

CANADA / JUDGMENT

R. v. M.(T.C.)

2007 BCSC 1778

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1778 R. v. M.(T.C.)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. M.(T.C.),

2007 BCSC 1778

Date: 20071123

Docket: 24209

Registry: Vancouver

AND IN THE MATTER OF THE YOUTH CRIMINAL JUSTICE ACT

IN THE YOUTH JUSTICE COURT OF BRITISH COLUMBIA

Regina

v.

T.C.M.

BAN ON PUBLICATION PURSUANT TO

s. 110(1) OF THE YOUTH CRIMINAL JUSTICE ACT

and s. 486.5(1) OF THE CRIMINAL CODE

and inherent jurisdiction

RE Identity of Accused, Three Non-Police Witnesses, and Undercover Police Officers

Before: The Honourable Madam Justice H. Holmes

Reasons for Judgment

Counsel for the Crown:

S. Cunningham, Q.C.

Counsel for the Accused:

D. St. Pierre

N. Reithmeier

Date and Place of Trial:

October 10-12, 15-19,

22-25, 29, & 31, 2007

Vancouver, B.C.

INTRODUCTION

- [1] Mark Allen Bowe was shot at close range during an altercation over drug "turf" outside the Argyll Hotel in the downtown eastside of Vancouver, and died about fourteen hours later. The question is whether the Crown has proven beyond a reasonable doubt that T.C.M. was the person who fired the single and lethal shot. If T.C.M. was that person, he will be guilty of second degree murder as charged.
- [2] To prove that T.C.M. was the shooter, the Crown relies on T.C.M.'s own detailed account of why and how he shot Mr. Bowe, which he told to undercover police officers in the course of a "Mr. Big" or "crime boss" undercover operation.
- [3] However, the defence says that what T.C.M. told the undercover officers cannot be taken as reliable. At the trial, T.C.M. said he witnessed some of the altercation that led to Mr. Bowe's death, but was not part of the altercation and, in particular, was not the shooter. He said that he told the undercover officers he was the shooter so that they would be more likely to accept him into what he believed was their criminal organization, as having "something to bring to the table".
- [4] For the reasons I will explain below, I do not believe most of T.C.M.'s evidence about his own and others' involvement in the events relating to the altercation and the shooting.
- [5] Nonetheless, it remains to be determined whether the evidence as a whole establishes beyond a reasonable doubt that T.C.M. was the shooter, as the Crown contends.

BACKGROUND

The Shooting

- [6] In their bare outline, the events that led to the shooting are not in dispute. They took place after 9:00 p.m. on February 13, 2006, in front of the Argyll Hotel in the 100 block West Hastings Street, Vancouver, near the intersection with Abbott Street.
- [7] A group to which Witness A at that time belonged was accustomed to selling illegal drugs outside the hotel and nearby on that block. The altercation arose because other people began to sell drugs there, and refused to leave when Witness A's associates told them to do so.
- [8] By all accounts, a heated argument developed between, on one hand, Witness A, an associate of his, and Mr. Bowe, and, on the other hand, the interlopers. The evidence differed as to how many people were part of the interloping group; it is clear that there were at least two, one male with darker (or black) skin and one male with lighter (or white) skin. The altercation continued for at least 10-15 minutes, Witness A's group telling the new group to leave the area, and the new group standing their ground.
- [9] Eventually, Mr. Bowe punched the light-skinned interloper in the face. As that person was recovering from the punch, the shot that killed Mr. Bowe was fired. It is the Crown's position that the dark-skinned interloper fired the shot, and that he was T.C.M. T.C.M. was not quite 18 years of age at the time, and is now 19.
- [10] By all accounts, there were numerous people in the area of the altercation, almost all of whom scattered after the shot.
- [11] Emergency health workers arrived quickly (at approximately 9:53 p.m.), and found Mr. Bowe lying in front of the hotel, bleeding profusely from the bullet wound in his head. They transported him by ambulance to Vancouver General Hospital. A doctor pronounced him dead at 11:31 a.m. the following day.

The Undercover Operation

- [12] Police officers began an undercover operation on June 26, 2006 when they first arrested T.C.M. and placed him in first a police wagon and then a holding cell with an undercover officer, Det. X. Det. X played the part of a sophisticated and wealthy criminal, working in the mid-to-upper reaches of a sophisticated enterprise engaged in money-laundering and other high-level financial or similar crimes. In the various scenarios in the undercover operation over the months following T.C.M.'s release, Det. X played up the very substantial opportunities T.C.M. could gain, if the crime boss, played by Sgt. Y, accepted T.C.M. into the criminal organization.

- [13] The various "scenarios" in the undercover operation were skilfully designed and enacted, and T.C.M. was taken in. He was paid sums of money for doing tasks for what he understood to be the criminal organization, was told that he performed well and that he could expect to earn more; he began to see a very real possibility of moving to a much better life, from his existence as a small-time drug dealer "working the block" for long and late hours on the streets of the downtown eastside.
- [14] The undercover operation was designed to and did culminate in an interview with the crime boss, played by Sgt. Y. In that interview, the boss would ask T.C.M. about the murder that led to his arrest and, it was expected, hear his admission to the murder as well as sufficient details to allow for independent verification of the truth of the admission. The interview would be video- and audio-recorded.
- [15] However, before that interview, T.C.M. spontaneously began to speak to the undercover Det. Z about the shooting. This was on October 11, 2006, during one of the undercover scenarios. T.C.M. spoke first about his street level drug dealing, and the violence associated with it, and then moved to the topic of the shooting.
- [16] T.C.M. told Det. Z that it was as a result of his arrest for murder, in relation to the shooting, that he had met his cell-mate Det. X. He explained that the police described the shooting as an "execution", but it was not. He related that he and a friend Mark had been in the area of Hastings and Abbott and were confronted by Mr. Bowe, who told them to find other areas to sell their drugs. Eventually, T.C.M., on his associate Mark's instruction, went to get a gun from a nearby "shack" (a room in which drugs and weapons were stored), put on gloves and an extra jacket with the collar pulled up, pulled his ball cap down over his face, and returned with the gun in a sock to hide it from people and cameras. By this time, Mr. Bowe had a group of friends around him, and he suddenly punched T.C.M.'s associate Mark in the head. T.C.M. pulled out the gun, still inside the sock, and, in his words to Det. Z, "blasted the guy right in the fucking chest", at close range, with one shot. He said that this "blew a hole" in Mr. Bowe, who dropped immediately to the ground. People scattered, and T.C.M. ran for the nearest cab.
- [17] In the course of T.C.M.'s account to Det. Z, he described the gun as a revolver and as a .357, and he remarked that "those hollow point bullets are bad ass rounds". He said that his cousin had taken the gun the next day and disposed of it.
- [18] The crime boss interview ultimately took place on October 30, 2006. T.C.M. gave much the same general account to Sgt. Y as he had given to Det. Z, but with additional detail: Sgt. Y carefully reviewed T.C.M.'s account with him and requested details, saying that he needed full details if he was to make T.C.M.'s problem (in relation to the shooting) go away. I will discuss aspects of the crime boss interview in greater detail later.

THE ISSUES

[19] There is no evidence, except for T.C.M.'s statements to Sgt. Y and Det. Z, directly identifying T.C.M. as the shooter.

[20] The Crown's case cannot succeed unless T.C.M.'s statements to the undercover officers that he was the shooter are accepted as reliable, and the evidence as a whole raises no reasonable doubt as to the truth of, in particular, T.C.M.'s statement that he was the shooter.

[21] In this context, and on the evidence, three key matters underlie the inquiry as to whether the evidence proves T.C.M.'s guilt beyond a reasonable doubt:

1. the credibility of T.C.M.'s evidence that the story he told the undercover officers was untrue
2. whether details in T.C.M.'s statements to the undercover officers are confirmed or, rather, contradicted by independent or objective evidence, and
3. the significance of certain weaknesses and inconsistencies in the evidence as a whole.

I will address these matters in turn.

1. Is T.C.M.'s Denial at Trial Credible?

[22] T.C.M. testified that in fact he was not part of the altercation; he was further along the block, smoking weed and chatting with an acquaintance, and watching one of his workers (selling drugs). He saw that a confrontation was taking place outside the hotel, and he heard the gunshot and ducked, but he did not see Mr. Bowe get shot. He immediately ran away from the scene.

[23] T.C.M. testified that about a week later he chanced to run into the acquaintance, who then told him that the victim had been shot in the chest. They discussed the fact that the sound of the shot had been loud, a big boom, and agreed as to the possible types of gun that may have been used.

[24] T.C.M. testified that he falsely told Det. Z he was the shooter because he wanted to be accepted into the criminal organization, in which he would make very large amounts of money; he therefore wanted the members of the organization to believe that he was not just "a punk off the streets". He wanted them to believe that "I mean business, if business has to be attended to", that he was ready to do whatever was necessary. He used the shooting of Mr. Bowe as the basis of his false story, because that was the only incident of its type for which T.C.M. had the full facts.

[25] T.C.M. testified that he based the detail for his false story on information from several sources: his own observations of the altercation from further down the block, information from the acquaintance T.C.M. was with at the time of the shooting (given when he chanced to encounter him about a week later), the general "word on the street" following the shooting, the details Sgt. Gabriel had given him during a formal interrogation, and depictions of criminal conduct in the movies.

- [26] In many important areas, T.C.M.'s testimony was entirely unconvincing.
- [27] Significant among these was T.C.M.'s evidence about whether other people were involved with T.C.M. in either the altercation that led to the shooting or in illegal drug-dealing.
- [28] T.C.M. insisted that he was a "lone wolf" in his drug-dealing, with no associates except his supplier. When Sgt. Gabriel mentioned names and showed pictures of various people to T.C.M. during the formal police interrogation after T.C.M.'s first arrest in June 2006, T.C.M. denied any meaningful acquaintance with any of those people. However, almost immediately after the interrogation, T.C.M. told the undercover Det. X that Sgt. Gabriel had shown him pictures of his "boys", meaning his friends.
- [29] Also, when T.C.M. told Det. Z and Sgt. Y about how he came to shoot Mr. Bowe, T.C.M. referred to many of those people by name. He was able to do this even though it had been months since Sgt. Gabriel had indicated their names to him, either expressly or impliedly in connection with the shooting. Indeed, T.C.M. used a nickname ("Rye") for one of them ([full name omitted], who T.C.M. explained to Sgt. Y, was called Ryan but goes by the name Mark) when he marked on a diagram that person's position during the altercation and shooting. In his evidence in the trial, T.C.M. testified that he believed that person's name was Mark, but only because he asked one of T.C.M.'s workers for the man's name, and the worker indicated that name.
- [30] T.C.M. maintained, in cross-examination, that he told Sgt. Y that he had close associations with most of these people so that, as crime boss, Sgt. Y would think that he had "connections" to people who, by the information Sgt. Gabriel had given T.C.M., had a higher position than his own in the drug hierarchy. T.C.M. was unable to explain why he did not consider it obvious that the crime boss would quickly discover this type of information to be false, if it was so. Nor could he explain why he thought that the purported criminal organization, which made clear that it was concerned about "heat" from the police, would favour a person with such connections over a person who worked in his drug dealing as a "lone wolf".
- [31] In some areas, T.C.M.'s evidence appeared rehearsed. Many of these areas were also among the most implausible areas. Notable, for example, was his explanation for why he made inculpatory statements about the shooting to Det. Z, well before the crime boss interview. T.C.M. testified that he made the statements because Det. Z, in response to T.C.M.'s question had he had ever killed a person, responded that he "had done his thing"; T.C.M. wanted to be at "the same level" as Det. Z, so he began to describe the shooting featuring himself as the shooter.
- [32] In his detailed review of his dealings and conversations with T.C.M., Det. Z gave no evidence about any such conversation. No such conversation was suggested to him in cross-examination. Such a conversation would have been both noteworthy and memorable.

- [33] In some areas of his evidence, T.C.M. had difficulty responding to Crown counsel's adept cross-examination. His failure left the impression that he based his testimony not on his recollection of actual experience but on a fairly complex set of memorized facts. He answered some questions readily, but, before he answered others (for which one would expect a ready answer), he inexplicably needed to pause before answering. Indeed, on one occasion - when he was challenged about his readiness to do violence - he lowered his head while he thought about his answer, as if wondering what his pre-conceived script required, and under his breath muttered - in words that were likely not audible to most in the courtroom - "let me see".
- [34] As I assessed T.C.M.'s responses on that occasion and others, they extended far beyond the natural caution a witness may wish to take before answering a question with potentially significant implications, and it indicated quite starkly his effort to realign his testimony with a pre-conceived script. As cross-examination proceeded, he evidently needed more and more frequently to think through the implications of what he was asked, before he could answer - even in relation to, by his account, relatively straightforward matters.
- [35] Courts rarely determine credibility on the basis of demeanour, because many factors other than truthfulness may affect a witness' demeanour. A young and inexperienced witness - particularly one facing a very serious charge - may face additional challenges that will affect demeanour. I find against T.C.M.'s credibility on bases other than his demeanour, but will note that his demeanour did nothing to assist his credibility.
- [36] For all these reasons, I do not find that T.C.M. was a credible witness in his evidence about his involvement in the events that led to the shooting death of Mr. Bowe.
- [37] However, I do not reject his evidence entirely.
- [38] I agree with Crown counsel that nothing in the criminal organization, as it was presented to T.C.M. in the undercover operation, celebrated violence or suggested that T.C.M. was more likely to be accepted into the criminal organization if he had a violent background. Indeed, the undercover officers took pains to discourage T.C.M. from violent conduct during the undercover scenarios and in relation to his own drug-dealings; they told him more than once that violent conduct was unprofessional and "bad for business". Time and again, the undercover officers told him that truthfulness and trust were key to participation in the criminal organization.
- [39] Despite this, I do not find that T.C.M. necessarily understood the situation similarly. Some of the undercover officers' statements were ambiguous. For example, a so-called Ryan (in the undercover scenarios) was said to be having trouble with a guy who would not listen, and was instructed to deal with the situation "hard and fast". While I accept Det. X's evidence that he meant nothing by that expression, it is more than possible that T.C.M. assumed that violence was involved, particularly since the conversation turned not long afterwards to the subject of disposing of guns. Before the first meeting with the crime boss, which ostensibly came about because the boss demanded to see Det. X right away, T.C.M. asked whether Det.

X and he would be "whacked", or killed. When, then, Det. X responded in the negative, T.C.M. asked whether the boss would be "strapped", or carrying a weapon.

[40] Even though T.C.M. was streetwise, he was not mature. For example, on one occasion during the undercover operation, he erupted into excited imitations of the sounds of various firearms. Generally during the undercover operation, T.C.M. was impressionable and was obviously attracted to popular culture as he took it from some aspects of commercial television and videogames.

[41] In short, from the evidence of his words and conduct in the undercover operation, T.C.M. evidently had an abnormal interest in guns and violence, and his responses must be assessed in that light.

[42] I find that much of T.C.M.'s evidence was incredible, and, as I discussed earlier, that he has added false detail to the basis for his explanation about why he claimed responsibility for an act of violence. However, I cannot reject entirely T.C.M.'s explanation that he believed that the criminal organization would think more highly of him if he had shot and killed Mr. Bowe.

[43] I turn then to consider the reliability of the evidence on which the Crown relies.

2. Are T.C.M.'s Admissions to the Undercover Officers Confirmed by Independent Evidence?

[44] There was no "hold-back" information about the shooting, which only the shooter could have known. However, to underline that T.C.M.'s statements to the undercover officers must have been true, the Crown relies on numerous details he recounted that are confirmed by other evidence, much of it independent or objective.

[45] These details arise in two main areas: (1) the gun and ammunition used in the shooting, and (2) descriptions of the immediate circumstances of the shooting.

(1) The Gun and Ammunition

[46] T.C.M. told the undercover officers that he used a .357 revolver when he shot Mr. Bowe, and he made a statement suggesting that he used hollow-point ammunition. The Crown contends that this specific knowledge, available to very few people, reinforces that T.C.M.'s admissions to the undercover officers were true.

[47] The difficulty with this submission is that the objective expert evidence provides only a very general description of the types of gun and ammunition actually used in the shooting, and indicates that the possible types are commonly used or available on the street. Any of three types of gun could have been used, including the .357 calibre revolver of which T.C.M. spoke; all three are common on the street, the .357 very common. The bullet fragments taken from Mr. Bowe's body were consistent with, but not necessarily from, a hollow point bullet. Also, hollow point ammunition is one of the most commonly used types of ammunition.

[48] I note parenthetically that T.C.M.'s own statements to the undercover officers, about what was done with the gun after the shooting, contain internal inconsistency. T.C.M. told Sgt. Y that the gun had been melted down, but shortly afterwards told Det. X that he was sure the gun had been sent to the USA.

(2) The Immediate Circumstances of the Shooting

[49] Three civilian witnesses who were at or near the altercation testified in the trial. I find that all three testified sincerely and as accurately as they were able.

[50] Of the three, Witness A was closest to the events and in an excellent position to make observations. He was not present for the start of the altercation, but when told of it he quickly arrived and engaged in the efforts to get the interlopers to leave.

[51] As Witness A described the altercation, the key players were, on one side, Witness A, his associate C.T., and Mr. Bowe, and, on the other side, a light-skinned male and a darker-skinned male, neither of whom Witness A had seen before. Witness A's group stood facing the doorway of the hotel, and the newcomers stood in the alcove at the hotel doorway, with their backs to the door.

[52] Witness A testified that he spoke mainly to the lighter-skinned person, and explained that he and his associates did not want anybody selling dope in front of the hotel, because they did not want problems from the police in that area. The discussion became heated, and Mr. Bowe delivered a close-fisted and hard punch to the lighter-skinned interloper's face. Witness A testified that as the lighter-skinned person reacted by smiling and appearing to shake off the punch, the darker-skinner male raised and held his arm horizontally at shoulder-level, pointing toward Mr. Bowe. A deep loud bang followed, and Mr. Bowe was sent flying backwards.

[53] Witness A headed for the door of the hotel. As he did so, the male who had raised his arm turned toward C.T., but did not fire, and then spun round and pointed a gun at Witness A. Witness A saw the end of the barrel pointing directly at him, and closed his eyes, expecting to die. However, no further shot was fired.

[54] When Witness A opened his eyes, Mr. Bowe was lying on his back and everybody else had gone.

[55] I accept that Witness A testified as an honest and forthright witness, speaking candidly about events during an unfortunate period in his past. He did not minimize his own or his associates' discreditable conduct. Nor did he attempt to fill in gaps in the matters he observed, or to overplay the reliability of his observations. Like the other civilian witnesses, he had concerns about giving testimony, because of what he understands to be the "rule on the street" that nobody should assist the authorities, but in my assessment he nonetheless determined to act responsibly as a member of society, and to testify accurately and fairly about matters within his knowledge.

- [56] There were details in Witness A's account of the altercation and the shooting which T.C.M. recounted in almost exactly the same way to the undercover officers, particularly Sgt. Y (to whom T.C.M. gave more detail).
- [57] First, both said that the lighter-skinned male spoke on his cell phone during the altercation. Witness A understood from what he heard of the conversation that the male expected the person at the other end of the call to come to assist. T.C.M. told Sgt. Y that "Bird", with whom he and Mark were a "unit", was on his way.
- [58] Second, Witness A testified that at some point during the altercation, the darker-skinned male left the side of the lighter-skinned male, and returned later in the altercation (which in total lasted about fifteen minutes until the shot). This accorded with T.C.M.'s statements to Sgt. Y.
- [59] Third, Witness A described the stance of the dark-skinned person during the altercation, in a fashion remarkably consistent with the way in which T.C.M. later described how he appeared during the altercation. Witness A said the dark-skinned male stood with his jacket zipped up to his nose, and his hands in his pocket as if he were cold. In the videotaped statements to Sgt. Y, T.C.M. demonstrated a very similar stance and dress.
- [60] Fourth, T.C.M. recounted almost exactly the experience Witness A described after the shot, in which the shooter, arm still outstretched, turned and pointed the gun toward Witness A.
- [61] The Crown submits that the remarkable similarity between these and the other details of the events, as each of Witness A and T.C.M. described them, indicates that T.C.M.'s statements to the undercover officers were true.
- [62] In my view, there are three main difficulties with this submission.
- [63] First, many - though not all--of these details were given to T.C.M. during the formal police interrogation by Sgt. Gabriel, on June 26, 2006, shortly after the first arrest.
- [64] In the interview, Sgt. Gabriel showed T.C.M. photographs of numerous people who Sgt. Gabriel contended were T.C.M.'s associates. He also outlined in some detail the police theory as to why and how the shooting took place.
- [65] Sgt. Gabriel took a number of different tacks in his efforts to encourage T.C.M. to speak, but all of them fell within a general approach of purporting to ask not whether T.C.M. shot Mr. Bowe, but why. Sgt. Gabriel made clear in numerous ways that the police knew that T.C.M. was the shooter, had evidence to that effect, and were simply interested in whether the shooting was calculated or, rather, spur-of-the-moment.
- [66] In the course of the interview, Sgt. Gabriel told T.C.M. the following:
- the altercation arose from a turf war about who would do business on the corner in question
 - T.C.M. was selling drugs there, and was told to leave

- during the altercation, the person who told him to leave made a telephone call, and a large man came out of the hotel and joined in
- one of T.C.M.'s associates made a telephone call to another associate
- T.C.M.'s associate Mark told him to go and get "the thing"; [the evidence established that in street language a "thing" means a gun]
- T.C.M. went, as instructed, and returned with the gun in a bag
- T.C.M. stood beside Mark and words continued to be exchanged
- the big male [who had come out of the hotel] punched Mark in the face; Sgt. Gabriel showed T.C.M. a picture of the person he referred to as Mark, and other evidence established that the person is [full name omitted]
- T.C.M. then raised his arm in "gangsta style", the gun in the bag, and fired
- the big male fell to the ground
- T.C.M. turned and pointed the gun at two of the associates of the big man who had been shot, but did not fire
- T.C.M. then ran away with the people with him, including his associate Mark
- T.C.M. telephoned someone to say that he had "taken care of business", and that person then phoned T.C.M.'s associates Richard, Daniel, and Jermaine, to tell them not to bother coming, and
- there had been a lot of people standing around the area of the altercation; Sgt. Gabriel listed eleven names.

[67] Even though T.C.M. turned his back on Sgt. Gabriel for much of the interview, it was evident that he paid attention to at least some of what Sgt. Gabriel said: later, to his undercover police officer cell-mate, he mockingly repeated some of Sgt. Gabriel's comments. That T.C.M. included the details I have listed above in his story to the undercover officers, therefore carries only limited significance.

[68] Similarly, it appears, even from the telling of the story to Sgt. Y, that T.C.M. may have gained some of his information from his friends. For example, one of the distinctive details common to T.C.M.'s account to Sgt. Y and Witness A's evidence, was that after firing at Mr. Bowe the shooter turned and pointed the gun at Witness A. When T.C.M. got to this area in his narrative to Sgt. Y, he switched briefly from an account of his own conduct and observations to a description of what he had been told by others about the events: "supposedly my boy [meaning friend] told me that I pointed at [Witness A]".

- [69] As I noted earlier, T.C.M. testified that he based some of the details in his false story on "the word on the street". There was ample evidence to confirm his suggestion that information travels quickly in the downtown eastside area, and that information may have been available to him from that source.
- [70] The Crown's position faces the second difficulty that the shooter was not the only person (other than Witness A) with access to details concerning the immediate circumstances of the shooting. By all accounts, the lighter-skinned male was also an integral part of the altercation, and was present throughout until the shot.
- [71] That T.C.M. was able to recount the details that are confirmed by Witness A's evidence leads me to conclude that T.C.M. was present for the altercation and the shot. However, it does not indicate that T.C.M. therefore must have been the shooter, as distinct from an associate of the shooter or someone nearby. The shot was fired at close range, with the parties to the altercation in fairly close proximity to each other. According to most of the evidence, the dark-skinned male and the light-skinned male were side-by-side, facing Witness A's group. The light-skinned male and the dark-skinned male must each have made much the same observations. Also, there were many other people in the immediate area, some of them close by.
- [72] The third difficulty with the Crown's position in this area is that although numerous details in T.C.M.'s story to Sgt. Y accord with the details as given in other evidence, there are some key details that conflict with other evidence, some of that evidence undisputed.
- [73] Of these, the most significant is that T.C.M. repeatedly insisted that he had shot Mr. Bowe in the chest. It is common ground that Mr. Bowe was shot once in the head.
- [74] When Sgt. Y challenged T.C.M. about what part of Mr. Bowe's body he shot, and suggested that he had information indicating that T.C.M.'s story was untruthful in that area, T.C.M. eventually allowed for some uncertainty, but nonetheless maintained that he was 80% certain that the shot hit Mr. Bowe's chest, the area for which T.C.M. aimed. On at least two occasions, to reinforce his stated belief that he shot Mr. Bowe in the chest, T.C.M. demonstrated the area of the chest from which he said Mr. Bowe was "leaking" immediately after the shot; he spoke of seeing the "red".
- [75] The Crown called expert evidence to explain the various reasons why a shooter may hit higher than he or she aims, and may mistakenly believe that the shot arrived elsewhere than it actually did.
- [76] Some of the explanations related to the function of firearms - in particular, to recoil and to muzzle flash. Other explanations were based in the psychology of human expectations and the human reaction to stress, and, as opinion, were not as well-grounded in the specialized knowledge of the expert witness.

- [77] As general observations, the various explanations were somewhat speculative, in the context of the evidence and the issues in the trial. For example, because of the gun's recoil, and tendency to climb after it is fired, the bullet fired may hit higher than the shooter expected. However, there was no clear evidence in the trial that the shooter held the gun with the sights upwards so that the distortion would have been vertical. There was some evidence that the gun was held "gangsta style" and that that meant on its side; if that were the case, the distortion would have been horizontal (to the side), not vertical.
- [78] More significantly, the expert evidence and the other evidence did not account for T.C.M.'s insistence, in the videotaped crime boss interview, that he saw blood coming from Mr. Bowe's chest. The police officers and the paramedic who arrived at the scene very shortly after the shot found Mr. Bowe lying on his back with his head slightly overhanging the curb, with a large pool of blood under his head, and with blood on his face. The various witnesses gave evidence of injury to his right eye, and a large amount of blood coming from the top of his head, but made no mention of any significant amount of blood on or pouring from Mr. Bowe's chest area.
- [79] There was evidence that T.C.M. suffered from bouts of blurred vision, but, in my view, that evidence was not sufficient to explain the discrepancy, particularly in light of T.C.M.'s demonstration, as shown in the video-recording, of the mid-body area from which he said he saw blood flowing.
- [80] Another key detail which it is common ground T.C.M. recounted inaccurately in the statements to Sgt. Y, was the date of the shooting. He began by saying that it was in the summertime. When Sgt. Y challenged him as to the date, and suggested that T.C.M. may be falsely confessing, T.C.M. gradually adjusted his estimate backwards according to what he evidently understood Sgt. Y to know the actual date to have been. Eventually he acknowledged that it might have been in March, but he insisted it was after his birthday on February 29. The shooting was actually on February 13.
- [81] It is difficult to interpret this evidence. A birthday is a significant reference point; it was T.C.M., and not Sgt. Y, who resorted to it. T.C.M. acknowledged in his evidence that he is not good with dates, but nonetheless his error - particularly at first - was significant.
- [82] At the same time, and as Mr. St Pierre acknowledges, by T.C.M.'s own evidence he was aware of the shooting when it took place and it made an impression on him. Also, he was arrested in relation to the shooting the following June, with the launch of the undercover operation, so it is difficult to understand how, in his statement to Sgt. Y at the end of October, he may reasonably have believed the shooting to have happened in the summer.

- [83] Also, in T.C.M.'s account of the shooting to the undercover Sgt. Y, a black Chicago White Sox baseball cap figured large; T.C.M. said that he wore it during the shooting, and considerable discussion followed about its whereabouts at the time of the crime boss interview. Eventually, T.C.M. gave Det. X such a hat, in order that the crime boss could ensure that all the potential evidence against T.C.M. was safely under his control.
- [84] Witness A made no mention at any time of the darker-skinned person or the shooter wearing a hat.
3. Does the Evidence Raise a Reasonable Doubt as to Guilt?
- [85] There are other troubling inconsistencies in the evidence as a whole.
- [86] The Crown does not contend that any of the eyewitnesses were able to identify the shooter, but submits that Witness A's general description is reliable. Witness A was confident that it was the dark-skinned male who raised his arm and, Witness A inferred, fired the shot. He was unable to identify or describe that person in any detail, because the man's jacket was zipped up covering his face to the bridge of his nose. Witness A's general description of the dark-skinned male is consistent with T.C.M.'s appearance: taller than Witness A's 5'6", fairly slim, black-skinned, younger than 20 years of age.
- [87] However, a matter of days after the event, Witness A described the dark-skinned man to a police officer and estimated the man's height at 5'4". Witness A had no recollection of giving that estimation, and by his manner, in his evidence, rejected the suggestion that he could have done so. However, the officer to whom Witness A gave information testified that he was certain that Witness A indicated that height, and I find that Witness A did. A height of 5'4" is, clearly, significantly shorter than T.C.M.'s height then and at the trial. Witness A, at 5'6" and in close proximity to the shooter, could be expected to have made a reasonably reliable estimate.
- [88] Witness A was a heavy user of illegal drugs at the time. He testified that because he was habituated to them, they did not affect his ability to see or hear; however, he candidly offered that they affected his judgment and his memory. Unsurprisingly, the incident had a profound effect on Witness A, both during the events and for some time afterwards.
- [89] I conclude for these various reasons that Witness A's observations and memory of details at the time may have been affected in ways that are not entirely apparent to him. Despite his sincerity and candour as a witness, his description of the two interlopers and their actions cannot be taken as perfect.
- [90] The evidence of the other bystanders who testified does not strengthen the Crown's case. Although in broad or general terms, the evidence of Witness B and Witness C accords with Witness A's description of the confrontation and shooting, as to the key issue of who shot Mr. Bowe their evidence did not support the Crown's position.

- [91] Witness B did not see a gun or anyone pointing at the male who fell to the ground after she heard a gunshot. She assumed that the white male - and not the black male--fired the shot, in retaliation for the punch to his face only a split second before; however, she was looking away from the scene when she heard the gunshot. When she spoke to the police about nine days after the events, she said she was confident in her assumption that the white male fired the shot, in part because of the angle at which the victim fell, straight back from the white male.
- [92] Witness C, a young person [description omitted], was some distance away and was able to see only the general movements of the people involved, but not, I conclude, the specific faces or the details of what happened.
- [93] Immediately before he heard a bang and saw a flash, he saw a person raise an arm, fully-extended, to shoulder level, in the manner Witness A also described, pointing toward the street. He saw a man fall immediately afterwards. He did not see a gun. After the shot, the people in the area ran, some of them toward him.
- [94] Shortly afterward Witness C selected (although not with complete confidence) a photograph of T.C.M. as a person present "on the corner", or at or near the altercation.
- [95] Witness C indicated at the time of the selection and in his testimony that the person whose photograph he selected was not the shooter. He testified that the shooter was Hispanic. He said that he is well aware of the distinction between black and Hispanic people, and is confident that the shooter was not black.

CONCLUSION

- [96] I have already indicated that I do not accept much of T.C.M.'s evidence concerning his involvement in the events that led to Mr. Bowe's death.
- [97] I also agree with Ms. Cunningham that the video-recording of T.C.M.'s interview with the undercover crime boss shows T.C.M. making the numerous inculpatory statements with a convincing fluency and apparent comfort that invite the conclusion that those statements were true.
- [98] However as I have discussed, there is very little independent evidence to confirm that conclusion, and there is evidence that contradicts it.
- [99] And, as I have also discussed, the very circumstances of the statements to the undercover officers, and some of the content of the statements, raise concerns about their reliability.
- [100] There was considerable reference in the trial, including in T.C.M.'s statements to Sgt. Y, to the strength of the "code" which prevents a person from giving information or evidence against someone else.

- [101] When I ask, as I must, whether the only reasonable inference from the evidence as a whole is that T.C.M. was the shooter, I must consider the possibility--even though T.C.M. did not testify to this effect--that T.C.M. was close to or involved in the events he described, but was not the shooter. In that situation, his proximity to the events would have provided him with the vivid details he recounted to the undercover officers.
- [102] I note, in this regard, that even after his lengthy account of the shooting to Sgt. Y, in which he willingly recounted numerous details, T.C.M. all but refused to provide Sgt. Y with contact information for the friends who, T.C.M. said, had taken the gun and disposed of it. Although he gave Sgt. Y a slightly different reason for his hesitation, his manifest concern was, as I saw it, to insulate those people from scrutiny and involvement.
- [103] There was no suggestion in the trial that even if T.C.M. is not proven to have been the shooter, he may nonetheless be guilty as a party to the murder actually committed by someone else. Any such position could not succeed, because most of the weaknesses in the evidence to establish T.C.M.'s liability as principal, apply similarly to his liability as a party.
- [104] The criminal standard of proof is a high one. It does not require proof to the level of absolute certainty, but it does not tolerate a reasonable doubt.
- [105] Many of the inconsistencies and uncertainties in the evidence are, on an individual basis, capable of explanation in a manner consistent with T.C.M.'s guilt (as the shooter). However, I must determine whether guilt is the only reasonable inference from the evidence, and I conclude that it is not. Even the very number of inconsistencies and uncertainties in the Crown's case prevents a confident conclusion that T.C.M. spoke truthfully to the undercover officers, when he claimed to have been the shooter.
- [106] Despite the very considerable care and skill devoted to the presentation of the Crown's case - and I say the same of the defence case--the evidence as a whole does not allow me to conclude beyond a reasonable doubt that T.C.M. was the shooter.
- [107] I find T.C.M. not guilty.

"H. Holmes, J."

The Honourable Madam Justice H. Holmes

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