SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Colley, 2011 NSSC 135

Date: 20110406
Docket: CRH 330640
Registry: Halifax

Between:

Her Majesty the Queen

v.

Steven Maurice Colley

Decision

Judge:	The Honourable Justice Kevin Coady
Heard:	February 14-23, 2011, in Halifax, Nova Scotia
Decision:	April 6, 2011
Counsel:	Alonzo Wright & Perry Borden, for the Crown Chris Murphy, for the Defendant

By the Court:

BACKGROUND:

[1] Mr. Colley stands charged:

> that he on or about January 21, 2009 at, or near, East Preston in the County of Halifax in the Province of Nova Scotia, did commit second degree murder on Andre Slawter, contrary to Section 235(1) of the Criminal Code.
>
> AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did attempt to murder Tywan Slawter while using a firearm by discharging a firearm at Tywan Slawter, contrary to Section 239(a) of the Criminal Code.\

[2] Initially Mr. Colley elected to be tried by Judge and Jury. A preliminary inquiry was held. On the first day of trial Mr. Colley indicated his wish to re-elect trial by a Supreme Court Justice sitting without a jury. The Crown consented pursuant to section 561.1(c) of the **Criminal Code**. A written notice and consent were filed with the court as exhibit one.

[3] On January 21, 2009, at East Preston, Nova Scotia, Mr. Colley crossed paths with Andre Slawter and Tywan Slawter. That contact ended with Andre Slawter

shot to death and Tywan Slawter injured. Mr. Colley was charged with this shooting.

[4] The theory of the Crown's case can be summarized as follows:

> •On or about January 19, 2009 Steven Colley borrowed a shot gun from Arnold Colley. He advised Arnold Colley that he wanted the gun to protect his garage and to do some pheasant hunting.
>
> •On January 21, 2009 the accused was travelling in his vehicle on Brian Street, East Preston. He came into contact with a vehicle occupied by Andre Slawter and Tywan Slawter. Tywan was driving and Andre was in the front seat passengers side.
>
> •The windows of both vehicles were rolled down as they pulled up beside each other.
>
> •The accused produced a shot gun and fired one shot. Tywan Slawter leaned forward and the back of his head was grazed by the shot. Andre Slawter was shot in the side of the head and died instantly.
>
> •Tywan Slawter ran to Andre Slawter's house and 911 was called.
>
> •The accused Steven Colley drove to Arnold Colley's home and returned the shot gun. Shortly thereafter he was arrested at his home on Caledonia Road in Dartmouth.

•A search of Steven Colley's vehicle resulted in the finding of a spent shot gun shell in the driver's door compartment.

•Steven Colley provided the police with a cautioned statement which they feel contains inculpatory evidence.

[5] The theory of the Crown's case is heavily dependent on the evidence of Tywan Slawter, their only "eye witness". The Crown also relies on Steven Colley's cautioned statement. The balance of the Crown's evidence can be described as peripheral to the *actus reas* of these offences.

[6] The parties filed an agreed statement of facts pursuant to section 655 of the **Criminal Code**. Those agreements are as follows:

1. **THAT** on 2009-01-21 at 15:14 hrs. Tywan SLAWTER reports [in a 911 call] that his friend Andre SLAWTER was shot in the head.

2. **THAT** the shooting took place on Brian Street in East Preston Nova Scotia.

3. **THAT** as a result of this shot to the head, Andre Slawter was pronounced dead at the scene of the shooting on Brian Street in East Preston Nova Scotia.

4. **THAT** Steven Colley shot Andre Slawter.

5. **THAT** the COOEY 12 GAUGE SINGLE-SHOT SHOT GUN, FRT #294-7 ("shot gun") found, seized and introduced in this case, by the Crown, is the shot gun used by Steven Colley to shoot Andre Slawter.

6. **THAT** Steven Colley was not a holder of a license to possess a firearm.

7. **THAT** the COOEY 12 GAUGE SINGLE-SHOT SHOT GUN, FRT #294-7 ("shot gun") is a weapon as defined by Section 2 of the Criminal Code.

8. **THAT** the shot gun shell found, seized and introduced by the Crown is the shot gun shell FIRED FROM THE SHOTGUN.

9. **THAT** there will be no issues raised with respect to continuity of any exhibits in this case including but not limited to:

   a. COOEY 12 GAUGE SINGLE SHOT SHOT GUN, FRT #294-7;

   b. Shot gun shell;

   c. Any and all photographs;

   d. Curriculum Vitae of Dr. Bowes;

   e. Autopsy Report by Dr. Bowes;

   f. 911 Call;

   g. Any maps presented.

8. **THAT** Steven Colley provided a FREE and VOLUNTARY statement to the police and that statement is admitted into evidence.

9. **THAT** Dr. Bowes is an expert in the area of Pathology. He is able to give opinion evidence on the cause or causes of death of human beings.

10. **THAT** cellular telephone seized from Steven Colley on January 21, 2009 had a telephone number of (902)802-3121.

11. **THAT** Andre Slawter owned a cellular telephone with a telephone number (902)293-7255.

12. **THAT** pages 1-5 in Exhibit "B" to the April 3, 2009 affidavit of Joanne Strawson are records relating to the cellular telephone owned by Steven Colley. Further, that the phone calls listed on Exhibit "B" were sent and received the by the telephones associated to the telephone numbers referenced in Exhibit "B". Further, that the text messages listed in Exhibit "E" were sent and received by the telephones associated to the telephone numbers referenced in Exhibit "E".

13. **THAT** pages 1-18 in Exhibit "B" to the November 9, 2010 affidavit of Debra Czerski are records relating to the cellular telephone owned by Andre Slawter. Further, that the phone calls listed on Exhibit "B" were sent and received the by the telephones associated to the telephone numbers referenced in Exhibit "B".

[7] While all of these admissions are important, Steven Colley's admission that he shot Andre Slawter is the most significant.

THE EVIDENCE OF TYWAN SLAWTER:

[8] Mr. Tywan Slawter is presently 37 years old and has lived in the community of Preston for most of his life. He described Andre Slawter as his "favourite little

cousin" and his best friend. Tywan stated that since 2005 the pair spoke on the phone daily and got together every third day. He testified that he does have a record for violence and that he has never used drugs in his life.

[9] Mr. Slawter testified about the events of January 21, 2009. He stated that he did not know Steven Colley before that date. He said that he had seen him around driving his van but that he did not know who he was until the day of the shooting.

[10] Mr. Slawter testified that he went to Andre Slawter's house at about 10:00am and stayed for 15 minutes. He stated that Andre said that he had something very important to do but never provided details. He stated that he left Andre's at 10:15am. Mr. Slawter testified that he drove to Halifax to retain a new legal aid lawyer.

[11] Mr. Slawter testified that he visited a friend in Spryfield for an hour or two. He said he then stopped to get some food and later a car wash. He then returned to Andre Slawter's house around 3:00pm. He testified that Andre said he had some "big news" but did not say anything to him about it. They departed his residence

in Tywan Slawter's vehicle. Tywan was the driver and Andre was seated in the front passenger seat.

[12] Tywan Slawter testified that a van passed them speeding. He stated that there was no eye contact between the occupants of the two vehicles as the van went by the Slawter vehicle. After the van passed, Andre Slawter instructed him to follow the van. Tywan testified that Andre gave as a reason that the driver of the van wanted to talk to him. Tywan put the vehicle in drive and followed the van down Brian Street towards a dead end. Initially Mr. Slawter stated that he had no idea why they were following the van. When presented with his statement he agreed that he felt the events were leading to a fight.

[13] Tywan Slawter testified that he started following the van slowly. He then saw the van turn around in a driveway and started coming towards them. He testified that the two vehicles stopped in the street beside each other and were facing in opposite directions. He testified that nothing was said by anyone. It was Mr. Slawter's evidence that while he recognized the driver of the van, he did not know his identity. Mr. Slawter denied blocking the van or yelling at the driver. It was Mr. Slawter's evidence that he had no idea why either vehicle was stopping.

[14] Mr. Slawter identified Steven Colley as the driver of the van. He said he could see him "from the shoulders up" and that he had a "cold look on his face." He was unable to describe Steven Colley's clothing and did not see his hands. He testified that nothing was said by anyone while the vehicles were stopped. It was his evidence that moments later he saw a shotgun barrel in the van's drivers window. He said the barrel was two inches out of the van window. He was unable to describe the way in which Steven Colley handled the 42 inch weapon in the driver's compartment of the van.

[15] Tywan Slawter testified about the critical moment as follows:

> "I seen it from the front; I saw it for a second before I heard the shot"

[16] He said the shotgun was sticking out of the van far enough to know it was a shotgun barrel but "not sticking out too far." He said that once he heard the shot he "walked on the gas" but did not go too far. He then went to Andre's home where he instructed the occupants to call 911. He testified he did not see Steven Colley at the scene after the shooting.

[17] Tywan Slawter testified that he never expected anything to happen when Andre told him to follow the van. He insisted that he blindly followed this instruction. He also insisted that his vehicle never crossed to the other side of Brian Street to block Steven Colley. He denies that he took steps to prohibit the van from leaving the street. He testified that he was not aware of any conflict between Andre Slawter and Steven Colley. He further denies any knowledge of any communication between Andre Slawter and Steven Colley on the day of the shooting or before.

[18] I am satisfied that the Crown's theory is substantially dependent on the evidence of Tywan Slawter. If it were not for that evidence, I very much doubt the police would have reasonable and probable grounds to charge Steven Colley with these offences. Unfortunately for the Crown, Mr. Slawter's evidence at this trial lacks any credibility whatsoever. In my thirty years as a criminal defence lawyer and judge, I have never encountered a witness with less regard for the oath than Tywan Slawter. I concluded that his evidence was driven by self interest and not by a desire to be truthful. Mr. Slawter never hesitated to give false evidence when it looked like the truth would reflect badly on him, or when the truth challenged the version of events he wanted to advance. Tywan Slawter committed perjury in this

trial on several occasions. I can not accept any of Tywan Slawter's evidence unless I can find corroboration in other evidence I believe. I have not been able to locate any such corroboration in the balance of the Crown's evidence. If it were not for Steven Colley's admission that he shot Andre Slawter, I would dismiss the charges outright.

[19] I also found that Tywan Slawter took steps to boost his credibility in the eyes of the court. He knew that he had been caught giving false evidence at the preliminary inquiry. He also knew that he would be giving false evidence in this trial. When asked an important question, he would turn his chair towards me, look me in the eye and speak with a feigned sincerity. Initially these actions appeared to support his credibility. In a very short time they were seen for what they were, overt actions meant to mask his many fabrications. I was astounded with the ease with which he misled the court. It was obvious that Tywan Slawter was not the least bit concerned with the consequences of his lies. Tywan Slawter had one agenda and that was to convict Steven Colley on mistruths and what he perceived as his community's feelings about the shooting. These factual conclusions are not just based on my observations, but also on Tywan Slawter's willingness to acknowledge his false evidence when exposed to the truth.

[20] I also feel that Tywan Slawter's evidence was influenced by the impact of the shooting on his community of East Preston. This crime split this community along the lines of Steven Colley's culpability. This may be the genesis of Tywan Slawter's mistruths.

[21] Given the above strong conclusions, it is necessary to review the evidence supporting this unflattering assessment of Mr. Slawter's credibility and reliability.

[22] Tywan Slawter testified at the preliminary inquiry. He was asked to tell where he was prior to the shooting. He testified he was at the home of one "Lucy Jenkins" obtaining a "parcel." After the preliminary inquiry the police investigated and determined that Lucy Jenkins was a fictional character. They further determined that he was with one "Michelle Williams" and that the "package" were the papers for Andre Slawter's car. The police confronted Mr. Slawter who admitted to the deception. When asked to explain, he testified that he was nervous and did not want to involve Ms. Williams. This is not true. The truth is that Mr. Slawter was subject to a conditional sentence house arrest order and he feared getting caught in a breach.

[23] Tywan Slawter testified at the preliminary inquiry that after attending at "Lucy Jenkins" place, and before picking up Andre Slawter, he went to an appointment at Nova Scotia Legal Aid, stopped at a fast food restaurant and washed his car at a Rubber Ducky. At trial Mr. Slawter admitted that he did not go into the legal aid office on January 21, 2009. He testified that he did not have an appointment and turned around at the elevator. He was unable to identify a fast food restaurant location. He was shown photos of his car taken after the shooting and it was evident it had not been washed for some time. The photos also establish that the paved roads on January 21, 2009 were dry and clear. At the preliminary inquiry he testified he was at Ms. Jenkins (Ms. Williams) momentarily whereas at trial he was forced to acknowledge he was there for "an hour or two." Once again I conclude that Tywan Slawter was looking after his own interests at the expense of the truth. He feared that he could be breached by the police investigating the death of Andre Slawter. Mr. Tywan Slawter only acknowledged his lies when the defence presented him with uncontrovertible evidence of the truth.

[24] Tywan Slawter utilized vagueness and evasiveness when answering questions where a yes or no was the required answer. It was my observation that

when he sensed that a yes or no would expose him, he would offer answers that were not believable. The evidence establishes that on the day of the shooting Tywan Slawter had a cast on his right hand. Post offence photos show the cast stained with blood. On direct examination he was asked about how he injured his hand and responded “I fell down or something”. When asked where, he said “on ice or something.” When asked what he was doing in the back yard at the time, he replied “jogging.” My observation of Tywan Slawter led me to believe that he felt the court was buying into his deceit. He seemed to take some pride in that perception.

[25] On cross-examination Tywan Slawter was presented with his police statement which he described as truthful. In that statement he described how he broke his hand fighting. He then told the officer “I’m a fighter, I’m a trained fighter, I’m a mixed martial arts fighter.” He told how the other combatant had an unusually hard head and that he “hit buddy in the wrong way.” When presented with this inconsistency he testified “I lied about this, I broke it in a fight.” Tywan Slawter was presented with his preliminary inquiry evidence in which he acknowledged the fight and added “I broke his jaw.”

[26] On cross-examination it was suggested that the injury was caused by a December 28, 2008 assault on a girlfriend named Gail Burris. While he acknowledged that the cast was installed on that date, he denied that the assault caused the injury. Yet on re-direct he stated that he injured his hand when "I whacked my girlfriend in the head."

[27] Tywan Slawter's preliminary inquiry evidence was that Andre Slawter did not know Lucy Jenkins (Ms. Williams) and that she was not his girlfriend. He testified they were just friends, hung out sometimes and went to the movies. When the transcript was read to him, he admitted that this preliminary evidence "was a lie."

[28] Tywan Slawter went to great lengths to distance himself from guns. He denied possessing a firearm at the time of the shooting. He insisted that he never possessed a firearm. When pushed he agreed that he held a handgun when he was "out west." He was forced to acknowledge that since his return to Nova Scotia he threatened to shoot his way through his girlfriend's door. He admitted pleading guilty to charges arising from the incident on April 8, 2009. Mr. Slawter was referred to a transcript of that proceeding and acknowledged telling that judge

"maybe I was just lying about having guns but it was wrong." He was also forced to acknowledge that before court he text messaged Ms. Burris threatening to kill her if she went to court. Ultimately, on May 6, 2009, Mr. Slawter plead guilty to obstructing justice.

[29] Tywan Slawter was provided with two text messages that Andre Slawter sent to Steven Colley at 12:26pm and 12:30pm on January 21, 2009. Those messages are as follows:

> Call my grandmom house again and hang up, you are going to get your issue soon as I fucking see you little boy. Believe
>
> Got no respect for my grandmother, calling her crib, you want your melon peeled, you'll see me, believe dat

[30] Tywan Slawter was not prepared to admit that these messages were threatening. Instead he went to some length to persuade the court that these texts were about "fruit." This is just another example of how far Tywan Slawter went to protect his perceived interests.

[31] I observed that Tywan Slawter was always on the alert for the necessity of a lie to protect his self interests. Nowhere is this more evident than in his 911 call:

> Q. Where was he shot at?
>
> A. He was shot right in the head. I just came back from like an appointment and everything and I'm . . . I just came back to my appointment and I supposed to be in (the house)
>
> Q. Okay, what's your name?
>
> A. My name is Tywan Slawter

This call was made minutes after the violent death of his favourite little cousin. Yet he recognized the need to protect himself from a breach of his conditional sentence order. Legal appointments were excepted from the terms of house arrest.

[32] Tywan Slawter insisted throughout this trial that he did not know Steven Colley before the shooting. He testified that he never spoke to Steven Colley and never heard Steven Colley speak. He said that he did not know anything about Steven Colley before the shooting. He testified that he had seen the van around the community and recognized Steven Colley as the operator. Tywan Slawter's

evidence was that when Andre Slawter directed him to follow Steven Colley, he did not identify him. He further testified that there was no conversation surrounding the shooting, yet minutes later he had the following exchange with the 911 operator:

Q. Hi, someone was shot there.

A. Yes someone was shot. 60 Brian Street. It just happened like about five minutes ago or ten minutes ago.

Q. Okay, did you see who did this?

A. Yeah, I know the guy who did it.

Q. What's his name?

A. His name is Stevie Colley, that's his name, right.

Q. Colley

A. Yeah, Stevie Colley

The evidence satisfies me that Steven Colley was known in his community as "Stevie."

[33] On direct Tywan Slawter created the impression that he was ignorant about all things related to the drug business. He testified that he heard drug talk in his past but had not seen drugs for years. Yet on cross he was prepared to admit he knew what a “front end guy” and a “back end guy” meant and knew cocaine sold for $45,000 a kilo in Vancouver.

[34] Tywan Slawter testified that he heard “around the way” that Steven Colley received a lot of money from the Red Cross. He was directed to his preliminary inquiry evidence where he denied such knowledge. At the preliminary inquiry he stated “I know nothing about that” and “I don’t know what you are talking about.” He was then directed to his KGB statement in which he admitted to this knowledge and stated that he heard that he got some money from the Red Cross, $100,000 or something, and that he “bought a couple of vehicles and shit.”

[35] On cross examination Tywan Slawter denied that when the vehicles pulled up beside one another he was expecting a fight. When shown his statement he was forced to acknowledge he stated he was thinking it was leading to a fight. He then adopted his statement evidence. He then gratuitously added that when he fights he

breaks bones. The Crown, on redirect, attempted to rehabilitate Tywan Slawter on this point. He was asked if any of these fights led to criminal charges. Mr. Slawter's response was to the effect that the people he fights with are not the kind of people who run to the police if they get hurt.

[36] Aside from my findings on credibility, I also concluded that Tywan Slawter was, and is, an extremely violent man. He was not reluctant to admit to physically abusing his girlfriends. He took no steps to minimize these events, which in light of his other deceits, is surprising. I conclude that he viewed his violence as a badge of courage. Tywan Slawter seemed to take pride in a reputation as a street fighter. He readily spoke about 30 street fights and to breaking jaws, arms and legs. He agreed an unintended nudge on the sidewalk was evidence of disrespect and warranted violence in the absence of contrition. He admitted to a bad temper and to goading people he did not know into a fight. Tywan Slawter is very fit and is a tall and muscular man.

THE EVIDENCE OF JULIAN COLLEY:

[37] Julian Colley presented to this court as a 21 year old immature boy. It was clear to me that his evidence was contaminated by the impact of this shooting on his community. He had a connection with both Andre Slawter and Steven Colley. Andre Slawter was his best friend and Steven Colley was related to him. I was able to sense the split in the community in Julian Colley's evidence. It was apparent that he fell into the camp of those who feel Steven Colley should be held accountable for what they consider a murder. It should be kept in mind that he was not at the scene of the shooting. It was necessary for Julian Colley to be untruthful to support his view of what happened. As a result of these factors I am unable to accept any of his evidence unless I find corroboration in evidence I accept. I have not found such corroboration.

[38] Julian Colley testified that on January 21, 2009 he left home for work at 1:30-2:00pm. He was walking to a bus stop when he noted Steven Colley's van. He flagged down the van and Steven Colley picked him up. He said that he found Steven Colley upset in a way he had never seen before. He said Steven Colley made him feel uncomfortable. He said that Steven Colley was upset about his new

garage being broken into a week earlier resulting in damage to his vehicle. He testified that Steven Colley grew more upset as they drove. He testified that Steven Colley said he was going to hurt them, was going to take them out. Julian Colley stated that Steven Colley never said who "them" were but he thought he was speaking about Andre Slawter. He did not give a reason why he drew that conclusion.

[39] Julian Colley testified that on the drive they encountered another relative named Brucie Saunders. He says that Steven Colley stopped and engaged in a conversation with Mr. Saunders. He says that Steven Colley asked Mr. Saunders to drive him to work. Mr. Saunders declined as he was not going in that direction. Mr. Saunders was not called as a witness in this trial.

[40] Julian Colley testified that he did not see a gun in Steven Colley's van.

[41] On cross examination Julian Colley admitted that when he got in the van he could not sense anger and that the anger did not arise for 5-10 minutes. He described Steven Colley as screaming and slamming his hand on the dash. He then added that Steven Colley said "I can't wait to get him alone" and "I want to get

him alone." When directed to the meeting with Mr. Saunders, Julian Colley said that Steven Colley was not as angry as he had been earlier in the drive.

[42] Julian Colley testified that he felt that his friend Andre Slawter was the subject of Steven Colley's wrath and that he wanted to warn him about any danger. When questioned why he did not call Andre Slawter he gave a number of unrealistic explanations. He said the number did not work. He said he was not aware Andre had changed his number notwithstanding seeing him 3/4 times a week and speaking to him on the phone often. He said he did not have Andre's home phone number. He said that during the 30 minute bus trip he did not call anyone else for assistance.

[43] The defence established the phone numbers of Julian and Andre in the days leading up to the shooting and obtained the records. The following calls occurred between their two cell phones:

• January 17, 2009 at 12:26pm Andre phoned Julian for 31 seconds.

• January 17, 2009 at 9:46pm Julian phoned Andre for 31 minutes.

• January 17, 2009 at 11:10pm Julian phoned Andre for 0 seconds.

• January 18, 2009 at 6:39pm Andre phoned Julian for 44 seconds.

• January 18, 2009 at 1:54pm Andre phoned Julian for 200 seconds.

• January 18, 2009 at 2:36pm Andre phoned Julian for 41 seconds.

• January 18, 2009 at 3:46pm Andre phoned Julian for 218 seconds

• January 19, 2009 at 6:04pm Andre called Julian for 37 seconds.

Julian Colley unequivocally denied making or taking any of these calls. He was not being truthful. I find that he preferred lying to avoid having to explain what these conversations were all about. I can infer from this that disclosure of the contents of these calls would not enhance his credibility.

THE OTHER COMMUNITY WITNESSES:

[44] The Crown called Carolyn Slawter, the mother of Andre Slawter. She testified that he was 20 years old at the time of his death. He lived with Ms. Slawter and her mother at 60 Brian Street, East Preston. She testified that she has known Steven Colley for 15 years and the last time she saw him was 2 weeks before the shooting. She said he never “hung out” with Andre Slawter.

[45] On cross examination Ms. Slawter acknowledged knowing that Steven Colley bought land on which he located a trailer and a new garage. She admitted knowing of his settlement with the Canadian Blood Services. She knew he owned a brown van. She stated that she never used Andre's phone, and did not send text messages on January 21, 2009. She testified that she would see Tywan Slawter at her house once a week. She possessed no evidence about the actual shooting.

[46] Ms. Yvonne Colley testified for the Crown. She said that she has known Steven Colley since he was young. Prior to the shooting he would visit her residence 5 to 6 times a week. Her husband Arnold worked for Steven Colley building his garage. She testified that on January 19, 2009 Steven Colley borrowed her husband's shotgun. She said that when it was not back in the prescribed two days she called him. She testified that he told her that he was not finished with it. He told her that he needed the gun to protect his garage. He said that the garage had been broken into the previous night and his prized vehicle vandalized. He told her that he had to protect his garage until electricity was installed. She testified that Steven Colley returned the gun between 3-4pm on the day of the shooting.

[47] Ms. Colley said that on January 21, 2009 at 9:00am Steven and Arnold left her home to go to work on the garage. She described Steven Colley as "not mad about anything" and said "he was fine." She said she was aware that previously Steven Colley's trailer was set on fire and shots fired into his garage.

[48] Arnold Colley also testified for the Crown. He described Steven Colley as a "foster brother." He confirmed that he helped build the garage. He testified that on January 19, 2009 they went down to the garage to work. He said they found the garage broken into and a truck extensively vandalized. Later, in Arnold Colley's home, Steven Colley noticed the gun on the wall and asked to borrow it. Arnold Colley testified that he reluctantly agreed to lend it to him. It was a single shot 12 gauge shotgun that had not been used for 20/25 years. Arnold Colley testified that he did not provide ammunition and there was no shell in the gun.

[49] On the day of the shooting Arnold Colley went to the garage at 1:00pm or 1:30pm. Steven Colley arrived at 2:00pm or 2:30pm. They were there for 30/45 minutes discussing the garage.

[50] Arnold Colley testified that he instructed Steven Colley to get wire to hook his trailer to the garage. He said Steven Colley made several phone calls to locate what they needed. He described Steven Colley's demeanor at the time as "nothing out of the ordinary." He said Steven Colley then left to get the wire and never came back. He said when Steven Colley left "his mood was fair" and he seemed to be in a hurry to get the wire so he could hook up his trailer.

[51] Arnold Colley was a very credible witness. While he may be elderly, he has all of his faculties. He listened to the questions carefully and thought about his answers. I could not detect that he was influenced by his relationship with Steven Colley. It was clear to me that he had not prejudged the case and that he respected the decision of the Court. I was impressed with Arnold Colley's forthrightness. Mr. Arnold Colley respected his oath and I believe all of his evidence.

[52] Terry Pipes was qualified as an expert in firearms. He testified that the weapon seized from Arnold Colley was a 12 gauge, single shot shotgun capable of causing death or bodily harm. He stated that it was 42 inches long which included a 30 inch barrel. He described it as manual loading. He said the trigger can not be pulled without cocking the hammer. He testified that a spent shell does not eject

automatically. He testified that this gun does not have a safety mechanism beyond the need to cock the hammer before firing.

[53] In his report (Exhibit #10) Mr. Pipes reports that the shotgun is "prone to shock discharge when struck on the end of the butt stock, either side of the receiver of the hammer (when in the forward position) as well as when dropped on the end of the butt stock." He testified that the plastic shot cup can travel up to 20 feet from the muzzle and the shot can travel up to 266 feet. The evidence of the medical examiner was that the cup and much of the shot were located inside Andre Slawter's head.

[54] Cst. Jason Stewart was on the lookout for a brown van after 3:10pm on January 21, 2009. He noticed a van that fit the description. It was heading towards Dartmouth moving fast and changing lanes. He followed it to Caledonia Road where he arrested Steven Colley. Cst. Stewart described him as appearing angry and agitated. When Cst. Stewart advised Steven Colley that he was following him because of a "shooting," Steven Colley said "there's no gun in that car." Steven Colley invited him to search the vehicle. Cst. Stewart testified that Steven Colley appeared to be shocked when he was told he was under arrest for murder.

[55] Cst. John McNeil attended at the van on Caledonia Road and conducted a search. He located an expended shell in a pocket on the inside of the drivers door. It was plainly visible. The agreed statement of facts indicate "that the shot gun shell found, seized and introduced by the crown is the shot gun shell fired from the shotgun."

[56] Dr. Matthew Bowes, the medical examiner, testified that Andre Slawter died of a gunshot wound to the head. He testified that the shot caused massive damage and it resulted in immediate death. There were no other competing causes of death. Dr. Bowes' report indicates that Andre Slawter was 20 years old, 110kg in weight and was 177cm tall. He reported finding a roll of currency in Andre Slawter's pants. Toxicology screens proved negative.

[57] Mark Colley testified for the crown. He lives at 80 Brian St., East Preston. He knew Andre Slawter and was Steven Colley's cousin. He testified that on January 21, 2009 he got up at 9:30am and went to work. He met Steven Colley who told him about the break into his garage and the vandalism to his truck. Steven Colley attended at Mark Colley's residence to pick up oil barrels to use at

his garage. One oil barrel was movable and the other was frozen in ice. They took the movable one to Steven Colley's garage and left the other behind. Mark Colley then saw the damages to Steven Colley's garage and truck. He described Steven Colley as "mad." He testified that Steven Colley gave no indication that he would be returning for the second barrel later that day. Mark Colley testified that on January 21, 2009 Steven Colley did not indicate he was going after someone and that he did not seem any "madder" than anyone else in that situation. He testified that if his truck is not at his home then he is not at home. He testified that he was not contacted by the police until after this trial started.

STEVEN COLLEY'S STATEMENT:

[58] The agreed statement of facts stipulate "that Steven Colley provided a free and voluntary statement to the police and that statement is admitted into evidence." The interview was held over approximately six hours on January 21, 2009. I have concluded that the following excerpts contain evidence probative to the issues in this trial:

Q. Do you understand what's going on here right now?

A. I have no idea what's going on.

Q. I saw your garage.

A. I get a bunch of mother fuckers tryin to destroy me. Threaten me. Try to kill me. Just because I'm trying to turn my life around.

Q. Jealousy's an awful thing. And especially down in Preston area ya see that often where ... where somebody gets ahead and there's always somebody else there to criticize them and say, how is he gettin' ahead? How come I'm not gettin' ahead? And ahh ... I don't know what it is down in Preston. I ... I see that more times ... Well, it's not only in Preston, ya see it everywhere. Nobody wants to see anybody get ahead.

A. Listen, I was bein' threatened to start to bring drugs to these mother fuckers.

Q. Do you wanna tell me about that?

A. Mmm ... I can't say nothing.

Q. Okay? Now, we do have an eye-witness. Okay? Who saw you do this.

A. Mmm hmm.

Q. Um, we ... we also have evidence associated with your hands and the vehicle and, ah, we have other witnesses who were in the vicinity who saw things go down. Okay? So this isn't ... This isn't a matter of a small little case, well, it's just his word against my word. Um, it's a lot more complicated than that. And ahh ... And that's the very unfortunate part about this because, you know what? Um, as far as the step by step details, what happened today, okay? We know that umm ... you ... you drive ...

you drove by these guys and then they followed you and then you went and turned around. We know that you pulled up against them. We know that ya took a gun and the driver bent over and you shot the passenger. We know that. Okay? That ... that's not a secret. But what I don't know is why that happened. And ahh ... I know that you just set up a garage. And I actually saw your truck, the white truck, that you put together. That's a pretty impressive piece of machinery there.

A. Did you see what they did to it?

Q. I didn't see what they did to it. I know that there was 20,000 dollars damage done to it. But I did see your truck. And ahh ... you built that yourself, didn't ya?

A. Yes

Q. Yeah.

A. But ya gotta understand one thing. Even after all that the drug dealers, far as they can tell I'm a drug dealer. I'm buildin' my ... I must be doin' drugs and all the criminals are in my face. Crack heads. Tryin' to rob me. Robbing me and stuff. Stealing out my garage. I did nothin' to these people. You know? The big drug dealers, you gotta sell drugs. We want you to sell drugs. We want ya to do this. Fuck you. I'm doin' a cd. I don't ... I'm not a drug dealer. I don't go to the shoe box for my money, I go to the bank. That's the difference.

Q. What happened there today? What caused all this today?

A. I have no idea what's going on. And what you're talking about what's going on. Speak to my lawyer.

Q. Mmm hmm.

A. I have nothing else to say in regards to anything. If you wanna talk about my life and what's going on with me, fine and dandy. Whatever happened, whatever's goin' on around this shit, I have no idea. I don't understand. I am not a murderer. I couldn't kill no one.

Q. Somebody died at your hands today. There's no ... There's no mistaking.

A. I can't believe that.

A. The only person that mattered to me was taken from me.

Q. And who was that?

A. You know, it's not important, but they are gone. Ya know, and ... This year ... This year started so fucked. It's only January even. New Year's Eve, two mirrors breaks. I burn my hand. And now I'm charged with murder. This ... In two weeks? Oh, but ya forgot my garage. What more can happen to me? Kill me. You might as well just go out there and shoot me. What's the sense to live now? I know I didn't do anything wrong here.

Q. In relation to today?

A. Nothing at all.

Q. What happened today?

A. See, the part that I don't understand is, you said I murdered someone. But I wasn't ... I never murdered nobody. I can't believe that.

Q. So what do you think should happen here today?

A. I don't think any of this should've happened today. Whatever . . .

Q. What should've happened?

A. . . . happened today.

Q. Tell what should've happened.

A. I should be home right now havin' some ice cream waitin' on my girls to come home. Gettin' ready to take my grandson to church on Sunday and on the way to the studio to ... (UNINTELLIGIBLE) ... after supper.

Q. So what ya did today is justified?

A. I never justi' ... I'm not saying anything's justified, what you're talking about. I haven't been convicted of doing anything. And until I'm convicted of something then, until then, I'm not speaking to anybody other than my lawyer.

Q. People are changing.

A. They tried to burn my friggin' garage. Threatened to burn my garage down. 'Cause I wouldn't sell drugs. Threatened to destroy all my property. Because I wouldn't become a drug dealer. Now I'm gonna go to jail prob'ly because I wouldn't become a drug dealer.

Q. The reason ... The reason why you're here is not because you wouldn't become a drug dealer. The reason why you're here is because somebody got shot today. That's the reason why you're here. And that's the only reason why you're here. Now, what led up to that sequence of events, that's the reason why we're talking here at this moment.

A. I'm not gonna sell drugs. (UNINTELLIGIBLE) ... to the kids. I'm not gonna poison those kids. I was in Toronto ... When I was in Ontario and I sold that ... drugs for like about a month, I couldn't do it no more. I had the last little bit to get rid of and that's what I was doin' that night in the hotel. That was it. I was done. But I got caught. And I went to court and I plead guilty. I said, Your Honour, I can't do this. I'm guilty of this. This is not right. And I plead my guilt and the judge said, ya know ... You can read the transcript or whatever ... four months. Plead guilty. Four months.

Q. Mmm hmm.

A. Because at one point I couldn't feel anything. And just up until last year where I met Lynn is when I could feel again. Like, there's so much positive stuff happened in our ... both our lives and for an accident to destroy that ... I would never deliberately go and kill someone.

Q. Why don't ya tell me what happened.

A. I promised my lawyer I wouldn't speak anything. She told me, don't say anything. And once I explain this to you maybe you'll see it in a different way. But if anybody I wanna explain it to is you.

[59] The most probative exchange is found in the following excerpts:

A. Yeah. They tried to kill me twice. Not once, but twice.

Q. Who tried to kill ya?

A. They did.

Q. Who ... who's they?

A. Drug dealers.

Q. Who, though?

A. My daughter and my girl were in the truck. I stopped. Thank God. There was only three nuts ... three nuts left on the wheel.

Q. So, who are these guys?

A. All I know is like ... We ... we know you know the connection for the dope. You better get something together or this is gonna happen to you or, like, we tellin' you. (UNINTELLIGIBLE) ... you don't hear? Ya

know, rah, rah, rah, rah, rah, rah, like ...Ya know, like, I walked away from that. Never to return. I promised the judge I wouldn't sell drugs again. That was the biggest mistake I made in my life. Why you tryin' to force me there? I don't want to sell drugs. All I wanna do is die peacefully.

So whatever you guys do, whatever, it doesn't matter. You're not gonna have me sell drugs. I don't gotta sell drugs for nobody and I'm pretty sure they got message that I'm not a drug dealer. I'm pretty sure they got the message that I just wanted to be left alone to protect my property. I told them, stay away from my property.

Q. So who was doin' this? Who was behind this?

A. The person in the car. Both of them. They came after me. Whatever they were gonna do to me, makin' threats to me.

Q. When did they make the threats?

A. [They] ... threatened me two nights prior, tellin' me he's gonna do this to me and that to me and how he's gonna fuck me up. He's gonna do this to me and looks good how my garage is burnt, ripped up. They fucken tried to burn it down. For nothing. Jealous. Simple jealousy. Tryin' to ... Callin' and tellin' people. Check on some of the phone conversation. Maybe you can check out them cell phone conversations and maybe find out what the fuck's goin' on. Check my messages, how many texts he's been textin' me. I can't see my phone so I can see the text because my phone's ... The screen ... the light in the ... the thing id dead so I can ... it wont ... So nothin' comes up on the face. I can't see nothin'.

Q. How ... how do ya know he's texting you?

A. I know he was texting me. I wouldn't answer the phone. He called me one day, he was arguin' and screamin' in the phone.

Q. Who ... who's that?

A. One of those guys in the car was screamin' into the phone.

Q. Which guy was it?

A. I don't know.

Q. The guy in the passenger's side or the guy in the ...

A. ...Driver's die.

Q. ...Driver's side?

A. Driver or the passenger. One of them. He was on the phone screamin' and yellin' in my ear, yellin', makin' threats, like, yeah, I'm gonna fuck you up, I'm gonna ... you ... you fucken burn your fucken garage out. I'm gonna burn ... You're gonna get burnt out and ... And I said, why the fuck is these fucken people ... ? Why are you fucken people goin' on like that? And like now, I'm sayin' to myself, I'm like fucken, Low Rider, they tried to kill me with that already. Now you fucken change the nuts on my van. Now he's threaten' to hurt me physically. He's threatened my family.

Q. How did this all start? Go right back to the beginning when it all started.

A. When I came home. When I started building my garage. People coming up wanting money ... to give me ... me to give them money or give them this and I say no. Wanted me to invest in drugs. I'd say no. I don't to that. I'm doin' a cd. I'm working on my music. And then right after that people start getting ... certain guys, losers, the losers, ones that don't

wanna do nuttin' for themselves, they start getting attitudes. Copping attitudes against me and whatever. Ya know, they don't understand like what's going on in my head. Like, I only got this ... I look at as five ... five years of life and I'm tryin' ... they wonder why I'm doin' so much so fast. Tryin' to leave some'in for my kids before I die. That was it.

That's all it was.

Q. How do ya know these guys? Your sister told ... tells me that the two families know each other.

A. Yeah.

All I can say is, I had no intentions on hurting anyone. Prob'ly scare them to get ... get away from me, leave me alone. But I didn't have no intention of killing them.

Q. What was your ... ? What was your ...? What was your thought process today when ya saw them and they started following you?

A. Fear. They prob'ly had a gun or some'in.

Q. Why did ya turn around?

A. I never turned around. I turned around because I was going back home. I just pulled in my ... I went to see my brother. And he wasn't home. So I turned around in his gate to go back. They pull me over. He kinda like stopped in front of me and them pulled on the side like blockin' me off in the street. Like, ya know, why you wanna talk to me? I have no ... no dealing with you. Why you gotta come fuck with me? Why would you leave your yard and come follow me? Why? For what reason? What you gotta talk to me about? Unless you tryin' to do somethin' to hurt me after you made threats to me. What am I supposed to do? Already had my jaw

broken in the bar. You robbed my frigging garage. What more am I s'posed to do, just stand back and just let people just fucken do this to me over and over?

Q. Was ... was he involved in that ruckus there at the ahh ... at the ahh ... The Hub?

A. These people was, yeah. They's his people too.

Q. The guys that were in the car?

A. One of them. His family. Yeah.

Q. Which ... which one now? The guy driving or the passenger?

A. Passenger's side. And they all ... they all got some'in to do with it. And then for some reason they didn't like being used to fuck with me.

I still don't believe what you're sayin'. I don't ... I don't believe that happened, somebody's dead. I don't believe that. (UNINTELLIGIBLE) ... It's not in my heart. I ... I don't feel nothing like that. I never ... I could never do ...

Q. So what happened yesterday when ya went to ... to get the gun?

A. I went ... I was just up at the property. Was parked ... I was there just makin' sure nobody came around. I just wanted to protect my property. And that's it. And just waited up there last night. And the night before I stayed there and made sure nobody would come and rob ... break in again. And umm ...

Q. Why didn't ya have the gun in the car today?

A. I was being threatened. I was in that area and I wanted to see my brother because he came up earlier and we was s'pose to go get the other oil barrel. I picked up an oil barrel.

Q. What's an old barrel.

A. Oil Barrel.

Q. Okay. Okay.

A. I picked up a 20 gallon oil ... oil tank.

Q. Yeah.

A. And we're s'posed to go get the other tank so I was goin' to see if he was home and go get the tank, but I said, I wont trust them fucken guys up there. Then try some'in, I said, I'm just gonna just have some'in just to scare em off. At least ... scare em away. Like, I ... I didn't just automatically wanna shoot somebody.

Q. So when you borrowed the gun did ya tell him why ya wanted it?

A. Yeah.

Q. What'd ya say to him?

A. Mmm ... that I wanted to use it to ahh ... just in case some ahh ... in case somebody wanted to whatever. No, I didn't tell him that. I said I wanted ... I wanted it ... What did I say I wanted it for? Shoot some fucken, um, pheasants in back.

Q. Did he give ya the ammo? Where'd ya get the ammo for it?

A. Mmm ... there's shells everywheres. I don't fucken know.

Q. Did ya go and buy some? Did ya go to the store and pick some up?

A. Oh, I got some, yeah.

Q. Where ...? What store was it ya got them at?

A. I can't remember where I picked them up, but I got some.

Q. Was it down in Preston or ...?

A. I can't remember where I got the, but I ... (UNINTELLIGIBLE) ... 'cause I had a couple.

Q. So, you're driving and they start following you. What happened then?

A. I backed up, turned around and they blocked me off, kinda. Started yellin' and talkin' shit. About the garage and shit and ... I don't remember anything else. After that I don't remember.

Q. What ... what point is the last point that ya remember?

A. Yelling.

Q. Them yelling or you?

A. Yelling.

Q. Did you say anything to them?

A. Nothing.

Q. So who ... who would've been doing the yelling, the driver or the passenger?

A. Both. Sayin' some'in about the ... Wait a minute. Wait a minute. Wait a minute. Fuck. Some'in like. And I don't actually know ... I know the driver probably would know what he said, what was said. Prob'ly told ya.

Q. Who ... who was doin' most of the talkin', the driver or the passenger?

A. I can't remember. All I know, there was yelling.

Q. Who do ya know best? The driver or the passenger?

A. The passenger. Driver. Both.

Q. What are their names?

A. I don’t know.

Q. You don’t have a clue what their names are?

A. I don’t know them like that.

Q. No, but you must know their names.

A. I don’t know them like that. I don’t hang with those kids.

Q. So when the gun went off what happened then?

A. I don’t remember anything.

Q. What do ya remember next?

A. All I remember is voices. And I don’t remember anything after that. It’s like I ... part of the ... part of that, it’s ... it’s not there. Like you’re tellin’ me stuff that I can’t ... and I’m tryin’ to explain to you, I don’t understand.

Q. You tell me what part ya don’t understand.

A. Any of this. I don’t understand any of this. ... Don’t understand it, man.

Q. What was your intention having the ... the gun in the ... in the truck?

A. Uhh ... protect myself. So no one ... I didn't wanna be hurt again.

Q. Why did ya give the gun back?

A. I don't even remember that. When did that happen?

Q. Why were these guys chasing after ya? Why did they come and follow you?

A. 'Cause they woulda beat the fuck outta me. That's what they woulda did.

Q. Why though?

A. Because they hate the fact that I wont be their drug supplier. I'm not selling drugs to fucken kids in my community. Kill me. Lock me up for life. No. You're not gonna hit me to more, beat me no more.

Q. You told me that ya felt threatened ... When did they make the threat against you?

A. Well how many strikes do a man gotta get?

Q. But ... those guys specifically. When did they make threats to you?

A. That's been goin' on for the last two weeks. Little ... little things. Ahh ...

Q. Was it both of them or just one of them?

A. Listen. I don't know how many of those guys there is. Could be a gang of them for all I fucken know.

Q. But ... but I'm ... I'm focussed specifically on the two people who were in that car today.

A. Listen. That guy come to my house, in the car. Wanted to sell me drugs.

A. Which one? The driver or the passenger?

A. The driver. I said, I don't fucken know you.

Q. What's that?

A. You told me I'm being charged for murder. Like ... How can I sit here and enjoy a meal?

Q. I know. I know what you're sayin'.

A. You're tellin' me stuff that I can't even figure. I don't understand. Ya know, no matter what, nobody deserves to lose their life. And if I did that then whatever I deserved I get. But I can tell you, if I did it was not intentional. And it was not planned. 'Cause that's not me.

Q. If it wasn't planned, why did ya get the gun yesterday?

A. Because I was up on my property protecting my property.

Q. Mmm hmm.

A. I had no, ah, ... no intentions of goin' to anybody's house and shootin' them. And actually, I didn't go to nobody's house. I went to see my brother to get the oil barrel. And my threat continued to fucken bother me. They just can't stop. Who are these people? One guy's fucken house arrest. He's already on fucken house arrest, for whatever fucken shit he did.

Q. Which guy was that?

A. The guy that ... I guess one of the guys in the car was on house arrest. Did you know that?

Q. I didn't know that, no. That doesn't mean he's not. It's just, I didn't ... didn't even know.

A. On house arrest for whatever ... whatever he did. Assaults or whatever he did. Ya know, you're callin' me on the phone makin' threats to me. In my home phone. Ringin' my phone off. My girl answered the phone and you yellin' in her ear. Makin' threats to me.

[60] The law is settled that when a statement of an accused is tendered by the Crown and admitted as voluntary, it becomes evidence both against the accused and for the accused. A trier of fact is entitled to consider an exculpatory part in the same way as it is able to assess other parts of it. (*R.v. Hughes*, [1942] S.C.R. 517)

[61] This principle was recently confirmed by the Supreme Court of Canada in *R. v. Rojas*, 2008 SCC 56. In that case Charron J. concluded that the entire contents of a mixed statement are substantively admissible as a general exception to the hearsay rule. At paragraph 37, after analyzing the historic rationale for the exception to the rule, she summarized the law and concluded:

> Of course, the general rule that excludes out-of-court exculpatory statements is not without exceptions. One such exception is relevant here - the mixed statement exception. Just as in England, it has long been established that where the Crown seeks to tender an accused's out-of-court statement which contains both inculpatory and exculpatory parts, it must tender the entire statement, and the exculpatory portions are substantively admissible in favour of the accused. *R. v. Hughes*, [1942] S.C.R. 517, at p. 521. Fairness to the accused is the obvious rationale for the mixed statement exception. The exception is also based on the more pragmatic consideration that it is often difficult to determine which parts of a statement are inculpatory and which parts are exculpatory.

This authority establishes that the exculpatory portions of Steven Colley's statement are substantively admissible.

[62] Given that Steven Colley's exculpatory remarks are substantively admissible, his credibility must be assessed pursuant to *R. v. W.(D.)*. In *R. v. Woodland*, [2009] S.J. No. 430 Popescul J. stated at paragraph 36:

> Therefore, it is clear that an accused's statement, both inculpatory and exculpatory, is evidence to be assessed by the trier of fact. It is to be assessed, in my opinion, in accordance with the directions and guidance provided by the Supreme Court of Canada in *Lifchus*, *Starr* and, with respect to credibility, the underlying principles set forth in *W.(D.)*. In other words, in circumstances such as this, where the accused has not testified, but the Crown has introduced his voluntary statement, the rule of reasonable doubt also applies to the issue of credibility. It is an error to analyse the evidence from the "either/or" perspective of which version ought to be accepted or to view the statement in isolation. Rather, the appropriate analysis involves considering the entire statement, whether inculpatory, exculpatory or neutral, together with the circumstances surrounding the taking of the statement, and the content of the statement itself as part of the whole of the evidence, to determine if the Crown has proven its case beyond a reasonable doubt. If it has, the accused must be convicted. If there is a reasonable doubt, the accused must be acquitted. While there is no need to hollowly recite the *W.(D.)* "incantation," there is a duty to follow the underlying principles that emanate from it.

Steven Colley has admitted to shooting Andre Slawter. The vast majority of his statement is exculpatory. The statements that are inculpatory do not add anything to Steven Colley's initial admission. The real import of Steven Colley's exculpatory remarks relate to the issue of self defence and whether that defence has an "air of reality."

SELF DEFENCE: AIR OF REALITY:

[63] In homicide prosecutions the burden of proof lies with the Crown to prove beyond a reasonable doubt that an accused did not act in self defence. However, trial judges have a positive legal duty to determine whether there is sufficient evidence in the first place to put the defence before the trier of fact. The judge must determine whether there is an evidentiary record upon which a properly instructed jury, acting reasonably, could acquit the accused on the basis of self defence if it accepted the evidence as true. In the case of Steven Colley the defence relies on section 34(2) of the **Criminal Code**. The Crown has not argued that another section should apply.

[64] The Supreme Court of Canada addressed "air of reality" in *R. v. Cinous*, [2002] S.C.J. No. 28, McLachlin C.J. stated at paragraph 51:

> 51 The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury. *Wu*, *supra*; *Squire*, *supra*; *Papajohn*, *supra*; *Osolin*, *supra*; *Davis*, *supra*. This is so even when the defence lacking an air of reality

represents the accused's only chance for an acquittal, as illustrated by *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1 (S.C.C.).

[65] The Court stated further at paragraphs 52-54:

52 It is trite law that the air of reality test imposes a burden on the accused that is merely evidential, rather than persuasive. Dickson C.J. drew attention to the distinction between these two types of burden in *R. v. Schwartz*, [1988] 2 S.C.R. 443 (S.C.C.) at p. 466:

> Judges and academics have used a variety of terms to try to capture the distinction between the two types of burdens. The burden of establishing a case has been referred to as the "major burden," the "primary burden," the "legal burden" and the "persuasive burden." The burden of putting an issue in play has been called the "minor burden," the "secondary burden," the "evidential burden," the "burden of going forward," and the "burden of adducing evidence."

The air of reality test is concerned only with whether or not a putative defence should be "put in play," that is, submitted to the jury for consideration. This idea was crucial to the finding in *Osolin* that the air of reality test is consistent with the presumption of innocence guaranteed by s.11(d) of the *Canadian Charter of Rights and Freedoms*.

53 In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. See *Osolin, supra*; *Park, supra*. The evidential foundation can be indicated by evidence emanating from the examination in chief or cross examination of the accused, of defence witnesses, or of Crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused. See *Osolin, supra*; *Park, supra*; *Davis, supra*.

> 54 The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. That question is reserved for the jury. See *Finta, supra*; *R. v. Ewanchuck*, [1999] 1 S.C.R. 330 (S.C.C.). The trial judge does not make determinations about the credibility of witnesses, weigh the evidence, make findings of fact, or draw determinate factual inferences. See *R.v. B. (E.H.)*, [1987] 1 S.C.R. 782 (S.C.C.); *Park, supra*. Nor is the air of reality test intended to assess whether the defence is likely, unlikely, somewhat likely, or very likely to succeed at the end of the day. The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.

[66] The Nova Scotia Court of Appeal in *R. v. Chan* 2005 NSCA 61 addressed "air of reality." Saunders J. (as he then was) adopted the words of Fish J. speaking for the court in *R. v. Fontaine* (2004), 183 C.C.C. 1 at page 13:

> Cinous is the decisive authority, as a matter of both sequence and of consequence, in this courts consideration and determination of the evidential burden governing all defences.

Chan, *supra*, was a case where Pickup J. found an "air of reality" to self defence where the accused had not testified. The trial judges' decision was upheld on appeal.

[67] The issue of self defence has been in play since the day of the shooting. The theme throughout Steven Colley's interview was "why." Sgt. Kelly stated as follows very early in the interview:

> I spoke to a number of members of your family and what not just to try to find out what this is all about. We know what happened. Okay? There's no dispute over what happened. We're just tryin to find out why this happened and, ahh ... that's probably the most important thing right now and that's gonna make a big difference in determining if its first degree murder, second degree murder or manslaughter. Ahh ... or if its an act of self defence.

I recognize that the officers words are not evidence and that they may represent interrogation techniques. However, after hearing all of the evidence, I am left with the impression that the police recognized the vulnerability of their only eye witness and the apparent lack of motive.

[68] Steven Colley's interview provides a substantial foundation for self defence. Much of that evidence has been cited in this decision. I will highlight some of that evidence:

> •He was being threatened by Tywan Slawter and Andre Slawter to get involved in the drug trade.
>
> •Steven Colley's garage was broken into, and his vehicle vandalized, days before the shooting.
>
> •Drug dealers tried to kill Steven Colley by removing the studs from the wheel of his vehicle.

> •Both Andre Slawter and Tywan Slawter threatened Steven Colley two nights prior to the shooting.
>
> •Andre Slawter and Tywan Slawter tried to burn down Steven Colley's garage.
>
> •Days prior to the shooting Andre Slawter called Steven Colley "screaming and yellin in my ear, yellin, makin' threats, like yeah, I'm gonna fuck you up, I'm gonna ... fucken burn your fucken garage out. I'm gonna burn ... you're gonna get burnt out."
>
> •When the two cars met on Brian St., Steven Colley experienced fear because he thought they had a "gun or something" when they blocked him off.
>
> •Andre Slawter and Tywan Slawter followed Steven Colley's van causing Steven Colley to think they wanted to "beat the fuck outta me."

[69] There were a series of phone calls between Andre Slawter and Steven Colley that also support the "air of reality" test. Between January 15, 2009 and January 19, 2009 Andre Slawter phoned Steven Colley nine times and Steven Colley called Andre Slawter once for 43 seconds. In light of all the evidence, it is a safe inference that these were not cordial calls. Steven Colley's statement supports this inference. The fact that many of Andre Slawter's calls were brief also supports this conclusion.

[70] On January 18, 2009 Andre Slawter sent the following text message to Steven Colley:

> Got sum 4 u answer the phone real talk all u can do iz profit

This corroborates Steven Colley's statement that he was being pressured to get involved in the drug trade.

[71] On January 21, 2009 Andre Slawter sent two text messages to Steven Colley. The first at 12:26pm stated:

> "call my grandmom house again and hang up ur going to get ur issue soon as I fuckin c u lil boy believe."

[72] The second at 12:30pm stated:

> "got no respect 4 my grandmother callin her crib u want u melon peeled ull c me believe dat."

[73] I find these to be threats to Steven Colley. These threats give an "air of reality" to self defence.

[74] On January 18, 2009 Steven Colley's garage was broken into and one of his vehicles was significantly damaged. There is no evidence to suggest that Andre or Tywan were involved. However, Steven Colley's statement suggest that those pushing him towards the drug business were a group. There were fires and a shooting at Steven Colley's property after January 21, 2009 but I have not considered them in my "air of reality" analysis.

[75] I am satisfied that Steven Colley has satisfied the evidentiary burden of an "air of reality" and, as such, self defence is in play.

THE DEFENCE OF SELF DEFENCE:

[76] The law of self defence is governed by sections 34 to 37 of the **Criminal Code**. These sections are grounded in the basic notion that each of us has the right to defend ourselves from death or bodily harm intended by another. The sections of the **Criminal Code** attempt to define specific circumstances that allow for the defence. What is clear is that in all cases of self defence, the essential inquiry concerns itself with the accused's apprehension of harm and his perception of the

degree of force required to defend himself against that perceived harm. It is equally clear that this defence is concerned with both the accused's subjective perceptions and the reasonableness of those perceptions. Section 34(2) permits the use of force, in the face of an unlawful assault, where the use of force causes death or grievous bodily harm, provided that the person reasonably apprehended death or grievous bodily harm, and reasonably believed that there was no other available means of self-preservation.

[77] The interaction of the subjective and objective components found in section 34(2) is described by Ritchie J. in the Supreme Court of Canada decision in *Reilly v. The Queen* (1984), 15 C.C.C. (3d) 1, at page 7:

> Section 34(2) places in issue the accused's state of mind at the time he caused death. The subsection can only afford protection to the accused if he apprehended death or grievous bodily harm from the assault he was repelling and if he believed he could not preserve himself from death or grievous bodily harm otherwise than by the force he used. Nonetheless, his apprehension must be a reasonable one and his belief must be based upon reasonable and probable grounds.

It is clear from this that if an accused is mistaken with respect to any of the three essential elements of the defence under this section, he may still avail himself of the defence if his mistake is a reasonable one.

[78] In *R. v. Pétel*, [1994] 1 S.C.R. 3 the court stated that it is the accused's state of mind that must be examined and it is the accused, and not the victim who must be given the benefit of a reasonable doubt. *Pétel*, *supra*, supports four established principles:

1. An honest but reasonable mistake as to the existence of an assault is not fatal to self defence.

2. The existence of an assault must not be made a kind of prerequisite for the exercise of self defence to be assessed.

3. The question for the trier of fact is not whether the accused was unlawfully assaulted but rather whether the accused reasonably believed, in the circumstances, that they were being unlawfully assaulted.

4. There is no requirement that the danger be imminent. Imminence is but one of the factors which the trier of fact should weigh in the self defence analysis.

[79] Section 34(2) does not require an accused's response to an unlawful assault be proportional. In *R. v. Hebert*, [1996] 2 S.C.R. 272 Cory J. described this principle at paragraph 16:

> Under s.34(2), the use of excessive force by the accused will not take away self-defence. In *R. v. Ward* (1978), 4 C.R. (3d) 190 (Ont. C.A.), it was properly found that it is not a requirement of s.34(2) that the force used must be proportionate to the assault against which the accused is defending him or herself. As well in *R. v. Mulder* (1978), 40 C.C.C. (2d) 1 (Ont. C.A.), it was correctly held that there is no requirement that the force be no more than is necessary to prevent death or grievous bodily harm.

Additionally, an accused has no obligation to flee, or attempt to flee, in order to succeed on self defence. *(R. v. Proulx* [1998], B.C.J. No. 1708 (B.C.C.A.)). Courts have consistently recognized that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. In R. v. Goudey [2007], N.S.J. No. 287 the court stated at paragraph 31:

> It would be an error to be overly rigorous in second guessing whether a person faced with an assault has measured carefully just how much force will be required to repel it. *R. v. Baxter* (1975) 27 C.C.C. (2d) 96 (Ont. C.A.). The British Columbia Court of Appeal in *R. v. Siu* 1992 CanLII 1014 (B.C.C.A.) ... stated:
>
> > "If the accused has acted within the legal definition of self-defence, that is, he honestly and reasonably believed that the force used was necessary to preserve himself, then whatever amount of force he used would not disqualify him from this defence."

[80] These are the principles that I must adhere to in assessing the defence of self defence.

SECTION 34(2), ESSENTIAL ELEMENTS:

[81] In order for Steven Colley to be convicted of either offence, the Crown must prove beyond a reasonable doubt that one or more of the essential elements was **not** present. They must prove:

1. Steven Colley was **not** the victim of an unlawful assault.

2. Steven Colley did **not** cause harm to the Slawters under a reasonable appreciation of death or grievous bodily harm.

3. Steven Colley did **not** believe, on reasonable grounds, that he could otherwise preserve himself from death or grievous bodily harm.

Even if a trier of fact is not convinced that an accused acted in self defence, they must still acquit if they have a reasonable doubt that the accused acted in self defence.

[82] In *R. v. Pétel, supra*, the Supreme Court recognized that threats made by a complainant prior to the "evening of the crime" are relevant to the self defence analysis. Lamer C.J. stated at page 16:

> The importance of failing to relate the earlier threats to the elements of self defence cannot be underestimated. The threat made by Edsell throughout his cohabitation with the respondent are very relevant in determining whether the respondent had a reasonable apprehension of danger and a reasonable belief in the need to kill Edsell and Raymond. The threats prior to July 21 form an integral part of the circumstances on which the perception of the accused might have been based.

[83] In *R. v. Lewandowski*, [1998] A.J. No. 540 the Court of Appeal held that self defence was available to an accused who found himself in a threatening and precarious situation, even though he had not actually been attacked when he moved to defend himself. The endorsement of the court read as follows:

> In this case the trial judge rejected the defence of self defence under s.34 of the Criminal Code because he found that Mr. Lewandowski had not been assaulted before he moved against the complainants. He referred to the "threatening" and "precarious" situations in which Mr. Lewandowski found himself, but was of the view that an assault must involve the intentional application of force. However, the definition of assault in s.265 includes a threat to apply force. In these circumstances, counsel for the Crown conceded, and we agree, that the appeal must be allowed. The convictions entered by the trial judge are set aside and a new trial ordered.

(i) VICTIM OF AN UNLAWFUL ASSAULT:

[84] The Crown has not satisfied me that Steven Colley was not the victim of an unlawful assault. In fact, I find that the whole of the evidence points to an assault

on Steven Colley by one or both of the Slawters. The Crown has failed to establish what happened at the scene so it is impossible to define the nature of the assault or whether it was effected by force or threat. The only acceptable evidence respecting the critical moment comes from Steven Colley's statement. I need not repeat that evidence as I have extensively reviewed it earlier in this decision. The text messages of January 21, 2009 are particularly probative and I find them to represent threats of imminent harm. The history of events against Steven Colley and his property support this conclusion. The violence of Tywan Slawter also contributes to the existence of an assault.

[85] In a prosecution such as this the Crown bears the burden of establishing what happened to create the crime. Obviously, the Crown put all their eggs in Tywan Slawter's basket. The total lack of forensic evidence hindered the Crown. In fact, if it were not for Steven Colley's admission, I would not be able to determine who shot Andre Slawter. I am left to wonder about the gunshot residue tests, the results of taking Steven Colley's clothing and the blood spatter tests. Distances between the gun and Andre Slawter's head were not established even though the necessary information was available. These kinds of expert evidence

could have assisted the crown in establishing Steven Colley's culpability or lack of culpability.

[86] I accept that the coming together of the two vehicles on January 21, 2009 was created by the actions of Andre and Tywan Slawter. I am satisfied that but for those actions, this shooting would not have occurred.

(ii) REASONABLE APPREHENSION OF DEATH/GRIEVIOUS BODILY HARM:

[87] The Crown has not satisfied me that Steven Colley did not shoot at the Slawters under reasonable apprehension of death or grievous bodily harm. In fact I am satisfied that Steven Colley discharged the shotgun under such reasonable apprehension.

[88] In *R. v. Paice* 2005 SCC 22 the Supreme Court of Canada defined "grievous bodily harm," as the term is used in section 34(2), as follows at paragraph 42:

> For the guidance of the judge who will preside at the appellant's new trial, I nonetheless believe it helpful to add that "grievous bodily harm", within the meaning of ss.34 and 35 of the Criminal Code, is **not** limited to harm or injury that is permanent or life threatening. In ordinary usage, "grievous" bodily harm

> means harm or injury that is "very severe or serious:" see The Canadian Oxford Dictionary (2nd ed. 2004), at p. 664. These terms respect the statutory context in which that expression was adopted by Parliament in the relevant provisions of the Code.

[89] I have no difficulty concluding that the prior actions of the Slawters, and their community, left Steven Colley afraid for his life. Those events are well canvassed in this decision. Steven Colley's statement also supports his fear that something bad was going to happen at the hands of the Slawters. The following evidence supports that fear:

> •"I get a bunch of motherfuckers trying to destroy me, threaten me, trying to kill me. Just because I'm trying to turn my life around.
>
> •"Listen, I was being threatened. Just had to bring drugs to these motherfuckers."
>
> •"They tried to burn my frigging garage. Threatened to burn my garage down. Because I wouldn't sell drugs. Threatened to destroy all of my property because I wouldn't become a drug dealer. Now I'm going to go to jail probably because I wouldn't become a drug dealer."
>
> •"The person in the car. Both of them [were behind this]. They came after me. Whatever they were going to do to me, they were making threats to me."
>
> •"They threatened me two nights prior. Threatened me he was going to do this to me and that to me and ... he was going to fuck me up, he's going to do this to me, and ... go down to my garage, burn the ... up, fucking try to burn it down. For nothing. Jealous. Simple jealousy. Trying to call me, telling people. Check with some of the phone conversations, maybe you can check out their cell phone

conversations. Maybe find out what the fuck's going on. Check my messages, how many texts ... he's been texting me messages. I can't see my phone, so I can't see the text, because my phone is ... the screen, the light in the thing is dead, so I can't ... it won't ... so nothing comes up on the face. Can't see nothing."

•"I know he's texting me. I wouldn't answer the phone. He called me one day, he was arguing and screaming in the phone ... One of those guys in the car. Screaming into the phone ... The driver's side. The driver's ... guy ... or the driver's or passenger, one of them. He was on the phone screaming and yelling in my ear and yelling, making threats, like, you know, I'm going to fuck you up, I'm going to ... you fucking ... burn your fucking garage out. I'm going to burn ... your're going to get burnt out and ... and I said, Why the fuck is these fucking people ... why are you fucking people going on like that? And like now, I'm saying to myself, I don't make fucking nobody ... they're trying to kill me with that already. No, you fucking changing ... he was threatening to hurt me physcially. He's threatening my family."

•"But you got to understand one thing: even after all, the drug dealers, as far as they can tell, I'm a drug dealer ... I must be doing drugs. Now all the criminals are in my face, crackheads, trying to rob me, robbing me and stuff, stealing out of my garage. I did nothing to these people. You know, the big drug dealers. You got to sell drugs. We want you to sell drugs, we want you to do this. Fuck you. I'm not going to CEL. I'm not a drug dealer. I don't go to the shoe box for my money, I go to the bank. There's a difference."

•"I don't know them [the men in the Intrepid] like that. I don't hang with those kids. I don't like the fact that people threatening me. I've been threatened, I've been fucked with for ... all for the last month, since I've been down. Since December I've been dealing with this shit. Jealousy. People coming up to me. How you make money, man? You know, we have, like, crackheads, you know, come on, man, like ... Come hook me up, man, let's do it. Fucking go get a job. Leave me alone."

•"All I know is this: I was threatened. My life was threatened. I felt threatened. Q: Did the guys in the car threaten you? A: Yes. I felt threatened."

•"Q: Those guys specifically. When did they make threats to you? A: That's been going on for the last two weeks. Little things. Q: Was it both of them or

> just one of them? A: Listen. I don't know how many of those guys there is. Could be a gang of them for all I fucking know."

I find as a fact that the manner in which the Slawters brought Steven Colley's van to a halt brought his apprehension to a level of imminent threat and fear of death or grievous bodily harm. I am satisfied that he viewed them as violent criminals fully capable of carrying out their threats. I cannot help but conclude that but for the shotgun, Steven Colley would be dead or would have suffered serious violence to his person.

(iii) THE ABSENCE OF ALTERNATIVES:

[90] The Crown has not satisfied me that Steven Colley did not believe, on reasonable grounds, that he could otherwise preserve himself from death or grievous bodily harm. In fact, I am satisfied that Steven Colley believed there were no alternatives aside from the shotgun that he had in his van. The only evidence that Steven Colley could not have otherwise preserved himself from death or grievous bodily harm at the time he fired the fatal shot comes from Tywan Slawter and that evidence has been completely discounted.

[91] *R. v. Pilon*, 2009 ONCA 248 is authority that the justification for an accused must exist when the fatal shot is fired. Furthermore, where an accused holds the belief contemplated by section 34 (2)(b), it is not necessary that he weigh to a nicety the exact measure of required defensive action. An accused in Steven Colley's situation is not required to wait until he is struck before he strikes out in self defence. *R. v. Lavallee*, [1990] 1 S.C.R. 852.

CONCLUSION:

[92] I accept that Steven Colley got the shotgun from Arnold Colley to protect, or scare off, intruders at this garage. I accept that he kept the shotgun in his vehicle. Tywan and Andre Slawter took steps to confront Steven Colley and they succeeded in cornering him. On the evidence, the shotgun was the only thing available to him to protect himself. I find as a fact that Steven Colley recognized the shotgun was the only option. The following excerpts from Steven Colley's statement support these conclusions:

> "So when I turned around in his gate to go back they pulled me over. He kind of like stopped in front of me and then pulled around the side, like, blocking me off in the street."

> "I never turned around. I turned around because I was going back home. I just pulled in my ... I went to see my brother and he wasn't home. So when I pulled around in his gate to go back they pulled me over."
>
> "I backed out, turned around and they blocked me off, kind of."

The fact that Brian Street is a dead end street supports Steven Colley's evidence.

[93] As I stated earlier, the crown must prove beyond a reasonable doubt that the defence of self defence cannot succeed. The accused does not need to prove anything. The crown has failed to discount self defence beyond a reasonable doubt, and, as such, I acquit Steven Colley on both counts.

J.