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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING	)	Libby Standil
	)	Adam C. Bergen
	)	for the Crown
- and -	)	
	)	
GUNNI ABDI HASSEN	)	Evan J. Roitenberg K.C.
accused.	)	Laura C. Robinson
	)	for the accused
	)	
	)	Judgment Delivered
	)	September 10, 2024

MARTIN J.

INTRODUCTION

[1] On February 9, 2022, at 3:31 a.m., near the Winnipeg Police Headquarters, a gunfight erupted between Abdulwasi Ahmed, a person in a group of people, and a second group of two-people being Tressor Nkuba and a companion, allegedly Gunni Hassen. During the shootout, Mr. Ahmed shot Mr. Nkuba, seriously wounding but not killing him. Within seconds, Mr. Ahmed was killed by a gunshot to his forehead. Mr. Nkuba's companion fled.

[2] A month later, Mr. Hassen was arrested and charged with first-degree murder of Mr. Ahmed (s. 235(1) of the ***Criminal Code*** (***C.C.***)), and two firearms charges (s. 95(1) and s. 467.12(1) ***C.C.***).

[3] The Crown's theory is that the two groups of people were members of rival criminal organizations, gangs, who had been clashing since 2019 over drug dealing and related tit-for-tat violence and killings. They assert Mr. Hassen became aware of Mr. Ahmed's whereabouts that morning and sought him out with the intention to kill him, for the benefit of, at the direction of, or in association with the Mohammad-Zarif Organization (MZO) and more particularly a sub-group dial-a-dealer cell, the Money Making Malis (MMM).

[4] The defence countered the Crown failed to prove that: (i) Mr. Hassen was the principal or a co-principal who shot Mr. Ahmed, or was a party; or alternately, (ii) the shooting was not in self-defence; and (iii) the killing was either planned and deliberate, or related to a criminal organization. The essence of the defence was "prove it".

[5] At the end of the trial, the Crown stayed proceedings of Counts 2 and 3, leaving only Count 1, the first-degree murder charge, for a verdict.

[6] Thus, bearing in mind the Crown's onus to prove all essential elements of the charges beyond a reasonable doubt, including negating self-defence, the key issues are:

1. is Mr. Hassen the person who fired the fatal shot to Mr. Ahmed, as principal or co-principal, or was he a party, such that he is responsible for Mr. Ahmed's death?

2. if Mr. Hassen is responsible for Mr. Ahmed's death, did he act in self-defence, such that he is not guilty? or,
3. if he did not act in self-defence, is he guilty of first-degree or second-degree murder, or manslaughter?

[7] The trial took place over four weeks in May 2024. While there is some overlap, in the main, the evidence and related analysis of the issues can be broadly divided between the shooting (issues 1 and 2) and the classification of the homicide (issue 3). For clarity and organizational convenience, I will address the issues, evidence, and analysis accordingly.

THE SHOOTING

Preliminary Comments on the Evidence

[8] The shooting evidence comprised, most importantly, of (i) witness testimony from R.L. who was driving Mr. Nkuba and "Jimmy" (allegedly Mr. Hassen) as they went about their dial-a-dealer drug sales in the early morning hours of February 9, 2022, along with (ii) video snippets collected from many locations, GPS data, limited physical and forensic evidence and cell phone communication data.

[9] As ably stressed by Mr. Hassen's counsel, I note R.L.'s evidence is not without some controversy. He gave three statements to police, one in March and one in October, plus another statement in October which, for the most part, was not directly related to the shooting. There were internal inconsistencies and omissions between the statements and compared to his trial testimony. Some of his testimony was contradicted by other reliable evidence or by other witnesses. His credibility and reliability were in issue.

[10] Further, both the Crown and defence assert his evidence should be considered through the lens of a ***Vetrovec*** analysis (***Vetrovec v. The Queen***, 1982 CanLII 20 (SCC), [1982] 1 SCR 811). I will not delve into the jurisprudence of this legal issue. It is well known. The essence is that for various reasons (such as concealing true motives or minimizing their own involvement) evidence from, for example an accomplice, jailhouse informant or an unsavory witness must be approached with great care and caution. A trier should look for independent evidence tending to show the witnesses evidence implicating the accused is true. However, if the trier finds the witnesses testimony trustworthy, they can rely on it even if it is not confirmed by other evidence.

[11] While I will address the more salient points in my analysis, despite some flaws and inconsistencies, I find R.L. fundamentally gave honest evidence as he recalled it, and I accept several key aspects, which, for the most part, I find reliable and supported by other evidence. Critically, I accept that Jimmy is Mr. Hassen, and that Mr. Hassen was with Mr. Nkuba at the shooting. Thus, I will use the names Mr. Hassen and Jimmy interchangeably. As will be seen, I do not rely on other specific points of R.L.'s evidence. In this respect, and in assessing his credibility or reliability overall, I am cognizant of contradictory testimony from his wife on certain peripheral points. If I do not mention a piece of his evidence, it should be understood I am not relying on it.

[12] Beyond this, I will make a few other brief points.

[13] First, as to other evidence, such as Mr. Hassen being a drug dealer or a gang member, or other gang members intimidating R.L. in October 2022, or other bad character evidence or the co-conspirators' exception to the hearsay rule evidence, these

are not factors or evidence I take into account in any way, in determining whether Mr. Hassen is responsible for causing Mr. Ahmed's death.

[14] Second, it is important to bear in mind that individual pieces of evidence need not be proven beyond a reasonable doubt, but the essential elements of the charge must be.

[15] Third, given the types of evidence led at trial, this is a convenient place to set out jurisprudence respecting circumstantial evidence. The leading case remains the Supreme Court of Canada's judgment in ***R. v. Villaroman***, 2016 SCC 33, [2016] 1 S.C.R. 1000. The headnote provides a concise summary of two main points:

> … An instruction about circumstantial evidence, in contrast, [to the reasonable doubt instruction] alerts the jury to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence. Telling the jury that an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits will often be a succinct and accurate way of helping the jury to guard against the risk of "filling in the blanks" by too quickly overlooking reasonable alternative inferences. ...
>
> A view that inferences of innocence must be based on proven facts is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the proof beyond the reasonable doubt standard. A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense. When assessing circumstantial evidence, the trier of fact should consider other plausible theories and other reasonable possibilities which are inconsistent with guilt. The Crown thus may need to negative these reasonable possibilities, but certainly does not need to disprove every possible conjecture which might be consistent with innocence. Other plausible theories or other reasonable possibilities must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[16] Fourth, video evidence of the shooting sufficiently shows the movements of people, but not enough to allow for identification. Other video evidence was of better or lesser quality but important nonetheless to link people, movements, and times, and

perhaps, depending on the video, articles of clothing such as the white Nike runners, with a black swoosh, worn by Jimmy ("the white Nikes").

[17] Finally, Mr. Hassen was not identified in court as Mr. Nkuba's companion at the shooting. The evidence implicating him is a combination of direct and circumstantial evidence. Critically, there is no one piece of evidence or testimony that is conclusive that he is Mr. Nkuba's companion, except perhaps R.L.'s photo-pac identification and testimony, which are not without concerns. There is other good evidence, which stands on its own, as pieces of circumstantial evidence and as evidence supporting R.L.'s account. This evidence includes police gathered and analyzed video, cell phone and GPS evidence. Finally, there is also another witness, W.A., a former MMM gang member, now in the Witness Protection Program, who identified Jimmy as Mr. Hassen, both in the photo-pac and in court. His evidence must also be considered through a ***Vetrovec*** analysis.

[18] For context, sitting in court, Mr. Hassen is obviously a black man; his skin tone is between dark and brown. Further, his impeccable style of dress, hair and facial hair in court is markedly different than in a police photo taken on February 11, 2022 (within two days of the shooting), and in video taken at various places around the key date, including at his apartment block at 33 Hargrave Street.

Mr. Hassen is Mr. Nkuba's Companion: Jimmy is Mr. Hassen

[19] As noted, I find Mr. Hassen was the person with Mr. Nkuba. The events leading to the moments of the confrontation and shooting are important.

[20] R.L. testified he was a crack cocaine user who met a drug dealer, who he knew as Jimmy, some months before. Jimmy and another fellow, called "Jay", worked together selling crack through a dial-a-dealer operation. Intermittently, for some time leading up to February 9, they would attend to R.L.'s apartment on McDermot Avenue to prepare crack for sale. Either Jimmy or Jay would then work a day or night shift selling the crack. Often, R.L. would drive either Jimmy or Jay in one of their vehicles, including an orange Equinox, to meet buyers who called a cell phone wanting crack. A third person, like Mr. Nkuba, might accompany them as protection.

[21] In support of R.L.'s testimony of the events on February 9, video shows Jimmy, Mr. Nkuba and a third male being let into the side entrance of R.L.'s McDermot Avenue apartment block at approximately 01:59. Once inside, they went to R.L.'s apartment. Video also shows Jimmy, Mr. Nkuba and R.L. leaving the apartment block at approximately 02:22. R.L. said the third male stayed behind to sleep in the apartment. Video shows Jimmy and Mr. Nkuba are black, similar to Mr. Hassen, while R.L. is white. The person identified as Jimmy is wearing the white Nikes.

[22] R.L. said the group then drove around Winnipeg in the Equinox selling crack. R.L. drove, Jimmy was in the front passenger seat and Mr. Nkuba sat behind Jimmy. Mr. Nkuba had been drinking. Jimmy was the dealer and in charge.

[23] At one point around 03:14, video shows the vehicle at a McDonald's restaurant parking lot on St. Annes Road. Mr. Nkuba got out of the rear passenger side to urinate. A female drug buyer arrived, got into the Equinox, bought drugs from Jimmy and left.

[24] The various videos to this point and GPS tracking data verify R.L.'s general testimony about the night.

[25] The buyer did not identify the dealer, a person she had not met before. In fact, she described the dealer as lighter skinned than Mr. Hassen, not black. Considering the nature of the transaction, the time of night, the lighting both inside and outside the Equinox, her quick 24-second interaction with Jimmy (the drug dealer) inside the Equinox while she was in the back seat and he was in the front, that he did not continually look at her and he wore winter clothing, I do not place any weight on her description of his skin color. R.L. described the same event and testified the dealer was Jimmy, which I accept. There is no realistic suggestion that the two black men (as seen on video), leaving R.L.'s apartment block with him at 02:22, were not the same two people he was with at the McDonalds at 03:14.

[26] As an important aside, police were able to retrieve GPS tracking data for those hours from a cell phone found in the Equinox by patrol officers during a traffic check on February 11, when Mr. Hassen and his companion "B.T." were arrested for drug dealing. The tracking data is fairly consistent with a video timeline assembled by police showing the Equinox's movements on February 9, critically from after 02:22 until only R.L. and Jimmy returned together to the McDermot Avenue apartment at about 03:43, a period of about 80 minutes. It may not be unequivocal support of R.L.'s testimony, but it is a good proxy.

[27] After the drug sale at McDonalds, they drove back downtown, to the area of Portage Avenue and Main Street. Tracking data showed they drove by Bar Red Sea

nightclub once, although R.L. testified they did so twice. When confronted by defence counsel, he agreed he was mistaken. R.L. also testified he heard Jimmy say words to the effect "that's him", referring to someone among a group of people in front of Bar Red Sea. He agreed this trial testimony was the first time he provided such evidence, but maintained it happened.

[28] In a video clip, at about 03:29, the Equinox is seen parking at an area by the Bleachers Sports Bar on Fort Street (the next street east of Garry Street). R.L. testified Jimmy instructed him to park there. When Jimmy and Mr. Nkuba got out of the vehicle, he saw Mr. Nkuba pass a gun to Jimmy. They then disappeared down a back alley. He was to wait for them.

[29] I pause to note another concern of R.L.'s testimony. He said he believed, from past interactions with Jimmy and Mr. Nkuba, that Mr. Nkuba carried a handgun in a man-purse or "murce", and that was the gun he saw passed to Jimmy. He conceded he had only known Jimmy about three months, and only knew Mr. Nkuba through Jimmy, yet agreed evidence was that Mr. Nkuba was in jail since October 31, 2021, until he was released on February 8, hours before this event. Thus, at face value, R.L. could not have known Mr. Nkuba, or presumably have past interactions with him as he described, at least since October 31, 2021. This was not explained.

[30] Otherwise, video shows the two men walking down the back alley to a parking lot, and then walking west in the parking lot toward Garry Street. At the same time, other video shows Mr. Ahmed's group walking south on Garry Street, a short distance from the Bar Red Sea, past the Ultra Lounge and the adjoining building at 275 Garry Street.

Within a moment, at 03:30, where the building and parking lot meet, the two groups came across each other.

[31] Video shows most of Mr. Ahmed's group immediately scattered northbound, while Mr. Nkuba and his companion, Jimmy, quickly moved back into the main area of the parking lot, close to the path they initially approached from. The shooting started almost immediately. The video definition is poor, in that faces and specific clothing of individuals cannot be made out and Mr. Nkuba's and Jimmy's images are blurred.

[32] However, it is adequate to show Mr. Nkuba rapidly fall to the ground - roughly where police later found him shot - and Jimmy moved eastward until he stopped near a parked vehicle. Police later found five .40 caliber bullet casings in the vicinity. As these things happened, Mr. Ahmed is standing on the sidewalk, aiming and shooting in the direction of Mr. Nkuba and Jimmy, before he collapsed dead from a .40 caliber bullet to the forehead. After the last gunshot is heard on an audio video, Jimmy ran toward Fort Street.

[33] At 03:32, video shows one person get into the Equinox front passenger seat on Fort Street, where the vehicle had remained. R.L. said it was Jimmy, and that he had a handgun. While not high quality, video shows that person wearing footwear consistent with the white Nikes. R.L. asked about Mr. Nkuba and was told that he had been shot. Jimmy also reportedly said words to the effect that, "I shot somebody". R.L. said a short argument ensued. At Jimmy's direction they drove off, initially east over Main Street toward St. Boniface but then they quickly turned around and returned to R.L.'s McDermot

Avenue apartment at about 03:43. Video evidence shows them entering the apartment building.

[34] I pause to note that consistent with R.L.'s testimony, GPS tracking shows the route he described. However, video seems to contradict R.L.'s testimony that he and Jimmy quarreled for a few moments about leaving Mr. Nkuba before driving off on Fort Street.

[35] Video also shows Jimmy leaving the McDermot Avenue apartment block alone at 03:53 and getting into a taxi. The taxi took him to the 33 Hargrave Street apartment block. Defence counsel asserted the taxi video showed a light skinned passenger-occupant. I disagree; it is simply how the video recorded, like an old-style photo-film negative. Before Jimmy entered the cab, and at the Hargrave apartment where he exited the taxi, it is clear he is a black man.

[36] Video at the Hargrave apartment shows Jimmy entered the front lobby, used a fob to enter the apartment block, waited for an elevator and entered it alone. He is wearing the white Nikes. He is also wearing a jacket with white accents, which R.L. said he gave him at R.L.'s apartment. The floor indicator showed the elevator stopped on the 18th floor. I pause to note Mr. Hassen was arrested at his apartment, 1811-33 Hargrave, weeks later. The jacket with the accents was there. This address was also provided to police by Mr. Hassen on February 11, when he was arrested for selling drugs from the Equinox. It is also an agreed fact that he lived there and that his key fob was used to access the building at about 04:00 on February 9. Finally, white Nike shoes with a black swoosh were later found in the Equinox, although they were not forensically tested and not directly linked as the white Nikes worn by Mr. Hassen on February 9.

[37] A few comments are necessary respecting R.L. and W.A.'s identification of Mr. Hassen.

[38] First, R.L. initially identified Mr. Hassen as Jimmy on March 2, 2022, through a police photo-pac line-up; however, this identification was not as unequivocal as when he testified in direct examination. On cross-examination he waffled. He agreed that even though he did not want to select a photo on March 2, he ultimately selected Jimmy's photo but told police he was not sure it was him. In court, he explained that his eyeglasses were not the correct prescription and hence, his eyesight was poor.

[39] In September 2022, R.L. contacted police and was reinterviewed, at which time he gave more detail of the evening of the shooting. He testified he did so because people who he connected to Mr. Hassen had recently intimidated and threatened him and his wife. To be clear, I do not rely on this intimidation evidence in any way respecting Mr. Hassen, who was in jail at the time. I rely on it only as narrative to explain why R.L. gave further details to the police in the fall of 2022.

[40] Defence counsel asserted police had wrongly shown him another photo of Mr. Hassen in October, implying it was the photo R.L. had identified in March, which thus bolstered his identification. R.L. agreed they were different photos but noted that it was the same person, i.e. Jimmy. Clearly it was, and the differences between the photos is minimal.

[41] I pause to note the photo R.L. relied on to identify Jimmy on March 2 was the one taken by police on February 11 after Mr. Hassen's arrest for drug dealing. Counsel challenged one of the February 11 arresting officers about when exactly the photo was

taken. The officer was flustered but held it was February 11, before Mr. Hassen's release that day. He was not questioned about a police photo of Mr. Hassen's apartment, which showed Mr. Hassen's release Undertaking indicated his "*Identification of Criminals Act*" requirements were completed at the time of his arrest.

[42] I find the photo relied on by R.L., as Jimmy and Mr. Hassen, was taken within two days of February 9. It also aligned with video evidence at the time from the McDermot Avenue apartment block, the taxi, and the Hargrave Street apartment block. As noted earlier, Mr. Hassen's appearance in court was markedly different than the police photos, which to be clear, I do not draw any negative insinuation from.

[43] Second, W.A. identified Mr. Hassen through the same photo selected by R.L. on March 2. He identified Mr. Hassen, whom he knew personally from MMM. There is no reason not to accept this evidence. Despite W.A. being a ***Vetrovec*** witness, this point was not controversial in his testimony and, regardless, I found him generally forthright and credible.

[44] All in, after accounting for the inconsistencies in R.L.'s evidence and identification, the totality of the evidence is proof beyond a reasonable doubt that Jimmy is Mr. Hassen and further, Mr. Hassen was Mr. Nkuba's companion at the shooting. I am satisfied Mr. Hassen is Jimmy, the drug dealer whom R.L. drove that night – who was with Mr. Nkuba before the shooting and left the scene without Mr. Nkuba after the shooting. R.L. and Mr. Hassen were driving together for about 80 minutes (02:22 – 03:43), and then at the McDermot Avenue apartment for approximately another 10 minutes. After, as clearly indicated on video, Jimmy left in a cab to his home on Hargrave Street,

arriving at about 04:00. Mr. Hassen's presence and identification over this time frame is fully accounted for by testimony, physical evidence (i.e. the jacket and white Nikes), video, and inferentially by GPS data and cell phone data evidence.

Mr. Hassen's Role In The Shooting

[45] According to video time stamps, Mr. Ahmed's and Mr. Hassen's groups crossed paths at 03:31:00. Given the video quality, it is not possible to actually see Mr. Hassen shooting. Based on his stance, within four seconds, Mr. Ahmed started shooting from what was later found to be a 9mm handgun. The evidence does not establish who shot first, or the sequence of shots.

[46] Mr. Nkuba fell quickly to the ground. Mr. Hassen moved further east in the parking lot, stopping where a car was parked. Mr. Ahmed remained in a shooting stance for another eight seconds or so. At 03:31:12, he lowered his arms. Two seconds later, he raised them again into a shooting stance and almost immediately collapsed dead from a .40 calibre bullet to the head. After the shooting, Mr. Hassen ran out of the parking lot and returned to the Equinox at 03:32:00.

[47] Only 9mm and .40 caliber casings were found at the scene. A single .40 caliber bullet casing was later found close to where Mr. Nkuba lay. Another .40 caliber casing was found on or near the route Mr. Hassen took through the lot, and four more .40 caliber casings were located close to where he stopped by the parked car. Because it was damaged, the .40 caliber bullet retrieved from Mr. Ahmed's head cannot be definitively proven to have been fired from one of these six .40 caliber casings found at the scene.

[48] The Crown asserts that only two guns were used in the shootout; a 9mm used by Mr. Ahmed, and a .40 caliber used by Mr. Hassen. If this theory is correct, clearly Mr. Hassen is the person who killed Mr. Ahmed. On the other hand, the defence postulates it is possible, if not probable, that Mr. Nkuba either possessed the handgun that killed Mr. Ahmed, while Mr. Hassen was unarmed, or they each possessed a .40 caliber handgun and it is not possible to tell which one made the fatal shot.

[49] In the end, for the following reasons, I find that Mr. Hassen was the individual who shot and killed Mr. Ahmed; he is the shooter.

[50] First, I accept the expert opinion evidence that the one .40 caliber bullet casing found close to Mr. Nkuba was fired from the same gun that fired the five .40 bullet caliber casings found over 65-feet away, close to where Mr. Hassen stopped. I recognize counsel's cross-examination of the expert respecting different physical marks on specific casings, notably the one found by Mr. Nkuba. In closing submissions, despite not specifically putting it to the expert, he inferred it is thus not clear the casings were fired from the same gun. However, the expert opined this did not affect his opinion; he maintained all six .40 caliber casings were fired from the same gun. The expert was highly qualified, experienced and credible.

[51] Second, common sense dictates that the five casings, in the vicinity where Mr. Hassen retreated and then stopped by the parked car, were found in proximity to where they were discharged from the gun. How close in proximity cannot be determined. Also, I recognize that many people, and a few vehicles, traversed the parking lot crime scene after the shooting until it was secured by police at 03:50. Crime scene evidence

could have been disturbed. And it is possible that other bullet casings were not found, particularly considering snow conditions. That said, it is fanciful thinking that the casings found close to where Mr. Hassen stopped, and relatively close to each other, could all have been disturbed or moved there from another location.

[52] Third, I do not accept that Mr. Nkuba fired the fatal shot. He was shot and in considerable distress, as testified to by the officers who assisted him. I have already commented about the .40 caliber bullet casing found near him, and observed that no other casings were found, although it is possible casings were missed.

[53] I am also alive to video evidence that one of two unknown people approached Mr. Nkuba about 10 minutes after the shooting, then walked west across Garry Street to some garbage bins, returned to the parking lot, got in a vehicle and drove away. It is not possible to tell what that person was doing, but defence postulates the person may have disposed of a gun from Mr. Nkuba. This may not be so farfetched, as people also approached Mr. Ahmed and his gun was found far away from his body, down the back lane behind 275 Garry Street. Someone obviously moved it.

[54] Nonetheless, considering all evidence and potential inferences, notably Mr. Nkuba being shot very quickly, the location of the .40 caliber casings relative to where Mr. Hassen is seen, observing Mr. Ahmed's shooting over 15 seconds until he was felled, and Mr. Hassen running after the last shot is heard, I find Mr. Hassen fired the fatal shot.

[55] Finally, while it is not necessary for the finding I have made, I accept R.L.'s testimony that Jimmy returned to the Equinox with a handgun. There is no direct supporting evidence for this piece of testimony, but there is the circumstantial evidence

of the proximity of the casings to where Mr. Hassen stopped and his quickly returning to the vehicle immediately after the shooting stopped, as shown by a combination of audio and video evidence. Further, R.L. was clear that he had not seen Jimmy with a gun on other occasions, so he did not attempt to bolster this evidence. I recognize R.L. did not tell the police in his March 2 statement about any weapons or guns, as he testified he was reluctant to do so. And further, in none of his statements did he specifically say that Jimmy wanted to ditch the weapon, as he said in his trial testimony. However, he did tell police Jimmy wanted "to leave something" that R.L. did not want to see. All in, his testimony makes sense and fits.

Mr. Hassen's Culpability for Shooting Mr. Ahmed - Has the Crown Proven Mr. Hassen Did Not Act in Self-Defence?

[56] At this stage in the analysis, having found Mr. Hassen intentionally caused Mr. Ahmed's death, the next issue is whether Mr. Hassen is entitled to be absolved of culpability based on the defence of self-defence or potentially defence of another, being Mr. Nkuba as he lay in the parking lot shot.

[57] No defence evidence was led; in law, that is not required. Thus, whether the Crown has negated self-defence depends on much of the evidence that I have reviewed, as well as on any other evidence that may shed light on Mr. Hassen's actions.

[58] As noted, the Crown's theory is that Mr. Hassen, along with Mr. Nkuba, exited the Equinox on Fort Street, walked through the back lanes to the Ultra Lounge building with the intention to shoot a member of a rival gang. If the evidence proves that theory, there is no air of reality to a claim of self-defence if the target managed to shoot first.

[59] On the other hand, the defence submits that Mr. Hassen's intention or plan has not been proven, i.e. that he intended to shoot someone, and as such the evidence, particularly the video evidence of the shooting, defeats the Crown's onus of proof respecting self-defence or defense of another person.

[60] Importantly, the issue of self-defence is connected to Mr. Hassen's role in the incident, including his purpose for being where he was at the time of the shooting, which inextricably leads to the third issue of whether he planned and deliberated to kill a rival gang member. There is no direct evidence of Mr. Hassen's intent or plan. The evidence arises circumstantially, perhaps supported by the co-conspirators' and common design exception to the hearsay rule. The evidence must be filtered through such an analysis.

[61] The first step is to determine whether the hearsay evidence is admissible against Mr. Hassen.

The Co-Conspirators' or Common Design Exception to the Hearsay Rule

[62] The co-conspirators' or common design exception to the hearsay rule was set out in ***R. v. Carter***, [1982] 1 SCR 938. It has become known as the ***Carter*** rule. The rule was reaffirmed in ***R. v. Mapara***, [2005] 1 S.C.R. 358, 2005 SCC 23. At para. 8, the Court summarized:

> [8] The co-conspirators' exception to the hearsay rule may be stated as follows: "Statements made by a person engaged in an unlawful conspiracy are receivable as admissions as against all those acting in concert if the declarations were made while the conspiracy was ongoing and were made towards the accomplishment of the common object" (J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 303). Following *Carter*, co-conspirators' statements will be admissible against the accused only if the trier of fact is satisfied beyond a reasonable doubt that a conspiracy existed and if independent evidence, directly admissible against the accused, establishes on a balance of probabilities that the accused was a member of the conspiracy.

[63] The ***Carter*** rule is aptly explained by David M. Paciocco, Palma Paciocco & Les Stuesser in *The Law of Evidence*, 8th ed., (Toronto, Irwin Law Inc., 2020), at p. 203-204, as a four-part jury instruction:

> Jurors are to be told:
>
> > 1) They are to consider whether, on all the evidence, *they are satisfied beyond a reasonable doubt* that the alleged conspiracy in fact existed. If they are not so satisfied, then the accused must be acquitted.
> >
> > 2) If they find the alleged conspiracy in fact existed, they must then review all the evidence that is directly admissible against the accused and decide, *on a balance of probabilities*, whether or not the accused was a member of the conspiracy.
> >
> > 3) If they find the accused was a member of the conspiracy, then they become entitled to apply the hearsay exception and consider the acts and declarations made by co-conspirators in furtherance of the conspiracy as evidence against the accused on the issue of the accused's guilt beyond a reasonable doubt.
> >
> > 4) This ultimate determination is for them alone. The mere fact that they have found evidence directly admissible against the accused that is sufficient to make that individual's participation in the conspiracy probable, and to trigger the hearsay exception, does not make a conviction automatic. They must be satisfied beyond a reasonable doubt as to the existence of the conspiracy and the accused's membership in it.

Further:

> "All the evidence" in part one of the *Carter* test refers to evidence properly admissible under the rules of evidence and relevant to the issue. The Crown cannot rely on inadmissible hearsay to prove the existence of a conspiracy. But …
> …statements allegedly made by a co-conspirator in formation or furtherance of the conspiracy are also admissible for the purposes of part one of the *Carter* test. Statements that are made in the formation of the conspiracy are not hearsay at all; their relevance lies in the mere fact that they were made, which constitutes circumstantial evidence of the existence of the conspiracy. Such statements are also direct evidence of the formation of an agreement to commit an offense. Here again, their relevance does not depend upon the truth of their contents, but upon the mere fact that they were made; hence, they are not hearsay. The same will be true of most statements made in furtherance of a conspiracy: their relevance to the issue of whether conspiracy exists will lie in the mere fact that they were made. …

The learned authors also point out:

- this hearsay exception is not limited to conspiracy charges, rather, it applies to all offenses involving a common design; and
- only those statements made during the course of the conspiracy, and in furtherance of the conspiracy, fall within the exception.

[64] It is asserted the MZO criminal organization, through a rather flat organizational structure, was comprised of multiple drug dealing cells, including MMM. It is claimed MZO and/or MMM were involved in a dispute, for various reasons, with the Willie Gooding Netwok criminal organization, which, since 2019, included tit-for-tat violence, shootings and killings of rival gang members.

[65] The Crown's theory is that there was a conspiracy or common design among MZO members, more specifically among MMM members, to attack or kill Willie Gooding Network members as part of an ongoing war. I understand this to mean any Willie Gooding Network member generally, as opposed to a specific individual member. The Crown says it has proven Mr. Hassen was a MMM member, while Mr. Ahmed was a Willie Gooding Network member.

[66] The defence asserts that on properly admissible evidence, the Crown's theory fails the ***Carter*** rule in all aspects.

[67] In the main, proof of the Crown's theory relies on two witnesses: a Winnipeg police officer I qualified as a gang expert respecting MZO, MMM and the Willie Gooding Network (see ***R. v. Hassen***, 2024 MBKB 65), and W.A., the former MMM gang member witness. While the gang expert gave insightful evidence, he has no first-hand knowledge

and depends primarily on information given to him by W.A., or other sources and inferences he has drawn from other crimes and investigations. Effectively, proof of the conspiracy substantially falls to W.A.'s testimony. Statements W.A. gave police, which were relied on by the gang expert, are not admissible evidence before me, rather it is W.A.'s trial testimony.

[68] I have no doubt that Mr. Hassen, along with others, were in a common enterprise, a conspiracy, to traffic drugs as part of the MMM cell. I am also satisfied that MZO and MMM resorted to violence from time to time for various reasons. I accept that Mr. Hassen and Mr. Ahmed were associates or members of the rival gangs.

[69] However, those are not the issues here. The critical question is whether Mr. Hassen was part of a conspiracy or common design to kill members of the Willie Gooding Network they came upon. Proof of such a conspiracy might provide a reason and motive for Mr. Hassen's actions. There is no other evidence of a connection between Mr. Hassen and Mr. Ahmed, or any of the people he was with at the time.

[70] For convenience and brevity, I start with a specimen jury instruction explaining conspiracy from David Watt, *Watt's Manual of Criminal Jury Instructions*, *2023*, (Toronto: Thomas Reuters Canada, 2023), at p. 1117-18, that could be given to a jury on this point:

> A conspiracy is an agreement between at least two people to commit a crime. The essence of a conspiracy is the agreement.
>
> The agreement does *not* have to be something formal, like a written document. Or cover every detail about how the agreement is to be carried out and by whom. The agreement does *not* have to say how long it is to continue. Nor does it have to be successfully carried out. Crown counsel does *not* have to prove that everyone who participated in the agreement knew everyone else. Or for that matter that everybody came together at one time and place to put the agreement together. Everyone does not have to join at the same time. Or have a position of the same nature or importance as any other. Persons who have joined the

> agreement may also leave it at the same or different times, and for the same or different reasons.
>
> An *agreement* is the coming together or meeting of the minds of two or more people who have a common object or purpose and agree to act in furtherance of that common object or purpose. Each person intends and expresses, by words, action, or both, the *same* purpose or object. In this case that object or purpose is [to attack or kill Willie Gooding Network members].
>
> To decide whether there was an agreement, you should take into account all the evidence. …
>
> You are also entitled to consider the manner in which [Mr. Ahmed's killing] was committed. Does it look like it happened by chance? Or, did it occur because participants had agreed to commit it beforehand? Use your good common sense.

[71] Also, as mentioned, W.A.'s testimony must be treated consistent with a ***Vetrovec*** witness. He is a criminal gang member of MMM, who offered evidence and testimony to obtain an advantage regarding his own outstanding criminal charges and sentencing. He entered into an immunity agreement and received benefits through the Witness Protection Program. Having cautioned myself accordingly, I found his evidence to be disturbingly matter of fact and forthright. I do not agree with the characterization that W.A. exaggerated or distorted his testimony. That is not to say his evidence is fully reliable or accurate. Portions of his testimony are supported by other evidence but critically, evidence of the conspiracy is not; it is either the hearsay evidence of J.J. (the leader of MMM) or other evidence from W.A.'s knowledge and observations.

[72] I will only reference germane aspects of W.A.'s extensive evidence. Specifically, W.A. testified that:

- Mr. Hassen was a friend of J.J., the leader of MMM. Anything he knew of Mr. Hassen he heard from J.J.;
- he and J.J. were cell mates from April 2021 until May 2022;
- he was a drug dealer member of MMM;

- MMM, and particularly J.J., had a "beef" with the Willie Gooding Network over drugs and the 2019 murder of Jamshaid Wahabi, after which things were more "intense". They had to "watch over their shoulder" "not to be attacked or killed";
- MMM looked to go after Willie Gooding Network side. From J.J., and otherwise, "everyone knew it was on" … meaning "watch out, they after us, we after them". If W.A. saw or came into contact with them, he would "shoot at them maybe"; if in public they would just keep going, but if a few people were around "just shoot at them";
- in jail, authorities kept MMM and Willie Gooding Network guys separated, as it was known "bodies were dropping";
- J.J. talked to him quite a bit about MMM and gang related things, including that Mr. Hassen was an associate, or "more than associate", dealing crack with MMM;
- Mr. Hassen was the person who told J.J. about Mr. Wahabi's killing;
- he heard Mr. Hassen and J.J.'s telephone calls in jail but did not know the content, except maybe sourcing drugs;
- he heard Mr. Ahmed's name from J.J. while they were in jail together;
- he last spoke to Mr. Hassen when they were in jail together later in 2022, but they did not talk about Mr. Ahmed's killing;
- Willie Gooding Network people hung out at the Bar Red Sea;

- B.T. (the person arrested with Mr. Hassen for trafficking on February 11) was on the lookout for Willie Gooding Network members and would contact someone in MMM to advise them;
- at trial, he said for the first time that Mr. Hassen had access to guns in the gang. However, he had told prosecutors he got guns through Mr. Hassen; and
- on cross-examination, he confirmed that J.J. had a beef with the Willie Gooding Network, which extended to other members of the MMM group. However, he agreed that he would not "just go out and kill somebody" over another person's beef, but he would shoot or stab someone to protect himself. He agreed Willie Gooding Network members were out to get anyone close to J.J. and he carried a gun to protect himself and shoot back.

[73] Other than W.A.'s evidence, there is also the gang expert evidence about numerous confrontations, shootings or killings between MZO members, including MMM members, and Willie Gooding Network members from September 2019 to February 2022. W.A. also testified to many of these incidents.

[74] Further, there were cell phone communications in the time leading up to the shooting, between a phone associated with B.T., seemingly emanating from an area around the Bar Red Sea, and a phone associated with Mr. Hassen that night. To be clear, the actual content of any communications between the phones is not known, only that the phones communicated to each other.

[75] Finally, there is the evidence of the shooting itself, which may give credence to the notion of a conspiracy.

[76] That said, for several main reasons, I am not persuaded that W.A.'s evidence, along with other evidence, amounts to proof beyond a reasonable doubt that a conspiracy to attack or kill Willie Gooding Network members generally existed.

[77] First, I am cautious of accepting W.A.'s evidence of what J.J. may have told him over the years. While relying on unsupported evidence of a ***Vetrovec*** witness such as W.A. may be appropriate with the benefit of a first-hand assessment of his sworn testimony, including importantly in cross-examination, it is dangerous to rely on his hearsay evidence of what a character like J.J. may have told him. The possibility for misunderstanding by W.A. or misinformation from J.J. is ripe. This is a reliability issue.

[78] Second and related, W.A.'s description, that "everyone knew it was on" meaning "watch out, they after us, we after them", lacks the specificity necessary to prove an agreement to go out and kill any random member of the Willie Gooding Network. This evidence must be viewed in context with his testimony on cross-examination, that he would not kill someone for another person's "beef" unless he was defending himself. As well, no information was described to show where, when, who or how such an agreement came to be, or any specifics about an agreement. The evidence is too vague to prove an agreement and common purpose to commit murder, as distinct from, for example, bravado or bluster or loose talk or posturing. I accept that J.J. had a feud with leaders and some others of the Willie Gooding Network, but, on the evidence, that does not translate into all members or associates of MMM or MZO agreeing to go to war, to kill, rival gang members.

[79] Third, most of the prior incidences between these groups had a relatively specific cause and effect - one person was killed or shot at for a specific reason, which often garnered retaliation. This is distinct from a standing agreement, among members of MZO or MMM, to attack or shoot-to-kill others, generally or randomly. It is not clear, even from the gang expert, if any victim was shot or killed simply because he was a member of one of the gangs. And there is no evidence that Mr. Ahmed, or someone in his group, was a retaliation target.

[80] On the whole, W.A.'s evidence, in context of the ongoing history, smacks of an understanding among MMM members to be aware of the Willie Gooding Network and be proactive, if necessary, but not necessarily an agreement to be outright pre-emptive and attack or kill their rivals.

[81] Otherwise, considering the second step of the ***Carter*** rule, aside from any inferences available from Mr. Hassen's association with MMM as a drug dealer, there is no evidence that he was specifically part of an alleged conspiracy to kill. At best, the evidence is of a serious and violent tit-for-tat beef between the groups that everyone was aware of, but there is insufficient evidence on a balance of probabilities that Mr. Hassen agreed to a plan to kill a member of the Willie Gooding Network he came across.

[82] Thus, I find that the co-conspirators' exception to the hearsay rule has not been proven. I disregard such hearsay evidence from W.A. Other portions of W.A.'s testimony may be considered if germane.

Self-Defence

[83] Section 34 ***C.C.*** is the controlling statutory provision respecting self-defence or defence of another:

> 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.
>
> (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:
>
> … (omitted for brevity)

[84] Section 34 ***C.C.***. was expansively commented upon by the Supreme Court of Canada in ***R. v. Khill***, 2021 SCC 37, which remains the key authority. Various portions of the SCC's headnote provide a sufficiently fulsome yet concise summary of the legal requirements and test of s. 34 which, in all cases of self-defence (including defence of another) consider the same three basic components or questions:

- first, "the catalyst":

> … 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.
>
> The catalyst considers the accused's state of mind and the perception of events that led them to act. Unless the accused subjectively believed on reasonable grounds that force or a threat thereof was being used against their person or that of another, the defence is unavailable. The question is not what the accused thought was reasonable based on their characteristics and experiences, but rather what a reasonable person with those relevant characteristics and experiences would perceive.

- second, "the motive":

… under s. 34(1)(b), the subjective purpose for responding to the threat must be to protect oneself or others;

The motive considers the accused's personal purpose in committing the act that constitutes the offence. 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. Clarity as to the accused's purpose is critical, as the spectrum of what qualifies as a reasonable response may be limited by the accused's purpose at any given point in time.

- third, "the response":

… under s. 34(1)(c), the accused's act must be reasonable in the circumstances.

The response, examines the accused's response to the use or threat of force and requires that the act committed be reasonable in the circumstances. While s. 34(1)(a) and (b) address the belief and the subjective purpose of the accused, the reasonableness inquiry under s. 34(1)(c) is primarily concerned with the reasonableness of the accused's actions, not their mental state. The reasonableness inquiry under s. 34(1)(c) operates to ensure that the law of self-defence conforms to community norms of conduct. 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 transition to "reasonableness" under s. 34(1)(c) illustrates the new scheme's orientation towards broad and flexible language: the ordinary meaning of the provision is more apparent to the everyday citizen and not dependent on an appreciation of judicial interpretation or terms of art.

This flexibility is most obviously expressed by the requirement to assess the reasonableness of the accused's response by reference to a non-exhaustive list of factors set out in s. 34(2). Through s. 34(2), Parliament has expressly structured how a decision maker ought to determine whether an act of self-defence was reasonable in the circumstances. The factors are not exhaustive, which allows the law to develop. The question is not the reasonableness of each factor individually, but the relevance of each factor to the ultimate question of the reasonableness of the act. Once a factor meets the appropriate legal and factual standards, it is for the trier of fact to assess and weigh the factors and determine whether or not the act was reasonable. This is a global, holistic exercise, and no single factor is necessarily determinative of the outcome.

One of the factors to be considered, which is at issue in the instant case, is "the person's role in the incident", set out in s. 34(2)(c). The proper interpretation of s. 34(2)(c) emerges from following the basic principles of statutory interpretation: … The "person's role in the incident" captures conduct, such as actions, omissions and exercises of judgment in the course of the incident, from beginning to end, that is relevant to whether the act underlying the charge is

> reasonable — in other words, that, as a matter of logic and common sense, could tend to make the accused's act more or less reasonable in the circumstances.
>
> The inclusive temporal reach of s. 34(2)(c) is evident from the word "incident", which has a broad and open-ended meaning. The "incident" incorporates a broader temporal frame of reference than the specific threat the accused claims motivated them to commit the act in question. 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 that constitutes the offence, 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. Section 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. 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. 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.
>
> (emphasis added)

[85] I am satisfied the Crown has proven this defence must fail. I will be brief.

[86] There is no direct evidence explaining the reason why this shooting took place. I accept that the Equinox, from which Mr. Hassen was dealing drugs, passed by the Bar Red Sea once. It is not necessary for me to find, as R.L. testified, that Mr. Hassen said the words -- "that's him" -- when passing the Bar Red Sea, but it makes sense, given his subsequent actions. At that point, Mr. Hassen did not return to his drug dealing. I accept he instructed R.L. to drive around the block, park at Bleachers and to wait for them. I find Mr. Hassen possessed a loaded handgun - - he used it and returned with it in about two minutes. The commonsense inference is that he was prepared to use it against another person. He and Mr. Nkuba walked through alleys to reach an area by 275 Garry Street, near the Ultra Lounge. I infer he did this covertly, not to be observed and to

provide a tactical, advantageous return to the Equinox; otherwise, on that cold winter night, he could have driven directly to the location he was intending to go and had the Equinox wait there in plain sight. The overall inference is singular and clear: he decided to confront someone and intended to shoot them.

[87] The evidence does not establish that Mr. Ahmed was the specific person he wanted to confront. It is not known if he, or members of his group, were at the Bar Red Sea moments before the confrontation, although they came from that general direction. And, Mr. Ahmed was a member of a gang that was in a violent tit-for-tat rivalry.

[88] Video shows the two groups almost bumping into each other. Seemingly, each group was caught off guard, as Mr. Ahmed's group scattered northbound, while Mr. Hassen and Mr. Nkuba backed away into the parking lot. Clearly, they recognized each other. And, they were alarmed enough to scatter, except ultimately Mr. Ahmed and Mr. Hassen, who exchanged gunfire over the span of the parking lot.

[89] The exchange of gunfire happened almost immediately. Video shows Mr. Ahmed shooting from where five 9 mm casings were found. As I explained, one .40 caliber casing was found very close to where Mr. Nkuba lay injured, not far from the place they met the other group. The logical inference is that Mr. Hassen fired a shot from about that spot, whether while paused or on the run, as he moved another 65 feet or so away to a parked vehicle. A second casing was near the path Mr. Hassen took. The remaining four .40 caliber bullet casings were found a little distance away, relatively close to each other near the parked car.

[90] I previously acknowledged that the crime scene could have been disturbed before it was secured. Officers testified they found the one casing near Mr. Nkuba, 8-10 feet south, at about 03:47. While other people were observed at the scene, and near Mr. Nkuba, before police arrived, I do not find it logical or probable the casing near Mr. Nkuba was moved there from another spot any significant distance away such as where the other .40 caliber casings were found.

[91] In all the circumstances, I do not find there is an air of reality to consider s. 34 ***C.C.*** (***R. v. Cinous***, 2002 SCC 29, [2002] 2 S.C.R. 3; ***R. v. Mustard (G.)***, 2016 MBCA 40). First, as to the catalyst, s. 34(1)(a), there is no direct evidence from Mr. Hassen of his state of mind or perception of events that caused him to shoot. I am left with the circumstantial evidence I have described. He was being shot at, but this was something he prepared for; something he instigated, going where he went armed as he was. There is no evidence Mr. Ahmed shot first or that Mr. Hassen did not shoot first. Second, and critically, respecting at least the s. 34(1)(b) "motive" element, I find Mr. Hassen's act of shooting at Mr. Ahmed was a subjectively likely or foreseeable outcome of his and Mr. Nkuba's actions. All in, here, I find the commonsense inference of taking a loaded handgun to a confrontation was a willingness to use it, to shoot someone. There is no evidence to the contrary, only speculation.

[92] If I am wrong, and s. 34 ***C.C.*** should be considered as a viable defence, then respecting the same elements and for the same reason, I find it ultimately fails. Further, under the circumstances, it also fails under s. 34(1)(c) for the factors enumerated under

s. 34(2), most notably as to Mr. Hassen's role in the incident. In ***Khill***, the Supreme Court explained:

> [74] In my view, based on accepted principles of statutory interpretation, Parliament deliberately chose broad and neutral words to capture a wide range of conduct, both temporally and behaviourally. Parliament's intent is clear that "the person's role in the incident" refers to the person's conduct — such as actions, omissions and exercises of judgment — during the course of the incident, from beginning to end, that is relevant to whether the ultimate act was reasonable in the circumstances. It calls for a review of the accused's role, if any, in bringing about the conflict. The analytical purpose of considering this conduct is to assess whether the accused's behaviour throughout the incident sheds light on the nature and extent of the accused's responsibility for the final confrontation that culminated in the act giving rise to the charge.

Without reiterating all the circumstances, I accept the gang expert's evidence of prior violence and killings generally, and aspects of R.L.'s and W.A.'s evidence inferring that guns are a part of the drug underworld. Knowing this, as a player in that world, Mr. Hassen took a loaded firearm, interrupting his drug dealing that morning, to initiate a confrontation. It was needless. He sought it out. Considering and weighing his role in the incident, along with the other factors in s. 34(2), under these circumstances and facts, I am satisfied the Crown has proven beyond a reasonable doubt that Mr. Hassen's actions were not reasonable. They have shown that self-defence or defence fails.

Recap

[93] To recap, I find Mr. Hassen set out to confront someone with a loaded handgun, which he ultimately used, shooting and killing Mr. Ahmed. I find W.A.'s hearsay testimony is inadmissible. I find the Crown has negated self-defence and defence of another. At this point in the analysis, Mr. Hassen is guilty of second-degree murder. The overwhelming reasonable and commonsense inference from all the surrounding circumstances and the nature of the shooting is that he intended to kill or do grievous

bodily harm that he knew was likely to cause Mr. Ahmed's death and was reckless, whether death ensued or not (s. 229(a) ***C.C.***). There is nothing on the facts that would reduce murder to manslaughter.

CLASSIFICATION OF THE MURDER

[94] The next step for the Court to consider is whether, on all the admissible evidence, the Crown has proven this murder should be classified as first-degree murder, in that it was planned and deliberate (s. 231(2) ***C.C.***), or that the murder was done for the benefit of, at the direction of, or in association with a criminal organization (s. 231(6.1)(a) ***C.C.***).

[95] I will not set out an extensive canvas of the jurisprudence regarding a planned and deliberate first-degree murder. Aside from proving all the essential elements for murder, as the Crown has, it must also prove that the murder itself was both planned and deliberate. Planned means a calculated scheme or design that has been carefully thought out, the nature and consequences of which have been considered and weighed. However, it does not have to be complicated and can be developed quickly. An important factor may be the time to develop the plan. Deliberate means considered, not impulsive, carefully thought out, not hasty or rash, slow in deciding. Thus, a murder committed on an impulse, or without prior consideration, is not planned and deliberate yet it is an intentional killing. All the admissible evidence should be considered.

[96] To cut to the quick, without restating all the relevant evidence, I am not satisfied this murder is proven to be planned and deliberate. Mr. Hassen saw someone at the Bar Red Sea and immediately took steps to confront him while armed with a loaded handgun. From the time he saw that person, to him leaving the Equinox on Fort Street, was a mere

moment or so. Within this short amount of time, his planning and deliberating to specifically kill someone would have had to happen. Seeing, or knowing the location of the person he wanted to confront, walking down the alley with Mr. Nkuba and the shooting itself, do not necessarily give rise to a planned and deliberate murder as the only reasonable inference under the circumstances, as opposed to a heat-of-the-moment intention to shoot someone. None of the evidence, including the route of travel of the Equinox after 03:14, cell phone communication data between phones associated with B.T. and Mr. Hassen that night, or post offence conduct, such as borrowing a jacket from R.L. while leaving his jacket at R.L.'s apartment, speaks exclusively to a planned and deliberate murder.

[97] I acknowledge that this is a so called "close call". The evidence raises considerable suspicion but, as we instruct juries, belief in probable guilt is not enough.

[98] As to the murder being done for the benefit of, at the direction of, or in association with a criminal organization, I come to the same result. Without reiterating, critically there is no direct evidence to establish this theory to the requisite criminal standard and any indirect, or circumstantial, evidence does not lead to this theory as the only reasonable inference. For example, from the evidence it could be equally inferred that Mr. Hassen engaged in this confrontation for purely personal or other reasons not related or connected to MZO or MMM, or for their direct or indirect benefit. Being a MMM gang member per se, does not mean every act done by him is for their benefit.

CONCLUSION

[99] I find Mr. Hassen not guilty of first-degree murder but guilty of the included offence of second-degree murder of Mr. Ahmed.

_____ J.