

COURT OF KING'S BENCH OF MANITOBA
(GENERAL DIVISION)

B E T W E E N:

HIS MAJESTY THE KING,)	<u>Amy Wood</u>
)	<u>Jacqueline E. Briard</u>
)	for the Crown
- and -)	
)	<u>Kristen L. Jones</u>
CHRISTOPHER BONE,)	<u>Patrick Gutowski</u>
)	accused.
)	
)	
)	JUDGMENT DELIVERED:
)	August 29, 2024

McCARTHY J.

INTRODUCTION

[1] The Crown and defence agree that the issues to be determined by this Court in this case are whether the Crown has proven beyond a reasonable doubt that the accused was the individual who shot and killed Ryan Spence on April 30, 2022, and if so whether there is evidence sufficient to reduce the verdict from murder to manslaughter on the basis of provocation.

[2] The Defence does not dispute that the shooting of Ryan Spence was an unlawful act and that it caused the death of Mr. Spence. They also acknowledge that if the Court is satisfied that Mr. Bone fired all four shots at Mr. Spence the intent to cause death or bodily harm that is likely to cause death is likely proven.

[3] The defence also conceded that while there is evidence of some alcohol consumption by Mr. Bone it is likely not sufficient to reduce murder to manslaughter. I agree with that submission.

[4] The defence does however raise the fact that there is evidence before the Court of provocation and as a result the Court must consider whether the accused was deprived of the power of self-control. Both counsel agreed that the Court must determine if section 232 of the Criminal Code applies in this case.

[5] I will deal first with the issue of who shot Mr. Spence.

[6] The evidence at trial was overwhelming that the accused, Christopher Bone, was present and had interacted with the deceased Ryan Spence at the Regal Beagle bar in the Marlborough Hotel in Winnipeg on the evening of April 30, 2022. In fact, the defence conceded this in argument at trial. The issue for this Court to decide is whether Mr. Bone was the individual who fired four shots hitting Mr. Spence in the back and killing him. There is no dispute that the cause of Mr. Spence's death was the three shots to the back of his trunk. He also sustained a shot to the back of his arm.

[7] The evidence as to what was happening in the bar at the time of the shooting and who the shooter was, came primarily from the evidence of four employees of the Marlborough Hotel who were present in the Regal Beagle that night. There was also evidence from a karaoke business owner who was working there that night. Each witness had a different vantage point and provided evidence with respect to some portion of the events of the evening. The Crown led both direct and circumstantial evidence that they say proves beyond a reasonable doubt that Christopher Bone was the shooter. The Crown does not agree with the assertion of the defence that this is a largely circumstantial case and that the principles set out in *R. v. Villaroman*, 2016 SCC 33, must be applied, with the Court giving the accused the benefit of the doubt if any other reasonable explanation exists upon which the accused could be found not guilty.

[8] The defence also urged the Court to find that the evidence of the lay witnesses was largely flawed and unreliable eyewitness testimony and that in some cases the memory of the witnesses was tainted or lacked credibility. They argued that there are too many material inconsistencies in the evidence for the Court to be satisfied beyond a reasonable doubt as to the guilt of the accused. The defence also argued that this is a case of the police forming tunnel vision within hours of the shooting and as a result not considering possible suspects other than the accused and tainting the evidence of eyewitnesses such as Jessica Ateah and Charles Celones.

[9] The Crown argued that this is a case where the evidence, if considered in its totality, establishes beyond reasonable doubt that Mr. Bone was the shooter. They argued that inconsistencies in eyewitness evidence of this nature is to be expected and does not diminish the reliability of the evidence or the credibility of the witnesses on material issues. They argued that any inconsistencies were minor and not material to the key issue of the identification of the shooter.

[10] In my view this is not an entirely, or even largely, circumstantial case. The evidence came from a series of witnesses who each saw various aspects of the events leading to the death of Mr. Spence and the reliability of their evidence is corroborated by DNA and fingerprint evidence and video surveillance. While I agree that there was some confusion immediately after the shooting occurred, that confusion in my view was understandable in the circumstances. When the dust settled and various people who had been present were able to describe what they had witnessed that evening a picture emerged which made it clear in my view that the accused, Christopher Bone, was the individual who shot and killed Mr. Spence.

[11] I do not find that the investigators acted with tunnel vision in this case. Officer Moroz testified that he reviewed all of the surveillance footage from the hotel and there is no evidence to suggest that if another lead had emerged, they would not have followed up on it.

[12] I will address issues raised by the defendant with respect to the evidence of Mr. Celones later in my reasons, however, the other witnesses who testified in

Court were in my view largely credible and reliable witnesses whose evidence, all taken together and considered in light of the DNA and video evidence, has satisfied me beyond a reasonable doubt that the accused was present at the Regal Beagle on April 30, 2022 and was the individual who shot Mr. Spence three times in the back and once in the arm causing his death. I also find that there is insufficient evidence of circumstances which would have deprived Mr. Bone of his ability to respond with restraint and I therefore find that he is guilty of second-degree murder.

THE EVIDENCE

[13] In addition to testimony from several witnesses, video surveillance from within Unicity taxi 003 driven by Barwez Paul; from the Ellice entrance to the Marlborough hotel; and from an apartment building at 475 Sargent Avenue, was viewed and entered into evidence at trial. Unfortunately, there were no cameras within the Regal Beagle bar itself where the shooting occurred, however, the video evidence that was available corroborated much of the oral testimony given.

[14] Mr. Paul, testified that on April 30, 2022, he was driving his taxi and, at approximately 11:05 p.m., he picked up an individual who he knew as "B". Video taken inside the taxi was consistent with Mr. Paul's testimony that he and Mr. Bone were familiar with one another prior to that ride although he did not know his name until after he was interviewed by the police. After getting into the taxi Mr. Bone asked that he be driven to the Marlborough hotel and during the ride he

suggested that Mr. Paul come into the bar and wait for him. Mr. Bone also gave Mr. Paul money to play the VLTs while he was waiting. Mr. Paul testified that after about 20 minutes it became apparent to him that Mr. Bone intended to stay longer than he had expected, so he went over to where Mr. Bone was sitting at the bar and told Mr. Bone that he intended to leave. He testified that Mr. Bone asked that he first bring his backpack in from the taxi before leaving. Mr. Paul did so and can be seen on the various video surveillance cameras leaving the bar, getting the backpack from his taxi, and bringing it back into the bar. He testified that he took it to Mr. Bone where he had been sitting at the bar since he got there. Mr. Paul then returned to the taxi to go back to work.

[15] Mr. Paul was able to identify himself and Mr. Bone entering the Regal Beagle through the Ellice Avenue entrance of the Marlborough hotel on the video surveillance from within the vestibule at 11:10 p.m. In the stills of that video surveillance it is possible to note that Mr. Bone is wearing very clean white running shoes, black sweatpants with the word champion in white down the leg, a black hoodie with the word champion in white print on the upper left front, a white shirt appears to be hanging out from under the hoodie, and he is wearing a red hat with a "P" on the front. Mr. Bone's hair which is showing from under the hat is cut very short. Mr. Bone is tall and large in comparison to Mr. Paul.

[16] On video surveillance from inside Mr. Paul's taxi it is possible to see that the individual in the car has a large stylized tattoo of a "B" on the top of his left

hand, a large tattoo which curves from the middle of his right eyebrow down to the outside corner of his eye, he is wearing a hat with a straight brim and the letter "P" on it. Because the video is in black and white the colours of his clothing cannot be determined.

[17] Mr. Paul was very clear in his testimony that during the time that he saw "B" in the Regal Beagle on April 30, 2022, he was sitting on the last chair along the railing at the end of the northeast side of the bar. He testified that he gave Mr. Bone his backpack while he remained sitting in that location and left it with him when he went back to work. When asked during a video recorded portion of an interview with the police on May 17, 2022, whether he could identify the person that he knew as "B" and that he had driven to the bar that night he picked a photograph of Christopher Bone out of a sequential lineup of 10 photos without hesitation.

[18] Jessica Ateah testified that she was working as the bartender at the Regal Beagle on April 30, 2022, and was training a new employee. She testified that the bar was busy that night and that she was very busy throughout the evening. She had invited a coworker, Kayla Campbell, who was off duty that night to come to the bar for karaoke. She testified that Ms. Campbell came and sat at the second last barstool from the railing at the northeast end of the bar. She testified that Ms. Campbell sat there because she had brought her own drinks which were not sold at the bar and the pillar immediately to her right prevented other hotel staff

from seeing her drinking alcohol she had not purchased there. That evidence was consistent with that of Ms. Campbell.

[19] Ms. Ateah testified that a male came and stood beside Ms. Campbell and then sat in the chair immediately to her left. The spot that she described the male as sitting in was the same spot that Mr. Paul identified "B" sitting in. Ms. Ateah testified that, although she was busy that night, she could see Ms. Campbell and the man who was sitting beside her at various times throughout the evening. He sat there for approximately 45 minutes. Ms. Ateah testified as to what Ms. Campbell and the accused were drinking that evening and her testimony included a specific recollection of what she had served the male, and that the person she was training had served the male and Ms. Campbell tequila shots made improperly and in dirty glasses. She testified that he was drinking Twisted Tea, tequila shots, and a Tequila Sunrise that she had made him.

[20] Ms. Ateah testified that at one point during the evening she saw Mr. Spence standing beside the man who was sitting at the end of the bar with his back to the railing. Ms. Campbell was still sitting on the other chair beside him. There were only 2 chairs in that area. She saw that Mr. Samura and the hotel manager were involved and they then escorted Mr. Spence out of the bar. She testified that she was observing Ms. Campbell from behind the bar to make sure she was ok when she saw the male sitting beside her make a shooting gesture toward Mr. Spence as he was being escorted out.

[21] The man remained sitting beside Ms. Campbell while Mr. Spence was outside banging on the bar windows. The next thing that caught her attention were sounds that she thought maybe were from a BB gun, and she saw Mr. Spence fly into the upper seating area. She was standing behind the bar near the POS system at the time and had not seen who fired shots. She noted that Ms. Campbell was still in her seat when the shots were fired and the seat beside Ms. Campbell was empty. She did not see the male who had been sitting there again that evening. She remained behind the bar, and Ms. Campbell remained in her seat, until the police came. They did not move anything on the bar top.

[22] She testified that in her opinion the man sitting beside Ms. Campbell was not drunk. She also described Mr. Spence, the victim of the shooting as "not drunk".

[23] Ms. Ateah's evidence was that she was working behind the bar most of the night, including at the time of the shooting. She made a 911 call from behind the bar to report the shooting. After speaking with the police, she eventually went home for the night. Her boyfriend who had also been present in the bar when the shooting occurred was also home. She was challenged on cross examination about her discussions with her boyfriend and others before she gave her police statement. She confirmed that she spoke to the police at the bar, in the police car and for 15 minutes at the police station that night. She also spoke with Daphne who was training with her that night. She testified that she spoke to her boyfriend

the next morning because he had been with Mr. Spence after he was shot. She also looked at the police Facebook page. She denied talking to anyone else prior to her statement as she said they had been told not to discuss it. The following evening, she attended to the Winnipeg Police headquarters where she gave a formal statement.

[24] Ms. Ateah described the individual who had been sitting beside Ms. Campbell as a male, having a bigger build, chubby, but not fat, maybe 270 to 280lbs. He had a tattoo over his right eye which was black and extending from mid eyebrow curved down to the corner of his eye, and a black neck tattoo. He was wearing glasses with a thicker frame, a red hat with a flat brim and a white shirt. He was lighter skinned Metis or light skinned indigenous and about 35 years old. He had no facial hair and she could not see his hair because of the hat. She described the bar as busy that night, but testified that she had not seen anyone else in the bar who looked like the man sitting beside Ms. Campbell. She testified that she had seen him in the bar on one prior occasion a couple of weeks earlier.

[25] On a videotaped portion of her police statement, Ms. Ateah was shown a photo lineup in sequential order. While viewing the photos she commented that one was just too fat and that the tattoo was lower above his eye. She also observed that the man in the bar had been wearing glasses and there were no glasses in the photo. She did not identify any of the individuals as the individual

in the bar. At trial the interviewing officer confirmed that a photo of Mr. Bone was contained in that lineup.

[26] On cross-examination Ms. Ateah acknowledged that she had struggled with mental health and drug use prior to the shooting of Mr. Spence, however, she was unshaken in her testimony that she was sober and that her mental health issues had been treated for weeks or months prior to April 30, 2022.

[27] I found Ms. Ateah's testimony to be very candid and credible throughout. She did not in any way try to embellish or testify to anything that she did not see directly. Her recollection of small details such as the dirty drink glasses added to her credibility. The only question was how reliable her evidence was, or whether it was tainted as the defence argued. Having carefully considered her evidence I find that it was reliable. Her description of the male sitting at the end of the bar to the left of Ms. Campbell was given in advance of being shown a still of the surveillance footage. I agree with the submission of the Crown that her reaction to that photo was one of confirmation of her recollection and description of the individual. While the actions of the officers in showing her the still photo from the surveillance video before a photo lineup had the potential of tainting any identification, in this case I find that it did not. Her description had already been given to the police and I accept that description as reliable. While I acknowledge that there is a discrepancy with respect to the colour of the individual's shirt, I accept the observations she made about his build, his face and tattoos, his glasses

and his hat. I am satisfied that she would have been more attentive to the customer's general stature and his face when she was interacting with him from behind the bar, than his clothing. I also find that she had a reasonable opportunity to interact with and observe him, such as when she was offering to make him a new drink because the trainee had made a mistake with his order. With respect to describing his glasses she did strengthen her evidence on this point after she had seen a photo of the accused. However, that improvement in her evidence does not negate or diminish her initial observation that he was wearing glasses.

[28] While it was put to Ms. Ateah on cross-examination, and she agreed, that from the front corner of the bar a pillar would have impeded her sight line to Ms. Campbell and the person sitting beside her, her evidence was that she was moving about behind the bar throughout the evening, and I am satisfied that from the back of the bar where the POS system was located and from other points behind the bar she would have been able to see the individuals at the far northeast end. I accept her evidence that when an altercation broke out between Ryan Spence and the individual sitting to the left of Kayla Campbell, she was able to see who was involved in the argument and to satisfy herself that security was handling the situation and Ms. Campbell was ok.

[29] I do not find that Ms. Ateah's evidence was tainted or unreliable as suggested by the defence and I accept her evidence.

[30] The next important witness was the head security guard on duty that day. Mohammed Samura testified that he had been dealing with problems with Mr. Spence throughout his shift. According to his evidence he was called into the bar on three occasions within the hour immediately preceding the shooting specifically because Mr. Spence was causing problems with an individual sitting at the bar. Mr. Samura testified that he was first called into the Regal Beagle by the hotel manager and directed to an argument at the end of the bar between Mr. Spence and a male he had never dealt with before. He described Mr. Spence, who he knew well, as standing near the bar, and the individual who he was arguing with as sitting and leaning on the bar top toward the end of the bar near the railing. Once he was oriented to a photograph of the bar (Exhibit 2, photo 12) he confirmed that the male arguing with Mr. Spence was sitting at the bar near the railing along the stairs at the left end of the bar counter, or bar top. On cross examination Mr. Samura confirmed that the male was sitting behind and to the left of a post that was blocking part of the view of the bar in Exhibit 2, photo 12. When he was asked whether the male was sitting in front of a beer tap to the right of the pillar, he indicated that he was to the left of that. In my view Mr. Samura did not materially change his evidence on cross examination and his evidence remained that the individual in an argument with Mr. Spence was sitting at the northeast end of the bar near the railing. The end of the bar which Mr. Samura indicated the male was sitting at was described by Constable Hannah, who created

a scene diagram in her notes, as the northeast end of the bar. It would also be the northeast end of the bar on Exhibit 1, which is a diagram of the scene filed in evidence which indicates which way is north.

[31] Mr. Samura testified that the first time he attended to the bar he directed Mr. Spence to leave the bar and then spoke with the male he had been arguing with to assure him that the matter had been handled. He described the bar as busy with people he worked with being around the area. This is consistent with the evidence of Ms. Ateah and Ms. Campbell that Ms. Campbell and at one point Melanie was in the same area. Mr. Samura described the male Mr. Spence had been arguing with as calm and cooperative. He said he saw that the male was drinking and on cross examination said he thought he was drinking a beer.

[32] Mr. Samura then went back to the security desk in the lobby outside the bar. Shortly after he was called into the bar by the hotel manager and saw that Mr. Spence had returned and was standing yelling at the same male again. The male remained sitting where he had been, and Mr. Spence was being very loud and refused to leave when asked. As a result, Mr. Samura requested that the other security guard, Gabriel Obiyor, come to assist him in removing Mr. Spence from the bar. He testified that by the time Mr. Obiyor had arrived Mr. Spence had moved away from the man at the end of the bar and that he then asked Mr. Obiyor to help him get Mr. Spence outside the Ellice Avenue doors. He requested that Mr. Obiyor stay in the exit vestibule for a while to ensure that Mr. Spence stayed

out. Video from the vestibule area between the Regal Beagle and the Ellice Avenue door shows the two security guards escorting Mr. Spence out of the bar and Mr. Obiyor waiting.

[33] Mr. Obiyor testified to the same course of events except that he added that Mr. Spence had asked to go get his bag from down the stairs off the bar before leaving, and that in the course of doing so he threw a water bottle in the direction of the bar. It did not hit anyone.

[34] Mr. Samura testified that while Mr. Obiyor ensured that Mr. Spence stayed outside, he returned to where the other male was sitting and assured him that he could stay, and that Mr. Spence was kicked out. He recalled joking with the male and described him as not causing any problems. Mr. Samura then returned to the lobby.

[35] Approximately 10 to 15 minutes later Mr. Samura was again called to the bar. He testified that as he was entering and walking around the bar to the same spot where he had been dealing with the prior issues, the male who had been seated earlier and arguing with Mr. Spence was walking toward him very fast. He testified that they met halfway down the bar and were standing face to face. He then described that a water bottle flew over his shoulder from the direction of the dance floor behind him and landed on the floor. At that point he stated that the man who was standing and facing him bent over, opened a backpack, pulled out a rifle, raised it above Mr. Samura's shoulder, and fired three shots. He said the

shots were fired over Mr. Samura's right shoulder and toward the dance floor. He testified that just immediately prior to the shots being fired he had turned his head and saw Mr. Spence re-entering the bar behind him and crossing the dance floor.

[36] Mr. Samura was certain that the individual who fired the shots directly over his shoulder was the same male who had been seated near the rail at the northeast end of the bar top and whom he had been dealing with directly over the previous hour. He testified that after shooting the gun the male put the gun back in his backpack and fled out the Ellice Avenue door. While putting the gun in the bag the shooter said "let's go" and another male came and grabbed the backpack and left right behind him. He said that his attention was on Mr. Spence after that point.

[37] It was clear from Mr. Samura's testimony that experiencing the shooting from such a close vantage point was very upsetting. He was unable to offer a lot of detail about the gun or the bag, which in my view was understandable given how fast things happened and his vantage point. He was able to describe the individual that he said fired the shots as an aboriginal male, maybe in his 30's, and taller and bigger than himself. The shooter's head was covered, but he could not say with a hat or what, and he thought he was wearing a white top, maybe a sweater. He noted that he had a tattoo on his neck or face.

[38] Kayla Campbell testified that she was not working on April 30, 2022, but she went to the Regal Beagle that evening because there was karaoke and Ms. Ateah

had invited her. She sat in the second last chair at the northeast end of the bar. There was a pillar on her right and there was one empty chair to her left until about 11:00 p.m. when an unknown male asked if he could sit there and took a seat. The male ordered himself a tequila shot and later asked her if she would like two tequila shots, which she accepted. She stated that she was not really talking to him as she was on her phone and at one point another bartender Melanie had come and talked to her for awhile. Then Mr. Spence approached her. She described Mr. Spence as a friend and said they were fooling around, but it did not look like it because Mr. Spence was intoxicated and seemed more aggressive than usual. She testified that at some point the man beside her told Mr. Spence to "chill out" and she described Mr. Spence as then becoming more angry, "beaking off" and "talking a lot of smack". She denied that he made any threats, but said he was saying a lot of things like "bitch". She testified that finally the hotel manager and Mr. Samura came over and she saw Mr. Samura take Mr. Spence out the Ellice doors. She did not see Mr. Spence throw anything and only noticed Mr. Samura and the manager at her end of the bar once. Once outside she described Mr. Spence as aggressively banging on the windows on the north wall behind her, and yelling. The entire time the same man remained sitting beside her to the left, and she was on her phone most of the time. Finally, the male beside her said "I'm out" and he got up and left. He walked away behind her past the divider on her right. Then, within a few seconds, she heard gunshots. She looked and saw

Mr. Spence diving onto the floor on the north side of the bar. She did not see the man who had been sitting beside her again that night.

[39] Ms. Campbell testified that she had consumed five drinks at the bar between 7:15 p.m. or 7:30 p.m. and the shooting and two to three drinks before that. She thought Mr. Spence was intoxicated from the way he was acting. She saw the male to her left have two shots of tequila and a Twisted Tea which she did not think he finished. His drinks were left on the bar and not moved before the police came. He did not appear intoxicated to her.

[40] Ms. Campbell described the male sitting beside her as native, wearing a red Jordan hat, black clothes with long sleeves and he had a big black tattoo on the right side of his face above his eye. She thought it was letters or numbers. She described him as acting calm throughout the evening.

[41] With respect to the evidence of Mr. Celones, the karaoke owner who was working in the bar that night, the defence argued that his evidence was unreliable and tainted. They urged the Court not to accept any of his evidence. The Crown argued that it was credible and reliable and that minor inconsistencies between witnesses are to be expected.

[42] My perception of Mr. Celones was that he was probably an honest man, and that he was very eager to be both cooperative and helpful. Perhaps too eager. I expect that he believes the events and observations he shared with the police and testified to at trial to be true. Having said that by the end of his evidence I had

serious concerns about the reliability of his evidence. I have no doubt that he was present in the Regal Beagle before and during the shooting. However, what exactly he saw and what his involvement was is not clear to me. There were inconsistencies within his evidence such as his evidence that each song lasted two and a half minutes, but he later recalled a specific eight minute song was playing when he was asked how he had time to make all of the observations he made away from the karaoke station in two minutes. His evidence was also at times inconsistent with video, DNA and fingerprint evidence. For instance, he was certain that the shooter was drinking rum and coke in a glass, and was very specific about it. However, Mr. Bone's DNA and fingerprints were found on Twisted Tea drink bottles and the evidence of other witnesses has him drinking Twisted Tea, tequila shots and a Tequila Sunrise, none of which fit his description. He also testified that he followed the shooter out of the bar to the street, but he does not appear on the video surveillance doing so. He said he performed CPR on Mr. Spence when no other witnesses mentioned his involvement. His evidence often contradicted the evidence of other witnesses whose evidence I have accepted. For instance, he was the only one who did not see something on the shooter's head and was able to describe his haircut. And when it was suggested on cross examination to be an even more unique hairstyle, he readily accepted that suggestion. He also said he spoke to Mr. Bone to try to calm him down, but no other witnesses mention ever seeing Mr. Celones speaking to Mr. Bone or trying

to calm him down. In fact, the evidence from all other witnesses was that Mr. Bone remained calm throughout the evening, and there was no mention by a single witness of Mr. Celones being around the area of the dispute. There was also some evidence that Mr. Celones was drinking that night as it was his wife's birthday although the amount is not clear. Overall, I found this witness to be too eager to please and too suggestible to be considered reliable. I am not accepting, or relying upon, any of his evidence as I fear that his perception or recollections are not reliable, or that his evidence was tainted by discussing what he saw with others.

ANALYSIS

[43] I am mindful that the Court must always be extremely vigilant in considering the frailties of eyewitness identification, particularly where it relates to identification of a stranger. For that reason, and the reasons set out above, I have not given any weight to Mr. Celones evidence, including that he identified the accused as the shooter, or that he saw the accused make a shooting gesture toward Mr. Spence before the shooting.

[44] However, even with extreme vigilance as to the frailties of eyewitness evidence, I do accept that Ms. Ateah had sufficient opportunity to observe the person sitting beside her friend Ms. Campbell and to provide a reliable description. I found Ms. Ateah's testimony to be very candid and believable. Her evidence was also consistent with DNA and fingerprint evidence from the bottles and glasses on the bar top immediately in front of the chair which Mr. Samura and Mr. Paul had

testified the accused had been sitting on. Her description of Mr. Bone was also consistent with the video surveillance. While she did not identify Mr. Bone in a photo lineup she did note that his picture was very similar and could have been the man's brother, noting that his face looked too large to be the man in the bar and that the position of the tattoo seemed off. I note on this point that the photo in the lineup was taken a year earlier, and it does appear that Mr. Bone may have been heavier in the photo than in his mug shot taken in 2022. Also, he was wearing glasses in the bar and not in the photo. These issues do not negate the reliability of the evidence Ms. Ateah was able to give.

[45] While the defence argued that Ms. Ateah's evidence was unreliable and tainted, in closing they conceded that she was correct, that Mr. Bone was the individual sitting at the end of the bar that evening, and therefore I can conclude that her description and recollection were largely accurate. In my view, her evidence that Mr. Bone had been arguing with Mr. Spence when security became involved was equally credible and reliable and was consistent with the evidence of Mr. Samura and Ms. Campbell. I accept Ms. Ateah's evidence in its entirety, including that Mr. Bone gestured with a motion that he was going to shoot Mr. Spence as he was being escorted away by security.

[46] I also accept the evidence of Mr. Paul, who identified Mr. Bone in the photo lineup, identified where he had been sitting in the bar, and testified that he had a

backpack with him prior to the shooting. His evidence was also conceded to be accurate at trial.

[47] I accept Ms. Campbell's evidence, including that a male fitting the description of Mr. Bone sat on the chair to her left along the rail at the end of the bar at about 11:00 p.m. and stayed there for about 50 minutes. During that time the male got into an argument with Mr. Spence and Mr. Spence was kicked out of the bar by security. Immediately before the shooting the male sitting beside her said "I'm out" and left his seat, walking quickly behind Ms. Campbell's chair in the direction of the Ellice Avenue exit. She did not see him again.

[48] And finally, I accept the evidence of Mr. Samura that the individual he had been dealing with earlier in the evening had been sitting near the rail at the northeast end of the bar, and that immediately prior to the shooting he walked quickly toward Mr. Samura from his chair, along the bar top, in the direction of the Ellice Avenue exit. Mr. Samura was facing the man and talking to him in front of the bar counter as Mr. Spence re-entered the bar through the Ellice Avenue entrance. I accept that the man then reached into his backpack, pulled out a gun and shot over Mr. Samura's shoulder toward Mr. Spence. The shots struck Mr. Spence in the back, and he fell forward to the floor. The shooter then immediately fled through the Ellice exit leaving his backpack behind. Another man grabbed the backpack and exited right behind him. His description of the shooter was consistent with Mr. Bone even though he had not noted many details. He

testified that his attention was more on Mr. Spence and his interactions with the other man.

[49] In addition to the testimony that I have accepted above, the physical evidence such as where the bullet casings were located and where Mr. Spence landed when he was shot, were all consistent with the description of events given by the above witnesses and corroborate their testimony.

[50] The video from the taxi and the Ellice Avenue entrance confirms that Mr. Bone entered the bar with Mr. Paul at 11:10 p.m. Mr. Paul went back to the taxi and got a backpack and took it into the bar at 11:29 p.m. Mr. Paul then left the bar. Mr. Spence was escorted out of the bar by security at 11:55:08 p.m. and re-entered 4 minutes later at 11:59:04 p.m. Mr. Spence can be seen on the video entering the bar and moving to the left toward the north side of the room. Mr. Bone can then be seen to be the first one leaving the bar out the Ellice exit at 11:59:22 p.m., followed immediately by a man carrying a backpack and then a woman. Security followed shortly after.

[51] Mr. Spence was shot 3 times in the back of his torso and once in the back of his arm within seconds of re-entering the bar and moving toward the stairs to the north seating area. The bullet casings were all found on the dance floor located between the stairs on which Mr. Spence landed after being shot, and the bar area where Mr. Samura testified that the shots were fired over his shoulder across the dance floor toward the raised platform where Mr. Spence landed.

[52] The defence in this case argued that there were many other people present in the bar when the shooting occurred, that there may have been moments that were not captured on the video of the exits from the bar, that there may have been another exit from the bar that was not video monitored, and that convicting the accused based on a circumstantial case runs significant risk of a wrongful conviction. They also argued that I should disregard the evidence of Mr. Celones and Ms. Ateah as tainted and therefore unreliable. The defence urged me to apply the principle set out in *Villaroman* that where any reasonable scenario exists on the evidence other than the guilt of the accused, I must acquit. They argued that in this case it was reasonably arguable that someone else in the bar had been the shooter, and that because Mr. Celones and Ms. Ateah were unreliable, and no one else had identified Mr. Bone as being the shooter, I must give the accused the benefit of the doubt and acquit him.

[53] In this case I am of the view that this defence ignores the existence of ample direct and reliable evidence that Mr. Bone was the shooter. While no one person whose evidence I have accepted saw the entire series of events, and was able to later identify the shooter, each of the witnesses gave direct evidence of what they had witnessed, which when all considered together paints a clear picture of who shot Mr. Spence. First the evidence establishes that Mr. Bone, who was previously known to Mr. Paul as "B" and identified by him in a photo lineup, was sitting at the far northeast end of the bar that night. The evidence of both Ms. Ateah and

Ms. Campbell establishes that an individual, of very similar description to the person riding in Mr. Paul's taxi and chosen by him in a photo lineup, was sitting in that same chair at the far northeast end of the bar and was not seen to move from that seat except immediately prior to the shooting. Ms. Ateah also confirmed that she had seen Mr. Samura dealing with a problem between Mr. Spence and the male seated in that spot earlier in the evening. Ms. Campbell had seen the male sitting to her left move behind her chair toward the Ellice Avenue exit immediately prior to the shooting. And finally, the evidence of Mr. Samura was that it was the person who was sitting at the far northeast end of the bar, whom he had dealt with during the previous hour for arguing with Mr. Spence, who shot Mr. Spence right over Mr. Samura's shoulder. The shooter then put the gun back into his backpack and handed it to another man and then immediately exited the bar through the Ellice Avenue exit. I accept the evidence of each of these witnesses as truthful and reliable. In addition, the video surveillance of the exits shows the accused coming into the bar at 11:10 p.m. as described by Mr. Paul, and later Mr. Paul bringing him his backpack at 11:29 p.m. It also shows Mr. Spence being escorted out of the bar and coming back in and heading toward the stairs on the north side of the bar as testified to by Ms. Ateah and Mr. Samura. Almost immediately thereafter the video shows Mr. Bone exiting the bar in a hurry, followed by a man carrying a backpack, and a woman. This evidence is all

consistent with, and corroborative of, the testimony of the witnesses whose evidence I have accepted.

[54] This is not a circumstantial case requiring a series of inferences to be drawn in order to determine what happened. The evidence of what the various witnesses saw is direct evidence which overlaps and coincides in a manner that satisfies me beyond a reasonable doubt that Mr. Bone was the person who shot Mr. Spence four times and caused his death.

[55] I am satisfied on the totality of the evidence that the only reasonable conclusion is that Mr. Bone was the shooter. All of the evidence, when considered together, makes this conclusion inescapable.

PROVOCATION

[56] The defence in this case argued that if I find that Mr. Bone shot Mr. Spence I must then consider whether there is evidence sufficient to reduce the verdict from murder to manslaughter on the basis of provocation.

[57] They argued that the evidence at trial supports a finding that the conduct of the deceased throughout the evening constituted provocation thereby reducing the culpability of Mr. Bone and reducing the offence from murder to manslaughter.

[58] With respect to the defence of provocation the Crown argued that in ***R. v. Fox***, 2022 MBKB 207, a decision of the Manitoba Court of King's Bench, Justice Champagne declined to find provocation in a situation where the victim had pulled a gun on the accused before being stabbed. Here, the Crown argued that there

was only a verbal argument with no physical contact or physical threat, and the accused was calm, cool and collected throughout. Also Mr. Spence was gone for 4 minutes, and Mr. Bone could have left. She noted that security was also present when the shooting occurred. She argued that there is no basis on the evidence for finding provocation.

[59] The provision relating to the defence of provocation is set out in section 232 of the ***Criminal Code***. It states that culpable homicide is reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation. Conduct of the victim which would constitute an indictable offence punishable by five years or more of imprisonment and that is sufficient to deprive the ordinary person of the power of self-control is provocation if the accused acted on it on the sudden and before there was time for his passion to cool. Acts that are legal or are incited by the accused are not provocation.

[60] Like self-defense once there is evidence to support a finding of provocation the onus falls on the Crown to prove beyond a reasonable doubt that the defence does not apply. The Crown need only prove that one component is missing to satisfy its onus.

[61] There are both subjective and objective components to provocation. Broadly speaking the objective components are that there must have been a wrongful act or insult, and the act must have been sufficient to rob an ordinary person of the power of self-control.

[62] The subjective components are that the accused must have acted in response to the provocation, and the accused must have acted on the sudden before there was time for his passion to cool. In this case, although the accused did not testify, I am still required to consider any direct and circumstantial evidence that goes to the accused's subjective belief at the time that the offence was committed.

[63] In this case the defence argued that the throwing of a water bottle by the victim could constitute assault with a weapon which satisfies the requirement of a wrongful act. The Crown argues that based upon the evidence of Mr. Samura and Mr. Obiyor it is likely that Mr. Spence did throw a water bottle at some point, but that it must have occurred at an earlier stage in the evening when Mr. Obiyor was in the bar. Both counsel agree that Mr. Obiyor was only in the bar one time that evening and it was not at the time of the shooting. The Crown therefore asserts that if there was an unlawful act it was too remote. It would not have impacted the accused at a time proximate to his response. Mr. Bone would have had time to cool down and was therefore not acting on the sudden if that was the act he was responding to.

[64] The defence argues that the throwing of the water bottle, together with insults and the fact that the conduct of Mr. Spence continued to persist and escalate, and that he kept coming back to antagonize Mr. Bone would have been sufficient to cause an ordinary person in Mr. Bone's circumstance to lose the power

of self-control. The defence argued that even if there was a short break between the throwing of the water bottle and the response, Mr. Spence continued pounding on the windows and yelling during that period.

[65] The defence argued that the evidence suggests that Mr. Bone did in fact act in response to the provocation and that he acted suddenly after Mr. Spence returned to the bar for the second time.

[66] In my view the evidence is not clear that the water bottle was thrown at Mr. Bone, or that he was aware that it had been thrown. It is just as likely that it was thrown at the security guards for kicking Mr. Spence out. There is no evidence that I accept that the bottle landed anywhere near Mr. Bone. I agree with counsel that Mr. Samura must have been mistaken that the bottle was thrown when he and Mr. Bone were standing together seconds before the shooting. Mr. Obiyor was by all accounts not in the bar at that time, and I accept his evidence that he also saw the water bottle thrown. Without that act by Mr. Spence, I am not satisfied that there is any conduct that would rise to the level of provocation in this case.

[67] Even if I am wrong, I find that if the water bottle was thrown at Mr. Bone, that act coupled with insults and persistence by a drunk bar patron would not in my view have been sufficient to cause an ordinary person in Mr. Bone's circumstances to be deprived of the power of self-control. The ordinary person in this case would have been an indigenous male in a tough bar where people were

drinking, and security was working. Mr. Bone was carrying a gun, and the evidence was that others in the bar would have been armed or selling drugs. In these circumstances I do not find that the conduct described of Mr. Spence would have robbed a reasonable person in Mr. Bone's circumstances of the ability to stay clam or walk away.

[68] Finally, with respect to the subjective element, all of the evidence was that Mr. Bone was calm, cool and collected at all points right up to the shooting. He was described by Ms. Ateah, Ms. Campbell and Mr. Samura as calm and cooperative. He never got up off his chair except on one occasion when Mr. Spence was escorted out of the bar to make a shooting gesture toward him. He was able to speak cooperatively with Mr. Samura and had been assured that Mr. Spence was seen as the problem and would be removed from the bar. He also had the opportunity to leave the bar and chose not to. There was no evidence that Mr. Bone was frightened, angry or in any other state that suggested he lacked the ability to control his responses to Mr. Spence in the moment.

[69] In my view the Crown has established beyond a reasonable doubt that Mr. Spence's conduct was not sufficient to deprive an ordinary person of self-control, and also that Mr. Bone did not shoot Mr. Spence as a direct and passionate response to a provocation. The evidence suggests that Mr. Bone was making conscious decisions about his actions.

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[70] Finally, with respect to the requisite state of mind for murder, I am satisfied beyond a reasonable doubt that, having found that Mr. Bone chose to shoot Mr. Spence in the back four times at relatively close range, it was his intention to either kill Mr. Spence or cause him bodily harm that he knew was likely to cause his death. I am satisfied that Mr. Bone had the requisite state of mind for murder.

CONCLUSION

[71] I find Christopher Bone guilty for the second-degree murder of Ryan Spence.

McCarthy J.