

Court of Queen's Bench of Alberta

Citation: R v Harris, 2019 ABQB 456

Date: 20190621
Docket: 170472963Q1
Registry: Grande Prairie

Between:

Her Majesty the Queen

- and -

Nicholas Richard Harris

Accused

**Reasons for Judgment
of the
Honourable Mr. Justice E.J. Simpson**

I. Introduction

[1] At about 1:00 am on the morning of October 1, 2014, outside the front entrance of the Canadian Brewhouse bar in Grande Prairie, Alberta, the accused, Nicholas Harris, fired two shots from a handgun which struck the deceased, John Rock, in the right leg and upper left chest.

[2] Mr. Rock collapsed near the northeast corner of a cement pad at the front of the bar.

[3] Taken to the Grande Prairie hospital, Mr. Rock received resuscitative efforts but was pronounced deceased.

[4] The accused, Nicholas Harris, faces a charge of first degree murder with respect to the death of John Rock. He has taken the stand and testified that he acted in self-defence.

II. Issues

[5] Has the Crown proven beyond a reasonable doubt that:

1. Nicholas Harris cannot avail himself of a defence of self-defence;
2. Nicholas Harris had the state of mind required for murder; and
3. Nicholas Harris planned to and deliberately killed John Rock.

III. Decisions

1. The defence of self-defence does not apply;
2. Nicholas Harris meant to cause the death of John Rock or meant to cause him bodily harm that he knew was likely to cause his death, and was reckless whether death ensued or not; and
3. Nicholas Harris planned to and deliberately killed John Rock.

IV. Facts

[6] The events before and after the shooting of John Rock do not, for the most part, give rise to any dispute. The following provides the factual context in relation to the killing of Mr. Rock.

[7] Both the accused, Nicholas Harris, and the deceased, Mr. Rock, at the time of the shooting, engaged in the trafficking of cocaine. Mr. Rock up until early July of 2014 would provide one-half or one kilogram amounts of cocaine to Mr. Harris on credit. Mr. Harris then broke the cocaine down into one or two ounce pieces.

[8] Ryan Stanley, 32 years of age at the time of the trial, knew Mr. Harris for about 18 years and worked for him for about two years before the shooting. Mr. Stanley would take the smaller pieces of cocaine from Mr. Harris, deliver the cocaine to another dealer in Grande Prairie, and collect money for Mr. Harris.

[9] Mr. Rock at the time of his death stood 6'4" tall and weighed 234 pounds. At times, he carried a handgun. On the evening of September 30, 2014, he had one in his possession. Sometime that evening prior to the time Mr. Harris shot him on October 1, 2014, he turned a handgun over to an associate, Michael Dier, telling Mr. Dier to put it away.

[10] Shortly after the shooting, the RCMP located Mr. Rock's abandoned truck. During the search of it, the police found a 9 mm handgun loaded with ten unspent rounds in the magazine, wrapped in a black t-shirt hidden inside the tailgate. Red stains on the inside of the barrel tested positive for blood.

[11] The search also located a can of bear spray in the console of the truck, a knife on the floor in front of the front passenger seat, and a knife holder from a compartment on the driver's side door.

[12] After the shooting but before the police located the truck, Michael Michaud, an associate of Mr. Rock, drove Mr. Rock's truck away from the Canadian Brewhouse. He did not go far because of damage to the cooling system of the truck which appeared to have resulted from gunshots so he abandoned it. Before leaving it, he took from it guns, drugs, cash and phones.

[13] Mr. Rock had in the past resorted to violence to enforce the collection of money owed to him. About one month before Mr. Rock's death, Mr. Stanley had attended a small social event at a house in Edmonton with four friends. Two other men arrived, one Mr. Stanley knew as Jimmy. The other he did not recognize. Mr. Stanley believed one of them phoned Mr. Rock to tell him of Mr. Stanley's presence in the home.

[14] Mr. Rock arrived shortly thereafter while Mr. Stanley stood in the garage, smoking. Mr. Rock burst into the garage, coming down the four or five steps from the house towards Mr. Stanley. Mr. Rock approached Mr. Stanley, taking out a handgun, which he used to strike Mr. Stanley on the top of his head and on the right side of his mouth. The blow to the top of his head caused a bleeding wound. The one to the right of his mouth split open his lip.

[15] The force of the blows knocked Mr. Stanley back against the garage door. Mr. Rock then stood about six feet away, pointing the handgun at Mr. Stanley. Mr. Stanley asked Mr. Rock, "Are you going to shoot me?" He went on to try to talk his way out of the situation, telling Mr. Rock he no longer worked for Mr. Harris.

[16] Mr. Rock during the attack cursed Mr. Harris regarding money he claimed Mr. Harris owed him. Mr. Stanley told him that he had nothing to do with the debt. Mr. Rock told Mr. Stanley to have Mr. Harris contact him, using words to the effect "to have his fucking bitch friend to get ahold of me". Mr. Rock left and Mr. Stanley went into the house where his friend, Jen, cleaned him up, then drove him home.

[17] Later that evening, Mr. Stanley called Mr. Harris, who took the call while in Grande Prairie. Mr. Stanley related to Mr. Harris what had occurred. Mr. Harris returned to Edmonton and the two men met the day after Mr. Rock's attack on Mr. Stanley. Mr. Stanley discussed the incident with Mr. Harris, receiving from Mr. Harris assurance that the money problem had nothing to do with Mr. Stanley, and Mr. Harris would take it up with Mr. Rock.

[18] Mr. Stanley knew something of the alleged debt prior to the attack on him by Mr. Rock. Mr. Rock had shortly before contacted him about it. Mr. Stanley understood that the debt had arisen back in the spring or summer of 2014. When Mr. Rock called Mr. Stanley, he threatened Mr. Stanley and his family. Of that threat, Mr. Stanley did not provide details.

[19] On the evening of September 30, 2014, Mr. Stanley drove his four door Ram pickup truck from Edmonton to Grande Prairie. Mr. Harris accompanied him. The two made the trip to collect money owed to Mr. Harris. As well, they planned to attend a birthday party for a woman whose name Mr. Stanley could not recall.

[20] Mr. Harris had just days before gained his release from custody on charges arising from his possession of a handgun in Edmonton by posting \$35,000 cash bail. As he travelled to Grande Prairie, he breached the terms of his release, a 10:00 pm curfew, and in his possession he had a .380 calibre handgun.

[21] During the drive, about an hour out of Grande Prairie, Mr. Harris received a call which upset him. The two discussed the matter and Mr. Harris understood that two acquaintances, Gary Ritchie, also known as Tommy, another drug trafficker, and Curtis Urbanoski, also known as

Kit, a part-time trafficker now helping Mr. Ritchie (Tommy), had been accosted by Mr. Rock at the Canadian Brewhouse bar in Grande Prairie.

[22] Mr. Stanley understood Mr. Rock had taken all of the money carried by Mr. Ritchie (Tommy) as well as the keys to Mr. Ritchie's (Tommy's) motor vehicle, a pickup truck.

[23] Tara MacDonald, a friend of Mr. Ritchie (Tommy), also at the Canadian Brewhouse that evening, saw three men going through Mr. Ritchie's (Tommy's) vehicle. Thereafter, another of Mr. Rock's associates drove the truck away from the Canadian Brewhouse, parking it at a nearby Holiday Inn.

[24] Mr. Harris had told Mr. Ritchie (Tommy) to avoid public places, such as the Canadian Brewhouse, as Mr. Harris knew Mr. Rock had made a point of finding him.

[25] Upon Mr. Stanley and Mr. Harris arriving in Grande Prairie, they did not go directly to the Canadian Brewhouse. Rather, they drove to an RV park to meet a man known to Mr. Stanley only as Rambo. There, Mr. Harris went into a trailer to speak to Landon Brokowski, also known as Rambo. Mr. Stanley followed a few minutes later. After some discussions, Mr. Brokowski (Rambo) left to obtain the assistance of another or others in support of Mr. Harris at his expected meeting with Mr. Rock at the Canadian Brewhouse.

[26] The meeting lasted about 10 to 15 minutes before Mr. Brokowski (Rambo) left and Mr. Stanley and Mr. Harris drove to a hotel parking lot about two blocks from the Canadian Brewhouse. Mr. Stanley recalls they waited there for another 30 or 45 minutes until Mr. Harris received a text from Mr. Brokowski (Rambo). The two then proceeded to the Canadian Brewhouse.

[27] Mr. Harris recalls waiting until Mr. Brokowski (Rambo) arrived in a pickup truck. Then after a brief discussion while he and Mr. Brokowski (Rambo) remained in the vehicles, both parties left for the Canadian Brewhouse. Nothing turns on whether a text or a meeting caused Mr. Stanley to drive to the Canadian Brewhouse. I make no finding of fact in relation to the difference in the evidence of Mr. Stanley and Mr. Harris on this point. What is important is that both parties then travelled to the Canadian Brewhouse.

[28] The Canadian Brewhouse is a large bar located in a warehouse type building with multiple windows along the front. It faces north with a large parking lot in front. Patrons ordinarily enter through the main entrance located about one-third of the length of the front side of the building from the west end. Within, the bar had numerous security cameras. A camera located outside, above the main entrance, capturing images immediately outside the front door was not functioning properly at the time of the incident. A suspected poor connection caused distorted images from that camera.

[29] Mr. Stanley parked his truck facing the bar in about the third parking stall east of the main entrance.

[30] Mr. Stanley recalls seeing Mr. Brokowski (Rambo) in his pickup truck parked on the Canadian Brewhouse parking lot as he and Mr. Harris drove onto the parking lot. Mr. Stanley could only see one other person in the vehicle. Mr. Stanley noted Mr. Brokowski (Rambo) parked on the far north side of the parking lot approximately 200 feet from the bar entrance.

[31] The bar security camera video system had a date and time stamp display on it. Constable Ekland checked them against his watch or cell phone. The officer found the time display lagged

45 minutes behind actual time. I accept his evidence on that point. He found no problem with the date. The date display I find is correct as it corresponds with the balance of the evidence except for the lag which would delay the date change until 45 minutes after midnight.

[32] Times referred to in this decision will be actual times unless stated as video security system stamp time, which I reference as “video time”. The time on the video becomes important for the sequence of events and the time between events.

[33] Mr. Harris entered the bar at 12:02:37 video time. From the entrance, he turned left, walked along some booths, then turned left again going through an opening between booths, and up two or three steps to a raised area where he turned left again. He walked past a booth on his right and approached the last booth, booth number 40, against the wall where he stood speaking to three men.

[34] Mr. Rock sat with his back to the wall in the booth next to the aisle, facing Mr. Harris who remained standing. Mr. Ritchie (Tommy) sat to the left of Mr. Rock. Across from Mr. Rock sat a male connected to Mr. Rock. Shortly thereafter, Mr. Urbanoski (Kit), who had stood back talking to another male in the next booth, a man connected to Mr. Rock, walked over and joined the discussion between Mr. Rock and Mr. Harris.

[35] Mr. Harris and Mr. Rock spoke to each other for about two and a half minutes. The two in times past considered one another friends but problems had arisen between them because of the debt owed by Mr. Harris to Mr. Rock. He owed Mr. Rock \$15,000 personally and another \$15,000 for a debt he had taken over and partially paid down on behalf of Mr. Ritchie (Tommy).

[36] On the evening of September 30, 2014, Tara MacDonald went to the Canadian Brewhouse with three friends, two women and a man, to celebrate her birthday. From the evidence of Mr. Stanley and herself, she was the birthday girl referred to by Mr. Stanley. At the bar, the four met two other women who formed part of the group celebrating her birthday.

[37] Thereafter, they met up with Mr. Ritchie (Tommy) and Mr. Urbanoski (Kit).

[38] Later, two men, John Rock, also known as Davis, and Michael Dier, also known as Rico, arrived. At the time, Ms. MacDonald only knew John Rock as Davis.

[39] Ms. MacDonald first saw Mr. Rock as he walked past her and Mr. Urbanoski (Kit) while they smoked outside the entrance to the bar. She could not for certain recall the precise words, but he said something about money to Mr. Urbanoski (Kit) as he passed by.

[40] She and Mr. Urbanoski (Kit) followed Mr. Rock into the bar. Mr. Rock had joined Mr. Ritchie (Tommy) and she heard Mr. Rock say something to Mr. Ritchie (Tommy) about owing money.

[41] The arrival of Mr. Rock caused, it appeared to Ms. MacDonald, an atmosphere of tension. She also noted a reaction of fear in Mr. Ritchie (Tommy). The tension she said you could “cut with a knife”. Ms. MacDonald considered herself a good friend of Mr. Urbanoski (Kit) and he did not seem as afraid as Mr. Ritchie (Tommy) but she thought him uncomfortable and agitated.

[42] Ms. MacDonald recalls words from Mr. Rock to Mr. Ritchie (Tommy) regarding money to the effect “Do you think you could owe me money and get away with it?”

[43] One of Ms. MacDonald's friends had already left when Mr. Rock told them all to leave. Annoyed at the interruption of her birthday celebration, Ms. MacDonald and her friends left the raised section, going down to the bar area just inside the main entrance. There they ordered some food and drank shots while waiting. Her friend, Mr. Urbanoski (Kit), went back and forth between herself and the table occupied by Mr. Rock. Ms. MacDonald and Mr. Urbanoski (Kit) argued at some length. Ms. MacDonald and her friends left before the shooting.

[44] Mr. Stanley did not enter the bar with Mr. Harris. He followed him in about 30 seconds later. He did not make the second left turn and enter the raised section. Instead, he stopped at a booth on the lower level, just past where Mr. Harris stood talking with the other men at booth 40. After Mr. Stanley passed by that booth to his left on the upper level, he turned and sat in booth 60 from which he could see booth 40 to his right and ahead of him on the upper level. Except for one brief comment, he could not hear the conversation. That one comment came from Mr. Harris who said words recalled by Mr. Stanley as "you think I'm a punk", "you think I'm a bitch".

[45] After Mr. Harris entered the bar at 12:02:37 video time, his conversation with Mr. Rock lasted only minutes. Mr. Rock left the table, then at 12:05:10 video time he left the bar. Mr. Stanley, Mr. Harris, Mr. Urbanoski (Kit) and Mr. Ritchie (Tommy) moved to the area near the interior door of the foyer. A sandwich board held the foyer door open. The men stood there discussing their options with respect to leaving the bar.

[46] While the four men stood there, Mr. Stanley could see Mr. Rock through a window outside of the main entrance to the bar. He made gestures which Mr. Stanley took to mean that he wanted to fight. At 12:07:03 until 12:07:14 video time, on camera 6, Mr. Rock can be seen through the window gesturing.

[47] At 12:09:30 video time, the four men moved towards the door to exit. Shortly before this, Mr. Harris took a handgun from his left side waistband and placed it in the left pocket of the hoodie he wore. Sometime before exiting, he had chambered a round in the handgun.

[48] Mr. Stanley wore a hoodie and by then had pulled the hoodie up over his head. Just after they exited, camera 6 picked up Mr. Stanley as he walked from west to east in front of a window just to the east side of the main entrance. After passing the window, Mr. Stanley stopped and stood near the south end of the first parking stall east of the main door.

[49] Outside, Mr. Rock came at Mr. Harris, punching him in the face. Mr. Harris drew a handgun from his hoodie pocket. He shot Mr. Rock in the right thigh. Mr. Rock came at Mr. Harris again. About one second after the first shot, Mr. Harris shot Mr. Rock in the upper left chest. After the second gunshot Mr. Rock fell to the ground. Thereafter, approximately five more gunshots occurred. These I find came from the parking lot to the northeast of the door of the bar. On the evidence, I cannot make a finding of facts as to the identity of the shooter.

[50] Mr. Rock suffered two gunshot wounds. One struck and exited his right thigh. Another struck his left chest, pierced his heart and liver, then exited his right side just above his waist. The wounds to his heart and liver caused massive bleeding which led to his death.

[51] Mr. Urbanoski (Kit) fled on foot to the northwest. Mr. Stanley, Mr. Harris and Mr. Ritchie (Tommy) ran to Mr. Stanley's vehicle which they entered quickly. Mr. Stanley hurriedly reversed, turned east out onto a street, then drove away to the south.

[52] Mr. Stanley later found bullet holes in the driver's side of his truck. One pierced the side of his truck ahead of the driver's door and entered the engine compartment, striking the firewall. He also found a bullet hole in the driver's side passenger door of his pickup truck.

[53] Not far from the Canadian Brewhouse, Mr. Stanley stopped his vehicle in a residential area where Mr. Harris exited the vehicle.

[54] Mr. Stanley and Mr. Ritchie (Tommy) drove back to the RV park. From there, Mr. Stanley called a female known only as "Jenn", who came and picked up Mr. Stanley. They returned to Jenn's house where Mr. Harris met them shortly thereafter.

[55] Mr. Harris, Mr. Stanley, Jenn and a male friend of Jenn, along with Kayla Simms, drove to Valleyview. Mr. Stanley in his evidence did not include Kayla Simms' travelling with them but from the evidence of Kayla Simms in Exhibit 22, I accept her evidence that she travelled in the vehicle. In Valleyview, the party met Mr. Ritchie (Tommy), Mr. Brokowski (Rambo) and Mr. Brokowski's (Rambo's) girlfriend.

[56] From Valleyview, Mr. Ritchie (Tommy), Mr. Stanley and Kayla Simms continued on to Edmonton, in Mr. Brokowski's (Rambo's) truck. Mr. Brokowski (Rambo), his girlfriend and Mr. Harris left Valleyview, in another vehicle, going in a different direction.

[57] Mr. Stanley left the keys to his truck with Jenn, she parked it on a residential street in Grande Prairie. Two or three days later, Mr. Stanley returned to Grande Prairie, picked up his truck and put duct tape over the bullet holes. He eventually repaired the holes with a filling material and painted over them.

V. Law – Self-Defence

[58] Section 34 of the *Criminal Code*, RSC 1985, c C-46 as applicable to this case reads as follows:

Defence – use or threat of force

34(1) A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them ...;
- (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves ... from that use or threat of force; and
- (c) the act committed is reasonable in the circumstances.

Factors

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (f.1) any history of interaction or communication between the parties to the incident;
- (g) the nature and proportionality of the person's response to the use or threat of force; and
- (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

VI. Analysis

Issues of Fact

[59] The defence raised by Mr. Harris requires me to decide some questions of fact.

[60] First, having viewed the video footage, and hearing the evidence of the expert Andrew Fredericks, whose opinion did not exclude Mr. Harris as the shooter, the evidence of Mr. Stanley, and the evidence of the accused, Nicholas Harris, the identity of the shooter is not in question. Mr. Harris shot Mr. Rock.

Evidence of Jason Bucci

[61] Regarding the evidence of Jason Bucci, he testified under two handicaps. He acknowledged his difficulty reading his three statements. His testimony had to be adjourned to allow him the assistance of having it read to him. Moreover, Mr. Bucci appeared to me to be very fearful with respect to involving himself in this matter.

[62] His evidence that two men fought, that someone shot another person and ran away fits with the other evidence. However, in cross-examination he agreed willingly with the defence that essentially his evidence came from what he read in his statement and not his memory. His evidence generally fit with the evidence seen by the other witnesses and as provided by Mr. Harris except that he had the first two shots fired towards the Canadian Brewhouse rather than away from it. Overall, his evidence provides little assistance with respect to resolving the issues before the Court unless the evidence of others or the video footage supports it.

Evidence of Sean Friesen

[63] The evidence of Sean Friesen is quite another matter. Mr. Friesen took the stand, showed no reluctance to testify, and unfortunately showed no reluctance in what turned out to be a reconstruction of the event. Mr. Friesen presented as candid and honest but mistaken on a number of important points. Mr. Friesen correctly testified that the two men faced each other, two shots were fired, and as he ran away other gunshots followed the first two. He also had the

location of Mr. Harris and Mr. Rock close to correct although somewhat further north from the building than described by Mr. Harris and as calculated by the expert, Mr. Fredericks.

[64] The balance of Mr. Friesen's evidence reminds me of the frailty of eyewitness evidence. He did not note any punches by Mr. Rock before the shooting, he placed the firearm in the right hand of the shooter, he noted silver on the firearm, he said the shooter drew the firearm from his left breast pocket area when Mr. Friesen's position behind the shooter would make that virtually impossible to observe, he noted the shooter wearing a North Face puffy black jacket going so far as describing the stitching on it. The rest of the evidence in the trial shows all of this evidence as incorrect.

Findings of Fact

[65] Mr. Friesen, however, is not alone with respect to errors in his observation as Mr. Stanley also testified that Mr. Harris raised his right hand and pointed it at Mr. Rock. Mr. Stanley did not testify to seeing a handgun. Mr. Stanley testified that he thought the firearm came from the right thigh area of Mr. Harris.

[66] Having heard from Mr. Fredericks as to his calculations of the location of Mr. Harris on the cement slab in front of the Canadian Brewhouse, and hearing Mr. Harris's evidence with respect to his location, Mr. Harris is correct. He did not leave the cement slab and moved back from the northeast area of it before firing the shots.

[67] Mr. Harris also testified that he fired with his left hand. Mr. Fredericks, the expert, confirmed that the shooter shot with his left hand. When Mr. Harris marked on an exhibit I noted him writing with his left hand and camera 6 video shows him moving a handgun from his left waistband to his left hoodie pocket with his left hand. The video from camera 6 also shows an object in the left pocket of his hoodie which appears to have a cylindrical shape to it, which Mr. Harris acknowledges as a .380 calibre handgun. Mr. Harris also testified that the handgun was black without any silver and that he was wearing a grey hoodie, not a black jacket.

[68] On the evidence of the expert, the videos and the evidence of Mr. Harris, I accept that Mr. Harris wore a grayish coloured hoodie, in which he carried a .380 caliber handgun in the left pocket, he removed it and fired with his left hand. The shots, although Mr. Stanley thought they occurred about 10 seconds apart, occurred as shown by the muzzle flashes on the video from camera 6 within about one second of each other.

[69] Camera 6 video footage confirms Mr. Stanley's testimony that the first shot went downward and the second shot towards the upper torso of Mr. Rock. Mr. Harris testified that he fired low at first and then fired a second shot.

[70] Because the video from camera 6 shows two flashes which on the evidence of Mr. Harris as to his location, the calculations of the expert, Mr. Fredericks, as to location of Mr. Harris, the movement of an individual that I infer to be Mr. Rock, who eventually falls to the ground, the evidence of Mr. Harris, Mr. Stanley, and the evidence of the autopsy report, I accept that Mr. Harris fired two shots, one towards the right leg of Mr. Rock and then one at Mr. Rock's upper left chest. Mr. Harris fired the second shot about one second after the first shot. Mr. Harris used his left hand and a black .380 caliber handgun to fire the shots.

[71] The police found two .380 calibre spent casings just east of the area where Mr. Harris fired his handgun. These casings support the evidence of Mr. Harris that he had in his possession a .380 calibre handgun. As I infer, his handgun ejected these two casings as he fired.

Possible handgun threat by John Rock

[72] Both Mr. Urbanoski (Kit) and Mr. Harris testified that near booth 40, when Mr. Rock stood up and moved close to Mr. Harris while they spoke, Mr. Rock had his hand in the pocket of his hoodie. Both Mr. Urbanoski (Kit) and Mr. Harris say that Mr. Rock pushed out with his hand, touching Mr. Harris on his side.

[73] Mr. Urbanoski (Kit) remembers Mr. Rock using his right hand. Mr. Harris remembers it as Mr. Rock using his left hand.

[74] Mr. Urbanoski (Kit) assumed Mr. Rock had a firearm in the pocket of the hoodie he wore. Mr. Harris testified that as he approached booth 40 he noticed Mr. Rock wearing a glove on his left hand. Mr. Rock, he says, while wearing a glove on his left hand pulled his left hand slightly out of his left hoodie pocket, allowing Mr. Harris to see something which Mr. Harris thought was the corner of a firearm, black in colour.

[75] Mr. Harris says that after the two of them discussed the debt, Mr. Rock said Mr. Harris was going with him. Mr. Harris told him he was not and added a snide comment to the effect “over my dead body”.

[76] Mr. Harris testified that Mr. Rock was now standing by Mr. Harris and responded, “yeah, that’s the point”, then pushed his left hand still inside his left hoodie pocket forward, contacting Mr. Harris on his right side, just below his rib cage.

[77] On the video from camera 15, Mr. Rock does stand up from the booth and move toward Mr. Harris. When he leaves the booth, he moves in an unusual and awkward manner, leaving both hands in the pockets of his hoodie. Ordinarily, I would expect someone leaving a booth to have both hands or at least one out on top of the table to assist with movement out of the booth.

[78] When Mr. Rock walked up to Mr. Harris, Mr. Urbanoski (Kit) approached Mr. Harris from behind, blocking the view of camera 15 of Mr. Rock’s left hand. Mr. Rock did move his left side in a manner similar to that described by Mr. Harris but Mr. Harris showed no reaction of surprise or alarm. This could mean Mr. Harris is fabricating the movement but he may have maintained his composure so as to present a “tough guy” appearance.

[79] I prefer the latter as it is in keeping with Mr. Harris’s reaction once he learned that Mr. Ritchie (Tommy) had fallen into the hands of Mr. Rock. Mr. Harris, with Mr. Brokowski (Rambo) as support, went to the bar. He then walked into the Canadian Brewhouse with purpose and self-assurance, directly to booth 40 where Mr. Rock sat. He maintained a “tough guy” appearance.

[80] Mr. Rock kept his hands in his pockets as he made the awkward movement to leave the booth and did push up close to Mr. Harris in a position to use his left hand as described by Mr. Harris.

[81] Mr. Urbanoski (Kit) has the movement correct but his recall of which hand Mr. Rock used does not fit with the rest of the evidence.

[82] Mr. Rock, I find, did push his left hand while in his left hoodie pocket into the right side of Mr. Harris. Whether he had an object in his left hand or pocket I cannot find as a fact.

[83] Mr. Urbanoski (Kit) testified that before exiting the Canadian Brewhouse, he told Mr. Harris that he thought Mr. Rock had a gun. Of all the individuals on camera 15 and camera 6,

Mr. Urbanoski (Kit) behaved in the most animated manner. In his testimony he described himself as animated and loud. The video evidence supports this.

[84] Mr. Urbanoski (Kit) and Mr. Harris spoke at length at the foyer before exiting. I accept that sometime after Mr. Rock moved up to Mr. Harris, nudged him with his left hand, and before Mr. Harris left the bar Mr. Urbanoski (Kit) told Mr. Harris he thought Mr. Rock had a firearm.

[85] No evidence supports a finding that Mr. Rock actually had a firearm in his left hoodie pocket. Mr. Dier took a knife from close to where Mr. Rock fell, and passed it over to another person who turned it over to the police.

[86] Whether Mr. Rock had that knife or any object in his left hoodie pocket, I cannot, on the evidence, make a finding of fact.

Self-Defence

[87] The defence has conceded that unless the defence of self-defence as raised by Mr. Harris succeeds, then he is guilty of murder or manslaughter in the killing of Mr. Rock. Therefore, I will first deal with the application of the evidence to the elements of self-defence.

Air of Reality

[88] Before the Court considers the evidence with respect to the elements of self-defence, in particular as to whether the Crown has disproved any one of the elements of self-defence, the Court must first decide whether the defence has an air of reality.

[89] In this case, the Crown concedes the defence has an air of reality.

[90] Considering the prior threats of Mr. Rock, the actions of Mr. Rock inside the Canadian Brewhouse with respect to Mr. Ritchie (Tommy) and the attack by Mr. Rock on Mr. Harris outside the Canadian Brewhouse, the defence has an air of reality.

Post-2012 Self-Defence Provisions

[91] Our Court of Appeal in *R v Raspberry*, 2017 ABCA 135, referring to *R v Bengy*, 2015 ONCA 397, set out the following three basic elements that apply to all self-defence cases:

- (i) Reasonable belief (34(1)(a)): the accused must reasonably believe that force or threat of force is being used against him or someone else;
- (ii) Defensive purpose (34(1)(b)): the subjective purpose for responding to the threat must be to protect oneself or others; and
- (iii) Reasonable response (34(c)): the act committed must be objectively reasonable in the circumstances.

[92] For the defence to succeed, the evidence must support each element. Once raised, however, the defence may point to any evidence in the trial in support of the three elements.

[93] The Crown then has the burden on the evidence to prove beyond a reasonable doubt that at least one of the elements fails.

1. Reasonable Belief

[94] For this element, the accused must believe he faces force being used against him. His belief must be objectively reasonable.

[95] The Crown also concedes this element. I agree. Outside the Canadian Brewhouse, Mr. Rock launched an attack with his fists upon Mr. Rock. In addition to the evidence of Mr. Harris, the evidence of Mr. Stanley, Mr. Urbanoski, and the video from camera 6 support the attack.

[96] Accordingly, the evidence satisfies the first element of a reasonable belief.

2. Defensive Purpose

[97] On this element the defence made extensive written submissions citing numerous circumstances known to Mr. Harris before the shooting, including: the attack in the garage on Mr. Stanley, threats of an attack on Mr. Harris and his girlfriend, the threat of violence to the woman known as “Cee Cee” to collect a debt, that Mr. Harris believed and it was reasonable for Mr. Harris to believe, Mr. Rock had a firearm in his hoodie, that a man with a firearm had tried to take Mr. Harris in the green Avalanche, and that Mr. Rock had with him a number of men outside, all in the drug trade and some gang members. From this context, the defence argues:

These facts present, at minimum, an Air of Reality that the force was used to repel Rock’s immediate attack and perceived gesture toward his pocket. Secondly, the force was used to repel any attempt to kidnap him. Harris’s belief that he would be kidnapped by Rock and his associates was reasonably held. On the whole of the evidence a reasonable inference can be drawn that Rock would inflict serious violence on the accused if the accused had been forced into the Avalanche and kidnapped.

[98] The Crown, on the other hand, argues Mr. Harris launched a pre-emptive strike against Mr. Rock, stating:

The second element under self-defence requires that the actions taken by the accused were done with the intent to defend himself from the force or threat or force established under the first element. This means that there must be a “temporal connection” between the attack or threat and the response to it. Engaging in pre-emptive strikes to save from some future threat will not satisfy this element (*R. v. Currie*, 2002 Carswell Ont 1841).

While his actions may have had that additional effect, the accused shot Mr. Rock as a pre-emptive strike, intending to kill him, knowing that anything less would mean “it wasn’t going to end”.

[99] At this stage, a court considers only “the subjective purpose for responding to the threat must be to protect oneself or others” (*R v Rasberry, supra*). The objective reasonableness of the act does not figure in the assessment until the third stage of the analysis.

[100] Much of the defence argument on this element properly goes to the third element, reasonableness, rather than the subjective purpose. Nevertheless, I agree with the defence that Mr. Harris acted for the purpose of defending himself.

[101] Mr. Harris did not launch a pre-emptive strike. Mr. Rock launched his attack on Mr. Harris with his fists. Mr. Harris knew he had to respond with force to protect himself or possibly suffer at a minimum a beating.

[102] Whether Mr. Rock reached for his left pocket in his hoodie I will deal with when assessing the final element of self-defence.

[103] At this stage, Mr. Harris responded to Mr. Rock's attack because in his mind he feared a beating at the hands of Mr. Rock. He did not launch a pre-emptive strike.

[104] The analysis of the reasonableness of his response follows.

3. Reasonable Response

[105] The evidence measured against the factors in s 34(2) of the *Criminal Code* does not support a reasonable act by Mr. Harris in the circumstances.

Credibility of Nicholas Harris

[106] Determining whether Mr. Harris acted reasonably requires an assessment of his credibility and reliability. His evidence did not at times even generally align with the evidence of his friend, Mr. Stanley.

[107] However, this is not a case where if believing Mr. Harris or at least not rejecting his evidence would necessarily support an acquittal. Whether I accept all, part or none of his evidence still requires consideration of all of the evidence against the s 34(2) factors.

[108] Accordingly, I will deal with his credibility and reliability as it relates to those factors or any other factors when analyzing whether or not he acted reasonably.

History

[109] As Mr. Harris and Mr. Rock had a relationship of some length which had deteriorated from friends to enemies. I begin with their history of interaction and communication.

[110] Mr. Harris told of the two becoming acquainted as far back as 2004 or 2005. They came to know one another through mutual friends. Mr. Harris thought at the time Mr. Rock had reached the age of about 18 years. He understood Mr. Rock belonged to a gang at the time. Mr. Harris knew some of the members.

[111] Thereafter, Mr. Rock spent some time in prison and on his release on parole he and Mr. Harris became better friends.

[112] By 2012, the two carried on business in a criminal venture. Mr. Rock supplied cocaine to Mr. Harris which Mr. Harris understood came from British Columbia. Mr. Rock would provide a kilo or half kilo of cocaine to Mr. Harris on credit. Mr. Harris then would break it down into ounce sized portions. For about two years before the shooting, his friend Ryan Stanley delivered the smaller portions of the drug to street dealers and collected money for Mr. Harris.

[113] In Grande Prairie, Mr. Harris had an associate dealer, Mr. Ritchie (Tommy), who sold the drugs, then paid "dividends" to Mr. Harris. Mr. Harris used this money to pay Mr. Rock.

[114] By July of 2014, Mr. Ritchie (Tommy) had a business arrangement with a woman known to Mr. Harris as Cecilia Wong, also known as "Cee Cee". Those two sold the cocaine in Grande Prairie.

[115] In early July of 2014, Mr. Harris testified he provided an amount of cocaine to Ms. Wong (Cee Cee). She took it, then not long after sent him a text advising that she would keep it without paying. Mr. Harris estimated his loss at about \$60,000. From that money, he owed Mr. Rock \$15,000.

[116] At first, Mr. Rock did not press Mr. Harris for payment, rather leading Mr. Harris to believe Mr. Rock would collect the money himself.

[117] However, within about four weeks Mr. Rock began to demand the money from Mr. Harris. This angered Mr. Harris because he believed Mr. Rock had started providing cocaine directly to Ms. Wong (Cee Cee) so she could sell to the customers of Mr. Harris and Mr. Ritchie (Tommy). Mr. Rock had now harmed the business of Mr. Harris and still wanted the \$15,000. Mr. Harris told Mr. Rock he would pay him when he felt like it. Mr. Harris never paid the \$15,000.

[118] Mr. Harris also owed Mr. Rock another \$15,000. This came from a larger debt incurred by Mr. Ritchie (Tommy) which Mr. Harris had taken over and paid down to \$15,000.

[119] Mr. Rock and Mr. Harris remained at odds over the money with some threats made by Mr. Rock through BlackBerry texting. The two continued to communicate through texting but did not meet.

[120] Matters escalated when Mr. Rock found Mr. Stanley in the garage and beat him with a pistol, demanding information as to the whereabouts of Mr. Harris. By late August to mid-September of 2014, because of the threats and Mr. Rock's treatment of Mr. Stanley, Mr. Harris believed his safety was at risk. Mr. Harris, who often carried a handgun, now did not leave his home without one. In public places he often chambered a round to be ready for any possible attempt on his life.

[121] This evidence from Mr. Harris I accept. Mr. Stanley supported it with his description of the events in the garage. On September 17, 2014, Mr. Harris left a handgun in a Kentucky Fried Chicken/Taco Bell restaurant in Terwillegar. The police, upon finding it, arrested him when he returned to recover it. After raising \$35,000 for his bail, he was released on September 26, 2014. Mr. Harris then left for Grande Prairie on September 30, carrying another handgun. Mr. Harris shot Mr. Rock with a handgun. Mr. Urbanoski (Kit) supports the debt and animosity between Mr. Rock and Mr. Harris in his description of Mr. Rock's treatment of Mr. Ritchie (Tommy) at the Canadian Brewhouse. Tara MacDonald heard words from Mr. Rock about money owed to him by Mr. Ritchie (Tommy).

[122] Accordingly, I accept Mr. Harris's version of the deterioration of the relationship between the two men over a debt. I accept that Mr. Harris's concern for his safety caused him to carry a handgun.

[123] Mr. Harris testified as to a number of threats made by Mr. Rock, or of information Mr. Rock provided to Mr. Harris as to Mr. Rock's willingness to visit violence upon other people to show Mr. Harris that he dealt severely with people who did not pay him. Of these various threats, I accept that Mr. Rock made a threat to Mr. Harris that the next time they met, he should hope he was wearing a vest. I take that to mean a bullet resistant vest.

[124] Mr. Rock used a handgun to beat Mr. Stanley. The police found a handgun hidden in the tailgate of Mr. Rock's truck after the shooting. Mr. Rock had a handgun which he turned over to Mr. Dier the evening before the shooting. Mr. Michaud removed guns from Mr. Rock's truck after the shooting. Whether those guns included the one turned over to Mr. Dier or not, I do not know. In any event, Mr. Rock had possession of at least three handguns on the evening of September 30, 2014. Mr. Rock had no hesitation in possessing handguns and I accept that he advised Mr. Harris with respect to wearing a vest the next time they met.

[125] With respect to the testimony of Mr. Harris regarding the threats from Mr. Rock to harm Mr. Harris's girlfriend, Ms. Biglo, or the woman known as Cee Cee, I have no evidence in support thereof and do not find as a fact they occurred.

[126] Nevertheless, from the history and communication of the two men from early July 2014 until October 1, 2014, Mr. Harris had reason to be concerned for his safety at the hands of Mr. Rock.

[127] Mr. Harris knew that the drug trade did not allow for the collection of debt by way of a civil claim. Mr. Stanley testified that bad debtors could expect violence and still expect to pay notwithstanding any violence suffered by the bad debtor. Mr. Harris knew that Mr. Rock had used violence against Mr. Stanley and Mr. Harris had no reason to expect anything less for himself at the hands of Mr. Rock.

[128] Indeed, the hand motions of Mr. Rock outside the window of the Canadian Brewhouse Mr. Stanley took to mean that Mr. Rock wanted Mr. Harris to come outside to fight. To that I would add Mr. Rock also meant "what are you waiting for?" or "you're not coming out so we can deal with this?"

Physical Characteristics

[129] The autopsy report provided a height of 6'4" and 234 pounds for Mr. Rock at the time of his death. Mr. Harris did not testify as to his height and weight at the time of the killing of Mr. Rock. Camera 15 provides the best view of the two men together, but it records from above them, from some distance on an angle downwards. That view makes it difficult to compare their relative height. Whatever their height, it could not change to any degree notwithstanding the passing of four and a half years since the security camera recorded the men on the early morning hours of October 1, 2014.

[130] From my observations of Mr. Harris on the stand, I made an estimate of his height at 5'9". At the end of the defence evidence I asked for clarification on some points. Intending to also put my observations as to the height and weight of Mr. Harris on the record, I overlooked making them.

[131] Therefore, before oral argument commenced about four weeks after the closing of evidence, I placed this evidence on the record notwithstanding that the parties had each closed their case. Counsel agreed with this procedure.

[132] The weight of Mr. Harris could vary since October 1, 2014. On the video images he appeared heavier than at trial. However, Mr. Rock did not look as tall as 6'4" to me on the video and appeared heavier than 234 pounds.

[133] The weight of Mr. Harris at the time of the trial I estimate at 175 pounds. Allowing for some margin of error in my estimate of the height and weight of Mr. Harris, and allowing for a somewhat reduced weight of Mr. Harris at trial from the weight indicated on the video, I have no hesitation in inferring that on October 1, 2014, Mr. Rock stood six to seven inches taller than Mr. Harris and outweighed him by approximately 50 pounds.

Role of Nicholas Harris

[134] Dealing with the events on September 30 to October 1, 2014, Mr. Rock instigated the confrontation. He came to know where he might find Mr. Ritchie (Tommy) and Mr. Urbanoski (Kit). No evidence points to Mr. Rock knowing when he went to the Canadian Brewhouse that

Mr. Harris would soon arrive in Grande Prairie. From the evidence I can only infer that Mr. Rock intended to find Mr. Ritchie (Tommy) in order to collect some of the money owed to Mr. Rock.

[135] From the evidence of Mr. Michaud in Exhibit 22, I accept that sometime after Mr. Rock arrived at the Canadian Brewhouse, Mr. Rock learned Mr. Harris was on his way to Grande Prairie. He knew Mr. Harris might come to the Canadian Brewhouse to discuss the debt.

[136] Mr. Harris for his part had no thought of calling the police to report the confinement, robbery and possible kidnapping of his friend, Mr. Ritchie (Tommy). He knew Mr. Rock wanted his money. Mr. Harris also knew from Mr. Stanley that Mr. Rock was looking for Mr. Harris. Mr. Harris had warned Mr. Ritchie (Tommy) that Mr. Rock would be looking for him too. I accept Mr. Harris's evidence on that point as it is obvious he would warn Mr. Ritchie (Tommy).

[137] Mr. Harris decided to confront Mr. Rock. I accept he had in his previous communications with Mr. Rock made it clear he would not back down from Mr. Rock. The conduct of Mr. Harris at the bar confirmed his willingness to stand up to Mr. Rock.

[138] For that reason, I accept also that Mr. Harris told Mr. Rock sometime before October 1, 2014 that neither of them were "pussies". From that I infer that both of them knew that neither had any inclination to allow the other to intimidate him.

[139] Early in the morning of October 1, 2014 at about 12 minutes before 1:00 am, Mr. Harris walked into the Canadian Brewhouse. Without hesitating, he walked directly up to booth 40, where he spoke with Mr. Rock.

[140] For the next two and a half minutes more or less, the two men spoke with each other. The video footage from camera 15 shows Mr. Harris dealing with Mr. Rock face-to-face. The footage has no audio but nothing indicates Mr. Harris went, as he testified, "with his tail between his legs" begging for his friend's life. The words Mr. Stanley heard, "you think I'm a punk", "you think I'm a bitch", do not show any reluctance on the part of Mr. Harris to confront Mr. Rock on behalf of himself and his friend.

[141] After Mr. Rock left the bar, Mr. Harris and his associates stood at the foyer discussing their options. Somehow, others in the bar came to the conclusion they would have an opportunity to see a fight outside the bar.

[142] Notwithstanding the criminal business Mr. Harris carried on with his associates in Grande Prairie, Mr. Harris, upon leaving the bar, had as much right as any other patron, to walk to a motor vehicle and drive away from the Canadian Brewhouse.

[143] As to Mr. Harris's testimony that he saw Mr. Brokowski (Rambo) driving on the parking lot to the north a short distance from the entrance to the bar, I do not accept it. Mr. Harris testified:

And by that I mean -- at that time I thought Landon would still be there too, so I figured -- and him and Landon are friends. So when I seen him driving away my heart kind of sank, so I was, you know, a little upset about that.

[144] Regarding this evidence, the Crown submits the defence breached the rule in *Browne v Dunn*, (1893), 6 R. 67 (UK. H.L.) because this important piece of defence evidence was not put to any Crown witness, particularly Mr. Stanley. It first appeared in the testimony of Mr. Harris.

[145] Our Court of Appeal in *R v Sawatzky*, 2017 ABCA 179 provided the following guidance with respect to the trial court's application of the rule in *Browne v Dunn* at paras 21-26:

[21] The "rule in *Browne v Dunn*" is not absolute. The trial judge is best suited to determine whether a party has failed to comply with the rule and whether the failure to cross-examine a witness on a certain point was unfair to the other side. The trial judge's decision about whether the rule was violated, and whether any unfairness resulted, is entitled to considerable deference: *R v Quansah*, 2015 ONCA 237 at para 90, 125 OR (3d) 81. The extent of the rule's application "is within the discretion of the trial judge after taking into account all the circumstances of the case": *R v Lyttle*, 2004 SCC 5 at para 65, [2004] 1 SCR 193. When the rule has been breached, the remedy lies within the discretion of the trial judge: *R v Werkman*, 2007 ABCA 130 at para 9, 404 AR 378.

[22] Unless admissible pursuant to a hearsay exception, a trial judge may not rely on an out-of-court statement for the truth of its contents. When a witness's prior out-of-court statement is used to impeach the witness during cross-examination, any portions of the statement put to the witness are not in evidence unless the witness adopts his or her prior statement. It is an error of law, reviewable on a correctness standard, for the trial judge to rely on any facts contained in the out-of-court statement as though they formed part of the witness's in-court testimony: *R v Youvarajah*, 2013 SCC 41 at para 26, [2013] 2 SCR 720; *R v Kelly*, 2011 ONCA 549 at para 41, 88 CR (6th) 371.

ANALYSIS

Failure to Apply the Rule in *Browne v Dunn*

[23] Where a party intends to impeach a witness who was called by his or her opponent, or present evidence contradicting that witness, the party should direct the witness's attention to the contradictory evidence. The contradictory evidence should be put to the witness during cross-examination, so that the witness has an opportunity to address or explain the contradictory evidence. If the witness is not cross-examined on any such matters of significance, the trier of fact may consider the failure to cross-examine the witness when assessing the witness's credibility or the credibility of any contradictory evidence: *Lyttle* at paras 64-65; *R v Paris* (2000), 2000 CanLII 17031 (ON CA), 150 CCC (3d) 162 (Ont CA) at para 22; *Werkman* at para 7; *Quansah* at paras 75-86.

[24] This is the well-known "rule in *Browne v Dunn*." The rule is rooted in concerns about fairness – specifically, fairness to the witness (who should have an opportunity to address the contested point), fairness to the opposing party (who should understand what aspects of its witness's evidence are contested), and fairness to the trier of fact (who otherwise might not have the information necessary to properly assess the witness's credibility): *Quansah* at para 77; S.C. Hill, D.M. Tanovich and L.P. Strezos, eds, *McWilliams' Canadian Criminal Evidence*, 5th ed (Aurora, ON: Canada Law Book, 2013) (loose-leaf, release 2016-2) at pp 21-107 to 21-108.

[25] The rule is not an “ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss”: *Quansah* at para 90. Any failure to cross-examine a witness must relate to a matter of substance, not an issue of little significance: *Paris* at para 23; *Quansah* at para 81; *R v Abdulle*, 2016 ABCA 5 at para 11, 609 AR 396. Before inviting the trier of fact to make an adverse credibility finding, the trial judge may also consider less drastic remedies, such as granting leave to recall witnesses: *Werkman* at para 9; *Quansah* at paras 119-120.

[26] Even if a party has violated the rule, it is up to the trier of fact to determine how much weight, if any, should be placed upon counsel’s failure to cross-examine a witness about a particular matter: *R v Palmer*, 1979 CanLII 8 (SCC), [1980] 1 SCR 759 at pp 782-783; *R v MacKinnon* (1992), 1992 CanLII 488 (BC CA), 72 CCC (3d) 113 (BCCA); *Paris* at para 27. Failure to cross-examine the witness about an issue does not require the trier of fact to accept the witness’s evidence on that point: *R v Scheideman*, 2001 ABCA 94 at para 2, 277 AR 331. An adverse inference is not mandatory.

[146] The defence argues that no breach occurred because the defence put questions to Mr. Stanley as to what memory he had of other vehicles or persons on the parking lot around the time of the shooting. Furthermore, the defence argues this evidence does not contradict any other witness so the rule has no application.

[147] The defence did breach the rule because the rule strives for fairness in the trial; fairness not only with respect to a witness the defence may later contradict but also fairness for the trier of fact.

[148] Not every piece of evidence requires cross-examination. The rule is not inflexible. Nevertheless, in this case the evidence related to what Mr. Harris knew of the circumstances as he stood on the cement pad outside the front door of the bar. Mr. Harris did not say that he saw the vehicle leave the parking lot but he said he did not see it again. His testimony “my heart kind of sank, so I was, you know, a little upset about that” Mr. Harris provided to leave the impression that Mr. Brokowski (Rambo) had left him to deal with Mr. Rock without the support of Mr. Brokowski (Rambo).

[149] Not to put that evidence to at least Mr. Stanley, who stood about a car length from Mr. Harris at the time Mr. Harris says he saw Mr. Brokowski (Rambo) driving away from the bar, was unfair. It painted for me, the trier of fact, a much different picture than the one provided by Mr. Stanley that he saw Mr. Brokowski (Rambo) in his vehicle parked on the north side of the parking lot as he and Mr. Harris drove into the parking lot.

[150] By the time this occurred, Mr. Stanley had completed his testimony some days before. I have no evidence as to his present circumstances regarding the question of whether he could return to the stand.

[151] Were it not for other evidence in the trial that persuades me Mr. Brokowski (Rambo) did not drive away as described by Mr. Harris, this would cause me some concern as to whether I should give less weight to this evidence of Mr. Harris.

[152] The relationship between Mr. Brokowski (Rambo) and Mr. Harris along with Mr. Brokowski's (Rambo) eagerness to support Mr. Harris persuades me Mr. Brokowski (Rambo) did not do anything to cause Mr. Harris's heart to sink.

[153] Mr. Brokowski (Rambo) showed no hesitation in agreeing to attend at the Canadian Brewhouse to support Mr. Harris. Later that day the two men met in Valleyview, travelling together from there in another vehicle. That Mr. Brokowski (Rambo) would leave the Canadian Brewhouse parking lot and fail to support Mr. Harris, meet him at Valleyview a short time later, then take Mr. Harris with him, makes no sense. Mr. Brokowski (Rambo) did not drive away as described by Mr. Harris.

[154] Nevertheless, as Mr. Harris stood on the cement slab in front of the Canadian Brewhouse, he could expect little if any help from his associates other than Mr. Brokowski (Rambo) and anyone Mr. Brokowski (Rambo) might have with him in his vehicle. Ryan Stanley had no stomach for violence. He testified that he did not care to fight and never had a fight he won. My observations of him on the stand, on the video and from his testimony confirm he eschewed violence.

[155] As for Mr. Ritchie (Tommy), Mr. Rock had thoroughly intimidated him within the bar, leaving him of little, if any, assistance to Mr. Harris.

[156] This left Mr. Urbanoski, who wanted to go out the back door.

[157] No evidence suggests that any of those three had a weapon.

[158] Accordingly, having no evidence or reason to believe Mr. Brokowski (Rambo) had abandoned him, Mr. Harris knew that although he could expect little from the three men who left the bar with him, some 200 feet away sat Mr. Brokowski (Rambo) and another man in Mr. Brokowski's (Rambo's) pickup, who remained there to support him.

The Green Chevy Avalanche

[159] I do not accept that a man exited a green Chevy Avalanche parked just to the east of the main entrance of the bar, approached Mr. Harris as he exited the bar, told him to come with him and lifted the bottom of the hoodie he wore to display a "silver-ish" object which Mr. Harris "believed to be a gun".

[160] Again, the Crown submits that this testimony breached the rule in *Browne v Dunn*, *supra*. Again, for the same reasons with respect to the evidence of whether Mr. Harris saw Mr. Brokowski (Rambo) drive away from the Canadian Brewhouse, the defence breached the rule.

[161] This is a different version of events than to which anyone else had testified. None of the witnesses, particularly Mr. Fredericks or Mr. Stanley, had any opportunity to comment on this possibility as the defence did not put it to any witness in their testimony.

[162] Given an opportunity, Mr. Fredericks might have been able to testify as to the presence of someone or not on camera 6 or camera 15, and may have been able to calculate that person's location and movements.

[163] Mr. Harris described the green Chevy Avalanche parked in a position such that Mr. Stanley would have stood very close to the front of it. Mr. Stanley saw Mr. Rock attack Mr. Harris. No doubt Mr. Stanley was paying attention to his friend as he saw the blows attempted and landed by Mr. Rock. Mr. Stanley would have the best opportunity to observe a man leave a

green Chevy Avalanche and approach Mr. Harris. Accordingly, not having given Mr. Stanley an opportunity to provide his observation means that as a matter of fairness to the trier of fact, the defence breached the rule. Again, however, there is other evidence that persuades me on balance not to accept the evidence of the green Chevy Avalanche and the man with a handgun.

[164] I do not believe that Mr. Harris, after the shooting, ran in the direction of a man who he says had just, while revealing a handgun, told Mr. Harris to come with him, because obviously this man supported Mr. Rock. If this person planned to take Mr. Harris away in the green Chevy Avalanche, the man would not let Mr. Harris, the person who had just shot his associate, go past him without further confrontation. Such a man armed with a handgun and willing, moments before, to threaten Mr. Harris, would not stand aside after the shooting while Mr. Harris ran away.

[165] Mr. Harris did not say where the man went after Mr. Harris declined his invitation to accompany him, but the man could not have gone far as Mr. Rock shortly thereafter struck Mr. Harris. Mr. Harris would not then run towards a location where shortly before stood a man armed with a handgun wanting to take him away. For these reasons, I do not believe the testimony of Mr. Harris with respect to the green Avalanche and the man who told him to come with him. His effort to persuade me a man who exited a green Avalanche, threatening the use of a handgun, wanted to take him away, I reject.

[166] Summarizing the role of Mr. Harris, he went to the Canadian Brewhouse to confront Mr. Rock regarding his friend, Mr. Ritchie (Tommy). He left the Canadian Brewhouse to deal with whatever action Mr. Rock might take. His use of the handgun to shoot Mr. Rock I deal with later in this judgment.

Nature of the Force

[167] When Mr. Rock attacked Mr. Harris, he did so with his fists. Mr. Harris at that time depending on his ability to fight back without weapons, using only his fists, meant he risked a beating. Based on their comparative sizes and with no evidence of any special training or physical ability on the part of Mr. Harris to respond, he would probably suffer to some degree a beating at the hands of the larger man.

Use or Threatened Use of a Weapon

[168] Mr. Harris used a weapon, a handgun, to shoot Mr. Rock, causing his death. The reasonableness of that I will deal with later.

[169] Mr. Harris testified that he saw Mr. Rock reach with his left hand towards his left hoodie pocket; Mr. Harris says he warned him to stop. He did not testify as to his words. He thought Mr. Rock was reaching towards his left pocket so Mr. Rock could shoot him with a handgun.

[170] I do not accept Mr. Rock reached for his pocket as if to reach for a firearm. Mr. Urbanoski (Kit) testified he did not see this because his back was turned while he spoke to persons near the door. Without any evidence in support, I would not accept Mr. Bucci's evidence on this point. Mr. Friesen did not even see the two blows testified to by Mr. Stanley and Mr. Harris. With all of the other errors in Mr. Friesen's evidence, I would not rely on his evidence on this issue without supporting evidence.

[171] Mr. Stanley did not see it but he acknowledged Mr. Rock possibly could have reached for his pocket.

[172] The video is not clear enough to help and the expert, Mr. Fredericks, did not address the movement of Mr. Rock's left hand towards his left hoodie pocket.

[173] Mr. Harris had credibility problems on the crucial details of the green Chevy Avalanche, the man with a firearm who he said exited it, and the driving away of Mr. Brokowski (Rambo) north from the Canadian Brewhouse entrance as Mr. Harris came out of the bar. I did not accept his evidence on these points. Because of the lack of eyewitness evidence on this point, I turn to the evidence in the trial that supports or undermines the evidence of Mr. Harris.

[174] Some of the evidence supports that Mr. Harris thought Mr. Rock reached for a firearm.

[175] Inside the bar, Mr. Rock, I have found as a fact, moved up beside Mr. Harris and used his left hand in his left hoodie pocket to push into Mr. Harris's right side as if he had a weapon in his pocket.

[176] Mr. Urbanoski (Kit) told Mr. Harris he thought Mr. Rock had a firearm.

[177] Mr. Harris knew Mr. Rock had used a firearm in the past, in particular, to assault his friend, Mr. Stanley. Mr. Harris for some weeks had carried a handgun because of the threats of Mr. Rock.

[178] As the aggressor, Mr. Rock attacked Mr. Harris outside the bar.

[179] However, the balance of the evidence does not support the assertion of Mr. Harris that Mr. Rock reached for his left hoodie pocket as if to reach for a firearm.

[180] Mr. Rock was using his hands to land blows, not reach for his pocket.

[181] No one, specifically Mr. Stanley who stood about a car length away, saw Mr. Rock reach with his left hand. Rather, Mr. Stanley saw Mr. Rock strike Mr. Harris once and try to strike him again, landing only a glancing blow. This fits with Mr. Harris's evidence that Mr. Rock struck him twice in the head.

[182] Nothing in the evidence supports any reason for Mr. Rock to increase the level of violence beyond a fist fight. Mr. Rock stood much taller and outweighed Mr. Harris by a significant amount. Nothing supports any reason for him to think it necessary to use a weapon against Mr. Harris.

[183] Moreover, the fight had barely started with Mr. Rock moving forward to strike Mr. Harris twice, and Mr. Harris backing away. Mr. Harris did not offer resistance by striking back towards Mr. Rock, so Mr. Rock had no reason to reach for a firearm when Mr. Harris had not yet fought back.

[184] The altercation between the two men occurred directly in front of the bar where each of the men would expect a security camera to cover the location. Mr. Rock, facing the camera, would not want a video recording of him reaching for a firearm when he could almost certainly defeat Mr. Harris with his fists.

[185] Accordingly, on the whole of the evidence as to whether or not Mr. Rock reached towards his left pocket of his hoodie as if to reach for a firearm, I reject Mr. Harris's evidence on that point.

[186] Therefore, there is no evidence of imminent use of force by Mr. Rock with a handgun.

Other Means

[187] Taking only the narrow perspective of a fight between two men with their fists, which escalated into the firing of shots from a handgun by Mr. Harris, does not portray the larger picture surrounding the incident. As a drug trafficker, Mr. Harris placed himself in a position where he could not act reasonably in the circumstances as regards other means.

[188] Any other person, not the leader of three other men trafficking cocaine in Grande Prairie, who knew – a larger man waited for him outside the bar, who knew the larger man had possibly threatened him with a handgun by poking him on the right side with his left hand inside a hoodie pocket, the larger man had just robbed his friend of his pickup truck to pay a debt, had previously beaten another friend with a handgun, then gestured outside the window of the bar as if to engage him in a fight, and who had in the Canadian Brewhouse told Mr. Harris that Mr. Harris was coming with him – would call the police.

[189] Mr. Harris in his circumstances could not call the police. To make the call would destroy the criminal business and lifestyle he maintained. The word would go out that he was a coward, a rat and he would face retribution.

[190] Moreover, he had in his waistband, then in his left hoodie pocket a handgun which the police, even without grounds to search him, might somehow notice.

[191] Furthermore, how could Mr. Harris explain to the police why Mr. Rock had robbed his friend, Mr. Ritchie (Tommy), to pay off a drug dealer's debt. Or how could he explain that he, Mr. Harris, had come to the Canadian Brewhouse to help Mr. Ritchie (Tommy) because Mr. Rock had confined him there.

[192] None of this could Mr. Harris do because of the effect it would have on his drug trafficking business.

[193] He decided to walk out of the Canadian Brewhouse knowing the nature of the man who waited to settle a drug debt. When he moved the handgun, with a round in the chamber, from his waistband to his left hoodie pocket, he did so to have it available to use against Mr. Rock as in his opinion the circumstances required. As he testified upon being questioned about moving the handgun from his waistband to his left hoodie pocket, "So if things went wrong, I wanted to be able to walk myself out of there."

[194] As Mr. Harris walked out of the Canadian Brewhouse with a loaded handgun in his pocket to deal with whatever came his way in his dispute with Mr. Rock, including using the handgun, he was not acting reasonably in the circumstances. He had gone too far down the road in his criminal career to act reasonably in the circumstances. He did not resort to other means because in his mind he had no other means. Rather, he meant to deal with the matter while armed with a handgun.

[195] However reasonable he considered his actions as a criminal, a drug trafficker, in responding to another drug trafficker, it fails the reasonableness test. The reasonable law abiding citizen sets the reasonable standard, not a reasonable drug trafficker.

Proportionality

[196] As I have found that Mr. Rock did not reach for his left pocket as if to reach for a handgun and no one from a green Avalanche tried to take him away, the nature of Mr. Harris's reaction is all out of proportion to the threat of Mr. Rock's force. Mr. Harris left the bar knowing

that his left hoodie pocket contained a loaded handgun. His shooting of Mr. Rock shows he had no intention of trying to walk “himself out of there”. He used it within seconds of knowing he had no choice but to fight Mr. Rock. Mr. Harris not only planned to walk himself out of there, he planned to shoot his way out of there. Neither is that reasonable in the circumstances. As regards proportionality, he failed to meet the standard of a reasonable law abiding citizen, as opposed to a reasonable drug trafficker.

Mistake of Law

[197] Even if Mr. Harris only intended to injure Mr. Rock, which I will later address, Mr. Harris was operating under a mistake of law if he did so to prevent a further attack.

[198] Mr. Harris cannot, for the reasons given, avail himself of the defence of self-defence. Therefore, when Mr. Harris left the Canadian Brewhouse to face Mr. Rock with a handgun, in his left hoodie pocket, ready to fire, he could not lawfully use the handgun against Mr. Rock. To do so was not reasonable in the circumstances.

[199] Any thought process by which Mr. Harris determined he could use the handgun to defend himself against Mr. Rock meant Mr. Harris was acting under a mistake of law because he could not benefit from the law of self-defence.

[200] Any use of the handgun, even to only injure Mr. Rock to prevent the attack, would mean Mr. Harris had committed an offence because he could not claim self-defence as to its use.

[201] Although the defence of self-defence fails, the Crown must still prove beyond a reasonable doubt, murder or manslaughter.

Murder or Manslaughter

[202] The defence of self-defence having failed, then Mr. Harris is guilty, as acknowledged by the defence, of murder or manslaughter.

[203] Mr. Harris is guilty of murder.

Cause of Death

[204] He caused the death of Mr. Rock by shooting him in the upper left chest. The wound to the heart and liver of Mr. Rock caused a massive loss of blood, leading to his death.

Unlawful Act

[205] Mr. Harris caused the death by an unlawful act. He had in his possession, in a public place, a loaded handgun which he fired at a human being, an assault with a weapon, at night, in an urban area. This unlawful act caused the death of Mr. Rock.

Requisite State of Mind

[206] The Crown must prove beyond a reasonable doubt that Mr. Harris specifically intended to kill Mr. Rock.

The Law Regarding Intent

[207] Section 229 of the *Criminal Code* defines when culpable homicide is murder:

Murder

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 ...

A trier of fact “ ... may draw the inference that sane and sober persons intend the natural and possible consequences of their actions” (*R v Seymour*, [1996] 2 SCR 252 at para 19, 106 CCC (3d) 520).

[208] Following *R v Seymour*, *supra*, the Supreme Court dealt with this “common sense inference” in *R v Walle*, 2012 SCC 41. From *R v Walle*, *supra*, the Supreme Court provided the following guidance with respect to the evidence required to prove the intent for murder beyond a reasonable doubt:

[3] ... Fundamentally, the appellant maintains that the trial judge erred in applying the “common sense inference” — that a sane and sober person intends the natural and probable consequences of his or her actions — to find that he had the requisite intent for murder, without first having considered the whole of the evidence bearing on his mental state at the time of the shooting....

...

[63] ... The jurors are admonished that the inference is permissive, not presumptive, and that before acting on it, they must carefully consider the evidence that points away from it....

...

[65] ...that in assessing the specific intent required for murder, it should consider the whole of the evidence that could realistically bear on the accused’s mental state at the time of the alleged offence ...

[66] ... if, after considering the whole of the evidence, they believe or have a reasonable doubt that the accused did not have one or the other of the requisite intents for murder at the time the offence was committed, then they must acquit the accused of murder and return a verdict of manslaughter.

[67] If, however, there is no evidence that could realistically impact on whether the accused had the requisite mental state at the time of the offence, or if the pertinent evidence does not leave the jury in a state of reasonable doubt about the accused’s intent, then the jury may properly resort to the common sense inference in deciding whether intent has been proved.

Defence Position Regarding Intent

[209] The defence submits there is no direct evidence of intent on the part of Mr. Harris showing either that Mr. Harris meant to cause the death of Mr. Rock or that he meant to cause him bodily harm that he knew was likely to cause his death, and was reckless whether death ensued or not.

[210] The defence argues because of the downward trajectory of both discharges from the firearm, Mr. Harris only intended to prevent an attack by Mr. Rock. He did not intend to kill him or cause him bodily harm likely to cause his death.

Crown Position Regarding Intent

[211] The Crown counters that the defence position conflates intent with whether the defence of self-defence applies.

The Issue Regarding Intent

[212] When the defence refers to preventing an attack, it does seem to refer to Mr. Harris defending himself. However, if I take the defence to mean that Mr. Harris only meant to injure Mr. Rock to the point of preventing the attack, rather than meaning to cause his death or bodily harm he knew was likely to cause his death, then the defence position properly raises the issue of intent.

[213] The issue for determination I can state as follows. Did Mr. Harris:

- (a) mean to cause the death of Mr. Rock; or
- (b) mean to cause Mr. Rock bodily harm that he knew was likely to cause his death, and was reckless whether death ensued or not, or intended to cause bodily harm to Mr. Rock that is not likely to cause his death; or
- (c) did he mean to only injure Mr. Rock so as to prevent an attack continuing?

Decision

[214] The answer is the evidence does not support an intention only to injure. The evidence as a whole proves beyond a reasonable doubt Mr. Rock meant to cause the death of Mr. Rock or meant to cause him bodily harm that he knew would likely cause Mr. Rock's death, and was reckless whether death ensued or not.

Mr. Harris's Evidence

[215] Mr. Harris never testified as to either his intention to kill or injure Mr. Rock. The following from the transcript of evidence provides his testimony as to what he had in his mind when he shot Mr. Rock (p 33, l 28 to p 34, l 22):

Q Okay.

A He screamed pretty much and said I told you that shit is fucking dead. And then he punched me twice in the head, called me a goof, and then -- I don't know, do you want me to stop there or keep going?

Q Yes, bring us through it, please.

A And then once he punched me in the head twice, I kind of leapt back I guess that you would say. So again, I am still on the concrete slab, and I kind of leapt backwards and then he started -- he started coming towards me and I seen him still have -- I seen him have the one glove on the one hand. I seen him start --

THE COURT: -- sorry, so he was holding up a hand?

A His left hand. It was his left, hundred percent. I know that everybody keep saying right but it was his left. I know without a doubt. But left hand. He started

going into his hoodie and then at this point -- as soon as that guy lifted up his shirt with the, I believed to be a gun, I put my hand in my hoodie and I had a gun in my hoodie.

Q MR. PHYPERS: You had a what?

A I had a gun in my hoodie.

Q Okay.

A So I put my hand right on my gun and then when I seen John Rock stepping towards me and reach into his hoodie, pulled out my gun and -- I just want to clarify, you know this is not something that I wanted to happen.

Q Okay.

A I don't know, it's just hard to talk about this, right, so.

Q What did you do?

A So I obviously warned him to stop and, whatever he was trying to do, like. In my mind I thought he was trying to reach to shoot me. So I aimed as low as I could, and I shot, and I thought I missed because he just kept kind of stepping forward. Like he stopped for a quick second, like a momentary second, I'm not even saying a real second. And then he stepped again towards me and I shot one more time.

A Warning?

[216] As to whether Mr. Harris saw Mr. Rock "reach into his hoodie", I have found as a fact that did not happen. It follows then that I do not believe "So I obviously warned him to stop and, whatever he was trying to do, like. In my mind I thought he was trying to reach to shoot me."

[217] If Mr. Rock did not, as I have found, reach for his pocket, Mr. Harris did not think Mr. Rock reached for a gun to shoot him. Therefore, he did not warn him to stop. I reject that evidence of Mr. Harris.

The First Shot

[218] Mr. Harris did fire downward on the first shot. Mr. Harris testified he "aimed as low as I could". Aiming as low as he could I take it to mean as low as possible and still have the bullet strike Mr. Rock. Obviously, he could have aimed even lower so as to hit the concrete slab, thereby providing a warning to Mr. Rock to stop his attack on Mr. Harris with his fists.

[219] Mr. Stanley also said Mr. Harris fired the first shot downward. The muzzle flash from the first shot shown on camera 6 confirms a downward shot. The autopsy report describes the wound path to Mr. Rock's right leg as downward. On the first shot, I find that Mr. Harris intended to shoot at the legs of Mr. Rock.

[220] The autopsy report describes a muscular injury without large blood vessel or femoral injury. What I take from that is a bullet wound to the thigh could be more severe but in this case a more serious injury did not occur.

[221] Although the bullet could have caused a more serious injury, the reasonable inference I make with respect to the first shot is that Mr. Harris fired at Mr. Rock's legs to injure him. In his mind, this would stop any further attack from Mr. Rock.

[222] Therefore, at this time Mr. Harris's actions show neither that he meant to kill Mr. Rock nor cause him bodily harm that he knew might cause the death of Mr. Rock.

The Second Shot

[223] The defence of self-defence, had it raised a reasonable doubt, would provide a full defence to Mr. Harris even if he meant with the second shot to kill Mr. Rock. As the defence of self-defence failed, the issue is did Mr. Harris have either requisite intent under s 229.

[224] The evidence makes out that he did have that necessary intent.

[225] The Crown submits that Mr. Harris raised the handgun before firing a second time. The defence argues that Mr. Harris again fired downward which finds support in the autopsy report where it describes the path of the bullet through Mr. Rock's body as downward. The defence argues, because he shot downward, this means Mr. Harris did not intend to shoot to kill Mr. Rock.

[226] The evidence does not support the position of the defence. On the contrary, Mr. Harris raised the handgun and fired from close range at the chest of Mr. Rock. In doing so, he either meant to cause the death of Mr. Rock or meant to cause him bodily harm that he knew was likely to cause his death, and was reckless whether death ensued or not.

[227] Mr. Harris did not testify he shot low when he fired the second shot. He only said, "I shot one more time". Mr. Stanley's evidence describes a lower first shot and a second shot higher. The muzzle flash on camera 6 shows a downward trajectory the first time, then a more or less horizontal muzzle flash from the second shot.

[228] The video from camera 6 shows the muzzle flashes at 12:10:00, video time. The second bullet did go downward from the chest area of Mr. Rock, then exit his right lower side. This, however, does not mean Mr. Harris shot downwards. From the video, after the first muzzle flash, Mr. Rock bends slightly forward and slightly down at the knees. Mr. Harris then fires the second shot.

[229] From the autopsy report, the bullet struck a rib of Mr. Rock which might, although on balance I cannot find that it did, cause the bullet to deflect downward. Expert evidence might assist on that point but I have none.

[230] Something caused the bullet to take a downward trajectory after striking Mr. Rock's rib, but the muzzle flash indicates a more or less horizontal flash directly at the chest of Mr. Rock.

[231] Moreover, if Mr. Harris shot downwards, striking Mr. Rock in the chest, with his second shot, this would tend to lend support to an intent to kill because it would mean that Mr. Harris shot down at the much taller man who had slumped down considerably or started to fall to the ground. If Mr. Rock had gone that far down towards the ground, it would indicate he had suffered an injury such that he could no longer carry out his attack. Therefore, his condition and position would make the second shot unnecessary. To fire again at Mr. Rock as he went to the ground would indicate an intent to cause his death.

[232] That did not happen. On the evidence from the video, I find as a fact that Mr. Harris, after firing downward on the first shot towards the legs of Mr. Rock, raised his aim and fired more or less horizontally directly at the chest of Mr. Rock, who had started to bend slightly forward. From the video and any other evidence, I cannot find if the position of Mr. Harris placed the handgun somewhat to Mr. Rock's left so as to cause the bullet to exit the right side of Mr. Rock.

Nor can I find as a fact why the bullet travelled downward. On the whole of the evidence, Mr. Harris fired the second shot directly at the chest of Mr. Rock. The bullet then struck Mr. Rock's rib, then his heart and liver, and exited his lower right side.

[233] The view from camera 6 foreshortens the distance between the two men at the time of the firing of the two shots. The autopsy report found no evidence of soot or gunpowder stippling on the body of Mr. Rock. Either of those two indicators would tend to show close range firing. Dr. Weinberg testified because of the variables he could not conclude the bullet did not come from close range.

[234] On the video from camera 6, it appears the men were not more than two to three arm lengths apart at the firing of the second shot. Allowing for some error because of the possible foreshortening from the camera 6 perspective, I find as a fact that a reasonable estimate of distance from the muzzle of the handgun to the chest of Mr. Rock to be about six feet.

[235] Common rifle calibres for the killing of big game are often around .300 calibre. When Mr. Harris fired a .380 calibre handgun from about six feet into a vital body area, the chest of Mr. Rock, the only common sense inference is he meant to cause his death or cause such bodily harm that he knew it was likely to cause the death of Mr. Rock. Nevertheless, Mr. Harris was reckless as to whether or not he caused the death of Mr. Rock. No evidence points to any other possible inference.

[236] The elements of murder having been made out, Mr. Harris is guilty of murder.

Planned and Deliberate

[237] The evidence also supports proof beyond a reasonable doubt that Mr. Harris planned to and deliberately killed Mr. Rock.

[238] In *R v MMK*, 2006 ABCA 284 at paras 8-10, our Court of Appeal set out the following principles with respect to planned and deliberate murder:

[8] A planned murder is one that was conceived and carefully thought out prior to being committed: *Nygaard*, 1989 CanLII 6 (SCC), [1989] 2 S.C.R. 1074, at para. 18. It requires that a design or scheme be arranged beforehand: *R. v. Jacquard*, 1997 CanLII 374 (SCC), [1997] 1 S.C.R. 314 at para. 26.

[9] A deliberate murder is one that is considered, not impulsive: *R. v. More*, 1963 CanLII 79 (SCC), [1963] S.C.R. 522 at para. 35. A person commits deliberate murder when he thinks about the consequences and carefully thinks out the act, rather than proceeding hastily, rashly or impulsively: *Jacquard*, at para. 26.

[10] A finding of planning and deliberation can be based on circumstantial evidence: *R. v. Mitchell*, 1964 CanLII 42 (SCC), [1964] S.C.R. 471 at para. 41. A plan can be simple and need not necessarily be in place for a long period of time: *Nygaard* at para. 18. If the circumstantial evidence is equivocal or speculative on the issue of planning and deliberation, however, a first degree murder verdict is unreasonable: *R. v. Duck*, [1993] 85 Man.R. (2d) 91 (C.A.) at paras. 36 - 38.

[239] The accused carried a handgun. Handguns have a number of uses. Some people enjoy collecting them, others use them for sport shooting, at one time trappers could sometimes obtain

a permit to use one for dispatching animals, and a handgun provides a most efficient means for shooting people. Law enforcement officers carry them for that purpose, if necessary.

[240] Mr. Harris inhabited a world which he believed required him to carry a handgun for the purpose of shooting people. That is what he stated in his testimony (p 54, ll 12-36):

Q [CROWN] Right. I am going to ask you a couple questions about the firearm.

You said that you took it with you, I presume from home, to Grande Prairie?

A M'hm.

Q So you didn't pick it up here?

A No.

Q When you -- well I will ask you. When did you load it?

A When did I load it?

Q Yes.

A I'm not sure.

Q And if it is a situation of it's more or less always loaded, then I will understand that too, but?

A It depends on the situation. I often do, like for instance when I go into restaurants and stuff like that, or places that I know there could be potential assassination attempts, I often do chamber it.

Q Okay?

A As bad as that may make me sound.

THE COURT: Sorry, it doesn't what?

A I said as bad as it might make me sound, it's true though.

[241] The only reason Mr. Harris carried a handgun was to effect his plan to shoot people. Mr. Harris had created a life for himself in which, if he thought it necessary, he would shoot to kill another person.

[242] He had, since late August or early September 2014, conceived a plan with respect to Mr. Rock. This exchange from his evidence supports that conclusion (p 10, l 37 – p 11, l 18):

Q MR. PHYPERS: And what exactly happened with the arrest; why were you arrested?

A Why was I arrested?

Q Yes?

A I had a man purse, satchel, whatever you want to call it, and I had my handgun in it, and me and Jamie went to go eat in a KFC/Taco Bell in Terwillegar at Edmonton, and I ultimately forgot the bag on a chair and left it there, and then went back to retrieve and got arrested, so.

Q So the KFC?

A KFC/Taco Bell, yeah.

Q Like Kentucky Friday Chicken?

A Yes.

Q Why did you have a firearm in KFC?

A Well I usually -- usually have a firearm on me quite a bit but after the threats from John Rock and then he also, the day before Jamie birthday, threatened her to basically tell him where he I am, or tell him where I am or else he was going to kick in her door, and -- I am just going use the words that she told me because I didn't see the text myself. He threatened to kill her unborn child, because she was pregnant with my child at the time.

[243] I find Mr. Harris planned to use his handgun to specifically shoot Mr. Rock. Apart from that, he would shoot any other person Mr. Harris might consider intended to do him harm or kill him.

[244] I further find Mr. Harris had carefully thought this out. Indeed, he went to Grande Prairie on September 30, just four days into his release, with another handgun in his possession. He had just posted \$35,000 to gain his release from custody, after his arrest for possession of a different handgun.

[245] Mr. Harris knew Mr. Rock was looking for him. He planned to use the handgun he carried to shoot Mr. Rock if their dispute rose to a level where in his mind he thought it appropriate.

[246] The ultimate act of Mr. Harris shooting Mr. Rock cannot be viewed only through the lens of camera 6 as to the actions of Mr. Harris in the minutes before the shooting.

[247] Mr. Harris had considered the possibility of shooting his enemy in the world of drug trafficking that the two of them inhabited. The shooting of Mr. Rock, his enemy, did not happen on an impulse. Mr. Harris had planned and considered what he would do when confronted by Mr. Rock or one of his associates. He would shoot that person with his handgun and in the circumstances that person was Mr. Rock.

[248] That circumstances arose on September 30/October 1, 2014 which placed Mr. Harris in a position where he could not reason with Mr. Rock or appeal to their past friendship makes no difference. Mr. Harris did not seek out Mr. Rock at the Canadian Brewhouse to kill him, nevertheless he planned and considered shooting Mr. Rock weeks before that encounter. When faced with circumstances of a confrontation with Mr. Rock for which Mr. Harris had planned and considered, he executed his plan and shot Mr. Rock dead. Therefore, Mr. Harris not only murdered Mr. Rock but he planned and deliberately murdered him. Accordingly, Mr. Harris is guilty of first degree murder.

VII. Criminal Organization

[249] There is a second potential basis on which I might conclude that Mr. Harris was guilty of first degree murder. During oral submissions, I inquired of counsel as to whether they wished to address the matter of whether Mr. Harris participated in a criminal organization.

[250] The defence advised that the defence was not prepared to deal with that argument. As that was not part of the case against Mr. Harris, he had not prepared a response. The Crown also did not intend to advance that possibility.

[251] After oral submissions, I raised with counsel the possible application of s 231(6.1)(a) of the *Criminal Code* as neither had addressed it. This section deems murder first degree murder if it is “for the benefit of, at the direction of or in association with a criminal organization”. Counsel asked for further time to make oral submissions on the issues of criminal organization, whether a criminal organization had any bearing on self-defence or first degree murder.

[252] The *Criminal Code*, in s 467.1(1), defines a criminal organization as follows:

467.1 (1) The following definitions apply in this Act.

criminal organization means a group, however organized, that

- (a) is composed of three or more persons in or outside Canada;
and
- (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

[253] Defence counsel acknowledged that at the time of the killing of Mr. Rock, Mr. Harris was part of a criminal organization. I accept that admission.

[254] The Supreme Court of Canada in *R v Venneri*, 2012 SCC 33, in considering the definition of ‘criminal organization’ required that to amount to a criminal organization, the organization must have “some form of structure and degree of continuity”. Paragraphs 29 and 40 state:

[29] I agree with Mackenzie J.A. that a flexible approach favours the objectives of the legislative regime. In this context, flexibility signifies a purposive approach that eschews undue rigidity. That said, by insisting that criminal groups be “organized”, Parliament has made plain that some form of structure and degree of continuity are required to engage the organized crime provisions that are part of the exceptional regime it has established under the *Code*.

...

[40] It is preferable by far to focus on the goal of the legislation, which is to identify and undermine groups of three or more persons that pose an elevated threat to society due to the ongoing and organized association of their members. All evidence relevant to this determination must be considered in applying the definition of “criminal organization” adopted by Parliament. Groups of individuals that operate on an *ad hoc* basis with little or no organization cannot be said to pose the type of increased risk contemplated by the regime.

[255] Mr. Harris headed a group in Canada of at least three people. Mr. Harris provided cocaine to Mr. Ritchie (Tommy) via Mr. Stanley, who delivered the drugs. Mr. Ritchie (Tommy) dealt the drugs in Grande Prairie and Mr. Stanley returned with money for Mr. Harris.

[256] The group headed by Mr. Harris trafficked cocaine, a serious offence under the *Controlled Drugs and Substances Act*, SC 1996, c 19.

[257] Mr. Stanley testified that he had worked for Mr. Harris delivering drugs for approximately two years. His duty was to deliver the drugs and collect cash. Mr. Ritchie's (Tommy's) involvement in the dealing of drugs is not clear for the full period of two years but I am satisfied on balance there was continuity in his relationship with Mr. Harris and Mr. Stanley. Mr. Ritchie (Tommy) had managed to incur a large debt to Mr. Rock. Mr. Harris had taken over this debt on behalf of Mr. Ritchie and the balance remained at \$15,000 when Mr. Harris shot Mr. Rock. This shows some continuity of the relationship between Mr. Ritchie (Tommy) and Mr. Harris, whether or not Mr. Ritchie (Tommy) had been associated for the entire two years as had Mr. Stanley.

[258] The group had structure and continuity. Accordingly, as acknowledged by the defence, Mr. Harris was a member of a criminal organization at the time he killed Mr. Rock.

Deemed Planned and Deliberate

[259] Section 231(6.1)(a) of the *Code* deems the required additional *mens rea* component, planned and deliberate, as made out if the Crown proves the person who committed the murder in one of the three ways listed in the section.

[260] The section of the *Code* reads as follows:

(6.1) Irrespective of whether a murder is planned and deliberate on the part of a person, murder is first degree murder when

(a) the death is caused by that person for the benefit of, at the direction of or in association with a criminal organization...

Mental Element

[261] The Supreme Court in *R v Venneri*, *supra* at para 57 stated as follows:

[57] The Crown must also demonstrate that an accused *knowingly* dealt with a criminal organization. The stigma associated with the offence requires that the accused have a subjective *mens rea* with respect to his or her association with the organization (see *Lindsay* (2004 S.C.J.), at para. 64)

[262] Proof of “for the benefit of” and “at the direction of” I conclude also requires proof of a mental element.

For the Benefit Of

[263] Dealing first with “for the benefit of”, no evidence persuades me beyond a reasonable doubt that Mr. Harris caused the death of Mr. Rock for the benefit of the criminal organization of which he was the head. The killing occurred as the culmination of a dispute over a drug debt. Mr. Harris owed Mr. Rock \$15,000 personally and \$15,000 as the balance of a debt for which Mr. Harris had assumed responsibility on behalf of Mr. Ritchie (Tommy). The evidence does not prove beyond a reasonable doubt that Mr. Harris killed Mr. Rock for the benefit of his criminal organization by way of extinguishing the debt. He did indeed extinguish the debt by the killing of Mr. Rock but the evidence does not make out he intended that benefit.

[264] Although Mr. Harris thought that Mr. Rock had begun to deal with the woman Cee Cee by supplying her with cocaine to sell in Grande Prairie and thereby damaging the business of Mr. Harris, the evidence does not prove beyond a reasonable doubt that Mr. Harris killed Mr. Rock to take over the sale of cocaine in the Grande Prairie area.

[265] For about three months Mr. Harris had continued to carry on the sale of cocaine in Grande Prairie after his falling out with Mr. Rock over the payment of the \$15,000 for drugs taken by Cee Cee. Apparently, Mr. Harris found another wholesale dealer after his dispute with Mr. Rock arose in July of 2014 as he continued in the business in Grande Prairie.

[266] Mr. Harris had tried to avoid, not find, Mr. Rock, and had told Mr. Ritchie (Tommy) to do likewise. The reason Mr. Harris and Mr. Rock met at the time of the killing was because Mr. Rock found Mr. Ritchie (Tommy) at the Canadian Brewhouse, held him there and robbed him of his motor vehicle. Mr. Harris did not seek out or seize the opportunity to kill Mr. Rock, intending to benefit his criminal organization by eliminating the debt or Mr. Rock as a competitor in Grande Prairie.

[267] Therefore, Mr. Harris did not kill Mr. Rock intending to achieve either of those benefits.

At the Direction Of

[268] Nor is there any evidence that the killing of Mr. Rock by Mr. Harris was at the direction of a criminal organization. The killing arose from the dispute over the debt, the actions of Mr. Rock causing Mr. Harris to go to the Canadian Brewhouse and the fight which commenced outside. No one in the Harris criminal organization directed Mr. Harris to kill Mr. Rock.

In Association With

[269] This leaves only the question of whether the evidence proves beyond a reasonable doubt that when Mr. Harris murdered Mr. Rock, that he did so “in association with a criminal organization”. “In association with” turns on whether the evidence proves beyond a reasonable doubt a connection to the activities of the criminal organization and whether the killing advanced their interest (*R v Venneri*, *supra*, paras 53 & 54).

[270] In *R v Venneri*, *supra*, the Supreme Court dealt with the phrase “in association with” as it is used in s 467.1(2) of the *Criminal Code*. It makes sense that their interpretation of it there applies to the phrase as used in s 231(6.1) of the *Code*. The Court stated at paragraphs 53 to 56:

[53] The phrase “in association with” should be interpreted in accordance with its plain meaning and statutory context. It is accompanied here by the terms “at the direction of” and “for the benefit of”. These phrases are not mutually exclusive. On the contrary, they have a shared purpose and will often overlap in their application. Their common objective is to suppress organized crime. To this end, they especially target offences that are connected to the activities of criminal organizations and advance their interests.

[54] Considered in this light, the phrase “in association with” captures offences that advance, at least to some degree, the interests of a criminal organization — *even if they are neither directed by the organization nor committed primarily for its benefit*. As noted by Miles Hastie:

The phrase “in association with” should capture, like its siblings, an interest of the criminal organization in the predicate offence.

The accused need not carry out the predicate offence exclusively for the criminal organization: the accused may (and, as an organization member, will usually) entertain other selfish motives. But offences committed for wholly selfish purposes should not generate liability. On some level, the offence must only capture actions with and for the criminal organization. [Emphasis added; emphasis in original deleted; footnote omitted.]

(“The Separate Offence of Committing a Crime ‘In Association with’ a Criminal Organization: Gang Symbols and Signs of Constitutional Problems” (2010), 14 *Can. Crim. L. Rev.* 79, at p. 91)

[55] The phrase “in association with” requires a connection between the predicate offence and the organization, as opposed to simply an association between *the accused* and the organization: see *R. v. Drecic*, 2011 ONCA 118 (CanLII), 276 O.A.C. 198, at para. 3. In *R. v. Lindsay* (2004), 2004 CanLII 16094 (ON SC), 70 O.R. (3d) 131 (S.C.J.), *aff’d* 2009 ONCA 532, 245 C.C.C. (3d) 301, the trial judge, correctly in my view, interpreted the phrase “in association with” as follows:

The phrase “in association with” is not impermissibly vague. The phrase is intended to apply to those persons who commit criminal offences in linkage with a criminal organization, even though they are not formal members of the group. *The Oxford English Dictionary* (10th ed.) defines the phrase “associate oneself with” to mean, “allow oneself to be connected with or seen to be supportive of”. The phrase “in association with” requires that the accused commit a criminal offence in connection with the criminal organization. Whether the particular connection is sufficient to satisfy the “in association with” requirement will be for a court to determine, based on the facts of the case. [Emphasis added; para. 59.]

[56] As mentioned earlier, an offender may commit an offence “in association with” a criminal organization of which the offender is not a member. Membership in an organization, however, remains a relevant factor in determining whether the required nexus between the offence and the organization has been made out (see *Drecic*, at para. 3).

[271] The Crown takes the position there is some evidence with respect to “in association with” but it falls short of proof beyond a reasonable doubt. The Crown points to the evidence of the substantial debt owed by Mr. Harris to Mr. Rock, that Mr. Rock started to deal with the woman Cee Cee, thereby hurting Mr. Harris’s trade in Grande Prairie, and Mr. Harris testified he had to take steps to protect that trade as Cee Cee knew his clients. These two possible benefits I have dealt with above.

[272] The Crown submits “There is little evidence that Mr. Harris’s concern at the time he killed Mr. Rock was for anything other than himself”.

[273] Although not obliged to accept the Crown's position (*R v Barabash*, 2015 SCC 9 at para 54), in this case I accept it as correct.

[274] From *R v Venneri*, *supra*, for the murder to qualify as "in association with", it must be connected with and advance the interests of the criminal organization (paras 54-55). As to the first part of the test, the evidence makes out that the killing was connected to the activities of the criminal organization.

[275] The connection of the criminal organization with the killing of Mr. Rock came from Mr. Rock's position as a wholesaler of drugs to Mr. Harris. Without this connection, Mr. Harris could not have incurred a debt he had to pay off from the activities of the criminal organization.

[276] Without the debt, Mr. Rock would not have confined and robbed Mr. Ritchie (Tommy) at the Canadian Brewhouse. That confinement related to the drug debt, either the amount incurred by Mr. Harris or the amount incurred by Mr. Ritchie (Tommy) and assumed by Mr. Harris, or both. The debt brought Mr. Harris to the Canadian Brewhouse. The fight outside the Canadian Brewhouse related to the debt.

[277] All of these factors related to the activities of the criminal organization pertaining to the sale of drugs and the payment of money from Mr. Ritchie (Tommy) to Mr. Harris, then to Mr. Rock. They connected the murder to the criminal organization.

[278] Turning then to the evidence, if any, which shows the murder advanced "at least to some degree the interest of a criminal organization", they did as a fact advance its interest.

[279] The threats to Mr. Harris ended. No longer would Mr. Harris need to concern himself with wearing "a vest". Nor would he need carry a handgun to deal with an attack from Mr. Rock.

[280] The intimidation of Mr. Ritchie (Tommy) ended. Mr. Harris told Mr. Ritchie (Tommy) to avoid the Canadian Brewhouse but Mr. Rock found Mr. Ritchie (Tommy), confined him, and robbed him. Further acts of intimidation could not happen again.

[281] Mr. Harris would not face an attack from the fists of Mr. Rock.

[282] Mr. Rock could no longer threaten or beat Mr. Stanley.

[283] The threats which Mr. Harris thought could extend to his family ended. Mr. Harris testified that Mr. Rock knew where they lived and therefore this situation would not end by Mr. Harris exiting the Canadian Brewhouse by the back door or otherwise taking steps to avoid facing Mr. Rock that night.

[284] From *R v Venneri*, *supra*, the three phrases in s 231(6.1)(a) "are not mutually exclusive" and "will often overlap in their application". Although I have found Mr. Harris did not seek out Mr. Rock and murder him for the benefit of the criminal organization to eliminate Mr. Rock as competition in the Grande Prairie drug trade or to eliminate the debt, the killing of Mr. Rock did advance the interests of the criminal organization by eliminating the intimidation of the members by Mr. Rock.

Intention

[285] The Crown must prove Mr. Harris intended both the connection to and the advancement of the interests of the criminal organization by the murder of Mr. Rock.

[286] On the evidence, I am not satisfied he intended both.

[287] The evidence could support he intended both because he testified not facing Mr. Rock that night would only make matters worse. Mr. Rock knew where he lived and where the mother of Mr. Harris lived. Mr. Harris expected further problems even if the four of them managed to make their escape from the Canadian Brewhouse.

[288] Therefore, the evidence could support an intention on the part of Mr. Harris to make an end of the problem.

[289] An equally likely conclusion, though, is that Mr. Harris intended only to respond to the attack of Mr. Rock, which Mr. Rock launched with his fists upon Mr. Harris. Although acting under a mistake of law as to defending himself with the handgun, this reasonable possibility raises a reasonable doubt as to his intention to murder Mr. Rock in association with the criminal organization.

[290] Therefore, the evidence does not make out a deemed planned and deliberate murder under s 236(6.1)(a) of the *Criminal Code*.

VIII. Conclusion

[291] The evidence proves beyond a reasonable doubt that Mr. Harris caused the death of Mr. Rock by an unlawful act and he cannot avail himself of the defence of self-defence. It also makes out he had the requisite intent for murder. Finally, the evidence as to planned and deliberate under s 231(2), proves beyond a reasonable doubt that Mr. Harris committed first degree murder.

Heard on the 25th day of February, 2019 to the 12th day of March, 2019, and the 31st day of May, 2019.

Dated at the City of Grande Prairie, Alberta this 21st day of June, 2019.

E.J. Simpson
J.C.Q.B.A.

Appearances:

Shannon Davis and Amber Pickrell
Crown Prosecutors' Office
for the Crown

Andrew Phypers
Barrister and Solicitor
for the Accused