standard of Review

[71] It is an error of law for the purposes of section 686(1)(a)(ii) of the *Code* for a trial judge to reach his or her verdict by reliance on irrelevant evidence or evidence that, while relevant, is inadmissible (see *R v Churchill*, 2002 BCCA 694 at para 18; and *R v Dela Cruz*, 2007 MBCA 55 at para 33). In either situation, the standard of appellate review is one of correctness.

Discussion and Conclusion

[72] In the trial of a multi-count information or indictment, the trier of fact must reach a verdict in relation to each count separately based only on the relevant and admissible evidence pertaining to each count (see *R v Rarru*, [1996] 2 SCR 165 at para 1; and *R v PEC*, 2005 SCC 19 at para 1).

[73] While this Court made the *obiter* comment in *R v Nikkel*, 2006 MBCA 40, that "[e]vidence on one count cannot be used as evidence on the other counts of a multi-count indictment, unless the evidence is admissible as similar fact evidence" (at para 6), there can be instances outside that general rule where evidence may be relevant and admissible under the rules of evidence to more than one count without being similar fact evidence (see *R v Archibald*, 1991 CarswellYukon 15 at para 12 (CA); *R v Davis*, 2003 BCCA 679 at paras 32, 37-39, leave to appeal to SCC refused, 2004 CarswellBC 2713; *R v Sandhu*, 2009 ONCA 102 at para 15; and *R v deKock*, 2009 ABCA 225 at paras 34-35). Four examples of exceptions to the general rule stated in *Nikkel* are noteworthy.

[74] First is the situation where the evidence is relevant to each count and its nature is not discreditable to the accused in some way (see *Handy* at paras 33-34). As Professor Cross explains, "If [the evidence] is relevant, but

upon a line of argument unconnected with the accused's discreditable disposition, it is, in principle, admissible, but remains subject to exclusion by way of judicial discretion if its prejudicial effect is regarded as sufficiently outweighing its probative value" (Sir Rupert Cross & Colin Tapper, *Cross on Evidence*, 7th ed (London, UK: Butterworths, 1990) at 352).

[75] A second example of where evidence may be applied across multiple counts, without engaging the similar fact evidence rule, is where the counts arise out of "[i]nseparable acts" (John Henry Wigmore, *Wigmore on Evidence: A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (Boston: Little, Brown and Company, 1940) vol 2 at 207; see also David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 88). Ryan JA provided the example in *Davis* of a gunman shooting two victims within an hour or so. She stated, "Two counts relating to the two victims would be presented on an indictment, but the evidence relating to the two shootings would be admissible to both" (at para 35).

[76] A third example is the situation of background evidence. Contextual evidence may be relevant to make a trier of fact's understanding of the allegations complete or the sequence of events understandable (see *R v Sawoniuk*, [2000] 2 Cr App R 220 at 234-35 (CA (Eng)); *Sandhu* at para 15; *deKock* at paras 34-35; and *R v Cook*, 2013 ONCA 467 at para 31). I would be remiss to not emphasise that great care must be taken in characterising evidence as being admissible for a contextual purpose to more than one offence to set the background for the judge or jury as, in such situations, the danger of improper propensity or coincidence reasoning often arises (see *R v Taweel*, 2015 NSCA 107 at paras 104-111, 132).

[77] A fourth example is determinations of credibility. The trier of fact is entitled to use the totality of the evidence in a case to assess the credibility of a witness, including the accused (see *PEC* at para 1; and *R v JMB*, 2019 MBCA 14 at para 31).

[78] This discussion illustrates that central to the determination of whether the admissibility of evidence engages the similar fact evidence rule is proper identification of the particular relevance of the evidence in question to the fact(s) in issue in the trial and the nature of reasoning that is being proposed in the use of the evidence, if admitted. As Binnie J explained in *Handy* (at para 27):

> The contest over the admissibility of similar fact evidence is all about inferences, i.e., when do they arise? What are they intended to prove? By what process of reasoning do they prove it? How strong is the proof they provide? When are they so unfair as to be excluded on the grounds of judicial policy and the presumption of innocence? The answers to these questions have proven so controversial as to create what Lord Hailsham described as a "pitted battlefield": *Director of Public Prosecutions v. Boardman*, [1975] A.C. 421 (H.L.), at p. 445.

[79] I agree with the accused that, if the probative value of the statistical evidence regarding stillbirths was to support a chain of reasoning that it was improbable that each child died pre-maturely by natural causes, then evidence of that kind could only have been admissible if it met the requirements of the similar fact evidence rule (see *Makin v Attorney General for New South Wales* (1883), [1894] AC 57 at 65 (PC (Eng)); *Handy* at paras 45-46; and *R v Pickton*, 2009 BCCA 300 at paras 83-85).

[80] However, this was not a homicide or neglect case where foul play on the part of the accused in relation to children born alive was alleged. The

fact in issue was not the improbability that six stillbirths by natural causes did occur, but the likelihood of each fetus being born alive but for some external event or circumstances. With one exception, which I will comment on shortly, the statistical evidence about stillbirths does not raise any concerns of potential misuse.

[81] The statistical evidence regarding stillbirths was "relevant" because, considering the context of the case and the positions of the parties, as a matter of logic and human experience, the evidence tended to prove a fact in issue for each count: fetal viability (*R v White*, 2011 SCC 13 at paras 36, 140). The statistical stillbirth evidence was probative of each count as it proved that stillbirths are rare in Manitoba once a fetus reaches a certain stage of development, even with mothers who have previously had a stillbirth, and are particularly rare for a mother, such as the accused, who lacks a medical history of risk factors and is generally healthy.

[82] The statistical evidence regarding stillbirths was also not discreditable to the accused in some way. It did not engage reasoning that could be said to be based on the accused's disposition or propensity, or have an improbability of coincidence purpose (see *R v Arp*, [1998] 3 SCR 339 at para 44; and *Handy* at para 63). Rather, the statistical evidence about stillbirths provided general medical information to assist the judge in evaluating other expert evidence, such as the autopsy evidence, on the question of the viability of each fetus given their respective gestational ages.

[83] The one concern I have is the relevance of the aspect of Dr. Naugler's opinion evidence about the statistical improbability of six successive stillbirths occurring both generally and in relation to the accused. Leaving aside its marginal relevance to the charges before the Court, the

purpose of such evidence appears to be to rule out the coincidence of multiple stillbirths due to natural causes. It raises an inference that the accused, because she was the mother, must have done something to cause the death of the children. I appreciate that, if this were a homicide case or one involving some allegation of neglect, the circumstantial evidence arising from the improbability of six successive stillbirths occurring may have been relied on by the Crown to potentially overcome the difficulty of proving live births due to the decomposed nature of the bodies. That, however, was not the case that the Crown alleged or the judge was required to decide.

[84] Despite the possible inadmissibility of this one aspect of Dr. Naugler's evidence to the charges against the accused, without the evidence being admitted as similar fact evidence, what is determinative, in my view, to disposing of this ground of appeal is that I am not convinced that the judge relied on this aspect of Dr. Naugler's evidence in any way. As McLachlin J (as she then was) explained in *R v Leaney*, [1989] 2 SCR 393, "The fact that the judge had before him inadmissible evidence does not impair that independent conclusion, if he did not rely on the inadmissible evidence in reaching it" (at p 415).

[85] It is not uncommon during a criminal trial for inadmissible evidence to be heard by the trier of fact without the objection of counsel. In a jury trial, the problem can typically be "fixed" by a remedial instruction without the necessity of declaring a mistrial. There is less concern in a judge-alone trial because the trial judge is presumed to know that the law prohibits the use of inadmissible evidence in reaching a verdict. As Moldaver J noted in *R v Sekhon*, 2014 SCC 15, "Judges . . . are accustomed to disabusing their minds of inadmissible evidence" (at para 48).

[86] When I read the reasons for conviction as a whole, I see no reason to not accept the judge at his word that he did not use any form of similar fact evidence to reach his verdicts (see *R v O'Brien*, 2011 SCC 29 at para 18). He could have come to the conclusion he did by relying on Dr. Pollanen's evidence, who rested his opinion on fetal viability in each of the six cases simply on the autopsy evidence, unlike Drs. Narvey and Naugler, who incorporated into their opinions, to differing degrees, some statistical considerations relating to the occurrence of stillbirths in Winnipeg. The judge properly identified that he had to decide the viability of each of the six fetuses— not whether a homicide or homicides occurred due to the statistical improbability of six stillbirths occurring. He went no further in his findings than to determine the viability of all the fetuses given their gestational ages and the other circumstances. There is nothing in the judge's reasons that convinces me that he engaged in any form of improper reasoning or otherwise misused evidence across counts which was not properly admissible on each of the counts. I would not give effect to this ground of appeal.

Issue Four—Reasonableness of the Verdicts

Background

[87] The reasonableness of the verdicts is not disputed as to two of the essential elements of the offences. The accused concedes that the Crown proved that she did an intentional act in disposing of each body. However, as I have explained, she says her intentional acts of disposal were not prohibited by section 243 of the *Code* because she retained possession of the bodies. Also, not surprisingly, given the unchallenged evidence, the accused does not contest that the Crown established that her disposal of each of the bodies was done intentionally to conceal each delivery.

[88] The issues relating to the reasonableness of the verdicts focusses on proof of two elements of the offences: (1) whether each of the bodies was that of a "child" within the meaning of section 243; and (2) whether the accused had the requisite knowledge that each of the children would likely have been born alive. In respect of both issues, the verdicts rested entirely on circumstantial evidence.

[89] As previously mentioned, the judge found that each of the six bodies was that of a "child" within the meaning of section 243 of the *Code* because, in his view, based on the expert evidence from several witnesses, each of the fetuses was "likely to have been born alive" (2017 MBPC 1 at para 93). He rejected the alternative inference argued by the accused that each of the fetuses died in her uterus as a result of a self-induced abortion. He stated (at para 104):

> There is no evidence of injury to any of the fetuses. I accept the expert evidence of Dr. Naugler that a self-induced abortion at the advanced gestational ages of these fetuses would have caused life threatening medical consequences to [the accused] which would have required urgent medical care. The accused's complete medical records (Exhibit 9) show no such treatment.

[90] The judge also found that "the only logical and rational conclusion to be drawn from [the] evidence is that [the accused] would have been aware that each child was likely to have been born alive" (at para 105). He drew that inference based on evidence such as the accused's life experience prior to the six pregnancies and her good health.

[91] The accused says that the judge's finding that each of the six bodies were children was an unreasonable verdict in two ways. First, she argues that the Crown could not prove these were live births, as opposed to stillbirths, on

the criminal standard of proof beyond a reasonable doubt. Second, she submits that there was another reasonable inference inconsistent with guilt in that each of the fetuses died in utero as a result of a self-induced abortion. Accordingly, the products of conception found in the storage locker fell outside the definition of a "child" in section 243.

[92] The accused further argues that it was speculative that she knew that each of the children was likely to have been born alive. She says it was plausible she knew none of the children would have been born alive because these were self-induced abortions or pregnancies that would result in stillbirths. She says that the judge misapprehended the evidence because alternative inferences inconsistent with guilt could not be ruled out.

[93] The position of the Crown is that there was "overwhelming" evidence that each of the bodies was that of a "child" within the meaning of section 243 as explained in *Levkovic (SCC)*. It also says that alternative inferences raised by the accused as to whether the bodies were children within the statutory definition or her knowledge as to the likelihood each of the fetuses would be born alive are speculative. It argues that the accused's failure to testify should be considered in assessing the reasonableness of the verdicts.

The Standard of Review

[94] The following comments were made in *R v Hall*, 2018 MBCA 122, about the appellate standard of review of the reasonableness of a jury's verdict in a circumstantial case (at paras 164-66):

> The standard of review of the reasonableness of a jury's verdict under section 686(1)(a)(i) of the *Criminal Code* is "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered" (*R v Yebes*, [1987] 2 SCR 168 at

> 185). To apply this standard, the reviewing court considers and, to some extent, re-weighs the evidence and its effect through the lens of judicial experience with due regard to the jury's assessment of the evidence because, in our system of justice, the responsibility for fact finding lies with juries who enjoy the advantage of hearing the evidence firsthand and assigning weight to it through their collective wisdom (see *Yebes* at p 186; *R v Biniaris*, 2000 SCC 15 at paras 36-40; and *R v WH*, 2013 SCC 22 at paras 26-29).
>
> Where a verdict depends on circumstantial evidence, the reviewing court must assess the reasonableness of the jury's use of inferential reasoning. Cromwell J explained in *R v Villaroman*, 2016 SCC 33, that can be done by determining "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" (at para 55). See also *R v Robinson*, 2017 BCCA 6 at para 38, aff'd 2017 SCC 52 (*Robinson 2017*); and *R v Youssef*, 2018 SCC 49.
>
> Deference plays an important part in evaluating the inferential reasoning of the jury. The reviewing court does not draw its own inferences; rather, it considers whether the inferences drawn by the jury were "reasonably open" to it in light of the standard of proof (*Villaroman* at para 67). Drawing the line between inferences that are speculative and those which give rise to a reasonable doubt is the responsibility of the jury alone (see *Villaroman* at para 71).

[95] The test for an unreasonable verdict is the same in a judge-alone trial except that the scope of appellate review in a judge-alone trial is "expanded" because a judge is required to give reasons for his or her decision which the appellate court will review and consider in its reasonableness analysis (*R v WH*, 2013 SCC 22 at para 26).

[96] Accordingly, the question for an appellate court is not just whether the verdict can be supported by the evidence, but whether the trial judge reached his or her verdict by an illogical or irrational reasoning process. As Deschamps J explained in *R v RP*, 2012 SCC 22 (at para 9):

> The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge (*R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3, at paras. 4, 16 and 19-21; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190).

[97] The situation where a verdict that can be sustained by the evidence, but must be set aside because it was reached by an illogical or irrational reasoning process, is "exceedingly rare" (*R v Sinclair*, 2011 SCC 40 at para 22). Erroneous reasoning alone is not enough for an appeal to be allowed. The context of a reasoning error must be assessed such that, short of one that "vitiates the *verdict*", the appellate court cannot invoke section 686(1)(a)(i) of the *Code* (*ibid* at para 82). As Charron J explained, the focus for the appellate court must always be on "the *conclusion* reached at trial" (*ibid* at para 81).

[98] Throughout the oral and written arguments of the accused on her appeal, comment was made that the judge "misapprehended the evidence". It is apparent that what is meant by that statement is that the judge should have come to a different interpretation of the evidence than the one he did. The accused did not invoke section 686(1)(a)(iii) of the *Code* or the test in *R v Lohrer*, 2004 SCC 80. All of her submissions can be dealt with under the umbrella of an allegation of an unreasonable verdict (see section 686(1)(a)(i) of the *Code*) and the test in *R v Yebes*, [1987] 2 SCR 168; *R v Biniaris*, 2000 SCC 15; and *Sinclair*, mindful this was a circumstantial case such that the judge's reasoning by way of inference must accord with the analysis in *Villaroman*.

Discussion and Conclusion

[99] There is no merit to the accused's first argument that "the onus remains [on] the Crown to prove that these were live births, and not stillbirths." That is not the law. The reference in the wording of section 243 of the *Code* to a child who dies "before, during or after birth" is, as was noted in *Levkovic (SCC)*, a deliberate effort to ensure "that the law can respond to criminal conduct against newly born infants in cases where the evidence does not establish that death occurred post-birth" (at para 66). The problem of a lack of a definitive conclusion by expert evidence about whether or not there was a live birth is exactly the problem that occurred here in relation to each of the six bodies because of decomposition.

[100] The judge applied the correct test by assessing the likelihood of each fetus being born alive. He did not reverse the onus of proof and require the accused to explain her actions or prove that stillbirths occurred as the accused argues. Given the gestational ages of each of the fetuses and the unchallenged expert evidence that each one was viable, in my view, the judge was entitled to conclude that the only reasonable conclusion available on the totality of the evidence was that each of the fetuses was a "child" within the meaning of section 243 of the *Code*.

[101] The next submission of the accused, that this may have been a case of six self-induced abortions, is not persuasive. The accused relies on the comments of Skarica J in the re-trial in *Levkovic* once the Supreme Court of Canada gave its decision that an aspect of section 243 was not unconstitutional (see *R v Levkovic*, 2014 ONSC 5544 (*Levkovic Sup Ct J #2)*).

[102] In that case, the accused had been making "significant efforts" (at

para 11) to abort the fetus beginning at 20 weeks and beyond and had the "desire and motive" to embark on a self-induced abortion (at para 12). The accused was acquitted because of what the Court described as the "reasonable possibility that the accused killed her 36 week old fetus within her before birth and the fetus was subsequently expelled by a self-induced abortion" (at para 16). Skarica J stated that, in his view, the law is "that any woman can destroy her near term or term fetus and can induce an abortion accordingly and do what she will with the remains without risking any criminal sanctions" (at para 18).

[103] It is not necessary to decide the correctness of the interpretation given to section 243 in *Levkovic (Sup Ct J #2)* despite the significant concerns the Crown raised with it. That discussion can be left for another day. I come to that conclusion for two reasons.

[104] First, there is no evidence that the accused here desired an abortion in any of the six pregnancies that are at issue. She did not testify or provide a statement that was introduced at the trial. Her medical records and the testimony from close friends and family, including her husband, do not suggest she discussed with anyone terminating any of these six pregnancies. The accused's medical records also evidence that she was of good health and that she was familiar with the process to obtain some form of abortion service from a healthcare provider in Winnipeg.

[105] Second, and more importantly, is that the record here confirms that a self-induced abortion of a near or full-term fetus is easier said than done. It is quite evident from the reported reasons in *Levkovic (Sup Ct J #2)* that the expert medical evidence before the Court in that case was minimal in comparison to what the judge heard here. The only expert witness quoted by

the Court in *Levkovic (Sup Ct J #2)* was a forensic pathologist who performed an autopsy on a female fetus in an "advanced state of decomposition" (at para 8). The forensic pathologist accepted some suggestions put forward on cross-examination regarding the possibility of self-induced abortion, but the discussion of the doctor's evidence does not delve deeper into the reasonableness of the assumptions behind the theory of a self-induced abortion in the third trimester, unlike what occurred in this trial. Here, in addition to the autopsy evidence from the two pathologists, the judge heard from Dr. Narvey and Dr. Naugler, who each have expertise about pregnancies, particularly as to what is an "abortion", the mechanics of how they occur both naturally and otherwise, and what occurs to both the mother and the fetus when a pregnancy is terminated in the third trimester.

[106] In my view, the unchallenged expert evidence the judge heard allowed him to reasonably rule out that any of the bodies was the result of what was called in *Levkovic (Sup Ct J #2)* a "self-induced abortion" (at para 13).

[107] Both Drs. Narvey and Naugler explained that there are conceptual differences between an "abortion" and a "stillbirth." A legal definition of a stillbirth can be found in *The Vital Statistics Act*:

> **"stillbirth"** means the complete expulsion or extraction from its mother of a product of conception in which after the expulsion or extraction there is no breathing, beating of the heart, pulsation of the umbilical cord or unmistakable movement of voluntary muscle,
>
> (a) where the expulsion or extraction occurs after a pregnancy of at least 20 weeks, or
>
> (b) where the product weighs 500 grams or more.

[108] That legal definition largely reflects medical terminology as well according to Drs. Narvey and Naugler. A medical (i.e., use of a specialised drug to end a pregnancy), surgical or spontaneous abortion occurs if the gestational term of the fetus is 20 weeks and under. If the fetus is older than 20 weeks, the expulsion or extraction of the fetus from its mother is typically referred to as a stillbirth, not an abortion. In rare cases, abortions are performed in Manitoba by doctors after 20 weeks, up to a maximum of 24 weeks, due to risks to a mother's life or health, or significant fetal abnormality.

[109] The two experts further explained that, absent some catastrophic injury to the mother causing death to the fetus in utero, which would be readily discernible and require urgent medical attention for the mother to survive, there is a practical problem of how a pregnancy of a fetus likely to be born alive can be terminated in the third trimester.

[110] Dr. Narvey explained that, once a fetus reaches 23 or 24 weeks of age, its lungs are developed enough that it can breathe on its own after birth. In his view, if a mother induced labour somehow by rupturing the amniotic sac with a sharp object, a near-term child would likely be born alive. He testified, "There's no reason for me to think the babies would be born deceased if someone induced the delivery at that point." Accordingly, the mere inducement of labour of a near or full-term fetus would not likely be enough to result in a stillbirth; some further action would have to be taken to kill the fetus in utero.

[111] Dr. Naugler was asked if it was possible, given the gestational ages of each of the six fetuses here, for the accused to "self-abort". Her answer was "[n]o." She said she "[didn't] know how [the accused] would do it." The

following is an excerpt from her cross-examination:

> Q When you talk about killing a baby, my learned friend was asking you about killing a baby in utero, and your response was to talk about shooting and stabbing, or shooting rather, I take it there's other ways of killing a baby in utero --
>
> A Like what?
>
> Q -- besides shooting?
>
> A Like what, I can't think of anything that's not traumatic, I mean, it has to be trauma, bayonet, something that would have to go in and kill the baby, I mean, I don't know. I can't think of other ways. They're not easily killed. I mean, they're well-padded and protected in there, so I can't, I can't really come up with anything that would cause a, the baby to remain structurally and anatomically normal that would just kill the baby. I, I don't know, I don't know of any reason, I don't know how you would do that.

[112] It is evident from a review of the record that the parties explored with the various experts the defence of self-induced abortion in the third trimester which was the basis for the acquittal in *Levkovic (Sup Ct J #2)*. It is noteworthy that no technique, let alone a plausible one, to kill a near or full-term fetus in utero that would be unlikely to seriously harm the mother was put to Dr. Naugler on cross-examination.

[113] In summary, as previously explained, the role of an appellate court reviewing inferences drawn by a trial judge from circumstantial evidence is deferential. The totality of the evidence here made it reasonably open to the judge to conclude that the alternative inference of a self-induced abortion of a near or full-term fetus in each of the six cases was nothing more than conjecture.

[114] I am also not convinced that the judge made any error in drawing

the inference that the accused had the requisite knowledge as to being aware that each of the six fetuses would likely have been born alive given her maturity, general good health and familiarity with her reproductive system. The accused's argument that one cannot know the mind of a mother is not compelling. Proof of knowledge does not require direct evidence; it may be inferred from the surrounding circumstances (see *Regina v Aiello* (1978), 38 CCC (2d) 485 at 488 (Ont CA), aff'd [1979] 2 SCR 15; and *R v Jenner*, 2005 MBCA 44 at para 20). In my view, the inference that the accused had the requisite knowledge in each of the six cases was an inference reasonably open to the judge on the sum of the evidence. The failure of the accused to testify can be taken into consideration by this Court—not as a piece of evidence to support the reasonableness of the verdicts but, rather, as a consideration on the assessment of the reasonableness of the verdict that there is no alternative exculpatory explanation to the accused having the requisite degree of knowledge in each of the six cases (see *Hall* at para 201).

[115] In conclusion, on this ground of appeal, it was for the judge to draw the line between speculative inferences and reasonable inferences given this was a circumstantial case. I am satisfied that he could reasonably have come to the decision he reached; therefore, this Court cannot interfere with the inferences he drew (see *Hall* at para 200). Based on my review of the entire record, I am satisfied the judge did not reach any of the verdicts by illogical or irrational reasoning and each of the verdicts was not unreasonable within the meaning of section 686(1)(a)(i) of the *Code*.

Issue Five—Summary Dismissal of Delay Motion and Issuance of Additional Reasons

Background

[116] It is not disputed that the accused's trial was complex. Over the course of 13 days, the Crown called 24 witnesses, seven of whom were expert witnesses who testified about several technical areas such as DNA, anthropology, fetal viability, the cause of death of several decomposed bodies, abortions and stillbirths.

[117] The trial was further complicated by the issue of spousal privilege (see section 4(3) of the *Canada Evidence Act*, RSC 1985, c C-5). The accused's husband, who was the holder of the privilege, waived it (see *R v Couture*, 2007 SCC 28 at para 41). He testified to conversations he had with the accused relevant to the charges.

[118] The case was case managed by another judge. Four case-management conferences were held prior to the trial beginning; a fifth was held during the trial. The Crown streamlined the prosecution by not proceeding on some of the charges originally laid.

[119] The trial began on April 18, 2016—just under 18 months after the charges were laid. It was not completed in the five days set aside. Four additional days were set to continue the trial (July 18-21, 2016).

[120] On July 8, 2016, the Supreme Court of Canada released its unreasonable delay decision in *R v Jordan*, 2016 SCC 27.

[121] The trial was not completed in the four days set aside at the end of

July 2016. All of the parties adjusted their schedules and four more days to finish the trial were arranged (August 29 to September 2, 2016). The hearing of evidence was completed in that period. Due to a sudden illness of the prosecutor, final arguments were delayed until October 5, 2016. On that date, the judge requested further written submissions. He reserved his decision for four months.

[122] The judge convicted the accused on February 6, 2017. A pre-sentence report was ordered and the matter was put over to May 10, 2017, for sentencing. Subsequently, the sentencing hearing was rescheduled at the request of the accused to July 7, 2017. By agreement, the judge would give his decision and pass sentence on the afternoon of July 14, 2017.

[123] On June 16, 2017, the Supreme Court of Canada released its unreasonable delay decision in *R v Cody*, 2017 SCC 31. On June 29, 2017, this Court released its unreasonable delay decision in *R v Schenkels*, 2017 MBCA 62, leave to appeal to SCC refused, 37664 (23 November 2017).

[124] After sentencing submissions were completed on July 7th, counsel for the accused announced that he had "another matter" to raise with the Court regarding "delay". He advised, for the first time, that he was thinking of bringing an unreasonable delay motion but that he was "not sure that [he was] going to go ahead with the motion." There was discussion about how the delay motion could be heard, if it was proceeded with, before the judge passed sentence the following week. Counsel for the accused then put forward the following proposal:

> I have one suggestion with the matter proceeding and that is we can do it the way Your Honour suggests, but whenever sentence, whatever sentence you are minded to impose, just say, I'm minded

> to impose the sentence, without pronouncing it. And you can give your reasons and then I can, and that will allow me to put off, or withdraw the application.

[125] The accused decided to pursue an unreasonable delay motion and filed her application on July 11, 2017. In it, she requested a judicial stay of proceedings pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). On July 13, 2017, the Crown filed an application for summary dismissal of the unreasonable delay motion.

[126] The Provincial Court of Manitoba does not have formal rules of court to govern criminal proceedings made pursuant to section 482(2) of the *Code*. The judges of the Provincial Court have, however, issued practice directives for contested applications (see Manitoba, Provincial Court, "Practice Directives for Contested Applications in the Provincial Court of Manitoba" (4 November 2013), online (pdf): *Manitoba Courts* <www.manitobacourts.mb.ca/site/assets/files/1175/notice_nov4_2013.pdf> (the Provincial Court Practice Directives)). The fundamental objective of the practice directives is to ensure contested proceedings are "dealt with justly and efficiently" (at p 1). Subject to the presiding judge's power to dispense with compliance with the practice directives "in the interests of justice" (Practice Directive 2.01 at p 6), the filing and service requirements for a moving party are set out in Practice Directive 6.04(1) (at p 14):

> **Minimum notice period for filing and serving of applicant's material**
> **6.04(1)** Except where otherwise expressly provided by legislation or these Practice Directives, or as ordered by a judge of the court:
>
> > (i) a Notice of Application shall be first filed in court and then served on all respondents, or their counsel, at

> least 2 days before the first returnable date of the application and not less than 30 days before the hearing date of the application; and
>
> (ii) all supporting documents shall be first filed with the court and then served on all respondents, or their counsel, at least 14 days before the hearing date of the application.

[127] An emergency hearing was held on the morning of July 14, 2017, to address both the accused's unreasonable delay motion and the Crown's motion for summary dismissal of the delay motion. As part of its submission, the Crown said the net delay in the case was "about 22 months" under the *Jordan* framework. It further argued that any delay beyond the presumptive ceiling of 18 months was justified on the basis that the trial went longer for unavoidable and unforeseen reasons relating to discrete events or the complexity of the case or, alternatively, that the transitional exceptional circumstances exception justified the delay.

[128] The explanation counsel for the accused provided for the late filing of the unreasonable delay motion was because the "Cody decision and the [Schenkels] decision came out." The accused argued that the sentencing decision should be delayed until a full hearing was held on the merits of her unreasonable delay motion. She also submitted that the net delay in the case was longer than the Crown was arguing based on some of the transcripts filed. Counsel for the accused never articulated why the excess delay could not be justified under one of the exceptional circumstances headings the Crown articulated. While not conceding the Crown's argument, he never explained why the motion could succeed.

[129] The judge granted the Crown's motion and summarily dismissed the

unreasonable delay motion. He provided five pages of written reasons. The judge advised that he reserved "the right to file further and more fulsome reasons for [his] decision" (2017 MBPC 30 at para 4). In his decision, he stated that "[p]ublic confidence in the justice system is enhanced when important legal issues are decided in a timely way and in accordance with rules set out by the law" (at para 23). He explained that "counsel have a responsibility to ensure [that a serious motion is] filed in a timely way" (at para 20). He decided that no satisfactory explanation was given as to why timely notice was not given but, instead, the motion was filed "at the last possible moment" (at para 20). The judge concluded that counsel's actions "speak to the lack of seriousness" with regard to the merits of the motion (at para 21). At the end of his reasons, he stated, "I will file further reasons for [this] decision at a later date" (at para 24).

[130] The accused's notice of appeal was filed with the registry of this Court on August 10, 2017. Grounds 1-8 and 20 in it raise arguments about unreasonable delay.

[131] On October 3, 2017, the judge issued additional written reasons. They are 14 pages in length. Much of the additional reasons provide more background information about the proceeding, none of which is controversial. He reiterated that there was no reasonable explanation as to the untimely filing of the motion and he rejected the submission that the "law regarding unreasonable delay changed in a substantive way in the days or weeks leading up to" the filing of the motion for unreasonable delay (2017 MBPC 41 at para 50). He described the motion as having "little merit" (at para 53) because any delay beyond the 18-month presumptive ceiling was clearly justified because of exceptional circumstances. He stated (at paras 64-65):

> I am satisfied that the case was particularly complex, such that the time the case took, was justified. The delay was reasonable and no stay would have issued.
>
> In those circumstances, I determined that the lack of proper notice to the Crown by Defence combined with an apparent lack of merit to the Application for unreasonable delay, warranted summary dismissal and justified proceeding with [the accused's] sentencing as planned.

[132] The accused says the original reasons of the judge were inadequate and prejudiced her ability to file a "complete" notice of appeal. She submits that the judge paid too much attention to the timeliness of the filing of the unreasonable delay motion and too little regard to the fact that the time between the laying of the charges and the imposition of sentence was almost 33 months. She argues that the Court's interest in finality and the demanding schedule of trial judges in the Provincial Court cannot take priority to her section 11(*b*) *Charter* right. The interests of justice must favour a full hearing on the merits of a claim of infringement of a *Charter* right. She asserts that there are no exceptional circumstances that can justify the lengthy delay in this case. Finally, she says that the judge improperly "put himself into the appellate arena" by issuing additional reasons after the notice of appeal was filed.

[133] The Crown argues that, in summarily dismissing the unreasonable delay motion, the judge did not err in principle, nor has a miscarriage of justice occurred. The motion had no merit and was brought in an untimely fashion without reasonable justification for its late filing. The record demonstrates that, for its complexity, the case moved reasonably through the court process such that a motion for unreasonable delay had no reasonable prospect of success.

The Standard of Review

Summary Dismissal of Unreasonable Delay Motion

[134] Dismissal of *Charter* arguments, without a full hearing and on a preliminary basis because of failure to meet the governing threshold, is a well-established exercise of a trial judge's case-management powers (see *R v Kutynec* (1992), 70 CCC (3d) 289 at 301-2 (Ont CA); *R v Vukelich* (1996), 108 CCC (3d) 193 at para 26 (BC CA), leave to appeal to SCC refused, [1996] SCCA No 461; *Winnipeg Child and Family Services v A (J) et al*, 2003 MBCA 154 at para 31; *R v Nixon*, 2011 SCC 34 at para 61; and *Cody* at para 38). As Dickson JA observed in *R v Simmonds*, 2018 BCCA 205, in order to ensure the orderly administration of justice and to minimise delay, judges have the responsibility to "ensure that only those applications which should proceed do proceed" (at para 104).

[135] In *Cody*, the Supreme Court of Canada identified that unreasonable delay motions should be screened by the trial judge on a threshold of whether or not the motion has a "reasonable prospect of success" (at para 38). If, after preliminary inquiries, the judge is satisfied that there is no basis on which the motion could succeed, it should be summarily dismissed.

[136] Preliminary screening of a *Charter* argument is an exercise of judicial discretion that will not be lightly interfered with on appeal unless the discretion was not exercised judicially (see *R v Pires; R v Lising*, 2005 SCC 66 at paras 46-47; *R v MB*, 2016 BCCA 476 at paras 45-47; and *R v Vickerson*, 2018 BCCA 39 at para 60).

Issuance of Additional Reasons

[137] There is a presumption of judicial integrity and impartiality. A judge's reasons are "presumed to reflect the reasoning that led [to the] decision" (*R v Teskey*, 2007 SCC 25 at para 19). The presumption may be displaced by cogent evidence to the contrary based on a holistic and contextual evaluation of the circumstances. McLachlin CJC described the question for the reviewing court in the following manner in *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 (at para 28):

> Procedural defects relating to reasons for judgment are many and varied. In all cases, the underlying question is the same: Would a reasonable person, apprised of all the relevant circumstances, conclude that the judge failed to come to grips with the issues and make an impartial and independent decision, thereby defeating the presumption of judicial integrity and impartiality?

Discussion and Conclusion

Issuance of Additional Reasons

[138] It is appropriate to deal first with the question of the challenge to the issuance of additional reasons.

[139] Issuing reasons to follow after pronouncing a decision is an acceptable judicial practice in a criminal case. It is not uncommon for busy trial judges to explain briefly what they decided and why they did in an abridged form and then release more detailed reasons at a later date. The mere fact that reasons are released following the filing of a notice of appeal does not bar appellate consideration of the reasons that follow (see *Teskey* at paras 16-17).

[140] I see no reason to consider the adequacy of the judge's original reasons in isolation as the accused argues; such an approach is contrary to *Teskey*. When both sets of reasons are considered together and read as a whole in the context of the trial record and the positions of the parties, the basis on which the unreasonable delay motion was summarily dismissed is adequately explained in a manner that is informative to the parties, provides public accountability and permits effective appellate review (see *R v REM*, 2008 SCC 51 at para 11). The additional reasons were released in a timely fashion—three months later. That period of delay is entirely reasonable (see *R v Cunningham*, 2011 ONCA 543 at para 37).

[141] There is no merit to the argument that the release of additional reasons prejudiced the accused in drafting her notice of appeal. She was able to articulate nine grounds of appeal to challenge the judge's decision on unreasonable delay based on his original reasons. Ironically, after the release of the additional reasons, the accused ultimately reduced her grounds of appeal relating to the dismissal of her unreasonable delay motion from nine to two and the entire notice of appeal from 42 grounds to nine.

[142] The record here does not provide any evidence, let alone cogent evidence, that the judge engaged in "result-driven reasoning" after the fact (*Teskey* at para 18) or that he "did not put his mind to the issues and decide them impartially" (*Cojocaru* at para 26) such that the presumption of judicial integrity and impartiality is displaced.

[143] There is no extrinsic evidence that, once the judge learned of the appeal, he attempted to buttress his earlier decision by providing more reasons to address the grounds of appeal. In his original reasons, given before the appeal was filed, he advised he was going to release further reasons. That he

did was a surprise to nobody (see *Regina v Hawke* (1975), 22 CCC (2d) 19 at 53 (Ont CA)).

[144] There is nothing intrinsic to the reasons themselves that assists the accused's argument that the judge put himself into the appellate arena. This was not a situation where the judge had difficulty making a decision or there was mystery to his thinking process (see *R v GDG*, 2013 MBQB 244 at para 63). He made a decision without hesitation that the motion was not a serious one.

[145] If one carefully reviews the original decision, the nine grounds of appeal in the notice of appeal before it was amended, and the additional reasons, it is evident that the judge did not craft more comprehensive reasons after the fact to arrive at a result after learning the case was going to be appealed (see *Hawke* at p 54; and *Cunningham* at para 43). Additionally, the style of the additional reasons is not a response to each of the grounds of appeal or a comment on the strength of the grounds of appeal, such that a reasonable observer would draw the inference that the judge, by releasing additional reasons, may have been attempting to defend or bolster his prior decision in the appeal court (see *Stuart Budd & Sons Limited v IFS Vehicle Distributors ULC*, 2016 ONCA 60 at para 84).

[146] In conclusion, the starting point must always be that judges are presumed to have done the job they are sworn to do (see *Cojocaru* at para 15). There is no good reason here to have a concern about the appearance of justice due to the simple fact that the judge issued additional reasons (see *Teskey* at para 17). The additional reasons were nothing more than supplementary reasons to the original reasons issued by a busy trial judge, as soon as practical, and reflected his reasons for deciding as he did in relation to the

accused's unreasonable delay motion. In my view, a reasonable person, apprised of all the relevant circumstances, would conclude that the judge did come to grips with the issues and made an impartial and independent decision.

Summary Dismissal of the Unreasonable Delay Motion

[147] Since at least the decision of Scott CJM in *R v D(DL)* (1992), 77 CCC (3d) 426 at 436, 438 (Man CA), it has been the accepted law in this province that, because an accused bears the onus of proof in questions involving section 11(*b*) of the *Charter*, he or she is required to give timely notice with proper particulars of a motion for unreasonable delay to the Crown and the Court. Further, it is within the discretion of the trial judge as to what procedure is best to adjudicate such motions in a manner that is fair to all, efficient and preserves the integrity of the trial process (see *R v Byron; R v Howardson; and R v Welwood*, 2001 MBCA 81 at para 24).

[148] Appropriately, the accused does not challenge the judge's conclusion that the notice provided of the unreasonable delay motion was untimely. The timing and sufficiency of notice in this case was totally unacceptable given the intensive case management and the late point in the trial process when the decision to bring the unreasonable delay motion was first made.

[149] Leaving aside the formalities of notice requirements under the Provincial Court Practice Directives (which do not have the force of law like rules of courts made pursuant to section 482(2) of the *Code* but, nevertheless, have legal implications for litigants in the sense that they represent the collective opinion of the Provincial Court as to how judges will exercise the implied power they do possess to manage and control proceedings before

them), what occurred in this case is completely contrary to what is expected of counsel as set out in *Jordan*.

[150] The Supreme Court of Canada's admonition in *Jordan* to end the fostering of a "culture of complacency within the [justice] system towards delay" (at para 4) is a watershed moment. It requires a re-evaluation of the attitudes and practices by all participants in the justice system to bring about the real change necessary to reduce delay. As was noted in *Cody*, "every actor in the justice system has a responsibility to ensure that criminal proceedings are carried out in a manner that is consistent with an accused person's right to a trial within a reasonable time" (at para 1).

[151] The accused's counsel's explanation that he made the motion, "when [he] thought of it" is not the proactive approach to prevent delay that *Jordan* mandates. *Jordan* was decided a year prior to when counsel for the accused first provided notice of the possibility of an unreasonable delay motion. Counsel for the accused is quite experienced and familiar with the expectation to be proactive to minimise delay and not squander finite judicial resources. Counsel's submission that a trial can be delayed indefinitely to accommodate litigation of an issue he just thought of (but seemingly believed in only half-heartedly based on what he told the Court on July 7, 2017), shrivels under careful scrutiny informed by the philosophy set out in *Jordan*. No purpose would be served to continue a trial to near its completion if counsel sincerely believed that the delay in the case was so unreasonable that the drastic remedy of a judicial stay of proceedings was appropriate.

[152] The accused's reliance on *R v Loewen* (1997), 122 CCC (3d) 198 (Man CA), does not assist her. In *Loewen*, a few days before the commencement of the trial, despite numerous pre-trial conferences, a motion

for unreasonable delay was filed. It was dismissed, without a hearing, in brief reasons for lack of reasonable notice as required by the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88. The Crown's objection to the motion was procedural; it did not suggest that there was no merit to it, unlike the situation here. In *Loewen*, Helper JA explained that "no case" was referred to the Court in which a trial judge refused to hear an unreasonable delay motion or in which an appellate court considered the appropriate remedy in the event of such a refusal (at p 205). The Court suggested that the trial could simply have been delayed to accommodate hearing the unreasonable delay motion on its merits. The reasoning of the Court was that, "Ultimately, procedural requirements must give way to constitutional rights" (at p 206).

[153] The situation here is quite different. The motion for unreasonable delay was filed over a year after the trial had started, as opposed to the eve of its commencement. In addition, in *Loewen*, there was no basis in the record to support the judge's exercise of discretion that there was no merit to the motion. Here, as I will explain, there was. Finally, care must be taken in placing too much reliance on *Loewen* in the post-*Jordan* era. As previously explained, the law now is more certain that mere assertion of a *Charter* right does not require holding a formal hearing to adjudicate a possible breach of it when the judge is of the view that is unnecessary. In addition, delaying a trial so that a motion that may have no merit can be heard is not appropriate because it is not fair to all, it is not efficient and it undermines the integrity of the trial process. Robust judicial screening based on the Court's trial-management power is now well accepted, unlike when *Loewen* was decided, and clearly so in the case of matters relating to section 11(*b*) of the *Charte*r (see *Cody* at para 38).

[154] While I appreciate that the judge made several critical comments in his two sets of reasons as to the untimely nature of the motion, I am persuaded he went further and satisfied himself there was no reasonable prospect of success to the motion given that was an issue the Crown raised in its arguments in favour of summarily dismissing the motion.

[155] The judge said that the motion lacked "seriousness" (2017 MBPC 30 at para 21) given that it was brought at the "last minute" and the "equivocal nature" (2017 MBPC 41 at para 53) of counsel's views about the motion as to the likelihood of its success. Leaving aside the inappropriateness of counsel for the accused suggesting to the judge that his future workload would be a function of what sentence he thought appropriate, I fail to understand why the judge would think there was much to the motion if the conduct and comments of counsel evidence that he had little confidence that it would likely succeed.

[156] Counsel for the accused never provided a coherent reason why the motion was not filed much earlier in the proceeding. He did not say it was an oversight; rather, the stated reason why the motion was brought at such a late date was based on counsel's misunderstanding of the law. The judge was correct that "the law regarding unreasonable delay [did not change] in a substantive way in the days or weeks leading up to" the decision to file a motion for unreasonable delay (2017 MBPC 41 at para 50). Counsel's misunderstanding of the law is further evidence of a lack of seriousness behind the motion.

[157] Finally, nothing about this case was "straightforward" on a qualitative assessment (*Cody* at para 65). The offence of concealing the body of a child is rarely prosecuted and the allegations here are unprecedented. Regardless of the dispute of the parties as to how much above the presumptive

ceiling the net delay in this case was (taking into consideration defence delay and unforeseen discrete events or unavoidable events (e.g., the prosecutor's illness or the accused's husband wanting to speak to counsel during the middle of the trial to discuss waiving spousal privilege), the accused did not provide any plausible argument to the judge as to why, given the undisputed complexity of this case, any excessive delay would not, at a minimum, be justified under the complexity exceptional circumstance discussed in *Jordan* (see paras 77-79), particularly given that the Crown followed a plan to minimise delay by extensive case management and speedy scheduling of continuation dates.

[158] At the screening stage of a *Charter* motion, counsel are required to put their best foot forward as to the particulars and merits of a motion. While only a skeleton of the argument is necessary, none of the substantive features of it can be held back. Counsel cannot circumvent a proper screening of the *Charter* argument based on the submission that all will be revealed if the time and effort is spent on a formal hearing. If counsel cannot, at the screening stage, articulate a basis on which the motion could succeed, it is within the discretion of the Court to dismiss the motion without proceeding with further inquiry (see *Vukelich* at para 25). The exercise of such a discretion is a function of the trial judge's right to control proceedings. As Moldaver J explained in *R v Jesse*, 2012 SCC 21, "Judicial resources are scarce and they ought to be used constructively, not wasted on pointless litigation" (at para 63; see also *R v Durette* (1992), 72 CCC (3d) 421 at 435-36 (Ont CA), rev'd on other grounds [1994] 1 SCR 469).

[159] I am not persuaded that the accused has met the high threshold to demonstrate that the judge did not exercise his discretion judicially in

summarily dismissing the unreasonable delay motion. In both sets of reasons, the judge emphasised the complexity of the case. He elaborated in his additional reasons that the case's complexity was of such a nature as to excuse the delay under both the complexity exceptional circumstance and as a transitional exceptional circumstance under the *Jordan* framework. That was a conclusion reasonably open to him. In my view, if the motion had proceeded to a full hearing, it was doomed to failure given that the complexity of the case, and the efforts to minimise delay, would have justified any of the net delay beyond 18 months to the date of sentencing.

Issue Six—Fitness of the Accused's Sentence

Background

[160] The accused was 43 years old at the time of sentencing. She had a good upbringing in a non-abusive environment with both of her parents. She graduated from community college with a diploma in business administration and has held employment throughout most of her adult life. She married at age 23. The marriage is stable despite challenges because of financial issues and conflict over her gambling addiction. Her husband has been supportive during these criminal proceedings. The accused maintains a healthy relationship with her two sons despite limited contact because of these charges.

[161] Her criminal record is as follows:

2016/04/28	Fraud Over $5,000 & Fail to Comply with Probation	1 day custody (equivalent of 30 days served), 2 years' supervised probation and restitution order

2014/09/30	Fraud Over $5,000	Suspended sentence and 2 years' probation

[162] The accused was in custody for part of her criminal proceedings and then released into a supervised house-arrest program with the Elizabeth Fry Society. It provided a positive letter of reference.

[163] The Crown sought a combined sentence of 11 years' imprisonment (one year on count one and two years consecutive on counts two to six) calling this the "worst case" of concealment of the body of a child. The defence requested concurrent sentences for the six counts and suggested a fit sentence would be time in custody (168 days).

[164] The judge concluded that each of the offences was, in his view, "separate and distinct" (2017 MBPC 28 at para 39) and consecutive sentences were "required" (*ibid* at para 38).

[165] The mitigating factors cited by the judge were the accused's assessment by a probation officer as being a "low risk" to reoffend; evidence that she was a good mother to, and in regular contact with, her two sons; no incidents of misconduct while on judicial interim release under house arrest; her good employment and volunteer history; and her willingness to take and complete counselling and programming.

[166] The aggravating factors identified by the judge were a criminal record for crimes of dishonesty; six occurrences of the offence taking place over a lengthy period of time; her familiarity with contraception, abortion services and medically assisted delivery of children but choosing not to avail herself of these services for the six pregnancies; "a significant degree of deliberation" to conceal the bodies; "not [demonstrating] any remorse"; a lack

of dignity displayed to the bodies by the manner of disposal; the negative impact of her conduct on those who discovered the bodies; the adverse effect of her actions on her two sons; and the significant harm to society caused by defeating the investigation of the cause of death of the six children. According to the judge, the aggravating factors "far outweigh[ed]" the mitigating factors (2017 MBPC 28 at para 79).

[167] The judge decided that the circumstances of the offences and of the accused made her an "unprecedented" offender (*ibid* at para 70); she was not sympathetic in some of the ways that other mothers charged with the concealing of a child's body can often be. In his view, given the facts and the accused's circumstances, "denunciation and personal deterrence are [the] paramount" (*ibid* at para 80) sentencing objectives with rehabilitation being a "secondary consideration" (*ibid* at para 81). He went on to comment that the sentences for the second and subsequent offences had to reflect the "increase in [her] culpability" (*ibid* at para 86).

[168] The judge imposed a sentence of six months' imprisonment on count one; one-year's imprisonment consecutive on count two; and two years' imprisonment on each of the remaining four counts, consecutive, for a total combined sentence of nine and one-half years' imprisonment. He concluded that, given the accused's personal circumstances, some adjustment for the purposes of totality was required to avoid a crushing sentence, so he reduced her combined sentence down to eight and one-half years' imprisonment, less credit for pre-trial custody on the basis of one and one-half days' credit for each day of pre-trial custody (252 days).

The Standard of Review

[169] Because sentencing is a delicate art, sentencing decisions are entitled to considerable deference on appeal (see *R v M (CA)*, [1996] 1 SCR 500 at para 91; *R v LM*, 2008 SCC 31 at para 14; *R v Nasogaluak*, 2010 SCC 6 at para 46; and *R v Ipeelee*, 2012 SCC 13 at para 38). The role of the appellate court is to not exercise its own discretion but, rather, to inquire as to whether the sentencing judge's discretion resulted in a sentence within an acceptable range and, if so, the sentence is fit and the appeal must be dismissed (see *R v Shropshire*, [1995] 4 SCR 227 at para 48; *R v Lacasse*, 2015 SCC 64 at para 49; and section 687(1) of the *Code*). Accordingly, appellate variation of a sentence is limited to cases where the sentence is "demonstrably unfit," meaning that, in the circumstances, it unreasonably departs from the principle of proportionality (*Lacasse* at paras 41, 52-55; and *R v Houle*, 2016 MBCA 121 at para 11) or the sentencing judge committed a material error, meaning that the error affected the sentence in more than an incidental way (see *Lacasse* at paras 44-45; and *Houle* at para 11). As Moldaver J explained in *R v Suter*, 2018 SCC 34, "In both situations, the appellate court may set aside the sentence and conduct its own analysis to determine a fit sentence in the circumstances" (at para 24).

Discussion and Conclusion

[170] While the accused alleges the judge made several errors in crafting the sentence, I am satisfied that two are material such that it is necessary to set aside the sentence, conduct my own analysis, and re-sentence the accused in light of the circumstances and relevant sentencing objectives and principles. The first material error is the judge double-counted. He increased the sentences for counts two to six because of count one, which amounts to double

punishment. The second material error is he sentenced the accused as if she had committed a more serious crime of child neglect or violence as opposed to a crime of dishonesty.

Increasing the Sentence for Counts Two to Six—"Double-Counting" Error

[171] A disproportionate sentence can arise from the related errors of increasing a sentence by double counting a circumstance or decreasing it by double subtraction. In my view, the former occurred here.

[172] I am not persuaded by the Crown's argument that it was open to the judge to increase the sentence for counts two to six because the accused's moral blameworthiness "[escalated] . . . as she continued to commit more offences." In my view, it was an error in principle for the judge to use the effect of the number of offences to increase the sentences for counts two to six because an offender cannot be punished twice for the same conduct. As Beveridge JA explained in *R v Naugle*, 2011 NSCA 33 (at para 32):

> To utilize the commission of the elements of other offences to justify the imposition of a maximum sentence for the core or underlying offence, and then impose consecutive incarceration for those other offences, would be to double count the moral culpability of the offender resulting in a sentence beyond one countenanced by the overarching principle of proportionality.

See also *R v DP*, 2008 ABCA 426 at para 4.

[173] The judge's error is material because, unlike in *Lacasse*, it is clear from the judge's reasons that he attached "real weight" (*Lacasse* at para 83; see also *R v Woodward*, 2011 ONCA 610 at para 48) in imposing the sentences for each of counts two through six on the purported aggravating

factor of the accused having previously concealed the body of a child by virtue of her conviction for count one. The judge increased the sentences for counts two to six for the following reason (2017 MBPC 28 at para 86): "The gravity of her actions and her moral culpability increased after the first offence and the sentences imposed need to reflect that increase in culpability." The sentence for count two was double that of count one and the sentences for counts three to six were four times higher than count one. There is no material factual distinction between the commissions of any of the counts that would require a higher sentence on any of them.

Sentencing for a More Serious Offence

[174] As was explained by Hamilton JA in *R v Bercier (TJ)*, 2004 MBCA 51, distinctions as to maximum sentences by Parliament "must be given meaning" by the courts (at p 16). The maximum punishment for concealing the body of a child is two years' imprisonment. This is the lowest possible maximum sentence in the *Code* for an indictable offence. By comparison, the somewhat similar offence of neglect or interference with a human body (see section 182 of the *Code*) is punishable by up to five years' imprisonment.

[175] There are many other offences in the *Code* that can occur during or after childbirth which have a higher maximum punishment than section 243. Five years' imprisonment is the maximum punishment for neglecting to obtain assistance in child birth (see section 242); infanticide (see section 237); failure to provide the necessaries of life to a child (see section 215(2)); and child abandonment (see section 218). Liability of up to life imprisonment or, in the case of murder (see section 235), a mandatory sentence of life imprisonment, arises from other offences that can be committed during or after child birth, such as killing an unborn child in the act of birth (see

section 238); criminal negligence causing death (see section 220(b)); and manslaughter (see section 236).

[176] Each of these more serious offences has an element of foul play by way of an act or some form of neglect that risks or endangers the life or health of a child or causes death. That feature is absent from section 243 which is concerned with only the concealment of the child's body, regardless of how death occurred. Section 243 is a crime of dishonesty—nothing more.

[177] Subject to those cases where section 725 of the *Code* applies (which has no relevance to this case), a sentencing judge must consider the charge for which an accused was convicted, not some other more serious charge which the facts may support but for which he or she was not convicted (see *R v Doerksen* (1990), 53 CCC (3d) 509 at 519-20 (Man CA)). As Russell JA explained in *R v Roberts*, 2006 ABCA 113, leave to appeal to SCC refused, 30282 (21 June 2017) (at para 19):

> An offender cannot be punished for unproven acts: ***Gardiner***, *supra* [*R v Gardiner*, [1982] 2 SCR 368]; ***Brown***, *supra* [*R v Brown*, [1991] 2 SCR 518]; ***R. v. Lees***, [1979] 2 S.C.R. 749. Doing so would violate the presumption of innocence, the principle of proportionality, and statutory rules governing the imposition of sentence for unproven acts: *Criminal Code*, s. 725.

[178] The accused was never convicted of any violent act or neglect in relation to a live child. I disagree with the Crown that the judge "correctly characterized the nature of the offences in his [sentencing] reasons." In his explanation as to why the accused's sentence had to be lengthy to satisfy the objective of denunciation, the judge stated as follows (2017 MBPC 28 at para 75):

> These were newly delivered infants, our most vulnerable. Expert evidence at trial showed the real possibility these children would have survived birth. The only person who can protect a newly delivered infant is their mother. We want as a society to believe that a mother would do everything to protect her newborn.

[179] In my respectful view, tying a denunciatory objective of a sentence to what society expects of mothers is not a correct characterisation of the offences for which the accused was convicted. The legal responsibilities of parents to care appropriately for a newborn child, who is alive and living independent of the mother, is covered by the more serious offences I have mentioned for which the accused was not prosecuted, let alone convicted.

[180] I am satisfied that the judge's error is material because a mischaracterisation of what societal norm a criminal offence is upholding in deciding how long a sentence must be to achieve the sentencing objective considered to be most important in the particular case may, and this case did, impact the ultimate sentence in more than an incidental way.

Re-Sentencing of the Accused

[181] The analysis to sentence an offender convicted of multiple offences is well established and requires a decision as to whether consecutive or concurrent sentences should be imposed; determination of a fit sentence for each count separately; and, finally, in cases of consecutive sentences, an application of the totality principle to ensure that the aggregate sentence is proportional (see *R v RJ*, 2017 MBCA 13 at para 13).

Consecutive or Concurrent Sentences

[182] Section 718.3(4)(b)(i) of the *Code* provides:

> **Cumulative punishments**
> **718.3(4)** The court that sentences an accused shall consider directing
>
> > **(b)** that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when
> >
> > > **(i)** the offences do not arise out of the same event or series of events.

[183] Much ink has been spilt attempting to rationalise when sentences for multiple offences should be served consecutively or concurrently. There are no "bright lines or road maps" because the decision is essentially a factual one (*R v Maroti*, 2010 MBCA 54 at paras 14-20).

[184] At the hearing of the appeal, it was conceded by the accused that there were no multiple births in this case. Based on the evidence of the gestational ages of the bodies, that would mean that each delivery was separated from the others by a minimum of about eight months (assuming the unlikely situation that the accused was essentially pregnant continuously over a four to five-year period). Given the lengthy period of time between when each concealment could have occurred, the offences are not sufficiently proximate to merit a concurrent sentence. In addition, each count addressed "separate legal interests" (*R v Boyd*, 2016 ONCA 380 at para 3), namely, the right of the state to determine the cause of death for each child. The accused's argument that one does not get three consecutive sentences for "stealing the bread, the milk, and the sugar from the grocery store" is not convincing because, in that hypothetical, there is but one legal protected interest: the store owner's right of property violated by the thief at the same time.

[185] I am also not persuaded by the accused's submission that, given the

wording of the counts, she could only be punished for one act of concealment relating to all six bodies between March 7, 2014 and October 20, 2014. The judge rejected the accused's argument that time was an essential element of the offences. His reasoning was correct (see *R v Colgan*, [1987] 2 SCR 686; and *R v B (G)*, [1990] 2 SCR 30 at 52-54). The counts were not objected to as they were worded before or during the trial. The wording of section 243 of the *Code* confirms that time is not an essential element of concealing the body of a child as the offence can occur at any time post-delivery. The Crown's theory that the concealment had been ongoing for years did not take the accused by surprise. Time was also not crucial to the accused's defence given the DNA evidence confirmed she was the mother of all six children and it was undisputed she rented the storage lockers and had exclusive access to them. I see nothing in the record that the judge's consideration that time was not an essential element of the offences resulted in an unfair trial or prejudiced the accused in some way.

[186] Like the judge, I am of the view that the degree of nexus between the offences in this case is sufficiently distinct such that consecutive sentences are appropriate. As he put it, the "offences relate to separate remains and were separate acts" (2017 MBPC 28 at para 88).

Fit Sentence for Each Count

[187] The sentencing objectives and principles set out in sections 718, 718.1 and 718.2 of the *Code* require that a fit sentence for each of the six counts be proportional to the gravity of the offence, preventing the state from verifying if a child was born alive or stillborn and the cause of death, and to the moral blameworthiness of the accused taking into account all of the circumstances related to her deliberate choice to dispose of the body of a child

to conceal her delivery of it.

[188] The counts, as laid in the Information, do not link a particular body to a corresponding count. It is impossible, on the record, to determine the exact sequence of the six deliveries. All that can be said is that, given the state of decomposition of the bodies, the expert evidence allows for the inference that Body #3 was the first delivery, followed by either Bodies #5 or #2. Bodies #1, #4 and #6 arrived thereafter in some order.

[189] This feature of this case has no impact on sentence because the exact sequence of the six deliveries is irrelevant. Each of the six offences was committed in the same way, but at different times. Although I find it incredulous that a healthy woman, who was described by one witness as "tall [and] thin", would be able to physically conceal six pregnancies and the resulting deliveries, the reality is that occurred. No plausible explanation was provided at the trial as to ***how*** this was done. The Crown's theory that the accused wore baggy clothing is not particularly compelling. However, ***what*** is undeniable is the accused hid the fact of these pregnancies and resulting deliveries. Several different witnesses, many of them with no motive to lie, all testified that the pregnancies and deliveries were concealed. The judge accepted their evidence as he was entitled to do.

[190] In a criminal trial, not every mystery need be answered. All that is relevant here is that, after each delivery, the accused made a concerted effort to dispose of each child's body with the intent to conceal her delivery of it. She hid the bodies in clothing, bags or detergent/concrete. She then placed them in sealed receptacles which she paid to store in a secure location for a lengthy period measured in years. She kept all of her actions secret, only being discovered by happenstance.

[191] In my view, for the purposes of assessing the accused's moral blameworthiness, none of the six counts was committed in a materially more or less significant way. Unlike the judge, I would conclude that the accused's moral blameworthiness for each count is exactly the same.

[192] While the accused disagrees with the weight the judge attached to the mitigating factors, she does not suggest that he failed to identify a relevant consideration. I therefore adopt the judge's list of mitigating factors as previously mentioned. Each of them applies to imposing a sentence for each of the six counts.

[193] The Crown appropriately conceded that the judge's comment that the accused's demonstrated lack of remorse was an aggravating factor was an error in principle (see *R v Wishlow*, 2013 MBCA 34 at para 3; and *R v Dick (KD)*, 2015 MBCA 47 at para 19). It should not be considered as an aggravating factor on any of the six counts.

[194] In my view, the judge's reliance on the accused's failure to exercise her reproductive rights in a particular way was another factor that cannot be taken as aggravating on any of the six counts. He used the following factors as aggravating (2017 MBPC 28 at para 79):

> - She knew she had medical options and chose not to access them;
>
> - She knew birth control was an available option but chose not to use it;
>
> - She was experienced in birth, delivery and therapeutic abortions and knew how to avoid this and did not reach out for help.

[195] The judge did an admirable job during the trial to limit the use of

character evidence regarding the accused strictly to issues relevant to the facts in issue, such as her knowledge that the children would likely have been born alive. However, I fail to see the relevance of the accused's reproductive choices during her pregnancy as a factor to aggravate the sentence for an offence that is only complete after a child has been delivered. In my respectful view, the effect of the judge's logic would be to increase the punishment for any woman familiar with birth control, abortion or assisted delivery who failed to make such a choice and then concealed the body of a child after it was delivered. That approach is far removed from the objective of the offence being to investigate homicides and has the consequence of punishing a mother's reproductive choices. In my view, it is an error in principle in sentencing for the offence of concealing the body of a child to treat as an aggravating sentencing factor the failure of a woman to make reproductive choices in a particular way.

[196] The accused says the judge also should not have considered the negative psychological impacts to those who discovered or dealt with the decomposing bodies as an aggravating factor. In fairness, the judge's reasons are open to interpretation that he went that far but, assuming he did, it is not necessary to decide whether a sentencing judge can consider the negative impacts of an offence on non-victims as an aggravating circumstance on an accused's sentence. While the impact of an offence on a non-victim is not a mandatory circumstance for a sentencing judge to take into consideration based on the wording of section 718.2(a) of the *Code*, that section is "not exhaustive" of a sentencing judge's discretion (*Lacasse* at para 85). Given there are other features of the case that are far more relevant in my view, I have decided not to consider the negative impacts of the offence on non-victims as an aggravating factor in the imposition of the accused's sentence

on any of the six counts.

[197] The accused does not challenge the other aggravating factors cited by the judge, nor do I see any difficulty with their relevance to each of the six counts.

[198] The sentencing objectives of denunciation, deterrence and rehabilitation are the primary considerations in imposing a sentence for the offence of concealing the body of a child.

[199] Prior decisions from the modern era involving other offenders convicted of concealing the body of a child have resulted in sentences ranging from a suspended sentence (see *R v Richards*, 2018 ONSC 5614); short period of incarceration (40 days) (see *R v Anderwald*, 2005 ABQB 888); and conditional sentence orders (6-14 months) (see *R v Morrow*, 2008 NBPC 7; *R v Taylor*, 2011 BCPC 85; and *R v Geraldizo*, 2016 BCPC 484). Lengthy probation orders typically followed the custodial dispositions. While each of these cases has unique circumstances, all of these offenders were in their early to mid-20's, lacked prior criminal records, pleaded guilty and expressed sincere remorse in mitigation of their behaviour. The methods of disposal of the bodies were rudimentary and easily detected. The reasons for the concealments followed common patterns: diagnosed mental illness (see *Anderwald* and *Morrow*) or evidence of post-delivery panic or emotional distress (see *Taylor*, *Geraldizo* and *Richards*).

[200] I agree with the judge that the accused's situation is not comparable in any way to these other cases where the circumstances provided good reason to emphasise the sentencing objective of rehabilitation. In my view, parity (see section 718.2(b) of the *Code*) is not an important factor in this case

because there are really no similar offenders who have gone to the lengths the accused did or have the type of personal circumstances of the accused.

[201] As was explained in *Levkovic (SCC)*, society is "gravely concerned with investigating offences committed against society's youngest" (at para 68). Commission of the offence of concealing the body of a child has the effect of impairing the state's ability to determine if a child was born alive or stillborn and what was the cause of death. Maintenance of a just, peaceful and safe society requires that such conduct be condemned and deterred by appropriate sentences. Unfortunately, history teaches that, for economic and social reasons, infanticide can be relatively widespread in societies who do not carefully monitor deaths occurring during or soon after childbirth. The comments of Chen PJ in *Geraldizo* are particularly apt (at para 26):

> Children are a vulnerable group in our society deserving and needing the government's protection. Scrutiny of their deaths is a pressing and significant state interest. The dignity of children requires that their bodies be properly disposed of. Civilized, regulated disposition of their bodies vests some humanity in the body.

[202] While the sentencing objective of deterrence, both general and specific, is a relevant consideration for this offence, I am less inclined than the judge to put as much significance as he did on specific deterrence. In terms of this accused, there is nothing in the record that would lead me to believe that society need reasonably fear this accused repeating this behaviour going forward, particularity given the notoriety of her behaviour and her age.

[203] I agree with the judge that the sentencing objective of rehabilitation is a secondary consideration in each of the six counts to denunciation. I say that because, for each of the six offences, there was a significant degree of

planning and deliberation by the accused to carry out each concealment. Thereafter, she expended considerable effort, and not insignificant financial resources, to continue the concealment for a lengthy period. Her efforts at concealment are in no way comparable to the cases mentioned in para 199. I also agree with the judge that the mitigating factors of the accused are not compelling. The accused is a mature offender who comes before the Court with a related record for dishonesty. She cannot enjoy the benefits that a guilty plea brings to mitigate her sentence based on demonstrated remorse. While she made some efforts to improve herself and was subject to restrictive conditions of judicial interim release for a lengthy period, her moral blameworthiness for each of the six offences is high making a sentence focussing on rehabilitation over denunciation inappropriate.

[204] Care must be taken with her unknown motive for committing these offences. She is entitled to remain silent, but she also must accept that the consequence of remaining silent is that her explanation for her behaviour cannot be assessed as either a mitigating or aggravating factor on sentence. In my view, the lack of an apparent reason of why the accused did what she did after each of the six deliveries is a neutral factor for imposing sentence on each of the six counts.

[205] Despite the principle of restraint (see sections 718.2(d)-(e) of the *Code*), I am satisfied that, because of the high moral blameworthiness of the accused in relation to each of the six counts, a term of imprisonment is necessary on each count. However, because this is really the accused's first real prison term, it should be as short as is reasonably possible.

[206] Taking into consideration all of the circumstances, the aggravating and mitigating factors, and the relevant sentencing objectives and principles,

a sentence of eight months' imprisonment for each count would be fit for a combined sentence of 48 months.

Application of the Principle of Totality

[207] The dual aspects of the principle of totality (see section 718.2(c) of the *Code*) are to ensure that a cumulative sentence for consecutive sentences does not exceed an offender's overall culpability (see *M (CA)* at para 42) and also to prevent a "'crushing sentence,' that is, a sentence not in keeping with the offender's record and future prospects" (*R v Wozny*, 2010 MBCA 115 at para 60).

[208] The factors to consider on a last look applying the principle of totality to a combined sentence for multiple offences to ensure it is not unduly long or harsh and respects the fundamental principle of proportionality were summarised this way in *R v Hutchings*, 2012 NLCA 2 (at para 84):

> (a) the length of the combined sentence in relation to the normal level of sentence for the most serious of the individual offences involved;
>
> (b) the number and gravity of the offences involved;
>
> (c) the offender's criminal record;
>
> (d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;
>
> (e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.

[209] The length of the combined sentence of 48 months is well beyond the normal level of sentence for the typical offender of this offence because

the circumstances here are so unusual. An individualised sentence for this accused must properly reflect how utterly egregious the conduct was.

[210] The number and gravity of offences involved are serious. The wilful impediment of the investigation of the cause of death of six children is shocking and deeply offensive.

[211] While the accused's record is related, it is minor. The accused's pre-sentence report confirms a lengthy prison sentence will have detrimental effects on her husband and children. She is an important part of their lives and has done her best over the years to contribute to the financial resources of her family. I reiterate that she is a mature person. Going forward, she will have to manage her gambling addiction and likely work in low-paying jobs. Her positive efforts while on intensively supervised judicial interim release and in pre-trial custody favour her being able to be law abiding even if she is incarcerated for a lengthy period. I am not satisfied that, given her future prospects, some form of penitentiary sentence may be harsh or crushing. To the contrary, it is entirely appropriate to properly communicate society's disapproval for what she has done and affirm the importance of state verification of the death of children.

[212] The other relevant factor in this case is the accused's high degree of moral culpability in each of the offences given the efforts taken to commit each concealment and maintain it over an extended period (see *R v James (GM)*, 2013 MBCA 14 at para 64).

[213] In order to ensure the aggregate sentence properly reflects the accused's overall culpability and to ensure her potential for rehabilitation is not extinguished by languishing too long in prison, I would reduce the

combined sentence by one quarter from four years' imprisonment to three years' imprisonment. I would achieve this by reducing the sentence on each of the counts from eight months consecutive to six months consecutive.

[214] A final comment. While neither the judge nor this Court had the benefit of submissions as to whether an adjustment to the accused's sentence for totality could lead to a conditional sentence (see section 742.1 of the *Code*), before determining the sentence I have arrived at, I considered the option of substituting a conditional sentence order, mindful of the principle of restraint and other relevant sentencing objectives and principles. I rejected that possibility for two reasons. First, conditional sentence orders cannot be "stacked" so that the total exceeds two years less a day (*R v Frechette*, 2001 MBCA 66 at para 4; see also *R v Middleton*, 2009 SCC 21 at para 43). Second, making all six sentences concurrent for reasons of totality and then imposing a sentence of two years less a day would not be appropriate. I am of the view that a proportional sentence for this accused for these offences must be a penitentiary sentence. In such circumstances, "a conditional sentence should not be imposed," notwithstanding pre-trial custody (*R v Proulx*, 2000 SCC 5 at para 58; see also *R v Fice*, 2005 SCC 32 at paras 15, 17; and *R v Lagimodiere*, 2008 MBCA 137 at para 30).

Conclusion and Disposition

[215] This is a deeply disturbing case. We will never know why these six little lights went dark due to the accused's appalling dishonesty. However, just as the mighty are not above the law, the unpopular are not outside of its protections, even on facts as troubling as here. While the accused was properly convicted of the offences, she did not originally receive a fit sentence based on a principled application of the law as she, like anyone else, is

entitled. The original sentence assumed certain culpable actions by the accused of which she was never tried or convicted.

[216] I would dismiss the conviction appeal.

[217] I would grant leave to appeal sentence, allow the appeal and vary the accused's sentence to six months' imprisonment on each of the six counts, consecutive, for a total combined sentence of three years' imprisonment as of the date of the original sentencing, less credit for the equivalent of 252 days of pre-trial custody. I would not alter any of the ancillary orders imposed by the judge other than to set aside the mandatory victim surcharges totalling $1,200 as section 737 of the *Code* was declared "of no force and effect immediately" two days after this appeal was heard and reserved (*R v Boudreault*, 2018 SCC 58 at para 98).

Mainella JA

I agree: Monnin JA

I agree: Pfuetzner JA