Court of King's Bench of Alberta

Citation: R v Braima, 2022 ABKB 708

Date: 20221027
Docket: 200162725 Q3
Registry: Calgary

Between:

His Majesty the King

Crown

- and -

Victor Fayiah Braima

Accused

Memorandum of Decision
of the
Honourable Justice A. Woolley

Introduction

[1] On February 2, 2020, Sheldon Wolf died after being shot twice while in the car of the accused Victor Braima.

[2] Before the shooting, Mr. Braima helped arrange a drug transaction between Mr. Wolf and Mr. Braima's friend "Chemakie", through which Mr. Wolf purchased and consumed cocaine.

[3] After the shooting, Mr. Braima helped dispose of Mr. Wolf's body by the side of a Rural Road just north of Calgary. He tried to hide the evidence of his involvement in Mr. Wolf's death. He wiped out his car and removed the license plate. He listed the car for sale online. He left it on

the street near his parent's, in front of a construction site. He dumped evidence in garbage bags in a park. He deleted records from his phone, in particular records related to his interactions with Chemakie and another friend, Selmon.

[4] Mr. Braima's conduct on the night of February 2, 2020 was thus generally troubling, both legally and morally.

[5] The issue before this Court, however, is narrow and specific. Mr. Braima has been charged on a single count:

> That he, on or about the 2nd Day of February 2020, at or near Calgary, Alberta, did unlawfully cause the death of Sheldon Wolf, thereby committing manslaughter, contrary to Section 236(b) of the Criminal Code of Canada.

[6] The Crown acknowledges that the evidence tends to support the conclusion that Mr. Wolf was not shot by Mr. Braima. The Crown advances two bases for Mr. Braima's guilt on the charge of manslaughter as a party.

[7] First, it says that the evidence shows that Mr. Braima planned and assisted in a robbery of Mr. Wolf. Mr. Wolf was assaulted and shot during the course of that robbery. The Crown submits that Mr. Braima's participation in the robbery makes him a party to manslaughter under either s. 21(1) or 21(2) of the *Criminal Code*, RSC 1985, c, C-46.

[8] Second, the Crown says that Mr. Braima middled a drug transaction between Mr. Wolf and Chemakie. After selling the drugs to Mr. Wolf, Chemakie attempted to rob Mr. Wolf, and assaulted and killed him. The Crown submits that Mr. Braima's participation in the drug transaction also makes him a party to manslaughter under either s. 21(1) or 21(2).

[9] For the reasons that follow, I find Mr. Braima not guilty of manslaughter. The Crown has not proven beyond a reasonable doubt that Mr. Braima had prior knowledge of, planned or participated in the robbery of Mr. Wolf. Nor am I satisfied that he would reasonably have foreseen that Chemakie would try to rob Mr. Wolf. While the evidence does prove that Mr. Braima middled a drug transaction, in the circumstances of this case I am not satisfied that his having done so provides a sufficient basis to find him liable for manslaughter under either s. 21(1) or s. 21(2) of the *Criminal Code*.

Background Facts

[10] In February 2020, Mr. Braima was 23 and living in a basement apartment with his girlfriend Kiara and three other people. He was taking a carpentry program at SAIT and supporting Kiara and himself through selling cocaine and sometimes other drugs. Mr. Braima had previously been incarcerated for drug trafficking and had intended not to return to drug trafficking upon his release; however, Kiara had an auto immune disease (psoriasis) that had grown worse, and she could not contribute to their finances.

[11] He did not have much money at the time. According to a text he sent to Kiara a few hours prior to meeting Mr. Wolf, he only had 11 dollars in his debit account. He had debts outstanding, and was responsible for paying the rent, along with his school and car expenses. He says, however, that while his financial situation was not great, it was OK. He was getting by.

[12] February 2nd was a Sunday. Mr. Braima had been awake in the early hours of that day, engaged in drug trafficking. He sold cocaine and tried to find new contacts to whom he could sell cocaine.

[13] At around two o'clock in the morning he got a phone call from a high school friend, whose number was saved in Mr. Braima's phone as "Chemakie".

[14] Chemakie is not the friend's legal name. His legal name was introduced at trial. Given, however, that this individual did not participate in these proceedings, or provide his version of the events of February 2, I have chosen to call him Chemakie.

[15] Similarly, I have chosen to call another individual "Selmon", which is the name he was listed as in Mr. Braima's contacts. Selmon was a friend of both Mr. Braima and Chemakie, who the evidence shows was involved in the events of February 2, 2020, but who also did not participate in the trial. Again, Selmon is not this individual's legal name.

[16] Mr. Braima did not answer or respond to the call from Chemakie.

[17] After going to bed late, Mr. Braima woke up close to noon. He spent the day continuing to communicate about selling cocaine, and also about purchasing marijuana. He was not able to sell any cocaine, however, because he had lost it – he told Kiara he thought he'd dropped it at home.

[18] In addition, Mr. Braima drove to High River to purchase some second hand boots he'd found online. He needed steel toed boots for school. The boots turned out to be Timberland boots, and not steel toed, but they only cost $9, so Mr. Braima bought them anyway.

[19] Chemakie called Mr. Braima again at around 1:00 pm. He and Mr. Braima then exchanged text messages and phone calls, through Chemakie's phone and also through Selmon's phone. They eventually arranged to meet at Chinook Mall to smoke weed.

[20] Mr. Braima testified that he and Chemakie went to high school together, although Chemakie was a grade younger than he was. They both played soccer during high school. After high school they sometimes ran into each other at the apartment building Mr. Braima lived in. They would hang out, for 15-20 minutes, in the parking lot and smoke weed. That happened about once a month. Mr. Braima said that he would see Chemakie when Chemakie came to Calgary from Saskatchewan where, as of 2020, Chemakie was residing.

[21] Chemakie had a history with law enforcement. Prior to February 2020, Chemakie had been investigated by the police and charged in relation to three incidents involving drugs, firearms and (in two of the incidents) violence. None of those charges had, however, led to convictions. The charges were stayed with respect to two of the incidents and withdrawn in the third. Nor was the Court provided with any evidence that Mr. Braima knew of these incidents or charges.

[22] As of February 2020, Chemakie was bound by a release order which required him to report to a probation officer in Regina, Saskatchewan. Chemakie reported to his probation officer in Regina on February 6, 2020. Thereafter he stopped reporting and, on February 20, 2020, a warrant was issued for his arrest for failing to report. As of this trial, Chemakie had not been arrested.

[23] Meanwhile, Sheldon Wolf and his wife Jessel Wolf were driving to Calgary. Ms. Wolf, who is originally from the Philippines, had a meeting at the US Consulate on the morning of

February 3rd for the purpose of obtaining a visitor's visa to allow her to travel to the United States. They arrived in Calgary at about 5:00 pm on the 2nd, and checked into the Sandman Hotel.

[24] Mr. Wolf, who had been trying to overcome what Ms. Wolf described as an issue with alcohol, stopped in the hotel bar to have a beer. Ms. Wolf went to the hotel room but came down shortly after to go to dinner with Mr. Wolf. They took an Uber to the Chop Steakhouse at Chinook Mall.

[25] Once at Chop, Ms. Wolf ordered an iced tea, and Mr. Wolf ordered a steak and a bottle of wine. Ms. Wolf was upset with how much alcohol he was consuming and left the restaurant. She and Mr. Wolf exchanged text messages arguing with one another. She testified that she was upset and crying.

[26] At around 7:15 pm, Mr. Wolf and Ms. Wolf met again at the southwest entrance to the mall, near the Chapters bookstore and the movie theatre, to take an Uber back to the hotel.

[27] They saw Mr. Braima who, by this point, was parked outside the mall entrance to meet Chemakie. Mr. Braima and Ms. Wolf gave largely identical accounts of what happened when they met. Mr. Wolf approached Mr. Braima and asked him if he was an Uber driver. Mr. Braima said no. Mr. Wolf asked Mr. Braima to drive him to the Sandman Hotel. Mr. Braima said "no man, I'm waiting for a friend". Mr. Wolf offered to pay Mr. Braima $40 to drive them, and Mr. Braima agreed.

[28] Mr. Braima says that he agreed to drive Mr. Wolf not because of the money, but because he said to Mr. Wolf, "hey is that your daughter", regarding Ms. Wolf. Mr. Wolf responded, "no, that's my wife" and then they both laughed. Mr. Braima said that it was the moment of humour that made him agree to drive Mr. Wolf: "I just – you know, it's just like a quick connection. And I thought, you know, maybe, you know – I just thought maybe it's a good thing to do".

[29] Ms. Wolf did not testify as to that exchange. She said that Mr. Wolf told Mr. Braima that they needed a ride because she was tired.

[30] Mr. Braima was driving a two door Toyota Scion. Mr. Wolf let Ms. Wolf into the back of the vehicle, and Mr. Wolf climbed into the passenger seat. Ms. Wolf said that the car smelled strongly of marijuana.

[31] Ms. Wolf and Mr. Braima give generally consistent accounts of what happened on the car ride to the hotel. Their accounts are also supported by phone records from the phones and wireless providers, which show calls were made between Mr. Braima's phone and Selmon's phone in that time period.

[32] Mr. Braima texted Chemakie to tell him that he was driving downtown. Chemakie responded, "I'm here" "man" "wtf". Mr. Braima then spoke on the phone with Chemakie, who he testified was using Selmon's phone. The call was on speaker phone.

[33] Ms. Wolf also recalled a phone conversation during the drive, although she could not recall most of the content. She did recall them talking about something like "women" or "girls"; "girls" is slang for cocaine.

[34] Mr. Braima said that Chemakie was upset that Mr. Braima had left the mall. They agreed to meet at the Sandman Hotel. Chemakie texted Mr. Braima "Yo send [it]" and Mr. Braima texted back, "Sand man hotel dt".

[35] During the drive Mr. Wolf said, “smells like weed in here man, we should have a party…we should get some blow”. Mr. Braima testified that he did not know how to answer, since he did not have any cocaine with him, but that Chemakie, who was on the phone said, “you want some girls?”, which was a reference to cocaine.

[36] In cross-examination, Mr. Braima described the conversation as Chemakie saying “who is that” and Mr. Braima responded, “buddy in my car wants some girls”. He said that he called Mr. Wolf buddy because he did not know his name.

[37] Mr. Braima recalled that Mr. Wolf asked for a ball of cocaine, which was 3.5 grams. He believes that Chemakie was still on the phone when this conversation occurred. That Mr. Wolf said he wanted a ball, and Chemakie said he had a ball.

[38] Mr. Braima testified that at this point he assumed that he would drive Mr. and Ms. Wolf to the Sandman Hotel, and that at the hotel Mr. Wolf would purchase cocaine from Chemakie.

[39] They arrived at the Sandman Hotel, and Mr. Wolf paid Mr. Braima. He also showed Mr. Braima an envelope containing cash. Ms. Wolf said that Mr. Wolf showed Mr. Braima the inside of the envelope which contained a stack of bills, about ¼ inch thick, which she understood to be about $1000. Mr. Braima said that Mr. Wolf showed him the envelope, that he understood it to contain cash, but that he did not see the cash itself. He said that when Mr. Wolf showed him the envelope he said, “I have money”. Mr. Braima understood this as Mr. Wolf attempting to get drugs.

[40] Mr. Braima said that he had assumed that Mr. Wolf had enough money to buy cocaine prior to him being shown the envelope.

[41] Once they arrived at the Sandman Hotel, Mr. Wolf did not get out of the car – he did not leave, and he did not move to let Ms. Wolf leave. Mr. Wolf again asked for cocaine, and Ms. Wolf said Mr. Braima responded, “no man, I don’t know”.

[42] Mr. Braima got up to let Ms. Wolf leave the vehicle and said to her, “sorry”. Ms. Wolf was crying, and talking to her mother-in-law on the phone.

[43] Mr. Braima also testified that when Mr. Wolf asked for cocaine during the car ride, Ms. Wolf had slapped him.

[44] Ms. Wolf entered the hotel at 7:42 pm.

[45] At around the time that Ms. Wolf left the car, Mr. Braima said that he asked Mr. Wolf to leave, but Mr. Wolf refused, saying something like “your buddy is already coming. Let’s just wait. I can grab it off him.”

[46] Also, at 7:41 pm, Mr. Braima had another phone call from Selmon’s number which lasted two minutes and 11 seconds. He does not recall what happened during that call. Selmon was not called as a witness at the trial.

[47] Mr. Braima testified that as he and Mr. Wolf sat in his Scion waiting for Chemakie, a white SUV drove past them. The rear passenger window of the white SUV was open, and Mr. Braima could see Chemakie sitting in the back. This account is confirmed by CCTV footage from the alley behind the Sandman.

[48] Mr. Braima said that he did not understand why the car had driven past. At 7:44 pm he sent a text message to Selmon saying “Buddy as 8 band pullup”.

[49] Expert evidence from the Crown said that "band" means $1000 or $10,000, suggesting that by 8 band Mr. Braima would have meant $8000 or $80,000.

[50] Mr. Braima said that by 8 band he meant $800, and said that he used that expression because he did not know precisely how much money Mr. Wolf had, just that he had an envelope of cash.

[51] As noted, the evidence from Ms. Wolf was that Mr. Wolf had in the range of $1000 in cash in the envelope.

[52] Mr. Braima also explained that his reason for sending the text was that he was trying to encourage Chemakie to complete the drug transaction that had previously been discussed. Mr. Wolf would not leave the car, and Mr. Braima thought that if they did the drug transaction Mr. Wolf would leave the car. He believed that if he told Chemakie that Mr. Wolf had money, it would encourage Chemakie to do the drug deal. Mr. Braima testified that "buddy as 8 bands" means Mr. Wolf has money, and "pull up" means come.

[53] He noted in his testimony the risks for drug dealers in selling drugs to people they do not know, and in particular the risk that the purchaser could be an undercover officer.

[54] Mr. Braima also flashed his lights at the white SUV.

[55] Mr. Braima then received a second phone call from Selmon's phone. He could not recall the content of this phone call.

[56] He also acknowledged that he had deleted the record of these and other phone calls between his phone and Selmon's phone.

[57] After this exchange of calls and texts, Mr. Braima turned right (south) onto 7th Street SW. As he did so, he could see the white SUV at the side of the road, and Chemakie standing behind the white SUV. He pulled over. He said that he was expecting Chemakie to sell the drugs to Mr. Wolf through the window. However, Mr. Wolf let Chemakie into the car, and Chemakie climbed into the back seat. CCTV footage shows the white SUV and the Scion, and an individual climbing into the Scion on the passenger side, and the Scion driving away.

[58] At 7:51pm the Scion turned into an alley running parallel and between 8th and 9th Ave, and ending in the back of what was then the Knoxville Tavern. The white SUV can be seen lingering in the entrance to the alley – before it and just onto it, until 7:53 pm, when it too drives down the alley.

[59] The Scion pulled up behind a dumpster at the rear of the Knoxville Tavern. It was parked in this location for approximately two and a half minutes.

[60] According to Mr. Braima, during this time Mr. Wolf purchased the cocaine from Chemakie and, at some point, paid Chemakie for the drugs. Mr. Braima could not recall exactly when the money changed hands. Mr. Wolf then said something like "let's party" and consumed a line of cocaine using Mr. Braima's car manual, the dash of the car, and a rolled up bill. Mr. Braima did not consume any cocaine, but was instead smoking a cigarette.

[61] After Mr. Wolf had consumed the drugs, Chemakie pulled out a firearm and said "give me everything you have". Mr. Braima thought that Chemakie may have also said "I'm going to shoot you", but Mr. Braima could not recall with certainty.

[62] Mr. Wolf responded along the lines of "what makes you think I'm scared of that?" or "you think I'm scared of you?". Chemakie then struck Mr. Wolf on the temple with the butt of the gun.

[63] Mr. Wolf then tried to grab the gun, reaching back with his left hand, and also turning around.

[64] Mr. Braima did not have a good view of what was happening. Mr. Wolf was a large man – 268 lb and around 5'10". Mr. Braima thought that he saw Chemakie kick Mr. Wolf.

[65] Mr. Braima said he was thinking, "what the fuck?" and that he was trying to tell them to stop. He can't recall exactly what he said, but that it was something like "Yo! Yo!" but it could have been "what happened" or "what the fuck".

[66] Mr. Braima then heard a gunshot, and then two or three more. He recalled hearing three gunshots together. He said that Mr. Wolf then collapsed facing the back seat. He described Mr. Wolf as not moving any more, and being in that position from then on.

[67] Aspects of Mr. Braima's account of the killing of Mr. Wolf are corroborated by the forensic evidence. Mr. Wolf had five blunt force injuries to his face and head area, including a laceration consistent with being struck with the butt of the gun, and bruising on the cheek consistent with being kicked in the face. He was shot twice, once in the centre of his chest, and once in the right shoulder. A gun had been fired in the car, although the experts could not say where.

[68] Other aspects of Mr. Braima's account did not clearly match the forensic evidence. Mr. Wolf was shot twice, not three times, and nor was there any trial evidence of a third gunshot that missed him. The blood in the car was largely on the passenger seat, and was not on the floor behind the centre console. If Mr. Wolf was slumped over facing the back then, given the size of the car and that Mr. Wolf was shot in the chest and that he had a significant laceration on his head, I would have expected blood to be on the floor behind the centre console, not largely in the passenger seat. Further, while Mr. Wolf could have lost consciousness and died quite quickly, the evidence of Dr. Coetzee-Khan, which I prefer to the evidence of the defence expert, was that Mr. Wolf likely took about 30 minutes to die.

[69] I also noted as an issue the probability of all of these events – the drug transaction, the consumption of the drugs, the alteraction and the shooting – happening in the 2 and half minutes that the car was parked in the alley.

[70] After Chemakie shot Mr. Wolf Mr. Braima said to him, "You just fucked up my life," Chemakie responded "Yo, drive" and Mr. Braima started driving. He did not check to see if Mr. Wolf had a pulse or was breathing.

[71] Mr. Braima described the events in the car as traumatic.

[72] At 7:54 pm, the Scion, with the white SUV following it, drove east along 5th Ave. They drove out of the City, north on Deerfoot. Mr. Braima describes himself as afraid and panicking; he was afraid that Chemakie would shoot him.

[73] He described Chemakie as saying "You aren't going to go home tonight. I'm going to help you get rid of the car; you're going to come with me to Saskatchewan". Mr. Braima said that he responded, "don't worry, I'm not gonna say anything". He said that Chemakie also said to him "I know where your parents live". Mr. Braima testified that he understood Chemakie to be

implying, by the Saskatchewan comments, that Chemakie would take Mr. Braima out of town to kill him. Mr. Braima was trying to reassure Chemakie that he wouldn't say anything.

[74] They eventually turned off the Highway, and ended up in the Rural Route where they left Mr. Wolf's body at the side of the road.

[75] The white SUV followed the Scion north of the City. Mr. Braima said that he had not appreciated that the white SUV was following him until they turned off the highway. The white SUV waited nearby while Mr. Braima and Chemakie took Mr. Wolf's body out of the Scion. Mr. Braima then drove Chemakie back to the white SUV. Chemakie said "if you want to go ahead and snitch you can snitch". Mr. Braima responded, "no I'm not going to say nothing". He understood Chemakie to be testing him.

[76] Mr. Braima left Chemakie with the white SUV. He has not seen or spoken to Chemakie or Selmon since that time.

[77] He does not know where Chemakie's gun was at this point.

[78] Mr. Braima drove back to Calgary. He describes himself as scared and confused. He tried to reach his friend Mr. Maldini. Mr. Maldini, who died in April 2021, was Mr. Braima's cocaine supplier, and an old friend from high school, who was also incarcerated at the same time as Mr. Braima. Mr. Braima also tried to reach out to Kiara.

[79] He said that he went to Mr. Maldini's house, but Mr. Maldini wasn't there, so then he went and picked up Kiara from her parent's house. He had her sit in the back seat because of Mr. Wolf's blood in the car, but that they did not talk about what had happened. She was "kinda mad" at him for not responding to her calls earlier.

[80] He took her back to the apartment, and then tried to clean up the car. He wiped up the blood and put everything from the car in garbage bags. He took the garbage bags to Elliston Park, to dump them there.

[81] At about 10:45 pm a City of Calgary security guard came to Elliston Park to close the park gates. The guard saw a black male walk out of a wooded area and get into what he described as an older model blue SUV. Mr. Braima maintains that he drove the Scion to Elliston Park, and that he was on his own.

[82] The City of Calgary security guard discovered the garbage bags. The bags contained the personal effects of Mr. Wolf including his wallet, "man purse", identification, Filipino currency and the key to Mr. Wolf's truck. It also contained other items including the Scion's floor mats, and blood-stained gloves, clothes and rags. DNA testing of apparent blood stains matched Mr. Wolf, except for one on the driver's side floor mat, which matched Mr. Braima. Some of the clothing contained DNA of Mr. Braima and of Kiara.

[83] After he dropped the bags at Elliston Park, Mr. Braima contacted Mr. Maldini. His text messages indicate that he was contacting Mr. Maldini to purchase cocaine. Mr. Braima said, however, that he was just trying to get Mr. Maldini to talk to him, because he was panicking about what had happened. He called Mr. Maldini 14 times in the early hours of February 3rd, starting at 00:02:54 am, and ending at 00:31:02 am. He also texted a friend from SAIT and told him that he wouldn't be at school the following day. He asked the friend to tell the teacher that Mr. Braima had a family issue.

[84] Mr. Braima texted his brother at 1:40 am saying “Hey brother if anyone come to the house asking for me please tell or u or dad to tell them I don’t leave there nomore and I don’t have a phone”. At 1:58 am he added “And I need tht insurance tomr”.

[85] Emmanuel is Mr. Braima’s younger brother. Mr. Braima said that he sent this message in case the police came looking for him. He didn’t want his family to be harassed because of what he did, and he didn’t live there any more. Also, he needed insurance so that he could drive the other car he owned (which was uninsured) now that the Scion was not available.

[86] That night Mr. Braima also listed the Scion for sale on Kijiji.

[87] Over the next few days Mr. Braima took a number of other steps to obscure his involvement in what had happened. He left the Scion outside a house under construction with the plates removed. He deleted calls and messages from his phone, including records of conversations to and from Selmon’s phone, and an attachment he received from Chemakie through Snapchat. He got rid of his SIM card and got a new phone number. He told Kiara to turn off location data on her phone. He googled “where can I stay without a credit card”.

[88] He also shared his anxiety about what happened with his friends, Mr. Maldini and another friend Tyen, and he also spoke to his parents about what had happened.

[89] To Tyen he said, “I fucked bad bro” and to Mr. Maldini he said, “This shit is eating me cuz”. He researched the possibility of making an anonymous tip to the police. He handwrote a document, a small fragment of which can be seen in a photograph taken by Mr. Braima, and which may be a handwritten account of what happened. He testified that he and Tyen talked about the possibility of kidnapping Chemakie, so they could force Chemakie to go the police and, in that way, help ensure the police would believe Mr. Braima’s account.

[90] On February 5th the police searched Mr. Braima’s parents’ house.

[91] Mr. Braima ultimately contacted a lawyer, a step he discussed with Tyen, Mr. Maldini and his parents. He says that Tyen and Mr. Maldini gave him some money to help him pay for the lawyer. On February 7th the lawyer drove Mr. Braima to the police station.

[92] Mr. Braima gave an interview to the police. In the interview he stated that he wanted to talk to counsel and, in the excerpts read into Court, answered most questions with “I don’t know” even where the answer was one that he did, in fact, know. In the context, in which he also said that he wanted his lawyer present on more than one occasion, I understand Mr. Braima’s saying “I don’t know” as being effectively his assertion of his right to silence. I reject the Crown’s suggestion that in so stating he was lying to the police. I do not think that was his intention, or what the police would have understood from him answering their questions with “I don’t know”.

[93] I agree that Mr. Braima was not honest when he told the police he did not have a car, and do not accept his explanation in his testimony that this answer was technically correct, because one of his cars had no license plate, and the other had no insurance.

Issues

[94] Based on the evidence at trial, I find as fact that on February 2, 2020 Chemakie shot Mr. Wolf in the course of robbing him. Prior to the robbery, Mr. Braima had arranged for Chemakie to sell Mr. Wolf cocaine; Chemakie had done so, and Mr. Wolf had consumed the cocaine prior to the robbery, and prior to him being shot.

[95] In determining whether Mr. Braima is liable for manslaughter in relation to these events requires me to answer the following questions:

1. Did Mr. Braima participate in the robbery of Mr. Wolf and, if so, does this make him a party to manslaughter under either ss. 21(1) or 21(2) of the *Criminal Code*?
2. Did Mr. Braima's participation in the drug transaction between Mr. Wolf and Chemakie make him a party to manslaughter under either ss. 21(1) or 21(2) of the *Criminal Code*?

Analysis

Credibility

[96] The Crown challenged the credibility of Mr. Braima. They identified inconsistencies in his testimony. They noted that his recollection of events was variable, being clear in some respects and absent in others. The Crown suggested that parts of his testimony were implausible, in and of themselves, or in light of the other evidence.

[97] I agree with the Crown that Mr. Braima remembered some things and did not remember others. I also agree that in some respects his recollection of events did not align with other evidence. I also found him to be an occasionally combative witness during cross-examination.

[98] On the other hand, key parts of Mr. Braima's testimony were corroborated by Ms. Wolf or by the forensic evidence. Mr. Braima admitted facts that were unhelpful to his case, such as having been shown the envelope by Mr. Wolf, his post-offence efforts to hide his involvement, and his self-focussed response to Mr. Wolf being shot. He generally answered the questions that were put to him without evasion.

[99] Further, the variability in his recollection was unsurprising given the passage of time and the traumatic events that unfolded that night. A failure to recall is more ambiguous and less obviously damning than an identified falsehood. Ms. Wolf also had significant gaps in her recollection of that night.

[100] The inconsistencies with the other evidence were not significant enough to support a finding that Mr. Braima lacked credibility. While, for example, it may surprise me that a drug transaction, drug consumption, a robbery, an altercation and a shooting could happen in two and a half minutes, that timing is not so unlikely as to warrant a finding that Mr. Braima is not credible. On some inconsistencies – such as the memory of the security guard as to the car he saw in Elliston Park – I accept Mr. Braima's account as the more reliable.

[101] I also note that in most respects Mr. Braima's evidence was uncontradicted. None of the other people who had knowledge of the events of February 2nd – Chemakie, Selmon, Kiara, Tyen or Emmanuel – were called as witnesses.

[102] In sum, nothing in the record satisfied me that Mr. Braima was lying. The imperfections in his testimony arising from some inconsistency with other evidence, variability in his memory and the tenor of some of his responses to the Crown, are not sufficient to lead me to reject his evidence on the basis of credibility or reliability. I accept much of his testimony as the best account of what happened on February 2nd and thereafter, noting the extent to which elements of it are corroborated by Ms. Wolf and other evidence, and the absence of contradictory evidence. As the case law makes clear, that I believe some or all of Mr. Braima's evidence is a significant

factor in my assessment of whether the Crown has discharged its burden of proving beyond a reasonable doubt Mr. Braima's liability for manslaughter: ***R v Ryon*** 2019 ABCA 36 at para 35-39; ***R v Achuil*** 2019 ABCA 299 at para 17-18; ***R v W(D)***, [1991] 1 SCR 742

Governing Law

[103] Manslaughter covers a wide range of circumstances, but always requires "conduct causing the death of another person" as well as "fault short of intention to kill". That fault may arise either from committing another unlawful act – "a predicate offence of an unlawful act" – which causes death, or from criminal negligence: ***R v Creighton***, [1993] 3 SCR 3 at para 6-7.

[104] Where manslaughter arises from the commission of an unlawful act which causes death, the accused need not have foreseen death, but a reasonable person in the accused's position must have realized that the "unlawful act would likely put another person at risk of bodily harm in more than a brief or minor way": ***R v Hardy***, 2017 ABQB 588 at para 73; ***Creighton*** at para 11, citing ***R v DeSousa*** [1992] 2 SCR 944 at 961.

[105] As described more fully in ***DeSousa***:

> The act must be both unlawful, as described above, and one that is likely to subject another person to danger of harm or injury. This bodily harm must be more than merely trivial or transitory in nature and will in most cases involve an act of violence done deliberately to another person. In interpreting what constitutes an objectively dangerous act, the courts should strive to avoid attaching penal sanctions to mere inadvertence…*To maintain the correct focus it is preferable to inquire whether a reasonable person would inevitably realize that the underlying unlawful act would subject another person to the risk of bodily harm*: ***DeSousa*** at 961 [emphasis added].

[106] Based on the evidence in this case, Mr. Wolf died because he was shot by Chemakie. Shooting is a form of assault. Mr. Wolf was shot in the course of a robbery, in which he was threatened verbally and through Chemakie brandishing a firearm, and in which he was assaulted. Chemakie's killing of Mr. Wolf was a culpable homicide. Whether it was manslaughter or murder would depend on findings with respect to Chemakie's *mens rea*.

[107] While the Crown suggested in its pre-trial brief that Mr. Braima may have been the person responsible for shooting Mr. Wolf, the evidence did not support that suggestion, and the Crown did not advance it in closing argument. I am satisfied that Chemakie was the shooter, and that the shooting did not unfold in a way that could make Mr. Braima potentially liable as a non-shooting co-principal. It follows that I am not satisfied beyond a reasonable doubt of Mr. Braima's guilt of committing manslaughter as a principal under s. 21(1)(a).

[108] For Mr. Braima to be a guilty of manslaughter on the basis that he was a party to Chemake's killing of Mr. Wolf, the Crown must satisfy the requirements of s. 21(1)(b), s. 21(1)(c) or 21(2) of the *Criminal Code*:

> 21(1) Everyone is a party to an offence who…
>
> > (b) does or omits to do anything for the purpose of aiding any person to commit it; or
> > (c) abets any person in committing it.

> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

[109] For liability under s. 21(1)(b) or (c) the Crown must thus establish that Mr. Braima aided or abetted Chemakie in the commission of manslaughter – which, here, is "the offence" actually committed: ***R v Alexis***, 2020 ONCA 334 at para 47. Mr. Braima is potentially liable as a party to manslaughter under s. 21(1) even if Chemakie himself is guilty of murder: ***Jackson*** at para 19.

[110] To establish that he aided and abetted Chemakie's commission of the offence, the Crown must establish that Mr. Braima either assisted or helped Chemakie, or that he encouraged, instigated, promoted or procured the crime to be committed: ***R v Briscoe*** 2010 SCC 13 at para 14. Further, it must show that he acted for the purpose of doing so; that is, he must have "intended to assist the principal in the commission of the offence": ***Briscoe*** at para 16. In addition, he must have known that the "perpetrator intends to commit the crime, although he or she need not know precisely how it will be committed": ***Briscoe*** at para 17. Mr. Braima need not have had the same *mens rea* as Chemakie; he needs simply to have known of Chemakie's intention to commit the crime, and to have acted with "the intention of assisting [him] in its commission": ***Briscoe*** at para 18; ***R v Hibbert***, [1995] 2 SCR 973 at para 36.

[111] In short, to establish Mr. Braima's guilt of manslaughter as an aider or abettor under s. 21(1), the Crown must prove that Mr. Braima did something for the subjective purpose of helping or encouraging Chemakie to commit the unlawful act that killed Mr. Wolf in circumstances where a reasonable person would have foreseen that there would be a risk of bodily harm to Mr. Wolf.

[112] Mere presence at a crime is not sufficient to ground culpability as an aider and abettor: ***R v Dunlop***, [1979] 2 SCR 881 at 891. The Crown must show that the accused did something to facilitate the offence, through their words or conduct: ***Dunlop*** at 891. Presence at a crime can be evidence of commission of an offence when combined with prior knowledge of the principal offender's offence; where an offender knew of the offence, was there when it occurred and was "going along" with it, a trial judge will have a basis for conviction: ***R v McKay*** 2012 ABCA 310 at para 22-23.

[113] A trier of fact may lack grounds for conviction under s. 21(1) where there were two separate unlawful transactions, and the accused participated in the first, but it was the second which killed the deceased. In ***R v Kirkness***, [1990] 3 SCR 74, the accused had helped his co-accused sexually assault the victim, but had not done anything to aid his co-accused's act of suffocating her, which was what killed her. As the Court of Appeal explained in ***R v K(P)***, 2006 ABCA 299 at para 21:

> The above passages [from ***Kirkness***] make it clear that, had the jury found that death resulted from the sexual assault (rather than form a separate act of suffocation), Kirkness could have been guilty of murder or at least manslaughter. In this case, it is clear that the appellant was part of a plan to inflict bodily harm on the victim. A temporal and substantive link existed between the planned assault and the subsequent death. In other words, this is not a case of two separate transactions but of one assault from which death ensued. Thus, the appellant has

> been properly found to be a party to a single transaction that led to death, even though the violence escalated to a form he may not have anticipated.

[114] The Court in ***K(P)*** suggested that a single offence sufficient for the imposition of party liability might arise from "a homicide that took place during a planned robbery": ***K(P)*** at para 22.

[115] Section 21(2) extends the potential for liability beyond that imposed by s. 21(1). It imposes liability on persons who participate in a "prior unlawful enterprise" for reasonably foreseeable offences incidental or collateral to the original common unlawful purpose committed by a co-participant: ***R v Simon***, 2010 ONCA 754 at para 39-42. Section 21(2)

> Extends liability to those engaged in one unlawful purpose to incidental or collateral crimes: crimes committed by any participant (in the original purpose) in carrying out the original purpose that the other knew or should have known would likely be committed in pursuing the original purpose: ***Simon*** at para 42; ***Alexis*** at para 47.

[116] For liability under s. 21(2), the Crown must show that the accused intentionally participated in the original unlawful purpose, prove the commission of the incidental crime by another person who was part of the original common purpose, and establish that the commission of an incidental crime was objectively foreseeably probable from the accused's perspective – that is, the Crown must establish the agreement, the collateral crime and what was known or should have been known by the accused: ***Simon*** at para 43; ***R v Harkes***, 2017 ABCA 229 at para 28.

[117] Here, to establish liability under s. 21(2) for the offence of manslaughter based on Chemakie's killing of Mr. Wolf, the Crown must prove that Mr. Braima and Chemakie had an intention to carry out an unlawful purpose, that Chemakie committed an offence "in carrying out the common purpose" that caused Mr. Wolf's death, and that Mr. Braima knew or ought to have known that the offence was a probable consequence of carrying out the common purpose, and that it was likely to result in at least bodily harm.

[118] An agreement or plan to carry out a robbery or a drug transaction may be sufficient to establish the "agreement" element of s. 21(2) where the offence committed is manslaughter. In such cases, however, the Crown must go on to establish "foreseeability of harm, which in fact results in death": ***R v Jackson***, [1993] 4 SCR 573 at para 32; ***Simon*** at para 49. That is, the harm that follows from the crime that occurs as an incident to the robbery or drug transaction must have been foreseeable. As explained in ***Jackson*** at para 33:

> On the evidence presented, one of the scenarios available to the jury was that Jackson and Davy had formed a common intention to rob Rae and that, in the course of the robbery, Jackson murdered Rae. Even if he did not participate in the murder, Davy could be liable under s. 21(2) in this scenario. If he foresaw that murder was a probable consequence of carrying out the common purpose – in this case the robbery – he would be guilty of second degree murder. *On the other hand, if Davy did not foresee the probability of murder but a reasonable person in all the circumstances would have foreseen at least a risk of harm to another as a result of carrying out the common intention, Davy could be found guilty of manslaughter under s. 21(2)* [emphass added].

[119] The question of objective foreseeability turns on what the accused should have considered, had the accused "proceeded reasonably": ***R v Creighton***, [1993] 3 SCR 3 at para 45.

What was objectively foreseeable in a particular case will generally depend on the nature of the offence and the circumstances in which it was committed.

Did Mr. Braima participate in the robbery of Mr. Wolf so as to make him a party to manslaughter under either ss. 21(1) or 21(2) of the *Criminal Code*?

Section 21(2) – Intention in Common

[120] Were I satisfied beyond a reasonable doubt that Mr. Braima and Chemakie had an intention in common to carry out the unlawful purpose of a robbery, I would also have been satisfied that Mr. Braima was liable as a party to manslaughter under s. 21(2) of the *Criminal Code*.

[121] Compelling someone to involuntarily part with their property carries with it the inherent risk of violence or threats of violence – how, otherwise, will the person be compelled to do so? Further, committing that robbery in circumstances where the victim is large, male, unknown to the perpetrators and in a small car, increases the foreseeability of violence. Had Mr. Braima formed an intention in common with Chemakie to carry out a robbery, I am satisfied that he would have known, or ought to have know, of the probable consequence of collateral crimes creating a risk of bodily harm to Mr. Wolf.

[122] However, I am not satisfied that the evidence proves that Mr. Braima formed an intention in common with Chemakie to rob Mr. Wolf.

[123] The Crown's theory that Mr. Braima and Chemakie shared the intention to rob Mr. Wolf rests on the following:

1. Mr. Wolf showed an envelope of money to Mr. Braima outside the hotel.
2. Ms. Wolf testified that Mr. Wolf showed the cash in the envelope to Mr. Braima. She said that the cash was about ¼" thick, that it contained some brown bills, "like hundreds". She thought it was "a thousand Canadian dollars".
3. Shortly after he was shown the envelope, Mr. Braima sent a text to Chemakie saying "Buddy as 8 bands pull up".
4. The Crown's expert witness explained that "8 bands" connotes either $8000 or $80,000.
5. At around this time, phone records show two calls between Mr. Braima's phone and Selmon's, neither of which Mr. Braima can recall.
6. The overall communications between Mr. Braima, Selmon and Chemakie show that Mr. Braima chose to have some communications openly by phone, and some communications secretly by text.
7. Mr. Braima and Chemakie are friends.
8. Chemakie did not brandish the firearm in the car after Mr. Wolf's death, or otherwise harm or injure Mr. Braima, which the Crown contends supports the inference that they were working in concert.
9. Mr. Braima's post-offence conduct provides circumstantial evidence of his guilt.
10. Cash was found in a purse at Mr. Braima's residence, although the Crown did not question Mr. Braima about whether that cash was proceeds of a robbery.

[124] This evidence in my view is not sufficient to establish beyond a reasonable doubt that Mr. Braima and Chemakie shared an intention in common to carry out a robbery, particularly in light of Mr. Braima's testimony: ***Ryon*** at para 35-39; ***Achuil*** at para 17-18; ***W(D)***.

[125] Mr. Braima says that he sent the 8 bands text because he was trying to persuade Chemakie to stop and sell the drugs to Mr. Wolf, because Mr. Wolf would not leave his vehicle. He says that he was not trying to communicate $8000 or $80,000, but something closer to $800.

[126] As explained earlier, I have some reservations about Mr. Braima's testimony. However, Mr. Braima's account of the 8 bands text is corroborated and logical in light of the evidence as a whole. Ms. Wolf testified that Mr. Wolf had $1000, which is much closer to $800 than $8000 or $80,000. She testified that Mr. Wolf would not get out of the car, even to let her out. She confirmed Mr. Braima's evidence that Mr. Wolf was seeking to buy drugs. She corroborates that phone calls happened with third parties in which drug slang – "girls" – was used. Further, the contemporaneous evidence shows that Mr. Braima did not have drugs that he could sell to Mr. Wolf because he had left his cocaine at home. To sell Mr. Wolf the drugs Mr. Wolf was persistent in seeking, he needed to arrange for someone else to do it.

[127] Further, the text communications support Mr. Braima's testimony that he and Chemakie had a plan to meet at the Sandman Hotel ("Sand man hotel dt"). The CCTV shows that Chemakie and Selmon drove past Mr. Braima's car, consistent with Mr. Braima's explanation that he sent the text to encourage them to meet him and to sell Mr. Wolf the drugs.

[128] The Crown relies on Mr. Wolf showing Mr. Braima the envelope, as an intervening event which shifted the common purpose from drug trafficking to robbery. The problem with that interpretation, however, is that Mr. Wolf had already acted like a person with money – offering $40 to a stranger to drive him, and immediately asking the stranger for cocaine. Mr. Braima said, and the general evidence makes this plausible, that he was assuming that Mr. Wolf had enough money to buy drugs. The envelope, on Ms. Wolf's evidence, had about $1000, which is considerable amount of cash, but not out of the ordinary given Mr. Braima's evidence regarding the price of cocaine. It is as likely to have confirmed what Mr. Braima already understood to be the case than to have entirely changed his perception of the situation.

[129] That two phone calls happened proximate to the 8 band text, and that Mr. Braima cannot remember what was said, does little to further the Crown's argument for common intention to commit robbery. The evidence as a whole does not justify drawing an inference that those conversations related to robbery, as opposed to a drug deal; indeed, given the evidence about the communication between the parties to this point, the better supported inference is that the phone calls were about a drug transaction. Given that I accepted Mr. Braima's testimony that the 8 bands text was sent by him to encourage a drug transaction, it seems logical to infer that his participation in the phone calls surrounding that text was for the same purpose.

[130] Further, Ms. Wolf and Mr. Braima both testified that the earlier phone conversations happened on speaker phone, and the Crown in closing emphasized text messages as a private method of communication, which a phone call in a small car – even if not on speaker phone – cannot be in its entirety.

[131] I acknowledge the Crown's point, that there may be an issue with credibility arising from the fact that Mr. Braima can recall the phone calls on the way to the Sandman Hotel, and the 8 band text, but not these phone calls. I do not, however, find that issue sufficient to change my assessment of Mr. Braima's testimony on the 8 band text, or to draw any meaningful inference about what happened in these phone calls. It may be that Mr. Braima does not remember the phone calls because nothing of particular note was said during them. I observe as well that Ms. Wolf also had an incomplete and partial recollection of the phone calls that evening, and that Mr.

Braima's better memory in relation to the 8 bands text can be explained by having the text itself to jog his memory.

[132] In my view the position that the phone calls were used to form a common intention to commit a robbery is speculation, not an inference warranted on the evidence.

[133] Even if I accept the Crown's characterization, that Mr. Braima was choosing to have private communications by text, and public by phone, that does not assist the Crown. That would support seeing the 8 bands text as the key inculpatory communication and, for the reasons just noted, it does not have that clear inculpatory meaning in relation to the robbery. Moreover, the other text messages sent by Mr. Braima at the time – sending Chemakie the name of the Sandman Hotel – is not in fact a communication Mr. Braima needed to keep secret. In short, the private/public theory does not assist the Crown, but nor is it supported by the evidence.

[134] I also accept Mr. Braima's characterization of his relationship with Chemakie as neither close friends nor mere acquaintances. As Ms. Urquhart pointed out, Mr. Braima did not know how to spell his name – it is not "Chemakie", albeit bearing some phonetic relationship to Chemakie. The Crown did not call any other witness to speak to the relationship. Chemakie lived in Saskatchewan, and Mr. Braima had been incarcerated. The texts between them suggest a familiarity consistent with them being more than acquaintances – Mr. Braima does not express surprise at hearing from Chemakie, and nothing is said to suggest that there has been a gap in their communications. Yet, he does not use the terms of endearment – "cuz"; "fam" – that he uses with Mr. Maldini. He also does not laugh or make jokes as he does with Mr. Maldini and Kiara. The relationship is not inconsistent with Chemakie making a plan to rob Mr. Wolf without first involving Mr. Braima.

[135] I note in this respect that it is entirely possible that Chemakie only thought of robbing Mr. Wolf after he got into the back seat, or even after he sold Mr. Wolf the drugs, at which point it would have been practically impossible for him to form a common intention with Mr. Braima.

[136] I cannot rely on the cash as evidence of a common intention to commit robbery. The cash was found in a woman's purse. It was not seized by the police. Mr. Braima testified that the purse was Kiara's. He explained that as a drug dealer he had cash. The cash was found several days after the homicide. Mr. Braima was not asked by the Crown about whether the cash was proceeds of a robbery.

[137] I do not find the facts that Chemakie, on Mr. Braima's evidence, did not brandish the gun at Mr. Braima, or harm Mr. Braima, persuasive as evidence of a common intention or plan in common. Having just shot a man in Mr. Braima's car, Chemakie would know that Mr. Braima knew he had a gun and was prepared to use it. The threat from the gun existed without Chemakie ever needing to make that threat explicit. Further, Mr. Braima's evidence was that he was threatened verbally by Chemakie.

[138] The import of the fact that Chemakie did not harm or kill Mr. Braima is unclear. As Mr. Braima explained, he made efforts to reassure Chemakie that he would not snitch or talk to the police. Chemakie not harming Mr. Braima could reasonably be because he believed Mr. Braima's assurances that Mr. Braima was not going to implicate him, or because he could not bring himself to kill his friend. It has too many other reasonable interpretations to permit the inference that Mr. Braima and Chemakie were acting in concert: ***R v Villaroman***, 2016 SCC 33 at para 56.

[139] The circumstantial evidence about Mr. Braima's post-offence conduct does not overcome these deficiencies. Mr. Braima's post-offence conduct shows his efforts to conceal and destroy evidence, to obscure his involvement in the crime, and to avoid the attention of the police. However, in my view his efforts are subject to three reasonable interpretations, only one of which is suggestive of guilt. He could, as the Crown submitted, have been attempting to hide his involvement because of his awareness of his guilt.

[140] He could also, though, have been panicking not because he was guilty, but because he had found himself in the wrong place at the wrong time, and was scared of what might happen as a result. This is what he testified was his mental state after Mr. Wolf's death. As Ms. Urquhart noted, Mr. Braima's efforts to hide his guilt were somewhat clumsy and ineffective – "hiding" his car by removing the license plate and leaving it on the street near his parent's house, throwing away his own clothes with the victim's identification, and deleting phone calls even where they were not inculpatory. She also pointed out his conduct that suggested his panic – his many phone calls to his friend Mr. Maldini on the night of the killing, and the implausible thought with Tyen that they could kidnap Chemakie to force him to justice. I am not certain that Mr. Braima was panicking for these reasons, but the evidence supports that as a reasonable interpretation of his conduct.

[141] Further, as Mr. Braima also referenced in his testimony, his actions are consistent with the rational fear that the legal system would convict him of manslaughter or murder even if he was guilty of neither. He was a young black man with a criminal record, he middled a drug deal, he introduced Mr. Wolf to Chemakie, Mr. Wolf was shot and killed in his car, and he helped to dispose of Mr. Wolf's body. He was implicated in Mr. Wolf's death even if, legally, he was not responsible for it. Trying to avoid police attention and hide his involvement by concealing and destroying evidence was wrong, but it could also have been an attempt to avoid a potential injustice. Mr. Braima was unlikely to appreciate the legal nuances of his situation, and could reasonably distrust the legal system's ability to do so. I say this not, of course, to justify or excuse Mr. Braima's conduct, but only in relation to my ability to use that conduct to draw an inference of guilt.

[142] I also note Mr. Braima's consideration of bringing an anonymous tip to the police (which is supported by contemporaneous evidence), that he contacted a lawyer, and that he turned himself in to the police prior to a warrant being issued for his arrest (albeit after the police had searched his parents' house). These acts show at least some willingness to submit to the legal system which is at odds with the Crown's characterization of Mr. Braima as planning an escape from it.

[143] To draw an inference of Mr. Braima's guilt from his post-offence conduct requires me to determine whether other explanations for his conduct are reasonable enough to raise a doubt that that inference is correct. In my view, while it is possible that his destruction and concealment of evidence, and his attempt to evade police attention for a period of time, was motivated by knowledge of his guilt, it is also reasonably possible that those actions were because he was panicked by the situation in which he had found himself for reasons unrelated to guilt, or feared unfair treatment by the legal system if he was caught. Those alternative reasonable inferences are such that I am not prepared to use Mr. Braima's post-offence conduct as evidence of his guilt: ***R v Villaroman***, 2016 SCC 33 at para 56.

[144] As such, based on Mr. Braima's testimony explaining his conduct on February 2nd, the evidence that corroborates his explanation, and the deficiencies in the evidence presented by the Crown, I am not satisfied beyond a reasonable doubt that Mr. Braima and Chemakie had "an intention in common to carry out an unlawful purpose" of robbery.

Section 21(1) – Aiding and Abetting

[145] Further, and on much the same basis, I am not satisfied beyond a reasonable doubt that Mr. Braima aided or abetted Chemakie in robbing Mr. Wolf. Once Chemakie initiated the robbery and pulled his gun – both things I am not satisfied Mr. Braima could have reasonably foreseen – there is insufficient evidence to conclude that Mr. Braima did anything to assist or encourage Chemakie to carry out the robbery.

[146] The Crown's theory with respect to aiding and abetting was that when Mr. Braima sent the 8 bands text, and perhaps before, Chemakie got the idea to rob Mr. Wolf. In the phone calls, which Mr. Braima purported not to remember, Chemakie communicated that plan to Mr. Braima. As such, Mr. Braima had knowledge of the robbery. Mr. Braima's awareness of the surrounding circumstances – his observation that the drug transaction was getting weird – would have contributed to his knowledge that what was planned was a robbery, not a drug deal. Mr. Braima then, through driving Mr. Wolf to Chemakie, and through conduct such as driving Mr. Wolf to a back alley and parking behind a dumpster, aided and abetted in the robbery. Having aided and abetted in the robbery, from which bodily harm was objectively foreseeable, Mr. Braima is liable as a party to manslaughter.

[147] The Crown also noted Mr. Braima's blood on the driver's seat floor mat, although in photographs taken of Mr. Braima on February 7, 2020, he did not have any visible cuts or bruises on his hands or face. Mr. Braima said he was not assaulted, and could not remember when the blood got on the floor mat.

[148] I am not satisfied beyond a reasonable doubt of the facts that underpin the Crown's theory. In particular, I am not satisfied based on the fact of the phone calls, and that Chemakie did not stop at the Sandman to sell drugs, that Mr. Braima knew a robbery was planned.

[149] As earlier explained in relation to Mr. Braima's participation in the phone calls, the better supported inference is that the phone calls were about a drug transaction, not a robbery. With respect to Chemakie's intentions, or what he might have said, I do not have any evidence at all. That Mr. Braima does not remember the calls, and that Chemakie did not stop to sell the drugs in the first instance, is not a sufficient factual basis for me to determine, even on the balance of probabilities, that during those phone calls Chemakie had, and communicated to Mr. Braima, an intention to rob Mr. Wolf.

[150] This proposition – that Chemakie communicated an intention to rob Mr. Wolf in the phone calls – was not put to Mr. Braima. Further, the other person in the white SUV with Chemakie, who the evidence suggests was Selmon, was not called as a witness by the Crown.

[151] I am thus not satisfied beyond a reasonable doubt that Mr. Braima knew that Chemakie intended to rob Mr. Wolf at any time prior to the robbery taking place.

[152] Further, the blood on the floor mat, when coupled with no evidence about when it got there, and the lack of apparent physical injury to Mr. Braima on February 7, 2020, does not provide an evidentiary foundation to determine beyond a reasonable doubt that Mr. Braima aided or abetted in the assault of Mr. Wolf during the robbery.

[153] As such, the robbery of Mr. Wolf does not provide a basis for convicting Mr. Braima of manslaughter under s. 21(1) of the *Criminal Code*.

Conclusion on Robbery and s. 21

[154] I am not satisfied beyond a reasonable doubt that Mr. Braima participated in the robbery of Mr. Wolf so as to be a party to manslaughter under either s. 21(1) or s. 21(2) of the *Criminal Code*.

Did Mr. Braima's participation in the drug transaction between Mr. Wolf and Chemakie make him a party to manslaughter under either ss. 21(1) or 21(2) of the *Criminal Code*?

[155] Mr. Braima admits that he facilitated Mr. Wolf's purchase of cocaine from Chemakie. He and Chemakie had a common intention to engage in the unlawful purpose of selling cocaine, and Mr. Braima took steps to assist Mr. Wolf purchase cocaine from Chemakie. He also helped Mr. Wolf consume the cocaine.

[156] The Crown submits that establishing Mr. Braima's involvement in the drug transaction is sufficient to make him liable for manslaughter under either s. 21(2) or s. 21(1). I do not agree.

Section 21(2) – Intention in Common

[157] I am satisfied that Mr. Wolf and Chemakie shared an unlawful purpose in relation to the drug transaction. I am also satisfied that Chemakie assaulted and killed Mr. Wolf in sufficient temporal proximity to the drug transaction for the killing to have been committed "in carrying out the common purpose".

[158] I am not satisfied, however, that a reasonable person in Mr. Braima's circumstances would have foreseen a risk of bodily harm to Mr. Wolf arising from the intention in common to carry out a drug transaction. Specifically, I am not satisfied that Mr. Braima knew or ought to have known that Chemakie would commit the collateral crimes – robbery, assault and brandishing a firearm – that created a risk of bodily harm to Mr. Wolf: ***Harknes*** at para 28-29.

[159] The Crown emphasized judicial comment on the relationship between drugs and firearms:

> Handguns and drug deals are frequent companions, but not good friends. Rip-offs happen. Shootings do too. *Caveat emptor. Caveat venditor*. People get hurt. People get killed. Sometimes, the buyer. Other times, the seller. That happened here: ***Simon*** at para 1.
>
> One of the more notorious crimes associated with drug trafficking is the possession and use of firearms. Offences involving firearms, particularly handguns, appear to have increased dramatically in Alberta over the past decade: ***R v Chin***, 2009 ABCA 226 at para 9.
>
> The courts have repeatedly emphasized that the toxic combination of drugs and guns poses a pernicious and persisting threat to public safety and the welfare of the community. The social ills, including associated criminal conduct, fuelled by this combination is now well recognized: ***R v Wong***, 2012 ONCA 767 at para 11.
>
> Yet again, this is a case involving that toxic combination of drugs and a handgun. Cocaine and crack cocaine. And fentanyl. A loaded .38 calibre handgun. In a

> motor vehicle, aptly characterized as a mobile pharmacy. Each a pernicious and persisting threat to the safety, welfare and indeed the lives of members of our community: ***R v Omoragbon***, 2020 ONCA 336 at para 22.
>
> The use of illegal drugs, particularly cocaine, is rampant in society. It fetches great amounts of money. There is risk in dealing drugs, the risk of being caught, and also the risk of violence. The gun in the present case is the handmaiden to the trade. It is there for protection and to avoid being ripped off, and as I found above, there is no hesitation to fire it. In my view, deterrence and denunciation are the paramount principles to be considered when sentencing those possessing drugs for the purpose of trafficking. The devastation to lives and the cost to society in confronting this trade is extremely large: ***R v Farquharson***, 2000 OJ No 6006 (ONCA) at para 9.

[160] The Crown also noted Mr. Braima's acknowledgement in his testimony that people do get robbed in drug transactions, and that you don't know who can be violent. The Crown relied on this acknowledgment as evidence of the danger associated with drug transactions.

[161] Nonetheless, when looking at the inherent nature of drug transactions, and the circumstances of this drug transaction as Mr. Braima understood them, I find that bodily harm was not objectively foreseeable by Mr. Braima.

[162] Considered apart from their illegality, drug deals are commercial transactions – a buyer acquires a desired good from a seller at a price determined by the market. Unless the drugs themselves are dangerous, the risks associated with drug transactions arise not inherently, but rather from the criminal and unlawful circumstances in which they take place.

[163] Those dangerous circumstances do not, however, arise equally in each case. A person purchasing ecstasy for personal use at a music festival does not face the same risk as a wholesale trafficker purchasing bulk quantities of cocaine from a supplier. Whether or not a drug transaction makes further crimes with a risk of bodily harm depends on factors such as the type of drug, the quantity of the drug, the presence of firearms, the disposition and mental wellness of the buyer and seller, and the involvement of criminal organizations.

[164] In ***Simon***, quoted above, the accused, Simon, and Cribb, who had earlier pled guilty, went to the house of the victim, Porter, and "Each, to the other's knowledge, was armed with a handgun": ***Simon*** at para 49. Justice Watt's comment on the companionship between drug deals and firearms must be understood in light of the facts of that case.

[165] Moreoever, limited weight should be placed on Justice Watt's rhetoric about the dangers of mixing firearms and drugs. The importance of ***Simon*** lies in its substantive analysis which, notably, discussed the drug transaction in relation to whether it could constitute an "intention in common to carry out an unlawful purpose" under s. 21(2), not in relation to whether drug transactions give rise inherently to a risk of bodily harm: ***Simon*** at para 48-49. That point is not disputed here.

[166] In any event, and in distinction to the facts of ***Simon***, the evidence in this case does not prove that Mr. Braima knew or ought to have known Chemakie had a firearm. On the evidence, Mr. Wolf did not have a firearm.

[167] In other words, Mr. Braima did not any reason to think that this was one of those instances – referenced in ***Wong*** and ***Omaragbon***– where there was a "toxic combination" of

drugs and handguns. I note in this respect that the toxicity referred to in ***Wong*** and ***Omaragbon*** arises from putting drugs and handguns together; it is not that drug transactions have a toxicity that leads inevitably to handguns. Further, the gun here, unlike the gun in ***Farquharson***, was not used as a handmaiden to the drug transaction. It was used for the subsequent robbery, a robbery which, other than temporally, did not relate to the drug transaction. This was not a case where, for example, a purchaser of drugs tried to rob the dealer of the proceeds arising from his dealing.

[168] The Court of Appeal's observation in ***Chin*** that firearms are associated with drug transactions does not show that the use of firearms is inherent to a drug transaction. I also emphasize that an *obiter* statement by a Court of Appeal in a sentencing case about an apparent increase in firearm violence associated with drug transactions does not amount to evidence that such an increase exists in fact, or provide a basis for taking judicial notice of such an increase. Nor do I think that the Court of Appeal intended that its contextual comments be deployed in that way.

[169] Further, in terms of the participants in this drug transaction, Mr. Wolf was intoxicated, but, while demonstrating an unwillingness to leave the car, had not been threatening or violent to Mr. Braima. Ms. Wolf described him as a generally happy drunk. Mr. Braima and Chemakie had been planning to meet at Chinook to smoke weed, an activity which post-legalization seems innocuous. Mr. Braima did not have any objective basis for believing that, if he brought those two men together for a drug transaction, offences of violence would result. To the contrary, it would have been reasonable for him to expect that Mr. Wolf would get his cocaine, Chemakie would get his money, and both would be satisfied.

[170] With respect to Mr. Braima's evidence, his acknowledgement that people do get robbed in drug deals, and that you do not know who can be violent, does not establish that robbery or violence was objectively foreseeable from *this* drug transaction. His acknowledgement does not provide an evidentiary basis for me to find that drug transactions always carry an inherent risk of robbery or violence. As Mr. Braima said in re-examination, he himself has never been robbed in a drug transaction and nor has he robbed anyone.

[171] The Crown's position on objective foreseeability was, in essence, that drug transactions inherently bring with them the risk that someone will be carrying a firearm. As such, a reasonable person who middles a drug transaction can foresee further offences creating a risk of bodily harm to the participants by virtue of the fact that a) it is a drug transaction; b) drug transactions bring the risk of firearms; and c) firearms bring the risk of bodily harm.

[172] That position rests, however, on a factual assertion about the nature of drug transactions that was not supported by evidence. I do not have evidence to satisfy me that drug transactions bring with them a sufficient likelihood of firearms so as to make a risk of bodily harm objectively foreseeable whenever a drug transaction happens. The appellate judgments cited by the Crown do not fill this evidentiary gap, or allow me to take judicial notice that drug transactions have that quality.

[173] Further, I am not satisfied that, on the facts of this particular drug transaction further offences creating a risk of bodily harm were objectively foreseeable. The evidence does not show that Mr. Braima knew Chemakie had a firearm or that he was a violent person. Mr. Wolf did not have a firearm and was not acting violently or aggressively. In these circumstances, a reasonable person in Mr. Braima's circumtances would not foresee that the drug transaction would lead to further criminality and a risk of bodily harm.

[174] Finally, it is not sufficient for the Crown to show that there is some inherent risk that a drug transaction *might* lead to further offences and violence. Section 21(2) requires the commission of the secondary offence to be a foreseeable "probable consequence" of carrying out the original unlawful common purpose. A mere possibility is not a "probable consequence". I am unable to conclude that the risk of violence during a drug deal is so high that it can be said to be "probable" that any given drug deal will turn violent. Indeed, for the reasons set out here, this strikes me as highly implausible.

[175] In sum, on the facts and evidence before me, I am not satisfied that Mr. Braima knew or ought to have known that Chemakie would commit the collateral crimes – robbery, assault and brandishing a firearm – that created a risk of bodily harm to Mr. Wolf.

Section 21(1) – Aiding and Abetting

[176] With respect to s. 21(1) the Crown submitted that, provided they could establish that Mr. Braima aided and abetted with the drug transaction, that was sufficient to establish his guilt as a party to manslaughter.

[177] As I understand the Crown's argument, they submit that Chemakie is guilty of unlawful act manslaughter because he killed a person "while engaged in an unlawful act". The unlawful act is a drug transaction, and bodily harm from that act was objectively foreseeable. Mr. Braima is then guilty as a party to unlawful act as an aider and abetter to the drug transaction:

> There are three avenues to finding the Accused…guilty of manslaughter, all of which relate to him being a party to the offence of manslaughter. The first avenue places the Accused as an aider to the unlawful act of robbery or a drug deal where bodily harm to the victim was objectively foreseeable. The second avenue places the Accused as an abetter to the unlawful act of robbery or a drug deal where bodily harm to the victim was objectively foreseeable. The third avenue is where the Accused is determined to be one of a group who formed a common intention to carry out one unlawful purpose (that being robbery or a drug deal) where yet another – unplanned but probable – offence (murder/manslaughter) occurred.

[178] As already explained, I am not satisfied beyond a reasonable doubt that Mr. Braima formed a common intention to rob Mr. Wolf. I am also not satisfied that he purposively aided or abetted a robbery.

[179] With respect to the drug deal, I reject the Crown's first and second avenues to the liability of Mr. Braima; they misdescribe the homicide in this case and, as well, the legal basis for liability under s. 21(1).

[180] On the evidence before me, Chemakie did kill Mr. Wolf "by means of an unlawful act", most obviously by pulling the trigger on a firearm that he was pointing at Mr. Wolf. The drug transaction was not the "means" by which Chemakie killed Mr. Wolf. The drug transaction was an unlawful act, but it is not the relevant unlawful act with respect to manslaughter in this case. The drug deal was completed, and Mr. Wolf had consumed the cocaine, before the threat, assault, brandishing the firearm or shooting began. As such, aiding and abetting the drug transaction did not aid and abet the unlawful act that killed Mr. Wolf.

[181] As was the case in ***Kirkness***, and as explained by the Alberta Court of Appeal in ***K(P)***, aiding and abetting an accused in one unlawful act, when it is the second unlawful act which created the risk of bodily harm or death, does not create liability as a party under s. 21(1).

[182] In ***Kirkness*** the Manitoba Court of Appeal had reversed Kirkness's acquittal at trial on the basis that the sexual assault to which he was a party "could not be isolated from the other incidents and that it ultimately resulted in the suffocation death of the victim": ***Kirkness*** at 83. The Supreme Court reversed, holding that a "single transaction" analysis does not apply in the case of manslaughter: ***Kirkness*** at 87. It found that the jury had been properly instructed and, based on those instructions, had determined that the victim was killed as a result of suffocation, not sexual assault. It convicted Kirkness's co-accused of first degree murder for suffocating her, and acquitted Kirkness, because Kirkness was not a party to the suffocation: ***Kirkness*** at 87-88.

[183] In my view the Crown's submissions on s. 21(1) effectively rely on a single transaction analysis, treating the drug transaction, robbery, assault and firearm as a single incident, and Mr. Braima's participation in the first part of that transaction as sufficient to ground liability in manslaughter, even if he did not participate in the rest. As the Supreme Court explained in ***Kirkness***, however, that approach is not appropriate for a s. 21(1) analysis in relation to manslaughter.

[184] The Crown's submission on s. 21(1) also errs in a way similar to the jury instruction at issue in ***Alexis***:

> In his instruction to the jury on s. 21(1), the trial judge told the jury that to convict Mr. Funes of manslaughter under this route to liability, they would have to be convinced beyond a reasonable doubt that: (a) Mr. Funes had participated in an unlawful act – the planning, organizing, and implementation of the armed robbery – as a perpetrator, aider, or abettor; (b) the unlawful act (the armed robbery) was objectively dangerous; and (c) the unlawful act caused Mr. Nedd's death: ***Alexis*** at para. 58.

[185] As the Ontario Court of Appeal noted, however, the offence "actually committed" for the purposes of s. 21(1) was the "unlawful killing", not the robbery. To be guilty under s. 21(1), the accused had to have aided and abetted in that unlawful killing; helping to plan the robbery, even if the robbery was objectively dangerous, was not sufficient: ***Alexis*** at para 50.

[186] Similarly, here, aiding and abetting the drug transaction, even if it was objectively dangerous, would not be sufficient for liability for manslaughter under s. 21(1). It was not by means of the drug transaction that Chemakie killed Mr. Wolf.

[187] In addition, even if I am incorrect on the scope of s. 21(1), for the reasons set out with respect to s. 21(2), I find that a risk of bodily harm was not an objectively foreseeable consequence of the drug transaction middled by Mr. Braima.

[188] In sum, I am not persuaded that aiding and abetting a drug transaction that precedes a manslaughter is sufficient in law to establish liability under s. 21(1). Further, and in any event, I am not satisfied that a risk of bodily harm to Mr. Wolf was objectively foreseeable as a result of the drug transaction aided and abetted by Mr. Braima.

Conclusion

[189] Based on the forgoing, on the single count of the indictment, manslaughter contrary to section 236(b) of the *Criminal Code*, I find Mr. Braima not guilty.

Heard on the 6th day of September, 2022 to the 23rd day of September, 2022.
Dated at the City of Calgary, Alberta this 27th day of October, 2022.

A. Woolley
J.C.K.B.A.

Appearances:

Kirsti Binns/Janice Walsh
for the Crown

Andrea Urquhart/Jeanine Zahara
for the Accused

Appendix – Oral Reasons

[1] I have set out my reasons in this case in writing, and will provide those written reasons to counsel and to Mr. Braima today. I will also submit them to CanLII for publication, with these oral reasons forming an Appendix to that decision.

[2] Those written reasons are my reasons for decision. What I am going to say now is simply a very brief oral summary of those reasons.

[3] Mr. Braima, you were charged by the Crown with the offence of manslaughter. The Crown says that you are guilty of manslaughter not because they can prove that you shot Mr. Wolf. Instead, they say you are guilty of manslaughter as a "party". A party is someone who does something that makes them guilty of manslaughter even if they are not the person who actually does the killing.

[4] The Crown says first that you are a party to manslaughter because you and Chemakie had an intention in common to rob Mr. Wolf. Then, while you were robbing Mr. Wolf, Chemakie committed further crimes. Those further crimes were ones you knew or should have known were a probable consequene of the robbery, and had a risk of bodily harm to Mr. Wolf. For that reason, the Crown says, you are guilty of manslaughter as a party under s. 21(2) of the *Criminal Code*.

[5] I reject that argument. I am not satisfied beyond a reasonable doubt that you and Chemakie had an intention in common to rob Mr. Wolf.

[6] The Crown's second position is that you are a party to manslaughter because you knew Chemakie planned to rob Mr. Wolf, and you aided and abetted in the robbery. For that reason, the Crown says, you are guilty of manslaughter as a party under s. 21(1)(b) and (c) of the *Criminal Code*.

[7] I reject that argument. I am not satisfied beyond a reasonable doubt that you knew Chemakie planned to rob Mr. Wolf, or that you aided and abetted Chemakie in robbing Mr. Wolf.

[8] The Crown's third position is that you are a party to manslaughter because you and Chemakie shared an unlawful purpose to sell drugs. The Crown argued that drug transactions are inherently dangerous. They always bring the risk that someone will have a firearm. As such, when you middle a drug transaction like you did, then you know or should know that other crimes creating a risk of bodily harm are probable. For that reason, you are guilty of manslaughter s a party under s. 21(2) of the *Criminal Code*.

[9] I reject that argument. You admitted that you and Chemakie shared an unlawful purpose to sell drugs. And it's true that Chemakie killed Mr. Wolf close enough in time to mean that, as a matter of law, Chemakie killed Mr. Wolf while "carrying out the common purpose".

[10] The problem with the Crown's position though is that the evidence does not show that drug transactions are so inherently dangerous that a violent crime is a probable consequence of being involved in a drug transaction. Also, the circumstances of this drug transaction were not such to make a reasonable person think that a violent crime was a probable consequence of helping to arrange it. I am not satisfied beyond a reasonable doubt that you did foresee or could have reasonably foreseen a risk of bodily harm to Mr. Wolf from middling the drug transaction between him and Chemakie.

[11] The Crown's fourth and final position is that by aiding and abetting in the drug transaction you also aided and abetted in the manslaughter. They said that it is enough that you aided and abetted the unlawful act of a drug deal in a situation when bodily harm to Mr. Wolf was objectively foreseeable.

[12] I reject that position as well. Based on the terms of s. 21(1) of the *Criminal Code*, the Supreme Court's decision in ***Kirkness***, and the Ontario Court of Appeal decisions in ***Simon*** and ***Alexis***, it's not enough that you participated in an unlawful act close in time and space to the unlawful act that killed Mr. Wolf. You have to have aided and abetted in the unlawful act that killed Mr. Wolf. The evidence does not satisfy me beyond a reasonable doubt that you aided and abetted in the unlawful act that killed Mr. Wolf.

[13] The death of Sheldon Wolf was tragic, violent and cruel. It was wrong. Mr. Wolf was a farmer. He kept bees. He was a pilot. He had a new wife whom he loved. His family and friends have suffered a loss that cannot be fixed.

[14] The evidence also shows me that on the night of February 2, 2020 you made some bad choices. You arranged for Mr. Wolf to buy illegal drugs from Chemakie. You helped to dump Mr. Wolf's body at the side of the road. You took steps to hide your involvement in what happened and to destroy evidence.

[15] It does not, though, show that you are legally responsible for Mr. Wolf's death. For that reason, on the single count of the indictment,

> That he, on or about the 2nd Day of February 2020, at or near Calgary, Alberta, did unlawfully cause the death of Sheldon Wolf, thereby committing manslaughter, contrary to Section 236(b) of the Criminal Code of Canada.

[16] I find you not guilty.