Regina, and M.A.A.

"Youth who admitted he was guilty of 2nd degree murder after shooting 3 people outside nightclub acquitted of 1st degree murder." [COMMENTS BY RICHARD NEARY]

R. v. M.A.A.

Between
Regina, and
M.A.A.

[2009] B.C.J. No. 1504

2009 BCPC 238

File No. 4481

Registry: Victoria

British Columbia Provincial Court
Victoria, British Columbia

E.C. Blake Prov. Ct. J.

Heard: June 18, 19, 22-26, 29, 30, July 2, 3, 6, 7, 9, 10, 2009.
Judgment: July 23, 2009.

(144 paras.)

Criminal law — Criminal Code offences — Offences against person and reputation — Homicide — First degree murder — Second degree murder — Attempted murder — Accused convicted of second degree murder and two counts of attempted murder — Two groups were involved in a confrontation at a nightclub — Thereafter, the accused arrived at the scene and shot the victims at the urging of a friend — The court found that there was insufficient evidence to establish that the murder was planned and deliberate so as to constitute first degree murder — However, the sequence and methodical nature of the shootings suggested that the accused had a specific intent to kill the victims given his proximity to the victims and the injuries they sustained — Criminal Code of Canada, s. 229.

Trial of the defendant, MAA, for first degree murder and two counts of attempted murder. The accused was a member of a group of young people involved in the sale of crack cocaine. The leader of their group became involved in a verbal confrontation outside of a nightclub with L and friends. When the groups parted, the leader inferred that the matter was unsettled. The leader was seen on security cameras pacing agitatedly and talking into his telephone. Within minutes, the accused arrived by taxi with possibly two others. The accused was armed with a revolver. The leader directed him to a parkade where he repeatedly urged him to shoot L. The accused pointed the revolver at L. T intervened verbally, moving into the path between the gun and L. The accused shot and killed T. Two further shots struck and injured L and L. The accused and the leader fled the scene. They were arrested shortly thereafter and the firearm was recovered. Several witnesses gave variable accounts of the incident. The accused did not deny his role in the shooting. He denied that the shooting was planned and deliberate so as to constitute first degree murder. He denied that he had the specific intent to kill L and L so as to constitute attempted murder.

HELD: MAA was convicted of second degree murder and attempted murder. There was insufficient evidence to establish that the murder of T was planned and deliberate so as to constitute first degree murder. The evidence that the leader wished to continue his dispute with L was not proof against the accused, who was not present at the confrontation. There was no direct evidence as to who received the leader's telephone call, the message he conveyed, and what caused the accused to arrive at the scene in a taxi. Upon arrival, the accused had to be urged by the leader to shoot. No express order was given to kill. No order was given to shoot multiple individuals. Accordingly, the accused was convicted of second degree murder. The evidence was sufficient to support a conviction for

the attempted murders of L and L. The sequence and methodical nature of the shootings suggested that the accused had a specific intent to kill the victims, given his proximity to the victims and the injuries they sustained.

Statutes, Regulations and Rules Cited:

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 229, s. 229(a)(i), s. 229(a)(ii), s. 229(b), s. 231, s. 231(2), s. 235, s. 239, s. 244(2), s. 268

Counsel:

Counsel for the Crown: Ms. C. Murray, Q.C. and Ms. J. Gillings.

Counsel for the Defendant: Mr. R. Neary and Mr. J. Mills.

REASONS FOR JUDGMENT

E.C. BLAKE PROV. CT. J.:–

INTRODUCTION

1. The Defendant MAA is charged with the first degree murder of PT, contrary to s. 235 of the Criminal Code[1]. He is also charged with the attempted murders of T L and R L, contrary to s. 239. In the alternative to the attempted murder charges, MAA faces charges of aggravated assault upon both T L and R L, contrary to s 268. Finally, MAA is charged with the offence of using a prohibited firearm in the course of committing an indictable offence, contrary to s. 244 (2). All of the charges arise out of an incident which took place outside a nightclub in Victoria in the early morning hours of July 19, 2008.

2. The Defendant does not take issue with the evidence which the Crown has presented on the firearms charge. I find the Defendant guilty on that charge and I will only return to it at the conclusion of these Reasons.

SUMMARY OF EVIDENCE

3. I will begin with an overview of the evidence. This summary is intended to provide context and to focus on the uncontested portions of the testimony presented, but it will be noted in places that even at this initial stage of the analysis I have been obliged to make findings of fact when faced with conflicting versions of the events.

4. In the summer of 2008 the Defendant was a member of a group of young people closely associated with one another in the sale of drugs, especially crack cocaine, in the Victoria area. The evidence before this Court discloses that there were perhaps ten to twelve people active in the group.

5. One of the leaders of the group appears to have been a 22-year old man named S C, who supplied the goods and in various ways directed the others in their illicit sales endeavours. These others moved about furtively between two or three residences in Victoria and also socialized together from time to time. It would be safe to infer that they formed a close-knit band, bound together by ties of loyalty, all the more so no doubt because of the unlawful nature of their joint enterprise. They frequently communicated with one another and with their customers by means of cell phones.

6. On the evening of July 18-19, 2008 Mr. C spent some time drinking and socializing with H B, a member of the group, and a third person. At some time around 1:00 am, the three of them went to the Red Jacket nightclub on View Street, where they met up with AA, the Defendant's girlfriend and the only female member of the drug-selling confederacy.

7. In the nightclub, some minor hostility arose between Mr. C and T L. The two men were unknown to one another until that time. The source of the hostility is not clear, but it had nothing whatever to do with drugs. I wish to emphasize that there is no evidence whatever that T L or any of his companions that night had any connection with the drug world.

8. Most witnesses who testified about events in the nightclub in the early morning hours of July 19th were not even aware that the hostility had developed between Mr. C and TL. It seems fair to say that the dispute was so minor that most people would have dismissed it without a second thought. For some reason, however, Mr. C was not prepared to do so.

9. Outside the nightclub after the 2:00 am closing time, Mr. C engaged T L once more in some unpleasant verbal banter. Mr. C was in company of H B and AA at the time. For differing reasons, neither Mr. C nor T L testified before this Court. The Court did, however, hear evidence from a number of people regarding the verbal confrontation outside the nightclub. That evidence was contradictory in many ways, as one might expect with regard to testimony concerning a brief verbal dispute that happened while several dozen people, in various states of intoxication, were milling around outside a nightclub nearly a year ago.

10. Piecing the threads together as best I can and relying most heavily on evidence from the witnesses B Kand R K which I accept without hesitation on these points, I am satisfied that Mr. C was the aggressor in the verbal dispute; that he attempted to intimidate T L by referring to himself as "Ricky, Red Scorpion"; and that he let T L know that although the two of them were walking away from one another at that moment, the dispute was not over. Mr. C conveyed this last message to T L by uttering words to the effect of "just wait ten minutes". I am satisfied that both AA and H B, Mr. C's underlings in the drug confederacy, likely added a few choice words of support on Mr. C's behalf before they guided the agitated Mr. C out of harm's way (at least for the moment) by physically moving him along to the area of the covered parkade located a few yards to the west of the nightclub.

11. T L had gone to the nightclub in company with B Kthat evening. There the two of them met up with P T. None of these people was seeking a confrontation with Mr. C, or anyone else for that matter. T L was simply unfortunate enough to have somehow roused spiralling and irrational levels of anger in Mr. C.

12. After the verbal sparring had occurred outside the club, T L walked away. He seems to have been only mildly irritated by the turn of events outside the club. He walked to the other side of the street and began to discuss with his friends the issues of who would be driving and where they might be heading to finish off the night's activities.

13. Some minutes later, as they were standing around talking casually in the street, T L and his group were joined by T Y, a doorman/ bouncer at the nightclub who was known to many of them. T L told Mr. Y that there had been a bit of unpleasantness with someone identifying himself as "Ricky Red Scorpion" who was now hanging around the parkade. Consistent with the nature of his employment, Mr. Y walked over to the parkade as casually as he could to make sure that everything had cooled down. He was assured by AA, whom he knew, and by H B, that everything was indeed under control. Mr. Y left it at that, and went back to chat with T L and his friends across the street.

14. In due course, T L and his group, now made up once more of B Kand P T, strolled across to the parkade themselves, with no intention other than to make their way to B K's vehicle parked there. As they made their way to the parkade, more or less oblivious to the continued presence of Mr. C and his cohorts, they were joined by R L, who was a work acquaintance of T L.

15. R L had not been at the Red Jacket club at all that night. Instead, he had been out drinking elsewhere. He was quite drunk as he walked up View Street at 2:50 in the morning. Seeing Mr. L's condition, T L offered him a ride home, and he fell in with the others proceeding toward the parkade. Mr. L had no idea that any unpleasantness had taken place.

16. All this time Mr. C was nursing feelings of anger and resentment toward T L. On this trial, the Court had the benefit of evidence in the form of video images taken by cameras located within the parkade. Those images show events near the entrance to the parkade between the time of the confrontation outside the nightclub and the time of the incident which forms the subject matter of the charges. At various times during that twenty minute interval, Mr. C is seen walking about the parkade in animated fashion and talking on a cell phone. Taking that evidence together with the telephone records which were introduced into evidence and the reluctant testimony from AA, I am satisfied that Mr. C was speaking on H B's cellphone during that period.

17. It is common ground that Mr. C's telephone discussions led, directly or indirectly, to the Defendant getting into a cab at H B's apartment building a few blocks away and proceeding to the Red Jacket nightclub. The Defendant carried a loaded .38 calibre revolver. There was at least one other person with him, possibly two.

18. Upon arriving in the street outside the nightclub, the Defendant (and possibly one other person) got out of the cab. Another passenger remained in the cab, paying the driver.

19. Despite the fact that it was a warm summer evening, the Defendant stepped out of the cab wearing a pair of gloves and a hooded sweatshirt with the hood drawn up over his head.

20. The Defendant was met in the street by Mr. C, who was excited. Mr. C quickly directed the Defendant over to the parkade. T L and his group were just entering the parkade, but T L himself had been waylaid by AA, perhaps innocently, perhaps not so innocently. AA asked T L for a cigarette and engaged him in casual conversation.

21. As he approached the entrance to the parkade with the Defendant by his side, Mr. C began yelling excitedly. In this Court, a number of witnesses attempted to repeat the words spoken by the Defendant. As will become apparent later in these Reasons, I do not apply equal weight to the testimony of all of the various witnesses. Most of them were trying to be honest in their evidence; some were not. Some of those who were trying to be honest were better placed than others to hear what was said. Some simply have better memories than others. For all these reasons, it is difficult to be precise about what Mr. C was yelling, but the essence of it is clear. He was encouraging the Defendant to shoot TL.

22. The Defendant drew the revolver from the pocket of his hoody and pointed it directly at T L from a distance estimated variously between 10 to 20 feet.

23. As the Defendant was nearing View Street in the taxi, T L's companions had begun to enter the parkade and had walked a few steps up the ramp leading to B K's vehicle. When AA came up to speak to T L, they momentarily left him on his own at the entrance to the parkade. Hearing the commotion which developed almost immediately thereafter, however, they quickly returned to the parkade entrance. Unfortunately, they did so just as the Defendant was arriving.

24. For a brief period of seconds, there was a standoff. The Defendant stood pointing the gun at T L, whose friends were now standing close by him. Mr. C continued to yell at the Defendant to shoot.

25. The Defendant said nothing, but P T spoke. Perhaps he did not believe that the Defendant's gun was real, or perhaps he was attempting to defuse the situation. It will never be known what he had in mind. In any event, he either said: "Yeah, do it" or "If you are going to shoot him, you will have to shoot me first", or perhaps both those things, and he moved somewhat into the path between the gun and T L.

26. The Defendant fired and hit P T with a single shot almost directly in the centre of the chest. Mr. T fell to the ground and was dead within minutes, perhaps seconds. The Defendant paused only briefly before firing twice more. The first of those two shots struck T L in the chest, on his left side. He too fell to the ground, seriously wounded. The next and final shot struck R L. Mr. L had instinctively turned slightly to his left, so that the shot caught him initially in the upper right arm. The bullet passed through his arm into his right chest area before passing right through his body and exiting out his right upper back. He too was injured, but to a lesser degree than T L.

27. The Defendant and Mr. C both turned and fled. Mr. C commanded AA to leave the scene and she departed in haste as well. Before leaving the immediate area, the Defendant tossed the revolver into a nearby bush. Others saw him doing so, however, and the police, who arrived on the scene literally within a minute or two, retrieved the gun in short order.

28. After running a few blocks, the Defendant and Mr. C hailed a cab and directed the driver to return to H B's apartment. They had only traveled part of the way there, however, when they were spotted by a quick-thinking police officer and arrested. There is no evidence that the Defendant was under the influence of drugs or alcohol at any time relevant to this case.

29. The Defendant does not deny that he shot each of the three victims. Nor does he deny that he is guilty of the second degree murder of P T. He denies, however, that Mr. T's murder was "planned and deliberate" so as to constitute first degree murder. He also denies that he had the specific intent to kill which is necessary to substantiate the charges of attempted murder with respect to T L and R L, and maintains that on those charges the Crown has only proved that he committed aggravated assault.

30. The issues which the Defendant disputes must now be resolved by a more careful and detailed analysis of portions of the evidence, in light of the established legal principles.

PLANNING AND DELIBERATION

31. As noted above, the Defendant accepts that the evidence proves that he murdered P T, pursuant to s. 229 of the Code. That section provides:

- 229. Culpable homicide is murder
    - (a) where the person who causes the death of a human being

- (i) means to cause his death; or

- (ii) means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not.

32. The Defendant does not concede that he intended to cause P T's death, but he accepts that in shooting Mr. T in the chest at close range he meant to cause him bodily harm, and he accepts that he was reckless as to whether death would ensue or not. Thus, he concedes that his actions bring him within the wording of s. 229 (a)(ii).

33. I will leave for the moment the question of whether the Defendant's culpability may also arise from the application of s. 229 (a)(i), on the basis that the Defendant actually meant to cause P T's death. I will also leave to one side the possibility that the Defendant may have committed murder by intending to commit murder upon T L but killing P T by mistake. In such circumstances, section 229 (b) would render the Defendant liable for the murder of P T notwithstanding the fact that his intended target was someone else.

34. For purposes of the present argument, it is not necessary to show if either alternative methods of committing murder apply to the Defendant's situation. It is sufficient to note that the offence of murder is proved against the Defendant one way or the other.

35. Section 231 provides that murder is either second degree murder or first degree murder. The issue that must be determined now is whether the murder is elevated to first degree murder, pursuant to s. 231 (2), on the basis that the evidence shows beyond reasonable doubt that the necessary elements of planning and deliberation have been proved.

36. It is well-established law that the words "planned" and "deliberate" used in the murder provisions of the Criminal Code have separate and independent meanings. R. v. More, [1963] S.C.R. 522.

37. The classic definition of the words is to be found in R. v. Widdifield (1961), 6 Crim LQ 152 (Ont. H.C.J.), where Gale, J. (as he then was) is quoted as having charged a jury in the following terms:

- I think that in the Code "planned" is to be assigned, I think, its natural meaning of a calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed. But that does not mean, of course, to say that the plan need be a complicated one. It may be a very simple one, and the simpler it is perhaps the easier it is to formulate.

- The important element, it seems to me, so far as time is concerned, is the time involved in developing the plan, not the time between the development of the plan and the doing of the act. One can carefully prepare a plan and immediately it is prepared set out to do the planned act or, alternatively, you can wait an appreciable time to do it once it has been formed.

- As far as the word "deliberate" is concerned, I think that the Code means that it should also carry its natural meaning of "considered", "not impulsive", "slow in deciding", "cautious", implying that the accused must take time to weigh the advantages and disadvantages of his intended action. That is what, as it seems to me, "deliberate" means.

38. That definition has been adopted as authoritative in this province many times. Counsel have referred me to the decision of the British Columbia Court of Appeal in R. v. Plewes, [2000] B.C.J. No. 832 as an example.

39. In order to succeed on a charge of first degree murder it is incumbent upon the Crown to prove specifically that murder was the object of the plan and not some lesser offence. R. v. Palmer (1986), 24 C.C.C. (3d) 557 (Ont. C.A.); R. v. Pritchard, [2002] B.C.J. No. 2964 (S.C.), at paragraph 58.

40. A good illustration of this point is to be found in R. v. B.K., [2007] N.J. No. 188 (NLCA). The issue in that case was whether the accused had been properly committed for trial on a charge of first degree murder at the conclusion of a preliminary inquiry. There was evidence that the victim, named Brace, died as a result of a beating inflicted by the Appellant B.K. and others. There was also evidence that some time before the beating occurred the Appellant said, "I'm going to get him tonight", and "I'll hit him if you want me to".

41. The Appellant's committal for trial on the first degree murder charge was upheld on a certiorari application to the Trial Division of the Supreme Court. The Supreme Court decision in turn was appealed to the Court of Appeal. In determining that the Appellant should have been committed for trial only on a charge of second degree murder, the Court of Appeal said this at paragraph 14:

- 14. [F] or B.K. to be committed to stand trial for first degree murder there would also have to be some evidence that he planned and deliberated to "cause [Mr. Brace] bodily harm that [B.K.] knows is likely to cause [Mr. Brace's] death. ..."

42. The Court of Appeal went on to say this at paragraphs 16 and 17:

- 16. While the evidence that B.K. had said "I'm going to get him tonight" and "I'll hit him if you want me to" supports the inference that B.K. planned and deliberated to cause bodily harm to Mr. Brace, those words, even in the context of the evening in question, are not evidence that B.K. planned and deliberated to "cause bodily harm that he knows is likely to cause [Mr. Brace's] death. ..."

- 17. The requisite intent for first degree murder is not made out where there is planning and deliberation to carry out an assault and then (in the course of an assault that causes death) the assailant means to cause death or to cause bodily harm and is reckless whether death ensues or not. As set out by the Supreme Court of Canada in Nygaard, what is required is to plan and deliberate to cause death or "to cause bodily harm that [one] knows is likely to cause death. ..." Evidence of such planning and deliberation is absent here.

43. Direct evidence of planning and deliberation is often difficult to come by. By their very nature, plans to commit murder are usually concocted in secretive fashion, with care being taken to ensure that traces of direct evidence are not left behind. It is therefore not at all uncommon for the Crown to try to prove planning and deliberation through indirect, circumstantial evidence. Thus, in R. v. Mitchell, [1964] S.C.R. 471, Spence, J. said this at page 5:

- Planning and deliberation involve the exercise of mental processes. Because of that, in almost every case where the jury is required to reach a conclusion as to whether or not a murder was planned and deliberate on the part of the accused, it must reach a conclusion on the basis of evidence which is circumstantial.

44. In the present case, the direct evidence of planning and deliberation to commit murder is sparse indeed.

45. It is clear that Mr. C was angry as a result of the confrontation with T L outside the nightclub and that he expressed a wish to carry on the dispute in some fashion. That evidence, of course, is not proof against the Defendant, who was not present at the time of the altercation. The evidence may be taken only as demonstrating that Mr. C was in a frame of mind which could easily have led him to try to seek the assistance of others to become involved in some way in his dispute. As I have noted, other evidence indicates that Mr. C was one of the leaders of a group of young people to whom he might be expected to turn in such circumstances.

46. It is acknowledged that Mr. C's telephone communications led to the Defendant arriving at the scene in a taxi. It can safely be inferred that Mr. C, using H B's phone, made contact with someone answering K S's phone, as a result of which someone using another of Mr. Schmidt's phones made arrangements for a taxi cab to arrive at H B's apartment. That taxi cab then transported the Defendant to the area of the Red Jacket nightclub.

47. Beyond that, however, the direct evidence is murky indeed. H B and K S both testified on this trial, but only reluctantly and without making the least effort to cooperate in providing useful information. I have no doubt that the Crown anticipated that these two witnesses would be next to useless in any effort to discover details about the telephone calls, but the Crown cannot be faulted for calling them to testify nonetheless. The Crown was bound to do so or risk being faced with argument that the prosecution was being less than open with the Court.

48. The fact remains, though, that the net effect of all of the testimony is that the Court has no direct knowledge as to who received Mr. C's telephone calls or what message Mr. C conveyed to that person or persons. It follows that there would also be a complete absence of direct evidence about what message was conveyed to the Defendant to cause him to take the taxi cab into town that night.

49. I think it is of some significance to pause for a moment and reflect on the circumstances which were prevailing outside the nightclub at around the time that Mr. C was speaking on H B's cellphone from the parkade. Once his confrontation with T L outside the club had ended, Mr. C retreated to the parkade and could only see T L and his group with difficulty. A significant number of people were still milling about the area. Mr. C was in no position to predict where T L and his friends might go, or even whether they would even remain long enough in the vicinity of the club to enable a renewal of the dispute to take place. In those circumstances, it would be difficult to imagine Mr. C on the cellphone piecing together any sort of murder plan which could be described as a "calculated scheme or design" that had been "carefully thought out", to adopt the terms used in the Widdifield definition. That is not to say that a calculated scheme could not have been hatched in that way; it is simply to cast some doubt on its likelihood.

50. The Crown maintains, however, that the evidence which emerges from later events indirectly proves that the phone calls resulted in the Defendant being committed to a plan of murder before he alit from the taxi cab on View Street. I must therefore turn to consider the inference to be drawn from that later evidence.

51. I am bound to say that I do not find the evidence about the conversation in the taxicab en route to the scene to be of any assistance at all in resolving this issue. The cab driver testified that he overheard one of his passengers repeatedly asking one of the other passengers, who was using a cellphone: "Are they still there? Are they still at the Red Jacket?" Assuming for the sake of argument that the questions are to be taken as having been a matter of interest to all of the passengers in the cab, the content says very little about the state of mind of any of them. It merely suggests that the passengers were hoping to meet up with someone at the Red Jacket, who might have moved on. It certainly does not suggest that they intend to murder someone or some persons at the Red Jacket. I would only add that the use of the word "they" in the cab driver's evidence is ambiguous. In the context used, it could refer to one person or to more than one person.

52. The Defendant's physical appearance once he got out of the cab on View Street, to which I have already referred, and the fact that he was carrying a loaded gun suggest very strongly that he had every intention of becoming involved in criminal activity of some sort. Murder is one possibility. Others which spring to mind are assault, threatening, or even forcible confinement and kidnapping.

53. It is also clear that Mr. C expected the Defendant's arrival. I infer from the testimony of J Oand T Y that Mr. C in particular became excited at the Defendant's arrival and came part way out into the street to meet him and direct him back to the parkade entrance.

54. AA's response to the Defendant's arrival, at least as she described it, was quite different from Mr. C's response, but just as telling in its own way. Despite the fact that she had been the Defendant's girlfriend for some time and was on good terms with him, she testified that she began to walk away from the front of the parkade when she saw him coming. She certainly appears to have made no effort to greet him. In the circumstances, her behaviour suggests that she knew that the Defendant had arrived on the scene to commit some unlawful act and that she was uncomfortable as a result.

55. I would go further. The video images from the parkade reveal that AA was in the immediate vicinity at various times when Mr. C had been on the phone before the Defendant's arrival on the scene. After viewing the video images, it is difficult to escape the conclusion that she must have known something of what Mr. C was discussing at the time, even if she did not realize who Mr. C was talking to or who was being summoned to the scene. Her reaction upon seeing that it was her boyfriend, the Defendant, who had arrived in the taxi can fairly be taken as showing that she was uncomfortable that he was about to become involved in an incident involving violence of some sort.

56. Once the Defendant got out of the taxi, he moved quickly across View Street to the front of the parkade. There was no hesitation. The witness C M, who observed the entire incident, estimated that a period of only one to two minutes elapsed during the time that the Defendant got out of the taxi, shot the victims, and then ran off. I accept that evidence, at least as a rough estimate of time. It coincides with the taxi driver J H's evidence that the shootings were completed before he had even finished making change for the passenger remaining in his cab. In addition, it is clear from the video images that the Defendant was in the immediate presence of the victims for only a period of about 25 seconds, including the time when the shootings occurred.

57. On the basis of all of the evidence, therefore, it is safe to say that the Defendant approached his task immediately upon getting out of the taxi. I accept the Crown's assertion that he moved in the manner of a person who had a purpose in mind before he ever arrived on the scene. That purpose plainly involved, at the very least, meeting up with his boss Mr. C and doing something, likely something violent and illegal, at Mr. C's behest.

58. The Crown asks that I take the further step of concluding that the remaining events at the crime scene prove not just a pre-arranged plan to engage in criminal violence of some sort involving a loaded gun, but specifically to engage in murder. The resolution of that issue involves a close analysis of the testimony concerning events that occurred in the few seconds before the shooting, including reference to words spoken.

59. A number of witnesses testified concerning the relevant events and, again, the evidence is seriously conflicting. As a result, it is exceedingly difficult to reach precise conclusions about what happened. Nonetheless, the attempt must be made.

60. The first witness to testify concerning the brief period before the shooting occurred was B K. Mr. K is a very close friend of T L and through T L he knew P T. In his testimony, he acknowledged feeling some anger toward the Defendant as a result of this incident and he acknowledged his opinion that the Defendant should be punished to the full extent that the law allows if he is found guilty.

61. In view of B K's perspective on the matter, which is hardly surprising, I have analyzed his evidence with great care. I have also noted that there are some minor discrepancies in his testimony. His evidence regarding the type of drink which he consumed that night, for example, varies from what he said in an earlier statement to the police. In addition, there is some unresolved, collateral evidence about a conflict he may have had with another Crown witness, suggesting that his anger about this case is perhaps deeper than he lets on.

62. By and large, though, I found B Kto be a sincere witness who was trying very hard to be accurate. He was sober at the time of the relevant events, being the designated driver for his friends, and he appeared generally to be a calm and methodical witness. When giving evidence in response to questions from either counsel, he was careful and responsive, and he provided precise, articulate testimony. If there is a reason to question his reliability as a witness, it stems more from the inherent difficulty of recalling fast-moving and traumatic events rather than from bias or any other source of error.

63. As the final seconds ticked away before the shooting Mr. K was returning to the entrance to the parkade, and he then stood in close proximity to his friends. He was thus also very well positioned to describe what happened.

64. Mr. K testified that his attention was first drawn to this final confrontation when he heard Mr. C yelling loudly and aggressively in the street outside the parkade. Mr. C was repeating words to this effect: "Who says Red Scorpions ain't shit?"

65. I have some doubt that Mr. C repeated those words as often as B Know recalls. If there had been such extended repetition, others would likely have fastened on the words in their evidence. I do accept, however, that Mr. C yelled something about Red Scorpions, since those words recur in the testimony of others, as I will point out in a moment.

66. According to B K, the Defendant then yelled the following words repeatedly at the Defendant: "Shoot him, shoot him", while pointing at T L. I accept that testimony. I am not certain whether the gun was already drawn when those words were first spoken or, as B Ksays, it came into sight afterwards. I do not think it much matters because I am convinced, on reviewing all of the evidence, that Mr. C knew in any event that the gun was present.

67. In any case, once the gun was drawn, I accept B K's testimony that it was pointed directly at T L at chest level.

68. In his testimony, and after being taken through the video images at some length, B Kaccepted defence counsel's suggestion that P T moved before the first shot happened. That movement is, I find, consistent with the tenor of his recollection about words that Mr. T was uttering at that point. In B K's testimony, those words were: "If you are going to shoot him, you will have to shoot me first". Those words, or something like them, may well have been said, although it is difficult to reach such a conclusion with certainty.

69. I accept B K's testimony that the Defendant then hesitated briefly. His gun was drawn, Mr. C was yelling at him with increasing vigour, P T was speaking, and there was at least some movement in front of him. After a few seconds' hesitation he fired the gun.

70. B Kthought four or five shots were fired, but the evidence demonstrates conclusively that the gun only discharged three bullets. Mr. K does not know who was hit first, but (as I have already noted, and will comment on further) I find that Mr. T was the first victim. I note that both counsel made submissions to me on that basis.

71. The witness R L was in close proximity to B Kin coming down the ramp from inside the parkade immediately before the shooting. Mr. L continued to the front of the parkade to come up right beside T L and P T, however, where B Kseems to have stopped a few feet short of his friends' location. Mr. L, thus, was also in a good physical position to make observations and hear what was said. On that basis, his testimony is entitled to careful consideration.

72. According to Mr. L, the first words he heard Mr. C speak were: "This is the guy I want you to shoot", referring to T L. Those words were followed by the words "shoot him, shoot him" repeated at least five times, with increasing desperation as the Defendant hesitated.

73. It is possible to interpret the initial words which R L claims to have heard as confirming that there was a pre-arrangement between the Defendant and Mr. C concerning the shooting of T L. On careful reflection, however, I do not have sufficient confidence in Mr. L's testimony to accept that those words were necessarily spoken in precisely the manner described by the witness. It should be noted that only a slight variation in the wording removes the implication of pre-arrangement. For example, if the words were: "I want you to shoot this guy" the implication is gone.

74. I have several reasons for being cautious with R L's testimony. Like everyone else at the scene, he was experiencing fast-moving and shockingly unexpected events. Unlike some others, however, he was also quite intoxicated at the time, by his own

assessment and by the assessment of others. It may well be that when Dr. Buchanan saw him some time later, after he had been shot, he created a different impression, but that does not alter the fact that those who saw him at the scene were immediately struck by his level of inebriation.

75. I also note that Mr. L has faced difficulties over the past year when attempting to precisely describe to the police what he heard. He himself feels some resentment at the way the police took a statement from him in the autumn of 2008. He says that he said many things at that time because he misunderstood the nature of the police focus. He believed they were attempting to assist him to reconstruct events by a process somewhat like "free association", without the necessity of being precise about every word he spoke. He thus feels some annoyance about being confronted with his own comments, made to the police, that he was "in a drunken stupor", for example. However that may be, it does not inspire confidence in the precise details of his present version of events.

76. I note that in his statement to the police, Mr. L stated that he thought he heard Mr. C tell the Defendant at one point to "shoot him in the leg", again referring to T L as the target. Mr. L agrees that he did say that to the police, but now does not recall those words being used by Mr. C at the scene. He is at a loss to know why he would say such a thing to the police.

77. Interestingly, the phrase "shoot him in the leg" comes up in other testimony, and I will refer to it again momentarily. In his evidence, Mr. L did not agree that he heard those words, and so that is not evidence emanating from him. The only reason I mention the issue at this stage is to point out the difficulties which arise when I am asked to accept the precise detail of Mr. L's version of the words spoken immediately before the shooting. It is apparent that Mr. L has said different things at different times, for reasons which may be perfectly innocent but which are nonetheless troubling. I accept his testimony to this extent: 1) His evidence confirms that Mr. C pointed out T L as the target and directed the Defendant to shoot at T L; and 2) Mr. C's direction to the Defendant to fire the gun at T L had to be repeated many times because the Defendant did not immediately respond.

78. The witness J Owas on duty as a doorman at the Red Jacket on the night when these events happened. After the 2:00 am closing time, he was standing outside the club generally keeping an eye on the dispersing crowd. He spoke casually to T L on the opposite side of the street from the club. He knew T L as a patron of the club and as a friend of one of the other doormen. In conversation with T L, he became aware that T L had been involved in some kind of minor unpleasantness with persons who were now standing over by the parkade. T L and his group then walked away heading toward the parkade. The impression is that Mr. O was not particularly concerned about the possibility of further hostility developing.

79. Shortly afterward, Mr. O saw the Defendant step from the taxi. Mr. O had not had anything alcoholic to drink and he was not a particularly close friend to any of the participants in the shooting incident. Those facts, together with the fact that he observed the entire incident at close range, dictate that his testimony about what happened once the Defendant was on the scene should receive considerable weight.

80. At the same time, though, it is apparent that the rush of traumatic events has had some effect on Mr. O'Rourke's ability to observe and recall with complete accuracy. There are some points where his testimony diverges from indisputable fact and he is clearly wrong. He did not, for example, see R L standing beside the other two victims in front of the parkade, although it is obvious that Mr. L was there. Nor did he hear Mr. C say anything about "Red Scorpions" as events began to unfold, although I think those words were uttered.

81. The first words which Mr. Oheard were "shoot him, shoot him". Those words were spoken by Mr. C as he pointed at T L, now standing on the sidewalk outside the parkade. Mr. C was "yelling" and "agitated" as he repeated those words three or four times. Mr.O saw the Defendant remove a gun from his hoody, hold it at his side for a second, then point it directly at T L's chest. There was a pause lasting less than ten seconds, during which P T moved somewhat in front of T L and uttered words which Mr. O heard as: "Do it". The Defendant then fired three times. The first shot struck Mr. T, the second struck T L, and Mr. O does not know what became of the third shot. Mr. O was clear and accurate in noting that the shots totaled three in number.

82. J O's fellow doorman, T Y, also testified. He also was in the street at the time of the shooting and was attempting to monitor the actions of those who had left the club at closing time and were milling about outside. Like James O'Rourke, T Y was completely sober and, I find, was trying to be an honest and reliable witness.

83. T Y's evidence suffers from greater frailties than the testimony of his co-worker, however. In part, that may be because he was a very close friend of P T, and remains close with T L. That is not to say that Mr. Y has deliberately shaded his evidence. I think it is more accurate to conclude that because of his closeness with the victims he has probably heard a lot about this incident from others and has become aware of bits and pieces of information from time to time about what others may have seen or heard. Over time, I suspect that he has become uncertain about what he actually witnessed himself and what he has heard from other sources. With that concern in mind, I confess to some hesitation in accepting Mr. Y's testimony on important points where his recollection diverges from the testimony of others or diverges from evidence which can be independently verified as accurate.

84. T Y testified that Mr. C began his exhortations to the Defendant with the words: "It's these guys causing shit", referring to T L and his group at the entrance to the parkade. No other witness heard these precise words uttered, and I note that later in his testimony T Y said that he only "thought" those were the words he heard. The sequence of events as shown on the parkade video camera makes it rather unlikely that T L's group had yet assembled together at the entrance to the parkade when Mr. C began to direct the Defendant, making it also unlikely that Mr. C would be able to point to "these guys" at that stage. For all these reasons, I am unable to conclude, as a fact, that Mr. C's opening words to the Defendant were as described by T Y in his testimony.

85. Mr. Y went on to testify, rather more convincingly, that he then heard the words: "Shoot him, shoot him", repeated several times. The Defendant pointed the gun at T L and paused for a time. Mr. Y maintains that before any shots were fired he heard H B yell out: "Bust him in the leg" and then P T said both "do it" and "If you are going to shoot him you will have to shoot me first".

86. T Y's evidence regarding the words spoken immediately before the shooting has changed considerably over time. In an earlier statement to police, he indicated that he believed that the words "shoot him, shoot him" were being yelled simultaneously by AA, H B and Mr. C, whereas he now attributes those words solely to Mr. C. In that same statement, he told the police investigators that he thought the same three persons had all been yelling "bust him in the leg" as well.

87. Mr. Y testified at Mr. C's preliminary inquiry. Neither at that inquiry nor in his statement to the police did he mention that P T uttered the words "If you are going to shoot him you will have to shoot me first" before the shooting began. When cross-examined by defence counsel here about that omission he conceded that a friend had recently told him about seeing that headline in the local paper.

88. I also noted that during cross-examination Mr. Y seemed to recall that T L had stood between P T and the Defendant, with the result that T L was the first victim of the shooting. The weight of the evidence, it seems to me, is to exactly the opposite effect. T Y has reversed the positions of the two individuals and the order in which they were shot.

89. In the final analysis, I do not feel comfortable drawing any conclusions from T Y's testimony concerning the words spoken immediately before the shooting, except as follows:

- 1. The words "shoot him, shoot him" were repeated several times by Mr. C; and
- 2. Mr. C may have said something about shooting T L in the leg.

90. Both of those conclusions are based on the fact that those items of evidence are corroborated by others whose evidence I accept on these points.

91. J Mwas another Red Jacket employee who testified on this trial. He was standing outside the club on the sidewalk, eating a hot dog, when he became aware of a commotion occurring "a bit more than 15 feet away". The commotion consisted of raised voices and Mr. Mdid not see or hear how it all began. When he looked toward the sound, he saw the Defendant pull out a gun and raise it to chest height. Then he heard Mr. C yell: "Shoot him, shoot him, just fucking shoot him". He did not hear any other words spoken before three shots were fired in rapid succession.

92. Mr. Mis a reliable witness. He does not claim to know any of the persons involved and he had had nothing to drink himself. As mentioned, however, he only witnessed the last part of the period that I am considering. I do not doubt his evidence, as far as it goes, with respect to the words spoken before the shooting.

93. The final nightclub employee who testified was C M. As I indicated to counsel during submissions I had a great deal of difficulty with Mr. M's evidence. It seemed to me that he made some significant, though perhaps unconscious, assumptions when he testified and he was demonstrably wrong on other matters. For example, he initially testified that he saw two males and a female get out of the taxi, all wearing hoodies. He later changed his evidence to say that only one had a hoody for certain. He cannot be correct that there was a female in the cab with the Defendant, even though he was not challenged on the point. He went on to say that the person from the cab wearing the hoody was yelling at one of his companions to shoot. That must be wrong, as well, and it is a matter of central importance.

94. In view of the significant problems with Mr. M's testimony, I do not place any weight on his version of what was said before the shooting, or by whom. He may well be correct on some matters, but I would have no confidence in relying on his version of events where it is not confirmed by other testimony which is verifiably correct.

95. For very different reasons, I also assign little or no weight to anything which AA told me regarding the events or the words spoken immediately before the shooting. Her life was emotionally intertwined with the Defendant at the time and she is no doubt also bound by ties of loyalty to, if not outright fear of, Mr. C. Her description of events outside the nightclub generally contains enormous gaps and inconsistencies when compared with evidence which I accept as reliable, such as the evidence from the parkade video or, generally, the testimony of R K. Her stated reasons for the gaps in her recollection are multiple in nature and all of the most doubtful variety, suggesting that she was deliberately being less than candid as a witness.

96. AA did provide a sparse and scattered description of the events which occurred at the time of the shooting and immediately before that, but I only accept her evidence to the extent that it is confirmed by other evidence which I find to be reliable.

97. The final witness whose evidence touches upon the crucial issue of possible inferences to be drawn from events immediately preceding the shooting is R N. Mr. N, like Mr. L, came upon the scene on View Street entirely by accident. Unlike Mr. L, however, he had not been drinking. He was in the habit of going for a walk late at night because he had difficulty sleeping.

98. Mr. N clearly faces some challenges to his physical health. He testified that he suffers from depression and anxiety, as well as the effects of an earlier addiction to illicit substances. None of these problems appeared to undermine his effectiveness as a witness, however. I find that his recollection of the earlier portions of the events in particular is deserving of considerable weight, even though his testimony is demonstrably less than perfect on some points.

99. I do accept as accurate Mr. N' observation that two people ran across View Street to the parkade to commence the final, fatal altercation. Those two people were the Defendant and Mr. C. I also accept that he heard one of those persons, who I find to be Mr. C, to yell out a phrase which contained the word "Scorpion". I find the fact that he has remembered it as merely "scorpion" rather than "red scorpion" actually adds an element of integrity to his evidence on the point. Plainly, he has no knowledge of any possible gang connotations connected with the term "red scorpions".

100. Mr. N then heard Mr. C yelling directly at his companion, the Defendant. He says that he heard the words "Shoot him, shoot him in the leg" and then the words "shoot him" several more times. When pressed, Mr. N confessed uncertainty as between the words "shoot him in the leg" and "shoot him in the knee". In my view, it is quite natural for him to be uncertain on this point. The impression left is that he has remembered the words by their general meaning rather than by rote.

101. Whatever the precise words used, the reference to a specific area of the body to be targeted featured prominently in Mr. N' recollections. I must say that I have a difficult time indeed discounting the gist of his recollection, quite apart from the fact that the same general theme about shooting in the leg arose elsewhere in this trial.

102. I am bolstered in my respect for Mr. N' testimony on this point by the simple clarity with which he described other matters happening at virtually the same moment. He was asked, for example, if those on the sidewalk, who ultimately became the Defendant's victims, were speaking before they were shot. In responding to that question, he incorporated as accurate a statement he earlier made to the police, in which he said those on the sidewalk may have uttered words like: "What are you doing?" He followed up that comment by remarking, in what seemed to me to be completely unvarnished candour: "I am not sure exactly sure what they said. They seemed startled, but I think they said something". That is my note of his testimony and it may not be precisely accurate.

103. Mr. N' testimony coincides well with other evidence which is undeniably true. He heard three shots. The first shot struck the Asian man who was nearest the shooter, and the second struck the Asian man who fell back against the booth of the parkade. The third shot hit "the chunky white guy". His estimates of the relevant distances are also very close to the police estimates and to the reliable testimony given by witnesses such as B K.

104. If Mr. N testimony concerning the demand from Mr. C to the Defendant to shoot the victim (or victims) in the lower extremities had been more fully confirmed by other reliable witnesses I would feel more comfortable in accepting it as factual. As it is, I find that I am at least satisfied that there is a reasonable possibility that those words were spoken.

105. To summarize generally, I have concluded that the evidence concerning the events immediately preceding the shooting is so conflicting and the credibility of the witnesses so variable that it is not possible to make wide-ranging findings of fact. In the end, though, I do find the following facts to have been proven:

- 1. Mr. C, AA and H B all knew ahead of time that somebody would be arriving in a taxi to engage in some sort of violent reprisal upon T L involving a gun;

- 2. When the Defendant arrived, Mr. C ushered him very quickly to the front of the parkade and identified T L as the target;

- 3. By the time Mr. C and the Defendant took up their positions on the roadway facing T L, P T and R L, Mr. C had begun yelling at the Defendant with increasing intensity. His initial words, perhaps directed to the Defendant or perhaps directed to others, contained a reference to "red scorpions".

- 4. At some stage, although it is not clear when in relation to the verbal barrage from Mr. C, the Defendant pulled out the gun from his hoody and pointed it directly at T L, as ordered.

- 5. The Defendant then hesitated for a few seconds and Mr. C's demands became louder and more insistent. Mr. C may have mentioned shooting T L in the leg in the course of his general direction to the Defendant to fire the gun.

- 6. P T said something to the Defendant, either because he did not understand the seriousness of the predicament he was in or out of a desire to defuse the situation, and he moved to a position somewhat in front of T L.

- 7. The Defendant fired once, striking P T and killing him. He hesitated briefly before firing and hitting T L, then firing again and hitting R L.

106. It is on the basis of these facts, in the context of the case as a whole, that I am asked to conclude that there was a pre-arranged plan between Mr. C and the Defendant to commit murder. I do not find that the facts allow that conclusion to be reached, at least not to the level of proof beyond reasonable doubt. There may have been such a plan, but that is about as much as I can safely say. There are several specific reasons why I have reached this conclusion.

107. One of the constant themes in the testimony which I have described is the manner in which Mr. C spoke to the Defendant once the two of them arrived at their final location in the street outside the parkade. Mr. C did not provide direction to the Defendant in the measured way that one might expect if there was a plan in place. On the contrary, Mr. C is described as yelling frantically, in ever louder and more aggressive tones for the Defendant to shoot. Phrases like "shoot him, shoot him, just fucking shoot him" suggest to me that this was a desperate and decidedly unplanned act of aggression. The clear implication is that the Defendant was not prepared; he had to be urged in the most aggressive manner to commit the act which Mr. C wanted done.

108. I also note with interest that Mr. C never used the words "Kill him", but rather "shoot him". The distinction is of some significance in the circumstances of this case. If Mr. Ccoupled those words with the phrase "shoot him in the leg" or "shoot him in the knee", as he may have done, it becomes even less obvious that either of these two assailants had a clear plan in mind to commit murder.

109. There is at least one further consideration. The Crown theory is that as a result of the earlier dispute between Mr. C and T L, Mr. C and the Defendant concocted a plan to murder T L. The weight of the evidence indicates that once the Defendant was at the scene Mr. C directed his attention to T L specifically. Having pointed T L out to the Defendant, Mr. C repeated the words "Shoot him!" over and over. He did not ever say "shoot them!". Yet when the Defendant fired the gun he shot not only T L, but also P T and R L. That turn of events suggests several possibilities. One of those possibilities is that the Defendant did not ever have a very clear idea of any plan. Given the extensive conflicts in the evidence in this case, it is difficult to discount that possibility.

110. Finally, I must confess that I have difficulty reconciling the notion of "calculated scheme or design which has been carefully thought out" (to borrow from Widdifield once more) with the use of taxi cabs in this case. I appreciate that a plan does not have to be clever and it need not incorporate an escape mechanism after the crime happens, but nonetheless I must seriously question the extent to which any sort of calculated scheme could co-exist with a decision to take a taxi to the scene of a killing, followed by a blundering attempt to hail another taxi in hopes of returning to the very same apartment where the first taxi ride began.

111. In a related vein, I must say that I am also struck by the circumstance of the passenger who found himself still in the taxi when the shooting happened. On the Crown theory, this person, whoever he may be, must surely have been just as much part of the killing plan as the Defendant. Yet when he discovers that a shooting has just happened he pleads with the taxi driver to just take him back to where he came from. There comes a point at which mere stupidity simply cannot be the full explanation for these events; it seems to me that this incident may be characterized just as much by lack of planning as by the "planning and deliberation" which the Crown asks me to find.

112. An alternate theory advanced by the Crown but not strongly pressed upon me at trial, was that even if a murderous plan was not in place by the time the Defendant stepped from the taxi on View Street it came into being before the Defendant took up his final position before the victims. The insurmountable problem with that theory, it seems to me, is that the conditions that presented

themselves to the Defendant once he got out of the taxi were simply not consistent with the formation of any sort of calculated scheme. The time was too short and emotions too heightened at that stage for there to be any realistic prospect for the formation of the sort of considered plan necessary to serve as the foundation for a first degree murder conviction.

113. For all of these reasons, I have concluded that the Crown has fallen short of proving the elements of planning and deliberation necessary to convert second degree murder to first degree murder in this case. Accordingly, I find the Defendant not guilty of first degree murder but guilty of the second degree murder of Pbert T.

ATTEMPTED MURDER

114. The offence of attempted murder is notoriously difficult to prove. In order to secure a conviction, the Crown must prove that the accused person had the specific intent to kill. It is not sufficient to show that the accused intended to cause bodily harm that he knows is likely to cause death and is reckless whether death ensues or not. R. v. Ancio (1984), 10 C.C.C. (3d) 385 (S.C.C.); R. v. Logan (1990), 58 C.C.C. (3d) 391 (S.C.C.).

115. The law generally allows a trier of fact to infer, however, that sane and sober persons intend the natural and probable consequences of their actions. Thus, if a person acts in such a way as to produce predictable consequences it may generally be inferred that he intended those consequences. R. v. Seymour, [1996] 2 S.C.R. 252, at paragraph 19.

116. Applying that principle to the use of handguns, it may ordinarily be inferred that a person who fires such a weapon from close range at a vital portion of the body of another person intended to kill that person. Thus, in R. v. Bains, [1985] O.J. No. 41 (C.A.); leave to appeal to SCC refused, [1985] 1 S.C.R. v., Cory, J.A. (as he then was) said at page 5:

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

117. Those words have obvious application to the present case. Estimates of distance show that the Defendant was perhaps 10 to 20 feet away from T L when he fired a .38 calibre revolver at him. He was much the same distance away from R L. He was only about half that distance away from P T.

118. The first victim, P T, slumped to the ground grasping at his chest immediately upon being hit. Yet the Defendant fired again. His second shot caused T L to fall back against the booth of the parkade, also grasping at his chest. Yet still the Defendant kept firing, striking R L in the arm and upper body. The sequence itself at least tends to suggest that the Defendant's intent was nothing less than the specific intent to kill the victims.

119. When analysing the Defendant's intent, it is also of some significance to note just how close both T L and R L came to actually dying. With respect to T L, the medical evidence was that only about half of those persons who suffer the type of injuries which he did even make it to hospital; of those who make it to hospital, the overwhelming majority die undergoing medical treatment. To paraphrase Cory, J.'s words from the Bains case referred to above, once T L was shot in the chest the only surprise is that he lived through his ordeal.

120. R L was even more fortunate. I gathered from the testimony of Dr. Buchanan that it was quite remarkable for a bullet to find a harmless passage through the upper body in the manner that occurred here. Obviously, the potential for R L's death was high.

121. The Defendant maintains, however, that if the Court takes into account all of the surrounding circumstances existing at the time of the shootings, a reasonable doubt must arise concerning the Defendant's intent. The Defendant points to the frantic atmosphere at that moment, specifically referring to the intense goading from his drug boss Mr. C, the victims' taunting and provocative comments, and then the last-second movement of P T toward him. He notes that the events happened in a very short space of time and that the victims were in close proximity to one another, such that there must exist a reasonable doubt about who the Defendant was shooting at and what he had in mind.

122. With great respect, I do not agree. Cory, J.A.'s words in Bains (above) are given special force if careful attention is paid to the details of the evidence regarding the Defendant's use of the handgun in this case.

123. The overwhelming weight of the evidence is to the effect that once the Defendant drew his revolver he extended his arm and pointed the gun directly at T L's chest. Thereafter the height of the gun never wavered.

124. I do accept that P T said something to the Defendant while the gun was in sight and I accept that it is likely that Mr. T made some movement, either sideways or forwards, immediately before the shooting which caused the Defendant to take a step or two backwards. Acceptance of that evidence does not, however, lead to the conclusion, or even the reasonable possibility that the Defendant lost his composure or his focus on the task at hand.

125. On the contrary, the evidence is virtually consistent that the Defendant did not waver, but instead proceeded to direct his weapon methodically and deliberately toward each of the victims individually before firing.

126. As I have already described there are undoubted weaknesses in the evidence of each of the witnesses to whom I am now going to make reference. I am aware of those general weaknesses, but at the same time there is obvious weight to be given to particular items of testimony which are provided with consistency from several sources and not specifically refuted.

127. B Ktestified to his observation that when T L shifted his feet a few steps to left and right in the few seconds before he was shot, the Defendant followed his motion with the gun, always maintaining the gun at the same height.

128. J Ogave evidence that the Defendant pointed his gun at T L's chest, but then P T stepped in the way, saying "do it". According to James O'Rourke, the Defendant fired and hit Mr. T, then he moved his arm to one side and shot T L. Then he moved his arm again, without ever changing the height of his aim, and fired the shot which I find hit R L. It is true that J Odid not actually see R L and did not see him get hit, but in my view that is of no significance. The important point, it seems to me, is that the witness described a deliberate movement of the arm before each shot, and specifically denied the suggestion that the Defendant's aim appeared to be affected by the recoil of the gun itself.

129. The witness T Y also described how the Defendant's gun moved methodically after each shot, with the height remaining the same. It was pointed out to the witness that he did not make this observation in his earlier statement to the police, but Mr. Y responded to that by saying that he did not believe the police had asked him about this specific point. I do agree, though, that Mr. Y's testimony on the point should be considered only with great reservation for several reasons, but most particularly because he described the shootings occurring in reverse order to the manner in which I have found that they happened.

130. The taxi driver J H also described the Defendant moving his arm "across" in deliberate fashion between shots. I appreciate that Mr. H was seated in his cab at the time, looking through the windshield, but he did have a clear view and may actually have been less emotionally involved because he was making observations from a position of relative safety. In any event, he was clearly transfixed by what was happening before him, and the details formed an indelible impression on his memory. Thus, he was quite clear and precise on other matters occurring at much the same time, such as, for example, in his recollection that the Defendant backed up a step or two before beginning to fire his gun. That detail is clearly confirmed by the evidence of the parkade video, and causes me to give added weight to his observations at the scene generally.

131. My earlier reference to the evidence of deliberate aiming of the gun being "virtually consistent" was, of course, deliberate. The evidence of R N in obviously to the opposite effect and must be considered.

132. Mr. N testified that after the Defendant shot "the closest guy" he did not appear to be aiming at any specific target. He said that the shooting thereafter appeared to be random, as if the gun was controlling the Defendant rather than the other way around. He mentioned the possibility of the gun recoiling in the Defendant's hand, causing it to move to the left with each shot.

133. I have already indicated that I accept significant aspects of the testimony given by Mr. N. On this point, however, I am bound to say that after careful consideration I must reject his testimony as simply inaccurate. There are certain obvious inaccuracies in Mr. N' recollections, right from the early stages of his observations. He is the only witness to describe both men from the cab (meaning the Defendant and Mr. C) as speaking when they arrived at the parkade, and on that point he must be mistaken. He also described the Defendant as wearing a sweatshirt with a green colour, an observation which is also patently wrong.

134. Mr. N then, is prone to inaccuracies, just as anyone would be when faced with a shocking and unexpected incident of this sort. With respect to the latter part of his observations, though, there is one other significant factor to consider. Mr. N testified that at or about the time the first shot was fired he began to back up in order to distance himself from the shooting. As he backed up, he tripped backwards over a curb and his attention was momentarily distracted. The effect was, to use his own words, that he saw the first shot "most clearly" but only saw the other shots "at 50%". As a result, it is my view that his testimony on the manner in which the gun moved between shots, which differs so markedly from the recollections of several other well-placed witnesses, must be rejected. It does not give rise to a reasonable doubt in my mind about what happened on this crucial aspect of the matter.

135. I also take into account the expert evidence which I have concerning the likely effect of recoil with respect to the particular type of .38 calibre revolver used by the Defendant on this occasion. In that respect, I refer to the evidence of Constable Kowan.

136. Constable Kowan testified that the Winchester .38 calibre revolver was designed for use by police officers at short range. It was specifically designed to have minimal recoil; any other specification would make it ineffective for its purpose. To the extent that recoil would occur, it would be in a vertical direction, assuming that the gun was held in the normal fashion, with the trigger facing down. The effect of this evidence, if accepted, is to seriously reduce the likelihood that the Defendant was using a weapon which was hard to control.

137. Defence counsel submits that there are significant weaknesses to Constable Kowan's testimony, and there is at least some merit to those submissions. I accept that the officer's evidence might have been a good deal stronger if he had actually fired the specific gun used in this case, or even another Winchester .38 revolver, rather than relying on his general knowledge of its properties. I do note, though, that there is no evidence to actually contradict the officer's testimony.

138. Faced with Constable Kowan's evidence, defence counsel suggested various alternatives to the witness which might affect the extent or direction of the gun's recoil. The most significant of these alternatives involved the possibility that recoil would be horizontal if the gun was held at an angle when fired. The officer did concede that in such circumstances there could be increased horizontal recoil, but I do not find that concession to be of any great significance for the simple reason that there is not a shred of evidence to suggest that the Defendant held the gun in that fashion. Virtually all of the witnesses who testified regarding the Defendant's handling of the gun described him as standing with his arm fully extended. None of the witnesses was asked whether the gun was held at an angle. In the absence of evidence to the contrary, I find that the Defendant held the gun in the usual fashion, with the trigger down. Any recoil that occurred then would have occurred in a vertical plane. Since all victims were shot at chest level the effect of gun recoil can safely be discounted.

139. In the end result, my review of all of the evidence I have concluded that the Defendant deliberately moved the direction of the gun from victim to victim as he stood only a few feet away from them on View Street. I do not know why he decided to shoot all three of the victims when it would appear that Mr. C was demanding only that he shoot T L, but I have no hesitation in finding that he did make that choice. It must be remembered that the Crown is not required to prove motive, only intent.

140. I appreciate that there were factors pressing the Defendant to make decisions quickly and to act upon those decisions. In the circumstances, it is likely that the formation of the intention to shoot to kill was not long in the making. The length of time is not the crucial factor, however. The essential issue is whether the Defendant made a deliberate, considered choice to kill each of the victims T L and R L before he fired the handgun. I find that he did so. They nearly died. That is because he intended them to do so.

CONCLUSION

141. With respect to Count 1, I find the Defendant not guilty of first degree murder but guilty of the second degree murder of Pbert T

142. With respect to Counts 2 and 3, I find the Defendant guilty of the attempted murders of T L and R L.

143. With respect to Count 6, I find the Defendant guilty of the offence of using a prohibited firearm in the course of the commission of an offence.

144. I do not expect that the Crown is seeking conviction on the two charges of aggravated assault, described in Counts 4 and 5, even though the elements of the two offences are obviously proved. Convictions may in any event be precluded by the principle in R. v. Kienapple, but I will hear submissions on the point if counsel wish.

E.C. BLAKE PROV. CT. J.