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Docket: CR 21-01-38533
(Winnipeg Centre)
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Cited as: 2022 MBQB 164

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

HER MAJESTY THE QUEEN,)	<u>Counsel:</u>
)	
	)	<u>Daniel Chaput and</u>
	)	<u>Matthew Armstrong,</u>
	)	for the Crown
- and -)	
)	
CLARENCE RAYMON SCOTT and	)	<u>Matt Gould and Zach Kinahan,</u>
TYLER RYAN KENNETH JACK,	)	for the Accused Scott
)	
	)	<u>Kevin Sneesby and</u>
	)	<u>John Rutherford,</u>
Accused.	)	for the Accused Jack
)	
	)	JUDGMENT DELIVERED:
	)	AUGUST 16, 2022

McKELVEY J.

I. INTRODUCTION

[1] Clarence Raymon Scott ("Scott") and Tyler Ryan Kenneth Jack ("Jack") (or jointly, the "Accused") are charged with first degree murder. The charge reads:

THAT THEY, the said CLARENCE RAYMON SCOTT and TYLER RYAN KENNETH JACK, on or about the 21st day of May 2020, at or near the City of Winnipeg, in the Province of Manitoba, did unlawfully kill NAIRNE

MARSHALL JAMES CHAPPAIS and did thereby commit murder in the first degree, contrary to the *Criminal Code of Canada*.

[2] The Crown must prove beyond a reasonable doubt that the Accused committed the offence on May 21, 2020, in the City of Winnipeg. It is necessary that the Crown establish that the Accused committed an unlawful act; that the unlawful act caused Nairne Chapais's (the "Deceased") death; that the Accused had the intent required for murder; and, that the murder was both planned and deliberate. The Deceased was shot several times outside a sixplex residence at 747 Selkirk Avenue ("747") where he resided with family members in both suites Nos. 5 and 6. The primary issues in this case include whether these two Accused were involved in the killing and, if so, was this a first degree murder? A youth also faces charges with respect to this matter, albeit his case has not as yet proceeded through the trial process. Accordingly, the findings in this decision are not determinative of his culpability.

[3] On May 18, 2020, shots were fired at suites Nos. 5 and 6 with no injuries occasioned (Exhibit 51, Agreed Statement of Facts – shooting incident of May 18, 2020). This event was admitted into evidence pursuant to a Crown application to allow similar fact evidence. The evidence was admitted for the purpose of identification and not to prove *animus* or motive. Additionally, inferences could be drawn from the May 18, 2020 circumstances that might impact on the circumstances of May 21, 2020.

II. CAUSE OF DEATH

[4] Dr. Charles Littman was qualified as an expert in forensic pathology (Curriculum Vitae, Exhibit 25). His qualifications reflect expertise in the cause and effect of injury on the human body and the mechanism and cause of death. In this case, Dr. Littman testified that the cause of death was multiple gunshot wounds (Autopsy Photobook, Exhibit 26). Blunt force trauma was also identified, but did not occur at the time of the shooting. There were five gunshot wounds to the Deceased's body with two shots opined to be lethal in nature. The first lethal wound was a bullet that entered both lungs, the pulmonary vein, and aorta. The second lethal injury was to the hip/pelvis area which impacted the femoral artery and bowels. There were three bullets recovered from the Deceased's body which were turned over to the Winnipeg Police Service ("WPS") Forensic Identification Unit. One wound, being to the right forearm, resulted in the shattering of the ulna, and was considered to be a defensive wound. The two identified lethal wounds resulted in death as a consequence of significant blood loss, the effect on the ability to breathe, and shock. I am satisfied, based upon Dr. Littman's testimony, that the nature and placement of the wounds demonstrate an intent to kill. The toxicology report showed that the Deceased had methamphetamine, amphetamine, Diazepam and valium in his system.

[5] Dr. Littman described the wounds as occurring in a dynamic situation between the shooter and the Deceased. The lethal wounds could have occurred when he was bending forward. There was no identified muzzle, gas, flame, stippling or burn wounds which would have demonstrated a close-range shooting.

If the shooter had been within three feet away, there likely would have been evidence of stippling or like wounding.

III. MAY 18, 2020

[6] Brenda Catcheway ("Catcheway") is the grandmother of the Deceased and also of Jerald Flett ("Flett"). She resided at suite No. 6 of 747 along with Flett. The Deceased regularly stayed at the premises as well. Suite No. 5 was occupied by Rena Trout ("Trout"), her partner Gordon Parenteau and daughters, Angel and Serena. The Deceased would also reside at suite No. 5, as Trout was considered to be a grandmother, albeit not biological. Suites Nos. 5 and 6 were located on the east side of the sixplex premises and overlooked a large yard area.

[7] Catcheway described an incident that occurred, at approximately 7:00 a.m. on May 18, 2020, when four to five gunshots were fired in rapid succession at both her premises and that of Trout's. There were shotgun pellet holes through her suite's porch windows, as well as damage underneath Trout's windows. No one was seen firing at the residence.

[8] Constable Nicholas Doyon was with the WPS Forensic Identification Unit and attended at 747 on May 18, 2020, in response to a shots-fired call (Exhibit 51 – Agreed Statement of Facts – Shooting Incident of May 18, 2020). He explained that discharge from a 12-gauge shotgun will contain six to 200 pellets. He did a walk-through of the area with other Officers and was shown the damage to 747 (Exhibit 52). There was shotgun pellet damage to the east-side of the premises at suite No. 5, as well as window damage to suite No. 6. Additionally, fresh pellet damage was evidenced to fence boards at the side of 741 Selkirk Avenue, which

adjoins 747 on the east side, along with two shotgun shell casings. Other casings were found in the backyard of 728 Pritchard Avenue, which is directly across the back lane, and in the rear driveway of 747.

[9] Constable Doyon, under cross-examination, indicated he had arrived at the scene at 8:28 a.m. and located two discharge “wads” behind the fence at 741 Selkirk Avenue. This was consistent with the direction from where the shots were fired. All casings found were on top of leaves indicative of a recent discharge. The pellet damage holes, in the residence, were in line with where the casings were located.

[10] Constable Kristopher Holmstrom was tasked on May 18, 2020, with securing video surveillance footage from cameras affixed to nearby residences. Those residences were 735 and 728 Pritchard Avenue, which are located to the north and across the back lane from 747 (Exhibits 53, 54, 55). The video clips from 728 Pritchard Avenue showed two suspects running from the back of 747 towards Pritchard Avenue. Additionally, one video clip reveals an individual firing a weapon at 747 from the backyard of 728 Pritchard Avenue. That person was wearing a backpack, camouflage shorts, a hoodie, and black and white runners. The two suspects were then seen walking north towards Pritchard Avenue, while the video surveillance from 735 Pritchard Avenue reveals the two walking west from the direction of 728 Pritchard. A black vehicle was noted to be in the area. This part of Winnipeg was identified by Constable Holmstrom to be a mid-to-high-level crime area.

[11] Gordon Parenteau (“Parenteau”) provided a statement to police, which was entered into evidence by agreement (Exhibit 20). Parenteau indicated that shots had been fired at the residence (suite No. 5) a couple of days before May 21, 2020, albeit the May 18, 2020 shots were louder.

[12] Wayne Cook (“Cook”) testified that on May 18, 2020, he lived at 736 Pritchard Avenue. He was awoken by a loud shotgun blast at 6:40 a.m. Four shots were fired close together. He immediately called 9-1-1. While looking from his upstairs bedroom window, Cook noted four to five males walking west on Pritchard Avenue, approximately 20 seconds after the gunshots had been fired. He did not see where they came from. Two of the individuals got into a black mid-sized car which was facing west towards Arlington Street.

IV. MAY 21, 2020

A. Civilian Evidence

[13] On May 21, 2020, at around 9:00 a.m., Catcheway left her suite, but noticed the Deceased sitting on the steps leading to suite No. 5 and spoke with her grandson.

[14] Under cross-examination, Catcheway testified that:

- the occupants of suite No. 2 sold crack cocaine;
- the window of suite No. 1 was boarded, as the occupant’s girlfriend broke the window;
- the occupant of suite No. 4 utilized methamphetamine, albeit she was unsure if the substance was also being sold from that location;
- people were seen coming and going from the 747 sixplex at all times;

- she would see the Deceased each day and he had a key to her residence;
- the house had never been shot at before;
- the east yard of the sixplex was wide open facilitating an excellent view, except for blockage provided by a tree;
- the premises later burnt down because of a fire in an air conditioning unit.

[15] Parenteau indicated that sometime after 8:30 a.m. on May 21, 2020, he heard “swearing and gunshots” in the yard (Exhibit 20, p. 7, lines 19-20). The individual swearing was said to be the Deceased. Just prior to that occurring, a noise was heard possibly being someone coming up the stairs. He indicated that gunfire was directed at the door of suite No. 5, albeit, when he looked out the window, he saw no one but the Deceased lying on the stairs.

[16] Flett’s evidence was permitted after a s. 715.1 *voir dire*, as he was under 18 years of age at the time of this occurrence. The video recording was made on the date of the incident, the acts were described, and he adopted the contents. Flett advised that he lived with his grandmother Brenda Catcheway at suite No. 6. He had a good relationship with his cousin, the Deceased, whom he had known his entire life.

[17] Flett said that the Deceased probably sold drugs, as he liked money and utilized methamphetamine. His appearance had changed in and around the time of his death in that he was skinnier. Flett acknowledged that his cousin was undergoing a difficult time because of methamphetamine use. His behaviour had

been affected. Flett acknowledged that the Deceased came and went at all hours from the residence and sometimes slept at suite No. 6.

[18] Flett testified that on May 21, 2020, at around 9:30 a.m., he heard three to four gunshots, and within 30 seconds looked out the window and saw his cousin lying on the suite No. 5 doorstep. He did not see anyone in the area. Flett also heard the back gate slam about three seconds after the last shot was fired. The gunshots were close together and he heard a yell just before they commenced. Except for what occurred on May 18, 2020, shots had never been fired at the sixplex during his time in the residence. The May 18, 2020 gunshots were different than those fired on May 21, 2020.

[19] Under cross-examination, Flett testified that those in occupancy of suites Nos. 5 and 6 got along well and they were friendly with those in the other units. He did not know whether anyone sold drugs in the sixplex, albeit, some may have been using drugs.

[20] Serena Catcheway ("Serena") resided at suite No. 5 of 747 with her mother Trout, father Parenteau, and sister Angel. She was the Deceased's aunt and was close to him because of regular contact. On the evening prior to the shooting, Serena, along with her boyfriend and others, including the Deceased, were at a house party. All were drinking alcohol and utilizing methamphetamine. At approximately 4:00 a.m. to 5:00 a.m., they returned to suite No. 5 where further drinking and methamphetamine use occurred. When Serena awoke between 9:00 a.m. and 9:30 a.m., she noted that Trout, Parenteau, a cousin, and Angel were in the home while the others had left. Shortly thereafter, three gunshots

were heard. The Deceased was seen lying at the top of the stairs, faced down with his head close to the door. The police were called.

[21] Serena testified that the Deceased had not been himself over the last couple of months. He did not laugh as much and seemed to be looking around and over his shoulder as if he was scared. She indicated that those who resided in suites Nos. 5 and 6 got along well, while others in the sixplex were more separate.

B. Police Officer Testimony

Constable Daniel Cifuentes (“Constable Cifuentes”)

[22] Constable Cifuentes was a member of the WPS Forensic Identification Unit and testified that the existence of shell casings, which are usually ejected from a weapon on to the ground, can identify a shooter’s location. Additionally, trajectory rods placed in areas of bullet damage provides directional information with respect to where shots came from.

[23] On May 21, 2020, Constable Cifuentes was assigned to be the photographer with respect to a shooting at 747, along with a Sergeant and Constable Labossiere. Firstly, the group attended at the Health Sciences Centre to retrieve the Deceased’s property and take photographs. The Officers arrived at the guarded 747 scene at 2:19 p.m. (Identification Photobook, Exhibit 1). Markers were placed in areas where casings were found - near a large multi-trunked tree, along with a live bullet, as well as the suite No. 6 stair area. Further, a backpack was located near the suite No. 5 stairs. In all, eight nine-millimeter Luger shell casings and two 22 live rounds were found in and around these areas of the yard. The Officer also

identified the suspects' path of travel across the back lane from 747 to 728 Pritchard Avenue, as well as to 721 Pritchard Avenue from operating video surveillance cameras on the nearby residences.

[24] Trajectory rods were placed in the bullet holes in and around the suite No. 5 stairway where the victim had been located. The bullets were approximately four to six feet high with one through the left frame of the doorway.

[25] Constable Cifuentes acknowledged, under cross-examination, that he could not say for sure when the casings had been placed in the yard. He conceded that there had been firearm discharges at 747 in the past. He accepted that trajectory rods are not an exact science, but do provide general directional information as to a bullet's path. The only bullet actually located in the house was in the left door frame. Further, the firearm utilized has never been recovered and, consequently, the ejection pattern from the weapon is unknown. (The firearm in question was located on August 22, 2020 – Agreed Statement of Facts – The Firearm, Exhibit 47. It was a KelTec SUB2000 9 millimetre firearm.)

Constable Gwenaelle Labossiere ("Constable Labossiere")

[26] Constable Labossiere was the Exhibit Officer who went with the Sergeant and Constable Cifuentes to the Health Sciences Centre where articles of jewellery, currency, clothing and exhibits related to the Deceased were secured (Exhibit 2). This forensic identification team then attended to 747 where eight spent nine millimetre Luger shell casings were seized, along with two live 22 bullets. A backpack was secured which contained, amongst other items, a syringe, cash,

drugs, and a six-inch blade knife. The fired bullet from the door frame at suite No. 5 and the bullets from the Deceased's body were also collected. Constable Labossiere was provided with other exhibits over the course of this investigation, such as those seized on May 27, 2020, when the Accused were arrested at or near a Theme Suite Hotel ("Theme Hotel"), as well as from an 859 Bannatyne Avenue address. These exhibits were linked through video surveillance evidence with the Accused and included (Exhibit 2, Exhibit Book):

- red Nike T-shirt - Jack (Exhibit 3);
- red face mask - Jack (Exhibit 4);
- gold ring - Jack (Exhibit 5);
- gold link bracelet - Jack (Exhibit 6);
- red Prada shoes - Jack (Exhibit 7);
- grey baseball cap - Scott (Exhibit 8);
- pair of Nike white and black runners - Scott (Exhibit 9);
- Ecko jacket - 859 Bannatyne Avenue (Exhibit 10);
- camouflage shorts - 859 Bannatyne Avenue (Exhibit 11);
- Herschel black fanny pack - the Theme Hotel (Exhibit 12);
- Hugo Boss red shirt - the Theme Hotel (Exhibit 13);
- HSTL Gang grey T-shirt – the Theme Hotel (Exhibit 14);
- black jean shorts - the Theme Hotel (Exhibit 15).

[27] Additional exhibits seized were from a black Dodge Journey ("Dodge") motor vehicle bearing Manitoba licence plate KLC 980. That vehicle had been

insured by Starlene Beardy for the period of May 12 to June 11, 2020. Documentation found in the Dodge included a carwash ticket dated May 23, 2020, and a May 22, 2020 Kroy Tire invoice made out to Philicia Lathlin (Exhibits 16-18).

Detective Sergeant Kenneth LePage ("Detective LePage")

[28] Detective LePage was tasked with and secured video from a waste systems garbage truck that was in the back lane between Pritchard Avenue and Selkirk Avenue on May 21, 2020. The video recording demonstrates that at 9:22 a.m. three individuals were seen running across the back lane towards the Selkirk Avenue address and, at 9:25 a.m., those persons retraced their route running back towards Pritchard Avenue.

Constable Tristan Peterson ("Constable Peterson")

[29] Constable Peterson testified that on May 21, 2020, he and his partner Constable Hebert were on general patrol and parked on College Avenue. Constable Peterson, the driver, observed a black Dodge Journey motor vehicle with Manitoba licence plate KLC 980 coming east-bound towards their location at 8:32 a.m. He provided the plate number to his partner to check, with the result being "all good". The plate was run as a consequence of the Officer's awareness of an earlier "BOLO" (be on the lookout) for such a vehicle. As the Dodge passed their location, Constable Peterson observed an Indigenous or Métis male driver for one to two seconds. The driver was of medium build with a cursive or old English writing tattoo on the left side of his neck. These observations were made from six to eight feet away.

[30] At 9:40 a.m., Constable Peterson and his partner were dispatched to a shooting at 747. They were tasked with and canvassed the area for video surveillance footage. The licence plate in question was run again by a WPS member at 10:24 a.m., albeit Constable Peterson did not know why.

Constable Ian Lobban ("Constable Lobban")

[31] Constable Lobban and his partner responded to the May 21, 2020 shooting at 9:30 a.m. Upon arrival one minute later, they found two females on the suite No. 5 landing near a person lying faced down with his head towards the door. The injuries noted were consistent with gunshot wounds. The Officers removed the victim's backpack and transferred his body to ground level to assess his situation. The victim was grey and unresponsive. Constable Lobban administered CPR for four minutes until paramedics arrived and took over.

[32] Constable Lobban went in the ambulance to the Health Sciences Centre with the victim at 9:53 a.m., death was pronounced at 10:04 a.m. Constable Lobban and his partner secured the personal effects of the Deceased and turned them over to the WPS Forensic Identification Unit.

[33] While on scene, Constable Lobban observed nine millimeter casings approximately five feet away from the suite No. 5 staircase area, near the tree, as well as close to the suite No. 6 back fence.

Constable Andrew Aitken ("Constable Aitken")

[34] Constable Aitken is a member of the WPS Canine Unit and has been a handler since 2018 (Curriculum Vitae, Exhibit 24). He described the tracking

abilities of the unit's canines, who are generally the Belgian Malinois breed. That breed is known for their high drive, intensity and never-quit attitude. At the time of this event, Constable Aitken was partnered with "Billy" who would signal a "track" by way of a head snap, body shift and then engage in a gallop showing "donkey kick intensity". When a track is lost, the dog's head will "pop up" and his body and pace relaxes. The handler will then endeavour to re-orientate the dog by circling the area in an attempt to again secure a head snap.

[35] On May 21, 2020, Constable Aitken received a firearm call and arrived at 747 at 9:33 a.m. He was told three individuals had fled north-bound through the rear gate of 747. As a consequence, Billy was deployed. The dog and handler went to the rear gate and did a semi-circle, which resulted in Billy signalling a track. They proceeded north through a path on the east-side of 728 Pritchard Avenue and then north-east across Pritchard Avenue towards 715 Pritchard Avenue. Billy demonstrated no hesitation in proceeding through the yard and east side path at 715 Pritchard Avenue. The track continued north onto a parking pad, behind that residence where it was lost. Constable Aitken noted that no distractions with respect to the dog had occurred, nor were there obstacles or adverse weather that would have impacted his ability to track. The actual track was of short duration and under one-quarter of a kilometer.

[36] Constable Aitken was of the view that the track was lost because the suspects got into a vehicle and left the area. Under cross-examination, Billy's record for tracks and arrests was compared to that of Constable Aitken's current partner, Max, as well as the fact that Billy was retired because of what was called

“unpredictable behaviour”. Constable Aitken testified that the reason for Billy’s retirement was unrelated to the dog’s ability to track. It was acknowledged that tracking more than one suspect is more complex, albeit the dog will stay with one track, even if others are gone.

V. BLACK DODGE JOURNEY MOTOR VEHICLE (“DODGE”)

Starlene Beardy

[37] In an Agreed Statement of Facts (Exhibit 23), Starlene Beardy (“Beardy”) indicated she leased the Dodge vehicle as a favour to Philicia Lathlin. This was accomplished on May 12, 2020. Lathlin drove her home from the leasing company and Beardy was never again in the vehicle before May 21, 2020. She was paid \$150 by Lathlin for leasing the Dodge.

Christopher Freis

[38] Christopher Freis (“Freis”) is the sales manager of “The Car Guy Inc.” being a company that engages in high-risk leasing to those who cannot lease elsewhere. A number of documents must be signed with respect to leasing a vehicle and include personal information and four references (Exhibit 27). In this case, Beardy’s references included Lakeisha and Philicia Lathlin. There are conditions attached to vehicle leasing which include that it cannot be used for criminal activity and must be equipped with a GPS tracking device. The purpose of the GPS is to ensure the vehicle can be located in those circumstances where payments become delinquent. The GPS is provided by Certified Tracking Solutions Inc. (“CTS”). The hardware is installed in the vehicles, while software is downloaded on a cellular

device or computer for tracking purposes. The GPS serves to locate a vehicle in real time and is accurate within 10 metres. It also facilitates access to historical data which shows where the vehicle has travelled. The Car Guy Inc. has a record of 100 per cent recovery of vehicles requiring repossession.

[39] On May 12, 2020, Freis met with Beardy who leased a black Dodge Journey motor vehicle. All conditions were signed off and accepted by her. On May 22, 2020, WPS Investigators Detectives Allan and Simpson attended at The Car Guy Inc. and inquired about the Dodge and requested its GPS coordinates. Those coordinates were provided on a number of occasions that day. The Officers returned with Production/Assistance Orders which resulted in contact with CTS who facilitated them logging into their system and downloading the necessary software application. On May 25, 2020, the Dodge historical tracking information for the May 12-22, 2020 period was provided to the WPS.

[40] A member of the WPS advised on June 3, 2020, that the Dodge could be picked up after a police seizure. Freis picked up the vehicle and returned it to Beardy, as there was no indication of her involvement in criminal activity. One week later, the vehicle was seized again, this time in Edmonton, Alberta. The RCMP contacted Fries and, again, the vehicle was retrieved.

Liam Cusack

[41] Liam Cusack (“Cusack”) is the chief operating officer of CTS. He testified as to the GPS fleet management system in place which facilitates the location of vehicles affixed with a “black box” GPS chip that is paired with a cellular modem. The information from the hardware is conveyed into a server maintained by CTS

which can be accessed by a client through an application or web browser. Companies such as The Car Guy Inc., who engage in high-risk leasing, track with CTS in order to ensure they know where their vehicles can be located in real time along with historical tracking data. Cusack testified that location accuracy is paramount, being plus or minus ten metres of what is shown on the system. He explained the historical data (Exhibit 44) can be outlined on an Excel spreadsheet with latitude and longitude being the most important location data.

[42] The data requested and provided to the WPS related to a Dodge vehicle bearing Manitoba licence plate number KLC 980. Cusack testified that on May 18, 2020, at 6:29 a.m., the vehicle was located in a stationary position at 735 Pritchard Avenue, while at 6:39:06 a.m., it was shown to be ignition off and stationary at 754 Pritchard Avenue. The Dodge was located at 867 Bannatyne Avenue ("867") at 7:05:54 a.m. On May 21, 2020, the Dodge vehicle was at 90-118 Marion Street with ignition off at 6:25:43 a.m. and 6:36:23 a.m. Previously, it was noted to have been located at 867. At 9:21:07 a.m., the Dodge was located at 715 Pritchard Avenue. The next notation occurred at 9:25:57 a.m., as the vehicle was proceeding at 31 kilometres per hour with no matching landmark noted. It was next detected at 9:48:12 a.m. with ignition off at 867.

[43] On May 22, 2020, the Dodge vehicle was noted to be, amongst many other locations, on Forks Market Road, commencing at 8:42:55 p.m. until approximately 9:38:31 p.m. Cusack acknowledged that there are periods of time where no data is reflected on the tracking information. The times indicated on the Excel spreadsheet are considered to be snapshots.

Detective Sergeant Gregory Allan ("Detective Allan")

[44] Detective Allan, partnered with Detective Sergeant Brent Simpson ("Detective Simpson"), became involved in this investigation on May 21, 2020. He had seen a BOLO on May 18, 2020, with respect to a shooting at 747 involving two suspects in an unidentified black Dodge vehicle. On May 21, 2020, he received witness information that, after hearing gunshots, three males were seen running from the area of 747 and departed at high speed in a black SUV. As a consequence of the previous BOLO, Detective Allen testified that he secured the licence plate number from the call history along with the relevant vehicle ownership and registration information. He also secured pictures posted on The Car Guy Inc. website (Exhibit 29) and compared those photographs to those secured by Detective Pete Sohota who had captured a black Dodge Journey coming out of a back lane at Pritchard Avenue and Arlington Street from surrounding video surveillance cameras during the relevant time period. He compared the photographs for consistencies and noted the only difference was that the right rear passenger tire was a spare.

[45] On May 22, 2020, Detective Allen and his partner were tasked to visit The Car Guy Inc. and spoke with Sales Manager Freis, who explained the operation of the GPS tracking system and the AutoConnect GPS platform. Consequently, the Dodge vehicle was located numerous times between 9:53 a.m. and 10:06 a.m. There was a spare tire noted to be affixed to the rear passenger side wheel by a surveillance unit. Subsequent requests were made of Freis for the Dodge's

coordinates on that day as the surveillance unit was watching its movements. At 5:55 p.m., Tracking Order Warrant/Assistance Orders were issued and served at 6:43 p.m. on The Car Guy Inc. requesting access to the CTS tracking service along with a password. Detective Allen testified that he was provided with that information, downloaded the application and logged in at 6:48 p.m. He was then able to locate the Dodge vehicle.

[46] On May 25, 2020, the Detectives returned to The Car Guy Inc. with a Production Order and secured the Dodge's historical data for the period between May 12 and 22, 2020.

[47] Detective Allen testified that he and his partner began examining the dates and areas of interest identified by the GPS tracking information for the Dodge vehicle, which included addresses at 867, an address on Ellice Avenue, and 118 Marion Street. Further, at 9:21 a.m. on May 21, 2020, the Dodge was identified as being at 715 Pritchard Avenue, and, at 9:25 a.m., being one minute past the gunfire, to be proceeding at 31 kilometers per hour west-bound in a Pritchard Avenue back lane. At 9:48 a.m., the vehicle was turned off at 867.

[48] On May 21, 2020, at 3:43 a.m., the Dodge vehicle had been parked in an Ellice Avenue lot which serviced a Winnipeg Hotel ("Hotel"). Detective Allen and Detective Sergeant Simpson attended at the Hotel on May 25, 2020, and secured footage from the surveillance cameras. That surveillance showed the Dodge vehicle arriving at 3:43 a.m. on May 21, 2020, occupied by two males and two females. Those individuals were later identified as Philicia Lathlin; her sister

Lakeisha Lathlin; Scott; and, an unknown male. Footage was also secured from the Norwood Hotel ("Norwood") at 118 Marion Street for the time periods of 6:25 a.m. and 6:35 a.m. on May 21, 2020. Three males and a female were seen in that footage in the hotel lobby and surrounding areas.

[49] On May 26, 2020, Detective Allen testified that he generated a BOLO with respect to the yet identified suspects (Exhibit 30). That BOLO was circulated throughout the WPS and its related justice partners. The responses generated by the BOLO identified Scott, Jack, a youth, and the female. Both Scott and Jack were located at the Theme Hotel on May 27, 2020. Searches were effected on the "China" and "India" theme rooms with Detective Simpson acting as the seizing exhibit Officer.

VI. RECOGNITION EVIDENCE

Constable Adam Rempel ("Constable Rempel")

[50] Constable Rempel has been a member of the WPS since January 2020. Previously, he was employed from June 2009 to March 2018, as a juvenile counsellor 1 ("JC1") at the Manitoba Youth Centre ("MYC"). Constable Rempel testified that on May 26, 2020, he responded to a BOLO request which sought to identify three persons. He instantly recognized Jack as one of those individuals. He testified that he only responds to a BOLO request if he is 100 per cent certain of his identification.

[51] Constable Rempel testified that he had interacted with Jack over a significant period of time during his incarceration at the MYC. They would speak

each day, had quality conversations, and a good rapport. Jack was memorable to him because of their interactions and the quality of those encounters.

Randy Paculan ("Paculan")

[52] Paculan was employed at MYC as a JC1 and acted as Jack's case manager. He responded to the May 26, 2020 BOLO with his recognition of Jack being close to immediate. He had a good level of certainty when he responded to the BOLO. Paculan's interactions with Jack took place before he left MYC in 2016. They had a significant connection over the course of a year with personal conversations, quality time, sports, the playing of games, and their contact as a consequence of his function as his case manager. He would check on Jack's wellbeing, help out, and speak with him on every shift. Their relationship was said to be good, as Jack was a trusted and respected inmate.

VII. SURVEILLANCE/IDENTIFICATION EVIDENCE

Sergeant Ryan Howanyk ("Sergeant Howanyk")

[53] In May 2020, Sergeant Howanyk was in charge of the WPS Surveillance Unit. At the time in question, surveillance unrelated to the 747 shooting had been occurring at 859 Bannatyne Street, albeit there were concerns as to whether it had been detected.

[54] On May 22, 2020, Sergeant Daryl Kostiuik of the Homicide Unit requested surveillance as regards three unknown males and a target vehicle, being the Dodge. The Dodge was the primary target as it had been identified, while the males had not. Eight members were assigned to the surveillance team. Detectives

Allen and Simpson assisted in locating the vehicle through The Car Guy Inc. and GPS tracker system. The Dodge was first located at 9:55 a.m. on Ellice Avenue with updates being provided until it stopped at 10:06 a.m. in the parking lot of an Arlington Street hotel. At that time, two unidentified females occupied the vehicle. The track was subsequently lost, but was soon reacquired at 867. The Dodge was often located at 867 or at a nearby church parking lot on McDermid Avenue both of which were close to 859 Bannatyne Avenue (Exhibit 33 – Agreed Statement of Facts – 859 Bannatyne Avenue Associations). The vehicle, again, became mobile at 1:53 p.m. with unknown male 1 and two females in the Dodge. The unknown male was described in further detail at 2:06 p.m., when the vehicle was stopped and surveilled at the Remand Centre. The descriptors included: a male wearing no shirt with a big build, a large chest tattoo, and tattoos on the chest, arms, and a band tattoo on the right upper arm.

[55] The Dodge vehicle was lost again, but reacquired at 3:10 p.m. while located at a Kroy Tire location with the two unknown females in attendance. It remained there until 3:45 p.m. and, upon leaving, the surveillance team observed that the spare rear tire had been replaced. The vehicle subsequently returned to the church parking lot and remained in that location from 4:59 p.m. to 8:16 p.m., when unknown males 1 and 2 and the two unknown females began travelling to various locations including to The Forks Market (8:42 p.m.). Unknown male 1 was noted to have a long hair braid, a black Oakland Raiders cap, black and white shorts, black and white runners, and a grey T-shirt with writing on the front.

Unknown male 2 was wearing a white T-shirt and red sweatpants, as well as red and white runners (Exhibit 31). The group returned to the Dodge vehicle at 9:37 p.m., was observed to pick up food and returned to the church parking lot where surveillance ended at 10:30 p.m.

[56] On May 22, 2020, Sergeant Howanyk acknowledged that the target vehicle was lost six times. It was either reacquired with the assistance of the Homicide Detectives through GPS, or by others on the surveillance team. It was unknown as to what happened during the lost times, if people within the vehicle left or whether others were picked up.

[57] On May 27, 2020, Sergeant Howanyk and the surveillance team were asked to assist with the identification, arrest, and charge of three persons of interest. By that time, the surveillance team had been provided with the names of the three targets, given descriptions and Niche photograph images. The three targets were: Scott, Jack and a youth. Sergeant Howanyk testified that he recognized Scott as being the unknown male 1 observed during his May 22, 2020 surveillance (1:53 p.m. and following). The Forks Market pictures were taken from approximately 50 feet away. The Officer was very confident that the Niche photograph shown on the target sheet and the person seen at The Forks Market was Scott.

Constable Jade Lowry ("Constable Lowry")

[58] Constable Lowry was attached to General Patrol and West District Community Support. He inadvertently became involved in this investigation on May 25, 2020. While partnered with Constable Gross, the team was tasked to effect an arrest on an individual (BW) for aggravated assault and on firearms

charges. Another unit was also tasked with the arrest because of the firearms charge. Constable Lowry indicated that on all calls, he endeavours to identify threats. Information was secured from BW's Probation Officer that he was residing at suite No. 1 of 859 Bannatyne Avenue. The four Officers attended at that residence with Constable Lowry ringing the doorbell which was answered by a male wearing a COVID mask. That person contended that he did not live at the residence and they should get a warrant. Philicia Lathlin came out of suite No. 1 and advised she did not know BW and also told the Officer to secure a warrant. Lakeisha Lathlin then came to the door from the same suite and was followed out by a large Indigenous male. The male left the premises and walked away. He was described as being six foot three-four inches in height with a thick build, a ponytail, and was wearing an HSTL Gang grey T-shirt. The male did not speak to the Officers, albeit was perceived as a "threat" by Constable Lowry.

[59] Constable Lowry testified that he undertook Niche and computer checks with respect to the individuals he had encountered. As a consequence, he was told to contact and meet Detectives Simpson and Allen. Constable Lowry was shown a surveillance photograph by Detective Simpson of the larger male and identified him as being the individual who had walked past the Officers at 859 Bannatyne Avenue. He testified that he was 100 per cent certain of that identification.

Detective Sergeant Randy Levasseur ("Detective Levasseur")

[60] Detective Levasseur testified that he and partner Detective Michael MacDonald were informed of the 747 shooting on May 21, 2020, and engaged in an investigation that day involving a Dodge vehicle, which was ultimately handed off to Detectives Allen and Simpson.

[61] On May 27, 2020, the Officers were briefed by Sergeant Kostiuik with respect to three shooting suspects, being Scott, Jack and a youth and were provided with Niche images. Detective Levasseur and his partner assisted with surveillance that day in the area of 859 Bannatyne Avenue. While on a break, they observed Scott on foot at 12:48 p.m. He was north-bound on Smith Street. The tactical team was advised. The surveillance focus shifted in the afternoon to the Theme Hotel. At 3:22 p.m., Scott was observed by Detective Sergeant Daryl Smuttell to leave the hotel and an arrest by the tactical team occurred shortly thereafter (Exhibit 35 – Agreed Statement of Facts – Tactical Support Team Involvement – May 27, 2020). Detectives Levasseur and MacDonald took control of Scott at 3:28 p.m., afforded him his rights and conveyed him to police headquarters. These Officers also conducted an interview and facilitated Scott's right to counsel.

[62] Scott's black and white runners and cap were seized at the time of arrest (Exhibit 2, Tab 2, pp. 6-7). Further "360 photographs" were undertaken which demonstrated the existence of tattoos on his chest, neck and arm (Exhibit 39). Scott was said to be six feet four inches tall and weighed 220 pounds.

Detective Sergeant Robert Simpson ("Detective Simpson")

[63] Detective Simpson was partnered with Detective Allen at the relevant time. Their task early in the investigation was focused on the identification and location of the Dodge vehicle through The Car Guy Inc. and ultimately through GPS.

[64] On May 25, 2020, Detective Simpson testified that he and his partner were part of the surveillance team watching 859 Bannatyne Avenue. While at that location, two unmarked police cruisers attended at 10:33 a.m. Once those Officers had cleared the area, Detective Simpson contacted Constable Lowry, who was part of the team who had attended at the residence. The purpose of the contact was to show Constable Lowry suspect photographic images secured from The Forks Market on May 22, 2020. This was done in order to determine the identities of those who he came into contact with at 859 Bannatyne Avenue. Constable Lowry recognized one individual being the male with long hair.

[65] Detectives Simpson and Allen's investigation continued by following up GPS historical data for the Dodge vehicle. On May 26, 2020, they secured the Norwood's video surveillance footage taken in advance of the 747 shooting. Three male suspects and one female were seen entering the hotel at 6:37 a.m. on May 21, 2020. The Dodge was also located in the hotel's parking lot. Detective Simpson testified that he created a bulletin (BOLO) for distribution to the police service with photographs secured from the surveillance footage asking for identification of the suspects (Exhibit 30). The following day, Sergeant Kostiuk informed him that responses had been received with respect to the bulletin identifying Scott, Jack, a youth and Rayanne Myron. Also on that day, Scott had

been seen in downtown Winnipeg at 2:43 p.m. and was ultimately arrested at 3:30 p.m. (Agreed Statement of Facts – Tactical Support Team Involvement – May 27, 2020, Exhibit 35).

[66] At 3:44 p.m. on May 27, 2020, Detective Simpson and his partner, along with Detectives Barber and Zaporzan went into the Theme Hotel with a focus on the “India” and “China” theme rooms. Shortly thereafter, two females were taken into custody being Lakeisha Lathlin and Mariah Wilson. They had emerged from the “India” suite. A short time later, Jack was arrested in the “India” suite and taken from the scene by Detectives Barber and Zaporzan (5:59 p.m.).

[67] Detective Simpson and his partner attended at the Hotel on Ellice Avenue on June 2, 2020, as that also was a scene identified by GPS tracking. A video canvass was undertaken with surveillance video footage secured showing Scott on May 21, 2020, at 3:43 a.m. and for a period thereafter.

[68] Under cross-examination, Detective Simpson testified that there was “lots” of foot traffic at 747 with “sketchy” people going in and out. He also confirmed he did not take statements from anyone at 747, with the exception of the residents of suites Nos. 5 and 6.

Detective Sergeant Robert Mitchell (“Detective Mitchell”)

[69] Detective Mitchell was partnered with Detective Sergeant Parry for the investigation of this matter. Their focus was, again, on the Dodge vehicle which was noted through surveillance video to be at a Night Club & Sports Bar on May 21, 2020 at 12:15 a.m. to 1:00 a.m. Previously, on May 18, 2020, it had been located at a convenience store on St. Mary’s Road between the time of 1:00 a.m.

and 1:25 a.m. The male in possession of the Dodge was later identified to be Scott.

[70] Detective Mitchell saw Detective Simpson's BOLO with respect to identification of three suspects and was able, through the Niche system, to identify the youth.

[71] On June 16, 2020, Detective Mitchell was aware that both Scott and Jack had been arrested. However, his GPS focus on the Dodge vehicle continued and led him to the Province of Alberta. Further, open source investigation was utilized (Facebook) where a photograph of Leikeisha and Philicia Lathlin was seen with the youth of interest, among others (Exhibit 38). The youth was arrested by the RCMP in Red Deer, Alberta, on June 17, 2020, and transported to Winnipeg by Detectives Mitchell and Parry. The youth is six feet tall and weighs 136 pounds (Agreed Statement of Facts – Arrest of Youth June 17, 2020, Exhibit 43).

David Bowman

[72] David Bowman ("Bowman") is a civilian analyst with the WPS. On May 21, 2020, he received a request to undertake a summary of the Dodge GPS tracking data and convert it to a visual format. The request covered the period between May 12 and 22, 2020. Bowman testified that he accessed AutoConnect and downloaded data into an Excel spreadsheet which he collated into a chart for each of the days along with a visual format (Exhibit 45). The important data with respect to this endeavour was longitude and latitude. Maps were created for each day with points of interest reflected which included 715, 735, and 754 Pritchard Avenue; 747; 867; and, 118 Marion Street.

[73] Bowman testified that on May 18, 2020, at 6:29 a.m., the Dodge vehicle was located at 735 Pritchard Avenue and at 6:39:06 a.m. had moved to 754 Pritchard Avenue. A video reflected the movement of the vehicle along with its presence, with ignition off, at 7:05 a.m. at 867. On May 21, 2020, amongst other locations, the vehicle was at the Hotel on Ellice Avenue (3:43:19 a.m.) and at 118 Marion Street (6:25 a.m. and 6:36 a.m.). Further, at 9:21:07 a.m., the Dodge was detected as being at 715 Pritchard Avenue, and at 9:25:59 a.m., was still in that area. At 9:48:12 a.m., the vehicle was again located at 867.

[74] Bowman acknowledged that the maps are only as good as the data upon which they are based and recognized that there are gaps in the GPS timing.

Detective Sergeant Derek Zaporzan ("Detective Zaporzan")

[75] Detective Zaporzan testified as to his involvement in the May 21, 2020 investigation, as well as to the work performed by Detective Preet Sahota who prepared a timeline photobook and video with respect to this incident (Exhibit 48). A number of Officers seized video footage in the relevant areas which was collated by Detective Sahota.

[76] Detective Zaporzan, who was partnered with Detective Barber, was tasked by Sergeant Kostiuk to use the GPS coordinates secured through AutoConnect to undertake a video canvass of where the Dodge vehicle had been located after the May 21, 2020 shooting. There was video evidence from a number of locations which included an address on King Edward Street (visited at 7:25 p.m. on May 21, 2020) and a Winnipeg mall at 5:52 p.m. (on May 21, 2020). Those images were passed to Detective Sahota for use in his timeline. He reviewed the photobook

and timeline prepared by Detective Sahota which demonstrated the suspects' movements both before and after the events of May 18 and 21, 2020. Included in the timeline video were articles of clothing and jewellery that were associated and seized from both Accused.

[77] On May 21, 2020, Detective Zaporzan testified that he attended at 747 and was able to talk to one of the neighbours in suite No. 4. The other suites were not canvassed. He was aware that the location had a significant history of police involvement from his own attendances while on general patrol. He was also aware that drug activity had occurred in some suites of that residence.

[78] Detective Zaporzan and his partner were tasked with attendance at the Theme Hotel on May 27, 2020, where video surveillance was secured and interviews undertaken.

VIII. EXHIBITS

Constable Susan Desender (Constable Desender")

[79] Constable Desender along with her partner Constable Hazey were assigned on May 28, 2020, to assist Homicide Detectives Bevan and Trudeau in the seizure and photographing of exhibits from 859 Bannatyne Avenue. A warrant was secured and the Officers were briefed by the Homicide team when they walked the scene. Constable Desender seized an Ecco jacket, a Chicago Bulls cap, camouflage shorts and runners, which were all turned over to Exhibit Officer Constable Labossiere (Exhibit 34).

[80] Constable Desender acknowledged, under cross-examination, that the suite in question had piles of both children and adult clothing, with all being mixed together. She bagged each of the exhibits separately in Ziploc bags to prevent contamination. Constable Desender conceded that there was no paper documentation seized which directly connected the suspects with the residence. Further, she was unaware as to how many lived in the suite or how long the exhibits had been at that location.

Detective Sergeant Paul Barber ("Detective Barber")

[81] Detective Barber was partnered with Detective Zaporzan and both attended a 7:00 a.m. briefing on May 27, 2020, which alerted them that the three suspects had been identified for the May 21, 2020 shooting being Scott, Jack and a youth. The Niche photographs and video stills from the Norwood were supplied in order to assist with the identification.

[82] Detectives Barber and Zaporzan attended at the Theme Hotel at 3:30 p.m. and were told by other Officers that Scott had left the hotel and been arrested. Consequently, the Officers went inside and spoke with the manager with a focus on the side-by-side theme suites of "India" and "China". Encountered in the foyer area were Lakeisha Lathlin and Mariah Wilson. The tactical team handled the arrest of Jack in the "India" suite and turned him over to other Officers around 6:03 p.m. Jack was charged, cautioned, and his right to counsel facilitated. Detectives Barber and Zaporzan interviewed Jack until 6:28 a.m. on May 28, 2020. The property seized from Jack included a red T-shirt, black sweatpants, red

runners, red COVID mask, and jewellery items. Photographs were also taken of his person (Exhibit 39). Jack is five feet 11 inches, and at the time weighed 157 pounds.

Detectives Simpson and Allen

[83] On May 28, 2020, Detectives Simpson and Allen re-attended at the Theme Hotel at 5:04 a.m. and executed a search warrant. Photographs were taken of the two involved theme suites and seizures occurred. Firstly, with respect to the “China” suite, a grey HSTL T-shirt, a Hugo Boss red-collared shirt which a male had been seen wearing at the Norwood on the May 25, 2020 video, and black shorts were seized. In the “India” room, a black Herschel fanny pack was secured (Exhibit 36). This item was seen in May 25, 2020 video surveillance being worn by Jack.

IX. DNA

Christy Sanderson

[84] Christy Sanderson (“Sanderson”) was qualified as an expert forensic specialist in DNA and is associated with the RCMP Forensic Science and Identification Services laboratory in British Columbia. Sanderson testified that she analyzed an Ecco jacket (Exhibit 10) and camouflage shorts (Exhibit 11) for DNA. Both those articles of clothing had one major contributor being Scott. Further, in the sample areas taken from the clothing, the DNA was of mixed origin with two or three other contributors. Sanderson testified she could not say how or when the DNA came to be affixed on the clothing.

[85] It was acknowledged by Sanderson, on cross-examination, that other individuals could have worn the clothing in question and transfer may have occurred. An analyst endeavours to look for sample areas that are more likely to attract DNA such as a zippered/buttoned area and collar. She could not say how long Scott had spent in the room where the shorts and jacket had been located and seized.

X. THE LAW

[86] The Crown is seeking a conviction for first degree murder as the circumstances are argued to constitute a planned and deliberate act. The Crown must prove each of the essential elements of that charge beyond a reasonable doubt:

- (i) that the Accused committed an unlawful act;
- (ii) that the unlawful act caused death;
- (iii) that the Accused had the intent required for murder; and,
- (iv) that the murder was both planned and deliberate.

In those circumstances where an accused is found to lack the intent required for murder, a conviction for manslaughter may be entered. Further, where there is reasonable doubt that the murder was both planned and deliberate, a finding of second degree murder may ensue. An acquittal could also be found in the event it cannot be proven that an accused committed an unlawful act.

[87] The wording of s. 231(2) of the **Code** requires that both planning and deliberation be established for a first degree murder conviction. To be planned, there must be some type of calculated scheme that was prepared in advance of

the killing. The deliberation element connotes a considered action rather than an impulsive act. It is a course of conduct where the consequences of the action are contemplated. A particular period of time for the planning and deliberation is not necessary.

[88] A reasonable doubt is not an imaginary, far-fetched, or frivolous doubt. It is not a doubt based on sympathy for or prejudice against anyone involved in the trial. It is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence, or the absence of evidence. Proof of probable or likely guilt is not proof of a guilt beyond a reasonable doubt. Further, absolute certainty is a standard of proof that is impossibly high.

[89] The Crown alleges that Scott was the shooter on May 21, 2020, with Jack being a party to that offence. It is submitted that Scott was the principal and did everything necessary to constitute the offence of a planned and deliberate first degree murder. The Crown also alleges that Jack both aided and abetted Scott's actions in that he helped him commit the offence and/or actively encouraged him to do so.

[90] Those who help others commit offences are described as aiders. Aiding requires both conduct and a particular state of mind. The aider must intend to help the other person commit the offence. Actual assistance is necessary. It is not enough that a person was simply there when a crime was committed by someone else, as, on occasion, people are in the wrong place at the wrong time. That said, if a person knows that someone intends to commit an offence and goes

to or is present at the place where the offence is committed to help the other person commit it, that person is an aider of the other's offence and equally guilty of it. The aiding also relates to a specific offence. It is necessary that Crown counsel prove both intent to help and that the aider knew that the principal intended to commit the offence, albeit the Crown need not prove that the aider knew precisely how the offence would be committed.

[91] A person who encourages another to commit an offence may also be found guilty of the offence they encourage. Those individuals are considered abettors which, again, requires both proof of conduct and a specific state of mind. An abettor must provide actual encouragement by words, conduct, or by both words and conduct, to another person to commit the offence. It is not enough that what the abettor does or says has the effect of encouraging, or results in encouraging, the other person to commit the offence. By what that person says or does, the abettor must also intend to encourage the other person to commit the crime. Again, it is not enough that a person was simply there when a crime was committed by someone else. However, if a person knows that someone intends to commit a crime and goes to or is present at a place to encourage that other person to commit the crime, that person who encourages is also equally guilty of the offence the other commits. Abetting relates to a specific offence. The abettor must intend that the other person commit the offence or know that the other person intends to commit it and intends to encourage that other person to do so.

[92] This case is based upon circumstantial evidence. Accordingly, it is necessary to be mindful of the Supreme Court of Canada's instruction on reasonable inferences as provided in **R. v. Villaroman**, 2016 SCC 33, [2016] 1 SCR 1000. Justice Cromwell, speaking for the Court, discussed the issue of drawing inferences where the ultimate decision may depend exclusively or largely on circumstantial evidence:

[36] ... As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30.... A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt... I agree with the appellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused"... "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[emphasis in original]

XI. THE CASE LAW

[93] The Crown relies on the decisions in **R. v. Johnson**, 2017 NSCA 64 (CanLII); **R. v. Briscoe**, 2010 SCC 13, [2010] 1 SCR 4111; and, **R. v. Tremble**, 2017 ONCA 671 (CanLII). The **Johnson** case outlined the essential elements of first degree murder. The court held:

[66] The intent for murder is found in s. 229(a)—the person who caused the death, meant to cause death, or meant to cause bodily harm that he knew was likely to cause death and was reckless whether death ensued or not.

[67] To attract liability for first degree murder, the trier of fact must be satisfied beyond a reasonable doubt that the murder was both planned and deliberate. The suggested wording to explain these requirements to a jury are found in *Watt's, supra*, p. 691:

A *planned* murder is one that it is committed as a result of a scheme or plan that has been previously formulated or designed. It is the implementation of that scheme or design. A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is *not* a planned murder.

"Deliberate" is *not* a word that we often use when speaking to other people. It means "considered, not impulsive", "carefully thought out, not hasty or rash", "slow in deciding", "cautious".

A deliberate act is one that the actor has taken time to weigh the advantages and disadvantages of. The deliberation must take place *before* the act of murder (*briefly describe*) starts. A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is *not* a deliberate murder.

Johnson also considered the issue of an aider's potential liability for a planned and deliberate first degree murder. The trier of fact must be satisfied beyond a reasonable doubt that the aider:

[80] ...

- did or omitted to do something that aided another person to unlawfully cause the victim's death
- did those things (or at least one of them) for the purpose of aiding that other person to unlawfully cause the victim's death
- when he did those things (or at least one of them) he either had the requisite intent for murder or knew that the principal offender had the requisite intent for murder
- when he did those things (or at least one of them), he did so for the purpose of aiding the principal offender to commit a planned and deliberate murder

- when he did those things, he planned and deliberated the murder, or knew that the murder was planned and deliberate

[94] The ***Briscoe*** decision also discussed the issue of aiding and/or abetting a principal in the commission of an offence.

[95] The Ontario Court of Appeal in ***Tremble*** reviewed the issue of a planned and deliberate murder in the context of the reasonable inferences that are required to be assessed in the context of the factual circumstances of the case. It is necessary to evaluate whether an accused is guilty of murder beyond a reasonable doubt, that is, of his identity as principal for the murder and his intention to kill. It is only when those issues are established that it is necessary to go further and determine whether the murder was planned and deliberate and whether that conclusion can be reasonably inferred in the circumstances:

[84] The circumstantial nature of this case required the jury to draw inferences. Inferences must be reasonably and logically drawn from facts established by the evidence. Inferences that do not flow reasonably and logically from established facts are condemned as conjecture and speculation...

***R. v. Ali*, 2021 ONCA 362 (CanLII)**

[96] This case was relied upon by the Defence and involved a first degree murder charge which was said to be planned and deliberate after the fashioning and implementing of a false home invasion narrative intended to cover up the murder.

In considering this matter, the court held:

[97] An inference of guilt drawn from circumstantial evidence must be rooted in the evidence and must be the only reasonable inference available on the totality of the evidence. However, when the jury is considering whether the Crown has met its burden to show that guilt is the only reasonable inference, the jury is not engaged in fact-finding and is not limited to considering alternative explanations founded on the evidence. Instead, the jury is testing the force of the inference urged by the Crown against the reasonable doubt

standard. In doing so, the jury can consider other reasonable alternative explanations for the conduct. Those alternative explanations may or may not lead the jury to conclude the Crown has failed to prove that guilt is the only reasonable inference available on the evidence: *R. v. Villaroman*, 2016 SCC 33, at paras. 28, 35-42.

[98] In determining whether the Crown has met that burden in a circumstantial evidence case, the jury may apply its logic and common sense to the totality of the evidentiary picture, including gaps in that picture, and consider whether other reasonable possibilities not only exist, but preclude a finding that an inference of guilt is the only reasonable inference available. As explained in *Villaroman*, at para. 36:

... a reasonable doubt or theory alternative to guilt, is not rendered 'speculative' by the mere fact that it arises from a lack of evidence ... 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.

The court in *Ali* went on to explain:

[100] In my view, human experience and common sense suggested various explanations, should the jury conclude the appellant fabricated the home invasion story. Some of those possibilities point toward guilt, others do not.

[101] It was a reasonable possibility the appellant fabricated the story to hide the fact she smothered Cynara to death. It was also reasonably possible she fabricated the story to hide the fact she had failed in her duty to protect Cynara after Cynara suffered a seizure. Alternatively, it was reasonably possible that the appellant fabricated the story because she felt responsible for what had happened to Cynara, regardless of whether her conduct would actually attract criminal responsibility, and she was attempting to shift the blame elsewhere. Finally, it was reasonably possible that the fabrication of the home invasion story was explained by the appellant's panic associated with a fear of being accused by the authorities of killing Cynara, regardless of whether the appellant was in fact responsible for her death: *Calnen*, at para. 117.

[102] I do not suggest the possibilities listed above exhaust the reasonable possibilities that the jury would have been entitled to consider in deciding what inference, if any, to draw from the fabrication of the home invasion. Nor do I suggest the trial judge was required to catalogue the reasonable possibilities. He was required, however, to instruct the jury, that when it was considering whether the Crown had met its onus, it should consider reasonable possible explanations for fabricating the home invasion story, other than the explanation urged by the Crown. One or two examples of what the trial judge regarded as reasonable possibilities open for consideration may have been

helpful in explaining to the jury how it should approach its task if it concluded the appellant fabricated the home invasion story.

[103] The trial judge should also have instructed the jury to consider those other possible reasonable explanations in the context of the entirety of the evidence. For example, while the appellant's character and long-time devotion to Cynara might suggest a non-culpable explanation for the fabrication of the home invasion story, the details and effort involved in constructing and repeating the fabricated story might well suggest a more sinister explanation. Ultimately, it was for the jury, having considered other possible reasonable explanations, to decide whether, on the totality of the evidence, the Crown had proved the case against the appellant.

V. THE POSITIONS OF THE PARTIES

a) The Crown

[97] The Crown submits that Scott was the shooter on May 21, 2020, while Jack was a party to a planned and deliberate first degree murder. Both Accused, based upon the evidence, are identified through video surveillance, clothing worn, and stature. Further, with respect to Jack, recognition evidence was supplied by Constable Rempel and Paculan. Additionally, the connection between the Dodge vehicle with both Accused, accompanied by the GPS information, essentially coalesced to put all the pieces together, "in concert", to support the Crown's contention. The linkage between the Dodge vehicle and Scott extends to the events of May 18, 2020. There were numerous other sightings of him with the Dodge and knowledge that it was located on Pritchard Avenue on both May 18 and 21, 2020, in and around the time of the shootings. Jack is seen at the Norwood with Scott and others on May 21 and 25, 2020. The Dodge vehicle was at 715 Pritchard Avenue at 9:21 a.m. on May 21, 2020, after leaving the Norwood at approximately 8:44 a.m. with Scott, Jack and the youth in the vehicle.

Identification is also established through the clothing worn by the Accused in the area of 747 through Pritchard Avenue area surveillance videos.

[98] The Crown acknowledges that there is no messages between the Accused laying out a plan, nor is there is evidence of an *animus* towards the Deceased. That said, a review of the circumstances leads to a reasonable inference that Scott and Jack undertook a planned and deliberate murder. The inferences in support of that intention are submitted to be grounded in the evidence. The Crown contends that planning and deliberation can be reasonably inferred to target the Deceased. This was demonstrated on May 18, 2020, as evidenced by shotgun damage to suites Nos. 5 and 6. The Deceased was the only identified individual who regularly attended at both those residences. Further, the Deceased sensed that he was in danger, as testified to by Flett and Serena.

[99] There is submitted to be evidence of planning and deliberation by virtue of the forethought demonstrated through the video surveillance from the Norwood on May 21, 2020 ("a mustering"), accompanied by the GPS evidence that the Dodge was on Pritchard Avenue at the relevant time. Video from the cameras affixed to the Pritchard Avenue residences show Jack, Scott and a youth's movements towards 747. Scott is seen to remove a gun from a backpack as the three travelled purposefully and in concert through the 728 Pritchard Avenue walkway. There was no surprise evident when the gun was first seen by the others. Between 9:21:50 a.m. and 9:24:25 a.m., Jack, Scott and the youth walked towards the back of 747, and behind the fence. They entered the backyard within 12

seconds, with the group situating themselves behind the tree. Constable Cifuentes's evidence supports that location because of the discovery of spent casings. The trajectory rods also were indicative of that being the angle from where some shots were fired.

[100] The video surveillance shows an individual walking up the stairs of suite No. 5, turning and then going down. Jack, Scott and the youth were then observed to be running across the back lane through the 728 Pritchard Avenue yard. Scott retained the gun in his hand. There was no confusion evident to show that anything unexpected had happened. The Crown submits that the plan had been executed with the three individuals proceeding through the yards at 728 and 715 Pritchard Avenue before getting into the Dodge parked on the parking pad behind that residence. This route was followed by Constable Aitken and his tracking dog "Billy". The Dodge vehicle can be seen on surveillance video to be travelling shortly thereafter at the intersection of Manitoba Avenue and Arlington Street. The ignition was turned off at 867 (9:48:12 a.m.).

[101] The Crown argues that the group moved as a unit with a shared intention, understanding and purpose as to what was to occur. They joined forces and mustered at the Norwood from where Jack drove the vehicle and led the three both to and from 747. They knew where to go and followed the same *modus operandi* as had been adopted on May 18, 2020. The Crown submits that there was a well-versed plan concocted in advance of what transpired. What occurred was not a robbery, as the Deceased's jewellery and the contents of his backpack

were left behind. These individuals were not there to again shoot at the house as they had sufficient time to do so before the Deceased's appearance.

[102] With respect to Jack, he aided and/or abetted Scott for the purpose of this killing. He had knowledge of Scott's intention to kill in what was a planned and deliberate murder. The assurance in Jack's movements speaks to his actual knowledge of the plan. Further, he was at the Norwood with the others on the May 21, 2020 morning of the incident. He was seen carrying the backpack which, presumably, contained the weapon from the Norwood to the Dodge vehicle which he drove from that location. There was coordination in all these individuals' movements. This was submitted, based on all the evidence, to be a planned and deliberate murder.

b) Defence Submission of Scott

[103] Counsel for Scott argues that what occurred behind the 747 fence cannot be seen, nor can it be discerned as to how things looked. The order of who proceeded into the area, and whether the group moved with a purpose, must be regarded as irrelevant and/or speculative. There was no demonstration of an intent as regards this matter.

[104] In the event Scott is found to be the shooter on May 18, 2020, that identification does not assist in extrapolating that he was also the shooter three days later. A prior bad act on May 18, 2020, being the firing of a weapon at a residence, should not be used as an identifier or for any other purpose. Further,

an "intent" from May 18, 2020, cannot be expanded to support the commission of a planned and deliberate first degree murder on May 21, 2020.

[105] There is nothing in terms of evidence that identifies Scott as the shooter or involved in what transpired at 747. The clothing worn by the three individuals, as seen in the surveillance footage, is, at best, generic with a lack of unique identifiers. While the Dodge may have had a GPS affixed to it, Scott did not. There was no sighting of Scott with the Dodge at or around Pritchard Avenue at the material times.

[106] The Defence argues with respect to identification that while there may be video of Scott at the Norwood, that individual leaves the hotel at 7:02 a.m. and, perhaps, again, at 8:42 a.m. The events at 747 occurred at 9:21 a.m., which leaves a significant gap that would have allowed him to leave the vehicle and others to enter. The Dodge was frequently used by different people. Others that have observed him, such as Sergeant Howanyk at The Forks, have provided varied descriptions of this individual. Further, Constable Lowry's identification was an extremely brief encounter and cannot be accepted as an identifier. There were other sightings of the Dodge on surveillance video, such as on May 21, 2020, at 5:36 p.m. at a Winnipeg mall, where Scott could have been one of the individuals. Such evidence is insufficient, in all the circumstances, to establish Scott's connection to the events at 747 on May 21, 2020, whether or not the similar fact evidence is considered.

[107] Even in those circumstances where Scott is determined to be the individual at 747 on May 21, 2020, an intention to commit first degree murder cannot be inferred. There is no evidence of a plan and deliberation to kill the Deceased. There are multiple inferences that may be drawn from the evidence in this case. With respect to *Villaroman* considerations, an intention to commit first degree murder is not the only reasonable inference to be discerned. The *Ali* case was cited with respect to this contention of drawing other reasonable inferences from the circumstances. In this case, other inferences include an intention to simply shoot at the house and, when the Deceased appeared, the group was surprised, scared, and perhaps threats were exchanged. What transpired was in no way intentional. Clearly, if Scott is identified as the shooter on May 18, 2020, it would be reasonable to conclude that he was simply there to, again, shoot at the house.

[108] Scott's counsel argues that the options with respect to this matter include an acquittal on the basis of an inability to identify Scott as the shooter, or convictions for second degree murder or manslaughter. There is no evidence of an association between Scott and the Deceased, nor was a motive established. There is a lack of connection and evidence of planning and deliberation to find first degree murder. Further, it is unknown as to what occurred in that yard and whether there had been discussions between the three individuals in advance. All of that is speculative, including whether or not a confrontation occurred.

c) Defence Submission of Jack

[109] Counsel on behalf of Jack argues that what transpired is based upon circumstantial evidence and speculation with clear evidential gaps. There is a grounding for other reasonable inferences that can be made which would negate a finding of first degree murder. In those circumstances where Jack is identified as being at 747 on May 21, 2020, he would not be guilty of first or second degree murder, but, instead, of manslaughter. That said, there is clearly uncertainty with respect to his identification. There is no distinguishing features identified, and the recognition evidence was, at best, dated.

[110] There is argued to be no evidence that Jack was responsible as a party to a first degree murder, as such a contention is based on speculation. There is no evidence of intention or knowledge; no evidence of history or association; no evidence of *animus* or motive; no evidence of planning and deliberation. Additionally, there is little evidence of Jack's association with the co-Accused, as his only pre-shooting sighting with Scott is at the Norwood on the morning of May 21, 2020.

[111] There were a number of persons who lived at 747 and, as testified by Catcheway, there was drug use and drug dealing in certain of the suites. There was also significant pedestrian traffic in what was described as a high crime area. It must also be questioned as to how the Deceased would be targeted given his "transient" lifestyle. The evidence showed that he would attend at 747 randomly and at various times, albeit there were occasions when he would not be seen for

days. Consequently, how would it be known that the Deceased would attend at the residence at approximately 9:30 a.m. as the Accused laid in wait? The yard was wide open and anyone could see who was coming or going. Further, all three of the Accused could not be hidden behind the tree. Since they could be seen, why would the Deceased come into the yard given a threat could so easily be discerned? The fact that only one of the Accused was armed would raise speculation as to why three would be attending in the yard as that would only serve to increase the chance of being observed.

[112] The Defence argues that the Crown's evidence of planning and deliberation which includes a "mustering" at the Norwood, a change of drivers to Jack, Jack leading the group both to and from the Dodge vehicle to 747, as well as other factors, are not demonstrative of a plan and deliberation. Further, while Jack may have been identified as the individual with the backpack at the Norwood, it is unknown as to whether the weapon was actually contained in it at that time. It must also be questioned as to what substantive purpose or plan could be discerned based on the order the individuals travelled in to and from 747. Indeed, what transpired and what can be seen on the video surveillance could be suggestive that something went wrong and the group ran out. There are many inferences that can be made, which includes fortuitous timing of the group being in the open yard and the Deceased walking in. They may have been there for an unrelated purpose. It would be likely that he would have seen the group and, accordingly, why would he continue to walk in and let them get so close? It is also noteworthy

that Serena's and Flett's evidence indicated a behavioural change with respect to the Deceased. He had been indulging in methamphetamine and other substances with erratic behaviour noted. Further, there were noted injuries to his body that pre-dated his death. The targeting assumption accompanied by planning and deliberation cannot be reasonably inferred in this case, particularly given injuries that predated May 21, 2020, along with other speculative evidence.

[113] There is no indication that Jack knew where he was going or had any intention with respect to murder. Further, there could have been a confrontation in the yard between members of the group and the Deceased. The fact that it was not overheard would not be unusual as doors and windows were closed. The shots fired were in quick succession and illustrative of panic and not an intention to kill.

[114] In accordance with *Villaroman*, there are many reasonable inferences that can be drawn with respect to the possibilities of what transpired in the 747 backyard. The Crown's submissions are based on speculation, a scarcity of evidence, and accompanied by many evidential gaps. The Accused could have gone to 747 for several reasons, such as to intimidate, to rob, or to collect a debt that may or may not have had anything to do with the Deceased. What occurred may have been caused by panic, as there is a dearth of evidence with respect to a plan. This was described as a tragic happenstance. In those circumstances where Jack is found to have been at 747 on May 21, 2020, the conviction he faces should be that of manslaughter.

XII. ANALYSIS

[115] The Deceased perished as a consequence of being struck by five bullets which impacted him in the chest, pelvis and other areas of his body. Dr. Littman was unequivocal that the gunshots were the cause of death and that conclusion was not seriously questioned. The location of the injuries and the fact that the Deceased was hit five times is demonstrative of an intention to kill. I have concluded that whoever shot the Deceased would be guilty of a murder of some description. There were eight spent casings found in the 747 yard.

[116] I am satisfied, based on the evidence, as to the identity of Jack and Scott being two of the three individuals involved in the Deceased's killing. Both Scott and Jack are seen at the Norwood on May 21, 2020, at 6:36 a.m. along with others. The video surveillance cameras capture these individuals whose features can be compared with those shown in the 360 Ident Photobook (Exhibit 39) after their arrest. Also of significance is the clothing worn as seen in the Hotel, Norwood and Pritchard Avenue area video surveillance footage when compared with items later seized from 859 Bannatyne Avenue, the Theme Hotel, and what was worn at the time of each individual's arrest. Further, Jack and Scott are also visualized in video surveillance from the Norwood along with two females on May 25, 2020. Again, their physical appearance and the clothing/footwear worn leads to a conclusive identification.

[117] With respect to Jack, on May 25, 2020, he can be seen wearing a shirt, shoes and face mask, along with a black Hershel fanny pack (Exhibits 3, 4, 7, and

12). These items were in his possession on May 27, 2020, at the time of his arrest. The same can be said for Scott who was seen on May 25, 2020, wearing a grey Nike cap and a distinctive red Hugo Boss shirt that were secured through a search warrant of the "China" theme room of the Theme Hotel and at 859 Bannatyne Avenue, along with camouflage shorts. Those shorts were seen to be worn by Scott, as the shooter, on May 18, 2020.

[118] This surveillance evidence serves to connect Scott and Jack in that they are seen together at the Norwood, as well as both being identified as being at the Theme Hotel on May 27, 2020 (date of arrest). Further, they are seen wearing items of clothing which can be identified in surveillance video taken on May 21, 2020, and on other occasions.

[119] Jack was identified by Constable Rempel and Paculan, who were both employees of MYC at the time Jack was incarcerated in that institution. These two persons responded to a BOLO prepared by Detective Simpson requesting assistance from anyone who could identify the three suspects in the Deceased's killing. Jack was immediately identified by Detective Rempel and Paculan, albeit they had not been in contact for a significant period of time. They responded to the BOLOs as they were certain of their identifications.

[120] In reviewing the video surveillance footage from the Norwood and the 360 Ident Photobook (Exhibit 39), it is apparent that Jack is the individual identified. This can be seen from the video surveillance of the Norwood on both May 21 and 25, 2020. On May 21, 2020, Jack is seen wearing a grey jacket and

distinctive grey/black pants, and, when ultimately leaving the hotel, is carrying a backpack (8:30 a.m.).

[121] With respect to Scott, he is also seen with Jack in video surveillance from the Norwood on May 21 and 25, 2020. Further, after investigation, Scott was found to be significantly connected with the Dodge vehicle and often in the company of the Lathlin sisters, who were also associated with the vehicle. Scott can be identified as being at various locations with the Dodge vehicle as seen through video surveillance footage. On May 21, 2020, at 12:25 a.m., Scott is seen making a purchase at the Night Club & Sports Bar vendor. At 3:43 a.m., at the Hotel, Scott is recognized on video surveillance and, additionally, on May 18, 2020, is in possession of the Dodge vehicle (Exhibits 37 and 40) at a convenience store location. He is also seen during the afternoon of May 22, 2020, by Sergeant Howanyk and other members of the surveillance team where he was identified by large chest tattoos and other descriptors, as well at 8:16 p.m. and at The Forks at 8:42 p.m. The Dodge is often identified through the GPS as being at 867. That location is obviously near 859 Bannatyne Avenue where Scott was identified by Constable Lowry as being in attendance on May 25, 2020. Constable Lowry provided a description which matches Scott, as well as what he was wearing being a Hustle Gang T-shirt. That T-shirt was seized from the Theme Hotel (Exhibit 14) on May 28, 2020.

[122] There were a number of items seized from 859 Bannatyne Avenue, which include a pair of camouflage shorts and a grey/black Ecko jacket. Those shorts were identified as being worn by the 747 shooter on May 18, 2020. The individual

wearing those shorts on that date has a similar stature to Scott and was the person holding the shotgun. Those shorts had Scott as the dominant DNA contributor. The areas where DNA was collected were on the left anterior leg near the knee, the anterior back waistband, and the button holes on the front clasp. Scott was also a DNA contributor to the Ecco jacket seen on video surveillance on May 18, 2020, albeit it was not worn by him that day.

[123] The Dodge vehicle on both May 18 and 21, 2020, was located on Pritchard Avenue, one block over from 747. On May 18, 2020, at 6:29 a.m., the Dodge, with ignition off, was noted to be at 735 Pritchard Avenue, and then moved at 6:39 a.m. to 754 Pritchard Avenue. The Dodge vehicle at 7:05 a.m. was located at 867. On May 21, 2020, the Dodge was located at 9:21 a.m. to be at 715 Pritchard Avenue with a "heartbeat" identified at 9:25 a.m. as the vehicle was proceeding at 31 kilometres per hour in the north back lane between Pritchard Avenue and Manitoba Avenue. The Dodge vehicle was next identified as being located at 867 with ignition off (9:48 a.m.). The Dodge was also tracked through video surveillance travelling from Pritchard Avenue on Manitoba Avenue.

[124] It is noteworthy that Scott was seen with that vehicle preceding both incidents, including at the convenience store on May 18, 2020, and at the Night Club & Sports Bar, the Hotel, and at the Norwood on May 21, 2020. At the Norwood, his tattoos are evident and he was initially carrying a dark backpack. The Dodge vehicle was at that location at 6:25 a.m. and 6:36 a.m. on that morning. The three individuals are shown in the lobby speaking and then proceeding to the same hotel room. Scott is then seen, without the backpack, to be leaving the hotel

with the youth. They drove away in the Dodge vehicle. At approximately 8:30 a.m., Constable Peterson observed the Dodge vehicle drive past him on College Avenue. Acknowledging that it was a quick observation, the Constable detailed a distinctive left neck tattoo evident on the driver. A similar tattoo, illustrating English or cursive writing, as described by Constable Peterson is evident in Scott's 360 Ident Photobook (Exhibit 39).

[125] The video surveillance from the Norwood reveals Jack and the female leaving the hotel room and waiting outside the entrance for approximately 10 minutes (8:32 a.m.). The Dodge is then driven to the hotel entrance with Scott exiting the driver's seat, the youth exiting the front passenger seat and Jack becoming the driver at around 8:42 a.m. Jack handed the backpack to the youth who proceeded to place it in the Dodge before going into the hotel and returning a short time later (8:44 a.m.). Scott rides in the front passenger seat with the youth in the back seat. The next time the vehicle is located by GPS is at 9:21 a.m. at 715 Pritchard Avenue. It can reasonably be inferred that the vehicle was located on the parking pad behind that residence.

[126] Three individuals are seen in the areas of 715 and 721 Pritchard Avenue moving quickly. These persons then proceeded through the 728 Pritchard Avenue pathway towards 747. The video surveillance clearly shows the distinctive grey/black pants worn by Jack, as well as Scott's black shorts, red running shoes, and the red hem of his shirt as seen below a dark jacket. He wore black shorts, red running shoes and a red shirt at the Norwood that morning. As the party

proceeds towards 747, Jack is in front, Scott is second wearing the backpack, with the youth at the rear. The weapon is shown in Scott's hands at 9:22 a.m.

[127] It is reasonable to conclude that two of the three individuals shown in the May 21, 2020 video surveillance are those that attended at 747 on May 18, 2020. The method of operation is the same, the Dodge vehicle is present one block over, and the larger individual, then wearing camouflage shorts, is of the same stature as Scott. He was, on that day, wearing white/black running shoes as can be seen on May 25, 2020, at the Norwood and at other times captured on video surveillance. Additionally, such runners were worn at the time of his arrest. While acknowledging items such as runners are generic in nature, the clothing and footwear worn by or seized from the Accused have a symmetry with the video surveillance evidence.

[128] I acknowledge that Defence counsel submits that there are other reasonable inferences that can be drawn with respect to the identification of Scott and Jack on May 21, 2020. However, I am not satisfied as to the existence of other reasonable inferences in these circumstances. The Crown is not required to negative every possible conjecture, which might be consistent with the innocence of the Accused. As stated in *Villaroman*, "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" (para. 37). The reasonable inferences that can be drawn from the circumstantial evidence in this case, viewed logically, is reasonably capable of supporting that Jack and Scott were two of the three individuals who attended at 747 on May 21, 2020, which

culminated in the ultimate demise of Chapais. That evidence includes the GPS location of the Dodge vehicle being on Pritchard Avenue at the relevant time accompanied by Jack's and Scott's association with that vehicle as shown through video surveillance footage from the Norwood. Scott was, as indicated, previously identified as having an association and, at times, sole possession of the Dodge vehicle. His identification is easily drawn from the video surveillance footage from those varied locations. Jack is seen at the Norwood and, again, his identification is clear and bolstered by the recognition evidence of Paculan and Constable Rempel. I am satisfied as to the ultimate reliability of the recognition evidence. Despite the passage of time, Constable Rempel's and Paculan's identification of Jack from the BOLO was almost, if not, immediate. Again, their identification is bolstered by the relative stature of each individual and the clothing worn as seen in the video surveillance and as seized from the Theme Hotel and 859 Bannatyne Avenue. The DNA also associates certain of those pieces of clothing with Scott. I have no hesitation in the determination that Scott and Jack are identified and involved in what transpired at 747 on May 21, 2020.

XIII. INTENTION

[129] There exists no discernable motive or *animus* with respect to the reason behind the Deceased being killed on May 21, 2020. There must be an intention required for murder and that murder must be both planned and deliberate to constitute and support a finding of murder in the first degree. Was this an act caused by a misadventure of some sort or was it planned and deliberate? As was said in the *Tremble* decision, it is necessary to first prove identity and an intent

to kill. It is after those two issues have been determined that the matter of planning and deliberation comes to the fore. Justice Weiler in *Tremble* said:

[75] In this case, the trial judge properly instructed the jury that it had to first be satisfied that the appellant was guilty of murder beyond a reasonable doubt, that is, of his identity as the perpetrator of the murder and his intention to kill Roberts. Only then could the jury go on to consider whether the murder was planned and deliberate.

[76] To establish planning and deliberation based on circumstantial evidence, the jury must be directed to consider all the circumstances that inform the question of the accused's mental state. Such circumstances will seldom, if ever, be wholly consistent with only one conclusion as to an accused's mental state. As Spence J. stated in *R. v. Mitchell*, 1964 CanLII 42 (SCC), [1964] S.C.R. 471, at pp. 478-479:

What [the jury] is now called upon to decide is not whether the accused committed the act, but whether the murder, of which he is guilty, was planned and deliberate on his part. The pattern of evidence which it must now consider is not a series of facts, which, in order to establish guilt, must lead to a single conclusion. The jury is now concerned with the mental processes of a person who has committed a crime. In relation to that crime it has to consider his actions, his conduct, his statements, and his capacity and ability to plan and deliberate. It must consider the whole of the evidence in relation to the issue of planning and deliberation. In nearly every case some of this evidence may indicate planning and deliberation and some may indicate the contrary. The jury must weigh all of this evidence and arrive at a conclusion.

[77] Similarly, in *R. v. MacKay* (1992), 1992 CanLII 5990 (BC CA), 16 C.R. (4th) 351 (B.C.C.A.), leave to appeal to refused, [1992] S.C.C.A. No. 522, the British Columbia Court of Appeal stated, at para. 91, that:

[A]lternatives other than that the appellant's murder of the deceased was planned and deliberate will not lead automatically to a verdict of second degree murder. A verdict of first degree murder could still be supported if the jury could reasonably infer first degree murder, i.e., a planned and deliberate killing, from proven facts which support such a conclusion.

[78] As Laskin J.A. stated in *R. v. Smith*, 2014 ONCA 324, at para. 27, two points guide the analysis of whether a jury's verdict of first degree murder is reasonable:

[...] First, the reasonableness of the verdict has to be assessed on the evidence as a whole. And, second, though the appellant can point to innocent explanations for individual pieces of evidence, he

cannot succeed on this ground of appeal if competing explanations are available from which one can reasonably infer planning and deliberation [...].

[79] These passages underscore that, on the issue of planning and deliberation, a jury is entitled to reject other possible inferences as not raising a reasonable doubt and a verdict of first degree murder is not unreasonable simply because it does so. What matters is whether planning and deliberation can reasonably be inferred in all the circumstances.

[130] The May 18, 2020 shooting incident was directed at suites Nos. 5 and 6. The Deceased was associated with both those suites on virtually a daily basis. That evidence is confirmed by Catcheway, Serena and Flett. Additionally, the Deceased was described as being in a state of flux in and around this time period as he perceived himself to be in some type of danger. Flett attested to this as did Serena, who indicated that he did not laugh as much and seemed to be looking around and over his shoulder as if he was scared. Was he expecting a confrontation of some sort? There is no direct evidence on that issue.

[131] I am satisfied that the video surveillance evidence, clothing worn and stature demonstrates that Scott was one of the two individuals who attended to the area of 747 on May 18, 2020. Further, he was the individual who fired the weapon at the residence as can be seen on the video surveillance. The route taken after alighting from the Dodge vehicle was close to that undertaken on May 21, 2020. That said, what occurred on May 18, 2020, is substantially part of the "narrative" of this entire circumstance. It does not necessarily serve to inform the issue of what occurred on May 21, 2020, with respect to whether this was a planned and deliberate murder.

[132] On May 21, 2020, Jack, Scott and the youth are seen on video surveillance to travel from 715 Pritchard Avenue, across Pritchard Avenue to the 728 Pritchard Avenue walkway. Jack is in the lead, Scott is in the middle wearing the backpack (which was last seen at the Norwood with Jack), and trailing is the youth. Jack's and Scott's lower garments and footwear are the same, as is seen worn by those individuals at the Norwood approximately three hours earlier. There is no discernible uncertainty in the movements of the group members. Scott is seen to remove the weapon from the backpack around 9:22 a.m., at which time there is no element of surprise shown by the other two involved. The group pauses at the back fence of 747 for approximately 12 seconds as they look over the fence to determine the status of the backyard (9:23 a.m. – video 4:16 a.m.). The backyard is then entered. At approximately 9:24 a.m. (video 4:18 a.m.), movement of an individual can be seen along the east wall of the residence on a path to suite No. 5. That person goes up the stairs, pauses, turns, and falls. Shadows can be discerned moving across the fence, which are illustrative of the group moving from the direction of the large multi-trunked tree to the back gate and out the back gate (9:24 a.m. – video 4:18 a.m.). The evidence of Constable Cifuentes was that a number of shell casings were located between the tree and the back fence. The trajectory rods utilized by the Officer also pointed in that direction.

[133] The evidence of Flett was that the shots were heard and, three seconds later, the back gate slammed. Jack, Scott and the youth are then seen on video footage to be leaving the yard and running across the lane into the backyard of

728 Pritchard Avenue. Scott is seen with the weapon and shortly after leaving 747, the group, again, re-establishes the order of Jack, Scott and the youth, who is then wearing the backpack. The video surveillance from 728 Pritchard Avenue reveals the group proceeding along the east walkway of that residence, while the footage from 721 Pritchard Avenue captures the three crossing Pritchard Avenue in a northerly direction and moving through the yard at 715 Pritchard Avenue. The GPS data from the Dodge vehicle illustrates that at 9:21 a.m., ignition was off with the location being 715 Pritchard Avenue.

[134] Constable Aitken and his Police Service dog Billy were deployed from 747 and hit a track at the back gate of that residence. That track was followed through 728 Pritchard Avenue, across Pritchard Avenue to the parking pad at 715 Pritchard Avenue where it was lost. Constable Aitken opined that the track was lost because those being pursued had proceeded into a vehicle. Such an opinion is a reasonable conclusion in these circumstances. The Dodge vehicle is then seen through video surveillance cameras in the area to proceed north onto Arlington Street and west on Manitoba Avenue at approximately 9:26 a.m. It, ultimately, was next located at 867 with ignition off at 9:48 a.m.

[135] As previously indicated, the Dodge vehicle is seen at other locations on that day and, again, with Scott in attendance (17:36 hours at a Winnipeg mall). His tattoos are visible, as are black/white running shoes.

[136] I am satisfied that on May 21, 2020, Jack and Scott, along with the youth, met at the Norwood and proceeded to 747. The Deceased was killed shortly

thereafter. The number of gunshot wounds and their location on his body is consistent with an intent that death would be a reasonable conclusion. That said, was this killing planned and deliberate? The group of three males was seen together at the Norwood and then proceeded to 747. Did they have a plan and did they deliberate the killing of the Deceased?

[137] It is possible that Scott and Jack had concocted a plan and deliberate killing of the Deceased. The reasonableness of such a conclusion must be assessed on the evidence as a whole. An inference of guilt in a circumstantial case must be based on the evidence and be the only reasonable inference available on the totality of the evidence. As was said in *Ali*, "... the jury is testing the force of the inference urged by the Crown against the reasonable doubt standard. In doing so, the jury can consider other reasonable alternative explanations for the conduct" (para. 97).

[138] In this case, it is impossible to discern what happened behind the fence of 747. Although not heard by Flett, Parenteau or Serena, some type of a confrontation may have transpired which went substantially undetected because of closed doors and windows. There were some sounds heard, being the Deceased swearing and a yell. Was the group of three there to intimidate and perhaps collect a debt? Other inferences that could be drawn or difficulties with the evidence include:

- How was the Deceased targeted at approximately 9:30 a.m. when he was known to visit 747 at various times during the day and, sometimes, not at all?
- The three individuals could undoubtedly be seen as all three could not hide behind a tree, albeit it was a large multi-limbed tree. Why, then, would the Deceased continue towards suite No. 5 when a perceived threat could be identified?
- Were the three individuals there for some other purpose when the Deceased appeared and disrupted an alternate plan?
- It is substantially unknown as to what happened behind the 747 fence.
- There is no direct evidence of a plan in place and that deliberation occurred.
- There is no evidence of an association between any of the co-Accused and the Deceased.
- There is no evidence of a motive for the killing.
- There is no evidence of an *animus* between the parties.

The fact that the three individuals “mustered” at the Norwood and proceeded to and from Pritchard Avenue to 747 in the same order is not necessarily demonstrative of a plan and deliberation. There must be some type of calculated scheme concocted in advance of the killing. The deliberation element requires a considered action rather than an impulsive act.

[139] I am satisfied that it is possible that Scott and Jack planned and deliberated the killing in these circumstances. That said, what occurred cannot be seen behind the fence and could well have been a confrontational situation which escalated quickly without planning. In all the circumstances, I am not satisfied beyond a reasonable doubt that planning and deliberation is supported by the evidence in this case.

[140] I am satisfied that, at all times, Scott was the principal and shooter. The eight casings that were recovered from the backyard of 747 were fired from one weapon as were the bullets taken from the Deceased's body and the one recovered from the suite No. 5 doorframe. Scott carried that gun into the yard and he is seen leaving the yard with it. Additionally, there is no inference that other weapons were utilized or that others had possession of the weapon.

[141] With respect to the culpability of Jack, I have concluded that he aided and/or abetted Scott in the carrying out this murder. He knowingly accompanied Scott to 747 and knew he was armed. Prior to that time, he is seen with Scott at 6:36 a.m. at the Norwood. He later brings the backpack down from the room which likely contained the firearm. He drove the Dodge vehicle to 715 Pritchard Avenue and led the group from 715 Pritchard Avenue to the rear of 747 and into the backyard. There is no question that Jack saw the weapon as just before proceeding across the back lane, he doubled back while Scott was handling it and then proceeded forward. There was no surprise evident by Jack through the video

surveillance in seeing the weapon. As indicated, he then led them into the yard and ultimately led them back to 715 Pritchard Avenue as the group fled the area.

IX. CONCLUSION

[142] This case is based on circumstantial evidence and must be evaluated in light of the dictates of *Villaroman*. I am satisfied that the reasonable inferences that can be drawn particularly from the video surveillance, the clothing/footwear worn by the Accused, relative statures, identification and correlation of the clothing with Jack and Scott, including DNA, all lead to the conclusions of both their identity and commission of an unlawful act with an intention to kill. The reason for the killing is unknown; however, that does not diminish what occurred and has substantially been seen through the video surveillance evidence. There was an intention, whether reckless or otherwise, formed to kill, albeit, I cannot be certain of the planning and deliberation element required for a finding of first degree murder. Consequently, I am satisfied beyond a reasonable doubt that Scott as the principal and Jack as a party are guilty of the second degree murder of Nairne Chapais.

_____J.