Court of King's Bench of Alberta

Citation: R v AM, 2022 ABKB 754

Date: 20221114
Docket: 210000592Q1
Registry: Calgary

Between:

His Majesty The King

Crown

- and –

AM

Young Person

Restriction on Publication

Identification Ban – See the *Youth Criminal Justice Act*, section 110(1).

No person shall publish the name of a young person or any other information that may identify a young person as having been dealt with under the *Youth Criminal Justice Act*.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Reasons for Decision
of the
Honourable Justice Anna Loparco

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Introduction

[1] The Accused, Mr. A.M., is a young person who stands charged with unlawfully causing the death of Calgary Police Sergeant Andrew Harnett on December 31, 2020, thereby committing first degree murder contrary to the *Criminal Code* of Canada, RSC 1985, c C-46.

[2] The Accused pleaded not guilty to this offence and pleaded guilty to the lesser included offence of manslaughter: *Code* s 662(3). Although the Accused sought to plead guilty to a culpable homicide as defined in s 222 of the *Code*, the plea was rejected by the Crown and the trial proceeded for first degree murder. Thus, the question is whether the Crown has established all the elements of the offence of murder beyond a reasonable doubt.

Overview

[3] The death of a highly respected police officer on New Year's Eve during a routine traffic stop attracted the attention of both local and national media. Both members of the Calgary Police Department ("CPD") and the public mourned the tragic loss of a decorated and exemplary officer.

[4] I provide the following general overview of the undisputed facts, which will be discussed in further detail later in these reasons.

[5] Calgary Police Sergeant Andrew Harnett pulled over a vehicle being driven by the Accused on New Year's Eve. The vehicle, a 2006 FX-35 Infiniti SUV (the "Vehicle"), was being operated without its headlights. The Accused could not provide Sgt Harnett with his driver's licence as he was unable to find his wallet. He did, however, willingly provide his correct full name and address.

[6] As the Accused stated that he was only in possession of his Class 7 (learner's) licence, Sgt Harnett also requested the identification of the adult, front seat passenger. This was provided and the passenger was identified as Mr. Amir Abdulrahman. A third passenger was observed in the backseat of the Vehicle but has never been identified.

[7] Because the Accused indicated that he was driving a mechanic's vehicle, Sgt Harnett took additional steps to ensure the Accused's identity and vehicle ownership. This included taking down the Accused's phone number, as well as getting the Accused to open the driver's side door so he could record the Vehicle Identification Number ("VIN").

[8] As Sgt Harnett was alone on patrol, he was joined shortly after the traffic stop by two CPD Constables who were in the vicinity- Csts Desroches and Osmond. The Constables arrived together in a police cruiser while Sgt Harnett was engaging with the Accused. They approached the Vehicle and briefly looked inside.

[9] Upon obtaining the initial information on the Vehicle and its occupants, all three officers returned to their respective police cruisers and Sgt Harnett proceeded to process the names of the Accused and the front seat passenger using computer equipment inside of his police cruiser. For reasons discussed more fully below, the amount of time it took to process this information took much longer than usual.

[10] After having processed the names of the two identified individuals, it became known that Mr. Abdulrahman was wanted on Alberta radius warrants for certain offences. His search also revealed a historical entry on CPIC relating to drugs in 2019. The officers decided that Sgt Harnett would approach the Accused and serve him with tickets issued under the *Traffic Safety Act*, RSA 2000, c T-6 for the driving infractions; Cst Desroches would approach the passenger side of the Vehicle and arrest Mr. Abdulrahman pursuant to the outstanding warrants. The audio recorded by the Body Worn Camera ("BWC") footage worn by the officers indicates that Mr. Abdulrahman would not have been aware of the outstanding warrants for his arrest.

[11] Cst Desroches approached the vehicle and knocked on the front passenger side window and asked Mr. Abdulrahman to confirm his identity. Mr. Abdulrahman did so, following which Cst Desroches asked him to open the door. Once the door was open, the Vehicle took flight.

[12] Sgt Harnett approached the driver's side door seconds after Cst Desroches began to engage with Mr. Abdulrahman. As Sgt Harnett approached, the Accused suddenly placed the car into gear and drove off. The Accused's window was open, and Sgt Harnett grabbed the Vehicle's front door, apparently to prevent flight.

[13] The Vehicle had initially been pulled over in the parking lot adjacent to a Petro-Canada gas station. Various video footage played at trial show that the Vehicle proceeded slightly to the left and then forward (northbound) out of the parking lot. It went over a curb and became hung up momentarily on a snow berm and then executed a sharp right-hand turn (eastbound) onto a major roadway - Falconridge Drive. While travelling eastbound, Sgt Harnett lost his hold on the Vehicle, and fell onto the roadway where he was struck by an oncoming car. He died later that evening in hospital.

[14] After Sgt Harnett fell from the Vehicle, the Accused continued his flight. The abandoned Vehicle was found the following day.

[15] As stated above, the Accused was a young offender. He turned 18 eleven days after the incident.

Elements of the offence

[16] By an Agreed Statement of Facts (exhibit 9), many of the elements of murder that the Crown must prove beyond a reasonable doubt have been already established. I review each of these elements, below.

[17] First, there is no doubt as to the identification of the Accused. He admits through the Agreed Statement of Facts that he is the individual depicted in the BWC footage of Sgt Harnett as the driver of the Vehicle.

[18] Second, the time and place of the offence are admitted in the Agreed Statement of Facts. The traffic stop commenced at 10:19 pm. Sgt Harnett was transported to Foothills Hospital after being struck by the oncoming car and was declared dead at 11:45 pm on December 31, 2020.

[19] In this case, there was an intervening act. After Sgt Harnett fell away from the Vehicle, he was struck by an oncoming (westbound) car operated by Mr. Ogunsanya. According to the Agreed

Statement of Facts, due to the collision with Mr. Ogunsanya's oncoming vehicle, Sgt Harnett suffered significant internal injuries listed as multiple blunt force trauma. These injuries included but were not limited to: transection/laceration of his spine as well as fatal internal blood loss due to the laceration of his abdominal aorta.

[20] Notwithstanding his plea to manslaughter the Accused took the position during closing argument that, if prosecuted under s 229(a)(ii) of the *Code*, the second collision severed the causal connection between his act and Sgt Harnett's death [transcript September 29, 2022 page 41 lines 5 – 11]. In my view, the impact by the second vehicle may bear upon this Court's analysis as to whether the Accused knew the bodily harm was likely to cause death; however, a causation argument is misplaced given the facts at bar, and as discussed further below.

[21] The Agreed Statement of Facts also acknowledges that Sgt Harnett was working in his capacity as a police officer at all times during the traffic stop. I note from the BWC footage that all three officers present during the traffic stop were wearing their CPD uniforms, which clearly identifies them as police officers. In addition, both police cruisers were marked with the CPD insignia.

[22] The fact that the Accused knew that Sgt Harnett was acting in his capacity as a member of the CPD is important in relation to the nature of the charge facing the Accused. Murder is classified as "first degree murder" when it is planned and deliberate: *Code*, s 231(2). Murder can also be classified as first-degree murder based on the identity of the deceased, even absent evidence of planning and deliberation. Section 231(4) of the *Code* provides that:

> Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is
>
> (a) a police officer…acting in the course of his duties; […]

[23] The special status ascribed to police officers for the purposes of a constructive first-degree murder charge reflects the unique position members of law enforcement hold in society. In discussing the purpose behind - and the constitutionality of - this provision, the Ontario Court of Appeal in ***R v Collins***, 48 CCC (3d) 343 held as follows, at para 82:

> … [law enforcement] occupations are extremely dangerous, having regard to the persons with whom they are in frequent contact by reason of the nature of their occupations. The classification of the murder of such persons as first degree murder with the heavier penalty consequent thereon is obviously designed as an additional deterrent to potential murderers. It might be rationalized that the murder of a person whose obligation it is to maintain law and order carries with it an added moral culpability and requires a heavier deterrent to protect the public interest.

[24] The Accused raises no argument about the applicability of s 231(4). Rather, the chief issue during trial was whether the Crown has demonstrated that the Accused had the required *mens rea* for murder.

[25] The Crown argues that the definition of murder under s 229(a) of the *Code* is applicable in this instance. It takes the position that the Accused caused the death of Sgt Harnett by either:

(i) meaning to cause Sgt Harnett's death; or

(ii) meaning to cause Sgt Harnett bodily harm that the Accused knew was likely to cause his death and was reckless whether death ensued.

[26] Throughout trial, the Crown focused its argument on s 229(a)(ii), taking the position that the evidence establishes each element of the offence beyond a reasonable doubt. Conversely, the Accused argues that the Crown has failed to demonstrate that he had the requisite intent for murder.

The evidence

i) The Crown

[27] The Crown called seven witnesses. In my view, each of them testified in a forthright and cooperative manner. Their evidence is summarized as follows.

a) Police Detective Scott Guterson

[28] Det. Guterson was the CPD officer assigned to the investigation into the death of Sgt Harnett. The BWC footage of Sgt Harnett and Csts Desroches and Osmond was entered through Det Guterson (Exhibit 1). Security or CCTV footage of nearby businesses, including footage from the adjacent McDonald's drive through, the Petro-Canada parking lot, and a business called India Jewelers located on Falconridge Drive was also tendered through the Detective (Exhibit 3). Certain portions of these videos were reduced to still photographs, also entered as exhibits, produced by agreement.

[29] Det Guterson provided an overview of where the Vehicle was initially pulled over in the Petro-Canada parking lot in the community of Falconridge, as well as the flight path of the Vehicle as it exited the parking lot and procced eastbound down Falconridge Drive. The area is best described aa a mix of residential with smaller commercial establishments. He also detailed how and where police subsequently located the Vehicle, which had been abandoned a short distance from the crime scene.

[30] During cross-examination, Det Guterson confirmed that from a review of the BWC footage, the first half-hour of the traffic stop proceeded routinely, aside from the fact that it took longer than usual to process the information because one of the police databases was down. He agreed that the incident went "off the rails" when the Accused drove away and that the entire flight lasted just 36 seconds from when the Vehicle took off to the point where Sgt Harnett fell from the Vehicle. He agreed that the scene was "very chaotic" and that during the flight, one of the passengers yelled at the Accused to "go go go".

[31] Det Guterson denied that there was any specific CPD policy addressing whether police should or should not grab onto a vehicle or wrestle with a driver during a traffic stop. Rather, he stated that such decision to engage in this fashion would depend on the judgment of the officer and what they perceived the situation to be at the time the decision was made. Finally, the Detective agreed that Sgt Harnett had obtained the name, address, and birthday of the Accused, and that any tickets related to the traffic infractions could have been mailed to the Accused's address as opposed to being served personally.

b) Police Constables Christopher Osmond and Joshua Desroches

[32] Calgary Police Constables Osmond and Desroches provided a first-hand descriptive account of the events during the traffic stop and subsequent flight. The Constables were working in the Falconridge area and attended the stop at the Petro-Canada parking lot as Sgt Harnett was on patrol alone and they thought it prudent to provide backup. They parked along the right side of Sgt Harnett's cruiser, and behind the Vehicle. Each Constable was wearing a functioning BWC, the footage of which was tendered as an exhibit, as described above. Absent some minor details, both officers' viva voce evidence was the same as the evidence from the BWC footage.

[33] Both Constables recalled arriving at the scene after the traffic stop had been initiated. Both agreed that processing the individuals' names took longer than usual due to issues with the computer system. When it became known that the front seat passenger had outstanding warrants, the officers confirmed that they established a plan, whereby Cst Desroches would approach the passenger side of the Vehicle to arrest Mr. Abdulrahman, Sgt Harnett would serve the Accused with a ticket for violating the *Traffic Safety Act*, and Cst Osmond would stand back in the position as "cover officer" since Cst Desroches was still in training.

[34] Cst Osmond testified that he has been a member of the CPD for nine years, the entirety of which has been spent in District 5, which includes the Falconridge area. Sgt Harnett had acted as his supervisor for a period of this time.

[35] According to Cst Osmond, Cst Desroches had just begun to engage with Mr. Abdulrahman when the Vehicle sped off at a "high rate of speed" toward the parking lot exit. Cst Osmond stated that he was momentarily "stunned" when he realized that Sgt Harnett was not standing on the pavement beside the Vehicle as it sped off.

[36] He recalled chasing after the Vehicle on foot and approaching the Vehicle when it was temporarily hung up on the icy snow mound or berm. He recalled that both himself and officer Desroches ran to the Vehicle with their service pistols in the "low ready direction", meaning they were pointed about four to five feet in front of them. He was yelling at the Accused to "stop the Vehicle".

[37] Upon drawing the conclusion that shooting at the Vehicle would not assist in stopping it from fleeing, he directed Cst Desroches to not shoot and both officers re-holstered their weapons. The Vehicle eventually regained its traction and headed eastbound down Falconridge Drive. Cst Osmond indicated that he dispatched that Sgt Harnett was being dragged from a Vehicle and shared his location. He then turned and sprinted back to his own police cruiser to pursue the fleeing Vehicle.

[38] As the cruiser rounded a slight bend on Falconridge Drive, he estimated his speed to be more than 100 kph. Cst Osmond recalled seeing a civilian standing on the road attempting to waive them down. As he brought his cruiser to a stop, he could see Sgt Harnett lying in the roadway approximately 30-40 feet behind the civilian. Cst Osmond confirmed that after the Vehicle initially took off, he did not see Sgt Harnett again until encountering him, laying in an unresponsive state, on Falconridge Drive.

[39] Csts Osmond and Desroches immediately ran to the aid of Sgt Harnett. Although he was breathing, he was not moving. Cst Osmond indicated that while stabilizing Sgt Harnett, he requested an ambulance.

[40] Once Sgt Harnett had been placed in the ambulance, Cst Osmond spoke to the civilian driver. As he noticed that the driver was in extreme distress or shock, he requested another ambulance. He also noted that the civilian driver's vehicle had body damage.

[41] On cross-examination, Cst Osmond indicated that he did not observe anything unusual going on inside of the Vehicle while the officers were situated in their respective cruisers awaiting the results of the various computer checks. He also agreed that just prior to flight, Cst Desroches knocked on the passenger side window, requesting that Mr. Abdulrahman roll down the window and began discussing the outstanding warrants. He confirmed that the BWC footage depicts that Cst Desroches reached the Vehicle first and had already begun engaging with Mr. Abdulrahman prior to Sgt Harnett having the opportunity to engage with the Accused. He denied that there was any plan for the officers to approach the Vehicle at precisely the same time.

[42] Cst Osmond further indicated that he has never otherwise been directly involved in an incident where a police officer became attached or otherwise grabbed on to a moving vehicle. He stated that the closest he ever got the to the Vehicle during its flight was when it became temporarily hung up on the icy berm, and that at this point, he would have been 15-20 feet from the Vehicle.

[43] Finally, Cst Osmond agreed that CPD training with respect to conducting traffic stops includes ensuring safety as a paramount goal. He further confirmed that officer training instructs that police should engage in pursuit only when the seriousness of the offence outweighs the level of danger, and that alternate measures should be looked to first.

[44] Cst Desroches began his career with CPD in March of 2020. He also worked in District 5 and was in his final weeks of training as a recruit. He was working alongside his mentor, Cst Osmond, at the time of the incident.

[45] Cst Desroches gave a similar account of the evening in question. He stated that after the plan to arrest Mr. Abdulrahman was made, he approached the right side of the Vehicle and asked the passenger to open the door. As the passenger did so, Cst Desroches began informing Mr. Abdulrahman about his outstanding warrants. At this point, the Vehicle suddenly took off, with the passenger door slamming shut in the process. A review of Cst Desroches' BWC footage during this stage of the traffic stop clearly displays the Accused placing the Vehicle into gear as the Constable begins to mention the warrants and as Sgt Harnett reaches the driver's side window.

[46] As with Cst Osmond, Cst Desroches expressed surprise at not seeing Sgt Harnett standing across from him after the Vehicle took flight. He indicated that from his vantage point, as the Vehicle sped off, he eventually saw that Sgt Harnett was attached to it. He indicated that while it was hard to determine, he believed that Sgt Harnett's feet may have been elevated off the ground at this point.

[47] He recalled unholstering his weapon and giving chase on foot toward the Vehicle which had by this point become hung up on the snow berm. He described his firearm as being held "at

the ready" by this point. As he was giving chase, he was verbally commanding the Accused to stop the Vehicle. He stated that the Vehicle quickly freed itself from the berm and continued down Falconridge Drive, with Sgt Harnett being "dragged" alongside it. He described how, while the Vehicle was stuck on the berm, its tires were "spinning out". When it finally regained traction, it accelerated at a high rate "as if the pedal [was] punched to the floor".

[48] Cst Desroches ran with Cst Osmond back to their police cruiser to give chase. He estimated their speed at upwards of 80 kph while in pursuit.

[49] He recounted that upon driving into the slight bend in the road, he immediately saw Sgt Harnett in the roadway and observed a nearby vehicle, which was stopped.

[50] When he approached Sgt Harnett, the nature of his injuries was not apparent, but Cst Desroches suspected a spinal injury and thus tried to stabilize his head and neck. As he moved his hands from the back of Sgt Harnett's head, he noted that they were soaked in blood. He continued to speak to Sgt Harnett and stabilize his neck while waiting for ambulance to arrive.

[51] He described Falconridge Drive as a "very busy road" and recalled how Cst Osmond was attempting to safely direct traffic around the scene to prevent any further injury. He stated it was "a bit of chaos".

[52] On cross-examination Cst Desroches agreed that the officers had initially planned to approach the Vehicle at the same time in order not to "spook" the occupants. He agreed that through the window he was able to observe that Sgt Harnett's arm and half of his body were positioned in over the driver's side window. He also agreed that Sgt Harnett's right arm and torso were still leaning into the window as the Vehicle exited out of the parking lot, heading east. Again, Cst Desroches' evidence at trial was largely consistent with his BWC footage.

c) Mr. Ogunsanya

[53] Mr. Ogunsanya was driving his vehicle, a 2006 Toyota Corolla, to his in-laws on the night in question. He stated that as he was heading westbound down Falconridge Drive he noticed a vehicle coming toward him at a speed, which was "moving faster than normal". He estimated the speed as somewhere between 60-70 kph. He described seeing a black object that he could not identify, coming from the eastbound speeding vehicle toward his vehicle as it passed by. He applied his brakes but still heard and felt something hit his car. At first, he believed the occupants of the suspect Vehicle threw something from their car. When he exited his car, he realized that the object he had impacted was a police officer. He described shaking and crying and stated he went back to his car to dial 911. He then got the attention of Constables Desroches and Osmond as they drove by. He stated that the suspect Vehicle did not stop after Sgt Harnett fell; it continued to proceed east down the road. He further testified that he was driving fully in his own (westbound) lane at the time of the collision.

[54] As discussed below, Mr. Ogunsanya was not charged in relation to the collision, with the incident being described as "unavoidable". I stress this point not only in relation to causation, but to express to Mr. Ogunsanya that what occurred that evening was in no way his fault. I say this given the fact that he was visibly and understandably distressed during his testimony, and I wish

to emphasize that he is not to blame in any way for what happened. I wish to thank him for providing his testimony, which required him to relive what was a profoundly traumatic experience.

d) Police Constable Vink

[55] Cst Vink was called by the Crown as an expert and qualified in the area of motor vehicle collision analysis and reconstruction. His curriculum vitae was examined during the *voir dire* regarding his qualifications as an expert. The Accused did not take the position that Cst Vink lacked the qualifications to provide expert evidence; he argued instead that any concerns would go to weight as opposed to admissibility.

[56] I will briefly review Cst Vink's training and qualifications as an expert in this field. I note that he has been qualified to provide expert opinion evidence on two prior occasions in August of 2021 in Provincial Court. He agreed that for his first appearance as an expert, his credentials were challenged and that the second time he was tendered as an expert by consent. On cross-examination Cst Vink agreed he has never testified for the defence.

[57] Cst Vink began his career with CPD in 1999, joining the Traffic Response Unit in 2002, a role which entailed attending at serious crash scenes and working alongside collision reconstructionists. In 2014, he transferred into the Collision Reconstruction Unit, which involved analyzing materials from crash scenes. As part of his ongoing education, Cst Vink completed a Collision Scene Photography course, as well as Advanced Collision Investigation Levels 2, 3, and 4. He indicated that Level 4 is the highest level of training worldwide and that he currently is an instructor for the Level 2 course. He also took courses in tire mechanics and tire forensic analysis. His role in the CPD is to examine the science behind collisions and determine how they took place.

[58] Based upon his experience and training, as well as the requirements for relevance and necessity, given the technical nature of this field, and given the absence of any exclusionary rule, I was satisfied that the criteria for admissibility provided in ***R v Mohan***, [1994] 2 SCR 9 had been established. Having found that Cst Vink's evidence is properly admissible expert opinion evidence, any arguments concerning independence and/or partiality given that he is a member of CPD are properly dealt with in relation to the weight to be given to such evidence: ***White v Abbott***, 2015 SCC 23, at para 40.

[59] Cst Vink was involved in providing a collision reconstruction report concerning the death of Sgt Harnett (the "Report"). This Report was tendered into evidence as exhibit 5. His Report contains several pertinent findings. He concluded that commencing at the point of its initial flight, the Vehicle travelled 427 meters to Sgt Harnett's final rest position. He stated that this distance could be broken down into two segments. First, the distance from the initial takeoff position to where the Vehicle temporarily became stuck up on the berm totaled 57 meters. Once it regained traction, it travelled a further 370 meters to Sgt Harnett's final rest position.

[60] Cst Vink's Report also drew attention to the markings which he indicated were tire tracks demonstrating the Vehicle's path of travel and scuff marks that would have been left by Sgt Harnett's footwear. He noted that the scuff marks indicated a dragging-type of motion, meaning that Sgt Harnett's feet were not solidly planted under him. In my view, these "dragging" marks are clearly visible in Cst Vink's photograph binder, notably at photographs 5-7 and 13, which were

made prior to the Vehicle getting stuck on the berm. I make this observation as it relates to the testimony of other witnesses, concerning the placement of Sgt Harnett's feet during flight. These markings also appear on Falconridge Drive (notably at photograph 17). Photos of the Vehicle show that it does not have running boards, although it does have a slight trim panel just above the undercarriage.

[61] Cst Vink opined that the scuff marks indicated that Sgt Harnett's footwear crossed over the centerline dividing traffic on Falconridge Drive, and this crossing could have occurred with the Vehicle door being swung open, thus propelling Sgt Harnett further from the Vehicle, as the tire tracks did not indicate that the Vehicle itself crossed over. He stated that ultimately the markings demonstrated that Sgt Harnett rolled or tumbled across the road surface into the westbound traffic lane.

[62] Cst Vink's examination of the Toyota led him to conclude that Sgt Harnett impacted the driver's lower side portion of that car, given where the damage was located, as well as the underside of this vehicle, given the existence of Sgt Harnett's hair and other biological transfer on the undercarriage.

[63] Given the lack of damage to the Infiniti Vehicle, outside of some front-end damage that may have been caused by the berm, coupled with his examination of Sgt Harnett's uniform, Cst Vink concluded that that Sgt Harnett had been grabbing on to the Vehicle, as opposed to having had some part of his uniform or duty belt stuck to it. He also confirmed that the Vehicle appeared to be in good working order, and that its brakes were functioning properly. The driver's side of the Vehicle had markings on it consistent with a person having rubbed up against the Vehicle.

[64] In his Report summary, Cst Vink identified three "major factors" in the collision, which were: (i) the Vehicle driving away and travelling at a high rate of speed; (ii) Sgt Harnett grabbing the Vehicle and holding on while the Accused drove away, and; (iii) Sgt Harnett being impacted by the Toyota while on the roadway.

[65] Cst Vink also conducted a speed analysis using three techniques. The first involved the distance traveled as against the time lapse displayed on Sgt Harnett's BWC footage, which indicated that the average speed of the Vehicle once it exited the berm was 58 kph.

[66] The second method utilized images of the speedometer and tachometer of the Vehicle taken from a still photo produced from Sgt Harnett's BWC footage. It indicated that just prior to the point of Sgt Harnett becoming dislodged, the Vehicle was travelling at approximately 97 kph.

[67] The third method utilized a time/distance analysis and was based upon CCTV footage from India Jewelers, which is a fixed point on the roadway, and measured against visual markers on the roadway. The distance between markers was measured against the frame rate of the CCTV footage and captured a speed of 76 kph.

[68] The speed limit on Falconridge Drive is 50 kph.

[69] As mentioned above, Cst Vink concluded that given the mechanics of travel (i.e., distance, speed, lighting, encountering an unexpected hazard, normal human reaction time) and method of detachment, the westbound driver (Mr. Ogunsanya) could not have done anything to avoid

colliding with Sgt Harnett. Cst Vink opined that the driver of the Toyota was likely travelling at or below the speed limit at the time of impact. During cross-examination, Cst Vink acknowledged that his conclusions about the Toyota being unable to avoid the collision were not based upon specific calculations performed as a part of his analysis.

[70] On cross-examination, portions of Sgt Harnett's BWC footage were reviewed frame-by-frame. Cst Vink agreed that it is difficult from the video footage itself to determine what exactly Sgt Harnett was grabbing onto. At some points it appeared as though he was grabbing onto the door frame or handle, and at others it looked like he had his arm wrapped inside the door.

[71] Cst Vink confirmed that throughout the flight, there was an ongoing physical struggle between the Accused and Sgt Harnett and that blows may have been delivered by either party, although it was unclear from the BWC footage. He also confirmed that he did not recall any point in the footage where Sgt Harnett took the wheel of the Vehicle.

[72] In reviewing human factors in crash causation, Cst Vink agreed that youth and inexperience are both factors that may be considered. As well, he agreed that interference with driving or distracted driving are factors which may impact a driver's perception.

[73] Cst Vink maintained that his markings indicating scuffing made by footwear were accurate, despite attempts by Defence Counsel to undermine his opinion on cross-examination. Cst Vink insisted that the later scuff marks were consistent with earlier ones.

[74] In reviewing this testimony, I respectfully disagree with Defence Counsel's submissions that Cst Vink "…agreed with the suggestion put to him, and it was in his Report, that Sergeant Harnett's feet never crossed the centreline": [transcript September 29, 2022, page 44 line 41 – page 45 line 1]. Rather, I note Cst Vink's testimony to the opposite: [transcript January 31, page 62, lines 21-25]. This is also indicated in his Report, where Cst Vink states that following the exit eastbound onto Falconridge Drive "these scuffs waivered from the eastbound lanes, *crossed the center line* and at times went onto the westbound travel lane": page 11 [emphasis added].

[75] Cst Vink was also thoroughly cross-examined concerning his speed calculations. He agreed that using the odometer/tachometer calculation would only demonstrate speed at a certain point in time and did not show speed over any length of time. He also agreed that the numbers on the odometer and tachometer might have been slightly skewed given the angle they were being filmed from on the BWC (what Defence Counsel referred to as a "parallax error"). As such he agreed that his estimate of 97 kph could (based upon a speedometer reading of 60 miles per hour) be too low or too high. He also agreed that speedometers have a margin of error of approximately 4 percent. While the fact that the Vehicle was being driven with a spare tire could affect speed estimates, Cst Vink testified that it would not have in this case, given the circumference difference of .002 metres.

[76] In my view, Cst Vink addressed these issues squarely during cross-examination. I do not find, given his opinion, that deviations for the spare tire, and speedometer margins of error were significant, or that his failure to include these factors discounts the value of his evidence. He was agreeable to the suggestion that parallax error might have resulted in estimates lower than 60 mph, but also higher than 60 mph. He remained steadfast on what he determined to be evidence of foot scuff mark along the route travelled by the Vehicle.

e) Mr. Hardeep Dhaliwal

[77] Mr. Dhaliwal is a City of Calgary Transit employee. On the night in question, he was driving a bus loop in the Falconridge area which brought him westbound down Falconridge Drive. He estimated he would drive past the Petro-Canada parking lot every 29-30 minutes on his loop. He stated that at approximately 10:15 pm on December 31, he witnessed a traffic stop in the gas station parking lot. He was surprised when he encountered the same traffic stop a half hour later on his next loop. He stated that on noticing the police were still there he started "wondering" and he "just looked". He then witnessed the Vehicle being driven with an officer struggling on the driver's side of the Vehicle.

[78] Upon witnessing this, he stopped his bus on the side of the road, worried about a possible collision. Mr. Dhaliwal was pulled over in the westbound lane and the Vehicle drove past the bus heading eastbound. He noticed the Vehicle get hung up on the snow temporarily and then execute a hard right hand turn down Falconridge Drive with the officer still struggling on the driver's side. He stated it appeared that the officer was trying to hold on. He then witnessed the driver's side door open and subsequently lost sight of both the officer and the Vehicle. Mr. Dhaliwal's testimony was consistent with the CCTV footage from the bus he was driving.

[79] In describing the movement of the Vehicle, he stated that it "was trying to get away, it was very fast" and he estimated its speed at around 80 kph. In cross-examination, he agreed that it is very difficult to estimate speed in a short amount of time and through the use of a rear-view mirror. He agreed that for portions of the flight, he could not see the lower half of Sgt Harnett's body and he believed that Sgt Harnett was attempting to stop the Vehicle from fleeing. He also agreed that in his original statement to the police he said that he wanted to tell Sgt Harnett to let the car go, as he could always issue a ticket later.

f) Mr. Jake Olson

[80] Mr. Olson is a university student who was out picking up a pizza on the night in question at the Dominos Pizza located near the Petro-Canada. He noticed the traffic stop as he went in to pick up his pizza. When he was leaving, he noticed that a police officer was hanging onto the door of the Vehicle as it drove away. Mr. Olson said it was obvious that the individual was a police officer given his manner of dress and the presence of two police cruisers. He stated that it looked as though the officer was being dragged and was hanging onto the door. He further stated that once the Vehicle left the curb, it headed eastbound at "a pretty good speed" which he estimated to be 70 kph.

[81] Mr. Olson indicated that he initially turned his vehicle off Falconridge Drive to head home, but then decided to drive back to see if the officer was OK. At this point, Csts Ormond and Desroches had arrived and were attending to Sgt Harnett.

[82] On cross-examination Mr. Olson agreed that in his earlier statement to police, he indicated that Sgt Harnett had both of his hands inside the Vehicle and was leaning in, attempting to grab either the steering wheel or the driver. In his statement he indicated that Sgt Harnett's feet were on the Vehicle's foot board and that after he slipped, he readjusted himself to get stable, and continued attempting to grab the driver as the car drove away eastbound. Again, the evidence of Cst Vink

confirms that the Vehicle did not have running boards or "foot boards" but did have a trim just above the undercarriage.

[83] Mr. Olson denied observing the Vehicle getting stuck up on the berm at any point in time but agreed that the Vehicle proceeded across the curb. Nor did he see the Vehicle swerve or try to knock the officer off. Finally, he indicated that it appeared that while the Vehicle was leaving the curb, that Sgt Harnett was wrestling with the Accused.

g) Sgt Harnett's BWC footage

[84] While as I have indicated the Crown called seven witnesses, I paid particular attention to the footage from Sgt Harnett's BWC. While the entire flight is just over one half of a minute, and the footage is obviously shaky in parts, given what is occurring, this key piece of evidence objectively demonstrates what transpired between Sgt Harnett and the Accused in the crucial moments during flight. In reviewing the video evidence, I was guided in part by the still photos/frames which assisted in demonstrating what was happening on the video. I also take note of the fact the time stamp on the video reflects a universal time used in BWC recordings and is not in mountain standard time. I reviewed this footage on multiple occasions, as the entire incident occurs in under one minute and much is occurring during that time.

[85] Sgt Harnett's BWC footage demonstrates that the stop involving the Accused began as 'routine'. Sgt Harnett was polite and professional when he questioned the Accused, and the Accused, in turn, was respectful and co-operative with Sgt Harnett. While the Accused did not have his driver's licence on him, he willingly provided Sgt Harnett with his full name, address, and phone number and he also opened the driver's side door to assist Sgt Harnett is obtaining the Vehicle's VIN. The Accused freely offered up the fact that his friend, Mr. Abdulrahman, had his licence on him. The Accused also partially rolled down the rear window of the Vehicle when Sgt Harnett was trying to communicate with the backseat passenger. Mr. Abdulrahman also cooperated with Sgt Harnett by providing his licence when asked to do so. Sgt Harnett then returned to his cruiser to process the information he had received concerning the two individuals.

[86] As testified to by the other officers and observed through the various BWC viewpoints, just as Sgt Harnett approached the driver's side window to issue a traffic ticket, the Accused can be seen putting the Vehicle into gear and driving away. Contrary to the Accused's testimony described below, this initial action to flee the scene does not appear panicked, but rather, a deliberately executed maneuver.

[87] Sgt Harnett is seen holding on to the Vehicle at a point near the driver's side window. Prior to getting hung up on the berm, Sgt Harnett issues two verbal commands to the Accused to "stop the Vehicle". My review of both Sgt Harnett's and the other officer's BWC footage indicates that from the moment of flight, the Vehicle travels northbound for approximately 10 seconds before getting stuck on the berm. Sgt Harnett again issues the command to "stop the vehicle" during the approximate 5 second period when the Vehicle is lodged on the berm. Once the Vehicle regains traction Sgt Harnett is heard issuing the command to "stop the Vehicle" on three more occasions during the approximate 21 second period while the Vehicle proceeds eastbound down Falconridge Drive before he loses his grip.

[88] A review of Sgt Harnett's BWC footage demonstrates a number of key interactions between himself, the Accused and Mr. Abdulrahman. First, it shows that at various points during flight, Mr. Abdulrahman takes control of the steering wheel. Mr. Abdulrahman's initial physical involvement in the flight occurs when he takes control of the steering wheel by cranking it hard in three quick rotations while the Vehicle was stuck up on the berm. This "cranking" occurred just after an unidentified member in the Vehicle is heard to state "go, go, go". He then appears to almost nudge, or correct, the steering wheel in relation to the Vehicle's flight path as it travels down Falconridge Drive on two separate occasions. The Accused remains in control of the gas and brake pedal throughout the flight.

[89] Second, the BWC footage indicates that Sgt Harnett and the Accused were involved in a physical struggle. However, while the Sgt Harnett's BWC footage is blurry, given the nature of his positioning, it is clear that the Accused is trying to maintain his hold on the Vehicle.

[90] It is while the Vehicle is stuck on the berm that Sgt Harnett most clearly attempts to lawfully restrain the Accused. While the footage is grainy, it depicts that Sgt Harnett struck the Accused, possibly on more than one occasion. The Accused's hair elastic is loosened during the struggle and his upper torso visibly moves backward and forward, with his hair being tossed around his face. The Accused appears to be engaged in both defending himself from these blows, as well as with trying to force Sgt Harnett off the Vehicle. Again, it is when the Accused has turned his attention to the direct physical exchange with Sgt Harnett that Mr. Abdulrahman leans over and briefly takes control of the steering wheel, cranking it in the three quick rotations mentioned earlier.

[91] Once the Vehicle has exited the parking lot and is gathering speed, Sgt Harnett's BWC footage clearly depicts the Accused pushing the driver's side door open using his hand. This action causes both the door and Sgt Harnett to "sway" away from the Vehicle and out onto the roadway. The Accused then uses his hand and later his lower leg to push open the door on two further occasions, each time causing Sgt Harnett to sway away from the body of the Vehicle. I note that this last attempt does not move Sgt Harnett very far away from the Vehicle. At certain points along Falconridge Drive, the Accused directly applies force to Sgt Harnett's arm. This can clearly be seen in frames 56782-56822 of the still photo exhibit, as well as in frames 56950-56962, where the Accused directly grabs at Sgt Harnett's wrist/forearm in conjunction with pushing open the driver's side door. I therefore disagree with Defence Counsel's submissions that "this is not a case where the young person was hitting or applying force to Sergeant Harnett" [transcript September 29, 2002 page 43 lines 24-25] as well as with his assertion that "the door was pushed, not Sergeant Harnett" [transcript, September 29, 2022 page 42 lines 28-29].

[92] Following these actions, the Accused is seen executing a brief series of moves in which he rotates the steering wheel left and right, causing the Vehicle to swerve side to side. It is during this maneuver that Sgt Harnett loses his grip and falls onto the westbound lane of the roadway. Sgt Harnett's video feed cuts out at this point, although the acceleration of the Vehicle away from the scene can still be heard.

ii) The Defence

[93] The Defence called one witness – the Accused. I am mindful of the approach to be followed when an accused gives evidence, as explained in ***R v W(D)***, [1991] 1 SCR 742. In ***W(D)***, the Court instructed that where (as at bar) credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that: (1) if they believe the evidence of the accused, they must acquit; (2) if they do not believe the testimony of the accused but are left in reasonable doubt by it, they must acquit; (3) even if not left in doubt by the evidence of the accused, they still must ask themselves whether they are convinced beyond a reasonable doubt of the guilt of the accused on the basis of the balance of the evidence which they do accept: 757-758.

[94] The ***W(D)*** analysis has undergone some nuanced modifications over time, notably as discussed by our Court of Appeal in ***R v Ryon***, 2019 ABCA 36. Labrenz J of this Court recently summarized the modified approach in ***R v Crier***, 2020 ABQB 20 as follows:

> 292 As I consider the accused's statements, it is important that I remind myself, once again, to be mindful that the rule of reasonable doubt applies to the credibility of witnesses: ***R. v. W. (D.),*** [1991] 1 S.C.R. 742 (S.C.C.) at 757. More specifically, I instruct myself that I must resolve any conflict in the evidence on the basis that any reasonable doubt should inure to the benefit of the accused: ***R v. Ryon***, 2019 ABCA 36 (Alta. C.A.) at para 21. Fundamentally, I may not decide guilt or innocence by asking if I prefer the inculpatory evidence over the exculpatory evidence, or the evidence of one witness or a group of witnesses, over that of others. As Martin JA said in ***Ryon***, at para 40, "...[a] trial is not a credibility contest requiring [the fact finder] to choose one version over the other."
>
> […]
>
> 297 I would add to these considerations, Martin JA's revisiting of the ***Ryon*** principles in ***R. v. Achuil***, 2019 ABCA 299 (Alta. C.A.) at para 18. In that decision Martin JA suggested a slight modification to the second prong, which he based upon his earlier pronouncement in ***R. v. Gray***, 2012 ABCA 51 (Alta. C.A.) at para 42:
>
> > In that context, if the accused's evidence denying complicity or guilt (or any other exculpatory evidence to that effect) is believed, or even if it is not believed still leaves the jury with a reasonable doubt that it may be true, then the jury is required to acquit.
>
> 298 Finally, as ***Ryon*** cautions, I must not consider the accused's exculpatory evidence in isolation from the entirety of the evidence.

[95] With the above in mind, I turn to the evidence given by the Accused.

a) The Accused

[96] The Accused commenced his testimony by providing a brief overview of his background and circumstances. He indicated that he grew up in a dysfunctional family in which his father was

abusive. This abuse resulted in his mother relocating the family to different cities from time to time, sometimes finding refuge in various women's shelters.

[97] In the Spring of 2018, he went to live with his older brother in Montreal for approximately six months. He stated that his mother wanted him to do so as he had become mixed up in a peer group that was into crime. When he returned to Calgary in September of 2018, he enrolled in William Aberhart high school and found part-time employment as a dish washer. He completed his grade 10 year there and then transferred to James Fowler high school. He stated that he transferred schools because he did not really fit in at William Aberhart as it was not very multicultural and his peers seemed more affluent than he was. He stated that James Fowler was more culturally diverse and was closer to home. At this time, he was living with his mother in the community of Thornecliff.

[98] The Accused recalled an incident that occurred while he was attending William Aberhart. He was present at a house party where the police had been called due to a noise complaint. The Accused indicated that he was singled out of a group of teens leaving the residence and was thrown on a couch by a police officer and was asked several questions geared toward determining his identity. He stated that there were not many visible minorities present at the party and that he felt he was targeted as a person of colour.

[99] The Accused indicated that in 2020, he began renting a basement suite in a home located somewhere in the community of Skyview. He stated that he was able to afford to do so as he was receiving Covid-19 benefits as well as employment insurance. He said that sometimes his friends would come to visit or hang out in the suite, but he mainly used it to spend time alone with his girlfriend. He stated that in his Muslim culture, it would not be appropriate to bring a girl to his family home. He indicated that he was "back and forth" between his family home and his rented suite.

[100] The Accused testified that in addition to spending time with his girlfriend, he liked to play basketball, as well as just "chilling out" at the park with friends and spending time on social media. One of his close friends from basketball was an individual named Moayed. Another close friend was Amir Abdulrahman, whom he met through Moayed. Both individuals were about two years older than the Accused.

[101] The Accused purchased a Jeep Cherokee in June of 2020. He indicated that a few days prior to Sgt Harnett's death, he noticed an issue with the tires on the Jeep and brought it to the shop of his mechanic, an individual named Bilal. Bilal provided him with the Infiniti Vehicle to drive as a loaner while the Jeep was being repaired. Bilal also informed the Accused about an "open" party happening on New Year's Eve, meaning that the Accused could attend and invite friends.

[102] The Accused extended this invitation to both Moayed and Amir. Mr. Abdulrahman accepted the invitation to attend the party with the Accused.

[103] On the night in question, the Accused testified that early in the evening, he watched some Turkish TV shows with his mother. He then went to his Skyview residence to relax and get ready for the party. He stated that around 10 pm Mr. Abdulrahman arrived at his Skyview residence with

a friend, and they planned to travel to the party together. The Accused indicated that the friend was someone he did not know, and could not recognize, as he was wearing a Covid-19 mask. No introductions were made, and the group got into the Vehicle and headed to the party. The Accused indicated he was unsure of where the party was, other than that it was downtown, as he was simply following his GPS coordinates.

[104] The Accused estimated that he had been driving for approximately 10 minutes when he was pulled over by Sgt Harnett. The Accused stated that he was only concerned he might be getting some type of ticket. He stopped the Vehicle and rolled down his driver's side window anticipating an interaction between himself and the police officer. He stated there was no real conversation between himself and the other occupants of the Vehicle at this time.

[105] The Accused indicated that he could not locate his wallet and therefore did not have the required documents to show Sgt Harnett when asked. The Accused was informed that he had been driving without his lights on; as is seen in the BWC footage, it is at that point that he activates the headlights. The Accused stated that he had been in a few traffic stops in the past and at this point during the stop he felt "a bit stressed" but was "not worried" as nothing unusual was going on.

[106] The Accused said that during the initial interaction, he noted Sgt Harnett shining his flashlight in the backseat window and so he partially rolled down that window so Sgt Harnett could see into the back of the Vehicle. This is shown on the BWC footage.

[107] The Accused indicated that Sgt Harnett asked for his name, date of birth and address. He felt that a request to provide this information was in keeping with his previous traffic stop experiences. He stated that Sgt Harnett then asked for his phone number and requested that the Accused open his front door so that he could record the Vehicle's VIN. He indicated that his anxiety was beginning to increase, as this was an atypical request, but was not yet worried. The information that the Accused provided to Sgt Harnett was later confirmed to be accurate.

[108] As a Class 7 (learners) driver, the Accused offered up the fact that Mr. Abdulrahman had his licence with him. Sgt Harnett asked to take a look at this licence and Mr. Abdulrahman appeared to readily hand it over.

[109] The Accused stated that when the second police cruiser arrived and another officer approached the Vehicle, he began getting "a bit worried", but was still thinking this was "nothing much" outside of the fact that this did not appear to be a typical traffic stop. The BWC footage indicates that while dealing with Sgt Harnett, the Accused notices the arrival of the second cruiser and that at least on two occasions he looks over at Cst Desroches, who by this point was standing on the passenger side of the Vehicle, shining his flashlight in. The Accused stated he did not know why "backup" would be called to a routine traffic stop.

[110] After obtaining Mr. Abdulrahman's licence, Sgt Harnett instructs the Accused to "stay in the vehicle" indicating that he will "be back in a minute". Of course, given the fact that various database systems were down, Sgt Harnett was not "back in a minute". Rather, the process took approximately 26 minutes.

[111] The Accused testified that during this 26-minute period, he engaged in some idle conversation with the other occupants in the Vehicle, but that mostly he was on his phone and

looking back in his side mirror to see when the police would return. He denied knowing that there were any warrants out for Mr. Abdulrahman's arrest. He also denied that there was anything illegal inside the Vehicle. He stated that the longer the traffic stop progressed, the more anxious he was becoming. He estimated the traffic stop to have lasted about 40 minutes.

[112] The Accused stated that he first noticed that the officers were returning to the Vehicle when he observed Cst Desroches approaching the passenger side door. He then said he looked quickly to his left where he observed Sgt Harnett approaching with his hand on his gun. In relation to seeing Sgt Harnett's hand on his gun the Accused indicated that this was the "last straw" to his mounting anxiety and panic, stating:

> …as soon as I seen that, honestly, I took off. You know, I looked to my right. I seen the officer. And then I looked to my left, and I seen Officer Harnett with his hand on his gun. And as soon as I seen that, I took off. I was scared. My anxiety was through the roof at this time […] I thought something bad was going to happen, to be honest right? You know, I thought just the fact that, like, why would he have his hand on his gun; right? That's the way I'm looking at it. Like, why? Right? I took off. As soon as I seen the officer, I took off. I was panicked. It was – I just – you know, I just took off. I was scared. [transcript September 27, 2022 page 36 line 3 – line 15]

[113] According to the Accused, he was not initially aware that Sgt Harnett had grabbed on to the Vehicle, but he soon realized that Sgt Harnett had done so, and was grabbing on to the door and the steering wheel. The Accused stated that Sgt Harnett's weight upon the steering wheel caused the Vehicle to steer over toward the Petro-Canada station and that the Accused was trying to maintain control and avoid hitting the station, resulting in the Vehicle impacting the snow berm where it temporarily became high centered.

[114] The Accused stated that he did not stop the Vehicle during this initial portion of the flight due to the fact that it was veering toward the gas station, and he was focused on maintaining a straight course.

[115] The Accused testified what while on the berm, he did not know why the Vehicle had stopped. He stated that at this time, Sgt Harnett grabbed onto his hair and began punching him. The Accused stated that he was focused on defending himself and was trying to block his face and back away. He indicated that he had "no control" and that as he was backing away, his eyes were closed, and his right leg was inadvertently pressing on the accelerator. He stated that during this altercation he heard someone shout "gun gun gun" as well as "go go go". He stated that he could not identify which occupant of the Vehicle said these things.

[116] The Accused stated that while stuck on the berm and during the assault, he was thinking that he "was done" and he believed that he was going to be dragged out of the Vehicle and either killed or seriously injured.

[117] After becoming dislodged from the berm, the Accused proceeded down Falconridge Drive. While the Accused acknowledged that the hand which pushes the driver's side door as seen in the BWC footage "appeared to be his" he indicated that he simply did not remember any of the

specifics of the flight down Falconridge Drive. Rather, the Accused stated that the situation was so chaotic and that everything happened so fast that he does not remember the details.

[118] When questioned about what was happening from his perspective as the Vehicle left the berm and proceeded down Falconridge Drive, the Accused indicated that everything happened too quickly for him to be able to process it. He indicated that he had just "got freed from getting punched" and that events were unfolding very quickly.

[119] He stated that he recalls Sgt, Harnett attempting to grab onto the wheel and that has was "super scared". He testified that at that point in time, he was not even considering what might happen to Sgt Harnett – rather, he was concentrating on himself and getting away from the situation and to a safe place. He indicated that he was not even aware that Sgt Harnett had fallen from the door until a few seconds after it happened.

[120] When asked why he did not stop the Vehicle while Sgt Harnett was struggling to maintain his hold, he indicated that he was too scared and that the last time the Vehicle was stopped (on the berm) "everything got worse" in that he was assaulted. He stated that he was simply focused on himself and trying to maneuver the Vehicle away from the situation. Again, he indicated that everything was so quick and chaotic, that he never really directed his mind to what might happened to Sgt Harnett.

[121] He estimated that the was travelling at approximately 70 kph down Falconridge Drive at the relevant time, indicating that due to a curve in the road at that point, he could not have been travelling any faster. He stated that he was not focused on oncoming traffic or anything else other than maintaining the flight path of the Vehicle. He did not consider what might have happened to Sgt Harnett after he fell from the Vehicle.

[122] I note the specific exchange during his examination in chief:

> Q: What were you thinking would happen to Sergeant Harnett here?
>
> A: To be frank with you, I wasn't thinking about him much. I wasn't thinking about him. I'll be frank. Like, I was just thinking about myself. Like—like, I was thinking about saving myself, honestly. Like, getting myself to safety; right? I wasn't thinking about the officer. [transcript, September 27, 2022 p 40 line 40 – p 41 line 3]

[123] The Accused indicated that after left the scene, he returned to his basement suite. At this point in time, he suspected that the police would arrive at his mother's house and look to arrest him. He did not turn his mind to Sgt Harnett until he was in his suite, stating "…I didn't think I would have hurt him. I didn't think I would have killed him". He stated that he saw a notification about the death of a CPD Officer around 3:00 am while he was watching YouTube. At that point he "lost it", felt "sick" and "empty" and began crying. He called Mr. Abdulrahman and informed him of this development and stated that he was going to turn himself in the following day and advised Mr. Abdulrahman to do the same.

[124] The Accused contacted a lawyer and turned himself in the following day.

[125] During cross-examination, the Accused admitted to each of the physical elements of the offence. That is, he stated that he knew a police officer was attached to the Vehicle at some point in the parking lot, and that the officer was still attached as he exited onto Falconridge Drive. He admitted that he was fully in charge of the accelerator and brakes, that he was aware of multiple demands to stop the Vehicle, that he was travelling in excess of the speed limit, and that he engaged in various attempts using his hands and his leg to undo Sgt Harnett's hold on the Vehicle. While the Accused stated that he had no recollection of doing these things, he agreed that these acts were demonstrated on the video. He further stated that he had no recollection of "jerking" the steering wheel just before Sgt Harnett fell, although he agreed he was in control of the wheel at that time.

Position of the Parties

i) The Crown

[126] The Crown takes the position that the Accused's version of events is neither credible nor reliable. It urges me to reject the Accused's testimony and rely instead on the common-sense inference as to intention. The Crown submits that the Accused was motivated to flee the traffic stop and did everything he could to eject Sgt Harnett onto the roadway, including physically assaulting the Officer, pushing and kicking the door open such that Sgt Harnett's body was swung away from the Vehicle, and finally, executing a "swerving" maneuver with the wheel aimed at making Sgt Harnett lose his grip. The Crown says all these actions took place on a busy roadway while travelling well in excess of the speed limit.

[127] The Crown urges this Court to reject the Accused's explanation that he simply panicked and did not turn his mind to that was occurring or the consequences of his actions. Rather, it asserts that the Accused made a calculated decision to flee the traffic stop at the moment he would have the best chance of getting away (i.e., when all three officers were out of their police cruisers). The Crown suggests that there was something in the Vehicle which – if found by police – would have placed the Accused in much greater jeopardy than the few tickets he would otherwise have received under the *Traffic Safety Act*.

[128] The Crown states that although a youthful offender, the Accused is very mature for his age. He had his own apartment, bought his own car, was employed prior to the pandemic, had lived in various big cities, had a girlfriend and had an older peer group. The Crown suggests that the Accused's evidence was tailored to give the impression that he was a frightened boy who panicked, as opposed to the sophisticated young man that he is. The Crown takes the position that the Accused's thought process that evening was more calculated, insightful, and mature than that which he testified to.

[129] As such, the Crown submits that this Court should reject any suggestion that the Accused got caught up in events he simply could not process or turn his mind to. It stresses that determination should not be confused with panic. Rather, that the evidence demonstrates that the Accused intended his actions with the obvious goal of dislodging Sgt Harnett out onto the road, knowing the likely result was death.

[130] The Crown says in rejecting the Accused's entirely self-serving evidence, the Court is left to assess the events of December 31 by inferring that the Accused intended the logical

consequences of his actions. The Crown takes the position that given the collection of factors discussed above, the Accused's intent to commit murder crystalized on Falconridge Drive. It asserts that intent has been established contemporaneously with the commission of the underlying unlawful act, and that the requirements under s 229(a)(ii) of the *Code* have been proven beyond a reasonable doubt.

ii) The Defence

[131] The Defence asserts that the Crown is incorrectly focusing on a general common-sense inference that the Accused was aware of what was occurring and thus can be said to have intended the consequences of his actions. Rather, the Defence states that the Court must analyze the events in issue through the subjective lens of the Accused.

[132] The Defence takes the position that while the Accused may have agreed with a number of the Crown's suggestions concerning danger and likelihood of bodily harm with the benefit of hindsight, his *mens rea* must be determined at the time of the offence and in regard to individual factors pertaining to the Accused including his youth, and his perception as a racialized individual. The Defence stresses that there is a legal distinction between making a decision known to be bad on impulse as opposed to not even turning your mind to the likely consequences of your actions.

[133] In relation to the Accused's credibility, the Defence takes the position that even if this Court rejects the Accused's evidence on more peripheral matters, the Accused's evidence concerning his panic and his singular focus of getting away to somewhere "safe" was never impeached. As such, this Court can rely on the Accused's evidence concerning his state of mind during the traffic stop and during the critical moments during the flight down Falconridge Drive.

[134] Even if the Accused's testimony is not relied upon, the Defence stresses that guilt can only be inferred from circumstantial evidence when no other reasonable inferences are available. Here, the Defence says that inferences inconsistent with a subjective *mens rea* exist.

Analysis

i) Initial findings of fact

[135] Prior to engaging in the crucial analysis concerning the Accused's *mens rea*, I will make a number of basic findings of fact concerning the acts that occurred during flight which inform upon my analysis as a whole. These segments are, of course, discussed in greater detail in analyzing the elements of the offence. As I noted earlier, the entire flight from takeoff to Sgt Harnett's becoming dislodged lasted approximately 36 seconds. I have broken the flight down into three segments to better analyze the flight as a whole. For the most part, these initial findings are not controversial.

a) The moments of initial flight

[136] The initial moments of flight are best captured on Cst Desroches' BWC footage. The Constable walks up to the Vehicle and knocks on Mr. Abdulrahman's window. At this point Mr. Abdulrahman is looking at something on his cell phone. Mr. Abdulrahman fully rolls down his window and Cst Desroches asks him to open his door. Mr. Abdulrahman complies and opens the passenger door. As he begins to do so, the Accused's hands are clearly seen placing the Vehicle in

gear and turning the steering wheel to the left to engage the Vehicle toward the parking lot exit. In my view, the Accused appears to execute this maneuver in a smooth fashion. I note that it does not look as though Mr. Abdulrahman closes the door as the Vehicle takes off. Rather, it seems as though the door closes on its own accord due to the forward momentum of the Vehicle, although his hand contacts the door just as it closes.

[137] The Vehicle takes off heading toward the northern exit just past the Petro-Canada station. Both of Sgt Harnett's feet are initially visible on Cst Desroches' BWC footage. His feet appear to run beside or be dragged alongside the Vehicle. I find it takes approximately 10 seconds from the time when the Vehicle initially takes flight until it gets stuck up on the berm. Sgt Harnett issues instructions to "stop the car" during this initial portion of flight. I accept Cst Vink's findings that the distance from the initial takeoff position to where the Vehicle temporarily became stuck up on the berm totaled 57 meters.

b) The berm

[138] I find that the Vehicle is high-centered on the berm for an approximate 5 second period. During this period, one can hear the engine revving high as the tires seek traction. Around the same time as the tires are heard spinning out, someone in the Vehicle is heard shouting "go go go". While on the berm there is a physical altercation between Sgt Harnett and the Accused. Although the BWC footage is blurry given the constant movement, having viewed it on multiple occasions, and having seen the still photos, I find that Sgt Harnett did lawfully strike the Accused and that the altercation caused the Accused's torso and head to lob back and forth in the Vehicle briefly. The Accused is also seen striking at Sgt Harnett's arms and possibly his torso. During this altercation Mr. Abdulrahman takes control of the steering wheel and cranks it hard three times. Instructions to "stop the car" are being yelled by both Sgt Harnett and the other two officers as they approach the berm on foot. The Vehicle did not really travel any notable distance while stuck on the berm.

[139] During this segment, Csts Osmond and Desroches chase the fleeing Vehicle on foot. They nearly catch it just as it begins to gain traction on the berm. At this point, the Constables have their guns drawn. As the Vehicle beings to regain traction, Cst Osmond issues the instruction not to shoot.

c) Falconridge Drive

[140] After exiting the berm, the Vehicle proceeded eastbound down Falconridge Drive. During this time Sgt Harnett appears to have his arm either attached to the frame of the door, or slightly inside the door frame.

[141] I accept Cst Vink's analysis that drag marks adjacent to the Vehicle's tire marks indicated that Sgt Harnett was essentially dragged alongside the Vehicle as it sped down Falconridge drive. I further accept Cst Vink's findings that the scene analysis demonstrated that Sgt Harnett's shoes crossed over the centre line dividing eastbound and westbound traffic on Falconridge Drive and that this crossing could have occurred with the Vehicle door being swung open, thus propelling Sgt Harnett further from the Vehicle, as the tire tracks did not indicate that the Vehicle itself crossed over.

[142] While the Accused testified that he does not recall much of what happened during the flight down Falconridge Drive due to his sole focus of getting to safety, I find that the Accused took a number of steps which resulted in Sgt Harnett becoming dislodged from the Vehicle during this segment.

[143] On viewing the BWC footage, I am satisfied that the Accused takes the following actions: (i) he uses his hand and grabs at/applies direct force to Sgt Harnett's arm (see frames 56950-56962) while the car is speeding down Falconridge Drive; (ii) on two separate occasions he uses his hand to push the Vehicle door open, causing Sgt Harnett to swing out away from the body of the Vehicle; (iii) following these two pushes by hand, the Accused uses his leg, again to push the door open and away from the Vehicle, and finally: (iv) he performs a "jerking" or "swerving" maneuver of the steering wheel. It is after this last maneuver that Sgt Harnett falls from the Vehicle and rolls into oncoming traffic. I address the issue of the "jerking" maneuver further, below.

[144] I find the flight down Falconridge Drive lasted for approximately 21 seconds.

[145] Of note, in discussing this segment of flight, I reject Defence Counsel's submission that it was Sgt Harnett who was somehow responsible for the repeated opening of the Vehicle's driver's side door. During closing arguments, Defence Counsel suggested that:

> The evidence of Constable Vink -- I will just point out now -- was that Sergeant Harnett was the cause of the door opening. It wasn't that the young person opened the door and pushed it. The door opened, and at that point, there was movement of the door, and you see the young person's hand on the door, and you see a push. I think that that's a fair characterization of the video evidence. [transcript September 29, 2022 page 33 lines 28-32]

[146] In my respectful view, this submission mischaracterizes Cst Vink's evidence. During cross-examination, Cst Vink was asked about certain portions of the BWC footage at time stamp 5:49 to 5:50:09. I have reviewed this segment of the BWC footage as well as the stills reproducing this segment. Not only does this time period relate solely to the that portion of flight while the Vehicle was in the parking lot and then on the berm, but the actual exchange between (then) counsel and Cst Vink was as follows:

> Q MR. ALONEISSI: If we could pause it here, please -- thank you -- and proceed just frame by frame.
>
> As you're doing that, as you're looking at this, Constable Vink, you recall your testimony about the door swinging open. I want to ask you if you can discern whether it's Sergeant Harnett that in fact opens the door as we view this?
>
> (VIDEO PLAYED)
>
> Q MR. ALONEISSI: Can you just stop for a moment. Thank you.
>
> You see that there's a hand, appears to be a gloved hand holding onto the door. What appears to be the door handle at that point; is that right?
>
> A It appears to be.

> Q From obviously outside. That is, the hand is from outside the vehicle. It would be reasonable to conclude that was Sergeant Harnett's hand?
>
> A I would believe so, yes.
>
> MR. ALONEISSI: Okay. Thank you.
>
> [...]
>
> (VIDEO PLAYED)
>
> Q MR. ALONEISSI: Does it appear to you at this point, Constable Vink, that Sergeant Harnett was grabbing the door frame of the vehicle?
>
> A It's difficult to see in the video itself as to what exactly he's grabbing onto. There's various times where he's grabbing onto the door frame. Other times where his arm is actually wrapped inside the door, almost in a pinching the door between himself and his arm. [transcript January 31, 2002 page 75 line 3 – page 76 line 25]

[147] In my view, the evidence might support a finding that Sgt Harnett grabbed onto the door handle at the outset of flight; but, it is indeterminable who initially opened the Vehicle's door. Nevertheless, there is nothing in the BWC footage or in Cst Vink's evidence to support a finding or an inference that anyone – other than the Accused – took part or played any role in the repeated pushing open of the door as the Vehicle sped down Falconridge Drive.

[148] I turn now to the question of speed. While a number of different estimates were provided as to the speed of the Vehicle as it travelled eastbound down Falconridge Drive, all witnesses believed it was travelling in excess of the posted speed limit of 50 kph. The lay witnesses (being Mr. Ogunsanya and Mr. Olson) gave speed estimates between 60-70 kph. The Accused estimated his speed at 70 kph. Contrasted against this, the professional drivers, who - given their employment positions may be more likely to accurately note the speed of passing vehicles - all provided estimates between 80-100 kph (being Cst Osmond, Cst Desroches and Mr. Dhaliwal). Finally, leaving aside his calculation of average speed, Cst Vink provided an expert opinion of speed between 76 and 97 kph.

[149] Given the above and placing a particular emphasis on the expert evidence provided by Cst Vink, and noting the estimates provided by "professional" drivers, I find that the Vehicle was travelling somewhere between 80 - 90 kph at the time Sgt Harnett fell away from the Vehicle. This takes into consideration the factors put to Cst Vink in cross-examination, including parallax error, general speedometer inaccuracy and the fact that the vehicle was being driven with a slightly smaller spare tire. This speed range equates to approximately 1.6 to 1.8 times the posted speed limit.

[150] I turn next to the question of whether the Accused either "jerked" or swerved" the steering wheel or whether this movement - as captured on the BWC footage – merely reflected the Accused guiding the Vehicle through the curved portion of Falconridge Drive.

[151] Having reviewed Cst Vink's Reconstruction Report (notably "Image #2 – Falconridge Drive") as well as the aerial footage of the Calgary Police Helicopter Air Watch for Community Safety ("HAWCS") I am satisfied that the curve in question is gradual as opposed to sharp, and that the final hand movements of the Accused are not consistent with a driver guiding a vehicle

through a moderate curve and then correcting his positioning as the road straightens out, as the Accused suggests. Rather, the movements demonstrate a quick back-and-forth jerking of the steering wheel, although not to the extent that the Vehicle leaves its designated lane of travel.

[152] Nor do I find this action to be consistent with the Accused attempting to maintain control of the Vehicle given icy road conditions. While I acknowledge Mr. Olson's testimony that he recalled the roads being slippery, I prefer Cst Vink's expert analysis, which contains data retrieved from Environment Canada at appendix 3.3. Of note, it indicates no precipitation amount and lists the weather as "n/a" over the relevant time period. His Report provides that (as of time of arrival being 00:45 hours):

> The road surfaces consisted of asphalt with a prevalent light snow covering and some slushy sections. […]
>
> Environmental and roadway conditions were not considered factors in this collision.

[153] Finally, in regard to the Falconridge Drive segment of flight, I accept Cst Vink's analysis that after exiting the berm, the Vehicle travelled a further 370 meters to Sgt Harnett's final rest position.

[154] Having made a number of preliminary factual determinations, I turn next to my analysis of the physical and mental element of the offence.

ii) The actus reus requirement for murder

[155] In order to obtain a conviction for murder, the Crown must prove that the Accused's conduct caused the death of the victim (the *actus reus*). Here, the Accused's unlawful conduct in taking active steps to dislodge Sgt Harnett from the Vehicle during his flight from police caused Sgt Harnett's death. While I address the issue of causation further, below, I find that the *actus reus* has been demonstrated on the evidence beyond a reasonable doubt.

iii) The mens rea requirement for murder

[156] As alluded to above, the crux of issue in this case is whether the Crown has established the requisite intent, or state of mind, for murder. The Crown must establish, beyond a reasonable doubt, that the Accused meant to cause Sgt Harnett bodily harm that the Accused knew was likely to cause Sgt Harnett's death. If a reasonable doubt exists as to whether the Accused possessed the requisite intent for murder, he must be given the benefit of the doubt and convicted of manslaughter.

[157] The difference between murder and manslaughter turns on subjective intent. Essentially, an unlawful act is part of the offence of murder, just as it is part of the offence of manslaughter. But, for murder, s 229(a)(ii) of the *Criminal Code* requires that an accused must mean to cause bodily harm that he knows is likely to cause death and is reckless as to whether death ensues.

[158] In this case, I find that the Accused committed an unlawful act, and that the unlawful act was a significant contributing cause of the death of Sgt Harnett. The issue is whether subjective or objective intent has been established.

[159] *Subjective* intent is only proven when the Crown demonstrates that an accused *meant* to cause bodily harm that *he knows* is likely to cause death and is reckless as to whether death ensues or not. That is, an accused must foresee a likelihood of death flowing from the bodily harm he is intentionally causing the victim: ***R v Moo***, 2009 ONCA 645 para 38; leave to appeal dismissed [2010] SCCA No 152.

[160] As recently described by our Court of Appeal in ***R v Newborn***, 2020 ABCA 120 at para 66 (leave to appeal refused: [2020] SCCA No 282):

> Murder is classified as a specific intent offence. The intent cannot be inferred merely from the fact of the killing. The significance of this classification is that where a person is unable to form the specific intent required to commit the offence of murder, then the offence is not proven beyond a reasonable doubt and the accused is guilty of manslaughter. …

[161] Unlike the offence of murder, the fault element in manslaughter is the commission of an unlawful act which is *objectively* dangerous in the sense that a *reasonable person, in the same circumstances of the accused*, would recognize that the unlawful act would subject another to a risk of bodily harm which is neither trivial nor transitory: ***R c Javanmardi***, 2019 SCC 54 para 31.

[162] In ***R v Creighton***, [1993] 3 SCR 3 McLachlin J (as she then was) described manslaughter as follows, at para 42:

> …Manslaughter is a crime of venerable lineage. It covers a wide variety of circumstances. Two requirements are constant: (1) conduct causing the death of another person; and (2) *fault short of intention to kill*. That fault may consist either in committing another unlawful act which causes the death, or in criminal negligence. [emphasis added]

[163] This means that in assessing whether the intent for murder has been established, I must consider the whole of the evidence that could realistically bear on the Accused's mental state at the time he committed the offence. If there is no evidence leaving me with a reasonable doubt as to knowledge and/or intent, then I may resort to the common-sense inference that a person knows what the predictable consequences of his actions are, and means to bring them about: see ***R v Walle***, 2012 SCC 41 at paras 63-67.

[164] In ***Walle***, the Court dismissed the accused's appeal of his murder conviction. The accused's position was that he panicked and that he did not want to shoot anyone and did not mean for the gun to go off. The Court found that the trial judge did not err in finding that the accused was aware of – and thus could have said to have intended – the consequences that were likely to follow from his actions of discharging a firearm at someone's chest at close range. Of note is the following direction in ***Walle***, at paras 66-67:

> After the jurors have been alerted to the pertinent evidence, they should be told that if, after considering the whole of the evidence, they believe or have a reasonable doubt that the accused did not have one or the other of the requisite intents for murder at the time the offence was committed, then they must acquit the accused of murder and return a verdict of manslaughter.

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

[165] I note that the common-sense inference is not to be applied presumptively: ***R v Kahnapace***, 2013 BCCA 45 at para 17; ***R v Wakefield***, 2018 ABCA 360 at para 57 (Berger JA, dissenting on another point). Moreover, the inference should not supplant the need to consider all of the evidence relating to knowledge and/or intent, particularly evidence of an accused's mental state that points away from these elements: ***R v Kam***, 2020 BCSC 893 at para 101-102.

[166] In addition, it is not enough under s 229(a)(ii) that an accused foresees a *danger* or *possibility* of death. For an act to constitute murder, an accused must foresee a *likelihood* of death flowing from the bodily harm that he is visiting upon the victim: ***R v Cooper***, [1993] 1 SCR 146 at 155-156. Furthermore, the law is clear that an accused must also foresee the likelihood of death concurrent with the impugned actions. The issue of concurrency was addressed by the Court in ***Cooper***. There, the majority of the Court confirmed, at 157 that:

> … an act (*actus reus*) which may be innocent or no more than careless at the outset can become criminal at a later stage when the accused acquires knowledge of the nature of the act and still refuses to change his course of action.
>
> The determination of whether the guilty mind or *mens rea* coincides with the wrongful act will depend to a large extent upon the nature of the act. […]

[167] The Crown correctly posits that a series of acts can form part of the same transaction: ***R v Saddleback***, 2022 ABQB 187 at para 103 (quoting ***Cooper***).

[168] I must therefore determine whether has the Crown established, on the required standard, that the Accused meant to cause Sgt Harnett such bodily harm that he knew was likely to result in Sgt Harnett's death (and continued to proceed recklessly in light of this knowledge).

[169] It is common ground that the unlawful act could have only coincided with an intent to kill during the third segment of the flight – that is, the portion of flight down Falconridge Drive. Had Sgt Harnett been dislodged in the parking lot during the initial 10 seconds of flight, he may have suffered injuries, but it would be unlikely that death would ensue, given the speed of the Vehicle and the nature of the movement of other traffic in a parking lot.

[170] Similarly, had Sgt Harnett been dislodged during the temporary stop on the berm, it would be unlikely that death - or even notable bodily harm - would have ensued. Again, the Vehicle was not moving at this point and the nature of the physical assault being perpetrated upon Sgt Harnett by the Accused during this time (being the attempt to dislodge the Officer) may have caused injury but was unlikely to cause death.

[171] Instead, it is the flight down Falconridge Drive where the unlawful acts of flight from police and assault of a police officer may have merged to occur contemporaneously with intent to cause bodily harm that the accused foresaw as likely causing death. The Crown is required to establish

contemporaneity at some point between intent to cause bodily harm and knowledge that this would likely cause death: ***Saddleback***, at para 140.

[172] As stated, during the flight down Falconridge Drive, the Accused actively attempted to remove Sgt Harnett from the Vehicle and executed a number of maneuvers, which ultimately caused him to release his hold on the Vehicle.

[173] In my view, there is no doubt that continued flight from the police in these circumstances carried with it an objective foreseeability of the risk of bodily harm which was neither trivial not transitory in the context of a dangerous act. The Accused is at a minimum, guilty of manslaughter.

[174] As stated above, the question in this trial is whether, subjectively, the Accused intended to cause bodily harm to Sgt Harnett and whether he knew that this bodily harm was likely to cause death. If established, this subjective standard elevates the accused's actions from manslaughter to murder. As previously noted, the fault element in the definition of murder under s 229(a)(ii) consists of three components, as described by Watt (JA) in ***Moo***, at para 45:

- Intention (to cause bodily harm);
- Knowledge (that the bodily harm will probably be fatal); and
- Recklessness (as to whether the victim lives or dies).

[175] In this case, if intent and knowledge have both been established beyond a reasonable doubt, there is no question that recklessness will also have been proven to the requisite standard. The Accused's actions in attempting to dislodge a human being from the side of a speeding vehicle on a busy roadway were clearly reckless. As was his decision to continue his flight and leave Sgt Harnett lying helpless in an oncoming lane of traffic once he fell from the vehicle. This was clearly reckless behavior.

[176] In any event, as the majority stated in ***Cooper***, at 154-155:

> The aspect of recklessness can be considered an afterthought since to secure a conviction under this section it must be established that the accused had the intent to cause such grievous bodily harm that he knew it was likely to cause death. One who causes bodily harm that he knows is likely to cause death must, in those circumstances, have a deliberate disregard for the fatal consequences which are known to be likely to occur. That is to say he must, of necessity, be reckless whether death ensues or not.

[177] As such, this case turns on the first two elements of the offence as restated in ***Moo***: (a) intent to cause bodily harm, and: (b) knowledge that the bodily harm will probably be fatal.

[178] As has been commented on in numerous cases, direct evidence as to an accused's state of mind is often unavailable unless it is from the Accused. Therefore, the specific intent for murder is often established through circumstantial evidence and the drawing of a common-sense inference. However, the inference may not be resorted to without considering all exculpatory evidence – including the evidence of the accused – which might cast doubt upon the common-sense inference. As recently confirmed in ***R v Weng***, 2022 BCCA 332 at para 69:

> The trier of fact may not apply the common-sense inference if there is reasonable doubt about the accused's intention based on the whole of the evidence: ***Seymour*** at para. 23

[179] The only direct evidence concerning the Accused's intent and his state of mind at the relevant time comes from the Accused himself.

iv) Analysis of the direct evidence

[180] In assessing the Accused's testimony concerning his subjective perception of events that evening, I necessarily turn to the issue of the Accused's credibility and reliability. Whether the Accused accurately or truthfully described what was going on in his mind is critical to my analysis of (a) intent and (b) knowledge. Again, the Crown argues that the Accused essentially fabricated this evidence, while the Accused maintains he operated in a state of chaos and panic and did not turn his mind to what would likely happen to Sgt Harnett.

a) Credibility/reliability

[181] Our Supreme Court has acknowledged that assessing a witnesses' credibility is "not a science" but is rather a "complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events": ***R v Gagnon***, 2006 SCC 17 at para 20. Evidence of a witness is to be considered against the backdrop of the whole of the evidence tendered. The Court should look to see if there is any corroborating evidence or if conflicting evidence can be explained. As stated in ***R v JAB***, 2016 ABQB 362 by Jerke J at para 20 (citing ***R v Storey***, 2010 NBQB 86):

> … In the final analysis it becomes a matter of determining the veracity of the evidence utilizing the age old tools of logic, reason and common sense in measuring the probability, if it is deducible from the evidence, that the witness or witnesses' honesty on the central issue or issues is assailable.

[182] Some of the Accused's questionable testimony was in relation only to tangential points, being evidence not touching on the elements of the offence itself or to core issues of credibility. For example, the Accused testified that he did not recall the location of the party he was enroute to prior to the traffic stop, outside of a vague reference to it being 'downtown'. The Accused also indicated that he did not know the address of his basement suite, or his landlord's name, nor how to spell his girlfriend's last name. He indicated that he was good friends with Mr. Abdulrahman yet could not recall Mr. Abdulrahman's home address. Nor could he recall how Mr. Abdulrahman and the backseat passenger arrived at his basement suite prior to leaving for the party. Furthermore, he could not explain why he was taking an indirect route from Skyview to the downtown area other than stating he was simply relying on his GPS.

[183] While these examples relate only to peripheral matters and not directly bear on the question of subjective intent, I agree with the Crown that the number of unexplained questions calls the ability of the Accused to accurately or reliably recall the events of the evening into question. I do, however, take Defence counsel's point that the above examples relate to fairly generic things that anyone might have difficulty recalling years later.

[184] The much larger concern lies with the Accused's truthfulness in relation to key pieces of evidence, which have a greater impact in informing upon the Accused's credibility on key issues, including his state of mind.

[185] The first piece of evidence in this regard concerns the identification of the backseat passenger. The Accused testified that when he first met the backseat passenger (whom I shall refer to in short as the Unidentified Male or the "UM") no introductions were made. Rather, the Accused testified that he felt there would be time at the party to properly introduce himself to the UM.

[186] The Accused stated that he never saw the UM's face, as it was constantly covered by a black Covid mask. All he could state was that this person was male, Caucasian, and had short hair.

[187] I note that while Sgt Harnett was initially interacting with the Accused, the BWC footage displays the UM's face which – while blurry in the video – is clearly not covered by any mask. When this was put to the Accused during cross-examination he explained that although he was looking out both his side and rearview mirrors the UM was not in his line of sight and he never saw his face.

[188] I do not accept that the Accused is being truthful on this point. I agree with the Crown that it does not make logical sense that the UM would be wearing a Covid mask outside of the Vehicle, yet not be wearing one inside the Vehicle, where the risk of transmission would be higher. It is also incredible to suggest that the Accused was repeatedly checking his mirrors – including his rearview mirror - but never saw this individual's face.

[189] It is also implausible that during an approximate half-hour traffic stop, during which the Accused testified to mounting anxiety and stress, that he would not take steps to determine who was in the car with him. He indicated that he had "no idea" why the stop was taking so long. He indicated his anxiety continued to significantly increase as the length of the stop drew on. In these circumstances, I find it improbable that the Accused would not have made even basic inquiries of his unknown passenger to determine his identity in an effort to ascertain some explanation as to why the stop was unfolding in such an usual fashion. Finally, and more remarkable, following the expulsion of Sgt Harnett from the Vehicle, it is unbelievable that the Accused would not have made a point of determining who the UM was, as he was a direct witness to a very serious crime in which the Accused was implicated.

[190] I note, in passing, that Det Guterson believed that police subsequently accurately identified the UM, but that their suspicion could not be confirmed given the absence of DNA evidence and the indeterminate evidence from local cell phone towers. He did indicate that police received various tips from the public providing information as to whom the UM may be, as well as a "side business" he may have. No arrest was ever made.

[191] Based upon the above, I conclude that the Accused was not being truthful when he testified that he had no idea who the UM was.

[192] The Accused also testified that during his flight, someone in the Vehicle yelled "gun gun gun" as well as "go go go". This latter utterance is clearly captured on the BWC footage. Given the audio quality of the recording, I find that the phrase "gun gun gun" was never stated.

[193] I turn next to the Accused's assertion that he felt racialized during the traffic stop. The Accused suggested that this perception may have been based, in part, on his previous negative encounter with police at the Aberhart high school party as well as how he believed other people generally perceived him.

[194] I acknowledge that the Accused viewed this encounter from the perspective of a visible minority dealing with members of a police department: see for example, the discussion at para 90 in ***R v Le***, 2019 SCC 34. That said, there was absolutely nothing in the interaction between Sgt Harnett and himself that suggested Sgt Harnett was treating the Accused in distinct, different, or disrespectful manner.

[195] The Accused testified that he had been following the George Floyd protests on social media earlier that year. He identified with the movement to increase awareness of racialized treatment of persons of colour. I accept that he had a personal belief that he could be a target of racial profiling – being Arab and a person of colour- and subjected to unfair treatment. However, I emphasize there was nothing in the exchange between himself and Sgt Harnett that indicated any type of inappropriate police conduct. Rather, Sgt Harnett conducted himself throughout in a professional manner.

[196] I turn finally to the matter of whether the Accused decided to flee from police because he witnessed Sgt Harnett approaching the Vehicle with his hand on his service weapon. I find that the Accused witnessed no such thing and that it was not a fear of being subjected to racist treatment and/or use of force that caused him to flee.

[197] I reach this conclusion for a number of reasons. First, although Sgt Harnett had earlier voiced his suspicion of possibly finding narcotics in the vehicle to his fellow officers, the Accused did not hear this. The only jeopardy the Accused had been informed of at that point was receipt of a couple of *Traffic Safety Act* tickets.

[198] The Accused testified that when he was first pulled over, he did not think much of it and that he was not that worried. This does not signal a person who is frightened by any interaction with police. The sole reason given to the Accused for having been pulled over was that he had been operating the Vehicle without its headlights on. When he was asked for his Driver's license and registration, he was a bit stressed, but again, not worried. He appeared calm and assured in the video with his hand on the steering wheel. He voluntarily answered the questions truthfully and advised that his passenger had a driver's license. The Accused even offered to be subjected to a search. It was later discovered that he was driving with a learner's licence absent having a Class 5 passenger in the front seat. The Accused testified that he had been in a few traffic stops in the past and had even received a ticket for driving in contravention of the licensing rules, which he paid. He was therefore familiar with the process and the consequences. The previous traffic stops occurred without any issue.

[199] There was nothing even remotely threatening that occurred during the initial interaction between Sgt Harnett and the Accused and/or his passengers. There is no reason to believe that Sgt Harnett approached the vehicle to hand out a basic traffic ticket with his hand ready to draw his service pistol.

[200] Moreover, I agree with the Crown that there was nothing in either Sgt Harnett's or Cst Desroches' mannerisms which suggested even the contemplation of a use of force. The BWC footage clearly indicates Cst Desroches casually approaching the Vehicle. The Petro-Canada fisheye lens CCTV video, while not of the best quality, shows Sgt Harnett approach the Vehicle using a normal gait with both his arms and legs – that is – not reaching for or placing his hand upon his gun. I reject the Accused's evidence that he witnessed Sgt Harnett approach with his hand on his gun.

[201] This necessarily leads me to my next question; even if Sgt Harnett did not have his hand on his gun, did the Accused mistakenly perceive that he did?

[202] I do not accept the Accused's evidence that he otherwise mistakenly believed that Sgt Harnett's hand was on his gun. Again, absolutely no evidence that might support such a perception is borne out by the video footage showing the officers approaching the Vehicle. Nor is it supported by the initial interaction with Sgt Harnett, which was completely cordial. The Accused had been in traffic stops before. He had only been pulled over because of a headlight issue and had no knowledge that his passenger had warrants. There was simply nothing on the evidence or the Accused's background and experience that supports the alternate theory that even if he did not actually see a hand on a gun, he mistakenly interpreted Sgt Harnett's movements as placing his hand on his service pistol.

[203] Rather, I find that the Accused concocted a story about seeing Sgt Harnett's hand upon his gun and hearing the word "gun" to explain why he suddenly took flight. In my view, the Accused did so to provide an innocuous explanation for his decision to flee. Absent a story about 'the gun', it would make no sense for the Accused to flee a traffic stop where he ostensibly faced only a couple of hundred dollars in tickets, especially as he had already provided Sgt Harnett with his real name and address.

[204] I conclude that the more likely reason for the sudden flight was that, as the traffic stop dragged on, the Accused became increasingly worried that something would be uncovered or he became aware that there was some reason that would increase his or his passengers' potential legal jeopardy to a level that was much more serious than a simple traffic ticket.

[205] I find that when Cst Desroches asked Mr. Abdulrahman to open the passenger side door, the risk of this increased jeopardy crystalized in the Accused's mind, and his decision to flee was put into action to avoid an encounter that he believed might attract serious legal consequences. This finding is supported by the timing seen on Cst Desroches' BWC footage. I conclude, therefore, that the Accused is being untruthful when he testified that even if Sgt Harnett did not in fact have his hand on his gun, he somehow misinterpreted the officer's actions to this effect. Further, I do not find Cst Desroches' request to open the passenger side door and the concurrent placing of the Vehicle into gear to be mere coincidence.

[206] Moreover, I do not believe that the Accused was startled when he saw Sgt Harnett. He testified that he was constantly looking through his rear and side-view mirrors waiting for the officers to return. I accept that his anxiety was increasing during the longer-than-usual wait, but there was nothing to explain why he would have suspected any harm would have come to him. Thus, when he saw Cst Desroches approach first on the passenger side, he likely would have

expected an officer to address him as well. I do not believe that when he saw Sgt Harnett on the driver's side that he was in such a heightened state of panic that it would have caused him to impulsively flee.

[207] The Crown also suggests that the Accused was not being truthful when he stated that the decision to place the car into gear and to flee was his alone. I agree. As stated above, there was some reason for the flight from police that was formed during the 26-minute wait and after their identities were revealed, although we may never know what that reason was. I do not believe the Accused that there was very little discussion outside of idle chit chat in the Vehicle and I reject his testimony that the decision to flee was his alone. I infer that there was a plan from the whole of the evidence, including: the direction to "go go go"; the passenger concertedly grabbing the wheel to help; the timing of flight when the officers were furthest from their cruisers; the deliberate motions to put the Vehicle in gear; and, the lack of vocal protest from the passengers.

[208] Moreover, the fact that Mr. Abdulrahman opened the passenger door does not negate the finding that there was a plan to flee. At the point the Vehicle is put into gear by the Accused, he does not appear shocked by the sudden flight, and is not heard saying anything that would suggest he was against the apparent flight or otherwise taken unawares. He is seen at various points on the BWC assisting the Accused by grabbing the steering wheel.

[209] Regardless, the plan to flee or the reason behind it does nothing to help answer the question of his subjective intent for murder during the third segment of the flight – namely the 21 seconds after the Vehicle leaves the berm.

[210] An intent to flee does not equate to an intent to cause death or seriously bodily harm. Nor does the question of why flight took place necessarily inform as to why subsequent actions during flight were taken.

[211] I accept the Accused's testimony that he did not initially see Sgt Harnett holding the door. However, he soon became aware of Sgt Harnett's presence at the side of the Vehicle and knew he was dragging him through the parking lot. He testified that Sgt Harnett was touching the steering wheel and that because of the officer's weight on the Vehicle, he was therefore required to correct the Vehicle's path of travel away from the Petro-Canada station to prevent it from crashing. Sgt Harnett also issues his first of many commands to "stop the vehicle" approximately 5 seconds following takeoff. I find that the Accused was aware of Sgt Harnett's presence mere moments from taking flight.

[212] Finally, to the extent that the Accused appeared to be suggesting that his foot was somehow inadvertently on the accelerator during this period on the berm, which resulted in the sudden take-off, I reject this outright as a fabrication. The Accused was actively trying to get away from a chaotic situation at this point.

[213] Given the above, I find that the Accused's credibility is in issue. He was uncertain about a number of details surrounding the evening, and I find that he outright lied about others. Notably, I find that he was purposefully evasive and untruthful in relation to questions concerning the identity of the UM. Moreover, he fabricated the story of the gun in order to provide himself with an

"innocent" explanation for his decision to flee, in order to cast himself in a more favourable light than might otherwise befall an individual who has something to hide from police.

[214] This said, it is for the trier of fact to decide - notwithstanding difficulties with a witness's evidence - how much, if any, of the testimony it accepts: ***R v H(W)***, 2013 SCC 22 at para 32. Juries are routinely instructed that they may accept all of the evidence, some of the evidence, or none of the evidence of each witness.

b) Findings concerning the Accused's state of mind

[215] It is against this background that I asses the evidence of the Accused respecting his level of intent and knowledge as he left the berm and proceeded down Falconridge Drive. While these are the crucial 21 seconds, the Accused's state of mind is informed by the events leading up to this deadly segment of flight.

[216] I have outlined my concerns respecting the Accused's credibility. I have found him to have been untruthful on a number of points during his testimony. The Crown urges me to conclude that the Accused's credibility issues permeate the whole of his testimony – including his evidence as to his state of mind during the crucial moments down Falconridge Drive. The Crown states that the Accused's evidence as to what he was thinking and whether he turned his mind to the consequences of his actions was fabricated.

[217] There is little doubt that in taking off suddenly from the traffic stop, a chaotic scene erupted. It became even more so when the Vehicle was held up on the berm. However, despite this initial scene, it is to be noted that once the Vehicle regains traction and begins its flight down Falconridge Drive, the Accused is no longer under a direct assault, and the other officers are not attempting to surround the Vehicle.

[218] The Accused made it clear in his testimony that he did not recall the actions he performed during the final segment of flight, nor did he turn his mind to what would happen to Sgt Harnett as he continued his flight down Falconridge Drive. To recap his evidence in chief he repeatedly stated that during this segment of flight:

- Things happened too quickly;
- Things were chaotic;
- He was not thinking straight as he had just been in a physical altercation;
- The last time stopped the Vehicle things went from bad to worse;
- He was just trying to get away and to save himself;
- He does not recall opening the Vehicle door;
- He only remembers driving and trying to "maintain"; and,

- He was only thinking about himself, not about Sgt Harnett. He did not consider what might happen to Sgt Harnett.

[219] During cross-examination, the following critical exchanges took place:

> Q If somebody falls off a vehicle at that speed, they're likely going to die; correct?
>
> A I -- I can't answer that. No, I -- I can't say, no. Like, I -- I can't tell you, like. Like, at the time, look, me looking back now is different from what was going on at the time. If -- if what you're trying to say is at the time, if I knew Officer Harnett was going to get killed or injured by falling off the vehicle: No, man, no. I was -- I, myself -- I, myself, was trying to defend myself. You know what I mean? I, myself, was just thinking about myself. I wasn't thinking about the officer or hurting him, you know. This is not a case where, like, I thought he was going to grab onto the vehicle, and that I thought -- like, this is not planned. This whole situation happened too quick for everybody. [transcript, September 28, 2022, p 66 lines 3-13]
>
> […]
>
> Q And it's common sense that if somebody is expelled off the side of the vehicle, at that speed, they're going to be very, very hurt. We all know that as drivers.
>
> A Yeah, because it's common sense when you sit down and you think about it. It's not common sense when you are going through something and you're in a position where, like, things are -- like, things are all over the place, where it's chaotic.
>
> Right now that I'm looking at it -- looking back at it, it's common sense; okay? At the time, was it common sense? No. At the time, it was --[transcript, September 28, 2022 p 66, lines3-37

[220] After reviewing the various actions that the Accused took to dislodge Sgt Harnett (as discussed above) the following exchange occurred during cross-examination:

> Q But you intended all those actions.
>
> A What do you mean: "intended all those actions"?
>
> Q You did all those things.
>
> A But "intended," you meant what? I meant to hurt him?
>
> Q You meant to push him off the vehicle, to make yourself safe.
>
> A No, man, I didn't -- I didn't -- look, just to be frank with you, once again, man, look, I didn't mean to hurt him; I didn't mean to kill him; nothing like this, man. I was in a situation where I panicked and I reacted; okay? This is not -- this is not me saying: I'm going to drive; I'm going to open the door; he's going to fall; he's going to get hurt. No, man, this is not the situation. The situation is: I'm getting beat up; I'm getting my hair pulled left and right; and I'm just trying to avoid it, because as soon as the car stopped, it was worse. It's like I thought I was going to get dragged out and killed. [transcript September 28, 2022 p 66, line 30 – p 67, line 11]

[221] If believed, the Accused's evidence as to his state of mind would lead to an acquittal on the charge of murder. Of course, the Crown urges me not to accept this evidence and argues that I should find the Accused untruthful concerning his intentions and what he turned his mind to.

[222] In laying out the above, I am cognizant of the fact that it is not the Accused's version of events alone that is to be considered. Whether the required mental element for murder has been made out is a question of fact which must be determined upon the examination of the cumulative effect of all the evidence. The physical actions of the accused and the circumstances of the offence have been detailed above. As noted by Watt JA in ***R v Srun***, 2019 ONCA 453, at para 89:

> Among the items of evidence offered in proof of an accused's state of mind is evidence of things said and done by the accused and others contemporaneous with the commission of the offence and the circumstances in which those words are spoken and that conduct occurred. Routinely, judges instruct jurors to consider the cumulative effect of this evidence in determining whether either of the mental elements required by s. 229(a) has been established…

[223] In examining the entirety of the evidence to ascertain whether the Accused had the requisite mental state for murder, I must determine what was actually going on in his mind. As McLachlin J (as she then was) stated in ***Creighton***, at 58-59:

> … The requisite intent or knowledge may be inferred directly from what the accused said or says about his or her mental state, or indirectly from the act and its circumstances. Even in the latter case, however, it is concerned with *"what was actually going on in the mind of this particular accused at the time in question"*: L'Heureux-Dubé J. in *R. v. Martineau*, supra, at p. 655, quoting Stuart, *Canadian Criminal Law: A Treatise*, 2d ed. (Toronto: Carswell, 1987), at p. 121.
>
> Objective *mens rea*, on the other hand…is not concerned with what was actually in the accused's mind, but with what should have been there, had the accused proceeded reasonably. [emphasis added]

[224] Similarly, in ***R v Hundal***, [1993] 1 SCR 867 Cory J described the subjective approach by adopting the following passage at 882-883:

> A truly subjective test seeks to determine what was actually in the mind of the particular accused at the moment the offence is alleged to have been committed. In his very useful text, Professor Stuart puts it in this way in *Canadian Criminal Law* (2nd ed.) at pp. 123-24 and at p. 125:
>
> > What is vital is that *this accused* given his personality, situation and circumstances, actually intended, knew or foresaw the consequence and/or circumstance as the case may be. Whether he "could", "ought" or "should" have foreseen or whether a reasonable person would have foreseen is not the relevant criterion of liability.

[225] This particular Accused was a youthful offender, albeit days shy of his 18th birthday. While 18 is used as the age that legally distinguishes a youth from an adult, it is an arbitrary number that does not reflect the maturity and discernment of an individual. I must consider the surrounding circumstances to determine whether the Accused knew death was likely.

[226] This is necessary to determine whether the Accused's testimony aligns with certain recognizable traits of youth.

[227] The Crown submits that notwithstanding the Accused's age, he was living a very mature lifestyle. He owned his own car, he rented his own basement suite, he had a girlfriend, he hung out with an older crowd, he held down jobs pre-Covid, and he was calm, and self assured in the courtroom. These are all accurate observations.

[228] Against them, I also note that the Accused displayed many indica of immaturity. His primary caregiver was his mother – for example, he still returned home daily, she cooked his meals, washed his clothes, and registered him in school. While he had his own suite, he spent a significant amount of time at home; sometimes with his mom watching videos, "chilling out" and the like. He also engaged in activities that were typical of teenagers. He described spending much of his days playing basketball, going to the park and just "chilling out" and smoking sheesha or vaping. He often filled his days by doing idle things. He played video games and spent time on social media.

[229] I cannot ignore the Accused's personal background either. He testified growing up in a home with domestic abuse and fleeing with his mother from city to city, at times living in shelters on the run from his abusive father. This forms part of how he perceives the world and may have contributed to his irrational decision to flee the traffic stop – even after revealing his identity – and taking dangerous actions to get out of the situation.

[230] While I agree that the Accused did present as relaxed in the courtroom, many of his mannerisms, in my view, displayed an immaturity or a lack of appreciation for the solemnity of the occasion. For example, he would apologize by stating "my bad", and would refer to the Prosecutor as "bro" and "man". This is not particularly indicative of a mature young man.

[231] I note also that he appeared unwilling or unable to learn from his past mistakes. Although he initially enrolled in a high school far from his home to avoid a negative peer group, the next year he enrolled once again in a high school located nearby, bringing him closer to the people he was seeking to avoid. Further, although he had been previously ticketed by CPD for driving as a learner without a Class 5 passenger, he made no enquires of Mr. Abdulrahman on the evening in question, and once again committed the same infraction - driving without having a Class 5 passenger in the front seat. These traits, evidencing continued action despite previous negative consequences, are demonstrative of a more typical (less mature) teenager.

[232] While the Accused expressed regret for what happened and apologized, his focus was on himself when he described the impact of the events of the evening in question. While he acknowledged that his actions impacted his family and other families, he mostly focused on how his life is now ruined. He appeared to lack any insight into the tragedy and lacked the maturity to appreciate the severity of his crime and impact on others. He became emotional only when describing the loss to him – that he lost friends, that people think he is a monster, that he could not sleep, and that he is the one sitting in jail reliving the events in his head. His minimal appreciation for the gravity of the effect on Sgt Harnett's family and friends reflect, in my view, the traits of an immature individual.

[233] Against this evidence, I turn first to a determination of whether the Crown has established the first element as broken down in ***Moo***, namely whether the Accused intended to cause Sgt Harnett bodily harm.

1) Intent to cause bodily harm

[234] While I believe the Accused that he did not desire to cause Sgt Harnett bodily harm likely to cause death during the flight down Falconridge Drive, 'desire' is not synonymous with 'intent'. The phrase "means to cause" embraces something other than subjectively desiring: see Manning, Mewett & Sankoff, *Criminal Law* , 5th ed (Markham, Ont: Lexis Nexis, 2015) at 903. A lack of desire does not mean a lack of intent - nor, of course, does the fact that someone has died mean there was an intent to kill.

[235] In this case, I can reach no other conclusion than that the Accused meant to cause Sgt Harnett serious bodily harm. While he may not have desired to hurt the Officer, he meant to engage in actions aimed at pushing him off the Vehicle.

[236] I find that during this final segment of the flight, the Accused took active steps to try and dislodge Sgt Harnett while traveling at high speeds. These actions included pushing the driver's side door out and away from the Vehicle on multiple occasions using both his hand and his leg, applying direct force to Sgt Harnett, and executing the jerky swerving maneuver with the steering wheel. While the latter movement was not a wild swerve or excessive movement, I find it was clearly executed for the purpose of dislodging Sgt Harnett.

[237] While the BWC footage supports the Accused's evidence that Sgt Harnett may have grabbed or leaned upon the steering wheel during the initial moments of flight, there is, in my view, no evidence supporting the Accused's testimony that Sgt Harnett was grabbing or attempting to grab the wheel during the portion of flight down Falconridge Drive. I further reject the Accused's argument that the reason he pushed the Vehicle's door open was to avoid being grabbed or hit while trying to control the Vehicle. My conclusion in this regard is supported by Cst Vink's analysis.

[238] The Accused's actions during this portion of the flight were not aimed at keeping Sgt Harnett from either assaulting him, or from grabbing the steering wheel. The evidence clearly demonstrates that it is doubtful that the officer could have accomplished either in the circumstances. By this point, he was merely hanging on to the Vehicle for his safety.

[239] It also bears noting that a successful attempt to dislodge Sgt Harnett from the driver's side of the Vehicle would necessarily result in him being ejected into the middle of the roadway, at least for some period of time.

[240] In my view, the BWC footage demonstrates that although the situation continued to be chaotic during the final segment of flight, the Accused was clearly able to turn his mind to his objective. He wanted Sgt Harnett off the Vehicle, so that he could get away or "get safe". In order to achieve this objective of escape, the Accused engaged in deliberate and intentional actions aimed at dislodging Sgt Harnett.

[241] The Accused's evidence that his central focus "…was trying to maintain -- maintain/stay on the -- on the right road" [transcript September 27, 2022 page 41 line 2] and that he "…was trying to make sure that the vehicle is straight": [transcript September 27, 2022 page 41, lines 14-15] is belied by the fact that Mr. Abdulrahman is seen leaning over and adjusting the Vehicle's steering wheel on two separate occasions during the flight down Falconridge Drive. During each occasion, the Accused is focusing his efforts on dislodging Sgt Harnett.

[242] A review of the BWC footage supports this conclusion. On two separate occasions (see frames 56797-56837 and frames 57023-57025) he is seen clearly turning his attention to Sgt Harnett, as opposed to the road. With each unsuccessful attempt, the Accused regroups and makes an additional effort. I find that he is aware that the Officer is still there, and he takes repeated actions to dislodge him.

[243] The BWC footage undermines the Accused's evidence he did not know what actions he took during this segment of flight. Rather, the Accused turns his attention toward the Officer with each attempt taken to push him away. To the extent that the Accused maintains that he simply does not recall taking these actions, I reject his evidence. He is being evasive as he has no other explanation for these deliberate and violent acts.

[244] In sum, I conclude that the Accused was deliberately trying to knock Sgt Harnett off the Vehicle, and after a number of attempts, he succeeded. I find that the Crown has established that the Accused intended and meant to cause Sgt Harnett bodily harm.

[245] The core of this case, however, rests on the final element of the alleged offence - whether the Crown has established that the Accused engaged in these actions knowing that this bodily harm would be of such a nature that it would be likely to result in death.

2) Knowledge that the bodily harm would likely be fatal

[246] Again, direct evidence was tendered by the Accused concerning this element of the offence. He stated that given the circumstances surrounding the offence, he simply did not turn his mind to the fatal consequences of his actions.

[247] The question is whether, despite the obvious speed, deliberate actions, and driving maneuvers to eject Sgt Harnett, this Accused had an appreciation that death was likely to follow.

[248] In assessing the Accused's credibility on this essential portion of his evidence, I again have regard to what was occurring contemporaneously with - and just prior to - the commission of the offence. The Accused described circumstances which lead to a state of chaos and panic: one in which he was stressed, fearful and hypervigilant about "getting somewhere safe". That is, an environment in which he was concentrating on himself and did not turn his mind toward what might happen to Sgt Harnett.

[249] In addition to how quickly everything unfolded, I add the further element of the initial surprise at finding Sgt Harnett attached to the Vehicle once the Accused made the decision to engage in flight. A chaotic scene instantly became much more frenzied following the discovery that a person was attached to the Vehicle as it sped away from the traffic stop.

[250] I accept that the chaos and panic testified to by the Accused continued, and likely even heightened, while on the berm. During this period the Accused was being (lawfully) assaulted, and was in turn (unlawfully) assaulting a police officer. The BWC footage captured the state of chaos and intensity of that interaction. I accept the evidence of the Accused that during this time, people were screaming various instructions at him – both to 'stop the car' and to 'go go go'. He was getting struck in the face. While on the berm, Csts Osmond and Desroches had their guns drawn and pointed toward the Vehicle. I accept that the Accused was scared and that his anxiety was "through the roof" at this point, even though I find it was self-induced from the decision to flee. In light of his youth and inexperience in such situations, he may not have been thinking rationally about the fatal consequences that might flow.

[251] In this regard, I have reviewed the actions of the other individuals present as the scene unfolded. I have done so in assessing the credibility of the Accused's claim that he was scared, panicked, and operating in a reactionary manner. I have engaged in this exercise to assess whether the situation in which the Accused found himself in supports his claim that he did not turn his mind to the likely deadly consequences of his actions in attempting to dislodge a person from a moving vehicle.

[252] I begin by noting that it was not only the Accused who was shocked to discover that Sgt Harnett had grabbed onto the Vehicle as it began to take flight.

[253] The evidence of both Csts Desroches and Osmond (and supporting BWC footage) demonstrates that they were startled to discover that Sgt Harnett was seemingly attempting to prevent flight by holding onto the Vehicle. Quick, reactionary decisions followed, including a foot chase and the drawing of their guns.

[254] This demonstrates that the situation was – initially at least – chaotic and panicked.

[255] Even Sgt Harnett's actions reflect split second decisions made in the heat of the moment when consequences were perhaps not fully being considered. While I am not questioning the prerogative of a seasoned veteran of the CPD to effect a lawful arrest, his decision to maintain his hold on the Vehicle as it regained traction and started out toward a busy roadway, in my view, reflects the chaos of the situation. Of course, it is the Accused, and not Sgt Harnett, who chose not to stop the Vehicle despite the Officer's repeated demands and instead took steps aimed at dislodging him onto a well-travelled street at high speeds. It is the Accused who could have avoided a tragic situation and instead chose a course resulting in death. Again, I note this only to illustrate the tumultuous state which existed at the time the Accused drove off the berm and onto Falconridge Drive.

[256] I must assess the essential issue of the Accused's credibility in the context of the evidence as a whole, including what I have just outlined above: whether this state of chaos and panic continued during the final segment of flight such that the Accused simply did not turn his mind to the likely consequences of his actions.

[257] I approach this task bearing the following principles in mind.

[258] First, I must approach my analysis bearing in mind the fundamental presumption of innocence. As recently summarized by Labrenz J of this Court in ***Crier***, at paras 9-10:

> Two rules flow from the presumption of innocence. One is that the Crown bears the burden of proving guilt. The other is that the Crown must prove his guilt beyond a reasonable doubt. These rules link together with the presumption of innocence to ensure that no innocent person is convicted.
>
> Proof beyond a reasonable doubt requires that the Crown prove more than just the accused is likely or probably guilty. A reasonable doubt is based upon reason and common sense, it is logically connected to the evidence or the absence of evidence, and must not be based upon sympathy or prejudice for any party. Having said this, proof beyond a reasonable doubt does not require proof to an absolute certainty as it is not proof beyond any doubt, nor is it an imaginary or frivolous doubt: *R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.) at para 36. Proof beyond a reasonable doubt, however, is much closer to absolute certainty than to proof on a balance of probabilities: *R. v. Starr,* 2000 SCC 40 (S.C.C.) at para 242.

[259] As recently restated by Mandzuik J in ***Saddleback***, this means that: "more is required than proof that the accused is probably guilty – a jury which concludes that the accused is probably guilty must acquit": para 4.

[260] The rule of "reasonable doubt" applies both to the essential elements of the offence, as well as to vital issues such as the credibility of a witness: ***Crier*** at para 12.

[261] As I have found above, the Crown demonstrated serious issues concerning both the Accused's credibility and his reliability as a witness. I have found that the Accused was untruthful on a number of issues concerning the circumstances surrounding the offence. Many of these issues were tangential. It is open to the trier of fact to accept, some, none or all of the evidence of a witness. Again, as noted in ***Crier*** at paras 13-14:

> …The essential point is that I may believe a witness, disbelieve a witness, or not be able to decide.
>
> If I have a reasonable doubt about the accused's guilt or the degree of the accused's culpability (e.g., proof of the mental element required for murder vs manslaughter), arising from the credibility of the witnesses, I must resolve such doubt in the accused's favour.

[262] On the evidence before me, I am left with a reasonable doubt as to the degree of the Accused's culpability concerning the element of whether the Accused knew that the bodily harm he intended and occasioned upon Sgt Harnett was likely to cause his death.

[263] In my view, the evidence of the Accused, together with the evidence of the other Officers as well as the BWC footage illustrates the following, which could realistically bear on the Accused's mental state at the time of the offence:

- The traffic stop took much longer than one would expect for a headlight infraction;
- As the length of the stop went on, the Accused became increasingly anxious. This was likely due to the fact that there was something in the Vehicle or some other reason that would attract serious legal consequences if anything

more than a routine traffic stop ended up occurring, or he was under pressure to flee;

- When Mr. Abdulrahman was asked to asked to open his front door, the plan to take flight crystalized. The Accused was in a state of self-induced panic and heightened adrenaline as he drove off;
- The Accused became aware shortly after engaging in flight that Sgt Harnett was hanging onto the driver's side door of the Vehicle, causing more panic;
- Seconds later, the Vehicle became high-centred and was temporarily hung up on the berm;
- While on the berm, a physical altercation took place between the Accused and Sgt Harnett during which the Accused was struck on more than one occasion;
- Competing demands were being made of the Accused at this time – lawful demands made by the police to "stop the car" and pressure from one of the passengers to "go go go";
- While on the berm, Csts Osmond and Desroches were able to make it to within an estimated 15-20 feet from the Vehicle. They had their guns drawn at the ready by this point;
- When the Vehicle finally came free from the berm, it was already moving quickly, given that its spinning tires had finally gained traction; and,
- The flight down Falconridge drive lasted a mere 21 seconds before Sgt Harnett became dislodged.

[264] Against this fact pattern, I am unable to conclude – beyond a reasonable doubt – that the Accused's mind was not overtaken by panic and chaos of wanting to take whatever steps necessary to get away as he proceeded down Falconridge Drive. I accept that in this panicked state, the Accused may not have turned his mind to the likely deadly fate of Sgt Harnett should the Accused successfully dislodge him from the Vehicle.

[265] I acknowledge that in law, there is no freestanding defence based solely on "panic": ***R v Stuart***, 2007 QCCA 924 para 32. However, in ***R v Shand***, 2011 ONCA 5, the Court accepted that panic could be a factor to consider when assessing whether an accused knew a dangerous act was likely to cause death. Specifically, the Court held, at paras 151-152, that:

> ...Once again, it is the perpetrator's state of knowledge "at that time" that must be determined.
>
> Vague realization that death is possible will not be sufficient. Similarly, if the dangerous act was done as a reaction, and out of panic, this may tend to show that the required subjective foresight of death was not present at the time that the act was committed.

[266] While the Court's comments in ***Shand*** were made in relation to an instance of unlawful act homicide under s 229(c) of the *Code*, its comments as to reactionary conduct borne out of panic

and the consequential effect upon subjective foresight of the likelihood of death are, in my view, equally applicable to the case at bar.

[267] Subjective foresight of a likelihood of death is a constitutional requirement of murder. Here, while I have no doubt that the Accused *should have* realized that his actions in attempting to dislodge Sgt Harnett in such circumstances were likely to result in death, that is not the test in law. The test is not what a reasonable person would have or should have known. I am unable to conclude that *this Accused did in fact* turn his mind to such consequences. Any reasonable doubt on this point should inure to the benefit of the Accused: ***Crier*** at para 292, ***Ryon*** at para 21.

3) Conclusion as to the Accused state of Mind

[268] In sum, I find the Accused's evidence was almost entirely self-serving. On his best version of events he engaged in the reprehensible behaviour of intentionally forcing a police officer from a moving vehicle because he was considering only himself and his needs at the time. If he was in a state of panic and distress, he was the author of it.

[269] However, even though I do not believe the Accused on much of what he had to say, for the reasons stated above, I am left with a reasonable doubt as to whether he possessed the subjective knowledge of death required for a first degree murder conviction.

[270] Again, the test is not whether the Accused is probably guilty, it is whether the Crown has established all of the elements of the offence beyond a reasonable doubt. A belief that the Accused is probably guilty requires an acquittal on the named charge.

4) Even if not left in doubt by the Accused's evidence, am I convinced on the requisite standard as to the guilt of the Accused on the evidence which I do accept?

[271] Alternatively, even if I were to accede to the Crown's argument and completely reject the evidence of the Accused, I am still left unconvinced of his guilt beyond a reasonable doubt on the basis of the balance of the evidence.

[272] The Crown's position is that the Accused was untruthful about what he told the Court he was thinking as he engaged in flight. That is, the Accused's evidence of panic is really just reflective of his determination to get away from the police at all costs – including cost of the life of Sgt Harnett. The Crown argues that this Court should completely reject the Accused's evidence as being fabricated and entirely self-serving, and should rely instead the common-sense inference that the Accused's actions in fleeing from a traffic stop with a police officer attached to his Vehicle – and in particular in travelling 370 meters down a busy roadway at high speeds while actively trying to eject the officer - leads to only one conclusion: that the Accused intended to cause Sgt Harnett serious bodily harm and that he knew this harm would likely result in death.

[273] As discussed above, the common-sense inference is not to be applied presumptively, and prior to acting on it, I must carefully consider that evidence pointing away from it: ***Walle*** at para 63. In ***R v Robinson***, 2010 BCSC 368, Joyce J articulated the following oft-quoted summary of how to approach the common-sense inference, at para 107:

> Of course, the Crown has the burden to prove the requisite intent under s. 229(a)(ii) beyond a reasonable doubt. Because we cannot look into the mind of the accused and there is often little direct evidence of an accused's mental state, intent must generally be proven based upon inferences to be drawn from established facts. This is where use may be made of the common sense inference that a sane and sober person intends the natural consequences of his acts. But there may be circumstances that cast doubt on whether one can safely rely on the common sense inference. [...] If such circumstances, either alone or in combination, raise a reasonable doubt that the accused had the subjective intent to cause bodily harm or that he had the subjective knowledge that the bodily harm he inflicted was of such a nature that it was likely to result in death, then the accused is entitled to the benefit of that doubt and cannot be convicted of murder.

[274] Concerns arise in utilizing inferential reasoning from circumstantial evidence: ***R v Villaroman***, 2016 SCC 33 at para 26. As noted by the ***Villaroman*** Court, "an inference of guilt drawn from circumstantial evidence should be the only reasonable inference that such evidence permits": para 30. The Court described the appropriate approach to assessing an inference which might be drawn from circumstantial evidence as follows, at paras 35 and 37:

> … The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. *If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.*
>
> … the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused" […]. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. [Emphasis added]

[275] The Accused submits that convicting him for first degree murder on the basis that all people intend the natural consequences of their actions risks substituting an objective standard – that of a reasonable person – for the required element of subjective mental fault. In other words, he states that I must assess his intentions from his perspective only and convict him if the *only* rational inference is that he intended to cause bodily harm that he knew was likely to result in death and that this bodily harm did cause the death.

[276] In this case, the Accused submits that his youth and immaturity preclude a reliance on an inference that a person intends the natural consequences of his acts. The Accused references s 3(1)(b) of the *Youth Criminal Justice Act*, SC 2002, c 1 in noting that Canada takes an approach whereby the criminal justice system for young persons is separate from that for adults, based, in part, on principle of diminished moral blameworthiness or culpability. In response, the Crown correctly asserts that there is no generalized rule that a young person, by reason of their age, cannot form the subjective *mens rea* for murder.

[277] In ***R v M(F),*** 2008 BCCA 111 two accused (aged 13 and 15) were charged with second degree murder under s 229(a)(ii) of the *Criminal Code*, as well as with aggravated assault for a separate attack committed one day prior to the killing. They had struck the deceased at least three

times on the head with a baseball bat, fracturing the side of his head and the back of his skull. After concluding that the attack was so sustained and of such force that the accused must have meant to cause serious bodily harm, the trial judge addressed the "more difficult" issue of whether they subjectively foresaw the likelihood of death as a result of the attack. In finding the accused guilty of the lesser offence of manslaughter, he concluded that:

> Here, it cannot be forgotten that the accused were 13 and 15 years of age at the time of the offence. *The lack of life experience and the relative inability to foresee serious consequences accompanying an act are hallmarks of youth. These considerations convince me that it is inappropriate to apply the inference the Crown urges to conclude these two actually knew they were likely to cause Mr. Thandi's death.* On balance, I have a reasonable doubt that the two accused meant to cause Mr. Thandi bodily harm knowing it was likely to cause his death. [emphasis added]

[278] The Crown appealed the acquittal, arguing that the trial judge erred in failing to apply the common-sense inference, notwithstanding that the accused were youthful offenders.

[279] In dismissing the appeal, the Court determined that the trial judge did not make any "sweeping generalization" about the capacity of youth to form intent. Rather, it was satisfied that the lower court's comments were made after considering the evidence as a whole.

[280] In examining which factors might be considered in drawing an inference concerning the subjective foresight of the consequences of a youthful accused's actions, the Court held, at para 24, that:

> Just as it is common knowledge that intoxication can affect the ability of persons to foresee the consequences of their actions, it is common knowledge that lack of life experience affects the level of maturity and can affect the ability of youths to foresee the consequences of their actions. This is not to say, however, that youths by virtue of their age alone have diminished capacity. Rather, their age and level of maturity are relevant considerations for the trial judge in determining whether or not it is appropriate to draw the common sense inference that they actually intended the natural consequences of their actions in the circumstances of a given case. Whether or not the inference is ultimately drawn will depend on the evidence before the trial judge…

[281] Similarly, in ***R v SK***, 2019 ONCA 776, the Court stated that an offender's age and level of maturity must be examined in determining whether the evidence establishes intent. The accused in ***SK*** was 15 and was convicted of constructive first degree murder of a police officer pursuant to sections 229(c) and 231(4)(a) of the *Criminal Code*. The accused had initially been pulled over by police for dangerous driving. Following the accused's failure to exit the vehicle as requested, the officer opened the driver's side door and reached into the vehicle in order to undo the accused's seatbelt in an effort to remove him from the vehicle. The vehicle suddenly took off and a crash ensued, injuring the accused and killing the officer.

[282] In allowing the appeal the Court (in separate decisions each concurring on this point) found that the trial judge's failure to instruct the jury to consider the young offender's age and maturity

level before relying on the common-sense inference directly impacted one of the elements of the offence: namely whether the offender knew his actions were likely to cause the officer's death.

[283] Although tried on the basis of unlawful act murder, certain comments made by the Court are applicable at bar as well. In particular, the Court stated that "where a finding of knowledge of the likelihood of death is required, a trier of fact must be cautious before inferring actual knowledge based entirely or substantially on the common-sense inference": para 71. Of course, in cases tried under s 229(a)(ii), subjective knowledge of the likelihood of death is likewise an essential requirement.

[284] The Court continued, at para 80 to state:

> As a starting point, this was a tragic case in which a police officer was killed as a result of the irresponsible acts of a headstrong 15-year-old. It was important that, once the jury concluded that the appellant's actions were intentional, they be cautioned not to rely on the common sense inference to find that the appellant knew his actions were likely to cause the officer's death without carefully considering all relevant evidence capable of pointing away from it.

[285] While the facts of ***SK*** are in many ways distinguishable from the case before me, of note in ***SK*** is that the young offender claimed to have been acting in a state of panic. When asked whether he knew his actions in driving up the highway with the officer halfway in the van were likely to kill the officer, he replied that "that thought never crossed my mind".

[286] The Court in ***SK*** commented that if, as in ***Shand***, panic could be a factor to considering in assessing whether an accused knew a dangerous act was likely to result in death, then "it only makes sense that age and level of maturity could be a similar factor": para 78. The Court concluded that the trial judge should have cautioned the jury that youthful offenders do not have the same life experience as adults, and that as a result, they may lack the level of maturity to foresee the consequences of a particular course of action: para 84.

[287] Similar to the reasoning in ***M(F)***, the Court in ***SK*** did not find that youthful offenders, *per se*, are somehow deemed to be incapable of appreciating the likelihood of their actions. Rather, the Court instructed that the trier of fact must determine whether the youthful offender before them in fact did so, taking into consideration the whole of the evidence: para 146.

[288] Although a sentencing decision, ***R v B(D)***, 2008 SCC 25 is of assistance in explaining why – with youthful offenders - age and maturity are relevant considerations in considering whether a common-sense inference as to knowing the likely consequences of one's actions may properly be drawn. The offender in this case was a 17 year old who had pled guilty to manslaughter following a fight. Abella J for the majority commented as follows at para 62:

> It is widely acknowledged that age plays a role in the development of judgment and moral sophistication. Professor Allan Manson notes that "[t]he general principle that applies to youthful offenders ... [is] that a lack of experience with the world warrants leniency and optimism for the future" (The Law of Sentencing (2001), at pp. 103-4). And Professor Bala describes the YCJA as

> premised on a recognition that to be a youth is to be in a state of "diminished responsibility" in a moral and intellectual sense. Adolescents, and even more so children, lack a fully developed adult sense of moral judgment. *Adolescents also lack the intellectual capacity to appreciate fully the consequences of their acts. In many contexts, youths will act without foresight or self-awareness, and they may lack empathy for those who may be the victims of their wrongful acts. Youths who are apprehended and asked why they committed a crime most frequently respond: "I don't know."* Because of their lack of judgment and foresight, youths also tend to be poor criminals and, at least in comparison to adults, are relatively easy to apprehend. ... This is not to argue that adolescent offenders should not be morally or legally accountable for their criminal acts, but only that their accountability should, in general, be more limited than is the case for adults.
>
> (Youth Criminal Justice Law, at pp. 3-4 (footnotes omitted)) [emphasis added]

[289] More recently, in ***R v KJM***, 2019 SCC 55, in examining whether the presumptive ceilings established in *Jordan* apply to youth justice court proceedings, the majority commented as follows, at para 51:

> *Reinforcing the connection between actions and consequences*. First, because young persons have "a different perception of time and less well-developed memories than adults" (Bala and Anand, at p. 144), their ability to appreciate the connection between actions and consequences is impaired.[…] [emphasis in original]

[290] As the above cases make clear, the sole fact that an offender is a youth does not mean that they are incapable of appreciating the likely consequences of their actions. The analysis must be fact-specific and consider the characteristics of the youth who is in front of the court.

[291] Here, as I have discussed above, the Accused displayed many indicia of maturity, including, having older friends, a job, a suite, a girlfriend, and a car. However, he also displayed a number of indicia of immaturity: he lived partially at home, he was reliant on his mother, he spent most of his time engaging in 'typical' teenage activities, he seemed unwilling/unable to learn from his past mistakes, he lacked any insight into the effect of his crime on others, he appeared to lack empathy, and he came across as insolent in Court – notwithstanding he was on trial for first degree murder.

[292] Given these indicia of immaturity, and despite the fact that the Accused in this instance is older than the offenders in ***M(F)*** and ***SK***, I am hesitant to draw any inferences concerning knowledge of the likelihood of the consequences of the Accused's actions. Given his relative youth along with the personal characteristics of this Accused, there is some evidence that his age and his maturity could have realistically impacted his ability to fully appreciate the likely outcome. I am therefore unable to drawn upon the common-sense inference urged upon me by the Crown.

[293] To the extent that the Crown submits in its written materials that some evidence of diminished capacity needs to be demonstrated beyond the indicia of immaturity discussed above, I disagree. The Accused's youthfulness is a factor that must be considered in the analysis of his subjective appreciation of the likelihood of death.

[294] As such, even if I completely discount the testimony of the Accused, on the basis of the evidence which I do accept, I am left with a reasonable doubt as to whether the Accused turned his mind to whether the consequences of his actions were likely to result in the death of Sgt Harnett.

v) Causation

[295] Again, notwithstanding the Accused's plea to manslaughter, the question of causation was raised during closing argument at trial. I must therefore address this issue.

[296] In my view, the facts do not support an argument that the second collision severed the causal connection between the Accused's act and Sgt Harnett's death.

[297] The Accused spent approximately 26 minutes waiting in the Vehicle while his information was being processed. He was positioned in a manner providing a view to Falconridge Drive, and the passing traffic. He stated that the roads were busy as it was New Year's Eve. Ejecting Sgt Harnett into an oncoming lane of traffic, at night and at high speeds, left him in obvious danger.

[298] The evidence demonstrates that that the Accused's actions caused Sgt. Harnett to become dislodged just as the eastbound Infiniti came up to the westbound Toyota. I accept Mr. Ogunsanya's evidence that everything happened fast and that he actually thought the occupants of the Infiniti had thrown an object toward his vehicle. He braked hard but could not avoid impact. Mr. Oguysanya's belief that the object being thrown was "coming from the car that [was] passing [him]" signifies that the two vehicles were in very close proximity to one another when Sgt Harnett was dislodged. In such circumstances, impact would have been near-instantaneous.

[299] Causation was discussed by our Court of Appeal in ***R v Magoon***, 2016 ABCA 412, with the Court stating, at para 75 that:

> The phrase "significant contributing factor" comes from *R v Maybin*, 2012 SCC 24, [2012] 2 SCR 30, a case about intervening acts. This is only one way to describe the causation test. In order to determine legal causation in a homicide offence, the Crown must prove that the accused's acts were a "contributing cause of death, outside the *de minimis* range": *R v Smithers* (1997), [1978] 1 SCR 506 at 519, 75 DLR (3d) 321; *R v Nette*, 2001 SCC 78, [2001] 3 SCR 488. In *Nette* (at para 72), the Supreme Court of Canada noted that judges may use a range of expressions to describe this standard:
>
> > . . . while different terminology has been used to explain the applicable standard, ... whether the terminology used is "beyond *de minimis*", "significant contribution" or "substantial cause", the standard of causation which this terminology seeks to articulate, within the context of causation in homicide, is essentially the same.

[300] Given the speed at which the Infiniti Vehicle was travelling, the Accused's action of dislodging Sgt Harnett from the Vehicle and necessarily into the westbound lane and directly into the path of the Toyota, I conclude that the Accused's acts were a significant contributing cause of the death. It is therefore immaterial whether there may have been more than one operative cause of death.

[301] ***R v Nette***, 2001 SCC 78, the majority discussed how best to articulate the test for causation, noting two connected concepts, at paras 44 – 45:

> In determining whether a person can be held responsible for causing a particular result, in this case death, it must be determined whether the person caused that result both in fact and in law. Factual causation, as the term implies, is concerned with an inquiry about how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result. Where factual causation is established, the remaining issue is legal causation.
>
> Legal causation, which is also referred to as imputable causation, is concerned with the question of whether the accused person should be held responsible in law for the death that occurred. It is informed by legal considerations such as the wording of the section creating the offence and principles of interpretation. […] In determining whether legal causation is established, the inquiry is directed at the question of whether the accused person should be held criminally responsible for the consequences that occurred. […]

[302] The majority in ***Nette*** goes on to recognize that while causation is a distinct issue from *mens rea*, where: (i) intent to cause bodily harm; (ii) that the accused knows is likely to be fatal, has been established, causation is generally not an issue. That is, the *mens rea* requirement generally resolves any concerns surrounding causation: see ***Nette*** para 47.

[303] Moreover, I do not see how a prosecution under s 229(c) of the *Code* would change this Court's conclusions on causation. The requirement that the act in issue resulted in death under s 229(c) is met on the evidence before me. Clearly there can be more than one cause of a death: ***R v Meiler*** (1999), 136 CCC (3d) 11 (ONCA) para 30. In ***Meiler***, the Court further noted that the test for causation created by the language in s 229(c) is the same as the test in s 222(5), and that s 229(c) requires that the act of the offender "causes the death of a human being."

[304] In ***R v Sinclair***, 2007 MBQB 219 at para 40, in concluding that an approaching motorist who struck a victim left unconscious and beaten on a roadway was not an intervening act that breaks causation, the Court stated: "…the ordinary course of events would be that a car may strike him."

[305] The evidence clearly establishes a direct causal relationship between Sgt Harnett being ejected off the Vehicle and into the westbound lane of Falconridge Drive and him being hit – almost instantaneously - by a car being driven in a normal fashion in that lane. There is no question that the Accused's actions constituted a significant contributing cause of Sgt Harnett's death. Again, his cause of death was due to significant internal injuries listed as blunt force trauma.

[306] I address causation in order to provide a full analysis should this decision be subject to an appeal, and in relation to the alternate route to criminal liability, as discussed further, below.

vi) Alternate routes to criminal liability

[307] The Accused submits that since the Crown argued for conviction under 229(a)(ii) of the *Code*, it (and the Court) cannot now proceed to convict pursuant to s 229(c). The difference between these provisions is that 229(a)(ii) requires that the Accused intend to cause bodily harm likely to cause death, while 229(c) provides that a person can commit murder without *intending* harm or death in instances where he engages in an activity that has an unlawful object which he knows is likely to cause death.

[308] Counsel for the Accused submits that this matter should have proceeded before the Court pursuant to s 229(c) of the *Code* as opposed to s 229(a)(ii) and that it cannot now be changed. I wish to make a couple of comments regarding this submission.

[309] First, Defence Counsel submits in his written brief that "the Crown argued for a conviction on the basis of s 229(a)(ii) of the *Code*. The Indictment refers specifically and exclusively to that provision": page 4. This in incorrect. Rather, as noted by the Crown, the Accused was indicted pursuant to s 235(1) of the *Code*, and was arraigned on this charge at the outset of trial.

[310] Regardless, the Crown chose to conduct its prosecution under s 229(a)(ii) of the *Code*. The possibility of a path to conviction under s 229(c) was only raised following the conclusion of the evidentiary part of trial, during closing argument.

[311] Counsel for the Accused submits that the only way s 229(a)(ii) is an available pathway is if the Crown can prove that the only possible inference in the circumstances is that the Accused was effectively using the car as a weapon to kill. It distinguishes cases involving shots fired from a gun or a lethal beating from a flight from police. I disagree. Deliberate actions to dislodge a person from a vehicle at high speeds on a busy roadway may, in appropriate cases, demonstrate intent to kill even if the vehicle itself was not used to inflict any injuries.

[312] In any event, section 229(a)(ii) is available to the prosecution given that I have found the evidence established an intention on the part of the Accused to cause serious bodily harm. As noted in ***Shand***, where an accused intends to cause serious bodily harm, the conduct will almost invariably come under s 229(a)(ii) and s 229(c) will not apply: para 135.

[313] In my view, the Crown correctly asserts that it is within the jurisdiction of this Court to find a pathway to murder under s 229(a) of the *Code*. However, this is not the only avenue under which liability may be found in this instance.

[314] The law is clear that the Crown is permitted to adapt its theory on liability to conform to the evidence and the applicable legal principals arising therefrom: see ***R v Pickton***, 2010 SCC 32 at paras 18-19. Although not required in this case, I note that the Crown may amend an indictment to conform with the evidence at trial: s 601(2) of the *Code*.

[315] In the case before me, I find that the evidence could also support a prosecution pursuant to s 229(c) of the *Code*. This offence, sometimes referred to as unlawful object murder, provides that

culpable homicide is murder "if a person, for an unlawful object, does anything that they know is likely to cause death, and by doing so causes the death of a human being, even if they desire to effect their object without causing death or bodily harm to any human being."

[316] In ***R v Roks***, 2011 ONCA 526, Justice Watts distilled the offence of unlawful object murder down into the following elements, at para 125:

> i. an unlawful object ("for an unlawful object");
>
> ii. a dangerous act ("does anything that he knows is likely to cause death and thereby causes death to a human being"); and
>
> iii. knowledge or foresight ("that he knows is likely to cause death").

[317] Section 229(c) requires that the unlawful object be something other than the harm that is foreseen as a consequence of the dangerous act: ***Shand*** para 136. As described in ***Roks***, at paras 126 - 127:

> …The unlawful object must be conduct which, if prosecuted fully by the accused, would amount to a serious crime, that is, an indictable offence requiring *mens rea*: ***Shand***, at para. 127; ***R. v. Vasil***, [1981] 1 S.C.R. 469 (S.C.C.), at p. 490. The unlawful object that an accused pursues must be something other than to cause the death of the victim or to cause the victim bodily harm…
>
> It is critical that the unlawful object be distinct from and not merge with the dangerous act….

[318] Despite the Crown's submissions to the contrary, in my view, the Accused's dangerous actions could be considered sufficiently distinct from the unlawful object. That is, it could be open to find that the Accused drove dangerously and erratically in furtherance of his desire to carry out his unlawful object of flight from police during an attempted lawful arrest. That is, the flight itself is not inherently dangerous but is nevertheless a distinctly an unlawful act, and there was an additional layer of dangerous actions (i.e., speeding, actions to eject the victim, and steering maneuvers) that are not necessary for the unlawful act.

[319] The Courts in both ***R v Jiwa***, 2010 ONSC 1636 and ***R v SK,*** 2014 ONCA 138 ("***SK 2014***"), dealt with directions for committal in cases where there might be competing inferences arising from the evidence, allowing for various pathways to conviction. In ***SK 2014***, the matter was remitted back to the preliminary inquiry judge with a direction that the appellant be committed for trial for first degree murder under ss. 229(a)(ii) and 229(c) of the *Code*, although the Crown ultimately proceeded only under s 229(c).

[320] Of note, the preliminary inquiry judge had initially discharged the accused on the first-degree murder charge and committed him for trial on the lesser offence of manslaughter. The Court of Appeal agreed that it was not for the preliminary inquiry judge to prefer evidence that the accused panicked when there was also sufficient evidence to support an inference of knowledge of likelihood of death: ***SK 2014*** at paras 2-3. As noted above, the main issue in ***SK*** was knowledge of the likelihood of death.

[321] In ***Jiwa***, the preliminary inquiry judge committed the accused to stand trial on a constructive first-degree murder charge based on either s 229(a)(ii) or s 229(c). A police officer became caught and held on between the driver's side door and the interior of a stolen car being driven by the accused. The accused reversed the car through a garden in an attempt to resist the arrest. He maneuvered the car around a tree in a manner resulting in the door crushing and killing the officer.

[322] The preliminary inquiry judge's finding that the requisite intent – to either cause bodily harm (229(a)(ii)) or to effect a desired unlawful object (229(c)) - could be reasonably inferred on the evidence was upheld. Establishing the additional element that the accused either knew his direct act was likely to cause death, or knew that the act done in furtherance of the unlawful object was likely to cause death was also possible on the evidence. That is, a committal under s 229(a)(ii) was possible in that the evidence could lead to a reasonable inference that the accused deliberately backed the car door into the tree, knowing the crushing action would likely result in the officer's death. It was also possible under s 229(c) in that the evidence could lead to a reasonable inference that the accused drove dangerously and erratically in effecting his object of escape knowing that this dangerous conduct was likely to result in the officer's death.

[323] Given the evidence in the case at bar, and similar to ***SK 2014*** and ***Jiwa***, I am of the view that a prosecution may have gone forward pursuant to either s 229(a)(ii) or 229(c). That is, the Accused may have intended to cause harm or may have intended to commit a dangerous act in furtherance of an unlawful object.

[324] However, given my finding that the Accused may not have subjectively appreciated that his actions were likely to result in death, the Crown would have failed prove all of the requisite elements of an offence under s 229(c) of the *Code* beyond a reasonable doubt in any event.

[325] In ***Shand***, the Court addressed the appropriate charge in an instance where the accused discharged a firearm into the deceased's chest. He was charged under s 229(a)(i) and (ii) as well as s 229(c) in relation to the accused's defence of accidental discharge. In discussing the distinction between the two forms of charges, the Court noted as follows, at para 129:

> …The difference between ss. 229(a) and 229(c) is that s. 229(c) requires more than proof of an unlawful object. The Crown must also prove that, when the dangerous act was committed, the person knew that death was likely.[…]

[326] The full *mens rea* requirement was further explored in ***Roks*** at paras 131-132:

> … The fault or mental element refers to knowledge of the consequences of the dangerous act. Knowledge of a specific consequence: death of a human being. And knowledge of the prospect of the consequence: the likelihood of its occurrence.
>
> *The knowledge or foresight to which s. 229(c) refers is the actual or subjective knowledge of the person charged, not the objective or constructive knowledge of a reasonable person in the same circumstances*: ***Shand***, at para. 188. An assessment of the actual knowledge of an accused is an intensely fact-specific inquiry that

> requires and involves a careful analysis of all the circumstances in which the dangerous act occurred. *The inquiry focuses on the accused's knowledge contemporaneous with the dangerous act*…[emphasis added]

[327] Again, I have found above that I am left with a reasonable doubt as to whether the Accused turned his mind to the consequences of his actions during his flight down Falconridge Drive. The Crown has therefore failed to establish the knowledge requirement which forms an essential element of an offence under s 229(c). In ***Roks***, at para 134 that Court clarified that:

> The extent of the risk of death occurring as a consequence of the dangerous act is defined by the term "likely". The accused must know that the death of a human being is a likely consequence of the dangerous act. The term "likely" refers to the probability of a consequence. Proof that an accused was aware of the risk, possibility, danger or chance of death as a consequence of a dangerous act is inadequate to establish the mental or fault element in s. 229(c)…

[328] As such, the above analysis as to an alternate route to liability under s 229(c) of the *Code* is moot as the *mens rea* requirement for either form of murder under s 229 has not been established on the requisite standard. I include this analysis in order to ensure a consideration of all of the arguments before me in case of an appeal.

Conclusion

[329] As I have discussed above, in law, more is required than proof that the accused is probably guilty. A trier of fact who concludes that an accused is probably guilty must acquit. I therefore find the Accused not guilty of the offence of murder, but guilty of the offence of manslaughter.

[330] A finding of first-degree murder in this case is a high bar to meet. It cannot be achieved through a retrospective lens and about what a person ought to have known in light of the horrific consequences that occurred; it has to be based on the contemporaneous foresight that death was likely at the time of the incident and in consideration of all the factors I have mentioned. In other words, I had to be almost certain that this Accused person, standing in his shoes with all his life experiences, knew that his actions were likely to cause Sgt Harnett's death. I have not found this to be the case.

[331] The Crown has established that the Accused committed certain unlawful acts, which a reasonable person in the same circumstances would have realized was exposing Sgt Harnett to a risk of serious bodily harm. In engaging in this conduct, the Accused contributed significantly to Sgt Harnett's death.

[332] In this case, I have found the Accused guilty of manslaughter independent of his guilty plea to the same offence. I note this only due to the fact that a Notice of Intention to apply for an adult sentence was filed by the Crown as agent for the Attorney General on January 13, 2021. It was unclear at the time the plea was entered as to whether the Accused was aware of this filing and therefore whether his plea met the conditions of being voluntary and informed: see s 606 of the *Code*.

Closing remarks

[333] I know that this has been a difficult and emotional trial for all involved. A grieving family had to revisit testimony concerning the tragic events of December 31, 2020 for a second time – the first being during the sentencing involving Mr. Abdulrahman. Sgt Harnett's colleagues had to relive the horrific experience of the flight all over again, as did the innocent driver of the oncoming Toyota which struck Sgt Harnett. A young person stood in jeopardy of being convicted of murder in the first degree. No one has left the courtroom unscathed.

[334] I do wish to stress the following to the family, friends and colleagues of Sgt Harnett, being as many of them may not have legal training. Under the *Criminal Code*, an offender commits a homicide when he causes the death of another. Culpable homicide has only three classifications, the latter of which was not in issue during this trial: murder, manslaughter or infanticide.

[335] While the Accused was found not guilty of murder, I stress that he has still been found guilty of committing a culpable homicide. I say this so the family appreciates that in finding the Accused guilty of manslaughter, I have found he has committed one of the most serious offences contained in our *Criminal Code*.

Heard from the 31st day of January to the 2nd days of February and the 27th to the 29th days of September, 2022.

Delivered orally November 10, 2022.
Dated at the City of Edmonton, Alberta this 14th day of November, 2022.

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