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(Winnipeg Centre)  
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## **COURT OF KING'S BENCH OF MANITOBA**

### **B E T W E E N:**

HIS MAJESTY THE KING,	)	<u>Colin Soul</u>
	)	for the Crown
	)	
- and -	)	
	)	<u>Saul B. Simmonds, K.C.</u>
CLAYTON MARCANO,	)	<u>Jessie S. Brar</u>
	)	for the Accused
Accused.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	February 7, 2024

### **McKELVEY J.**

#### **I. INTRODUCTION**

[1] Clayton Marcano ("Marcano") is charged with the July 28, 2021 second degree murder of A.M. This tragic and senseless incident occurred in and around a Salter Street convenience store/gas station, in the City of Winnipeg, in Manitoba. In the early morning hours, Marcano and A.M. became embroiled in a physical confrontation which resulted in multiple stab wounds to both parties. A.M. died as a result of an oblique stab wound , which partially transected the aorta and pulmonary artery. Marcano raises the defence of self-defence.

## II. **THE LAW**

[2] Section 235(1) of the ***Criminal Code of Canada***, R.S.C., 1985, c. C-46

("Code"), establishes:

### **Punishment for murder**

**235 (1)** Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

Crown counsel must prove beyond a reasonable doubt the essential elements of second degree murder:

1. that the accused caused the deceased's death;
2. that the accused caused the deceased's death unlawfully; and
3. that the deceased had the state of mind required for murder.

Marcano submits that if he, in fact, fatally stabbed A.M. he was acting in lawful self-defence under s. 34 of the ***Code***.

[3] Section 34 states:

### **Defence — use or threat of force**

**34 (1)** A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

### **Factors**

**(2)** In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[4] The Crown has the onus to prove beyond a reasonable doubt that the conduct of an accused, which would otherwise be criminal, was not done in self-defence or in defence of another. The self-defence provisions of the **Code** have recently been considered in **R. v. Khill**, 2021 SCC 37 and **R. v. King**, 2023 MBCA 37. In **Khill**, Justice Martin described the three fundamental elements which must be satisfied to establish the defence of self-defence. Those are well outlined in the **King** decision at paras. 22-28.

[22] Under section 34(1) of the *Code*, three fundamental questions must be addressed in all cases where self-defence is raised. They are described by Martin J in *Khill* as follows (at para 37):

...[F]irst, under s. 34(1)(a), the accused must reasonably believe that force or a threat of force is being used against them or someone else; second, under s. 34(1)(b), the subjective purpose for responding to the threat must be to protect oneself or others; and third, under s. 34(1)(c), the accused's act must be reasonable in the circumstances. Section 34(2) sets out nine non-exhaustive factors that shall be taken into account when considering if the accused's act was reasonable in the circumstances...

[23] Martin J goes on to describe the inquiry under section 34(1)(a) as the "catalyst" (at para 51) and explains that, for this section to apply, an accused's actual subjective belief that force or a threat of force was being used must be held on reasonable grounds (see para 53). This is a "blended or modified objective standard" (at para 54). In other words, the accused's subjectively honest belief must accord with "what a reasonable person with those relevant characteristics and experiences would perceive" (at para 57).

[24] Turning to the inquiry under section 34(1)(b), Martin J refers to this as the "motive" (*ibid* at para 51) which assesses the accused's "personal purpose in committing the act that constitutes the offence" (at para 59). In order for this provision to apply, an accused's subjective personal purpose for their act must be defensive rather than for "vigilantism, vengeance or some other personal motivation" (*ibid*).

[25] Finally, the inquiry under section 34(1)(c), referred to by Martin J as the "response" (*ibid* at para 51), looks at the nature of an accused's response to the use or threat of force to determine if it is "reasonable in the circumstances" (at para 62). This examines whether the actions of the accused accord with "the conduct expected of a reasonable person in the circumstances" (*ibid*). Martin J observes that section 34(1)(c) "is primarily concerned with the reasonableness of the accused's *actions*, not their mental state" (at para 66). As a result, she warns that "[c]ourts must therefore avoid treating the assessment of the reasonableness of the *act* under s. 34(1)(c) as equivalent to reasonable *belief* under s. 34(1)(a)" (at para 67). This aspect of the self-defence assessment is examined on a modified objective standard in that it "should not reflect the perspective of the accused, but rather the perspective of a reasonable person with some of the accused's qualities and experiences" (*ibid*).

[26] Section 34(2) of the *Code* provides structure and guidance for the inquiry under section 34(1)(c) in respect of the reasonableness of the accused's actions by setting out a non-exhaustive list of nine factors to be considered. The consideration of the factors under section 34(2) is not

optional. As noted by Martin J, “the fact finder ‘shall’ consider all factors set out in paragraphs (a) to (h) of s. 34(2) that are relevant in the circumstances of the case” (at para 68). The judge is to “decide which factors in s. 34(2) are relevant, applicable, and/or worthy of consideration based on the evidence actually adduced in the particular trial” (at para 127). If there is no factual basis to inform a factor, it need not be considered.

[27] Importantly, for the purposes of the present case, the tests under each of the three inquiries in section 34(1) differ: section 34(1)(a) has both a subjective aspect and a modified objective aspect; section 34(1)(b) is solely subjective; and section 34(1)(c) has a modified objective test of “reasonable in the circumstances” with mandatory factors that must be considered.

[28] Care must be taken to ensure that each line of inquiry is considered separately in accordance with its specific test. That is not to say that trial judges must slavishly follow a set formula or evaluate the inquiries or factors in the exact order set out in the *Code*. It is always the case that reasons must be read holistically and in light of the record in determining whether an error has been made (see *R v REM*, 2008 SCC 51 at para 37; and *R v Bourget*, 2019 MBCA 10 at para 5).

[5] In the event the Crown is unable to satisfy me beyond a reasonable doubt that at least one of the three essential elements for self-defence is not met, I must find Marcano not guilty of second degree murder and enter an acquittal. However, if the Crown is successful in meeting its burden of proving Marcano was not acting in lawful self-defence, A.M.’s death would constitute a culpable homicide. The determination would then turn to whether the evidence establishes that Marcano is guilty of second degree murder or the included offence of manslaughter. Section 234 of the **Code** provides that, “Culpable homicide that is not murder or infanticide is manslaughter”. Culpable homicide is set out in s. 229 of the **Code** and holds that:

**229** Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

- (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

[6] There are both subjective and objective components to the evaluation of whether an individual can successfully rely upon a claim of self-defence. An accused must not only subjectively and honestly perceive the need to respond to a use of force or threat, but must also reasonably perceive the threat or use of force and respond reasonably to it. The difficulty arises as to how objective standards should be contextualized to reflect an accused's circumstances and characteristics. The factors to be considered include the immediacy and nature of the danger or threats, the existence of other means to respond, and the proportionality of the responsive force used by an accused to the force used or threatened. In essence, the claim of self-defence must be reasonable in the circumstances of the case.

### **III. THE EVIDENCE**

#### **Police Scene Witnesses**

[7] The Crown called several police officers as witnesses who attended at the convenience store scene to lend assistance to the deceased and accused, as well as to gather evidence. There were photographs taken and video footage secured from cameras in the surrounding area.

[8] Detective Brian Hunter and his partner Constable Giovanna Wickett responded to a call for assistance at 1:11 a.m. on July 28, 2021. Detective Hunter testified that two severely injured males were located on the ground, south of the convenience store, in a back lane. Both were lying in a significant blood pool.

Detective Hunter observed a knife in the person of an unconscious male (A.M.) for whom he immediately rendered CPR assistance. He was unable to detect a pulse. CPR ultimately was conducted by the attending paramedics, who also were unsuccessful in their revival attempts.

[9] Detective Hunter testified that the second male was conscious, but injured, bleeding profusely, and in distress. The knife, which had fallen from A.M.'s body, was seized as an exhibit as were other items in the immediate vicinity. These were turned over to the exhibit officer (Icon. Christian Rivard). Detective Hunter testified that his partner attended to the conscious male (Marcano).

[10] Constable Wickett, in attending to Marcano, noted a large stab wound on his back along with a left leg arterial bleed that was spurting blood. Bleeding from the right leg was also seen. She observed that the extent of Marcano's blood loss could be life threatening. Two tourniquets were applied by her in order to negate Marcano from bleeding out. He was described as being very pale, and in a state of tachycardia.

[11] Constable Wickett went with Marcano by ambulance to the HSC at approximately 1:44 a.m. He was rushed into triage and resuscitation room no. 1. At a later point that day, Sergeant McLean advised her to charge and caution Marcano for murder once his medical condition stabilized. This was accomplished at 3:30 a.m. Constable Wickett opined that Marcano understood his rights and was alert at that time, albeit medical staff were still rendering treatment.

[12] Constable Tiffany Veldkamp and Icon. Christian Rivard attended to the scene to gather evidence, take photographs, and secure video footage. They arrived at approximately 4:00 a.m. and walked through the area which had been secured by other officers. A number of photographs were taken in order to capture the nighttime lighting conditions and the identification of possible exhibits.

[13] Icon. Rivard and Constable Veldkamp arrived at the HSC at approximately 10:20 a.m. in order to photograph Marcano's wounds, with the exception of the back injury. This wound was not photographed because of a pneumothorax and surgical requirement to inflate the lung. Marcano was described as cooperative throughout their interactions with him.

[14] Icon. Rivard and Constable Veldkamp re-attended the scene at around 10:45 a.m. in order to secure daylight photographs of the area, possible exhibits after the placement of numbered exhibit blocks and to collect video footage. The exhibits included two Puma sandals found in a south-east direction towards the lane; a knife sheath at the south-west corner of the convenience store; and at the actual confrontation site, a black backpack, a shoe, medical debris, the pooling of blood and clothing. Additionally, Constable Veldkamp located and photographed a "handgun" in the gutter of an adjacent garage. Upon arrival at the scene, these officers were told that something may have been thrown onto the garage roof resulting in the need to investigate that area. The handgun was an airsoft pellet gun – a BB gun. The Puma sandals were identified as belonging to the deceased, while the knife sheath was found between the sandals and the location of the



confrontation. Constable Veldkamp testified that there was an absence of a blood trail from the front of the convenience store to the site of the incident in the lane.

[15] Icon. Rivard testified as to the contents of the black backpack found at the scene. The items included Marcano's identification, toiletries, and a plastic container with BBs (bullet balls) which were consistent with the pellets in the airsoft gun found on the garage roof, along with a black metal Smith & Wesson knife which was at least six inches in length. A grey fanny pack was also located at the scene, which possibly contained drugs. The knife found embedded in A.M. was a "Schrade" brand with a green and grey handle. This weapon was also in excess of six inches in length.

[16] Icon. Rivard testified that there was significant blood loss in the back lane, encompassing a 10–12-foot radius. He confirmed that there was no blood trail from the convenience store or gas pumps towards the lane, nor was blood uncovered on the knife sheath. The Smith & Wesson knife, located in Marcano's backpack, was negative for blood. Further, there was no indication that it had been used during the course of this incident. Drugs were found in the front left pocket of A.M.'s shorts.

### **C.S.**

[17] C.S. was approximately 15 or 16 years of age on July 28, 2021. She testified that around midnight of a hot July 27, 2021, she awoke from a nap, was thirsty and wanted to get a drink from the local convenience store. Her best friend, A.M., aged 17, and A.M.'s cousin, Greysky Olson ("Olson"), were in attendance at her

residence. Olson, being older, went with them to the store, as they wished to walk with an adult. The convenience store could not be entered at the time because of COVID-19 pandemic restrictions and, thus, required those who wanted to make purchases to attend at a window for service. Her testimony was that Marcano came towards her group in a scary fashion. This resulted in her walking behind A.M. and Olson through the parking lot. She said that Marcano reached for Olson's phone or jacket, with the conversation between them turning from pleasant to "weird and drug related". She observed Marcano jog to where the gas pumps were located, pull out a "handgun", and commence shooting at them. The group began to run across the store lot towards the lane, with A.M. losing his "slides" (shoes). C.S. said that she knew the fired shots were not gun shots.

[18] C.S. testified that she had a grey fanny pack with her that morning, which A.M. took hold of as they all ran back down the lane. C.S. also acknowledged that her sheathed Schrade knife with a green handle was in the fanny pack. This weapon had been given to her by her father to protect her from wildlife. After A.M. ran back towards Marcano in the lane, the fight began. She was approximately 30 feet away with Olson pulling her down the lane. C.S. testified that A.M. said, "run, I love you". She observed that he was lying in the middle of the lane.

[19] Under cross-examination, C.S. acknowledged that Olson had consumed alcohol at her residence, but she did not recall any marihuana use. She said that A.M. had not drank alcohol, albeit conceding that she was asleep during most of

the evening. She did not know if he had used marihuana. Initially, C.S. testified that the Schrade knife was not taken out at the convenience store window. She contended that it was only after A.M. had taken her fanny pack in the lane that the knife was introduced.

[20] C.S. contradicted her testimony, under cross-examination, and acknowledged that A.M. took the knife out in front of the convenience store. It was then that Marcano retreated around the corner of the store in an effort to move away from her group. She was aware that the "handgun" accessed by Marcano was an airsoft BB gun. C.S. recalled that one of her shoes was struck by a pellet while she was fleeing down the lane. She also acknowledged that A.M. ultimately confronted Marcano in the laneway after he went back towards the store. She did not see much of what transpired in terms of the actual confrontation, nor could she address how many punches or blows were exchanged.

**Dr. Charles Littman**

[21] Dr. Littman conducted the A.M. autopsy on July 29, 2021. His qualifications as a forensic pathologist were not challenged. I was satisfied that he was qualified to give the expert opinion requested on cause of death. Dr. Littman testified that there were seven sharp force injuries inflicted, along with 17 blunt force superficial injuries to A.M.'s person. The police brought the Schrade knife recovered from the scene to the autopsy. Dr. Littman opined that all seven wounds could have been caused by that blade. The degree of force required to inflict any of the

injuries was said to be dependent on the blade's sharpness, skin thickness, and whether bone was struck.

[22] The cause of A.M.'s death was an oblique stab wound to the central chest area which perforated the pericardium, and partially transected the pulmonary artery and aorta. The direction of that stab wound was from front to back, downwards towards to the right and had a depth of approximately eight centimeters. This wound would have caused death within minutes. Certain of the other wounds were significant because of blood loss, lung collapse, and liver damage, albeit those, if treated promptly, would not have proven to be fatal.

[23] Dr. Littman could not discern whether there were a number of hands on the knife at the time any of the wounds were inflicted on either party or whether a struggle was ensuing. The superficial abrasions could potentially have been caused by a struggle on the lane's concrete surface. He also could not say that it was incorrect to suggest that Marcano was fighting for his life.

[24] Dr. Littman testified with respect to Marcano's injuries including the stab wound to his back which resulted in a pneumothorax with associated breathing, lung, and chest problems. Such an injury was said to be potentially life threatening. In his view, the tourniquets applied to Marcano's legs by Constable Wickett likely saved his life. The fact that he received eight units of blood and TXA for clotting would be indicative of a significant amount of blood loss placing Marcano's mortality at risk.

[25] Dr. Littman was cross-examined on Marcano's medical condition as documented in the HSC records (Exhibit No. 9). It was confirmed that Marcano was brought into the hospital, by ambulance, showing hypotensive tachycardia with a heart rate into the 120s and his initial blood pressure was systolic 70s on 40s. He was noted to be pale with a weak pulse. A chest tube was inserted because of the pneumothorax and shortness of breath. Dr. Littman noted that Marcano's condition was documented as "++unstable" with his life in danger. He required immediate medical attention. The anterior stab wound to the leg which cut the arterial artery was also affirmed to be life threatening. Dr. Littman opined that it was feasible that Marcano was engaged in a struggle as his injuries were consistent with being stabbed by a person coming from behind. It is possible he was frightened for his own safety, while struggling on the ground, and perceived he was fighting to preserve his life.

**Dr. Brendan McCarthy**

[26] Dr. Brendan McCarthy provided a report dated January 8, 2024, with respect to the admission and treatment of Marcano at HSC (Exhibit 10). Dr. McCarthy confirmed that Marcano had sustained multiple stab wounds to the right posterior chest, right thigh, and left calf. Upon admission, he was unstable and hypotensive with low blood pressure. The stab wounds were regarded as being "... life-threatening in nature as he did come in hypotensive after having significant hemorrhage and without proper treatment in the hospital that he was provided, this could have been fatal" (Exhibit No. 10).

**Detective Sergeant Stephen McIntyre**

[27] Detective Sergeant McIntyre, along with his partner, was assigned to interview a potential witness to the July 28, 2021 events, being Clevon Day ("Day"). After a *voir dire*, Day's statement was allowed into evidence based on a ruling that it constituted a principled exception to the hearsay rule. Detective Sergeant McIntyre testified that he had no reason to doubt Day's version of events.

**Day Interview**

[28] Day was in attendance at the convenience store at the relevant time, as he had just purchased a beverage. He noted a man at the scene who he described as being funny and engaging with others who were in line for service. While he could not recall the words being exchanged, it was his impression that the man was endeavouring to be sarcastic and joking around. The man was said to have started talking to a "kid" in line when another "kid" ran towards him wielding a knife and a chase began. The man ran but then returned brandishing a BB gun. These events occurred quickly, with the man chasing the "kid" possessing the knife. The man appeared to have lost sight of the "kid", as he began looking around the vehicles in the parking lot area. Day said in his statement that, "... then all of a sudden they – they came out of somewhere. And then I didn't see them after that for awhile because they – they – they went out of sight" (Interview, p. 17, lines 20-23). It was at that point that Day heard three "booms" being shots from the BB gun. Shortly thereafter he heard the man saying, "Call the ambulance" and "Help". Day attended to the lane and found the man asking for help with the

"kid" laying on his back beside him. The man was grabbing his right leg that "had a big -- big -- big hole" which was bleeding (Interview, p. 21, line 14). He did not see any weapons and no one else was in the area. The police attended in approximately two minutes.

[29] Day acknowledged that a BB gun was used by the man, with the "kid" being in possession of a skin knife. He had no idea as to the reason for the confrontation.

**Detective Sergeant Anthony Plett**

[30] Detective Sergeant Plett provided testimony with respect to the video evidence secured from cameras in the convenience store/gas pump/lane areas. There is no audio accompanying any of the video surveillance secured. The first video surveillance viewed was with respect to three outdoor cameras attached to the convenience store. The first camera (outdoor no. 2) showed Olson, A.M. and C.S. arriving at the store parking lot at 1:01:26 a.m. C.S. and A.M. were standing to the right of the front doors/window area with Olson between vehicles in the parking lot. Marcano was to the north of the three and appeared to be interacting with them. At 1:02 a.m., Olson moved closer to, and was speaking with Marcano, followed by all three moving towards him at 1:03:30 a.m. as he backed up. Detective Sergeant Plett testified that A.M. appeared to have something in his hand. At 1:03:44 a.m., A.M. chased after Marcano and out of camera view. Olson and C.S., followed them out of camera range soon after. At 1:04:07 a.m., Marcano is observed to be running towards Salter Street, near Flora Avenue, with the others remaining in the parking lot. Shortly thereafter, A.M. and C.S. are seen running

southbound across the front of the convenience store on the sidewalk, with Olson walking in the same direction. Several seconds later, Marcano also walks southbound holding a black backpack in his left hand and a handgun in his right hand. He then walks in the parking lot area with the gun visible looking into vehicles in what would appear to be an attempt to locate A.M. and possibly the others as well. Shortly thereafter at 1:05:15 a.m., A.M. can be seen running northbound towards the gas pumps on the east side of Salter Street. At 1:05:19 a.m., he runs southbound towards the lane.

[31] Outdoor camera no. 1 recounts what transpired at 1:01 a.m., but then continued the video from where outdoor camera no. 2 concluded relevant footage. At approximately 1:05:14 a.m., Marcano moved southwards towards the dumpsters located in the lane by the convenience store. At 1:05:23 a.m., A.M. ran past the gas station pumps in a southerly direction towards the dumpsters and lane.

[32] There were two cameras affixed to a garage on Stella Avenue, one with a westbound view and the other with an eastbound vantage point. At 1:04:21 a.m., four individuals are noted to be walking/running easterly in the lane with three looking back behind them. One of the four individuals was not identified, nor involved in this matter. The other three were A.M., C.S. and Olson. At 1:04:33 a.m., A.M. carrying a fanny pack over his shoulder, began to retrace his steps in a westerly direction towards the convenience store dumpster area. Shortly thereafter, both Olson and C.S. are also seen to be walking westerly towards the



store (1:05 a.m.). At 1:05:12 a.m. to 1:05:18 a.m., Olson and C.S. are observed to run eastbound in the lane as C.S. looked back towards the dumpsters.

[33] A video camera, which faces westbound and towards the convenience store, was in place on a Flora Avenue garage. At 1:04:25 a.m., three persons were seen running in an easterly direction down the lane (A.M., C.S. and Olson) with an unidentified person walking in the same direction. The three noted individuals stopped, with A.M. turning and walking back towards the convenience store dumpsters. He was followed shortly thereafter by C.S. and Olson. At 1:05:14 a.m., both C.S. and Olson are again seen running eastbound down the lane. At 1:05:18 a.m., Marciano appears around the dumpsters pointing the BB gun towards the fleeing C.S. and Olson. He then turns back at 1:05:20 a.m. towards the convenience store lot but is observed to quickly raise his right hand and point the handgun at a figure emerging from behind the dumpsters. At 1:05:24 a.m., A.M. knocks Marciano to the ground and the physical confrontation commences. By 1:05:31 a.m., both individuals were grappling on the ground with Marciano under A.M. Shortly thereafter, at 1:05:45 a.m., Marciano gained a superior position over A.M. and appeared to be using his right arm in a striking or plunging motion. At 1:05:50 a.m., Marciano was on his feet with A.M. on the ground and, again, a striking motion was transpiring. At 1:06 a.m., A.M. was motionless on the ground, at which time one further distinct striking motion was performed by Marciano to A.M.'s body. Marciano picked something up from the ground at 1:06:22 a.m. and tossed it upwards onto the garage roof (the BB gun).

By 1:06:25 a.m., he was bending over and then seated beside A.M. at 1:07 a.m. The individual, who was later identified as Day, appears on the scene. Both A.M. and Marcano were on the ground with police attending at 1:12 a.m.

[34] Under cross-examination, Detective Sergeant Plett acknowledged that the video footage illustrated:

- A.M. possessed a knife at the store window;
- C.S. gave conflicting evidence as to what transpired at the convenience store window, particularly as regards the knife;
- Marcano ran from the window location of the store with A.M. in pursuit carrying a deadly weapon;
- Olson never entered into a physical confrontation with Marcano;
- Olson, C.S. and A.M. initially proceeded easterly down the lane. However, A.M. turned and retraced his path back towards the convenience store;
- Marcano, at 1:05:10 a.m., chased A.M. towards the gas pumps with the handgun levelled. He turned away and, soon thereafter, was at the lane with the pellet gun in his hand, likely firing at the fleeing C.S. and Olsen. He quickly discontinued the chase and turned back and proceeded towards the convenience store;
- A.M., at 1:05:14 a.m., was near the gas pumps but moving towards the dumpsters with an item in his right hand that was consistent with it being a knife;

- A.M. jumped out and attacked Marcano in the area of the store dumpsters, wounding him;
- Marcano was never seen with a knife prior to the struggle, nor was he observed to have stabbed his own body;
- Marcano was wounded, albeit it is impossible to tell when or how many wounds occurred;
- it could not be discerned if both individuals had their hands on the knife at any one time;
- the attack in the back lane began through A.M.'s initiative;
- the number of blows struck by each individual could not be discerned;
- Marcano may have been endeavouring to preserve his own life;
- it is possible that Marcano was on the ground calling for help and cradling A.M.'s head after the confrontation.

#### **IV. SUBMISSIONS**

##### **The Crown**

[35] The Crown acknowledges that C.S.'s testimony is of limited use as it has been controverted by the video evidence and through cross-examination. The Crown went through the video timeline from 1:01 a.m. to 1:06 a.m. and submitted that Marcano could and should have made alternate decisions after initially being chased by A.M., which would have halted the ultimate confrontation, such as turning and walking away. The incident then would have been over. Instead, he

escalated the situation by responding with a BB gun and endeavouring to search for A.M. Marcano ultimately gave chase and levelled the handgun as A.M. proceeded towards the gas pumps before moving to the lane to fire at the fleeing C.S. and Olson. Further, at one point during the actual physical confrontation, Marcano was in control of the struggle and on top of A.M. At that juncture, he could have terminated the encounter.

[36] The Crown reviewed the s. 34(2) factors and submitted:

- (a) the nature of the force or threat - there was a knife attack by A.M., albeit the threat no longer existed when Marcano gained the upper hand in the confrontation;
- (b) once Marcano was above A.M., he did not stop the attack, nor did he endeavour to seek assistance from others in the area;
- (c) both Marcano and A.M. were complicit in the altercation, and both had an opportunity to retreat. That said, Marcano pursued the three individuals with his BB gun until the final encounter from which he could have walked away;
- (d) Marcano utilized a handgun;
- (e) Marcano was noted to be a taller individual and was approximately 21 years older;
- (f) the nature, duration, and history of the relationship between the parties encompassed approximately five minutes of time. While A.M. chased Marcano on one occasion, Marcano chased A.M. twice

during their short period of interaction. There is no known history or relationship between these two individuals;

- (g) Marcano's response to the use or threat of force was not proportionate as he gained the upper hand during the struggle and could have terminated the encounter.

[37] The Crown submitted that, pursuant to s. 34(1)(c) of the **Code**, the actions of Marcano were unreasonable in the circumstances. The altercation escalated quickly, albeit Marcano could have stopped his attack. Accordingly, his response to the threat or use of force was not proportionate.

[38] The Crown relies upon the decisions in **R. v. Munro**, 2023 MBKB 96 (under appeal) and **R. v. Mousseau**, 2023 MBKB 7. The Crown submitted that the fact scenario in this case is stronger than existed in **Mousseau** where the accused was found guilty of the included offence of manslaughter. Here, Marcano was seen to plunge the knife into a lifeless A.M., step back, pause, and then thrust the knife once more. The pause between each of the blows demonstrated intent and not an individual acting in self-defence. While acknowledging that A.M. made errors, such as introducing the knife, that action should not have resulted in his death. Marcano undertook a clear decision to kill.

### **The Defence**

[39] The defence relies principally upon Day's statement and the video evidence. Initially, at the convenience store window, Marcano was not an aggressor. Instead, he was joking with a "kid" when another came towards him wielding a knife. C.S., under cross-examination, acknowledged that A.M. pulled out the knife while at the store window. Marcano, as previously indicated, backed up with all three following and chasing him towards Salter Street. Marcano made the decision to access his BB gun from the backpack rather than the knife he possessed. It could be inferred that the BB gun was being utilized to scare the three individuals who had confronted him.

[40] When Marcano looked down the lane, just prior to the ultimate altercation, he saw three individuals. Seeing three persons, one who was later known to be an unidentified pedestrian, could have resulted in an inference, in Marcano's mind, that the group of three were leaving the area. Accordingly, he chose not to pursue them and turned back towards the convenience store. It was then that A.M. aggressively attacked him from behind the dumpsters. Marcano was injured by the aggressor and in peril. The confrontation itself lasted approximately 36 seconds. The two males were seen to be rolling on the ground and endeavouring to take control of the knife. It is submitted that Marcano was entitled to take proportionate actions to save his life.

[41] The defence submits that perhaps A.M. had imbibed in substance use during the course of the evening, which might offer an explanation for his

behaviour. (There is no concrete evidence in that regard.) That said, no evidence exists with respect to possible insults being exchanged between the group and Marcano, nor has a reason been established for A.M. to have introduced the knife into the scenario. During the course of the physical confrontation, should Marcano have stopped endeavouring to get the knife while blood was spurting from his leg and his breathing compromised? Did he have concern for his life? The answers to these questions were argued to be readily apparent as Marcano was endeavouring to preserve his life. Further, while he may have gained the upper hand during the struggle could it have been subsequent to the lethal wound having already being inflicted upon A.M., or, possibly, did A.M. roll on to the knife? It is argued that proportionality allows Marcano to take the steps that he did, and a determination should be accorded that his actions were reasonable and proportionate.

[42] In terms of s. 34(1), the defence submits that Marcano is not guilty of a culpable homicide as he believed on reasonable grounds that force or a threat of force was being used against him. Further, the act that constitutes the offence was committed for the purpose of defending himself and was reasonable in the circumstances of being attacked by an armed individual who had, for no reason, earlier brandished and confronted him with a weapon.

[43] The defence argued the s. 34(2) factors as follows:

- (a) Marcano was faced with a lethal weapon which had already caused him grievous harm;

- (b) the extent of the force is significant as demonstrated by the injuries suffered;
- (c) Marcano endeavoured to fend off A.M. through the use of a BB gun instead of the utilization of his own knife;
- (d) A.M. used the knife and introduced it into the situation. Further, he caused serious harm to Marcano;
- (e) the body types of these individuals were similar, albeit Marcano is taller;
- (f) there was no evidence that the parties knew one another or had any animosity until A.M. introduced the knife;
- (g), (h) the actions of A.M. were not lawful and, accordingly, Marcano's response was proportionate as his life was at risk.

[44] The defence relies upon the decisions in *R. v. King and Laquette*, 2021 MBQB 274, *R. v. King*, 2023 MBCA 37, *R. v. King*, 2022 ONCA 665, and *R. v. Villaroman*, 2016 SCC 33.

[45] In all the circumstances, an acquittal should be entered as Marcano acted in self-defence from the attack of a knife-wielding A.M. In the event an acquittal is not found, the relevant offence committed is that of manslaughter.

## **V. ANALYSIS**

[46] As indicated, Marcano is charged with second degree murder. Consequently, Crown counsel must prove each essential element of that offence beyond a reasonable doubt:



- i. that Marcano caused A.M.'s death;
- ii. that Marcano caused A.M.'s death unlawfully; and
- iii. that Marcano had the state of mind required for murder.

I am satisfied that Marcano's conduct and involvement in the struggle and confrontation with A.M. caused the fatal outcome. It is possible that the fatal wound was occasioned while the two combatants struggled on the ground for control of the knife with the weapon's trajectory informed through contact with the pavement. However, in a consideration of all the evidence, I am satisfied that Marcano's involvement in the confrontation would, at the very least, have significantly contributed to and caused A.M.'s death beyond a reasonable doubt.

[47] The second element of second degree murder requires that an accused must have caused another's death unlawfully. It is not always a crime to cause another person's death. The Crown must prove beyond a reasonable doubt that Marcano was not acting in lawful self-defence under s. 34 of the **Code**. I am satisfied, based upon a consideration of all the evidence, that there is an air of reality to Marcano's defence of self-defence as regards how the events unfolded during the course of the approximate five-minute interaction between the parties and the circumstances of the actual physical confrontation. The elements of self-defence that must be considered are whether:

- i. Marcano believed that force or the threat of force was being used against him and that belief was based on reasonable grounds;

- ii. Marcano committed the act for the purpose of defending or protecting himself from the use or threat of force; and
- iii. Marcano's act was reasonable in the circumstances.

[48] The three elements established under s. 34 of the **Code** were well outlined in the **Khill** decision and are described, as earlier indicated, as the catalyst, motive, and the response.

[49] An accused person who believes on reasonable grounds that force is being used or threatened against them may do something that otherwise would be an offence but be acting lawfully in circumstances where what they do is for the purpose of defending or protecting themselves from that use or threat of force and their action is reasonable in the circumstances as the accused knew or honestly believed them to be. This is so even if an accused provoked the use or threat of force.

[50] In this case, has the Crown proved beyond a reasonable doubt that Marcano did not believe that force or the threat of force was being used against him, or that Marcano's belief was not based on reasonable grounds – the catalyst? This area involves a consideration of what Marcano reasonably believed in the circumstances and whether that belief accords with what a reasonable person with his same relevant characteristics and experiences would also perceive as a threat or use of force. An accused may even be mistaken in their belief about the use or threat of force as long as that mistake is reasonable in the circumstances, as known or believed to be. Justice Martin, in **Khill**, stated:

[53] Importantly, the accused's actual belief must be held "on reasonable grounds". Good reason supports the overlay of an objective component when assessing an accused's belief under s. 34(1)(a) and in the law of self-defence more generally. As self-defence operates to shield otherwise criminal acts from punitive consequence, the defence cannot depend exclusively on an individual accused's perception of the need to act. The reference to reasonableness incorporates community norms and values in weighing the moral blameworthiness of the accused's actions (*Cinous*, at para. 121). It "is a quality control measure used to maintain a standard of conduct that is acceptable not to the subject, but to society at large" (Paciocco (2014), at p. 278).

[54] The test to judge the reasonableness of the accused's belief under the self-defence provisions has traditionally been understood to be a blended or modified objective standard. Reasonableness was not measured "from the perspective of the hypothetically neutral reasonable man, divorced from the appellant's personal circumstances" (*R. v. Charlebois*, 2000 SCC 53, [2000] 2 S.C.R. 674, at para. 18). Instead, it was contextualized to some extent: the accused's beliefs were assessed from the perspective of an ordinary person who shares the attributes, experiences and circumstances of the accused where those characteristics and experiences were relevant to the accused's belief or actions (*Lavallee*, at p. 883).

[51] In this case, the evidence demonstrates that A.M., equipped with a knife at the convenience store window, commenced a chase of Marcano for an unknown reason. This was followed by Marcano arming himself with a BB gun and pursuing A.M., Olson and C.S. at approximately 1:04 a.m. Ultimately, at 1:05:18/19 a.m., Marcano, while turning back to the convenience store after abandoning his chase of C.S. and Olson down the lane, was seen to raise his right hand holding the BB gun as A.M. attacked him with the knife in hand. The raising of the right arm by Marcano could have been undertaken to fend off the attack, rather than endeavouring to fire the handgun. This attack was a blindside action by A.M. on Marcano who, it could be inferred, thought all contact with the three individuals had broken off. As previously indicated, there were three individuals proceeding easterly down the lane, being C.S., Olson, and an unidentified pedestrian. It can

be reasonably inferred that Marcano thought A.M. was the unidentified pedestrian in the lane and that the three had discontinued their interactions with him and left the area. A.M.'s surprise attack and resultant struggle had him being on top of Marcano for a short period of time, after which Marcano gained the superior position (1:05:45 a.m.). All in all, the confrontation lasted for approximately 36 seconds with both individuals struggling on the ground in a likely attempt to gain control of the knife. Both parties sustained serious sharp force injuries in the encounter, as well as superficial wounds from the concrete lane. It is difficult to discern if Marcano sustained defensive injuries after viewing photographs of his bloodied hands (Exhibits 2, pictures 27-33). However, he did suffer wounds to his back, legs, head and arm. Certain of those wounds were life-threatening according to Dr. Littman's testimony and the report of Dr. McCarthy. Those wounds likely were occasioned during the early stages of A.M.'s attack.

[52] I am satisfied beyond a reasonable doubt that Marcano reasonably believed, in the circumstances as he knew or believed them to be, that force was being used or threatened against him. Further, a reasonable person in the same circumstances would believe that force was being used or threatened. A surprise attack by a knife-wielding individual would reasonably be viewed as an act of force or threat of force.

[53] The next question to be determined is whether the Crown has proved beyond a reasonable doubt that Marcano did not commit the act for the purpose

of defending or protecting himself from the use or threat of force – the motive?

As was said in *Khill*:

[59] The second element of self-defence considers the accused's personal purpose in committing the act that constitutes the offence. Section 34(1)(b) requires that the act be undertaken by the accused to defend or protect themselves or others from the use or threat of force. This is a subjective inquiry which goes to the root of self-defence. If there is no defensive or protective purpose, the rationale for the defence disappears (see *Brunelle v. R.*, 2021 QCCA 783, at paras. 30-33; *R. v. Craig*, 2011 ONCA 142, 269 C.C.C. (3d) 61, at para. 35; *Paciocco* (2008), at p. 29). The motive provision thus ensures that the actions of the accused are not undertaken for the purpose of vigilantism, vengeance or some other personal motivation.

[54] It is necessary to consider Marcano's state of mind and his purpose in doing what he did. His purpose must be to defend himself from A.M.'s use or threatened use of force. Again, the evidence to be considered is the fact that A.M. armed himself with a weapon at the window of the convenience store and commenced a chase of Marcano. It is acknowledged that Marcano then accessed a BB gun, which could be inferred was for the purpose of scaring A.M. and the others. Marcano also carried a knife in his backpack, but did not utilize it at any time. The nature or tenor of the verbal exchanges between the parties is unknown. It is necessary to consider an accused's actions as they evolve during the progression and/or escalation of an incident. The full context of an encounter must be evaluated. This includes A.M.'s initial chasing of Marcano with a knife; Marcano's response by arming himself with a BB gun, pursuing and firing the BB gun at C.S., Olson and A.M.; along with the final confrontation when A.M. launched his attack at or near the dumpsters on the southside of the convenience store. It was an aggressive attack, which lasted approximately 36 seconds while the parties

struggled on the ground, likely in an effort to gain control of A.M.'s knife and preserve their lives. Marcano sustained knife wounds to his back, head, arm, and legs. I am satisfied that he was endeavouring to save his life when he engaged in the ultimate 36-second altercation with A.M. where adrenaline and fear would be flowing, along with a reasonable reaction to what had just occurred through being attacked. It was a fluid situation. It can be inferred from the video evidence that Marcano was initially stabbed in the back and other locations of his body by A.M.

[55] The subjective inquiry required under this question must be answered by holding that Crown counsel has not proven beyond a reasonable doubt that Marcano did not commit the act for the purpose of defending himself from A.M.'s threat or use of force. Marcano acted for a defensive purpose. His actions were carried out in order to defend himself from the use or threat of force by A.M. brandishing a knife. There is no indication that his actions were anything other than defensive in nature, and were not vigilantism, vengeance, or some other personal motivation. This is so even though he ultimately secured a superior position during the course of the heated physical struggle.

[56] The next area to be considered is whether the Crown has proved beyond a reasonable doubt that Marcano's actions were not reasonable in the circumstances – the response? In consideration of this area, it is necessary to query what an ordinary person who shares Marcano's attributes, experiences, and circumstances would have done in his position. This is not a consideration of individuals whose

perceptions are based on factors such as racism, substance use, excessive fear, or abnormal vigilance. This area is grounded in the conduct expected of a reasonable person with those same characteristics and experiences of Marcano in the same situation. This is not the time to consider what Marcano thought, but rather an evaluation as to the reasonableness of what he did in the circumstances as known to him or what he honestly believed them to be. It is important to remember that anyone who defends themselves cannot be expected to know exactly how to respond to or deal with the situation or to weigh to a nicety the responsive force to be used. All the relevant circumstances of the parties must be considered, as well as their conduct. This includes an analysis of how the circumstances developed, what happened, and the role of each of the parties. It is a modified objective element.

[57] The Supreme Court of Canada in *Khill* stated the following:

[62] ... By grounding the law of self-defence in the conduct expected of a reasonable person in the circumstances, an appropriate balance is achieved between respecting the security of the person who acts and security of the person acted upon. The law of self-defence might otherwise "encourage hot-headedness and unnecessary resorts to violent self-help"...

.....

[82] As such, in choosing the broad phrase "the person's role in the incident", Parliament signaled that the trier of fact should consider the accused's conduct from the beginning to the end of the "incident" giving rise to the "act", as long as that conduct is relevant to the ultimate assessment of whether the accused's act was reasonable. This expansive temporal scope distinguishes the "person's role in the incident" under s. 34(2)(c) from other factors listed under s. 34(2), some of which are temporally bounded by the force or threat of force that motivated the accused to act on one end and their subsequent response on the other. For example, s. 34(2)(b) considers what alternatives the accused could have pursued instead of the act underlying the offence, such as retreat or less harmful measures, relative to the imminence of the threat. The question of proportionality under s. 34(2)(g) similarly juxtaposes

the force threatened and the reaction of the accused. Both of these factors ask the trier of fact to weigh the accused's response once the perceived threat has materialized. In this way, s. 34(2)(c) was intended to serve a distinctive, balancing and residual function as it captures the full scope of actions the accused could have taken *before* the presentation of the threat that motivated the claim of self-defence, including reasonable avenues the accused could have taken to avoid bringing about the violent incident.

.....

[85] The analytical purpose of considering the person's "role in the incident" is its relevance to the reasonableness assessment where there is something about what the accused did or did not do which led to a situation where they felt the need to resort to an otherwise unlawful act to defend themselves. Only a full review of the sequence of events can establish the role the accused has played to create, cause or contribute to the incident or crisis. Where self-defence is asserted, courts have always been interested in who did what. The fact that the victim was the cause of the violence often weighed heavily against them. As this Court explained in *R. v. Hibbert*, [1995] 2 S.C.R. 973, at para. 50:

In cases of self-defence, the victim of the otherwise criminal act at issue is himself or herself the originator of the threat that causes the actor to commit what would otherwise be an assault or culpable homicide (bearing in mind, of course, that the victim's threats may themselves have been provoked by the conduct of the accused). In this sense, he or she is the author of his or her own deserts, a factor which arguably warrants special consideration in the law...

The phrase "role in the incident" captures this principle and also ensures that any role played by the accused as an originator of the conflict receives special consideration. In this way, the trier of fact called upon to evaluate this factor will determine how that person's role impacts the "equities of the situation" (Paciocco (2014), at p. 290).

.....

[90] When such escalations do occur, particularly in the heat of the moment, the opportunity for mistake and disproportionate responses only grows. This is recognized in former s. 35 and its imposition of a duty to retreat where the accused was an initial aggressor or provocateur, reflecting the need to balance the accused's bodily integrity, that of the victim and the wider societal interest in controlling the application of force. Failure to consider the accused's role in creating or escalating the conflict will invite moral paradoxes, where both attacker and defender may rightly appeal to the new permissible scope of self-defence and yet also find themselves the legitimate target of attack (H.



Stewart, "The constitution and the right of self-defence" (2011), 61 *U.T.L.J.* 899, at p. 917; F. Muñoz Conde, "Putative Self-Defence: A Borderline Case Between Justification and Excuse" (2008), 11 *New Crim. L. Rev.* 590, at p. 599). Where an accused opts to stand their ground or, as in this case, advance while armed towards a perceived threat rather than de-escalating or reassessing the situation as new information becomes available, a trier of fact is entitled to account for this role when assessing the reasonableness of the accused's ultimate act.

.....

[102] As a result, I do not accept that the accused's "role in the incident" is necessarily or inherently a "pro-conviction factor" which should be read narrowly. The words Parliament chose are not only wide, they are deliberately neutral. On a plain language reading, "the person's role in the incident" neither evokes strong emotion nor carries the normative stigma of conduct which is unlawful, provocative or morally blameworthy. As written, it is not more suggestive of guilt than any of the other factors listed under s. 34(2), such as "whether there were other means available to respond" (s. 34(2)(b)), the "size, age, gender and physical capabilities" (s. 34(2)(e)) or "the nature and proportionality of the person's response" (s. 34(2)(g)). Section 34(2)(c) is neutral and its application will depend entirely on the conduct of the accused and whether their behaviour throughout the incident sheds light on the nature and extent of their responsibility for the final confrontation that culminated in the act giving rise to the charge.

[58] In order to make the determination of whether Marcano's conduct was reasonable in the circumstances, it is necessary to consider the factors outlined in s. 34(2) of the **Code**:

- (a) the nature of the force or threat. It is clear that over an approximate five-minute period, Marcano was aware that A.M. possessed a knife and had threatened and chased him with it. At the time of the ultimate confrontation, he was again presented with A.M. wielding a deadly weapon, which was used to inflict injuries;
- (b) the extent to which the use of force was imminent is well displayed initially by A.M. chasing Marcano with the knife and, ultimately,

launching a surprise attack by the dumpsters while brandishing the weapon. When initially presented with A.M. pursuing him with the knife, it is acknowledged that Marcano could have left the area. However, Marcano responded to the threat of A.M. wielding a knife by virtue of the utilization of a BB gun in order to, what may be inferred, frighten and fend off A.M., Olson and C.S. Perhaps this action could be regarded as provoking in nature. That said, Marcano chose not to utilize his own knife. Further, he did not terminate the ultimate confrontation until it was over;

- (c) Marcano's role in the incident was as an individual who was threatened by A.M., who had used the knife and wounded him. It cannot be forgotten that Marcano played a role in this incident. The full context of his actions must be reviewed in a holistic manner. There were obviously words exchanged, a chase by A.M. with a knife, followed by Marcano's pursuit with a BB gun until the final confrontation. During that final struggle, Marcano's actions must be found to be reasonable in these circumstances, albeit there is no requirement that he believed that there was no other course of action he could adopt. Again, an accused need not weigh to a nicety any force used in a response. The ultimate issue is whether the force used was reasonable in the circumstances;

- (d) as indicated, A.M. used and threatened Marcano with a knife. A BB gun was utilized by Marcano. Ultimately, A.M.'s knife was handled by both parties in inflicting both the fatal and serious woundings;
- (e) there is little evidence as to the size and physical capabilities of each of those involved in the incident, albeit, on video, the two appear to have similar builds. Marcano is significantly older and was taller than A.M.;
- (f) the nature, duration, and history of the relationship between Marcano and A.M. is one of approximately five minutes. There is no evidence that they knew one another or had any type of relationship. It is also unknown what words were exchanged at the convenience store window that caused A.M. to introduce the knife;
- (g) the initial response of Marcano to the display of the knife at or near the convenience store window and being chased was to draw his BB gun and pursue A.M., Olson and C.S. While it would have been prudent for Marcano to simply leave the area, his response was, in some measure, a need to teach the "kid" a lesson. It is instructive when reviewing the video that others in the parking lot, who were also attending at the convenience store, did not appear to be overly concerned with respect to what was transpiring around them, with the exception of Day, who observed the knife and Marcano scoping the parking lot in search of A.M. That said, those precipitating and

provoking actions between the parties, while illuminating to a degree as to what ultimately transpired, are not determinative. It is the ultimate confrontation that is important in order to truly examine the nature and proportionality of Marcano's response to A.M.'s use or threat of force.

A.M. initially had the upper hand in terms of the attack on Marcano beside the dumpsters (1:05:24 a.m. to 1:05:45 a.m.). It is likely that most, if not all, of the wounds to Marcano, including the punctured the lung, occurred at that time. The perception of the danger presented would facilitate a responding attempt to counter the attack along with preservation of life. The Crown suggests that once Marcano had the upper hand in the struggle and was seen to pause between blows, that he should have broken off the confrontation (1:05:45 a.m. to 1:06:01 a.m.). As indicated, the entire struggle lasted only 36 seconds. Without question, adrenaline would be flowing because of the encounters between these individuals, a lack of careful thought and appreciation of what was occurring could well have existed, along with a possible perception of preserving one's own life. Marcano's life was at risk, and I am satisfied he had reason to defend himself, in a manner that constituted a proportionate response to A.M.'s aggressive actions at the dumpsters. The injuries to both individuals included five stab wounds to Marcano along with

superficial injuries, which were also occasioned to A.M. along with seven stab wounds. It is unknown with any certainty as to when those stab wounds were sustained on either individual's bodies. What can be discerned are motions displayed on the videos as to the actions of each party's arms which were engaged in grappling, punching and/or striking motions. It is unknown as the circumstances unfolded as to who was holding the knife, punching or fending off an attack. That said, Marcano was attacked in a dark lane by A.M. after earlier threatening interactions between the two parties. It is possible, according to Dr. Littman, that certain of the stab wounds could have resulted while the two struggled on the ground with one or both rolling onto the knife. This was also conceded by Detective Sergeant Plett.

It is known that Marcano experienced life-threatening injuries as shown by his presentation at the hospital, the immediacy of surgery, and the requirement of eight litres of blood. A person in his situation over a 36-second period would respond as best they could to a use or threat of force in order to preserve life. I am satisfied his conduct was that of a reasonable person in the circumstances;

- (h) this factor is inapplicable.

[59] Marcano's conduct and exercise of judgment from the commencement of the interactions with the group at 1:01 a.m. to its tragic conclusion can, in certain respects, be questioned. This is particularly so given he was an adult in a confrontation with a young person. He played a role in contributing to the confrontation that resulted in A.M.'s death. However, when attacked unexpectedly in the dark, I am satisfied that the nature and proportionality of Marcano's response was reasonable. It is not necessary to dissect and isolate each frame of video evidence in order to determine the proportionality of the force utilized to defend himself. An individual who is under attack cannot be expected to weigh the response in an effort to calculate the exact measure necessary to defend oneself. As was stated in *Khill*:

[83] This broad temporal frame allows the trier of fact to consider the full context of the accused's actions in a holistic manner. Parliament made a choice not to repeat the freeze-frame analysis encouraged by such concepts as provocation and unlawful assault. Rather than a forensic apportionment of blows, words or gestures delivered immediately preceding the violent confrontation, the "incident" extends to an ongoing event that takes place over minutes, hours or days. Consistent with the new approach to self-defence under s. 34, judges and juries are no longer expected to engage in a step by step analysis of events, artificially compartmentalizing the actions and intentions of each party at discrete stages, in order to apply the appropriate framework to the facts... For example, where both parties are engaged in aggressive and confrontational behaviour, s. 34(2)(c) does not demand a zero-sum finding of instigation, provocation, cause or consent (paras. 21-22). Parliament has now selected a single overarching standard to weigh the moral blameworthiness of the accused's act in context: reasonableness. This reflects the complexity of human interaction and allows triers of fact to appropriately contextualize the actions of all parties involved, rather than artificially fragmenting the facts...

[60] The Crown has not satisfied me beyond a reasonable doubt that any of the three elements of the defence of self-defence are disproven in this case. While the results of the confrontation and loss of life of this young man are tragic, it

would be difficult to consider Marcano's conduct during the 36 second struggle to have been unreasonable, even when the entire five minutes of interaction is evaluated. Marcano responded to the use or threat of force and endeavoured to save his own life. The requirements of the defence of self-defence have been satisfied in this case. As a consequence, Marcano is acquitted of the charge of second degree murder.

[61] In the event I am in error with respect to this acquittal, I have concluded that Marcano did not have the state of mind required for murder, after a consideration of all the circumstances and evidence. Consequently, the appropriate conviction would be guilt of the included offence of manslaughter. I am not satisfied that Crown counsel has proven beyond a reasonable doubt that Marcano either meant to kill or meant to cause A.M. bodily harm that he knew was likely to kill and was reckless whether A.M. died or not. In the very unique circumstances of this 36 second confrontation, and given what transpired over the five minutes of interaction, I do not believe that I can conclude or infer as a matter of common sense that Marcano knew the predictable consequences of his actions. In assessing the circumstantial evidence in this case, reasonable inferences other than guilt of a second degree murder are evident. Consequently, the Crown's burden of proof has not been satisfied for a second degree murder conviction. There are clearly other plausible theories and reasonable possibilities that do not approach speculation that are inconsistent with demonstrating an intention to kill or recklessness: ***Villaroman***. Those include Marcano defending himself after

being attacked with a deadly weapon, his wounds, calling for assistance, and the nature of the short struggle itself. Accordingly, and again, if I am in error with respect to the acquittal, this matter would constitute a manslaughter and not the offence of second degree murder.

\_\_\_\_\_J.