

CANADA / JUDGMENT

R. v. Anderson

2020 BCSC 2196

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2196 R. v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Anderson,

2020 BCSC 2196

Date: 20201130

Docket: X082064

Registry: New Westminster

Regina

v.

Michael Branden Anderson

Before: The Honourable Madam Justice Horsman

Oral Reasons for Judgment

Counsel for the Crown:

S.H. Quendack

Counsel for the Accused:

J.B. Turner

Place and Date of Trial/Hearing:

New Westminster, B.C.

August 10-14, 24-28 & 31,

September 18,

and October 26-28, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 30, 2020

INTRODUCTION

- [1] The accused, Mr. Anderson, is charged with eight offences under the Criminal Code in relation to a shooting that occurred in the early morning hours of May 5, 2018, in Surrey, British Columbia. The alleged offences consist of: attempted murder contrary to s. 239(1)(a) of the Criminal Code; discharge of firearm with intent to wound, maim or disfigure or endanger the life of a person, s. 244(1); intentional discharge of a firearm while being reckless to the life or safety of another person, s. 244.2(3)(a); aggravated assault, s. 268(2); two counts of possession of a prohibited or a restricted firearm, s. 95(1); and two counts of being an occupant of a vehicle in which he knew there was a prohibited or restricted firearm, s. 94(1).
- [2] The main issue in this case is identity. The shooting victim, Julian Page, declined to speak to police at the time of the shooting or since. Mr. Page testified for the defence at trial. He says Mr. Anderson was not the person who shot him. A second witness for the defence, Scott Bown, testified that he was present at the scene of the shooting and saw the shooter. He also says it was not Mr. Anderson.
- [3] The Crown's case is largely circumstantial. A white Jeep observed leaving the scene was tracked to a tattoo shop where the occupants, including the accused, were arrested. A 9mm handgun was found in the glovebox of the Jeep during a police search of the vehicle. Forensic analysis ties the handgun to bullets and casings recovered from the scene of the shooting.
- [4] The Crown also tendered security video footage from the parking lot outside the tattoo shop and the shooting scene itself, which the Crown says provides cogent evidence that the accused is the individual who shot Mr. Page on May 5, 2018.
- [5] The Crown says that the evidence of Mr. Page and Mr. Bown as to the identity of the shooter is not credible or reliable.

THE EVIDENCE

The Crown's evidence

- [6] I will begin with a review of the evidence tendered by the Crown. I will not engage in a witness-by-witness review of the Crown's case, but rather highlight the salient points in the evidence.

Initial police response

- [7] The shooting occurred on May 5, 2018, shortly after 1:00 a.m. on 149A Street in Surrey. 149A Street connects 102A Avenue to the south and 104 Avenue to the north. The area is residential. The scene of the shooting is within blocks of the RCMP Surrey District 2 office, which is on 148 Street at 104 Avenue. A number of RCMP officers present at the District 2 office on the morning in question heard the sound of gunshots and immediately drove to the area of the shooting.
- [8] RCMP Constables Sean Oliver and Kevin Li were among the first officers to arrive at the scene. They had been sitting in a marked police vehicle outside the Surrey District 2 office shortly after 1:00 a.m., with Constable Oliver in the front passenger seat and Constable Li in the driver's seat, when they heard the sound of eight to 10 gunshots. Constable Oliver estimated that it took approximately one minute for them to drive from the district office to the shooting scene. They drove east on 104 Avenue and then turned right on 149A Street. As they proceeded south on 149A, Constables Oliver and Li observed an Acura sedan drive slowly towards them and then pass by them. They did not attempt to stop the Acura sedan, but rather continued on down 149A before stopping.
- [9] As Constable Oliver exited from the passenger side of the police vehicle, he heard a further four to five shots that sounded like they were coming from in front of him. He observed a male walk out from behind a parked pickup truck and move towards and then get into a white Jeep that was stopped on the street. Constable Oliver described the male as heavily built and between 30 and 40 years old. He appeared to Constable Oliver to be East Indian. Constable Oliver estimates that he was approximately 50 metres away from the pickup truck at the time he made these observations. Constable Li also observed a male get into the Jeep, but he could not provide a description of him.
- [10] The white Jeep then travelled south down 149A Street, turning right at 102A Avenue. Constable Oliver broadcast a description of the vehicle and its direction of travel to the RCMP dispatcher.
- [11] Constables Oliver and Li then walked towards the parked pickup truck. They observed two people on the ground, both male. One of the males appeared to be uninjured, the other was crying out for help. He said he had been shot and that his name was "Chris". Constable Oliver provided first aid. He cut off the injured person's jeans and underwear and saw holes in his upper thigh and above the knee that appeared to be bullet wounds. Constable Oliver applied pressure until the paramedics arrived. The injured male was eventually taken to the Royal Columbian Hospital by ambulance.

- [12] Although the injured male said his name was Chris and later refused to be interviewed by police at the hospital, there is no issue that the victim of this shooting was Julian Page. As I have noted, Mr. Page eventually testified for the defence at trial.
- [13] RCMP Constables Martin Frano and Alexander Cameron were also at the RCMP Surrey District 2 office on the morning in question and they drove to the scene of the shooting on hearing gunshots. They followed Constables Oliver and Li down 149A Street. Constable Cameron was driving. Constable Frano observed the Acura sedan that had passed by Constables Oliver and Li driving towards them. He instructed Constable Cameron to stop in front of the Acura to prevent it from leaving. They directed the driver of the Acura to step out of the vehicle. He was then put in handcuffs and detained. The driver of the Acura was later identified as a Mr. Westlake.
- [14] RCMP Constable Catherine Boucher was similarly on duty and in the parking lot of the Surrey District 2 office in the early morning hours of May 5, 2018. Her partner that evening was Constable LeNoble. At approximately 1:12 a.m., Constable Boucher heard eight to 10 gunshots. She and Constable LeNoble drove south on 148 Street before hearing Constable Oliver over the police radio asking for assistance in the area of 103A Avenue and 149A Street. They arrived at the scene at approximately 1:15 a.m. On arrival, Constable Boucher saw an injured male slouched down with a bullet wound in his lower extremities, and a second male adjacent to him. They were next to a parked pickup truck.
- [15] Constable Boucher called for an ambulance and told Constable LeNoble to put the uninjured male in the police cruiser. The uninjured male was subsequently interviewed and identified himself as Allan Hiscock. Police took a statement from Mr. Hiscock, confirmed his identity, and then allowed him to leave the scene. While police initially believed Mr. Hiscock to be a victim, his status later changed to suspect.

Helicopter pursuit

- [16] At the time of the shooting, Vancouver Police Department ("VPD") Constable Steve Burrridge was on patrol in a nearby Air One police helicopter. Constable Burrridge was seconded to the RCMP Air Section as part of a Lower Mainland helicopter patrol. In the early morning hours of May 5, 2018, he was airborne in the Surrey area, approximately two and a half kilometres from the RCMP Surrey District 2 office. Constable Burrridge and the pilot were the only ones in the helicopter.
- [17] Constable Burrridge heard a broadcast over the police radio that shots had been reported in the area of the District 2 office. He directed the helicopter to the scene. While on route, Constable Burrridge heard a further report that a white Jeep Patriot was seen leaving the scene and was now headed south on 149 Street. He located a vehicle travelling in that direction. When the vehicle turned right to head westbound, Constable Burrridge was able to see that the vehicle matched the description of a white Jeep Patriot. He advised police dispatch that he had located the vehicle.

- [18] Constable Burrridge activated his on-board video and recording system as soon as he sighted the white Jeep. The video and audio system remained on as Constable Burrridge followed the vehicle in his helicopter. A number of police vehicles were also following the white Jeep on the ground. Constable Burrridge advised police on the ground to stay back until a safe stop could be made. He tracked the Jeep until it parked in a driveway off of Scott Road by the back of a tattoo shop. At this time, Constable Burrridge could see that there were three people in the vehicle.
- [19] The officers who had been following the white Jeep at a distance on the ground converged on the site. There were five officers in total, including Constable Mark Zawadsky, who was with the Lower Mainland Integrated Police Dog Section. Constable Zawadsky testified that he was specifically called to assist by the Air One helicopter patrol because he drives an unmarked vehicle and the helicopter patrol did not want marked vehicles in the area.
- [20] Constable Zawadsky and the other officers approached the white Jeep on foot. The three occupants of the Jeep had been directed to exit the vehicle by the Air Force One patrol. Constable Zawadsky had his police dog Deuce with him and on leash. Other officers at the scene yelled commands to the three suspects to the effect of, "You are under arrest" and "Get on the ground." Two of the suspects immediately complied. One male who was standing at the open front passenger door did not immediately comply, but instead leaned into the vehicle with his back turned to the officers. Constable Zawadsky moved the male away from the vehicle with the assistance of the police dog. The male was bitten by Deuce in the process. He then complied with police direction by getting on the ground. This individual was later identified as the accused, Mr. Anderson.
- [21] Constable Zawadsky was also responsible for ensuring that the white Jeep was clear and that there was no one else inside. When he looked inside the Jeep to ensure it was clear, Constable Zawadsky could see two objects in the driver side door that looked like a handgun magazine and spent shell casing. He took photos at the scene, including photos of the accused and of the items that he had observed on the driver side floor.
- [22] The three occupants of the Jeep were arrested. This included the accused, his wife Ms. Watson, who had exited the Jeep from the driver side. A third occupant who was in the back seat was later identified as a Mr. Colbreath. All three were taken to the Surrey RCMP detachment.
- [23] The evidence tendered by the Crown includes the photographs taken of Mr. Anderson by Constable Zawadsky at the time of his arrest, in addition to photographs later taken at the RCMP detachment following his arrest.

Further investigation at the scene

- [24] The police investigation at the scene of the shooting continued on the morning of May 5, 2018. Officers examining the scene found shell casings and bullets on the ground. There was also damage consistent with bullet holes in adjacent vehicles, including the Acura. There was a bullet hole in the garage of a nearby house. A trail of blood and two knives were found under the parked pickup truck next to where Mr. Page was sitting when the police arrived. There was a set of brass knuckles in the bed of the pickup truck.
- [25] Constable Moe Haddaghkar of the RCMP Forensic Identification Section was assigned to attend the scene of the shooting. He arrived at approximately 7:00 a.m. By that time, police officers had secured the scene and placed orange pylons at the site of potential evidence, including the shell casings and bullets. Constable Haddaghkar walked the scene and took pictures which are in evidence. He placed numbered markers next to the orange pylons.
- [26] Corporal John Hanson, a member of the RCMP Serious Crime Unit, was assigned the role of crime scene officer. He attended the scene of the shooting on the morning of May 5, 2018. Constable Haddaghkar was already there when Corporal Hanson arrived. They walked the crime scene together. Corporal Hanson observed that multiple cones and markers had been placed. He seized the exhibits. They included a total of 16 spent 9mm casings, one live 9mm round, and spent 9mm bullets. The spent bullets were not of assistance to Corporal Hanson in estimating the number of shots fired, because there was no way to match the spent bullet to a casing. From what he collected at the scene, it appeared to Corporal Hanson that there were 16 shots fired and one live round deposited.
- [27] Corporal Hanson also attended Royal Columbian Hospital in order to attempt to get a statement from the shooting victim. Mr. Page was in intensive care but able to speak. He declined to cooperate with police by providing a statement. He also declined to sign a consent for police to have a copy of his medical records at the hospital. The records were later directly obtained from the hospital by way of a production order.
- [28] Mr. Page's medical records, which are in evidence, indicate that he had eight gunshot wounds all below his waist. There were four gunshot wounds to his right leg, one to his left thigh, and three to his buttocks. He required surgery for a rectal injury. No bullets were recovered from Mr. Page at the hospital.

Security video

- [29] The Crown's case at trial included video evidence gathered by police in the course of the investigation. RCMP officers attended the location of Rebel Tattoo, the tattoo shop that was the site of Mr. Anderson's arrest, to look for video surveillance. The tattoo shop was located in a small industrial storefront building that housed three to four other businesses. One of the adjoining businesses, Window Fashions, had cameras located outside the building that pointed toward the parking lot. The owner of Window Fashions gave police access to the security video for the evening in question.

- [30] The video records an individual, who appears to be Mr. Anderson, arrive with another male at the tattoo shop on the late evening of May 4, 2018. A white Jeep is parked in the lot. Mr. Anderson can be seen walking back and forth between the car he arrived in, the tattoo shop, and the white Jeep. The video is of good quality. I have no doubt that it is Mr. Anderson who is seen on the video. He is wearing board shorts, a long-sleeved shirt, a dark vest, white socks, and dark shoes.
- [31] Mr. Anderson can be seen placing a black baseball bag in the back of the white Jeep. A woman who appears to be Mr. Anderson's wife, Ms. Watson, gets in the driver's seat of the Jeep. Mr. Anderson gets in the front passenger seat and the third individual gets in the back of the Jeep. According to the timestamp on the video, the Jeep exits the parking lot at 11:53 p.m. on May 4th.
- [32] The RCMP also gathered video evidence from security cameras affixed to the outside of a house on 149A Street in the vicinity of the shooting. The cameras captured a portion of the incident, including at least some of the shooting, from two different vantage points. The video footage is not of high quality. It is dark and difficult to see the features of the individuals captured on the screen. The video is, however, sufficiently clear to allow the viewer to follow the sequence of events and to see the general physical features and clothing of individuals who are present. The timestamp on the video is inaccurate. There is no issue, however, that the video captures the shooting of Mr. Page on May 5, 2018.
- [33] The video footage shows a vehicle arriving in the area of the shooting and a number of people exit. A short time later, three people can be seen running down the street, all in the same direction. One of them, believed to be Mr. Page, stumbles and falls, then crawls under a pickup truck that is parked in a driveway.
- [34] At the same time, a male comes into view who is carrying a handgun and walking down the street as he fires the gun at the people who are running. He appears to notice the individual under the pickup truck, paces around the truck, then crouches and begins to fire at the individual. The individual under the pickup truck eventually crawls out. He is then punched and kicked by what appear to be three assailants, including the shooter.
- [35] A white Jeep arrives on the scene as the assault is ongoing. The male who had been firing the handgun walks to the front passenger side of the Jeep and gets in the vehicle. The Jeep then drives away. Another of the assailants can be seen getting into a sedan and driving away in the opposite direction.
- [36] As I have noted, due to the darkness and the quality of the video, it is difficult to see distinct features of any of the individuals on the video. It can be said that the man who is shown firing the handgun at the people in the street and at the individual under the pickup truck is of the same build and physical description of the accused. He appears to be wearing the same clothes that the accused was wearing in the video recorded outside of the tattoo shop just over one hour before the shooting.

Search of the Jeep

[37] In the course of the police investigation, the white Jeep Patriot and the Acura sedan were both towed to the Surrey Main RCMP detachment and secured in a garage bay. A warrant to search the vehicles was issued by a judicial justice on May 7, 2018.

[38] Corporal Hanson led the execution of the warrants. The items located and seized in the search of the white Jeep include:

- a 9mm Norinco pistol magazine and a 9mm shell casing in the driver's footwell;
- a 9mm shell casing in the console between the front driver and passenger seats;
- an unloaded 9mm pistol and a pistol magazine with three rounds in it in the front passenger glovebox;
- a wallet containing items that included Mr. Anderson's identification in the front passenger glovebox;
- insurance papers for the Jeep showing Ms. Watson as the owner;
- a pair of black disposable gloves on the rear seat;
- a loaded 12-gauge shotgun with its stock cut off and taped in the rear hatchback;
- a black baseball bag in the rear hatchback; and
- a box of 9mm Blazer ammunition with 25 bullets left in it in the rear hatchback.

Forensic analysis

[39] Corporal Hanson requested a forensic analysis of the 9mm pistol seized from the glovebox in the Jeep to determine if it matched the casings and rounds recovered at the main crime scene. Corporal Hanson provided three bullet casings and two spent bullets recovered from the scene to the Forensic Firearms Unit, in addition to the 9mm pistol and the 12-gauge shotgun that were found in the search of the Jeep.

[40] The forensic analysis was performed by Evelyn Pederson, a Firearm and Toolmark Specialist with the VPD. She has been employed with the VPD in that capacity since 1994. Ms. Pederson prepared a report on the results of her analysis and she testified at trial. She was qualified without objection by the defence as an expert in firearms examination, identification, and classification.

[41] Ms. Pederson described the process she undertakes when she is asked to determine if unknown fired bullets or cartridge cases were fired from a particular firearm. She explained that each firearm leaves unique marks on a bullet. At the first step of her analysis, Ms. Pederson determines if the unknown bullets and cartridge cases possess marks in sufficient quality and quantity to permit a comparison. If so, Ms. Pederson then test fires the firearm and compares the bullets from the test fire to each other to ensure that the marks from the

firearm are being reproduced and that they are unique, so that it is possible to conclude that they come from that firearm. These are the known samples.

- [42] As a final step, Ms. Pederson conducts a microscopic comparison of the unknown samples to the known samples from the test fire. If the identifying markings are in sufficient quality and quantity, this allows her to reach a conclusion as to whether the unknown sample was fired by the firearm that has been provided to her for analysis.
- [43] Ms. Pederson followed this process in this case. She concluded that there were identifying marks of sufficient quality and quantity on the unknown samples to allow a microscopic comparison. She test fired the Norinco handgun with eight cartridges and collected eight spent bullets and cartridge cases as her known sample. She examined them individually and against each other, and was satisfied that the firearm was reproducing its own identifying marks onto bullets and casings in sufficient quality and quantity to be suitable for comparison. She then compared her known and unknown samples.
- [44] As a result of her analysis, Ms. Pederson concluded that the three casings and two spent bullets recovered from the scene of the shooting, which were her unknown sample, were all fired from the 9mm Norinco handgun that was seized in the search of the white Jeep. She further opined that the 9mm Norinco pistol fit the definition of a restricted firearm and the 12-gauge shotgun fit the definition of a prohibited firearm.

The defence evidence

- [45] The defence called two witnesses, Julian Page and Scott Bown.

The evidence of Julian Page

- [46] Mr. Page testified via video from the Surrey Pretrial Centre. He is the victim of the shooting on May 5, 2018. His evidence is that he contacted defence counsel around the end of August 2020 to indicate that he wanted to give evidence for the defence.
- [47] Mr. Page testified that he was at 149A Street in the early morning hours of May 5, 2018. He was there because he had business with someone on the street. He declined to say what that business was. He said that he had problems with people on the street and "stuff caught up to me in the end".
- [48] Mr. Page testified in his direct evidence that he had a little bit of memory of being shot and that he remembers the shooter. He describes the person who shot him as a "brown guy with slicked-back hair that lives on the street." He is sure that the person had hair and that it was black in colour. He says the person was within a couple of feet of him. He also says he knows the person but did not want to give his name. He says he never saw Mr. Anderson before testifying at trial and observing him in the prisoner dock. He said he is "100 percent" certain that Mr. Anderson is not the person who shot him.

- [49] In cross-examination, Mr. Page agreed that he has a criminal record which includes convictions for theft, possession of stolen property, fraud, assault with a weapon, robbery, and breaches of probation orders. He initially refused to identify the person who shot him, but eventually said in cross-examination that his nickname was "Jay". He says he and Jay have had issues for a while over "stuff", which he described as "street issues". He would not say what the street issues were.
- [50] Mr. Page's evidence was not consistent as to when and how he found out that someone was in trouble for shooting him. He stated at various points in cross-examination that he found out "a little while ago", "maybe a year ago", and since he was incarcerated five months ago. He said he had found out on a telephone conversation with the person who shot him. He also said he found out because "cops told me", although he did not know which cops. He also said he knew that Mr. Anderson was in trouble for the shooting because "word goes around in jail".
- [51] Mr. Page would not say who he went to 149A Street with on the evening in question or for what purpose. His evidence was inconsistent as to whether there was one or two people present when he was shot. He says he was "all messed up" because he had lost a lot of blood. He does not remember being punched or kicked. He says he was only paying attention to not getting shot.
- [52] Mr. Page says he was drinking on the evening in question, but denied that his memory was impaired by either alcohol or his injuries. He denied that he has been pressured to come forward or that he made any sort of arrangement to testify to help Mr. Anderson out.

The evidence of Scott Bown

- [53] Scott Bown currently lives in the Okanagan and previously lived in Delta. He testified that he was at a house on 149A Street in the early morning hours of May 5, 2018.
- [54] In his direct evidence, Mr. Bown testified that he went to the house to visit a girl named "Heidi" who had previously babysat Mr. Bown's children. Heidi reported that some guys were giving her a rough time. She asked Mr. Bown and his friend to stop by and see if they could get these individuals to stop bothering Heidi. Mr. Bown estimates that he and his friend were at the house for about 30 minutes. He says that Mr. Anderson, who he did not previously know, and his wife were also at the house talking to Heidi.
- [55] At some point, Mr. Bown could hear gunshots from outside, in front and to the left of the house he was in. Everyone else in the house scattered to the back, but Mr. Bown and his friend went to the front door. Mr. Bown says he could see the shooting as he looked out the door. It looked to him like the shooter was going around a pickup truck and someone was under the truck. Mr. Bown says that it was dark out, but he could see the man with the gun when it discharged and gave off a flash. He describes him as an East Indian with greased hair, "like Fonzie" and bare arms. He was not paying attention to the shooter's feet or legs. Mr. Bown estimates that he was 40 to 50 feet away when he made these observations. Mr.

Bown says that Mr. Anderson was not the shooter.

- [56] Mr. Bown says that when he saw the shooter was focused on the man under the pickup truck, he realized he was not the target and he said "let's get out of here" to his friend. They went out the front door, got into their car, and drove north on 149A until they reached the parking lot of a pub called the Loose Moose on 104 Avenue. He says he saw police vehicles go by, but the police did not stop them.
- [57] In cross-examination, Mr. Bown testified that he was not sure whether it was Heidi who contacted him to come to the house or Mr. Bown's friend "Lindsay", who was with him that evening. He recalls being told that a group of young men were picking on Heidi and stealing her stuff. He did not really have a plan for what to do if the people bothering Heidi showed up. He believes he was asked to become involved in Heidi's situation because he had been a boxer for many years, until he suffered a head injury in a car accident in 1986 or 1987 that left him in a coma for a number of months. He does not believe the head injury affected his memory of the evening. He says he does not clearly recall every detail, but does remember the important stuff.
- [58] Mr. Bown says he did not try to speak to police at the time because he thought it had nothing to do with him or Heidi. He changed his mind when Heidi phoned him to tell him that one of the men in the house had been arrested for the shooting. He cannot clearly remember when he received this call, it may have been a year or so ago. He told Heidi to have defence counsel call him if they wanted to talk to him. Defence counsel eventually did call sometime this year, Mr. Bown cannot recall exactly when.
- [59] Mr. Bown agreed in cross-examination that he has a criminal record that includes convictions for break and enter, theft, and fraud. He says that this was part of the reason why he did not want to get involved by talking to the police. He said that he did not want to be present when the police arrived and therefore was in a hurry to leave the scene. Mr. Bown denied that he had been pressured to come to court or that he has been promised anything to testify for Mr. Anderson.

COUNTS 1-4: THE SHOOTING OF JULIAN PAGE

- [60] I will begin by addressing the first four counts of the indictment that relate directly to the shooting of Mr. Page. The accused again is charged with attempted murder, Count 1; discharging a firearm with intent to wound, maim or disfigure or endanger the life of another person, Count 2; discharging a firearm while being reckless as to the life or safety of another person, Count 3; and aggravated assault, Count 4.

Issue 1: Did the accused shoot Julian Page?

- [61] The identity of the shooter is a common threshold issue to each of these charges. I will therefore begin by addressing this issue. I must determine whether the Crown has proved beyond a reasonable doubt that the accused was the person who shot Julian Page on May 5, 2018. There is conflicting evidence on this issue.
- [62] Central to the Crown's case is the video recording of the shooting itself. The Crown says that this video footage, along with the video taken from the tattoo shop and the photos taken of the accused after his arrest, combine to prove that the accused was the individual who shot Mr. Page. The Crown also points to the police tracking of the white Jeep, the arrest of the accused standing by the front passenger door of the Jeep, the location of the handgun found during the search of the Jeep, and the connection of the gun to the shooting scene through forensic analysis. The Crown's case is that the video and physical evidence combined establishes beyond a reasonable doubt that the accused shot Mr. Page.
- [63] The defence evidence includes the testimony of Mr. Page and Mr. Bown that the accused was not the shooter. To resolve the conflict in the evidence about the identity of the shooter, I must determine whether I find the evidence of Mr. Page and Mr. Bown to be credible.
- [64] I will approach this issue in accordance with the decision of the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 [W.(D.)]. W.(D.) instructs that a trier of fact must relate the concept of reasonable doubt to credibility findings when faced with conflicting evidence from an accused and a Crown witness. The W.(D.) framework consists of the following steps:
- 1) if the trier of fact believes the accused, an acquittal must follow;
 - 2) if the trier of fact does not believe the evidence of the accused but is left with a reasonable doubt by it, then an acquittal must follow;
 - 3) even if the trier of fact is not left in a reasonable doubt by the evidence of the accused, the trier of fact must ask whether, on the basis of evidence that is accepted, the trier of fact is convinced beyond a reasonable doubt by that evidence of the guilt of the accused.
- [65] The principles underlying W.(D.) are not confined to cases where an accused testifies and his or her evidence conflicts with that of a Crown witness. Where on a vital issue a trier of fact must make credibility findings between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, it is necessary to relate the concept of reasonable doubt to those credibility findings: see *R. v. D.(B.)*, 2011 ONCA 51 at para. 114.
- [66] In the present case, if I believe the evidence of Mr. Page or Mr. Bown that the accused was not the individual who shot Mr. Page, then I must acquit the accused of Counts 1 to 4 of the indictment. If I do not believe the evidence of Mr. Page or Mr. Bown, but their evidence, viewed in the context of all of the evidence, leaves me in a state of reasonable doubt that the accused was the individual who shot Mr. Page, then I must acquit the accused of Counts 1 to 4. If I am not left with a reasonable doubt by the evidence of Mr. Page or Mr. Bown, I must go on to consider whether the evidence that I do accept convinces me beyond a reasonable

doubt that the accused shot Mr. Page.

Credibility of Mr. Page and Mr. Bown

- [67] It is common ground between the parties that a Vetrovec caution does not apply to exculpatory defence evidence: see *R. v. Vassel*, 2018 ONCA 721 at paras. 156 to 166. The credibility of the evidence of Mr. Page and Mr. Bown is to be determined in accordance with the general principles that govern the assessment of a witness's credibility.
- [68] The factors to be considered in assessing credibility are well known and were recently summarized by our Court of Appeal in *R. v. J.T.*, 2019 BCCA 180 at para. 31. The factors include:
- [31] . . . a witness's demeanor in the witness box, although it is recognized that it would be dangerous to rely wholly on demeanor to convict; internal inconsistencies in a witness's testimony at trial and/or external inconsistencies in a witness's testimony with prior testimony or out-of-court statements; any explanation by the witness for the inconsistencies; any consistent evidence or corroborating evidence to support the witness's evidence, although corroboration is not a requirement; and how a witness withstands cross-examination.

See also *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-87.

- [69] For the reasons that follow, I do not find either Mr. Page or Mr. Bown to be a credible witness.
- [70] Mr. Page's evidence was vague and his memory selective. He refused to provide details that might permit an assessment of the veracity of his evidence in a fuller context. He could not recall the events of May 5, 2018, with any particularity beyond his insistence that the accused did not shoot him. Mr. Page's evidence changed over the course of his direct evidence and also between his direct and cross-examination. He had no consistent answer to the question of how he came to be aware of the accused's arrest for the shooting. He was defensive and argumentative in the course of cross-examination.
- [71] Mr. Page's evidence is also implausible. For example, he testified that he could recall with 100 percent certainty who shot him, based on observations he made after emerging from under the pickup truck. At the same time, he explained his inability to recall how many people were present and whether he had been kicked or punched because he was all messed up from the loss of blood. At various points in his evidence, Mr. Page stated that in addition to being all messed up, he had only a little bit of memory of being shot, was all out of it, and in and out of consciousness.
- [72] Mr. Bown's evidence was also vague, inconsistent, and implausible. His reasons for being present at 149A Street in the early morning hours of May 5, 2018, changed over the course of his testimony. He initially stated that Heidi had asked him to come by, then later testified he could not remember whether she had done so. He could not explain exactly what difficulties

Heidi was having or what Mr. Bown planned to do about them. Mr. Bown's memory about the events was also selective. He agreed his memory was not good due to his head injury, but professed an ability to recall the important facts, including a precise description of the shooter who Mr. Bown only saw in the dark from some distance away as he attempted to flee the house in the midst of a shooting.

- [73] I did not find the explanations provided by Mr. Page or Mr. Bown regarding the reasons for their delay in coming forward to be credible. Mr. Page insists that he has never met Mr. Anderson before and is motivated only by a desire to ensure that an innocent man is not convicted. If this was Mr. Page's motivation, he has not explained the reasons for his refusal to cooperate with the police at the time of the shooting and his two and a half years of silence since.
- [74] Mr. Bown professed to have the same motivation as Mr. Page. However, his explanation for not speaking with the police is that the shooting had nothing to do with him and he did not want to be involved. If Mr. Bown changed his mind and decided that he did want to be involved, there is also no reasonable explanation for his failure to contact the police at any time over the past two and a half years.
- [75] The evidence of both Mr. Page and Mr. Bown is inconsistent with other independent evidence of the events of the shooting, particularly the video footage of the shooting scene. While the video is, as I have noted, not of high quality, the events are sufficiently clear to persuade me that what happened is not consistent with the description provided by Mr. Page and Mr. Bown. The shooter does not have slicked-back black hair or bare arms. Rather, he appears to be bald and wearing sleeves. The shooter bears a striking physical resemblance to the accused and is wearing the same clothes.
- [76] Furthermore, the shooter is captured on the video getting into the front passenger seat of the white Jeep, which was then continuously tracked by police to the site of the tattoo shop. None of the three occupants of the white Jeep who were arrested at the tattoo shop are males with slicked-back black hair. The accused was arrested at the front passenger door to the Jeep and a handgun eventually tied to the shooting was found in the front glovebox.
- [77] In short, the evidence of Mr. Page and Mr. Bown simply cannot be reconciled with independent and credible evidence that contradicts their evidence as to the events of the shooting.
- [78] Mr. Page and Mr. Bown both denied a prior association with Mr. Anderson and denied that they were testifying under pressure or with the offer of inducements. I do not need to speculate as to what specific motives Mr. Page and Mr. Bown might have for testifying as they did at trial. I conclude that whatever motives they had, those motives did not include providing truthful evidence to the court. I simply do not find them to be credible witnesses and I do not believe their evidence about the identity of the shooter.

- [79] I turn now to the next step of the W.(D.) inquiry and the question of whether the evidence of Mr. Page or Mr. Bown, even though I disbelieve it, nevertheless leaves me with reasonable doubt on the issue of identity.
- [80] Defence counsel argues that even if there are issues with the credibility or reliability of Mr. Page and Mr. Bown, other evidence at trial lends support to their testimony that the accused did not shoot Mr. Page. The defence points to the evidence of Constable Oliver, one of the first RCMP officers to arrive at the scene, who said that the male he observed getting into the white Jeep appeared to him to be East Indian. The defence notes that Mr. Colbreath, who was arrested at the same time as the accused and who had been in the back of the white Jeep, appears from the police photos to have dark skin. Defence counsel says this evidence, viewed in the context of the evidence of Mr. Page and Mr. Bown, gives rise to a reasonable inference that it was Mr. Colbreath and not the accused who was the shooter.
- [81] The defence also points to a witness statement taken by police from the resident of a nearby apartment building who reported having been woken at around 1:00 a.m. on May 5, 2018, by the sound of gunshots. This individual reported that a few minutes after hearing the shots, he observed a male walking slowly through his complex courtyard while grabbing his right shoulder. The male is described in the witness statement as "either Caucasian, Aboriginal, Hispanic, or Middle Eastern" with tan skin, medium build, a clean-shaven face, and short dark hair. The defence says this evidence supports a reasonable alternative inference that the shooter managed to escape the scene of the shooting before police arrived.
- [82] I do not place a great deal of weight on Constable Oliver's description of the male getting into the Jeep, given his limited ability to observe the event. He had only a brief sighting of the male in dark lighting conditions from some distance away. The accused's face is heavily tattooed, which may have made it difficult for Constable Oliver to accurately assess his skin colour in such conditions.
- [83] While Mr. Colbreath does have dark skin, that in itself does not support a reasonable inference that Mr. Colbreath was the shooter. Mr. Colbreath is also bald, or at least was at the time the police photos were taken following his arrest, and therefore does not match the description of the shooter provided by Mr. Page and Mr. Bown. Mr. Colbreath's build and the clothing he was wearing at the time of his arrest do not match the video of the shooter at the scene.
- [84] As for the witness statement, there is no reasonable basis to infer that the male observed walking through the apartment complex had anything to do with the shooting. There is no evidence provided by the witness statement, other than the sighting of the male and the witness's vague description of him.
- [85] For these reasons, I do not believe the evidence of Mr. Page or Mr. Bown as to the identity of the person who shot Mr. Page, and I am not left in a reasonable doubt by their evidence.

Did the Crown prove the accused's identity as the shooter beyond a reasonable doubt?

- [86] I turn now to consider whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt that the evidence of the identity of the accused as the person who shot Mr. Page is established.
- [87] As I noted at the outset, the Crown's case is largely circumstantial. The question for me 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. If so, then the Crown has not met its burden of proof: see *R. v. Villaroman*, 2016 SCC 33 at para. 38. In other words, I must decide if the only reasonable inference to be drawn from the evidence is that the accused shot Julian Page on May 5, 2018, or whether there are other reasonable inferences that can be drawn from the evidence that are inconsistent with his guilt.
- [88] I will start with the security video footage from the scene of the shooting which is central to the Crown's case. It is not in dispute that the video evidence is relevant and admissible on the issue of identity. Defence counsel says that limited weight should be placed on the video, given its generally poor quality. He cites the warning from the Supreme Court of Canada in *R. v. Nikolovski*, [1996] 3 S.C.R. 1197 at para. 30 [Nikolovski], that the trier of fact should consider carefully whether video evidence that goes to identity is of sufficient clarity and quality to allow the trier of fact to conclude that identity has been proved beyond a reasonable doubt. The defence says that in this case the video evidence is not of sufficient clarity and quality to permit a conclusion on identity.
- [89] I have watched the video footage numerous times. I have already noted the issues with its quality. The video is dark and the features of the individuals are indistinct. If the video was the only evidence I had to establish identity, as was the case in *Nikolovski*, I would be unable to conclude beyond a reasonable doubt that the accused was the person who shot Mr. Page.
- [90] However, the video is not the only evidence of the identity of the shooter.
- [91] First, there is other video evidence of the accused at the tattoo shop filmed just over one hour before the shooting, and the photographs of the accused taken by RCMP officers after the shooting. It is clear to me from watching the video from the tattoo shop and viewing the photographs that the person who shot Mr. Page is of the same build and physical description as the accused and is wearing clothing identical to that worn by the accused before and after the shooting. The clothing is distinctive, a dark vest, long sleeves, board shorts, white socks, and dark shoes. The shooter's gait and manner of walking is distinctive and similar to that of the accused on the video from the tattoo shop.
- [92] Second, there is other evidence beyond the videos and photographs to support the inference that the accused shot Mr. Page. I have already outlined this evidence in detail. In summary:
- the person who shot Mr. Page can be seen on the security video getting in the front passenger seat of a white Jeep at the scene of the shooting;

- police officers arrived at the shooting scene in time to witness a male get into the front passenger seat of a white Jeep;
- a description of the Jeep and its direction of travel was broadcast over the police radio;
- the white Jeep was located by a nearby Air One helicopter patrol and continuously tracked to the tattoo shop;
- the accused was arrested standing by the open front passenger door of the white Jeep;
- in the ensuing search of the Jeep, a 9mm handgun was seized from the front passenger glovebox, along with a wallet containing the accused's identification;
- a 9mm cartridge magazine and spent shell casings were also discovered in the search of the Jeep; and,
- Ms. Pederson's forensic examination establishes that bullet casings and bullets found at the scene of the shooting were fired from the handgun found in the glovebox of the white Jeep.

[93] Defence counsel argued that limited weight should be placed on Ms. Pederson's evidence because she has not visited the Norinco manufacturing plant in China to observe the manufacturing process, and she did not test fire a second Norinco handgun for comparison purposes. It is argued that this weakens Ms. Pederson's evidence that the Norinco handgun she was testing produced unique markings on the bullets when fired.

[94] I do not accept that Ms. Pederson's opinions are weakened by the factors cited by defence counsel. In her evidence at trial, Ms. Pederson explained the reasons for her opinion that an exact copy of the Norinco handgun she was provided for testing would not have produced the same results. I accept her opinion on this issue.

[95] In my view, there are no reasonable alternative inferences that can be drawn from the evidence that are inconsistent with the identity of the accused as the shooter. Based on the evidence as a whole, I am satisfied beyond a reasonable doubt that the only reasonable inference that can be drawn from the evidence is that the accused shot Mr. Page on May 1, 2018.

Is the accused guilty of the offences in Counts 1-4 of the indictment?

[96] I turn now to my consideration of the first four counts of the indictment which relate specifically to the shooting of Mr. Page. I am mindful of the fact that there may be an issue with respect to the rule against multiple convictions in relation to the offences charged. I will invite the parties to make submissions on the application of the Kienapple principle at the conclusion of my reasons for decision.

Count 1: Attempted murder

- [97] The actus reus for the offence of attempted murder under s. 239(1)(a) of the Criminal Code is the taking of some step towards the commission of the offence beyond mere preparation. The mens rea is the specific intent to kill. An accused may only be convicted of attempted murder if it is proven beyond a reasonable doubt that the accused intended to cause the death of another person: see *The Queen v. Ancio*, [1984] 1 S.C.R. 225 at pages 401 to 402. Absent a direct expression of an intention to cause the death of the victim, subjective intention may be inferred from the totality of the circumstances, including the nature of the weapon, the extent of its use, the manner in which it is used on the victim, the area of the victim's body that is attacked, and the results of the attack: see *R. v. Vukaj*, 2016 BCCA 356 at para. 44.
- [98] In this case, I have concluded that the evidence establishes beyond a reasonable doubt that the accused shot Mr. Page. This finding establishes the actus reus of the offence of attempted murder. The more difficult question is whether it can be inferred from the circumstances that the accused had the subjective intention to kill Mr. Page.
- [99] The Crown argues that the accused's subjective intention can be inferred from the nature of the injuries suffered by Mr. Page, the number of times he was shot, and the fact that the shots were fired at close range. The Crown says it can be inferred that if a person points a firearm and shoots at a vital part of another person's body, they intend the probable consequences of that action, which is the death of the person targeted.
- [100] I accept that one reasonable inference that could be drawn from the evidence is that the accused intended to kill Mr. Page. Mr. Page was shot a number of times at close range. He could easily have died in the shooting had a stray bullet hit him in the wrong part of his body. However, the mental element of the offence of attempted murder is not recklessness but rather subjective intent. Further, it is not enough to show that a reasonable inference of subjective intent can be drawn; rather, it must be shown that this is the only reasonable inference that can be drawn.
- [101] I conclude that there is a reasonable inference that can be drawn from the evidence that is inconsistent with the accused's subjective intent to kill Mr. Page. The other reasonable inference is that the accused wanted to send a message or warning to Mr. Page, perhaps with the intent to cause him harm and potentially even being reckless as to whether death would ensue, but without a subjective intent to kill him.
- [102] In my view, such a reasonable inference can be drawn from the following circumstances.
- [103] First, it can be inferred from Mr. Page's refusal to cooperate with the police, and his refusal to be forthright in his evidence at trial, that Mr. Page was at 149A Street on May 5, 2018, for unlawful purposes. It is reasonable to infer that the unlawful purposes could have led to a retaliatory message or warning.

- [104] Second, the video evidence of the shooting scene suggests that the accused was not specifically targeting Mr. Page, at least initially, but rather shooting in the direction of at least three individuals running down the street and away from him. The accused only became focussed on Mr. Page when he noticed him under the pick-up truck.
- [105] Third, although Mr. Page was shot eight times, all of the bullet wounds were to his lower extremities and none were life-threatening.
- [106] Fourth, the accused had a clear opportunity to kill Mr. Page, if that was his specific intent, when Mr. Page emerged from under the pickup truck. The evidence from the search of the Jeep suggests that the accused still had bullets available to him in the handgun magazine. However, instead of shooting Mr. Page when he had a clear shot, the accused appeared instead to participate in a physical beating of Mr. Page that did not lead to life-threatening injuries.
- [107] As there is a reasonable inference that can be drawn which is inconsistent with the accused's subjective intent to kill Mr. Page, I am therefore left in a reasonable doubt as to his guilt of the offence of attempted murder. I find the accused not guilty on Count 1 of the indictment.

Count 2: Discharge of a firearm with intent to wound, maim or disfigure

- [108] I now turn to whether the evidence establishes beyond a reasonable doubt that the accused committed the offence alleged in Count 2 of the indictment. Section 244(1) of the Criminal Code makes it an offence to discharge a firearm at a person with the intent to wound, maim, or disfigure or endanger the life of a person.
- [109] The Crown argues that even if the court accepts that the accused shot Mr. Page but has a reasonable doubt that he had the specific intent to kill, the evidence nevertheless proves that the accused discharged a firearm with the intent to wound, maim or disfigure or endanger the life of Mr. Page, contrary to s. 244(1) of the Code.
- [110] I find that the Crown has proved beyond a reasonable doubt that the accused intentionally discharged a firearm at a person, that being Mr. Page. As captured by the video and evident in Mr. Page's injuries and the bullets and casings recovered at the scene, the handgun was fired numerous times. There is no reasonable inference that can be drawn that the discharge of the firearm was accidental. As captured in the video from the scene of the shooting, the accused deliberately aimed at and shot Mr. Page. He also deliberately shot Mr. Page as he attempted to hide under the pickup truck. It is beyond doubt that Mr. Page, who suffered eight bullet wounds, was wounded, maimed, or disfigured, and that his life was endangered.
- [111] I now turn to the question of whether the Crown has proved beyond a reasonable doubt that the accused intended to wound, maim or disfigure or endanger the life of Mr. Page.

- [112] The mens rea of this offence also requires specific intent. It is not sufficient to show an intention to scare or frighten another individual, nor is objective foreseeability of harm sufficient. Intention can be inferred from circumstantial evidence and it may be inferred that persons intend the natural consequences of their actions. However, the evidence must be inconsistent with any rational conclusion other than the intent to wound, maim or disfigure or to endanger the life of another person: see *R. v. Seymour*, 2011 BCSC 1419 at paras 111 to 113.
- [113] In my view, the only reasonable inference that can be drawn from the circumstances is that the accused discharged a firearm at Mr. Page with the specific intent to wound, maim or disfigure or endanger the life of Mr. Page. The video evidence captures the accused shooting at Mr. Page as he ran down the street and then circling the parked pickup truck while shooting at Mr. Page underneath. There is no reasonable inference that can be drawn that the accused was discharging the gun accidentally or that he was only attempting to scare Mr. Page without actually hitting him. The video shows the accused deliberately aiming at Mr. Page and the medical evidence indicates that Mr. Page was struck by eight bullets.
- [114] I conclude that there is no reasonable inference that can be drawn from the evidence that is inconsistent with the accused's specific intent to wound, maim or disfigure or endanger the life of Mr. Page. I therefore find that the Crown has proved beyond reasonable doubt the accused's guilt of the offence charged in Count 2 of the indictment.
- Count 3: Intentionally discharging a restricted firearm while being reckless as to the life or safety of another person
- [115] The Crown argues that if the court finds that the accused did shoot Mr. Page but lacked the specific intent to wound, maim or disfigure or endanger the life of Mr. Page, he may still be convicted of the offence in Count 3 of the indictment, intentionally discharging a restricted firearm while being reckless as to the life or safety of another person, contrary to s. 244.2(3) (a) of the Code.
- [116] For the reasons stated, I have concluded that the accused did intentionally discharge a firearm. As I have found that the Crown has proved beyond a reasonable doubt that the accused had the specific intent to wound, maim or disfigure or endanger the life of Mr. Page, it necessarily follows that I conclude the Crown has also proven the lesser mens rea of recklessness as to the life or safety of another person. The handgun used by the accused is a restricted firearm within the meaning of s. 84(1) of the Criminal Code.
- [117] Accordingly, I conclude that the Crown has proved beyond reasonable doubt the accused's guilt of the offence charged in Count 3 of the indictment.

Count 4: Aggravated assault

- [118] The final count of the indictment that is specific to the shooting of Mr. Page, Count 4, alleges that the accused committed an aggravated assault of Mr. Page contrary to s. 268(2) of the Criminal Code.
- [119] Section 268(1) of the Code provides that an aggravated assault is one that wounds, maims or disfigures or endangers the life of the complainant. "Complainant" is defined in s. 2 of the Code is the victim of an alleged offence. The mens rea of this offence is objective foresight of a risk of bodily harm. It is not necessary that the accused specifically intend to wound, maim or disfigure or endanger the life of the victim: see *R. v. Kaplan*, 2019 BCCA 356 at para. 42.
- [120] The Crown argues that even if the accused lacked a specific intent to wound, maim or disfigure or endanger the life of Mr. Page, he may be found guilty of aggravated assault based on an objective foresight of risk of bodily harm.
- [121] As I have found that the Crown has proved beyond a reasonable doubt that the accused had the specific intent to wound, maim or disfigure or endanger the life of Mr. Page, it necessarily follows that I conclude the Crown has also proved the lesser mens rea of objective foresight of bodily harm. I therefore find the Crown has proved beyond a reasonable doubt the accused's guilt on the offence charged in Count 4 of the indictment.

Is the accused guilty of the offences in Counts 5-8 of the indictment?

- [122] The remaining counts of the indictment, Counts 5 to 8, allege weapons offences against the accused in relation to the 9mm Norinco handgun and sawed-off shotgun that were located in the search of the Jeep. I will first address Counts 5 and 7 which concern the Norinco handgun.

Count 5: Possession of an unloaded restricted firearm with readily accessible ammunition (Norinco handgun)

- [123] Count 5 of the indictment alleges that the accused, contrary to s. 95(1) of the Criminal Code, was in possession of an unloaded restricted firearm, a 9mm Norinco pistol, with readily-accessible ammunition capable of being discharged in the firearm, without being the holder of an authorization or licence and a registration certificate for the firearm.
- [124] It is not in dispute that the 9mm Norinco handgun fits the definition of a restricted firearm under s. 84 of the Criminal Code and that the accused was not the holder of an authorization or registration certificate to possess the firearm. There was readily-accessible ammunition found in the glovebox of the Jeep; that is, the pistol magazine and bullets capable of being discharged in the firearm.
- [125] The main issue of contention on this count is whether the Crown has proved beyond reasonable doubt that the accused was in possession of the Norinco handgun. The defence points out that to constitute possession within the meaning of s. 4(3) of the Criminal Code,

the Crown must prove that the accused had both knowledge of and control over the handgun. Defence counsel emphasizes that the accused was only a passenger in the Jeep that was owned by Ms. Watson, and that there were two other passengers who equally could have placed the gun in the glovebox. The defence also notes that there is no forensic evidence, such as DNA or the results of a gunshot residue test on the accused, that directly ties him to the Norinco handgun.

[126] I find that the evidence as a whole proves beyond a reasonable doubt that the accused had knowledge and control and therefore possession of the 9mm Norinco handgun that was found in the front passenger glovebox of the Jeep.

[127] I have already stated my reasons for finding that the Crown has proved beyond a reasonable doubt that the accused was the one who shot Mr. Page. I find that the only inference that reasonably arises from the evidence is the accused shot Mr. Page with a 9mm Norinco handgun that he then placed in the front passenger glovebox of the Jeep, along with his wallet and identification. The accused knew that there was readily-accessible ammunition capable of being discharged, because he also put the pistol magazine in the glovebox. This is the only reasonable inference that arises from the evidence.

[128] I therefore conclude that the Crown has proved beyond a reasonable doubt that the accused is guilty of the offence alleged in Count 5 of the indictment.

Count 7: Occupying a vehicle knowing there is a restricted firearm in it (Norinco handgun)

[129] Count 7 alleges that the accused occupied a vehicle knowing that there was a restricted firearm, a 9mm Norinco pistol, in the vehicle contrary to s. 94(1) of the Code. The offence under s. 94(1) requires proof of three elements: that a restricted firearm was in the vehicle, that the accused knew the firearm was in the vehicle, and that the defendant was in the vehicle at the same time the firearm was in the vehicle: see *R. v. Colmenares-Guevara*, 2020 ONSC 5965 at para. 44.

[130] I have found that the Crown proved beyond a reasonable doubt that the Norinco handgun is a restricted firearm and that the accused knew it was in the glovebox of the white Jeep because he put it there. I am also satisfied beyond a reasonable doubt that the accused was in the Jeep at the same time as the firearm because, again, he had the firearm in the Jeep from the time he was picked up from the shooting scene until the Jeep arrived at the tattoo shop.

[131] I therefore conclude that the evidence establishes beyond a reasonable doubt that the accused is guilty of the offence charged in Count 7 of the indictment.

Count 6: Possession of a loaded prohibited firearm (Sawed-off shotgun)

Count 8: Occupying a vehicle knowing there was a prohibited firearm in it (Sawed-off shotgun)

- [132] The final two counts of the indictment, Counts 6 and 8, allege the same offences as in Counts 5 and 7 in relation to the 12-gauge sawed-off shotgun found in the back of the white Jeep during the police search of the vehicle. That is, it is alleged in Count 6 that the accused was in possession of a prohibited loaded firearm, the shotgun, without being the holder of an authorization, licence, or registration certificate contrary to s. 95(1) of the Criminal Code, and in Count 8, that the accused occupied a vehicle knowing the sawed-off shotgun was in it contrary to s. 94(1) of the Code.
- [133] An element common to both offences is that the Crown must prove beyond a reasonable doubt that the accused knew that the sawed-off shotgun was in the back of the Jeep. The Crown says that such knowledge can be inferred from the circumstances, specifically the video recorded at the tattoo shop prior to the shooting, and Corporal Hanson's evidence that the shotgun was found in plain view during the course of the search of the Jeep. The Crown says that the only reasonable inference to be drawn is either that the shotgun was in the black baseball bag that the accused placed in the Jeep prior to the shooting, as captured on the video, or alternatively that he would have seen it in the Jeep even if he did not put it there. In other words, the Crown says that there is no reasonable inference that can be drawn that is inconsistent with the accused's guilt.
- [134] I accept that one reasonable inference that can be drawn from the evidence is that the accused had knowledge of the shotgun in the Jeep. However, I do not agree that this is the only reasonable inference that can be drawn. Although the shotgun was in plain view at the time the Jeep was searched, there is no evidence that it was in plain view at the time the accused placed items in the Jeep prior to the shooting, as captured on the video from the tattoo shop. There is also no direct evidence that the shotgun was in the black baseball bag. The shotgun cannot be seen on the video. The accused is not the registered owner of the Jeep. He was not in the Jeep at all for at least the period of time covered by the shooting. There were at least two other people who had access to the Jeep during the same time period and conceivably more.
- [135] I find that a reasonable inference could be drawn that the shotgun was, without the knowledge of the accused, placed in the back of the Jeep by someone else, such as one of the two other occupants of the vehicle, either before or during the shooting.
- [136] As there are other reasonable inferences that can be drawn in relation to the accused's knowledge or lack of knowledge of the presence of the shotgun, I conclude that the Crown has not proved the offences alleged in Counts 6 and 8 beyond a reasonable doubt. I find the accused not guilty of these offences.

SUMMARY

[137] In summary, I find the Crown has proven the accused's guilt of the offences alleged in Counts 2, 3, 4, 5, and 7 beyond a reasonable doubt. I find him not guilty of the offences alleged in Counts 1, 6, and 8.

"Horsman J."

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