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Docket: CR 17-01-36252
(Winnipeg Centre)
Indexed as: R. v. Weldekidan
Cited as: 2021 MBQB 164

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:)
)
THE QUEEN,) For the Crown:
) Christian A. Vanderhooft and
) Monique Cam
-and-)
)
HABEN ABRHAM WELDEKIDAN,) For the Accused Weldekidan:
) Evan Roitenberg and
) Laura Robinson
)
Accused.)
) **JUDGMENT DELIVERED:**
) **JULY 22, 2021**

MCKELVEY, J.

I. BACKGROUND

[1] Haben Abrham Weldekidan (the "Accused") has been charged with 13 counts brought in a July 20, 2017, indictment:

- i. four counts of attempted murder with a restricted or prohibited firearm, to wit: a handgun, by discharging the firearm at four persons, contrary to s. 239(1)(a) of the ***Criminal Code***;
- ii. four counts of discharging a restricted or prohibited firearm, to wit: a handgun at four persons with intent to wound, contrary to s. 244(2)(a) of the ***Criminal Code***;

- iii. one count of possession of a loaded restricted or prohibited firearm, to wit: a handgun, and not being the holder of an authorization or licence allowing possession, contrary to s. 95 of the ***Criminal Code***;
- iv. one count of unauthorized possession of a firearm, to wit: a handgun, without being the holder of a licence, contrary to s. 91(1) of the ***Criminal Code***;
- v. one count of possession of a firearm, to wit: a handgun, while prohibited by a s. 515(4.1) order issued March 8, 2016, contrary to s. 117.01 of the ***Criminal Code***;
- vi. two counts of failure to comply with conditions of recognizance entered into on March 8, 2016, contrary to s. 145(3) of the ***Criminal Code***;

[2] The four complainants are Henok Goitom ("Goitom"), Adonay Gizaw ("Gizaw"), Merhawi Mehari ("Mehari"), and Miracle Tamana ("Tamana").

[3] The allegations arose on March 13, 2016, in the City of Winnipeg, in the Province of Manitoba. It is alleged that the complainants were injured as a result of gunshot wounds after encounters with the Accused at a house party on Hazel Dell Avenue ("the residence").

II. THE STATEMENTS

[4] Goitom, Mehari and Tamana all provided warned and affirmed video-recorded statements to the police while in hospital recovering from gunshot injuries. In each of those statements, the complainants identified the Accused as the shooter, as well as provided other details as to what transpired before and during a house party at the residence. Gizaw was not hospitalized because of his

injuries, but also provided a video-recorded statement to police. He did not identify a shooter in his statement.

[5] The Crown called all four complainants during a *voir dire* with Goitom, Mehari and Tamana failing to acknowledge their previous identifications of the Accused as the shooter. Further, they claimed only to have a minimal recall of the events of March 12 and 13, 2016, contrary to what had been detailed in their statements. These witnesses were each shown their video-recorded police statements which did not refresh their memories. Their statements were admitted into evidence at the *voir dire* pursuant to a principled exception to the hearsay rule as both necessity and reliability established threshold reliability on a balance of probabilities (see: ***R. v. Weldekidan***, 2021 MBQB 111 (CanLII)). Additionally, the statement of Gizaw was accepted into evidence under the hearsay exception of past recollection recorded.

[6] As indicated, these statements were accepted into evidence on the basis of threshold reliability having been established. However, threshold reliability is clearly distinguishable from ultimate reliability when considering the Goitom, Mehari and Tamana statements. It becomes necessary to determine what to do with the statement evidence and whether or not to accept any, all or some of it for its truth in the evaluation of what occurred in this matter. The most salient consideration is that ultimate reliability cannot and was not predetermined during the threshold admissibility *voir dire* stage. As was said in ***R. v. Bradshaw***, 2017 SCC 35, [2017] 1 SCR 865:

[39] The distinction between threshold and ultimate reliability, while “a source of confusion”, is crucial... Threshold reliability concerns admissibility, whereas ultimate reliability concerns reliance... When threshold reliability is based on the inherent trustworthiness of the statement, the trial judge and the trier of fact may both assess the trustworthiness of the hearsay statement. However, they do so for different purposes... In assessing ultimate reliability, the trier of fact determines whether, and to what degree, the statement should be believed, and thus relied on to decide issues in the case... This determination is made “in the context of the entirety of the evidence” including evidence that corroborates the accused’s guilt or the declarant’s overall credibility...

.....

[41] In short, in the hearsay context, the difference between threshold and ultimate reliability is qualitative, and not a matter of degree, because the trial judge’s inquiry serves a distinct purpose. In assessing substantive reliability, the trial judge does not usurp the trier of fact’s role. Only the trier of fact assesses whether the hearsay statement should ultimately be relied on and its probative value.

[7] This case will substantially be determined on whether any of the prior statements of Goitom, Mehari and Tamana should be relied upon and, if so, to what extent. This must be considered within the matrix of all the evidence presented during the trial. These three hospitalized complainants made statements to police within days of the March 13, 2016 shootings. As indicated, all three identified the Accused as being the individual who wielded the handgun and shot them. They also provided other details as to what occurred during the course of the evening. Mehari and Goitom testified as to having little or no memory of speaking to the police while hospitalized. Further, they had all been drinking leading up to the shootings. Tamana testified that his memory of five years ago was poor and that he was extremely drunk at the house party. He indicated that what he told police about the events of March 12 and 13, 2016, had been supplied by others who had spoken to him during his hospital stay. All

of this evidence must be carefully considered in the determination of how much or how little of the testimony and the contents of the earlier statements should be believed and relied upon in the evaluation of whether the Crown has proven its case, on any of the charges, beyond a reasonable doubt. The evidence of all complainants will be considered along with the forensic/police evidence and, in particular, that provided by Detective Robert Mitchell ("Mitchell") and Patrol Sergeant Jason Dee ("Dee").

III. THE EVIDENCE

- **Patrol Sergeant Jason Dee**

[8] Dee, a long-time member of the Winnipeg Police Service ("WPS"), was with the forensic identification unit on March 13, 2016. He was assigned as the exhibit officer and attended the residence at 7:32 a.m. He and other WPS members walked the scene in order to identify relevant evidence, which was marked, photographed and collected (Exhibit 4). Some of the collected evidence is summarized as follows:

- near the rear door and deck of the residence was a bloodstain on the sidewalk, a bloodstained t-shirt and expended 40 caliber Smith & Wesson cartridge casings ("casings"), along with a copper lead bullet;
- west side of the house – bloodstaining on the sidewalk;
- a dark-coloured Mitsubishi Lancer ("Lancer") and a Volkswagen Passat motor vehicles were parked west of the residence in a parking lot reserved for businesses located on the east side of Henderson Highway. A pool of blood was visible between the vehicles;

- the parking lot at the rear of the Henderson Highway businesses revealed other evidence, including bloodstaining, five expended casings and one copper lead bullet;
- the rear wall of a Henderson Highway business had been struck by the Lancer vehicle, as the impression of its licence plate was visible on the wall, accompanied by damage to the vehicle's front end. There was also damage to the rear of the Lancer vehicle which, in all likelihood, resulted from being backed into a nearby hydro pole. That pole showed paint transfer from a darker coloured vehicle;
- the hood and windshield of the Lancer vehicle exhibited bullet strikes;
- a black weight bench support, an expended lead bullet, an expended casing and a bloodstained tissue were found in the lane running east/west behind the residence;
- bloodstains were located within the residence.

[9] Dee and Sergeant Lucas examined the Lancer vehicle, owned by Goitom, on March 14, 2016. It was determined that the windshield bullet hole was on the driver's side and 3.10 feet from ground level. There were other bullet strikes on the hood of the Lancer. Additionally, the driver's side window was "smashed out". A further bullet hole was discovered inside the vehicle that Dee said likely resulted from a gunshot through the driver's window. The bullet shattered the window and entered the front passenger seat before lodging in the backdoor.

[10] Dee examined the clothing of the complainants on March 15, 2016, and determined that there was a bullet hole in the buttock area of Tamana's jeans.

There was bloodstaining, as well as blood at the bottom of his black and red sports jersey. Mehari's clothing exhibited a hole on the left front jeans pocket, which was also blood stained, as was his jacket and t-shirt. There were entry bullet holes on those pieces of clothing. Blood was evident on Goitom's black vest jacket, along with a hole in the front lower left side of the jacket. There was also bloodstaining to the front of his t-shirt and holes detected. The Accused's clothes were examined by Dee on March 21, 2016. The only blood detected was on a pair of black sweat pants and matched his DNA. The Accused's clothing was not sent for gunshot residue analysis.

[11] Dee located, in or close by the residence, a bag containing white powder and a scale, as well as three baggies floating in a toilet, again containing a white powder. He testified that the Accused's fingerprints were not found in or around the residence, nor was any other forensic evidence linking him to the scene.

- **Henok Goitom**

[12] Goitom testified in court that he does not have many memories of the evening of March 12th and the early morning hours of March 13, 2016. He recalled being at Bar Red Sea and drinking with others. He was aware that he had been shot in the stomach, but has no actual memory of that occurring. He knows he spoke to the police while in the hospital, but does not recall speaking with Mehari, Gizaw or Tamana before speaking with the authorities. As previously indicated, reviewing his video-recorded police statement did not serve to refresh his memory of the incident. Goitom testified that he has no recollection with respect to his video-recorded statement because of the injuries

and administered pain medications. The medications included morphine and pain killers.

[13] Goitom knew the Accused, as they had been friends for approximately six years. He did not recall going to a house party, albeit people told him that he had. He has no recollection as to whether friends and family who visited him in the hospital said anything about the events of the evening. He has no memory as to signing any forms provided by Mitchell, including a personal health information release form, a property return form, a photo identification form, and a WPS Sworn Witness Declaration Form.

[14] Goitom provided his statement to police on March 22, 2016. This video-recorded statement was made under solemn affirmation. Further, he acknowledged that, before giving his statement, he understood the criminal consequences of making a false statement, his right to choose whether or not to make a statement, his understanding that the statement would be video-recorded and his choice to give a statement (Exhibit 9). Goitom provided the following information in his statement:

- the Accused wanted to engage him in an altercation at Bar Red Sea. He followed the Accused out; however, friends discouraged the fight and drinking continued;
- he and his friends went to a house party at the residence. The Accused was also in attendance;
- he has no idea why the Accused wanted to engage him in a fight;

- he was downstairs in the residence when the Accused tapped him on his hand and said, "go". As a consequence, Goitom followed the Accused upstairs and outside for what he thought was to be a one-on-one fight;
- Goitom followed the Accused out of the backyard and into the lane;
- the Accused pulled a handgun and shot him in the abdomen, causing him to fall to the ground. The Accused then walked towards the backyard of the residence. Goitom's friends Mehari and Gizaw helped him into his Lancer vehicle with Gizaw driving him to Concordia Hospital for care.

[15] The video-recorded statement also captured the photo line-up. Goitom signed the relevant form and selected the picture of the Accused from a 10-person photo gallery pack. He identified the Accused as the individual who shot him.

[16] Goitom testified that he was under general anesthesia while in surgery for the repair of his gunshot wounds. He indicated that the doctors would be in the best position to advise as to his care, what medications had been administered and what effect they may have had on him. Those drug-induced effects caused him to lose track of time/days, knowledge as to whether he gave a statement, who may have visited him, and what he may have been told.

- **Merhawi Mehari**

[17] Mehari testified that he recalled being at Bar Red Sea with Goitom. He did not remember anything happening at the bar, nor does he recall anything

thereafter. The viewing of his video-recorded police statement did not refresh his memory. Mehari said that he has no recollection of signing any forms as requested by Mitchell while hospitalized or providing any information as to what transpired on March 13, 2016.

[18] Mehari testified that these events happened over five years ago and he has little recall. He was in pain because of the gunshot injuries and was under the influence of medication. He testified that because of the medication, he could not recall what transpired during his hospital stay, albeit the doctors would be able to advise of his condition and the possible effects of medications upon him. Additionally, Mehari testified that he lost track of time and days due to both the pain he was experiencing and the medications he was under. He indicated that many friends and family visited with him. They talked about what had happened on March 13, 2016. That said, he did not get information from others and, again, his recall does not extend much beyond attendance at Bar Red Sea. He has no recollection of speaking to the police at any time and does not know how he got the information supplied in the video-recorded statement. He also indicated that he had had a lot to drink on the night in question.

[19] Mehari's witness statement was video recorded along with his execution of the WPS Sworn Witness Declaration Form (Exhibit 10). Mehari affirmed prior to undertaking the statement that he knew the consequences of making a false statement, the right to choose whether or not to make a statement, understanding that the statement would be video recorded and that he chose to provide a statement.

[20] Mehari, in his statement, indicated that, "This guy and Goitom were at Bar Red Sea with him and went outside to fight". They then went to the after-party where he observed the Accused touch Goitom, indicating "Let's go outside" (Video-Recorded Statement #16-51286 Mehari Transcript, p. 4, line 24). It was his assumption that a fight was about to take place. Consequently, he followed them out of the residence in an effort to break up the fight, heard a gunshot and observed Goitom falling. He went to assist him, along with Gizaw. Mehari then ran to save himself when "... this guy came after me. I run". He asked, "Why are you shooting me for?". The shooter responded, "Like I just want you to dead" (p. 5, lines 15–16). Mehari said that he put his hand around his head and moved under a vehicle which was in the parking lot/back lane area. He was shot six times in the stomach, left hand and abdomen. Mehari stated that the shooter was the Accused and was someone known to him for two or three years. He also said he heard further shots fired in the residence backyard with respect to Tamana. Mehari said that "Francis" helped him. Francis slapped his face and said, "Talk to me" (p. 22, line 14). The firearm in question was a handgun.

- **Adonay Gizaw**

[21] Gizaw testified in court that he spoke to police on March 13, 2016. His memory was said to be unclear as to the events of March 12 and 13, 2016, beyond being at Bar Red Sea and going to a house party. That said, he testified that he told the police the truth when he spoke with them. In his statement, which was admitted into evidence as "past recollection recorded", Gizaw said that he was heading upstairs to get food at the residence and heard several shots

outside. He went outside and heard Goitom saying that he, "got shot". Goitom provided him with his car keys and asked to be taken to the hospital. Gizaw helped his friend into the Lancer vehicle and, upon starting it, there was (Video Recording #16-199, Gizaw Transcript, p. 5, lines 17–24):

...a flash kind of like the broken windows and the gunfire at the same time so I put my head down, put the lever in drive, stepped on the gas, I went straight. So, I must have hit something, there was a knock sound that I heard and I still put my head down and tried to get going. Just put the gear in reverse, reversed back and headed out through the back to the Concordia Hospital.

[22] Gizaw testified that a bullet grazed his shoulder and broken glass cut his arm. In terms of the shooter, Gizaw said that the individual wore a black jacket. Gizaw testified he has no clear image of what transpired beyond there being a flash and the window breaking.

[23] Gizaw returned to the residence to assist Mehari after dropping Goitom at Concordia Hospital. He noted that a police presence had already gathered. Gizaw left the Lancer vehicle at that location. He learned that others had been shot and had been taken to the Health Sciences Centre ("HSC"), including Tamana and Mehari. Accordingly, he went to the HSC by taxi with others from the party. They were not permitted to see their friends as they were under medical care.

[24] Gizaw returned to the hospital in the days following and was able to see his friends. He told police that there was significant texting, social media and rumours circulating as to what had transpired at the residence (p. 25).

- **Miracle Tamana**

[25] Tamana received gunshot wounds to his thighs, abdomen and legs as a consequence of the March 13, 2016 gunfire. He recalled speaking with the police at the HSC; however, reviewing his statement did not refresh his memory of the details beyond knowing that he had been at Bar Red Sea. Further, he had consumed a significant amount to drink and this circumstance happened over five years ago. He was aware that he was at the back of the residence when he was shot, but was "super drunk". He also indicated he did not know Mehari, Goitom or Gizaw. Tamana testified that he remembered that Mitchell came to the hospital three times. Despite him not telling Mitchell anything, the officer and his partners kept returning. Tamana recalled signing the WPS Witness Statement Declaration Form and testified that no one had forced him to speak with police despite the fact he did not want to. Friends and family had attended at the hospital and provided him with information. Those individuals told him "a lot", as he did not remember what had occurred. This was, in part, because he was "black out drunk". He told the police the information he had collected from others so they would leave him alone. At no time did Tamana ask the officers to leave his bedside during the course of their visits.

[26] On March 13, 2016, when he spoke to the police, Tamana testified that he told them he did not know who had shot him. Additionally, he was in pain and under the influence of medication. The police returned on March 14, 2016, to advise that a suspect had been arrested and either provided him with the name, or others had told him, or it was on social media. He claimed to have pieced

information together as gleaned from others and provided that to the police as he did not know what had happened. When the police told him they had arrested a suspect, it was his belief that they must have done their job and arrested the correct individual. At this juncture, he does not know if it was the Accused who shot him. In terms of the documents he signed, he was willing to trust the police and sign whatever forms they requested. Further, his compliance would assist in him no longer having to deal with them. Additionally, he knew others had been shot and were hospitalized.

[27] Tamana knew who the Accused was and was shown a gallery photo pack by Mitchell. He was told by the officer to, "Pick out someone you know". Further, he indicated he had been told by police that the Accused had been arrested. Accordingly, when he went through the photographs, he selected the Accused (Exhibit 2). This was particularly after being told by Mitchell, "Obviously, you know this guy. I am just going to make sure we're talking about the same guy here" (Video Recording, #16-51286 – Tamana Transcript, p. 26).

[28] Tamana provided a statement to Mitchell and his partner Detective Dave McDonald on March 17, 2016. Tamana was advised as to the criminal consequences of making a false statement, the right to choose whether or not to make a statement, understanding the statement would be video recorded, and choosing to give a statement. The statement was made under solemn affirmation (Exhibit 11).

[29] Tamana said in his statement that an argument began between Goitom and the Accused at Bar Red Sea where they endeavoured to fight but were

stopped. The group then went to an after-party at the residence. Tamana described his condition as being "pretty drunk". He went outside to get fresh air and, when seated on a deck step, with his head down, saw someone walk up in front of him. This caused him to raise his head and determine that it was the Accused. Tamana asked, "What's up?" and the next thing that transpired was him being shot several times. The Accused was then seen to walk to the parking lot area where Tamana heard more shots being fired. Tamana recalled that his friend Francis came, slapped him and urged him to "stay up". He indicated that he was surprised he was not dead and that what had transpired was cold-blooded (p. 16, lines 12-13). His next recollection was waking up in the hospital. Tamana said that he and others had been friends with the Accused. The Accused had, in the last two months, began acting differently and this caused his group to distance themselves. This angered the Accused.

- **Detective Robert Mitchell**

[30] Mitchell was tasked, after briefings with other WPS officers, to attend to the HSC to speak with three gunshot victims. Prior to attending at the hospital, on March 13, 2016, Mitchell created a gallery photo pack at 10:10 a.m., as a suspect had already been identified. That suspect was the Accused. Mitchell arrived at the HSC at 10:47 a.m. and met with Mehari who was in the post-surgical unit. Mehari was said to be quiet, whispered any words spoken and communicated through nods and shakes of the head. It was assumed that he was in pain, albeit they were able to communicate. It was acknowledged that it was hard to secure additional information from Mehari at that time. The

interview was completed at 11:04 a.m. Mitchell and his partner Detective Alan Mymryk ("Mymryk") returned on March 14, 2016, at 2:00 p.m. to advise that a suspect had been arrested, in order to alleviate any worries that the person who had shot Mehari was still at large. He did not reveal the name of the person who had been arrested.

[31] Mitchell indicated that he and Mymryk re-attended at Mehari's bedside on March 15, 2016. Mehari was on the same ward as Tamana and Goitom by that time. Mitchell noted that Mehari's condition had improved but he was likely still in pain. He continued to secure information from him in a pre-interview style, as well as having him sign a medical release form and ultimately the WPS Sworn Witness Declaration Form on March 17, 2016, when the video-recorded statement was taken.

[32] Mitchell also attended, with Mymryk, to Tamana's bedside on March 13, 2016. He endeavoured to secure information and continued to visit over the next few days. Mitchell was able to procure a signed medical release form. On March 17, 2016, a video-recorded statement was taken after the execution of the Witness Declaration Form.

[33] Goitom was first contacted by Mitchell and his partner on March 14, 2016, with information being provided on that day, as well as on March 15 and 22, 2016, when the video-recorded statement was secured after completion of the Witness Declaration Form.

[34] Under cross-examination, Mitchell acknowledged he did not know the state of Mehari's health on March 13, 2016, when he attended to speak with him,

beyond that he was recovering from surgery. This was also the case with respect to all attendances at the bedsides of Mehari, Goitom and Tamana. His notebook did not reflect that he adhered to his practice of approaching a health care provider each time he attended to speak with a hospitalized patient, to make inquiries as to whether it would be permissible to speak with those individuals. In the event permission was not given, he would re-attend at a later time. He agreed that he made no direct inquiries with respect to levels of pain, medication, or conditions with each of the three hospitalized complainants. Mitchell also acknowledged that:

- on March 15, 2016, Tamana said that he did not know who shot him and that he was very drunk on March 13, 2016;
- he never cautioned the complainants to not discuss the events of March 12 and 13, 2016, with each other, their families and/or friends, or to avoid information from social media sources;
- Francis was interviewed and indicated that he had gone to the aid of Tamana at the residence. This is despite the fact that both Tamana and Mehari said that Francis had come to their aid;
- he made no inquiries at Bar Red Sea with respect to anyone having knowledge of the circumstances that might have happened at that location on the evening and morning of March 12 and 13, 2016, nor was surveillance video requested;
- he was aware that Goitom had said that he had no idea who shot him when attending at the Concordia Hospital;

- Mehari told him on March 15, 2016, that Francis has applied pressure to his wound. Further, he indicated that, despite the fact he was injured in the lane of the residence, he believed that the Accused had shot Tamana in the backyard. The officer did not know the source of that information and did not query how Mehari could have seen what transpired in the backyard which was shielded from his view by a fence and garage;
- no inquiries were made with respect to the complainants' sources of information, if any, or whether what they told police was from their own knowledge and recollections of the events. He never cautioned the complainants against telling him what they had heard from others or was secured through social media sources;
- he never advised the complainants of the name of the suspect arrested on March 14, 2016, when he arrived at the HSC at around 2:00 p.m., as that could taint their police statements. He accepted after reviewing media releases that the WPS had reported the Accused's name and his gallery photo pack picture to media in advance of his HSC attendance on that day (Exhibit 22).

Detective Alan Mymryk

[35] Mymryk was partnered with Mitchell and was also tasked to speak to the gunshot victims at the HSC. At 9:56 a.m. on March 13, 2016, Officer Pats had received information as regards a possible suspect who was identified as the

Accused. It was based upon that source that the photo line-up gallery pack was generated.

[36] Mymryk essentially confirmed the testimony of Mitchell, who had taken the lead in the interactions with the complainants. He confirmed that they made no specific inquiries as to the state of health of the complainants, either with each of them or with their health care providers during their hospital attendances.

IV. POSITIONS OF THE PARTIES

A. The Crown

[37] The Crown submits that all charges against the Accused have been proven beyond a reasonable doubt. The complainants' statements should be accepted as being ultimately reliable and as accurate accounts of what transpired on March 12 and 13, 2016. This was primarily because of the described consistency of the material events; the manner in which the statements were secured and expressed; the threshold reliability factors; the striking similarity of the statements; and the confirmatory nature of the forensic evidence. The complainants, with the exception of Gizaw, all identified the Accused as the perpetrator of the shootings. Further, the manner in which these events transpired was argued to prove beyond a reasonable doubt that the Accused intended to kill by virtue of the fact that he fired his weapon at each complainant and, with respect to certain of them, on more than one occasion. There was an intention to kill clearly recognizable by the circumstances of these events. Further, the instrument used was a firearm that was discharged at the

complainants with an intention to wound, maim, disfigure or kill. All other charges were argued to have been established beyond a reasonable doubt.

B. The Defence

[38] The defence submits that this case revolves around who, in fact, shot the four complainants. It was argued that the Crown failed to prove beyond a reasonable doubt that it was the Accused, primarily because of the manner of evidence gathering utilized by the police. It would, in all likelihood, be appropriate to have suspicions as to who the shooter might have been, but that was argued to not constitute proof beyond a reasonable doubt as to who discharged the firearm in question.

[39] The defence contends that the statements of the three hospitalized complainants cannot be relied upon for the purposes of ultimate reliability. This was principally because it must be queried whether the three hospitalized complainants spoke with each other as to the events of March 12 and 13, 2016, spoke to others, or had the opportunity of accessing social media sources, as well as reviewing the WPS press release in terms of securing relevant information. As Gizaw said, there was lots of on-line chatter. Did those types of circumstances coalesce and influence the complainants' statements along with their identification of the Accused as the shooter?

[40] A further consideration argued by the defence was the significant consumption of alcohol by the hospitalized complainants on March 12 and 13, 2016. This may have impacted their ability to accurately recall the events in question. Further, they all had sustained significant injuries, undergone surgical

or medical interventions and were on pain medications. Mitchell should have asked the health care professionals as to the complainants' health and the effects of the administered medications – he chose not to do so. Further, the officers made no direct inquiries of the complainants as to their respective health conditions and the possible influences of medications. The Crown needed to call medical evidence with respect to the complainants' injuries, recoveries and the effects that medications may have had on their abilities to provide accurate information to the police.

[41] The defence argues that the complainants' statements illustrate that conversations must have transpired between these individuals or that information was secured from other sources. This was shown by the evidence of Mehari and Tamana who both said that Francis had slapped them, stemmed the bleeding from their wounds and urged them to stay awake. That did not happen with respect to both of these complainants. Additionally, Gizaw testified that many people came to the hospital talking about what had occurred at the residence, as well as what was reflected on social media. Tamana testified that the ward had to be closed at one point because of the number of people who were visiting. It was submitted to be very important that the police never asked these complainants to tell them what had transpired from their own experiences or what, if any, information they had secured from talking to each other, to others, or through social media.

[42] Further submissions included:

- Gizaw did not indicate that a challenge or altercation between anyone had happened at Bar Red Sea;
- no investigation was conducted at Bar Red Sea, which might have illuminated what, if anything, had occurred between these individuals at that location, including viewing surveillance video;
- Gizaw did not say that there was a “tapping” of Goitom’s hand by the Accused;
- Gizaw did not indicate that the Accused was at the party;
- there was no evidence of a forensic nature to tie the Accused to the residence;
- the gallery photo pack was created before any of the complainants identified the Accused or were interviewed by police (the Accused had been identified as a suspect by others before the authorities attended at the HSC);
- Tamana pieced together information from what he had been told by others and provided that to police in an effort to terminate their visits;
- Goitom and Mehari testified that they did not know what transpired on March 13, 2016, as they lost track of time while hospitalized and were significantly impacted by the medications administered;
- Mehari advised police that after being shot, the Accused went into the yard and shot Tamana – it must be queried how he would know that occurred unless someone told him, as the fence and the garage would have blocked his view of what had happened in that area.

V. ANALYSIS

[43] The first issue that must be determined is the ultimate reliability of the Goitom, Tamana and Mehari statements and what use will be made of each of them. In order to make that evaluation, it is necessary to consider what occurred in and around the making of the statements and whether there was coaching. An additional consideration relates to the demeanour of the complainants during the course of giving their statements. These considerations must all be evaluated in the context of all of the evidence, including the complainants' trial testimony. The effectiveness of cross-examination was, in many respects, limited during the course of the trial. The statements themselves were complete and accurately recorded.

[44] There were valid concerns with respect to the statements as argued by defence counsel. The defence suggested that limitations must be placed upon the Goitom, Mehari and Tamana statements because of issues, which include:

- two of the complainants indicating immediately that they did not know the identity of the shooter;
- the three hospitalized complainants were all on medications and, accordingly, it must be queried what their respective states of mind were at the time of giving their statements. Mitchell did not ask the complainants or medical staff as to their conditions, nor was medical evidence called at trial as to the potential effects of medications on these individuals and on their abilities to provide accurate information to the police;

- there was no forensic evidence tying the Accused to what transpired on March 13, 2016, at the residence;
- there was no follow up investigation at Bar Red Sea or the viewing of surveillance video recordings from that location;
- the possibility existed that the complainants secured information as to what transpired at the residence through conversations with friends and/or family as well as from each other, as they all came to be housed on the same hospital ward. Additionally, there were media releases and social media "chatter" which was testified to by Tamana. Further, Gizaw confirmed in his police statement that social media communications were transpiring. It is also noted that the WPS, in a media release with accompanying picture, had earlier in the day identified the Accused as the shooter prior to Mitchell attending to HSC and advising the complainants that a suspect had been arrested;
- did the complainants become aware of certain facts through conversations with others as illustrated by the fact that Mehari knew Tamana had been shot, but could not have seen such an occurrence through a fence and garage, or the evidence of Goitom and Tamana that both were assisted in the same manner by Francis?

[45] The aforementioned factors must be considered in an evaluation of the ultimate reliability of the complainants' statements and, indeed, these are valid concerns. However, they must be weighed through the lens of all of the evidence in this case, including the viewing of the video-recorded statements, the

similarities between the statements, and details that would not necessarily have been known by others who were not directly involved. The forensic evidence is also a key component, as it served to verify information contained in the statements. It is acknowledged that there is no stated motive as to why these complainants' versions of events changed from that provided to police in the hospital to their testimony before the court, albeit suspicions on that topic exist. That said, all the statements were given under affirmation, all understood the criminal consequences of making a false statement, and that the statement would be video-recorded. Further, they chose to make a statement after knowing that they had the right to decline to do so. These statements were all taken within days of March 13, 2016. Accordingly, events would have been fresh in the complainant's minds rather than endeavouring to remember what occurred five years later at this trial. Tamana, Goitom and Mehari all identified the Accused as the individual who shot them, as well as recalling other circumstances that transpired.

[46] Tamana was engaged with Mitchell during the course of providing his video-recorded statement. He recounted events in a conversational manner and was, at all times, cooperative. He was able to physically show Mitchell the location of the injuries on his body and towards the end of the interview communicated that he was in pain. However, he continued to engage with the officer and, after changing positions to become more physically comfortable, urged Mitchell to "go ahead" with the statement process. At all times, Tamana gave clear responses, had no apparent memory issues nor was there an inability

to communicate. He was calm, alert, and relaxed. He engaged in a reasonable fashion, as well as showed no difficulty in his understanding of the interview process. There were no discernible effects of pain medication throughout his presentation. He also said to Mitchell, "Don't let this guy walk, man".

[47] There was forensic evidence that corroborated the Tamana statement including his description of the backyard of the residence, as well as the finding of three expended casings and a bullet close to where he said he was when shot. Additionally, there was blood found in that area. The clothing seized from Tamana evidenced bullet holes corresponding to where he was shot.

[48] Tamana's description of the shooting was detailed, including where he was seated and the fact he asked the Accused "What's up?" only to be shot numerous times. The shooter was in close proximity to Tamana. Tamana said he was surprised he was not dead. He testified at trial that he was told many versions of the event by others, including by the police authorities as to what had occurred at the residence. He said he took those pieces of information from the different sources, put them together and advised the police of the version of events in his statement in order to stop their continuing visitations.

[49] I am not satisfied that Tamana would have been able to concoct such a consistent version of what occurred if it had been pieced together from other sources. Indeed, the other "sources" were not identified, nor did they testify as to what was seen in the backyard of the residence. Tamana's video-recorded statement is strikingly similar to other accounts and *ad idem* with the forensic evidence. There may be "pieces" he was told by others, however, the substance

of his video-recorded statement is ultimately reliable, particularly with respect to his shooting. There was no indication during the statement that medications had any affect upon him, as he appeared alert, engaged and, at all times, cooperative.

[50] Mehari presented as a soft spoken and serious individual who was alert and engaged while giving his video-recorded statement to police. He identified the Accused as the shooter, along with other details as to what had transpired. He was also able to correct the officer when appropriate. At one point, Mehari removed a bandage and cast from his arm to show the wound, as well as illustrating to the officers where the injuries to his legs were located. This demonstrated cooperation and a lack of any sign of impairment in terms of his speech, ability to communicate or behaviour. He provided an account as to how his injuries were occasioned and who inflicted them, including the fact that he hid his head under a vehicle in the parking lot area behind the Henderson Highway businesses.

[51] The forensic evidence uncovered by Dee illustrated five casings and blood in the identified area. Additionally, Mehari's clothing was damaged where the bullets had entered into his body. There was no indication that Mehari had any difficulty understanding the questions asked and his ability to communicate was not impaired through medication to any apparent degree.

[52] Mehari described the fact that the Accused had tapped Goitom on the hand while at the residence after the altercation invitation at Bar Red Sea. These actions were confirmed by Goitom. Mehari also testified in court that he does not

know if he spoke to others at the hospital with respect to the events of March 12 and 13, 2016. I am satisfied as to the ultimate reliability of the Mehari statement.

[53] Goitom, during the course of his video-recorded statement, supplied clear responses with no apparent memory issues or inability to communicate. He was calm, alert and relaxed during his interactions with Mitchell. Goitom was engaged in the process and showed no discernible effects of any pain medications while providing a detailed description of what had transpired. Goitom had had a prospective altercation with the Accused at Bar Red Sea and testified with respect to the tapping of his hand at the residence – a fact confirmed by Mehari. He said that he was shot in the lane by the Accused with Mehari being shot shortly thereafter.

[54] At one point during the course of providing his statement, one of the medical devices at Goitom's bedside sounded. He illustrated his alertness and engagement by turning it off and continuing the interview. There was no appearance that he was negatively impacted or clouded by medication. Further, Goitom indicated that he had no recollection as to whether he had spoken to others as to the events of the night in question. The forensic evidence supports the Goitom statement in that one expended casing was found in the rear lane between the parking lot and the residence. His clothing was also illustrative of bloodstains and bullet holes in the same areas as his injuries. The ultimate reliability of the statement is confirmed.

[55] As previously indicated, there is no stated motive as to why these complainants were unable to recall what they had told Mitchell in their video-recorded statements. The fact that they could not do so at trial might be a consequence of the passage of time or other reasons. However, that does not mean that their statements were not a reliable or an accurate accounting of what occurred. At the time those statements were provided, the complainants affirmed their truthfulness, while knowing the consequences of giving a false statement, and that they were not obliged to give a video-recorded accounting of what had transpired. Their individual encounters with the Accused were well described. It is acknowledged that the complainants were visited by friends and family with discussions also occurring as regards these events taking place on social media. That said, only Tamana and Gizaw related those concerns. Mehari and Goitom claim to have no recollection as to whether they had spoken to others with respect to the events of March 12 and 13, 2016.

[56] The March 13, 2016 statement of Gizaw was provided in a straightforward and coherent manner. In some respects, it is strikingly similar to the statements of the other complainants, except he did not identify the shooter. He confirms that he heard gunshots, that Goitom indicated he was hit and the fact that he assisted Goitom into the Lancer vehicle. He also acknowledges that the Lancer vehicle was shot at, with a bullet grazing his shoulder as he moved his head downwards. Gizaw's evidence confirms that Goitom was shot in the lane and that he drove him to the hospital. The forensic evidence establishes that a shot was fired through the windshield of the Lancer vehicle and through the driver's

side window breaking the glass. A casing was found in the rear of the vehicle. Further, there was evidence that the Lancer had collided with the wall of a Henderson Highway building and a hydro pole.

[57] There were identified similarities between the three hospitalized complainants' statements, as well as that of Gizaw:

- the Accused engaged in some type of a disagreement with Goitom at Bar Red Sea. This was confirmed by Mehari and Tamana;
- their statements confirmed that the Accused is known by the nickname "Nipsey";
- the Accused was identified by all three hospitalized complainants as the individual who shot them, albeit acknowledging that two of the three did not initially name him as such;
- the Accused was at the residence house party. Goitom, Mehari and Tamana confirmed that to be the case;
- the Accused "tapped" Goitom on the hand and indicated they should go outside. A touching was confirmed by Mehari;
- Goitom was shot in the back lane. Mehari and Gizaw heard shots from that area. Goitom recalled that he had been shot and was found lying in the lane. Dee located expended casings in that area. Goitom was helped into the Lancer vehicle and was driven to the hospital by Gizaw. Gizaw confirms that fact;
- the Accused shot Tamana in the backyard of the residence. The shots were heard by Mehari. Dee found expended casings, one bullet

and bloodstaining in the backyard deck area. Tamana also heard shots coming from the area of the parking lot while he was lying wounded in the yard. The fact of shots being fired from that area was confirmed by Goitom and Mehari;

- Mehari was shot in the parking lot area where he saw the Accused. Dee located shell casings, a bullet and bloodstaining in the parking lot;
- Gizaw, while driving the Lancer vehicle from the parking lot with Goitom as a passenger, saw a flash and gunfire. A bullet hole was located in the windshield, as well as a bullet in the backseat/door area that had likely entered and shattered the driver's side window. There were also bullet strikes on the hood of the vehicle. Additionally, the front and rear of the Lancer vehicle were damaged after Gizaw moved the vehicle forward into a building and back into a hydro pole.

[58] Those are examples of similar accounts and/or forensically documented details of what transpired in the early morning hours of March 13, 2016. Additionally, in reviewing the video-recorded statements, the hospitalized complainants showed no hesitation in providing details and were clear, communicative and engaged. They exhibited no signs of being impacted by medication and, additionally, it would be unusual for all three to be affected and impacted in the same manner by administered medications. They were all lucid at the time and showed no difficulty in recounting their evidence. Further, there

was no indication that they were coached, that leading questions were asked, nor was there evidence of threats, promises, tunnel vision, or threatening conduct on the part of the police officers. There was no suggestion of oppression or police trickery. It is also noteworthy that Tamana and Goitom, during the course of their video-recorded statements, identified the Accused as the individual who shot them from the gallery photo pack provided by Mitchell. While Mitchell did not specifically address the health status of each of the hospitalized complainants directly with them or their health care providers, I accept his evidence that he sought permission to speak with them from medical personnel. Such permission was obviously given.

[59] There is no question that there are certain inconsistencies in the video-recorded statements provided; however, that would be expected. Indeed, it would be concerning if all were identical, particularly when these individuals were in different locations in and around the residence and were experiencing varied levels of intoxication. I am not satisfied that the impairing of medications on the complainants was evidenced during the course of their statements, nor were they influenced by information provided by others or through social media to any appreciable degree, if at all. It is acknowledged that there were no fingerprints or forensic evidence identifying the Accused at the residence. Further, there was blood in the residence and none of the complainants were known to have been inside. However, I have concluded, based upon a consideration of all the evidence, and beyond a reasonable doubt, that the Accused was the shooter.

VI. ATTEMPTED MURDER

[60] The Crown must prove beyond a reasonable doubt that the Accused:

1. meant to kill the complainants; and
2. fired a weapon at the complainants.

[61] In terms of an intention to kill, the decision in ***R. v. Ancio***, [1984] 1 SCR 225, the Supreme Court is instructive and held as follows (para. 30):

It is clear from the foregoing that in common law and under the criminal law of Canada criminal attempt is itself an offence separate and distinct from the crime alleged to be attempted. As with any other crime, the Crown must prove a *mens rea*, that is, the intent to commit the offence in question and the *actus reus*, that is, some step towards the commission of the offence attempted going beyond mere acts of preparation. Of the two elements the more significant is the *mens rea*. In *R. v. Cline, supra*, Laidlaw J.A., speaking for the Ontario Court of Appeal, said, at p. 27:

Criminal intention alone is insufficient to establish a criminal attempt. There must be *mens rea* and also an *actus reus*. But it is to be observed that whereas in most crimes it is the *actus reus* which the law endeavours to prevent, and the *mens rea* is only a necessary element of the offence, in a criminal attempt the *mens rea* is of primary importance and the *actus reus* is the necessary element.

and in *Russell on Crime* (12th ed.), vol. 1, p. 175, it is said:

Since the mischief contained in an attempt depends upon the nature of the crime intended, the criminality lies much more in the intention than in the acts done.

This proposition was accepted by Lord Goddard in *Whybrow, supra*, at p. 147, where he stated that "the intent becomes the principal ingredient of the crime".

[62] This area of the law was also considered in the decision of ***R. v. Raposo***, 2017 MBQB 43 (CanLII):

[48] The crime of attempt to commit murder is difficult to prove and requires proof of a specific or particular state of mind — an intention to kill. The court must be satisfied, beyond a reasonable doubt, that Raposo did the shootings, and meant to kill one, two, or all three of the complainants. It is trite to say that a person usually knows the consequences of his/her actions and means to bring them about. A permissible inference that may be drawn is that Raposo intended the natural consequences of his actions, which included discharging a firearm at Cst. Moreau-Quevillon or Cst. Rivard, and/or Ms. Furutani with the specific intent to kill. What must be considered is all the trial evidence, including Raposo's testimony and the fact that he may have been impaired by a substance and/or exhibited a reduced mental capacity at the time. Raposo testified that he had no intention to kill any of the complainants.

[49] The decision of the Supreme Court of Canada in *The Queen v. Ancio*, 1984 CanLII 69 (SCC), [1984] 1 S.C.R. 225, attempts to confine the potentially broad scope of section 24 of the *Criminal Code*. Subsections 24(1) and (2) state:

24. (1) Attempts — Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

(2) Question of law — The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

[50] The *Ancio* decision considered the mental element required for proof of attempted murder and concluded that such intent must be the specific intent to kill.

[51] The crime of attempted murder has been considered in this province in decisions such as *R. v. Anderson*, 2008 MBQB 330, [2008] M.J. No. 453 (QL), and *R. v. Boissonneault*, 2012 MBCA 40, [2012] M.J. No. 170 (QL). In *Anderson*, Abra J. entertained the situation of a warranted forced entry by police officers into that accused's home in pursuit of detecting the existence of drugs. The accused, hearing persons coming into his home, retreated to a bathroom and fired shots through a closed bathroom door. He loaded and reloaded a shotgun and fired four times through the door. Two of those shots were said to have been accidental. The shotgun was aimed at a height that would, in all likelihood, result in a person on the other side of the door being struck in the midsection of the body. Abra J. found that such a discharge of a weapon, at an individual six to 24 inches away, could foreseeably result in the death of that person. The accused was found guilty of the crime of attempted murder with respect to the officer outside the bathroom door. There was a clear

intention to shoot and perhaps kill a person based upon the fact scenario. A second officer had fired three shots in the direction of the accused in defence of himself and of the other officer. The accused fired the shotgun in the direction of those muzzle flashes authored by the second officer. Abra J. concluded that the accused did not know specifically where that second officer was located. As a consequence, the accused was found guilty of the agreed included offence of discharging a firearm with intent to wound.

[52] The ***Boissonneault*** decision upheld the decision of the trial judge after finding that there was direct evidence that could be relied upon to infer that the accused had the specific intent to kill the victim. A passage from a decision of Cory J.A., on behalf of the court, in ***R. v. Bains and Grewal*** (1985), 7 O.A.C. 67 (C.A.), was referenced:

[27] All firearms are designed to kill. A handgun is a particularly insidious and lethal weapon. It is easy to carry and conceal, yet at close range, it is every bit as deadly as a .50 calibre machine gun. It follows that when, at close range, a handgun is pointed at a vital portion of the body of the victim and fired, then in the absence of any explanation the only rational inference that can be drawn is that the gun was fired with the intention of killing the victim. No other reasonable conclusion can be reached: a deadly weapon was used in the very manner for which it was designed – to cause death. It is appropriate to conclude that in these circumstances the gun was fired in order that it might fulfil its design function and kill. An element of surprise arises only if death does not occur.

[63] In this case, a common-sense inference can be drawn that the Accused intended to kill. An accused's intent is critical in an attempt crime and for attempted murder it is necessary that subjectively it is known that death is likely. In essence, an attempt crime constitutes a failure to complete the *actus reus* of a fulfilled offence. The carrying of a firearm could be illustrative of a subjective intent. The carrying of a loaded firearm and pointing it is demonstrative of an inherently dangerous circumstance and sufficiently proximate to the final goal to be considered as a comprehensive attempt. It is apparent that a firearm is

designed to kill. There must be a contextual examination of multiple factors in order to properly evaluate the circumstances in this case.

[64] Tamana was shot in the center/abdomen of his body at very close range. Mehari hid his head under a vehicle while experiencing gunshot wounds to his hand, legs and stomach. Goitom was shot point-blank, and face-to-face with the Accused. The shot, again, was to the center of his body. The gunshot through the driver's side windshield and the trajectory of that bullet was clearly headed towards Gizaw and, instead, grazed his shoulder. The weapon was discharged at the correct height and direction to strike Gizaw, who appropriately ducked. The driver's side window was broken by gunfire.

[65] The Accused had armed himself with a handgun at some point on March 12 and/or 13, 2016. He pointed and discharged a loaded firearm at the four complainants on at least one occasion each. The firing of the weapon could foreseeably have resulted in the deaths of these individuals. It must be presumed that the Accused intended the natural consequences of his actions. Indeed, Tamana and the others reflected a disbelief that they had not been killed. Further, the Accused said to Mehari, "Like especially you I want you to dead" (Video-Recorded Statement #16-51286 Mehari Transcript p. 6, line 6).

[66] Goitom was shot on one occasion; Gizaw had two bullets fired into the vehicle at him, with one grazing his shoulder; and both Tamana and Mehari were struck several times. The forensic evidence demonstrated that multiple discharged casings were found, along with bullets, in the area of the residence. The repeated firing of a firearm at these four individuals was deliberate and

demonstrated an intention to kill. Three out of the four were struck in the center of their bodies along with other gunshot wounds. Gizaw was fortunate to only have been grazed. Three out of the four complainants were hospitalized for extended periods. These were not blind shots or gunfire of a defensive nature. It is only common sense that a person usually knows what the predictable consequences of his or her actions will be and means to bring them about. On four occasions, the Accused pointed and discharged a loaded firearm at the four complainants. This, foreseeably, could have resulted in their deaths. The Accused's actions, the forensic evidence and the statements of the complainants facilitate that the only reasonable inference that can be drawn from the circumstances is that the firearm was discharged by the Accused with a killing intention. Firearms are designed to kill.

[67] The defence is correct: this case rests on whether the Crown has proven beyond a reasonable doubt that the Accused was the shooter. I am satisfied that the Crown has met that burden based upon the ultimate reliability of the three hospitalized complainants' statements, the forensic evidence and in the context of all the evidence adduced in this case. The whole of the evidence demonstrates the Accused's intention to kill.

VII. FIREARM CHARGES

[68] The Accused is charged with four counts of discharging a restricted or prohibited firearm with intent (s. 244(2)(a) of the *Criminal Code*). The intent stated in the indictment was to wound the four complainants. The firearm in

question has never been recovered. The weapon is defined pursuant to s. 2 of the ***Criminal Code*** as a:

...barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.

[69] All the complainants have given evidence and/or motioned that a handgun was seen and fired. This would meet the criteria of a restricted or prohibited weapon. Further, all injuries sustained were gunshot wounds, with the exception of the cuts to Gizaw's arm experienced when the driver's side window shattered as a consequence of a gunshot. Additionally, Dee recovered nine casings and five bullets in locations where the complainants indicated they were shot.

[70] I am satisfied beyond a reasonable doubt that the weapon used by the Accused was a firearm as defined in s. 2 of the ***Criminal Code***. Further, it was intentionally discharged at the four complainants. I have determined that in discharging the firearm, the Accused intended, at the very least, to wound all the complainants. Three out of the four complainants were hospitalized with significant gunshot injuries, with Gizaw receiving a grazing wound. I have concluded that, beyond a reasonable doubt, the Accused intended to wound and endanger the life of all four complainants when he intentionally discharged the firearm at each of them.

[71] I am also satisfied that the Accused is guilty of:

- possession of a loaded restricted or prohibited firearm;
- the unauthorized possession of a firearm;

- possession of a handgun while prohibited pursuant to s. 515(4.1) of the ***Criminal Code***;
- failure to comply with conditions of recognizance that he not attend within two city blocks of Bar Red Sea and failed to be at his home address in compliance with a court-ordered curfew.

VIII. CONCLUSION

[72] I am satisfied beyond a reasonable doubt of the Accused's guilt of all charges. Any other plausible alternative explanation has been dismissed based upon an evaluation of all the evidence brought in this case. A number of the charges will be "Kienapped" (***Kienapple v. The Queen***, 1974 CanLII 14 (SCC), [1975] 1 SCR 729). This will be accomplished at the sentencing hearing.

_____ J.