

IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

R. v. B.T., 2012 NSPC 88

Date: October 12, 2012

Docket: 2388561 -
2388565

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

T.(B.)

TRIAL DECISION

JUDGE: The Honourable Anne S. Derrick

HEARD: September 11, 12, 13, 14, 17, 19, 20, 21, 24, 25, 26, 27, 28,
October 4, 2012

DECISION: October 12, 2012

CHARGES: sections 235, 344, 355(b), 342(1)(c), and 88(1), of the *Criminal Code*

COUNSEL: Ronald Lacey and Kimberly McOnie, for the Crown
Luke Craggs, for T.(B.)

By the Court:

Introduction

[1] On November 19, 2011 Glenn Oakley was shot in the abdomen and killed. A police investigation led to three teenagers being charged – T.(B.), and Jerricho Upshaw with murder, and Christopher Picco as an accessory after the fact to murder. T.(B.) had turned 17 just two months before Mr. Oakley was shot. He elected to be tried in the Youth Justice Court. Mr. Upshaw and Mr. Picco are being tried by juries in the Supreme Court.

[2] T.(B.) is charged with the first degree murder and robbery of Mr. Oakley, unlawfully having in his possession an RBC client card and a MBNA Mastercard, unlawfully using the RBC client card and MBNA Mastercard, and unlawful possession of a .22 calibre rifle for the purpose of committing an offence. In final submissions, the Crown conceded that the evidence at T.(B.)’s trial does not support a charge of first degree murder. Therefore on the murder charge, the issue is whether the Crown has proven beyond a reasonable doubt that T.(B.) is guilty of second degree murder.

The Meaning of Reasonable Doubt

[3] The Crown bears the heavy onus of proving T.(B.)’s guilt beyond a reasonable doubt, an onus that never shifts to T.(B.). The standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, a presumption that applies to T.(B.) throughout these proceedings.

[4] A reasonable doubt is not a doubt based on sympathy or prejudice; it is based on reason and common sense. It is logically connected to the evidence or absence of evidence. It does not require proof to an absolute certainty nor is it proof beyond any doubt. It is not proof beyond an imaginary or frivolous doubt. A determination that an accused “probably” had the requisite intent falls far short of proof beyond a reasonable doubt. (*R. v. Lifchus*, [1997] S.C.J. No. 77, paragraph 36) The reasonable doubt standard “falls much closer to absolute certainty than to proof on a balance of probabilities.” (*R. v. Starr*, [2000] S.C.J. No. 40, paragraph 242)

The Positions of the Crown and Defence

[5] The Crown submits that proof beyond a reasonable doubt of T.(B.)’s culpability for second degree murder is found in the evidence of four witnesses, two of whom had their police statements admitted after successful *Khelawon* applications by the Crown. (My decisions on these applications are *R. v. T.(B.)*, 2012 NSPC 86 and 87.) Other relevant evidence was obtained from the execution of search warrants, security video footage of T.(B.) and Mr. Upshaw, and the testimony of a forensic pathologist and a firearms and tool marks expert.

[6] It is the Crown’s position that T.(B.) shot Mr. Oakley either intending to kill him or intending to cause him bodily harm that he knew was likely to cause Mr. Oakley’s death and recklessly going ahead and shooting him anyway.

[7] The Crown is also seeking convictions on the remaining charges based on the evidence led at trial.

[8] The Defence submits that a reasonable doubt exists that it was T.(B.) who shot Mr. Oakley and points to the fact that some of the Crown’s evidence comes from untrustworthy witnesses. The Defence characterizes the Crown’s young civilian witnesses, all friends of T.(B.), as having “dirty hands, some dirtier than others” and as being “more interested in pursuing their own agendas” than in telling the truth. It is the position of the Defence that the Crown’s case against T.(B.) amounts to nothing more than a suspicion that he was responsible for Mr. Oakley’s death. At most says the Defence, T.(B.) may have negligently handled the gun resulting in Mr. Oakley being shot.

[9] In due course I will be discussing the evidence on which the Crown is relying and the relevant legal issues. At this point I will provide a narrative of the evening of November 19, 2011 and the evidence collected by the police investigators.

The Man on the Bridge

[10] On November 19, 2011, sometime after 10 p.m., a man, later identified as Glenn Oakley was found lying on the pedestrian walkway of Drysdale Road bridge.

[11] Jack Lamond, who lived close to the bridge at 144 Drysdale Road with his wife, Joan, was out in his garage around 10:20 p.m. on November 19, loading his truck for a flea market the next day. A mother and a daughter out walking their dog approached him. They had seen someone lying on the bridge.

[12] The discovery of Mr. Oakley was actually not the coincidence it seemed to be at the time. The mother and daughter who alerted Mr. Lamond were Amber Fenton and her daughter, Samantha Smith. At the time, Samantha Smith was the girlfriend of Jerricho Upshaw. She had just been speaking to Mr. Upshaw; it was a result of their discussion that Ms. Smith went for a walk with her mother to the Drysdale Road bridge. Mr. Upshaw is very significant to the Crown's case against T.(B.) It is admitted (Exhibit 59, Agreed Statement of Facts) that T.(B.) and Mr. Upshaw were friends.

[13] Mr. Lamond observed Mr. Oakley lying on his back with his eyes and mouth open, looking straight up. Mr. Lamond assumed he had passed out or had a heart attack. He tried to rouse Mr. Oakley who was completely unresponsive. Mr. Lamond could not feel a pulse.

[14] Mr. Lamond called 911. Police and EHS were dispatched accordingly; the ambulance arriving first at 10:36 p.m. Cst. John McLeod reached the bridge at 10:40 p.m.

[15] Joseph Boudreau, a paramedic, found Mr. Oakley to be cold but not stiff. As he was in this condition in a cold environment, EHS protocol required resuscitation to be undertaken. Mr. Oakley had gone into cardiac arrest: his heart had stopped, he was not breathing and he had no pulse.

[16] While CPR was being done, Cst. McLeod noticed blood on Mr. Oakley's shirt by his belt line. He pointed this out as the paramedics had not noticed what turned out to be a puncture wound in Mr. Oakley's lower abdomen.

[17] Mr. Lamond, and later his wife and Cst. John McLeod, all noticed that Mr. Oakley's pants pocket was turned inside out and there were some items scattered about, including some change by his left hip. Cst. McLeod noted a black leather belt loop on Mr. Oakley's belt of the type used to attach a wallet but there was no wallet.

[18] EHS worked on Mr. Oakley until they left the scene at 11:05 p.m. They were unable to find a pulse at any point and there were no signs of Mr. Oakley's condition improving as they tried to resuscitate him.

[19] EHS arrived with Mr. Oakley at the QEII Infirmity Hospital at 11:16 p.m. At 11:24 p.m. he was declared dead by Dr. Janet MacIntyre, the emergency medicine department doctor on duty. He had shown no signs of life, no spontaneous respiration and no cardiac activity since being discovered on the bridge.

Cause of Death

[20] An autopsy was performed on Mr. Oakley on November 20, 2011 by Dr. Marnie Wood, a Medical Examiner for the Province of Nova Scotia and a forensic pathologist. Dr. Wood was qualified without objection by Defence to give opinion evidence with respect to the cause of injuries to the human body and the cause of death.

[21] Dr. Wood concluded that the cause of Mr. Oakley's death was "an indeterminate range penetrating gunshot wound to the abdomen." Nothing else contributed to his death.

[22] Dr. Wood examined not only Mr. Oakley's body but also the clothing he had been wearing which accompanied him to the autopsy. She noted that the holes in Mr. Oakley's jacket, sweater and T-shirt, matched the hole in his abdomen. She observed no gunshot residue or debris around the wound.

[23] Dr. Wood testified that the hole in Mr. Oakley's abdomen was an entrance wound. There was no exit wound and she recovered a small calibre white metal bullet from under the subcutaneous tissue of Mr. Oakley's back. The bullet had

penetrated the apron of fat that suspends the bowel, perforated Mr. Oakley's bladder, and grazed his aorta.

[24] The grazing of Mr. Oakley's aorta, a very large blood vessel, caused considerable blood loss, a total of three litres, into his abdominal and retroperitoneal cavities. Dr. Wood testified that three litres of blood is "a fatal amount of blood loss." It was her evidence that within "a very few minutes" after being shot, Mr. Oakley would have lost enough blood to cause death.

Mr. Oakley and His Nightly Routine

[25] Glenn Oakley had just turned 70 on November 3, 2011. He worked for 32 years, until his retirement at 65, as a dishwasher at Northwood Manor. He had been married to Sheila Oakley since 1972.

[26] Mrs. Oakley testified that her husband had an evening routine of going for an extended walk. His usual routine was to start at 6:40 p.m. – 6:50 p.m. and walk for 1 – 2 hours at most. His walking circuit was from his home on Bridget Avenue, to Sylvia Avenue, then through JL Ilsley High School, on to Drysdale Road and back home. He had talked to Mrs. Oakley of walking on the Drysdale Road bridge, the bridge where he was found.

[27] Mr. Oakley carried his wallet in his pocket attached to his belt with a chain that was anchored by a leather loop. In his wallet he carried various cards, including a Royal Bank of Canada (RBC) client card and an MBNA credit card.

[28] Mrs. Oakley last saw her husband alive on November 19 at 6:40 – 6:50 p.m. when he left for his walk.

The Police Investigation – The Arrests of T.(B.) and Jerricho Upshaw

[29] Police investigators were able to zero in on T.(B.) and Jerricho Upshaw quite quickly. They had information that Mr. Oakley's MBNA credit card and RBC client card had been tried in the ATM's of the Royal Bank, Herring Cove Road Branch, 339 Herring Cove Road, on November 19 close to 8:30 p.m. The investigation established that attempts were made with the client card at 8:25:41

p.m., 8:26:16 p.m., and 8:26:28 p.m. and with the credit card at 8:25:51 p.m., 8:26:19 p.m., 8:26:35 p.m. and 8:26:49 p.m.

[30] It has now been conceded by T.(B.) that it was he and Mr. Upshaw trying to get money from Mr. Oakley's accounts. T.(B.) and Mr. Upshaw were identified by police and then witnesses at the trial as the young men depicted in security video stills from the Herring Cove Royal Bank. (Exhibit 52) They can be seen standing in front of the ATM's, Mr. Upshaw on the left and T.(B.) to his right. Bank documentation (Exhibits 54 and 55) establishes that Mr. Upshaw was using Mr. Oakley's credit card and T.(B.) was using his client card.

[31] The series of security camera still photographs from the Herring Cove Royal Bank depict Jerricho Upshaw and T.(B.) entering the ATM area of the Bank with their faces covered, T.(B.) with a balaclava and Mr. Upshaw with his hood pulled down and a zippered collar pulled up. In those photographs where their faces are covered only Mr. Upshaw's and T.(B.)'s eyes are visible. However subsequent camera images captured T.(B.) having removed his balaclava. His face can be plainly seen and he is readily identifiable.

[32] The RBC security video images led to police being able to arrest T.(B.) on November 20, and Mr. Upshaw on November 21, 2011. They charged both T.(B.) and Mr. Upshaw for first degree murder in relation to the shooting of Mr. Oakley. When he was arrested, T.(B.) was dressed in the same clothes he had been wearing the night before.

Police Interrogations

[33] Mr. Upshaw was interrogated by police on the night of November 21 and the morning and early afternoon of November 22, 2011. Homicide investigators were also questioning a close friend, Christopher Picco, at the same time. Mr. Picco had been arrested as an accessory after the fact to murder. (I was in error in my decision on the admissibility of Mr. Upshaw's police statement in saying that Mr. Picco's statement was obtained later than Mr. Upshaw's. The recording of Mr. Picco's first statement failed so the police conducted a re-interview with him. However Mr. Picco's first statement was taken while the police investigators had

Mr. Upshaw in custody. A few things that Mr. Picco had said to police about Mr. Upshaw's involvement were put to Mr. Upshaw when he was being questioned.)

[34] Homicide investigators also questioned T.(B.)'s girlfriend, C and Mr. Upshaw's girlfriend, Samantha Smith, obtaining statements from both of them.

The Police Investigation – Residential Searches

[35] Police investigators executed search warrants at the homes of T.(B.), Mr. Upshaw, and Mr. Picco. For the purposes of my decision, it is what police found at T.(B.)'s home on November 21 and Mr. Picco's apartment on November 22 that is relevant.

[36] The search warrant executed at T.(B.)'s home on November 21 resulted in the seizure of the stock of a long gun (Exhibit 47) from a drawer in T.(B.)'s bedroom. On November 22, police seized a semi-automatic .22 calibre Ruger rifle with a sawed-off barrel and sawed-off stock from the laundry room in Christopher Picco's apartment building. (Exhibit 46)

[37] During the search of Christopher Picco's apartment, police located Mr. Oakley's wallet lodged in the open cavity of a speaker standing in a small hallway between Mr. Picco's bedroom and the bathroom. It was wrapped in a plastic bag that had been taped. On November 22, the police recovered Mr. Oakley's Royal Bank client card from an employee at the MacDonald's restaurant who had found it a couple of days earlier. The MacDonald's is located next to the Herring Cove Branch of the Royal Bank. Mr. Oakley's wallet was missing his RBC client card and his MBNA credit card.

Expert Evidence Concerning the Semi-Automatic .22 Calibre Ruger Rifle

[38] Evidence from Terry Pipes, a civilian RCMP firearms and toolmark specialist, indicated that he could not rule out the bullet recovered from Mr. Oakley as having been fired from the .22 Ruger rifle seized from Mr. Picco. The bullet had been discharged from a .22 calibre rifle or handgun, with six lands and grooves and a right hand twist, the characteristics of the seized Ruger, although other gun manufacturers also produce those markings. Mr. Pipes also examined the stock

seized by police investigators from T.(B.)'s bedroom and confirmed that it had belonged to the sawed-off Ruger rifle.

[39] The seized Ruger rifle comes with a ten cartridge magazine. Mr. Pipes described how the rifle functions: the shooter releases the action mechanism which places a cartridge from the magazine in the chamber, presses the trigger and the gun fires and reloads the chamber from the magazine. The rifle ejects the expended cartridge from which the bullet has been fired. When Mr. Pipes tested the Ruger, the action and the ejector were working properly. He testified that the ejector would "pop" the cartridge out with some force to the right of the firearm.

The Police Investigation – The Search of the Scene

[40] Police searched the path below the Drysdale Road bridge and found no spent cartridge shell. I will return to this later in these reasons.

The Evening of November 19 – The Evidence of Christopher Picco

[41] Christopher Picco lived at 44 River Road with his girlfriend. Unemployed and not in school, his apartment was a hang-out for his circle of friends while his girlfriend was at work. Mr. Picco's friends included T.(B.) and his girlfriend, C, and Jerricho Upshaw and his girlfriend, Samantha Smith. T.(B.), Mr. Upshaw and Ms. Smith all lived quite close to Mr. Picco's.

[42] The police arrested and questioned Mr. Picco on November 22. They charged him as an accessory and he was subpoenaed to testify at T.(B.)'s trial concerning what he knew about the evening when Mr. Oakley was shot.

[43] Mr. Picco testified that he and T.(B.) had been relaxing at the apartment from around lunchtime until suppertime. T.(B.) left to go home and get some supper, returning around 5 p.m. with another good friend, Jerricho Upshaw. (I note that Mr. Upshaw told police investigators that he was at Mr. Picco's apartment with him before T.(B.) arrived but I do not regard this as a discrepancy that has any significance.)

[44] Mr. Picco, T.(B.) and Mr. Upshaw "chilled" together, playing Call of Duty, watching You Tube videos, and going for a walk to the library and back. They also talked about a gun that Mr. Picco had, a .22 sawed-off Ruger rifle. That talk

focused on trying the gun out to make sure it wasn't jammed. As Mr. Picco put it in his testimony, "We were going to go to the bridge and just shoot it off."

[45] Mr. Picco's evidence about when the discussions concerning the Ruger occurred was somewhat inconsistent. He first testified that it was after the walk to the library that they "got the idea to go down the fire road by the bridge and test the gun out." Later in his testimony he said they had had the idea "all day."

[46] It does not much matter when the discussion about the gun got underway: Mr. Picco was unequivocal about the fact that he, Mr. Upshaw and T.(B.) were all present when the idea of going out to shoot off the gun was discussed.

[47] According to Mr. Picco, he decided not to go on the gun-testing excursion. He testified that his girlfriend was getting off work early and he wanted to clean up the apartment and make supper for her. He stayed behind and Mr. Upshaw and T.(B.) left with the Ruger. Mr. Picco said this was "about quarter to seven-ish" on November 19.

[48] Mr. Picco identified Exhibit 46, the .22 calibre Ruger rifle seized by police as the gun that had been the subject of discussion and that T.(B.) and Mr. Upshaw took with them when they left.

[49] It was Mr. Picco's evidence that T.(B.) took the rifle. Although he testified that he doesn't know how T.(B.) was carrying the gun, a little later in his testimony he said that "they" always put the gun in their pants when they took it out of the apartment.

[50] Although the police photographs don't make obvious what may have been done, Mr. Picco testified that once alone in the apartment he began to clean up and make supper. He thinks it was "probably eight o'clock" when T.(B.) and Mr. Upshaw returned. He testified that T.(B.) had the gun. He described T.(B.) as "kinda shocked" and both of them as "kinda white-faced" and uncharacteristically silent. Mr. Picco sensed that something was amiss. He asked what was wrong and T.(B.) said: "I shot someone."

[51] Mr. Picco testified that he did not believe what he was hearing. He thought he was being made the butt of a joke, that T.(B.) and Mr. Upshaw were "yanking

his chain.” He took the gun and tucked it back in a corner of his bedroom. He told T.(B.) and Mr. Upshaw to “go home and relax.”

[52] According to Mr. Picco, T.(B.) and Mr. Upshaw left the apartment and returned about a half hour later. He claims he was alone in the interim, still making supper and cleaning up. When T.(B.) and Mr. Upshaw returned this time, they both said at the same time that they went down to the body, that it was Mr. Oakley who had been shot.

[53] It was Mr. Picco’s evidence that he still didn’t believe what he was being told and so went with T.(B.) and Mr. Upshaw down toward the Drysdale Road bridge. From the Lions Rink parking lot he could see a shadow on the bridge and his stomach “turned.” He testified that they all then walked in the same direction, Mr. Picco heading home. T.(B.) lived one street over from River Road and Mr. Upshaw beyond that in the 500 block of Herring Cove Road. As the evidence later revealed, Mr. Upshaw’s address at the time was 536 Herring Cove Road, Apartment 17. Mr. Picco reached his street first and says he assumed T.(B.) and Mr. Upshaw went home. According to Mr. Picco, there was no conversation as the three of them walked away from the bridge.

[54] The next night, Mr. Picco was walking on River Road with T.(B.) when they encountered Csts. Patricia Kennedy and D’Arcy Hueston who were assisting the homicide investigators. T.(B.) was arrested. Mr. Picco headed home to his apartment. He says that “reality hit.” The Ruger was still in his bedroom from the night before. His girlfriend didn’t know anything about what had happened. In Mr. Picco’s words, “I shouldn’t have had the gun in the first place.” He stuck the gun in his pants and went to the basement laundry room to stash it behind the dryer. Following his arrest on November 22, he told police where to find it.

[55] As I noted earlier in these reasons, the Ruger was not the only physical evidence connected to Mr. Oakley’s homicide that was seized by police searching at Mr. Picco’s apartment building. Mr. Oakley’s wallet with its attached chain was located by police in Mr. Picco’s apartment. In the witness box, Mr. Picco denied any association with the wallet. He testified to having no recollection of T.(B.) or Mr. Upshaw bringing a wallet back to his apartment on November 19. He said there was no discussion about credit cards that he can recall.

The Evening of November 19 – The Evidence of Jerricho Upshaw

[56] Mr. Upshaw’s evidence came in through a statement he gave to police on November 22, 2011. Through the night before and into the morning of November 22, Mr. Upshaw had been resisting the efforts of police interrogators to get admissions about his role in Mr. Oakley’s homicide. (The unfolding of Mr. Upshaw’s November 21/22 interrogation is described in my decision on the Crown’s *Khelawon* application (2012 NSPC 87)). The police had emphasized to Mr. Upshaw that they did not believe he had shot Mr. Oakley. They pressed him on the issue of whether he had urged T.(B.) to pull the trigger, which he steadfastly denied. What Mr. Upshaw eventually described to Cst. Bobby Clyke, the officer with whom he had an established and comfortable relationship, was the traumatic experience of witnessing T.(B.) spontaneously shoot Mr. Oakley. According to Mr. Upshaw the effect on him was “almost like [being] knocked unconscious.” He told Cst. Clyke: “I was good for nothing.” (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 171*)

[57] Mr. Upshaw told Cst. Clyke he “wasn’t close at all” to Mr. Oakley when he was shot. He and T.(B.) had started walking up the path by the Drysdale Road bridge. Mr. Upshaw spotted Mr. Oakley up on the bridge, and employing a nickname used by the neighbourhood young people, gave Cst. Clyke his version of the events: “...And I didn’t see him. And I looked over and it scared me. I was, like, “Oh, Jesus, there’s Squizzy.” (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 187*) Mr. Upshaw continued:

...I kept walking and [B.] kept walking. And, like, I didn’t realize he turned around, but then I turned around and then he turned—like, he was already on the trail...And I was like, “What’s he doing?” and then, “Bang.” And then I paused for a second, because it was kind of, like, what in the fuck? And then we—I took off like a bat out of hell. That is my part in it. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, pages 187-188*)

[58] At this point, Mr. Upshaw broke down crying, telling Cst. Clyke he had not known what to do: “...for the days after I was in a daze...I was walking around like I was stupid. I was walking around looking like I was high.” (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 198*)

[59] Mr. Upshaw told Cst. Clyde how scared the shooting made him, it was nothing he had ever seen before and he "...thought for sure [Mr. Oakley] was dead." He maintained that he had nothing to do with Mr. Oakley's wallet being taken, saying that was all T.(B.)'s doing, and that he – Mr. Upshaw – had not wanted to go to the bank with the stolen cards. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 197*) Mr. Upshaw said he was not with T.(B.) when he went to get the balaclava he is seen wearing in the RBC security video stills: "When he went and got the masks I was at my buddy's house just freaking." (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 199*) He confirmed that the buddy he was referring to was Christopher Picco. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 200*) He then met up with T.(B.) outside on River Road and they went to the bank together. Mr. Upshaw said he had wanted to go to see his girlfriend, Samantha Smith, to tell her about what he had just seen, but he went off to the bank with T.(B.) instead. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 202*) He later told the investigators that he now realized going to the bank was "a mistake" and "a stupid fucking idea." (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, pages 218, 227, 267*)

[60] Cst. Clyde suggested to Mr. Upshaw that while he was "freaking out" at Mr. Picco's, he was talking to him about what happened. Mr. Upshaw refuted this, saying: "I didn't tell Picco...I'm not the one that told Picco." (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 201*)

[61] Later in the morning of November 22, Sgt. Kelly, who had interrogated Mr. Upshaw to no avail the night before, took over the questioning from Cst. Clyde. He made it plain to Mr. Upshaw that the police did not believe his claims that he did not know T.(B.) had a gun and did not tell T.(B.) to shoot Mr. Oakley. Mr. Upshaw said that while he was at Christopher Picco's apartment, sitting on the couch, he could see the gun being passed around but did not see T.(B.) take it with him when they left to go for a walk. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, pages 228– 230*) He described the size of the gun to Sgt. Kelly and Cst. Clyde and said: "Do you want to know where it fits perfectly? Right down your pants."

[62] Mr. Upshaw had obviously seen the Ruger at Mr. Picco's. He told Cst. Clyde that while he and T.(B.) were walking: "...I didn't know B. had that .22 when we were walking, I know that." (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 186*) To this point in their interrogation of Mr. Upshaw, the police had provided no description of the gun they suspected had been used in Mr. Oakley's shooting. But no matter how hard he was pressed, Mr. Upshaw emphatically denied any knowledge of T.(B.) taking the Ruger with him when they left Mr. Picco's for their walk. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, pages 186, 192, 303, 343, 349, 354*) The police plainly did not buy this claim. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 257*)

[63] Some time into Sgt. Kelly's interrogation of him on November 22, Mr. Upshaw described again where he was when Mr. Oakley was shot:

I was up on the path leading down from the street...we were just walking up to leave the trail. We were getting ready to leave and go back to Chris'...when I walked up I looked over and I got kind of scared because I seen Glenn...like, just scared because it just looked like he came out of nowhere, and I was, like, "Oh, there's Squizzy." And I said – uh, I was – kept on walking. And then, uh, when I got up to the path I turned around, talked to B, uh, and then he's down on the path, and then...he got shot...I saw him [B] hold the gun and shoot him. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, pages 239 – 240*)

[64] After this Mr. Upshaw told Sgt. Kelly he and T.(B.) ran. T.(B.) had the gun, "He didn't chuck it. He just ran." (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 309*) According to Mr. Upshaw's statement, he did not know that T.(B.) gave the gun to Mr. Picco and did not give the wallet "to anyone. I didn't touch the wallet." (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 245*) "I didn't give him [Picco] the wallet." (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 285*) Mr. Upshaw eventually claimed that T.(B.) gave Mr. Picco the wallet, something he witnessed happening in Mr. Picco's bedroom. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 286, 344*) He could not recall who was at Mr. Picco's when he and T.(B.) returned; he just remembered being there with T.(B.) and Mr. Picco,

and “maybe somebody else. I cannot remember who, though.” (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, pages 310-311; page 319*)

[65] Close to the end of his interrogation on November 22, Mr. Upshaw said he saw T.(B.) take Mr. Oakley’s wallet from Mr. Oakley’s prone body on the bridge. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 315*) Previously he had denied witnessing this. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 185*) Back at Mr. Picco’s Mr. Upshaw says T.(B.) was “showing people the wallet.” (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 316*) Confronted by what his girlfriend had told police about being at Mr. Picco’s and seeing a stolen credit card that was being discussed, Mr. Upshaw admitted to Cst. Clyke that he now remembered Ms. Smith was at the apartment. Shown portions of Ms. Smith’s police interview he told Cst. Clyke that T.(B.) gave him a credit card from Mr. Oakley’s wallet and kept the client card for himself. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 330*) Mr. Upshaw continued to minimize his involvement: “I didn’t actually plan on using it.” (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 330*) He said he forgot all about seeing his girlfriend at Mr. Picco’s apartment that night. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 331*)

[66] Mr. Upshaw had earlier told Cst. Clyke how anxious he had been to tell Ms. Smith what had happened because he knew she would do something about it, which she did by going for a walk with her mother, leading to the discovery of Mr. Oakley’s body and Mr. Lamond calling 911. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, pages 178, 190-191, 198, 246-247*) When asked why he had not told Ms. Smith anything at Mr. Picco’s apartment before going to the bank with T.(B.), Mr. Upshaw said there had been too many people around so he chose to talk to her alone, later. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 332*)

[67] Mr. Upshaw reiterated for a third time in his interrogation what he said happened at the Drysdale Road bridge: he and T.(B.) started walking up the path, Mr. Upshaw said “there is Squizzy”, T.(B.) was behind him at the bottom of the path, he pulled up, stepped back, shot Mr. Oakley, and they ran back to Mr. Picco’s apartment. He and T.(B.) returned to the scene, T.(B.) took the wallet and they

went back to Mr. Picco's. (*Exhibit VD-2, Transcript of Jerricho Upshaw Police Interview, page 343*)

The Evening of November 19 – The Evidence of T.(B.)'s Girlfriend, C

[68] Police investigators also obtained a statement from T.(B.)'s girlfriend, C. In my decision (2012 NSPC 87) admitting C's statement as evidence, I describe her police interview. Like Mr. Upshaw, C was resistant to talking. She presented herself as defiant and hostile. Eventually she disclosed some small details. She told Det/Cst. Blencowe she was with T.(B.), Mr. Upshaw and Christopher Picco "and a couple of other people" on the evening of November 19. (*Exhibit VD-4, Transcript of C's Police Interview, page 55*) She said that "B and Jerricho left and came back." After this, she walked home. "And we made a few pit stops on the way home..." This occurred on Herring Cove Road while C waited at a bus stop. She and T.(B.) then went to her house. It is conceded by Defence that T.(B.) did not go home to where he lived with his parents on Sylvia Avenue on the night of November 19. (*Exhibit 59, Agreed Statement of Facts*)

[69] Det/Cst. Blencowe took a blunt and leading approach with C once she told him T.(B.) had gone home with her that night. He asked her: "When did he tell you he did the murder?" She told him, "That night" and then said she did not want to answer any more questions, "I'm not trying to be rude, I'm really not...I'm scared and I don't want to talk about it." (*Exhibit VD-4, Transcript of C's Police Interview, page 56*) She did however respond to Det/Cst. Blencowe asking her to describe T.(B.) when he told her "what happened": "He was fucked up. He didn't even look like the same person." (*Exhibit VD-4, Transcript of C's Police Interview, page 57*) Otherwise, C was invited to speculate about what led to Mr. Oakley's shooting. I have not accorded her opinions any weight in my assessment of the evidence.

The Evening of November 19 – The Evidence of Samantha Smith

[70] By November 19, 2011, Samantha Smith had been in a serious dating relationship with Jerricho Upshaw for about a month. They had been friends for some months before they started going out. Ms. Smith had turned nineteen in July. Mr. Upshaw had just turned eighteen in October. By the time she testified at

T.(B.)’s trial, Ms. Smith described herself as Mr. Upshaw’s ex-girlfriend but said he was one of her best friends.

[71] Ms. Smith had been good friends with T.(B.) and Christopher Picco since childhood. She referred to Mr. Picco as “like family.”

[72] Ms. Smith spent November 19 in Springhill visiting her father. She was late getting back to the city. After a quick stop at home and a visit to a nearby convenience store for cigarettes, Ms. Smith made her way to Mr. Picco’s, not even a five minute walk. She is very certain she got there a little after 7 p.m. She testified that she checked the time when she arrived at home because she had been supposed to meet Mr. Upshaw at 5:30 p.m.

[73] Ms. Smith has a more complete memory of who was present at Mr. Picco’s. Her brother was there, T.(B.), C, Mr. Upshaw, and some other young people, a total of about 8 – 10 people according to Ms. Smith. Everyone was just sitting around the kitchen area talking. The talk was about a stolen credit card. According to Ms. Smith it was mostly T.(B.) and Mr. Upshaw who were having the discussion. They were saying they had found the card and were “going shopping.” Ms. Smith says she saw the card in T.(B.)’s hand. She was sitting very close to where Mr. Picco, Mr. Upshaw, and T.(B.) were congregated.

[74] Ms. Smith thought the plan to try and use the card was a grave mistake. She tried to convince Mr. Upshaw of this. She wanted to prevent him from getting into trouble. She told him they would get caught, that there were cameras everywhere. Mr. Upshaw was not dissuaded although he did eventually promise Ms. Smith he would not get involved.

[75] Other than the stolen credit card, nothing else caught Ms. Smith’s attention. According to her evidence, “Everyone seemed perfectly fine...normal.” What was otherwise being discussed seemed normal. Ms. Smith had no inkling of anything beyond the fact of a credit card having been found or taken from someone’s wallet.

[76] After hanging around the Picco apartment for a while longer – Ms. Smith says she was there for about 45 minutes in total – she and her brother left to go home and eat. She thinks it was close to 8 p.m. when she got home. After eating

something, she watched a movie with her brothers and then Mr. Upshaw showed up “a little before 10 p.m.”

[77] Mr. Upshaw’s appearance at Ms. Smith’s home was nothing out of the ordinary. He came every night to say good night to Ms. Smith. But this time, according to Ms. Smith, “He didn’t seem right.” She thought he was on drugs. He was not forthcoming at first and denied that anything was the matter. When Ms. Smith took him to the side of the house to talk to him in private, Mr. Upshaw told her that something had happened down at the bridge involving “Squizzy”.

[78] Ms. Smith knew Mr. Upshaw was referring to Glenn Oakley. She understood from what Mr. Upshaw told her that whatever had happened at the bridge was very serious. She became agitated and Mr. Upshaw told her to calm down. He said he did not know what to do.

[79] After they smoked a cigarette together, Ms. Smith told Mr. Upshaw to go home. She went inside where her mother was getting ready to take their dog for a walk. Ms. Smith remembers it being around 10:30 p.m. Although not normally keen to walk the dog, Ms. Smith volunteered to accompany her mother and they made their way toward the Drysdale Road bridge. She said nothing to her mother about the possibility they might find someone. She didn’t want her mother to know anything. She also didn’t want to believe that something terrible had happened.

[80] Ms. Smith testified that in hindsight, once she saw Mr. Oakley lying on the bridge, Mr. Upshaw’s demeanor at Christopher Picco’s did seem strange to her. It was only when Mr. Upshaw came to see her later that it became apparent something really serious had happened. Ms. Smith noted that Mr. Upshaw puts up “a strong front” around his friends but with her, he “always let his guard down.” It was her evidence that: “Around the boys he wouldn’t show he was scared...he wouldn’t have shown that at all.”

Assessing the Witness Evidence

[81] Mr. Oakley was last seen by his wife at approximately 6:50 p.m. on November 19 as he left to go for his walk, a walk that took him over the Drysdale Road bridge. Just before 8:30 p.m. T.(B.) and Jerricho Upshaw were at the Herring Cove Royal Bank trying to extract money from Mr. Oakley’s accounts using his

client and credit cards. When Mr. Oakley was found lying on the Drysdale Road bridge just before 10:30 p.m., his wallet was missing. That wallet was found on November 22 in Christopher Picco's apartment. Also found in Christopher Picco's apartment building was the semi-automatic, 22 calibre Ruger rifle that could have fired the bullet recovered from Mr. Oakley's body. The stock for that rifle was seized by police from T.(B.)'s bedroom.

[82] The Crown's evidence about what happened to Mr. Oakley, the .22 calibre rifle, and Mr. Oakley's wallet, has been supplied by young witnesses whose evidence suffers from memory, credibility, and reliability problems. I have to sort through that evidence to determine if there is proof beyond a reasonable doubt that it was T.(B.) who shot Mr. Oakley.

[83] I must also be mindful of the fact that the evidence from Mr. Picco and Mr. Upshaw is evidence from accomplices. As I mentioned earlier, Mr. Upshaw is charged with Mr. Oakley's murder and Mr. Picco is charged as an accessory after the fact to that murder. I have to consider whether it is dangerous to rely on their evidence.

Vetrovec Warning

[84] The evidence of Mr. Upshaw and Mr. Picco must be approached with caution. The Supreme Court of Canada in *R. v. Vetrovec*, [1982] 1 S.C.R. 811, *R. v. Bevan*, [1993] S.C.J. No. 69, *R. v. Khela*, [2009] S.C.J. No. 4, and *R. v. Smith*, [2009] S.C.J. No. 5, to name a few of the applicable cases, has emphasized that it is dangerous to convict an accused on the unconfirmed evidence of an untrustworthy witness. The trier of fact should look for independent evidence that offers "comfort... that the witness can be trusted in his or her assertion that the accused is the person who committed the offence." (*Khela*, paragraph 42)

[85] *Vetrovec* cautions are not merely for juries. If warranted, they must feature in judicial reasoning in judge-alone trials. Where a trial judge in a judge-alone trial is considering the testimony of an untrustworthy witness, she must give herself "a clear and sharp warning" in accordance with the law. (*R. v. Kehler*, [2004] S.C.J. No. 1, paragraph 24) While it has been held that a trial judge, sitting alone, is not required to verbalize the *Vetrovec* warning to herself (*R. v. McAllister*, [2008]

N.S.J. No. 4 (N.S.C.A.), trial judges are obligated to provide adequate reasons for our conclusions. (*R. v. Sheppard*, [2002] *S.C.J. No. 30* and *R. v. Braich*, [2002] *S.C.J. No. 29*)

[86] It is well recognized that the evidence of one untrustworthy witness can be corroborated by the evidence of another witness with respect to whom similar concerns arise. (*R. v. Naicker*, [2007] *B.C.J. No. 2626 (C.A.)*, paragraph 34, citing *R. v. Illes*, [2007] *B.C.J. No. 364*, paragraphs 30-31 and *R. v. Pollock*, [2004] *O.J. No. 2652 (C.A.)*, paragraph 161)

[87] This is relevant to my consideration of the evidence of Mr. Picco and Mr. Upshaw. There is no evidence or suggestion of collaboration between them and where that is the case, “the corroboration of two such witnesses can be strong and reliable.” (*Naicker*, paragraph 34; *R. v. Roks*, [2011] *O.J. No. 3344 (C.A.)*, paragraphs 67 and 72)

Christopher Picco’s Evidence

[88] Christopher Picco’s evidence has T.(B.), in the company of Jerricho Upshaw, leaving his apartment with a sawed-off .22 calibre Ruger rifle. The purpose of taking the gun was to make sure it fired properly. T.(B.) comes back, in a stricken state, and tells Mr. Picco he shot someone. He and Mr. Upshaw leave again, and when they return, they tell Mr. Picco it was Glenn Oakley who was shot. Mr. Picco continues to disbelieve what he is being told and goes to see for himself, claiming that he then glimpses the body lying on the Drysdale Road bridge. He stashes the gun, returned to him by T.(B.), in his bedroom first and then behind a dryer in the laundry room of his apartment building. He claims to know nothing about Mr. Oakley’s wallet and recalls no discussion about a credit card. According to Mr. Picco, no one else is present for any of the events he describes.

Jerricho Upshaw’s Evidence

[89] Mr. Upshaw also describes leaving the Picco apartment to go for a walk with T.(B.) He says the purpose of the walk was nothing out of the ordinary: the Picco apartment was stuffy and a walk would get them some fresh air. He claims not to have known T.(B.) was carrying a gun, a .22 calibre Ruger rifle. He sees Mr. Oakley on the Drysdale Road bridge and announces this to T.(B.) To his horror,

T.(B.) inexplicably shoots Mr. Oakley and they run back to Mr. Picco's. He is "not the one that told Picco" what had happened, implying that T.(B.) did so. They go back without Mr. Picco to check on Mr. Oakley and while at the body, T.(B.) takes his wallet. They return to the Picco apartment with the wallet. Mr. Upshaw sees his girlfriend, Samantha Smith, there. He and T.(B.) go to the Royal Bank to try the cards. After this he talks to Ms. Smith alone outside her house and tells her that something happened at the bridge.

[90] Mr. Upshaw acknowledges that T.(B.)'s girlfriend was also at Mr. Picco's because he tells police he does not know why she did not go with them other than she wanted to stay behind.

The Evidence of C

[91] C confirms that T.(B.) and Mr. Upshaw were at Mr. Picco's. She saw them leave together and come back. She says that T.(B.) admits to her that he shot Mr. Oakley. Her evidence about "the pitstops" at businesses on Herring Cove on the way home while she waited outside at a bus stop sounds very like the trip made by T.(B.) and Mr. Upshaw to the Royal Bank.

The Evidence of Samantha Smith

[92] Ms. Smith's evidence puts T.(B.), Mr. Upshaw and C at Christopher Picco's when Mr. Oakley's credit card was being displayed and discussed. It was as a result of Mr. Upshaw coming to talk to her that Mr. Oakley's body was discovered.

Mr. Oakley's Body and the Trajectory of the Bullet

[93] As I mentioned earlier, the forensic pathologist, Dr. Marnie Wood, was unable to indicate the distance from which Mr. Oakley was shot. This is why she described the penetrating gunshot wound to his abdomen being of "an indeterminate range." The shot was fired from far enough away that there was no gunshot residue or debris around the wound.

[94] Mr. Oakley sustained an injury to his head that is relevant. During autopsy, Dr. Wood found a red, abraded contusion on the back of Mr. Oakley's head. This "occiput" injury is consistent with a fall backwards which suggests that, once shot, Mr. Oakley fell onto his back, striking his head. The lividity of his body, as seen in

the autopsy photographs, is consistent with him falling and lying prone on his back as his heart stopped and circulation ceased. This is how he was found on the Drysdale Road bridge. I accept Dr. Wood's expert opinion that Mr. Oakley was dead within a very few minutes of being shot.

[95] During the autopsy procedure, Dr. Wood used a probe to track the trajectory of the bullet she retrieved from Mr. Oakley's back, the bullet that had entered his abdomen, 73 centimeters from the top of his head and 4.5 centimeters right of his anterior midline. (The anterior midline is measured from the throat through the umbilicus to the pubic bone.) The bullet came to rest 52 centimeters below the top of Mr. Oakley's head and 5 centimeters left of his posterior midline.

[96] Dr. Wood testified that she is unable to tell what position Mr. Oakley was in when he was shot. If he had been in the standard anatomical position, that is, upright, then the bullet travelled upwards in his body and from right to left.

[97] Dr. Wood found no injury to any bone and therefore no evidence of the bullet ricocheting. She testified that the bullet travelled in a straight line through the body along the trajectory that can be seen in Exhibit 2, Photograph 31 from the autopsy.

The Evidence that T.(B.) Shot Mr. Oakley

[98] There are three main sources of witness evidence that Mr. Oakley was shot by T.(B.) Mr. Picco testified that T.(B.) told him he shot someone, that someone later being identified as the man lying on the Drysdale Road bridge, Glenn Oakley. Jerricho Upshaw gave a police statement in which he described T.(B.) shooting up at Mr. Oakley from a path just below the Drysdale Road bridge. And T.(B.)'s girlfriend, C, told Det/Cst. Blencowe that T.(B.) had admitted to her that he committed the homicide.

[99] Mr. Upshaw is the only purported eyewitness to Mr. Oakley's shooting. He described the shooting in specific detail on three separate occasions during his November 22 police interrogation. He related the details consistently on each occasion. Aspects of what he described are corroborated by other evidence: Mr. Oakley's injuries are consistent with him being shot from below and falling backwards and lying prone on his back until his heart and circulation stopped; the

bullet retrieved from him could have been fired from the .22 calibre Ruger rifle; a .22 calibre Ruger rifle was recovered from Christopher Picco's apartment building laundry room by police and he admits to having hidden it there; the .22 calibre Ruger seized by police is the same gun Mr. Picco testified was the subject of the discussion with T.(B.) and Mr. Upshaw on November 19; by saying that T.(B.) returned the gun to him, Mr. Picco corroborated Mr. Upshaw's statement to police that T.(B.) did not throw the gun away but ran with it back to Mr. Picco's; T.(B.) had some familiarity with the Ruger as the stock that had belonged to it was found by police in T.(B.)'s bedroom; the description by Mr. Upshaw of Mr. Oakley's wallet, that it had a chain attached to it, is accurate; Mr. Oakley's wallet was seized from Mr. Picco's apartment; the wallet was missing Mr. Oakley's RBC client card and his MBNA credit card, the cards that Mr. Upshaw and T.(B.) were trying to use in the Royal Bank ATM's; Samantha Smith testified that she saw a credit card in T.(B.)'s hand at Christopher Picco's apartment and urged Mr. Upshaw not to use it.

[100] I have to consider whether Mr. Upshaw's descriptive details could have come from the fact that he, not T.(B.) pulled the trigger and shot Mr. Oakley. There is no evidence of this. None of the witnesses gave evidence pointing to Mr. Upshaw as the shooter. It is also significant to me that C, T.(B.)'s girlfriend, did not challenge Det/Cst. Blencowe's construction of the facts: "When did he tell you he did the murder?" She had shown herself to be feisty and combative with the detective in earlier exchanges. She did not respond by indicating that Mr. Upshaw had committed the homicide. She simply responded to Det/Cst. Blencowe's question by saying it was "that night". I can think of no reason for her to have given the police an untruthful answer. C was even able to describe how T.(B.) looked when he told her – "He was fucked up. He didn't even look like the same person."

[101] I find that C, although very guarded, was truthful with Det/Cst. Blencowe in the sparse details she offered about what she knew. In her testimony before me she was either experiencing a massive memory loss about events that happened less than a year ago or she was trying not to assist the Crown in its prosecution of her boyfriend. When she opened up to Det/Cst. Blencowe, even to the limited extent that she did, she did not provide answers to his questions that would help T.(B.).

Helping T.(B.) would have involved C saying something different than what she said. I find she opted to tell Det/Cst. Blencowe the truth. On C's evidence, T.(B.) admitted to shooting Mr. Oakley.

[102] I also find that Samantha Smith was truthful. I am aware that when first questioned by police she was not. She acknowledged that when she testified. When she was interviewed on November 20 she did not tell the police about her conversation with Mr. Upshaw the night before. It was her evidence that she did not want to get him and T.(B.) into trouble. She also was fearful of the repercussions of talking to police and telling them she knew who was responsible. It was only during her second interview when Det/Cst. Blencowe came in and told her they were interviewing Mr. Upshaw that she admitted to what she knew. She knew what she had to say corroborated what Mr. Upshaw was telling the investigators and she felt there was "no point in continuing to lie." I find that Ms. Smith then decided to tell the truth and continued to do so when she testified at T.(B.)'s trial.

[103] I note that how Mr. Upshaw appeared at Mr. Picco's is entirely consistent with Ms. Smith's description of his unwillingness to show any weakness around his friends. At that time he seemed "perfectly normal."

[104] Samantha Smith impressed me as an honest witness: she was unshaken in her evidence, straightforward in her responses, and clear about what she remembered. She has had enduring friendships with Mr. Picco, Mr. Upshaw and T.(B.), yet she did not hesitate in answering questions on direct and cross-examination in a forthright manner. She was asked on cross-examination if she wasn't just trying to protect Mr. Upshaw with her evidence, a suggestion she emphatically rejected: "I have no reason to protect Jerricho right now because he's in jail, he's facing these charges, there's no more protecting him. I was protecting B too when I did not call the cops and say that B and Jerricho did this..."

[105] As a matter not of credibility but of accuracy, I do not think that Ms. Smith, despite her certainty on this point, can have been correct about the time she was at Mr. Picco's apartment. She was only at Mr. Picco's apartment to witness Mr. Oakley's credit card being discussed. According to Mr. Upshaw this was after Mr. Oakley had been shot and he and T.(B.) had first returned to the apartment. I

believe that Mr. Oakley would have been shot after 7 p.m. and the displaying of the credit card had to have occurred sometime later than that. I believe what Ms. Smith described about what she witnessed at Mr. Picco's apartment but I think she is mistaken about the time she was there.

[106] I have taken a hard look at the evidence from Mr. Picco and Mr. Upshaw and am mindful that, as accomplices, they could be seeking to advance their own interests at T.(B.)'s expense. I agree that they each seemed to be trying to tailor aspects of their narratives. However, in Mr. Picco's case, there does not seem to have been a significant attempt to minimize his involvement, with the exception of his evidence denying knowledge of Mr. Oakley's wallet, evidence that could be true although I think that is highly unlikely. Where Mr. Picco's evidence does not accord with the evidence of Samantha Smith, notably in relation to the discussion in Mr. Picco's kitchen about the credit card, I unhesitatingly accept the evidence of Ms. Smith. I find that Mr. Picco elected to give a partial narrative about the events of November 19, leaving out details - the credit card, for example - that he may have thought could implicate him further.

[107] Mr. Picco was also very careful only to acknowledge T.(B.) and Mr. Upshaw being at his apartment. On the evidence I have heard, this is plainly inaccurate.

[108] I also do not accept Mr. Picco's evidence that his visit to the Drysdale Road bridge involved a third trip there by T.(B.) and Mr. Upshaw. Either Mr. Picco did not go at all or he went with T.(B.) and Mr. Upshaw on their second and last walk to the bridge when they returned to check on Mr. Oakley. This is when Mr. Oakley's wallet was taken: perhaps Mr. Picco is distancing himself from that event. However, this and the other discrepancies I have noted do not leave me doubting the crucial details of Mr. Picco's recollection about the night of November 19.

[109] I am also not persuaded to dismiss Mr. Picco's testimony about November 19 on the basis of his denials, which I reject, that he did not engage in the sale of drugs, other than on an at-cost basis to friends. The evidence indicates a modest drug-selling enterprise. The two safes in Mr. Picco's apartment, containing money and jewelry, the small baggies of what looks very much like marijuana and is

packaged like marijuana, his expressed fears about a possible home invasion, the fact that he had a prohibited semi-automatic rifle and a CO2 pellet gun that looks remarkably like a real handgun, and his lack of any obvious income, all point to his having been a petty retailer in the drug trade. Exhibit 5, photograph 23 also shows a digital scale on a table in his bedroom.

[110] There is corroboration for Mr. Picco's evidence that satisfies me he has remembered accurately and told the truth about the facts most critical to this trial. I disbelieve Mr. Picco when he says he was not selling any drugs for a profit, and I find he was evasive about how he came to acquire the .22 Ruger rifle but these features of his testimony do not undermine my confidence in his credibility in relation to the facts that are relevant to Mr. Oakley's homicide. I am not surprised if he sought to avoid implicating himself in other, unrelated criminal activity.

[111] Mr. Picco was forthright in acknowledging his role as an accessory, storing and then hiding the gun. He recognizes he may go to prison for what he now describes as a mistake, saying: "I'll get what I deserve." Although he was not wholly truthful in his testimony, I find that T.(B.) did tell him he had shot someone, gave him back the Ruger, left again with Mr. Upshaw and returned with Mr. Oakley's wallet containing Mr. Oakley's client and credit cards. Mr. Picco testified that T.(B.) telling him he shot someone is "impossible to forget. I can remember that, it doesn't leave my head." I do not have concerns about Mr. Picco's memory despite his attempts to suggest that he has memory impairment issues.

[112] As for Mr. Upshaw, I agree that he sought to cast himself in a more positive light than the independent evidence supports. While I accept that he was likely exhibiting bravado after Mr. Oakley was shot, as Ms. Smith suggested based on her knowledge of him, he was hardly in the "daze" he described to Cst. Clyke during his interrogation. He was sufficiently focused and motivated to go the Royal Bank and make four attempts to withdraw money using Mr. Oakley's credit card. He went ahead with the plan to go to the bank despite Ms. Smith's explicit warnings.

[113] While it does not appear to me from his interrogation that Mr. Upshaw fully understood what constitutes being a party to an offence, I find he knew enough to

try and minimize his involvement. His claims of being unaware that T.(B.) had the gun when they left Mr. Picco's apartment are simply not believable. Nor is his saying that he and T.(B.) went out merely to enjoy a refreshing walk. But what I do not find is that Mr. Upshaw minimized his involvement by lying about T.(B.)'s: my close study of Mr. Upshaw's police statement satisfies me that when he started to talk he described truthfully what he saw but endeavoured to cast himself as the hapless witness. He tried to admit as little as possible, owning up to certain facts only after being confronted with evidence by the investigators.

[114] All that being said, as indicated, I believe that Mr. Upshaw's descriptions of Mr. Oakley's shooting are true and reliable. I find he was being truthful when he told police T.(B.) pointed the Ruger at Mr. Oakley and pulled the trigger. Important aspects of the evidence obtained from Mr. Upshaw are corroborated by Mr. Picco and Ms. Smith, and the evidence of Dr. Wood. Details in Mr. Upshaw's narrative are also corroborated: how Mr. Oakley looked lying on the bridge; the description of the wallet with its chain; and the fact that it was Mr. Upshaw with the credit card at the Royal Bank.

The Missing Spent Cartridge

[115] I want to deal with a final factual issue relating to the shooting of Mr. Oakley, that being the missing expended cartridge from the Ruger. The Defence notes that, after the shot described by Mr. Upshaw, the Ruger's action mechanism should have ejected the cartridge, popping it out so that it would have dropped to the ground, to the right of the rifle. Terry Pipes testified the force of the ejection could propel the cartridge a distance of one to three feet.

[116] I know that Mr. Oakley was shot. His injuries are consistent with a shot from below the bridge upwards. There is no evidence that could support the shot having come from any other direction. The absence of the cartridge is a mystery but it is not a mystery of any consequence. Mr. Pipes indicated in his evidence that the cartridge could have been picked up, or not ejected, or not found.

Findings of Fact

[117] For the reasons I have given, I am satisfied that the Crown has proven beyond a reasonable doubt that on November 19 T.(B.), using the sawed-off .22

calibre Ruger rifle he and Mr. Upshaw had taken with them from Mr. Picco's apartment, shot and killed Mr. Oakley as he stood on the Drysdale Road bridge. A little later, T.(B.) returned to the bridge with Mr. Upshaw and took Mr. Oakley's wallet. After going back to Mr. Picco's with the wallet, T.(B.) and Mr. Upshaw then went to the Herring Cove Royal Bank and tried in vain to use Mr. Oakley's RBC client card and his MBNA credit card.

Convictions

[118] My factual findings support convictions against T.(B.) for unlawful possession of Mr. Oakley's RBC client card and his MBNA credit card (Count 3), unlawful use of the RBC client card (Count 4), and unlawful possession of a .22 calibre rifle for the purpose of committing an offence, a culpable homicide (Count 5). I do not find that T.(B.) made unlawful use of Mr. Oakley's MBNA credit card, which is part of Count 4, as the evidence indicates it was Mr. Upshaw who was trying to get money with it.

[119] I am also acquitting T.(B.) of robbery (Count 2). The only form of robbery that could apply on the facts I have found is subsection (b) of section 343 of the *Criminal Code*, which provides that a person commits robbery where he "steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds...or uses any personal violence to that person." On the facts of T.(B.) leaving the scene after the shooting and only later going back, not immediately, and taking Mr. Oakley's wallet from his prone body, I do not find that the elements required for robbery are made out. I do however find T.(B.) guilty of theft of Mr. Oakley's wallet, an included offence to the charge of robbery.

Has the Crown Proven Beyond a Reasonable Doubt that T.(B.) is Guilty of Second Degree Murder?

[120] My focus must now be trained on the most serious of T.(B.)'s charges. Has the Crown proven beyond a reasonable doubt that T.(B.) is guilty of second degree murder?

[121] The applicable *Criminal Code* provision is section 229 (a). It establishes that culpable homicide is murder where the person who causes the death of a person (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. Section 234 of the *Criminal Code* provides that “Culpable homicide that is not murder...is manslaughter.”

[122] For T.(B.) to be guilty of second degree murder, the Crown must prove each of the following essential elements:

- 1) that T.(B.) caused Mr. Oakley’s death;
- 2) that T.(B.) caused Mr. Oakley’s death by means of an unlawful act;
and
- 3) that T.(B.) had the state of mind required for murder.

[123] As indicated, I have found beyond a reasonable doubt that T.(B.) shot Mr. Oakley in the abdomen with the result that Mr. Oakley died of massive blood loss. Shooting Mr. Oakley was an assault. The Crown has proven the first two essential elements for second degree murder beyond a reasonable doubt. I will therefore turn to the issue of T.(B.)’s state of mind.

[124] In conducting my analysis of T.(B.)’s state of mind, I have considered two factors that I will briefly dispense with now: motive and accident.

Motive

[125] As a matter of law, motive is not an essential element of the prosecution case and does not have to be proven. As evidence, it is always relevant, and admissible. Motive is often a relevant factor in a murder case. Here the Crown did not seek to prove any motive and there is no evidence to indicate a motive for Mr. Oakley’s shooting. Mr. Upshaw told police investigators that T.(B.) had expressed an interest in robbing a nearby video/convenience store - Krazy Khan’s - which was notorious for always being closed. Krazy Khan’s was closed on the night of November 19, as it always seemed to be. Mr. Upshaw told police that put an end to any discussion about a robbery. The robbing of a person was never mentioned. There is nothing further in Mr. Upshaw’s narrative of events or in the evidence of any of the other witnesses that suggests T.(B.) had any motive for shooting Mr. Oakley.

Accident

[126] T.(B.) did not advance a defence of accident. Terry Pipes, the firearms expert testified that the .22 calibre Ruger rifle is not susceptible to shock discharge and is not capable of being fired without the trigger being pulled. The trigger requires the application of a force greater than 2.5 kilograms (5.5 pounds). There is no evidence to support an accidental or involuntary discharge of the gun. There is nothing in the facts to suggest that the shooting of Mr. Oakley was an accident.

The Issue of Intent

[127] There is no evidence that T.(B.) shot at Mr. Oakley with the specific intent to kill him. The proven facts do not support the drawing of an inference of a specific intent to kill. Therefore the Crown's case for second degree murder rests on whether there is proof beyond a reasonable doubt that T.(B.) meant to cause Mr. Oakley bodily harm that he knew was likely to cause his death, and was reckless whether death ensued or not. It is not sufficient that an accused "foresee simply a danger of death, the accused must foresee a likelihood of death flowing from the bodily harm that he is occasioning the victim." (*R. v. Cooper*, [1993] S.C.J. No. 8, paragraph 21)

[128] The essential element is that "of intending to cause bodily harm of such a grave and serious nature that the accused knew it was likely to result in the death of the victim." (*R. v. Nygaard and Schimmens*, [1989] S.C.J. No. 110, paragraph 29) For second degree murder, there must be subjective foresight of the likelihood of death. In other words, the Crown would have to have proven beyond a reasonable doubt that T.(B.) foresaw that Mr. Oakley would likely die from being shot at. "Likely" means "probably". (*Nygaard*, paragraph 32)

[129] The Supreme Court of Canada has been clear about what is required by section 229(a)(ii) of the *Criminal Code*. It "demands a highly subjective mental element to be present..." (*Nygaard*, paragraph 34) The accused must "intend to cause the gravest of bodily harm that is so dangerous and serious that he knows it is likely to result in death and to persist in that conduct despite the knowledge of the risk." (*Nygaard*, paragraph 30) As held by Cory, J. in *Nygaard*, there is nothing to distinguish the degree of culpability as between a specific intent to kill

under section 229(a)(i) of the *Code* and section 229(a)(ii), (at the time sections 212(a)(i) and (ii)):

... The variation in the degree of culpability is too slight to take into account. Let us consider the gravity of the crime described by s. 212(a)(ii) [now s. 229(a)(ii)] in the light of three examples which, pursuant to the section, would be murder. First an accused forms the intent to inflict multiple stab wounds in the abdomen and chest of a person knowing that the wounds are likely to kill the victim and, heedless of the known probable result, proceeds with the stabbing. Second, an accused forms the intent to shoot a former associate in the chest knowing that death is likely to ensue and, uncaring of the result, shoots the victim in the chest. Third, two accused form the intent to repeatedly and viciously strike a person in the head with a baseball bat realizing full well that the victim will probably die as a result. Nonetheless they continue with the bone-splintering, skull-shattering assault. The accused in all these examples must have committed as grave a crime as the accused who specifically intends to kill. Society would, I think, find the drawing of any differentiation in the degree of culpability an exercise in futility. The difference in the calibration on the scale of culpability is too minute to merit a distinction. I would conclude that the crime defined in s. 212(a)(ii) can properly be described as murder and on a "culpability scale" it varies so little from s. 212(a)(i) as to be indistinguishable. (*paragraph 32*)

Inferences to Be Drawn From the Evidence

[130] When Mr. Oakley was shot he was standing on the Drysdale Road bridge facing the path where T.(B.) and Mr. Upshaw were walking. It was dark, but not so dark that Mr. Upshaw could not see someone standing on the bridge and identify who it was. There would have been some illumination in the immediate area: Exhibit 1, Photograph 33 shows the lit underside of the bridge. Presumably T.(B.) could also see Mr. Oakley although there is no evidence to tell me how visible he was.

[131] T.(B.) and Mr. Upshaw were approaching the bridge when Mr. Upshaw noticed Mr. Oakley, although according to Mr. Upshaw, T.(B.) was behind him. As the photographs indicate, the bridge is some height above the path Mr. Upshaw described. None of the distances were measured and I received no evidence about them. Mr. Upshaw told the police investigators that right after he identified Mr.

Oakley to T.(B.), “There’s Squizzy”, T.(B.) shot him. To do so T.(B.) had to lift the relatively heavy sawed-off Ruger and point it up toward Mr. Oakley.

[132] Terry Pipes testified that sawing off the Ruger’s barrel could reduce the velocity and accuracy of the bullet. Six inches were missing from the gun’s manufactured length of eighteen inches. It is designed to be fired from the shoulder, steadying its aim. With its stock sawed off, it cannot be safely or effectively fired from the shoulder. In its original condition, the Ruger would have had sights. Mr. Pipes acknowledged that without the sights, which are used to aim at a target, it would be very difficult to accurately hit something. There is no evidence as to how many feet away from Mr. Oakley T.(B.) was when he pulled the trigger but it was Mr. Pipes’ evidence that at 30 – 40 feet “it would be a matter of luck” whether the Ruger would hit its target. Tragically, it did.

[133] The evidence establishes beyond a reasonable doubt that T.(B.) intentionally pointed the Ruger at Mr. Oakley and, apparently impulsively, pulled the trigger. It turned out to be a catastrophically accurate shot, hitting Mr. Oakley in the abdomen.

[134] However it is not reasonable to infer from the evidence that T.(B.) pulled the trigger of the Ruger intending to cause Mr. Oakley bodily harm of “such a grave and serious nature” that he knew would probably result in Mr. Oakley’s death. The evidence is that T.(B.) and Mr. Upshaw took the gun from Mr. Picco’s to test it out and see if it was operational. There is no evidence T.(B.) knew the gun even worked although it is a reasonable inference that he expected it did or he would not have pulled the trigger. However I am simply not satisfied to the high standard of proof demanded that when T.(B.) pulled the trigger he did so intending to inflict bodily harm to Mr. Oakley that he knew was likely to result in his death.

[135] T.(B.) was still some distance away from Mr. Oakley when he pulled the trigger. This is not one of those cases where a firearm is discharged into a victim at close range and the common sense inference to be drawn is that the shooter had the requisite intent for murder. (*R. v. Walle*, [2012] S.C.J. No. 41, paragraph 53; *R. v. Walle*, [2010] A.J. No. 1427 (C.A.), paragraph 10 and 11) T.(B.) was using a gun the barrel of which had been modified in a manner that should have affected its accuracy; the gun had no sights; it could not be properly steadied as its stock had

been sawed off; and T.(B.) was pointing it up at someone who was behind the metal railing of a bridge. It is not reasonable to infer from the evidence that T.(B.) in using this gun had the subjective foresight that he would cause bodily harm to Mr. Oakley that would probably kill him. On the facts in this case, intentionally pointing and firing the gun at a distance at night is not, by itself, enough to satisfy the requirements of section 229(a)(ii). It was reprehensible but it was not murder.

Post Offence Conduct

[136] I have considered whether T.(B.)'s return to Mr. Oakley's body and the stealing of his wallet, what is referred to as post-offence conduct, can be used to determine his intent when he fired the Ruger. I find this conduct is not evidence that can be used to determine T.(B.)'s culpability for Mr. Oakley's death as between murder and manslaughter. It is equally consistent with both. It cannot be considered evidence of T.(B.) having had a specific intent to kill nor can an inference be drawn from it as to his intent. (*R. v. White*, [2011] S.C.J. No. 13, paragraph 39; *R. v. Berner*, [2012] B.C.J. No. 817 (C.A.), paragraph 22; *R. v. McIntyre*, [2012] O.J. No. 2375 (C.A.), paragraph 44) It is relevant that the theft of the wallet happened some time after Mr. Oakley was shot, once T.(B.) and Mr. Upshaw had first gone back to Mr. Picco's apartment. It was opportunistic, predatory, callous behaviour but it is not probative of T.(B.)'s intent when he pulled the trigger.

Manslaughter

[137] Where the Crown fails to prove that a shooter had the requisite intent for murder, the proper verdict is manslaughter. (*R. v. Wharry*, [2007] A.J. No. 764 (Q.B.), paragraph 87) In *Wharry*, the accused shot a loaded handgun in the dark in the direction of a group of teenagers, hurriedly and without aiming or using the sights or both hands. A bullet struck an eighteen year old girl and killed her. Mr. Wharry was acquitted of second degree murder and convicted of manslaughter. (paragraphs 86, 89)

[138] T.(B.)'s decision to point the Ruger at Mr. Oakley and pull the trigger was a dangerous, reckless act. It had catastrophic consequences. Taking into account distance, the condition of the gun, and Mr. Pipes' expert opinion, I cannot say it

was an act that had predictable consequences. I cannot conclude that T.(B.) intended them. T.(B.)'s demeanor at Mr. Picco's right after the shooting suggests T.(B.) was reacting to an unintended consequence. Mr. Picco described him as being in a state of shock. This immediate reaction so proximate to the shooting is inconsistent with a subjective awareness that firing the gun at Mr. Oakley would cause him bodily harm, let alone probably kill him.

[139] The Crown is to be held to a very exacting standard when it comes to proving the intent for murder. I have to be satisfied beyond a reasonable doubt that the only reasonable inference to be drawn from the evidence was that T.(B.) had the highly subjective mental element required for second degree murder. As I have explained, my review of the evidence and the reasonable inferences to be drawn from it leaves me with a doubt that when T.(B.) pulled the trigger he knew he would cause Mr. Oakley bodily harm that would probably kill him and recklessly went ahead anyway. The Crown has failed to satisfy me that T.(B.) should be convicted of second degree murder. I am acquitting T.(B.) of murder and convicting him of manslaughter in the death of Glenn Oakley.