IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: R. v. "X", 2013 NSPC 127

Date: December 20, 2013

Docket: 2588522 - 2588530

Registry: Halifax

Between:

Her Majesty the Queen

v.

"X"

TRIAL DECISION

Bans on Publication pursuant to s. 110 and 111 of the Youth Criminal Justice Act

Judge:	The Honourable Judge Anne S. Derrick
Heard:	November 25, 26, 29 and December 16, 2013
Decision:	December 20, 2013
Charges:	section 239; 85(1)(a); 86(1); 87(1); 88(1); 91(1); 92(1); 244; 244.2 of the *Criminal Code*
Counsel:	Terry Nickerson, for the Crown
	Christa Thompson, for "X"

By the Court:

Introduction

[1] On April 15, 2013 in broad daylight "Y" was shot in the abdomen by someone using a rifle. Just before the shot was fired, "Y" had been standing talking with his friend, "Z", inside the [. . .] community basketball court. Other teenagers and younger children were also on the court, taking advantage of the early spring sunshine. The shooter fled. "Y" was rushed to Emergency and into surgery. He had life-threatening internal injuries and spent two weeks in hospital. He has since made a full recovery. He was 15 years old when all this happened.

[2] On April 24, "X" was arrested without incident at his high school and charged with offences arising out of the shooting, including the attempted murder of "Y", and various firearms offences.

[3] The central issue in this case is whether the Crown has proven beyond a reasonable doubt that it was "X" who shot "Y". If I find that "X"'s identity as the shooter has been proven beyond a reasonable doubt, I will then have to determine the issue of intent – is a specific intent to kill the only reasonable inference to be drawn from the evidence?

Reasonable Doubt and the Presumption of Innocence

[4] It is not "X"'s responsibility to demonstrate, establish, or prove his innocence or to explain away the allegations made against him. He is not required to establish who shot "Y", if not himself, nor is he required to explain the evidence presented by the Crown. He is presumed to be innocent until proven guilty beyond a reasonable doubt. The Crown bears this onus of proof beyond a reasonable doubt throughout the trial and it never shifts.

[5] The onus resting upon the Crown to prove "X"'s guilt beyond a reasonable doubt is inextricably linked to the presumption of innocence. (*R. v. Lifchus, [1997] S.C.J. No. 77, paragraph 27*) A reasonable doubt is a doubt based on reason and

common sense which must be logically based upon the evidence or lack of evidence. A reasonable doubt is not a doubt based on sympathy or prejudice, or one that is imaginary or frivolous. Proof establishing the probability of guilt is not sufficient to establish guilt beyond a reasonable doubt. It is not proof beyond a reasonable doubt when guilt is suspected. Proof beyond a reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities. (*R. v. Lifchus, paragraph 36; R. v. Starr, [2000] S.C.J. No. 40, paragraph 242)*

How "X" Came to Be Identified as the Shooter

[6] "Y" and "Z" identified the shooter as "X", whom they both knew. At trial they each named "X" as the shooter. I will discuss this evidence in more detail shortly.

[7] This is a case involving evidence of recognition. On the issue of identity, the fundamental question I will be examining is the reliability of the evidence relied on by the Crown in its case against "X".

A Rifle in a Gun Case

[8] The day after the shooting a hunting rifle was found in the woods about 200 meters from the basketball court. It is this rifle (*Exhibit 6*) the Crown alleges was used to shoot "Y". A spent cartridge was found in the rifle's ejection chamber.

[9] Although two police canine units tracked the shooter into the woods after the shooting, they lost the scent. Despite searching the woods quite thoroughly before darkness fell, no evidence was found. (*Exhibit 2, Agreed Statement of Facts; Testimony of Detective Alexander MacAdam*) On April 16, Ground Search and Rescue was called in to start searching the woods. The search started at 7 a.m. At approximately 11:50 a.m., one of the search teams located the rifle. The rifle was in a plastic gun case which had been jammed into the root system of some fallen trees. The area where the rifle was found was damp and swampy.

[10] Cpl. Martin McKenna, the forensic IDENT specialist in this case, testified that it is not possible to tell how long the rifle and gun case had lain in the woods. The metal portions of the rifle are heavily pitted by rust which indicates the gun

had been stored outside for quite some time. There is a hole on the front of the gun case that would have let moisture in.

[11] Cpl. McKenna removed the following ammunition from the gun case: two 30-30 calibre live rounds; three 20 gauge live shot gun shells; and a 300 Savage live round, the same calibre as the spent cartridge in the rifle.

[12] Also found with the rifle in the gun case was a scope. A scope is used to improve the sighting of a target. There are scope mounts on the rifle rendering it capable of holding a scope or a light. Cst. John Riggins, a Halifax Regional Police officer seconded to the RCMP National Weapons Enforcement Support Team, testified that different kinds of scopes could be attached to the rifle.

[13] No trace or physical evidence was found on the rifle. The scope was not amenable to being treated for fingerprint evidence as it has a rubberized, textured surface.

[14] Cpl, McKenna, qualified without objection as a fingerprint analyst, testified to his opinion that a fingerprint found inside the gun case belonged to "A", a friend of "X"'s. "A" was shown the rifle and the gun case and denied ever seeing them before. He could not explain how his fingerprint got on to the inside of the case.

[15] "A" testified that he did not provide "X" with a gun on April 15 and did not see him that day at all. "A" denied shooting "Y" and testified that he was not at the basketball courts on April 15, next to them, or in the woods that day. "A" has not been charged with any offences in relation to "Y"'s shooting.

[16] How "A"'s fingerprint got inside the gun case remains a mystery. There is no evidence to suggest the fingerprint analysis was flawed although it is a subjective process. While the fingerprint evidence casts doubt on the credibility of "A"'s testimony, it does not constitute evidence against "X".

[17] A washcloth (*Exhibit 16*) was found in the gun case. It has a faded central area and, according to Cpl. McKenna, smelled faintly of bleach. This might suggest that bleach was used to clean the rifle of fingerprints but I do not have enough evidence to be satisfied of this. There was no evidence led establishing that

the rifle had been wiped down. Dampness on the cloth could have been the result of being stored in the leaky gun case.

The Condition of the Rifle

[18] The rifle was examined by a firearms expert and found to be in operating condition. It has been described as a model 99, 300 Savage lever action rifle. (*Exhibit 1, Report of Jacques Rioux of the Firearms Section, National Forensic Services, Halifax*) It is a firearm within the meaning of section 2 of the *Criminal Code*, "in that it is a barreled weapon from which a projectile can be discharged and that is capable of causing serious bodily injury or death to a person." (*Exhibit 1, Report of Jacques Rioux*)

[19] The rifle requires a trigger pull of greater than 2.38 kilograms and is not prone to shock discharge. (*Exhibit 1, Report of Jacques Rioux*)

[20] Cst. Riggins testified that a .300 calibre rifle is predominantly used for hunting mid-sized North American game such as deer, elk, and bear. It could have inflicted the wound suffered by "Y". This is not in dispute. The Defence simply argues that there is insufficient evidence to establish that this particular rifle was used in the shooting.

Drawing a Reasonable Inference about the Involvement of the Rifle in the Shooting

[21] There is no forensic evidence to link the rifle to "X" or to the shooting. However, it is a reasonable inference from the evidence that it is the rifle that the shooter used. "Z" and "Y" gave descriptions of a gun that match the rifle. It was found in a wooded area which video footage shows the shooter running toward. View #13-51102-c3 of Exhibit 27, video footage from the Recreational Centre, shows the shooter running in the direction of the woods where the rifle was located the next day.

[22] Ms. Thompson has argued that the failure of the police canine units to track the shooter's scent to the rifle indicates that Exhibit 6 could not have been rifle involved in the shooting. However no evidence was led about what factors may have caused the dogs to lose the shooter's scent and it is speculative to suggest that

this can only be explained by there being no connection between the shooter and the gun.

[23] I know that when Detective Alexander MacAdam, the police officer assigned to be the lead investigator, arrived on scene in [. . .], he met with RCMP and Halifax Regional Police Service canine officers. Det. MacAdam testified that "Y" had been transported to hospital by the time he got there at 7 p.m. RCMP officers and a canine unit walked him through the scene. This suggests that the canine units had already been searching. Even so, the shooter had had plenty of time to stash the rifle in the woods before the dogs were deployed. As no rifle was found closer to the scene of the shooting, the only reasonable inference is that when the shooter turned and ran, he had the rifle with him. The video footage is not sufficiently distinct to see that.

[24] The photographic evidence (*Exhibit 2, Photograph 26*, an aerial shot) indicates that just beyond the wooded area into which the shooter disappeared, there are streets and houses. It is reasonable to infer that the shooter would not have run along the streets of [. . .] carrying a rifle that had just been used in a shooting. Exhibit 6 is the only rifle discovered in the vicinity of the shooting after an extensive search, making it reasonable to infer that despite the absence of incriminating forensic evidence it was the rifle used to shoot "Y".

"Y"'s Injuries

[25] The gunshot wound suffered by "Y" was a "through-and-through" wound, that is, the bullet passed through "Y" and was not recovered. When "Y" was assessed prior to surgery it was noted that he had a small circular wound on the front of his abdomen just below the rib cage and a larger one in his back, both on the right hand side. A CT scan identified the presence of numerous bullet fragments along the pathway of the gunshot. There was evidence of numerous vertebral fractures involving three lumbar vertebrae however these fractures were of transverse and spinous processes – prominences of vertebrae – and not the main body of the bones. "Y"'s spinal cord was not injured. (*Exhibit 2, Agreed Statement of Facts*)

The Video of the Shooting

[26] The basketball court is about 300 feet from the [. . .] Recreation Centre. The Centre had a number of external cameras. One of them captured the shooting of "Y". The video is Exhibit 27 and the view that shows the shooting is #51102.

[27] Det. MacAdam testified that the time stamp on the Recreation Centre video is accurate but for the fact that it was not adjusted for Daylight Savings Time and is therefore one hour behind. In these reasons I refer to the time shown on the video.

[28] The image of the shooter can be seen clearly on the video but it is not possible to make out the shooter's facial features. The camera is simply too distant to pick up these details. The video is useful primarily for showing the movements of the shooter and the time when events occurred. The footage captures relevant events between 15:57:45 and 16:00:21.

[29] The video footage shows a lot of activity on the portion of the basketball court visible to the camera. As the kids on the court bob and weave, the camera picks up movement over on the right of the frame at 15:57:45. A figure climbs a low fence and walks uphill toward a wooded area. The figure seem to stoops down briefly and then, at 15:58:18 moves out of sight into the trees. The image of the figure flickers fleetingly through the trees. The camera does not pick up any image of the person for the next 1 minute and 35 seconds.

[30] At 15:59:53, the figure can be seen, from the camera's view, moving toward the basketball court. The movement appears to be seamless: at 16:00:00, the shooter takes the shot, has turned away by 16:00:02, and is gone back into the trees at 16:00:05. Movement in the trees can be seen at 16:00:11, the shooter emerges from the trees at 16:00:12, runs along the bottom of the slope by the Recreation Centre and disappears from the camera's view at 16:00:21.

[31] I have kept in mind that the view captured by the Recreation Centre camera is not the view from the basketball court of the shooter's approach to the court. The view from the court was not obscured by trees.

[32] What the video footage shows is that the shooter would have been coming out of the trees by at least 15:59:53 when movement can be seen, walked quickly to the fence surrounding the basketball court, took the shot without hesitating, and

immediately turned and fled. The approach, the taking of the shot, and the turning to flee appears to me to have taken 9 seconds.

[33] The Recreation Centre camera shows that the shooter was at the end of the basketball court nearer the Centre when the shot was fired. As I will discuss, I find that "Z" and "Y" were closer to the other end of the basketball court when the shooter emerged from the trees and took the shot.

The Evidence of "Z"

[34] "Z" is a good friend of "Y"'s. They were together on the basketball court when "Y" was shot. "Z" saw the shooter approach the fence with the gun. His description of the gun matches the rifle found in the woods – a long gun, a rifle, with a scope. It looked to "Z" "…like a hunting rifle."

[35] "Z" is certain the shooter was "X". He has known "X" since childhood and although they have not gone to school together since they were elementary students, "Z" testified he would see "X" weekly in the community where they both lived, walking around and at the basketball court. He would also see him at the mall and sometimes at school events. He and "X" share a common paternal grandfather.

[36] When "Z" saw the shooter, he and "Y" were just standing in the basketball court talking. Around them was the commotion and noise of other kids on the court. "Z" testified that notwithstanding this he was able to hear rustling in the woods which flanked the side of the court where he and "Y" were standing. He tapped "Y", on the shoulder saying look back there. They turned and that is when "Z" saw the shooter "come up with a gun."

[37] In his evidence on direct examination, "Z" testified that the time from when he looked back and saw the shooter until the shot was fired was five seconds. On cross-examination he testified that when he first noticed the shooter, the shooter was still in the woods. This indicates that as the shooter emerged from the trees and approached the court, "Z" was looking at him.

[38] From the Recreation Centre camera footage it appears that from the shooter's approach to the time of the shot was 7 seconds. "Z" may well have spent

5 – 6 seconds looking at the shooter before turning to run just as the shot was fired. By the time "Z" turned to run, he had already formed the opinion that the person with the rifle was "X".

[39] "Z" testified that he and "Y" began to run at the same time. As I noted earlier in these reasons, "Y" was shot in the abdomen. This indicates that despite seeing the shooter before the shot was fired, "Y" did not have time to turn around before the bullet hit him.

[40] "Z" thought "Y" was with him as he ran but when he looked back he saw that "Y" had fallen on the court. "Z" kept running.

[41] "Z" testified that as the shooter came toward the court, he saw it was "X" He could tell it was "X" even though the person was wearing a mask that covered the lower part of his face and was pulled over the end of his nose. "Z" could see the person's eyes. The shooter was dressed in black – a black sweater and black pants. The mask was black. "Z" was clear about the type of mask the shooter wore: it was not a ski mask that pulls over the head but one that covers just the lower part of the face, leaving the ears exposed.

[42] "Z" testified he was 15 – 20 feet from the shooter when he saw him. Where he recalls standing when he saw the shooter is proximate to the location of the blood stain on the court, marking where "Y" would have fallen and begun bleeding.

[43] "Z" was adamant that it was "X" with the gun. He testified: "I know "X" He had seen "X" a half hour earlier. "X" had come up to the basketball court and left. "Z" described being certain, saying he had "no doubt" it was "X" and emphasizing "I know what I seen." He said about "X": "I know what he looks like."

[44] "Z" rejected the suggestion made to him on cross-examination that the chain link fence around the basketball court made it harder for him to see the shooter. When asked where the shooter's face appeared in relation to the fence's horizontal support bar, "Z" said it was below the bar.

[45] "Z" was very firm in his evidence. If he did not agree with a proposition he said so. He was a self-possessed, definite witness. He did not hesitate to emphasize on cross-examination that he did not think it was "X", he "knew" it was "X".

[46] "Z" was not a very expressive witness but he was unshaken in his evidence. He has known "X" since childhood. He identified him at relatively close proximity and in broad daylight. He looked directly at "X" and testified that the chain link fence did not make it difficult for him to recognize "X" whom he had just seen a half hour before.

[47] I am satisfied that "Z" was a truthful witness. I believe he gave an honest description of the events that he was part of on April 15. I find that "Z" did not come to court with an axe to grind against "X". He said, and I believe him, that he had not had a problem with "X" in the past.

[48] There is only one area of "Z"'s testimony where I find he was being evasive. He testified to not being able to recall who else was on the basketball court on April 15. It was obvious to me that he did not want to name names. I do not accept that "Z" wouldn't be able to remember who else was there, especially as these would be kids from the same small, close-knit community he has grown up in. On cross-examination "Z" acknowledged that he recognized the kids on the basketball court as being [. . .] residents. However, "Z"'s claim of memory loss about this one aspect of the events does not in any way undermine my view that on the essential issues in the case he was an honest witness with a good recall.

The Evidence of "Y"

[49] In April 2013 "Y" was in Grade 10. He grew up in [. . .] but had not been living there for a few months because his house had burned. It was the first time in his life that he had not lived in [. . .].

[50] "Y" has known "X" his whole life, having gone to daycare with him. "Knew each other from babies" is how "Y" put it. Their grandfathers are brothers. They also went to school together until the beginning of Grade 9 when "X" went to a different junior high and then high school.

[51] Although not living in [. . .] for about four months prior to the shooting, "Y" went there regularly. "Lots" is how he put it when asked. On April 15, "Y" went to [. . .] after school. He went to the basketball court, arriving there around 4 p.m.

[52] At trial, "Y" was able to identify by name the teenagers and younger children on the basketball court. These other young people were shooting hoops and throwing the ball around: there was no organized game underway. The younger children were at the other end of the court from "Y", closer to the Recreation Centre.

[53] According to "Y", sometime between 10 – 20 minutes after he got to the basketball court, he saw "X" walking toward it. Their eyes locked and they stared at each other. Neither of them spoke. "Y" testified that "X" was wearing an orange top.

[54] "X" turned and took off running. "Y" figured something was up so he stepped out of the court for a second and picked up a large rock. Based on a history of animosity, he thought that "X" might be going to get a knife. He felt that "something was going to happen." He figured that "X" would be coming back.

[55] Police seized some items from the basketball court which corroborate "Y"'s description of these events prior to the shooting. These items included a grey hoodie which "Y" had been wearing. The hoodie (*Exhibit 24*) had head phones and a phone charger (*Exhibit 22*) in one pocket and a large rock (*Exhibit 23*) in another. "Y" identified these items in the police photographs in Exhibit 3 and confirmed that he had been wearing the grey hoodie shown in Photograph 75 of Exhibit 3.

[56] Approximately a half-hour later, while "Y" and "Z" were on the court talking, "Z" said there was something in the woods. "Y" had not heard anything. He turned to look and saw "X" over by the fence on the outside of the court. He had a gun and was pointing it at "Y". "Y" and "Z" were standing together: when asked how he could be so sure it was "X", "Y" testified: "Because I was stuck at the time when I seen the gun pointing at me. I didn't know what to do. So I just stared at him…"

[57] "Y" testified that he could see the shooter's eyes, eyebrows, and forehead. It was his evidence that when he was looking at the shooter the scope was not in front of the shooter's face and therefore did not obscure it.

[58] According to "Y"'s trial testimony, "X" was wearing a black leather jacket. He had a black ski mask on that covered the lower half of his face, including his nose. He said nothing to "Y".

[59] "Y" described the gun as a "rifle." He said the shooter was holding it in two hands. The description "Y" gave, of a long, black gun, with a scope, matched that of Exhibit 6, the rifle that was found in the woods.

[60] Although "Y" testified to the shooter being about 8 feet away, his evidence places him farther away than that. He described himself as being at the end of the basketball court closest to the woods but at the opposite end of the court from the shooter. Although this evidence was not assisted by any hand-drawn diagrams and references to the photographs were a little confusing, I am satisfied that "Y" located his position on the court in the same area as "Z" had described.

[61] It was "Y"'s perception that he looked at "X" for about 2 seconds while "X" was at the fence with the gun. It seemed longer to him than that. He turned to run and thinks he got about 3 feet before he was shot.

[62] "Y" cannot be correct in his recollection of turning to run and then getting shot. He confirmed in his evidence that he was shot in the stomach not the back. The bullet entered neatly, making a small hole, and left a larger exit wound in his back. This means he had to have been facing the shooter when he was shot. It follows that if I accept "Y"'s evidence, he was looking at the shooter from the time "Z" had him turn around until the shot was fired.

[63] Like "Z", "Y" was positive in his identification of "X". He testified: "I know "X". We were brought up from babies. I seen his eyes and eyebrows. I know it was him." He rejected the suggestion that his view of the shooter was impaired by the chain link fence. "I could still see through the fence." Like "Z", he also described the shooter's face being below the horizontal bar in the fence.

[64] "Y" was unmoved by suggestions that he was mistaken or had fabricated his evidence to get "X" into trouble. "He shot me. I wouldn't lie about that.", was "Y"'s response. "Y"'s description of recognizing "X" was not shaken in the course of cross-examination. He too was emphatic about what happened at the basketball court and what he saw.

[65] I accept "Y"'s evidence as truthful and I find he was doing his best to give an honest account in court. I note there is some corroboration for his evidence that he saw "X" shortly before the shooting – the evidence of the rock that was found in the pocket of his grey hoodie, a rock "Y" says he armed himself with in the belief that "X" would be coming back with a knife.

[66] In relation to both "Z" and "Y", the question that remains to be addressed is whether their claims of recognizing "X" as the shooter are accurate.

The Frailties of Identification Evidence

[67] Any eyewitness identification evidence, even where it involves recognition, must be viewed through a critical lens. Trial judges are repeatedly warned to be "wary of eyewitness identification" and reminded that "Generally, it is fraught with danger." (*R. v. Provo, [2001] N.S.J. No. 247, paragraph 21 (S.C.*) In *R. v. Burke, [1996] S.C.J. No.27*, Sopinka, J. identified the dangers:

> The cases are replete with warnings about the casual acceptance of identification evidence even when such identification is made by direct visual confrontation of the accused. By reason of the many instances in which identification has proved erroneous, the trier of fact must be cognizant of "the inherent frailties of identification evidence arising from the psychological fact of the unreliability of human observation and recollection." (*Burke, at paragraph 52*)

[68] Where the criminal act is not in dispute and the identity of the accused as the perpetrator is the only issue, the accuracy and reliability of the identification evidence "becomes the focal point of the trial and must itself be put on trial." The correctness of the identification "must be found from evidence of circumstances in

which it has been made or in other supporting evidence." (*R. v. Atfield, [1983] A.J. No. 870 (C.A.), paragraph 3*)

[69] Determining that a witness is credible does not settle the issue. The evidence of the honest and confident eyewitness must still be very carefully scrutinized to determine its reliability. As Arbour, J. noted in *R. v. Hibbert, [2002] S.C.J. No. 40*, the trier of fact must understand there is a "very weak link between the confidence level of a witness and the accuracy of that witness." In making this statement, Arbour, J. was referencing the recommendations from the Royal Commission of Inquiry examining the wrongful conviction of Thomas Sophonow. (*Hibbert, paragraph 52*)

[70] The need to exercise caution, an appreciation that a mistaken witness can still present convincingly, and the need to examine closely the circumstances in which the identification was made are all essential elements of the trial judge's task of assessing eyewitness identification evidence. (*R. v. Shermetta, [1995] N.S.J. No. 195 (C.A.), paragraph 46*)

[71] And as the Ontario Court of Appeal has held, eyewitness testimony is effectively, opinion evidence "the basis of which can be very difficult to assess." (*R. v. Miaponoose, [1996] O.J. No. 3216, paragraph 11*)

[72] With these principles in mind, it is important to appreciate that the case against "X" is not so much a case of identification as it is a case of recognition, raising the issue of whether "Z" and "Y" were able to reliably recognize "X" as the shooter. This was acknowledged by Ms. Thompson in her final submissions. "Z" and "Y" have not testified about someone who was a complete stranger to them prior to the shooting. They both knew "X" well and since childhood.

[73] There is a significant difference between stranger identification cases and cases in which a witness recognizes a previously-known person. "While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence." (*R. v. Bob, [2008] B.C.J. No. 2551 (C.A.), paragraph 13*)

[74] It is important to recognize, as the British Columbia Court of Appeal has done in *R. v. Smith, [2011] B.C.J. no. 1655*, that "recognition" evidence,

> …is not a distinct category. The concept of recognition in the context of eyewitness identification simply intimates the witness's evidence is based in part on his or her dealings with the accused before the crimes were committed. The extent and quality of those encounters is but one factor to be considered in weighing the witness's evidence.

[75] I have already found "Z" and "Y" to be credible. What I must now carefully assess is the quality of their recognition of "X" as the shooter: is this "recognition" evidence reliable?

[76] In my assessment I have considered a number of factors: (1) the circumstances under which the recognition occurred; (2) the significance, if any, of what "Y" said to Cst. Jeff Campbell; (3) discrepancies between "Y"'s police statement and his trial testimony and whether these discrepancies indicate that the "recognition" evidence cannot be relied on; (4) the possibility that "Z" and "Y" contaminated each other's recollections; (5) whether the "recognition" evidence is evidence of "bare recognition"; and (6) whether there is other evidence that supports the "recognition" evidence. It is necessary for me to carefully examine these factors in weighing the quality of the evidence obtained from "Z" and "Y" on the issue of the shooter's identity.

The Circumstances under which the Recognition Occurred

[77] The circumstances in which "Z" and "Y" identified "X" as the shooter were highly favourable. The shooting happened on a sunny day in broad daylight. Although "Z" and "Y" were standing in the opposite end of the basketball court from the shooter, they were on the same side of the court and not very far from the shooter when they made their observations. The shooter was visible to "Z" from 15:59:53 when the Recreation Centre camera captures his movement through the trees – trees that obscured the shooter somewhat from the camera but not from "Z"'s view – until the shot at 16:00:00 or just before, a period of as little as 5 and as much as 7 seconds. "Y" would have been able to see the shooter for much the

same amount of time: while he turned to look after "Z" had, he was still facing the shooter when he was shot.

[78] Five to seven seconds is not a fleeting glance. It is ample time in which to recognize a well-known person.

[79] The Defence has suggested that the frightening sight of the rifle would have compromised the ability of "Z" and "Y" to accurately recognize "X". However the evidence does not indicate that "Z" and "Y" were so distracted by the rifle they could not focus on what they were seeing. They each described a gun with the same features and they each described a person of shorter stature, a person whose face was visible below the horizontal support bar of the chain link fence.

[80] Although "Y" acknowledged he was pretty scared and felt panic when he saw the gun he said it is not possible that he is mistaken about it being "X" who shot him.

[81] "Z" and "Y" did not have the benefit of seeing the shooter's entire face as the shooter was wearing a partial mask. However, "Z" and "Y" were again consistent in their observations: the mask only covered the lower portion of the shooter's face. The shooter's eyes, eyebrows, and forehead were visible.

"Y"'s Response to Cst. Jeff Campbell

[82] Cst. Campbell was the first police officer to reach "Y" when he was lying on the basketball court after being shot. He could get no response from "Y" to inquiries about the shooter's description or the direction he had gone. "Y" did ask where the ambulance was and pointed out that he needed one. Otherwise he was "in and out of responsiveness." Members of the community had gathered around and were urging "Y" to hold on, stay calm, and stay awake. Cst. Campbell testified that he had asked "Y" who had shot him. "Y" responded by saying he didn't know.

[83] This evidence could in other circumstances raise concerns about "Y"'s subsequent evidence that it was "X" who shot him. However I place no significance on "Y" telling Cst. Campbell he didn't know who the shooter was. I find this statement to have been untrue. "Y" testified that at the hospital before being taken into surgery he told his mother who shot him. I accept the evidence

that the first person this critically injured 15 year old told was his mother. It indicates to me that "Y" could have told Cst. Campbell who he believed the shooter to be and chose not to. I do not infer from this that "Y" is unreliable.

Discrepancies between "Y"'s Police Statement and his Trial Testimony

[84] "Y" was able to give police a statement while still in hospital on April 23. On cross-examination, the Defence brought out some discrepancies between what "Y" had said in his statement to police and what he had said in his trial testimony. These inconsistencies had to do with what "X" was wearing when "Y" first saw him on April 15, what the shooter was wearing, and whether "Y" tried to look at the shooter or was just trying to run away. When the inconsistencies were put to "Y", he acknowledged them.

[85] "Y" told police that "X" had been wearing as black sweater when he first saw him. He agreed this was different from what he had said in his trial testimony about "X" wearing an orange shirt.

[86] "Y" told police that the shooter was wearing a black sweater. In his trial testimony he said the shooter had on a black leather jacket.

[87] Although "Y" told police he was "just trying to take off running, I wasn't really trying to look", he was emphatic at trial: "I did take a minute to look." I view the "minute to look" reference as a figure of speech and not intended to represent the actual time frame of "Y"'s observations of the shooter, which I previously discussed.

[88] I find these minor discrepancies between "Y"'s police statement and his trial testimony to be inconsequential. They are not substantial or numerous and I do not find that they suggest "Y"'s trial evidence is unreliable. I take into account the fact that when "Y" gave his statement to police he was still in hospital and recovering from life-threatening injuries.

The Possibility of Contamination of "Z"'s and "Y"'s Evidence

[89] After "Y" was shot, "Z" was very worried about him and visited very regularly at the hospital. He says they did not discuss the incident until after he had

given the police his statement. He did talk to "Y"'s parents about his memory of the incident. He has talked to "Y" since his statement.

[90] "Z" testified that he did not speak to "Y" about the incident before he gave his statement on April 29 because "Y" was on medications. The Defence brought out that "Y" was able to give his police statement on April 23. That does not indicate he was no longer medicated. Indeed he was: the Agreed Statement of Facts (*Exhibit 2*) confirms that "Y" was discharged on April 30 with a prescription for morphine, presumably to manage ongoing pain.

[91] "Y" did talk about the shooting with his parents and girlfriend and "Z". "Y" talked with "Z" after he got out of the hospital. He testified that he didn't "go over it" with "Z" because "Z" was there when it happened. "Z" already knew what had happened so "Y" "didn't really have to talk to him about it." In the witness box "Y" said he had not talked to "Z" since "Z" testified at the trial.

[92] I accept the evidence of "Z" and "Y" that they did not supply each other with details about the shooting or the shooter. I find that whatever discussions they may have had did not compromise the independence of their evidence.

Bare Recognition

[93] Bare recognition seems to refer to recognition of a perpetrator without reference to any distinguishing characteristics or features. It raises the spectre of an undifferentiated, inaccurate identification. It was a concern to the Supreme Court of Canada over forty years ago in *R. v. Spatola, [1970] O.J. No. 1502*, where Laskin, J. (as he then was) said the following:

> Bare recognition unsupported by reference to distinguishing marks, and standing alone, is a risky foundation for conviction even when made by a witness who has seen or met the accused before. Of course, the extent of their previous acquaintanceship must have a very important bearing on the cogency of the identification evidence, as will the circumstances in which the alleged recognition occurred. Where some distinguishing marks are noticed and later verified, there is a strengthening of credibility according to the nature of such marks. But the initial

> issue of the caution with which identification evidence must be received, particularly where it is the unsupported evidence of one witness, remains; all of this is, in a jury trial, for the jury to evaluate on proper direction. If that direction should embrace an admonition of caution where there is questioned identification evidence, and such a direction is not given, an appellate Court cannot say that a conviction in such a situation must be sustained.

[94] In this case, neither "Z" nor "Y" expressly provided evidence of any distinguishing marks in their identification of "X" as the shooter. What they did testify to was the nature and extent of their relationships with "X" and the significance of this as their basis for recognizing him as the shooter. And despite the efforts of the Defence to suggest that these relationships had become attenuated once these boys went to different schools, I find that there was long-standing and ongoing contact that made "X" a very familiar person to "Z" and "Y" .

[95] Earlier in these reasons I described how "Z" and "Y" each knew "X". They grew up together in the same small community. They were each related to "X". In addition to what I previously described as their experience of knowing "X", "Y" had a history of physical altercations with "X" which is another context in which he would have become very familiar with "X"'s appearance. Does the extent of "Z"'s and "Y"'s previous acquaintanceship with "X" off-set the lack of detail in their "recognition" evidence? Is this a case where the "recognition" evidence satisfies the strict burden of proof on the Crown to prove beyond a reasonable doubt that "X" was the shooter?

[96] I have to be mindful that the confident witness can be mistaken, that certainty is not a guarantee of reliability. "Z" and "Y" had a basis for their certainty that "X" was the shooter. They knew him and knew him well. They could see a good portion of his face - his eyes, eyebrows, and forehead. "Y" based his recognition of "X" on these features: when asked how he could be sure, even with the mask that it was "X", he replied: "Seen the eyes and the eyebrows. Like I know it's him. Like I know who "X" is." "Z" had no doubt that it was "X" saying: "…I know him, I know what he looks like."

[97] In *R. v. Bardales*, Wood, J. of the British Columbia Court of Appeal, although dissenting in the result, explained the approach to be taken to "recognition" evidence in cases where identity of the accused is in issue:

> …where recognition is a factor, considerable weight may attach to the opinion of an eye-witness, depending on the intimacy of the relationship between that witness and the accused and the length of time it has subsisted. Indeed, the nature of the relationship may be such as to obviate the need for all but the most cursory of cautions. On the other hand, where the "recognition" is based on a casual relationship characterized by infrequent contact, the potential weight of the opinion may not be much greater than that offered by a complete stranger…(*R. v. Bardales, [1995] B.C.J. No. 2105, paragraph 106*)

[98] It is significant that "Z" and "Y" not only knew "X" very well, they had seen him shortly before the shooting. (*R. v. O.R.B., [2005] S.J. No. 794 (C.A.), paragraph 14*) They both recognized him when he approached the basketball court and turned and left. The fact that they had seen him so close to the time when "Y" was shot is material to the issue of the reliability of their recognition of him as the shooter. "Y" testified that when he saw "X" prior to the shooting, he and "X" "caught eyes, stared at each other."

[99] "Z" and "Y" noted that the shooter was a black male as is "X". They both described the shooter's face as visible below the horizontal support bar for the chain link fence. This evidence and photographic evidence of where the shooter stood, which is not in dispute (*Exhibit 3, Photograph 15*), indicates that the shooter was a person of smaller stature, which "X" is. And the video evidence, while offering little that is distinguishable about the shooter, does show the shooter to have been a smaller, slighter figure, that is, not a large person.

[100] Evidence that indicates the shooter was a smaller, black male does not offer much to differentiate "X" from other smaller, black males who may have resided in [. . .] at the time. But truly distinguishing characteristics are not always present. And while there is a lack of descriptive detail in the evidence given by "Z" and "Y", the reliability of their identification is measured by their lifelong familiarity

with "X", the fact that they saw him at close quarters just before the shooting, and their ability under favourable conditions to observe the shooter as he approached the court and took the shot. "Z" and "Y" testified to having an unobstructed view of someone they had known all their lives. The partial mask was no obstacle to their ability to recognize the shooter as "X".

[101] I have considered the evidence on identity very carefully and throughout I have been mindful of the risks that may exist even in cases involving recognition. I have satisfied myself that "X"'s identity as the shooter has been proven beyond a reasonable doubt.

The Evidence of Motive

[102] I am now going to discuss an issue that is relevant in this case, although not an essential element of any of the offences charged against "X". It is evidence of *animus* shown by "X" toward "Y", evidence that may be admissible in cases concerning identity and intent.

[103] During "Y"'s direct examination, after a consideration of the applicable law, I admitted evidence of "X"'s prior discreditable conduct toward "Y". In doing so, I found the decision of the Ontario Court of Appeal in *R. v. Stubbs, [2013] O.J. No. 3657* to be particularly helpful. It assisted me in determining the admissibility of evidence of prior discreditable conduct on the part of "X" toward "Y". *Stubbs* is a case of attempted murder in a domestic context where there was evidence of Stubbs' prior discreditable conduct toward the victim. The Ontario Court of Appeal discussed the general rule that evidence of misconduct outside of the offences charged against the accused is inadmissible where it does no more than portray an accused as a person of general bad character. (*Stubbs, paragraph 54*) However the Court held that the rule is "not unyielding" and that "sometimes this evidence is so relevant and cogent that its probative value exceeds its prejudicial effect." (*Stubbs, paragraph 56*) Establishing that the probative value of the evidence exceeds its prejudicial effect is done on a balance of probabilities standard.

[104] Although *Stubbs* references prosecutions for "domestic homicide" and was a case of near homicide (the victim was shot in the head), I am satisfied the

principles from the case are more broadly applicable. I found that evidence of "other discreditable conduct of the accused that shows or tends to show the nature of the relationship between the principals, or *animus* or motive on the part of the accused" to be admissible in this case. Such evidence is relevant to prove the identity of the perpetrator and the perpetrator's state of mind. (*Stubbs, paragraphs 57 and 65*)

[105] The standard of review for the admission of such evidence is deferential:

> Appellate courts will defer to the trial judge's assessment of where the balance falls between probative value and prejudicial effect unless it can be shown that the result of the analysis was unreasonable, or undermined by legal error, or a misapprehension of material evidence. (*Stubbs, paragraph 58*)

The Relationship between "X" and "Y"

[106] According to "Y", his childhood friendship with "X" soured in elementary school. It started out with arguing and then they began having fistfights. Although in the earlier years, "Y" and "X" would reconcile after fighting, in Grade 9 they stopped being friends. Asked about the last couple of years before the shooting, "Y" testified that when he saw "X" in [. . .] he would walk by him but "X" would always want to fight.

[107] As they got older, the fights had become more serious. "Y" testified that one day "X" had a knife and was "ganged" by "Y" and his friends. According to "Y" after that "X" always carried a knife. As a result, "Y" sometimes went out with a knife on him as well.

[108] It was "Y"'s evidence that when he fought with "X" he never used anything and never had anything in his hands. He tried to avoid "X" and "X"'s friends. But when he saw "X" and his friends he would expect a fight every time. It was "Y"'s evidence that "X" "just always wanted to be on top."

[109] "Y" estimated about 20 fistfights with "X" in the last couple of years up to April 2013. The evidence obtained from "Y" clarified that he and "X" had had no actual physical altercations between November 2012 and April 2013.

[110] "Y" was very straightforward when asked about his feelings toward "X" He acknowledged he did not like him very much. He agreed "X" was someone he had problems with. He said there were other black teenage males he had problems with, about 7 of them. It is reasonable to infer that some or all of these people could be "X"'s friends, given what "Y" described about encountering "X" with his friends.

[111] "Y" did not seize upon opportunities to embellish his evidence about the bad blood with "X". He acknowledged occasions at the mall and at a house party when he and "X" kept their distance from each other and no confrontations occurred.

[112] "Y" was asked about a meeting that occurred in November 2012 with the police and "Y"'s and "X"'s mothers in attendance. "X" and "Y" agreed at the meeting they would not "bug" each other anymore. At the end of the meeting, "Y" tried to shake "X"'s hand. "X" told him to get the F*** out of his face. "Y" testified this indicated "X" didn't like him and did not want "to be cool", and this made "Y" feel bad. He testified it made him think his troubles with "X" were not over. "Y" agreed that he and "X" had had no physical altercations since that meeting.

[113] About three weeks before the shooting "Y" saw "X" in the mall. "X" was telling him to come in the washroom but, at his sister's urging, "Y" just kept walking. Another incident proximate to the shooting had occurred as well. "Y" described this as an altercation between "Y" who was with his brother and his brother's friends, and "X" and two of his friends. Pepper spray was used and one of "X"'s friends got stabbed. "Y" denied doing the stabbing. "X" was armed with a knife on this occasion. He had called "Y" outside and when "Y" went out and "squared off", "X" pulled out the knife.

[114] This incident was the last confrontation "Y" had with "X" before the shooting.

[115] The inference I draw from "Y"'s testimony, which I accept, is that "X" had significant and long-standing feelings of animosity toward "Y". The November 2012 meeting with parents and police indicates that the situation was taken very seriously. Despite this attempt to resolve the problem, I find that "X" was

unwilling to move on and, in the weeks leading up to the shooting, continued to demonstrate his aggressive hostility for "Y".

[116] I find that "X" had an *animus* toward "Y" and a motive to shoot him. His hostility toward "Y" had not abated and while the shooting was a significant escalation in the aggression "X" had demonstrated previously, it occurred on a continuum where "X" had started to produce weapons and fists had already been supplanted by knives.

Attempted Murder

[117] Attempted murder requires a specific intent to kill. (*R. v. Ancio, [1984] 1 S.C.R. 225, page 14 (QL version)*) To secure a conviction for attempted murder the Crown must prove beyond a reasonable doubt a specific intent to kill. As there is no direct evidence that "X" intended to kill "Y" - for example, he made no utterances to this effect - does the evidence support the inference that his intention when he shot "Y" was to kill him?

[118] The evidence I have accepted indicates that "X" fired a shot from a powerful rifle into "Y"'s abdomen. Is it a reasonable inference that this was an attempt to kill?

[119] It is a reasonable inference that a shot at close quarters directed to a vital area of the body is an attempt to kill. (*R. v. Bains, [1985] O.J. No. 41 (C.A.), page 4; R. v. Rajanayagam, [2001] O.J. No. 393 (S.C.J.), paragraph 17*) *Bains* deals with the deadly nature of a handgun:

> All firearms are designed to kill. A handgun is a particularly insidious and lethal weapon. It is easy to carry and conceal, yet at close range, it is every bit as deadly as a .50 calibre machine gun. It follows that when, at close range, a handgun is pointed at a vital portion of the body of the victim and fired, then in the absence of any explanation the only rational inference that can be drawn is that the gun was fired with the intention of killing the victim. No other reasonable conclusion can be reached: a deadly weapon was used in the very manner for which it was designed - to cause death…

[120] *Rajanayagam* recognizes the impossibility of drawing "a bright line in every case" between

> **18** …gunshots that provide evidence of intent to kill and gunshots that do not. It is entirely a question of degree having regard to all the circumstances including the firearm, the range, the caliber, the load, the projectile, the number of shots, the aim, and the vital or non-vital portion of the anatomy struck by the bullet.

[121] Here the firearm was a powerful hunting rifle designed to bring down larger game. A rifle does not have to be fired at as close a range as a handgun to be accurate. There is evidence that a scope was used. The scope, Exhibit 18, has cross-hairs for sighting the target. The bullet was fired into a vital part of "Y"'s body, his abdomen, and inflicted life-threatening injuries. "Y" described what he saw when he turned in response to "Z" hearing the noise of "X" emerging from the woods - he saw "X" "with a gun pointing at me." And then, he was shot.

[122] Ms. Thompson has suggested that because "X"'s brother was on the basketball court on the same side as "Z" and "Y", it is unreasonable to infer that it would be "X" shooting in that direction. However, according to "Y"'s testimony, "X"'s brother was "off with other people" and not with "Z" and "Y". The location of "X"'s brother supports the inference that "X" would have to have been focused on accurately aiming at "Y" so as not to put his brother or anyone else on the court at risk.

[123] I find it is not reasonable to infer that "X" would have been aiming at "Z" who testified to having no problems with him. And it is not reasonable to infer that "X" was taking a random shot or that the gun went off accidentally. The rifle was tested and not prone to shock discharge. The video footage shows a deliberate shot. This is not a case of a reckless shooting.

[124] On the totality of the circumstances, I am satisfied beyond a reasonable doubt that the only rational inference to be drawn from the evidence is that "X" fired at "Y" intending to kill him. (*R. v. Griffen, [2009] S.C.J. No. 28, paragraph 34*)

[125] This case is different from *R. v. Blagdon and Clayton, [2013] N.S.J. No. 404 (P.C.),* relied on by Ms. Thompson. I do not find it equally reasonable to infer from all the evidence that "X" wanted to hit "Y" but had not formed the specific intent to kill him. By deliberately pointing a hunting rifle at a stationary "Y" and firing into his abdomen, "X" was trying to kill. No alternate inference is rational.

[126] I have not found it necessary to consider whether "X"'s prior misconduct toward "Y" could be a basis for inferring that when he shot "Y" he intended to kill him. I find their prior history establishes that "X" had a motive for shooting "Y" and supports the identification evidence. It is from the circumstances of the shooting that I draw the inference of "X"'s intent to kill.

Conclusion

[127] I am convicting "X" of the attempted murder of "Y", contrary to section 239 of the *Criminal Code* - Count 1 on the Information. I am also convicting him of using a firearm, a rifle, while committing the indictable offence of attempted murder, contrary to section 85(1)(a) of the *Criminal Code* – Count 2. I am convicting him, on the basis of Exhibit 5 and the evidence of Cst. Riggins, of possessing a rifle for which he did not have a registration certificate issued to him, contrary to section 91(1) of the *Criminal Code* – Count 6, and I am convicting him of possessing a rifle, knowing he was not a holder of a license or a registration certificate for the firearm under which he may possess it, contrary to section 92(1) of the *Criminal Code* – Count 7. I am staying Counts 3, 4, 5, and 8 on the basis of the principles in *R. v. Kienapple, [1975] 1 S.C.R. 729*. I am unsure of whether Count 9 should be dismissed as there is no evidence of recklessness, or stayed pursuant to *Kienapple*. I will look to counsel for their views on this. (After discussion with counsel, I concluded that the appropriate disposition of the section 244.2 charge – Count 9 – was a dismissal as there was no evidence of recklessness.)

[128] Finally, I took note of the Crown's submission that I should find "X" guilty of having attempted a first degree murder. I have concluded that it is unnecessary for me to address this. The facts I have found are sufficient to deal with the matter of "X"'s sentencing when that occurs.