CITATION: R. v. Banwait, 2010 ONCA 869
DATE: 20101217
DOCKET: C46219 and C45813

COURT OF APPEAL FOR ONTARIO

Laskin, MacPherson and Simmons JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Amandeep Banwait

Appellant

AND BETWEEN

Her Majesty the Queen

Respondent

and

Harjit Matharu

Appellant

Philip Campbell, for the appellant, Amandeep Banwait

Ravin Pillay and Lance Beechener, for the appellant, Harjit Matharu

Gillian Roberts and Stacey Young, for the respondent

Heard: June 28 and 29, 2010

On appeal from the convictions entered by Justice W. Brian Trafford of the Superior Court of Justice, sitting with a jury, dated January 12, 2006.

Simmons J.A.:

[1] Amandeep Banwait appeals from his conviction for the first degree murder of Raheel Malik. Harjit Matharu appeals from his conviction for the second degree murder of Mr. Malik. Both convictions were imposed on January 12, 2006, following a jury trial presided over by Trafford J.

A. FACTS:

The murder

[2] On the evening of June 6, 2003, Raheel Malik was attacked by a group of young men in the parking lot of the Albion Mall in the Rexdale area of Toronto. He was hit on the head with various weapons including a hammer, a wooden "two-by-four" and possibly a metal pipe. The attack was over in less than a minute. Following the assault, Malik lapsed into a coma. He never regained consciousness, and died of pneumonia in hospital 20 days later.

Events leading up to the attack

[3] Malik was associated with a group of young South Asian men from Rexdale and Banwait with a similar group from Mississauga. The two groups had a history of conflict, and in the months leading up to the attack, Malik and the appellant Banwait developed some form of personal "beef". In the week before Malik's death, Banwait had been attempting to locate Malik and the two apparently had an altercation at Malik's place of work a day or two before the attack.

The day of the attack

[4] Banwait arranged for a group of young men to gather at "Mac's Plaza" in Mississauga. The appellant Matharu was one of the men that Banwait called. Matharu showed up at the plaza in a car driven by his friend Gurpreet Bath. Banwait took over as driver and left the plaza. The group followed in a convoy. Matharu was in the backseat along with another young woman. While driving, Banwait borrowed Bath's cell phone and called Malik. The two exchanged angry words and agreed to meet at the Albion Mall.

[5] When he received the call from Banwait, Malik was out with three friends. After the telephone conversation, Malik made his way to the Albion Mall. However, he stopped at a Rexdale home along the way to recruit some people to join him. They refused. Malik then drove to Albion Mall with his three passengers in tow.

[6] Banwait's sister, Daljit, had lived in Rexdale for a couple of years and was present at the Rexdale home when Malik tried to enlist some supporters. Another person at the home heard Malik say things like, "I'm gonna like kill him" and "I'm gonna go myself and finish this business". Fearing for her brother's safety, Daljit quickly borrowed a car and headed for the Albion Mall before Malik left the house.

The events at Albion Mall

[7] Banwait and his friends arrived at the mall before Malik, at about 9:30 p.m. Most of the group parked near the northern exit of the mall, though others parked a little to the

west. Banwait, Matharu and two other young men went to look for Malik in the pool hall. Not finding him there, they went back outside and the two other young men returned to their car.

[8] Banwait and Matharu approached two men near the cinema entrance, Mutti-Ur Rehman and Hammad Khan. They were joined shortly by Hammad's brother, Azzm Khan. Banwait asked the group (all of whom were friends with Malik) if they knew a short guy who worked as a security guard at the mall. The three men immediately recognized this man as Malik.

[9] At some point during this discussion, Daljit Banwait arrived and asked her brother what he was doing. He said he was waiting for the security guard to arrive and that he had 25 to 30 men parked in the parking lot, in case something happened.

[10] Just as Rehman attempted to reach Malik by cell phone to warn him, Malik drove into the parking lot and stopped his car near Banwait and Matharu. Malik got out of his car, telling his passengers to stay in the car and lock the doors. He and Banwait began to yell at one another. Banwait and Matharu gestured for the group waiting across the parking lot to approach, yelling "come, come". The group ran across the parking lot towards Malik. Many carried weapons. Banwait pulled out a hammer from his clothing and Matharu pulled out a pipe. Malik backed away from them but was struck on the back of the head with a two-by-four by someone in the approaching group. Banwait then hit

Malik on the jaw with the hammer. There was some evidence that Matharu hit Malik with his pipe, though Matharu maintained that he only kicked him.

[11] The evidence concerning how many further blows were struck and by whom was conflicting. Suffice it to say that Malik was surrounded and brutally beaten to the point of unconsciousness in under a minute.

[12] The group dispersed quickly and ran back to their cars. Banwait remained, shattering the windows of Malik's car with his hammer before returning to Bath's car.

[13] Malik suffered three main head injuries, including fatal skull fractures to the side and back of the head. The forensic evidence was that the injury to the temple was likely caused by a hammer blow, and the injury to the back of the head was the result of a blunt instrument. Malik's third non-fatal head injury was a fracture to the left jaw, also caused by a blunt instrument. He had no other significant injuries.

Events following the attack

[14] Banwait and Matharu left in Bath's car. Banwait responded to phone calls, telling everyone to meet at Country Style Donuts. According to witnesses, Banwait was rowdy and hyper at the donut shop and he told his sister that he had spoken to his father about sending him to India. Soon after their arrival, Matharu left the donut shop.

[15] Banwait was arrested at home early the next morning. Matharu was arrested later that afternoon. He provided a statement to the police in which he initially denied being present at the attack but then admitted he was there and armed with a pipe. He claimed he

just waved the pipe at Malik but acknowledged kicking him hard a couple of times in the body. A third man, Amar Gurpreet Sandhu, was arrested several weeks later.

[16] All three men were charged with first degree murder. At trial, the Crown alleged that Sandhu was the man who wielded the wooden two-by-four. Sandhu was convicted of manslaughter.

B. ISSUES

[17] In oral argument, each of the appellants pursued only some of the grounds raised in their notice of appeal:

Banwait

(1) The verdict of first degree murder was unreasonable.

(2) The jury was not properly instructed on the relationship between planning and deliberation and murder, as defined under s. 229(a)(ii) of the *Criminal Code.*

(3) The trial judge erred by failing to direct the jury on the negligible value of post-offence conduct.

Matharu

(1) The trial judge misdirected the jury as to Matharu's position on the evidence of the pathologist.

(2) The trial judge erred in finding that Matharu's statements to police were voluntary and admissible.

(3) The verdict of second degree murder was unreasonable.

C. ANALYSIS

Banwait's Conviction Appeal

(1) Was the verdict of first degree murder unreasonable?

(a) The positions of the parties at trial

[18] None of the three accused called evidence at trial.

[19] The thrust of the Crown's theory, as expressed in the closing address, was that the three accused, along with others, concocted a plan to kill Malik to exact revenge. According to the Crown, the evidence at trial established that the group hunted Malik down; lured him to the Albion Mall where they lay in wait for him; surrounded him when he got out of his car alone and unarmed; beat him mercilessly about the head in a carefully executed manner with dangerous weapons; and then left him lying in a parking lot, unconscious and bleeding, to die.

[20] Although Banwait's counsel challenged causation and therefore did not admit any degree of liability, in his closing address he acknowledged, on behalf of his client, the following level of participation: being present at the Albion Mall on the evening of the attack; trying to contact Malik beforehand; arranging for some people to be with him at the Albion Mall "in case something happened"; arguing with Malik before the fight;

hitting Malik once with the hammer; smashing the car windows; and becoming panicky, fleeing from the scene, disposing of the hammer and telling a friend that he hurt Malik.

[21] However, Banwait's counsel disputed the Crown's claim that Banwait intended to kill Malik and vigorously disputed the Crown's claim that Banwait planned and deliberated a murder. According to Banwait's counsel, the planning and deliberation was for nothing more than a gang fight.

(b) The trial judge's instructions on the routes to first degree murder

[22] In his final instructions, the trial judge left with the jury the option of finding each accused guilty of a planned and deliberate murder (s. 231(2) of the *Criminal Code*) under either s. 229(a)(i) (means to cause death) or s. 229(a)(ii) (means to cause bodily harm knowing it is likely to cause death and being reckless whether death ensues) of the *Criminal Code*.

(c) The significance of the jury's verdicts against Matharu and Sandhu

[23] Based on the verdicts against Matharu and Sandhu, the jury must have rejected the Crown's theory of a joint plan to murder Malik and almost certainly rejected the Crown's theory that it was Sandhu who hit Malik over the head with the two-by-four when the attack began.

(d) Banwait's position on appeal

[24] On appeal, Banwait submits that the Crown's theory that the evidence gave rise to an inference of a planned and deliberate murder makes no sense and ignores powerful

and unchallenged evidence pointing to a plan for a gang fight that got out of control. In particular, Banwait relies on the following evidence and available inferences:

- planning a murder in a public venue like the parking lot of a shopping mall with good lighting, security cameras and the likelihood of bystanders makes little sense;
- the fact that Banwait had no way of controlling exactly when or where Malik would arrive and no way of predicting that he would arrive alone and unarmed is inconsistent with the suggestion of a planned and deliberate murder;
- although there was a history of hostilities between the two groups, no evidence was called demonstrating a motive for murder—similarly, unlike the situation with Malik, no evidence was called suggesting that Banwait, or anyone in his group, expressed an intent to kill anyone;
- the history of confrontation between the two groups, the evidence that Banwait talked about going to get "these guys" while en route to the mall, as well as the evidence that Malik attempted to recruit supporters before going to the mall suggest that all participants expected a group encounter;
- Banwait's conduct at the mall belies the suggestion of a planned and deliberate murder—after they first arrived at the mall, he and Matharu went downstairs on their own at the pool hall to look for Malik, leaving their two companions upstairs–in addition, Banwait gave his first name and the general location of his

residence when talking to the group of three young men at the cinema entrance; and

- Banwait's conduct before and after the attack is inconsistent with a planned and deliberate murder—he had not obtained the keys to the car he arrived in before going to look for Malik and therefore had no clear plan for escape; and the fact that he did not talk to his father about going to India until after the attack also undermines the suggestion of a planned event.

(e) Discussion

[25] Although I agree the jury would have been justified in concluding that the tragic events of June 6, 2003, reflected a plan for a gang fight that later got out of hand, I am also satisfied that it was open to the jury to conclude that Banwait was guilty of a planned and deliberate murder taking account of the following evidence and available inferences:

- in the week leading up to the attack, Banwait searched for Malik, eventually discovering his telephone number and where he worked;
- after obtaining this information, Banwait went to Malik's place of employment accompanied by two friends and engaged in a confrontation;
- within a day or two of the workplace confrontation, Banwait organized a much larger armed group to accompany him to Rexdale for a further confrontation;
- Banwait started organizing the armed group hours before the attack;

- although some of the evidence had Banwait speaking of getting "these guys", other evidence referred to him as speaking of going to see "the Rexdale guy";
- an inference could be drawn that Banwait contacted Malik and arranged their meeting in a manner that would limit Malik's ability to organize and recruit supporters for himself–although he had a cell phone, Banwait borrowed Bath's cell phone that had a caller identification blocking feature to call Malik, thus increasing the likelihood that Malik would take the call; further, Banwait made the telephone call only after his group was at or close to Rexdale;
- although the evidence about Banwait's conversation with Malik was conflicting and somewhat ambiguous, one possible inference was that Banwait chose the location for the confrontation;
- the assault itself could be viewed as a well co-ordinated attack initiated on Banwait's signal after Malik arrived and got out of his car—Banwait and Matharu began approaching Malik while signalling and calling to their supporters to join them; Malik was originally struck from the rear as Banwait and Matharu produced their weapons; within seconds, Banwait and his group surrounded Malik, crushed his skull and left him for dead;
- the speed of the attack was demonstrated by the security cameras – Malik lay fatally injured within a minute of his arrival;
- all of Malik's injuries were to his head, he had no other significant injuries;

- all of Malik's head injuries were caused by blunt force weapons applied with considerable force;
- although the three men at the entrance indicated they were friends of Malik and made some efforts to impede the attackers, none of them was harmed and none of the passengers in Malik's car was harmed;
- an inference could be drawn that Banwait was celebrating following the attack—at the Country Style venue, Banwait was observed thanking people as they left, shaking hands and exchanging shoulder bumps–to at least one witness, he appeared rowdy and hyper, making statements along the lines of: "We got him. He's gone….Oh, he is dead. He's dead….We fucked him up; we fucked him up."

[26] Particularly in the light of the organized nature of the attack, the potential inference that it was planned in a way that would limit Malik's ability to recruit supporters for himself, the speed and intensity of the blows administered exclusively to Malik's head and the failure to harm any of Malik's friends, in the context of all the factors outlined above, in my view, it was open to the jury to return a verdict of first degree murder against Banwait.

(2) Was the jury properly instructed on the relationship between planning and deliberation and murder, as defined under s. 229(a)(ii) of the *Criminal Code*?

[27] As I have said, the trial judge left with the jury the option of finding each accused guilty of a planned and deliberate murder under either s. 229(a)(i) or s. 229(a)(ii)of the *Criminal Code*. Those sections read as follows:

> 229. Culpable homicide is murder
>
> (a) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

[28] Banwait argues that it is possible, on the facts of this case, that the jury reached second degree murder by concluding that, even though the principals in the attack were not planning to kill Malik, they inevitably realized, during the course of their attack, that the injuries they were inflicting would likely cause death, even though they did not originally intend to kill him.

[29] Taking account of this possibility, Banwait submits the trial judge's instructions on the interrelationship between planning and deliberation and s. 229(a)(ii) were not sufficient. These instructions failed to make it clear to the jury that, even though they were satisfied Banwait had murdered Malik, in order to return a verdict of first degree murder, they had to be satisfied not only that he planned and deliberated causing bodily harm to Malik that would likely cause death, but also that he actually recognized, *in advance of the attack*, that Malik would likely die from his injuries.

[30] The essence of this ground of appeal is an attack on the adequacy of the jury instructions. However, because it appears that counsel and the trial judge did not share the same views about whether the strength of the Crown's case for first degree murder

arose under ss. 229(a)(i) or (ii), or whether the Crown was even relying on s. 229(a)(ii), I will also review what emerges from the record about those subjects.

(a) Pre-charge discussions – December 12, 2005

[31] The evidentiary portion of the trial ended on December 8, 2005, when counsel for all three accused elected not to call evidence. Pre-charge discussions began on Monday, December 12, 2005. During the course of these discussions it became clear that counsel for Sandhu and the trial judge perceived the essence of the Crown's case as being a s. 229(a)(ii) case, at least in relation to planning and deliberation:

> **Sandhu's counsel**: I'm going to use that as a segue if I could, because the Crown in this case is alleging - and I just want to be clear - at this point the Crown is alleging the theory that's going to go to the jury, that there was a planned and deliberate murder *in the sense of planned and deliberate to inflict serious bodily harm that was likely to cause death*.
>
> **The Court**: That's the core of their case.
>
> [Emphasis added.]

(b) Closing addresses – December 14-15, 2005

(i) *Crown*

[32] Because the defence called no evidence, the Crown addressed the jury first. In his closing address, Crown counsel characterized the attack as a planned and deliberate mission agreed upon by all three defendants to kill Malik. He made no reference in his address to a plan to cause bodily harm, knowing the bodily harm is likely to cause death and being reckless whether death ensues.

[33] On my review of the record, the closest Crown counsel came to relying on s. 229(a)(ii) were the following comments made at different points in the address:

> The next stop with his convoy was a gas station where Jason Noronha told you that he saw a rowdy and hyper Mr. Banwait, and he heard him say, or yell, "We're going to get these guys. We're going to fuck them up."
>
> This is very important evidence for you to consider. Mr. Banwait clearly stated the group's plan and their intent before they arrived at the mall.
>
> ...
>
> The attack was carried out leaving Raheel beaten, bloodied, unconscious and struggling to breathe just as planned.

(ii) *Defence*

[34] As is customary, defence counsel addressed the jury in the order their client's names appear on the indictment: Sandhu's counsel first, Matharu's counsel second, and Banwait's counsel last.

[35] Despite his earlier exchange with the trial judge, Sandhu's counsel apparently understood the Crown's theory in relation to planning and deliberation as expressed in the closing as relying solely on s. 229(a)(i) and he responded only to that theory.

[36] In contrast to Sandhu's counsel, Matharu's counsel appeared to think the Crown was relying on s. 229(a)(ii) and his closing included reference to that theory.

[37] Banwait's counsel apparently understood the Crown as relying solely on s. 229(a)(i) and he responded only to that theory.

(c) The trial judge's charge – January 4-9, 2006

[38] Because of the positions taken by the parties at trial, the trial judge's instructions to the jury were complex and extended over four days.

[39] After describing the general legal principles applicable to the case, the trial judge turned to the instructions concerning the offence.

[40] He gave the jury an overview of the homicide provisions in the *Criminal Code* in the classic way: by going "up the ladder" from homicide to culpable homicide; by distinguishing murder from manslaughter based on the mental element for murder; and by distinguishing first degree murder from second degree murder by describing a first degree murder as a murder that is planned and deliberate.

[41] Although he did not refer to the section numbers of the *Criminal Code*, the trial judge described the necessary mental element for murder in terms of both s. 229(a)(i), which he described as an intent to cause death, and s. 229(a)(ii), which he described as an intent to cause serious injuries knowing they are likely to cause death and not caring whether death occurs.

[42] And again, in the classic way, it was only after describing the two possible mental elements for murder that the trial judge distinguished a first degree murder (under s. 231(2)) from a second degree murder by describing a first degree murder as a murder that is planned and deliberate.

[43] Before turning to the elements of the offence to be proven against each accused, the trial judge described the liability of parties to an offence and provided the jury with an "Overview of the Case".

[44] In describing the case for the Crown in his "Overview", the trial judge focused exclusively on section 229(a)(ii). He said:

> The case for the Crown is that Mr. Banwait, Mr. Matharu and Mr. Sandhu *agreed to cause serious injuries to Raheel Malik that they knew would likely kill him, not caring whether or not he died*. This agreement was the result of a plan, for the most part, by Mr. Banwait joined by Mr. Matharu and Mr. Sandhu at critical stages of its implementation on June 6, 2003. It was deliberately carried out, efficiently and brutally. [Emphasis added.]

[45] In relation to each accused, the trial judge then gave the jury instructions concerning causation, identity as a principal, murder as a principal, first degree murder as a principal, identity as an aider or abettor, murder as an aider or abettor, first degree murder as an aider or abettor, and manslaughter as either a principal or as an aider or abettor.

[46] Starting with Banwait, the trial judge went through each of the elements to be proven by the Crown in detail. In dealing with the mental element for murder as a principal, he essentially repeated his earlier short form summary, again without referring to section numbers. He then provided the following, more detailed instruction in which he referred to the mental element described in both s. 229(a)(i) and s. 229(a)(ii):

> The crime of murder requires proof of a particular state of mind. For an unlawful killing to be murder, the Crown must prove beyond a reasonable doubt that Mr. Banwait meant either to kill Raheel Malik or meant to cause serious injuries to Raheel Malik that Mr. Banwait **knew** would likely kill Raheel Malik, and went ahead anyway, not caring whether Raheel Malik died. Crown does **not** have to prove **both**. One is enough. All of you do **not** have to agree on the same state of mind, as long as everyone is sure that one of the required states of mind has been proven beyond a reasonable doubt. [Emphasis in the original.]

[47] After some further instructions, the trial judge set out the positions of the parties on the mental element for murder. The trial judge indicated the Crown took the position that "there is an abundance of evidence that proves beyond a reasonable doubt *either* of the states of mind required to commit the offence of murder." [Emphasis added.]

[48] After reviewing Banwait's position, the trial judge turned to the issue of first degree murder. Following an introduction, in which he repeated his short form summary of the mental element required for murder (either an intent to cause death or an intent to cause serious injuries knowing they are likely to cause death and not caring whether death ensues), he defined a first degree murder as a murder that is both planned and deliberate, emphasizing that "[i]t is **murder** itself that must be both planned and deliberate" and also that "[t]he planning and deliberation must be for a 'murder' and not merely for a fight." [Emphasis in original].

[49] The full text of the impugned portion of his instruction reads as follows:

> **Y. 4. 5.1 Introduction**
>
> Let me now deal with the fourth issue to be determined in the case against Mr. Banwait, namely, if the Crown has proven beyond a reasonable doubt that Mr. Banwait, as a principal offender who caused the death of Raheel Malik:
>
> - intended to kill Raheel Malik; or
>
> - intended to cause serious injuries to Raheel Malik that he knew would likely kill him and went ahead anyway not caring if Raheel Malik died,
>
> has the Crown proven beyond a reasonable doubt that Mr. Banwait, as a principal offender, planned to "murder" Raheel Malik and deliberately "murdered" him? A "murder" is "first degree murder" where it is both planned and deliberate.
>
> **Y. 4. 5. 2 The Definition of First Degree Murder**
>
> Let me begin this part of the charge with the definition of first degree murder.
>
> Not every murder is first degree murder. To prove that Mr. Banwait's murder of Raheel Malik, as a principal offender, was first degree murder, the Crown must prove beyond a reasonable doubt not only that Mr. Banwait murdered Mr. Malik, but also that the murder was both planned and deliberate. It is **not** enough for the Crown to prove that the "murder" was planned, or that the murder was deliberate. In order to establish that the "murder" of Mr. Malik was first degree murder, the Crown must prove both planning and deliberation beyond a reasonable doubt.
>
> It is **murder** itself that must be both planned and deliberate, **not** something else that Mr. Banwait did or said. The planning and deliberation must be for a "murder" and not merely for a fight. [Emphasis in the original.]

[50] In elaborating on the definitions of planning and deliberation, the trial judge said the following:

> A **planned** murder is one that is committed as a result of a scheme or plan that has been previously formulated or designed. It is the implementation of that scheme or design. A "murder" committed on a sudden impulse and without prior consideration, even with an intention to kill is **not** a planned murder.
>
> …
>
> A deliberate act is one that the actor has taken time to weigh the advantages and disadvantages of. The deliberation must take place **before** the act of murder, that is, before the verbal confrontation with the deceased at the Albion Mall started. A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is **not** a deliberate murder. [Emphasis in the original.]

[51] The trial judge then set out the position of the Crown and the position of Banwait on this issue. In describing the position of the Crown, the trial judge accurately recounted the Crown's position, which focused solely on s. 229(a)(i).

(d) Objections to the charge

[52] Following the completion of the trial judge's instructions to the jury, counsel for Banwait objected to the trial judge's leaving s. 229(a)(ii) with the jury. He said it appeared to him from the Crown's closing that the theory of the Crown was that the three accused formed the intent to kill Malik from the outset and he addressed the jury "in a certain way" as a result. Although he acknowledged that s. 229(a)(ii) might be another way of proving the intent for murder, he suggested that it was inappropriate to leave that theory with the jury if the Crown was not relying on it. Counsel for Banwait did not

object to the form of instructions given concerning s. 229(a)(ii) and planning and deliberation.

[53] The trial judge declined to change his characterization of the Crown's position. Although he acknowledged that the focus of the Crown's closing was on s. 229(a)(i) of the *Criminal Code*, he said he understood that the Crown was also relying on s. 229(a)(ii) and that it was his recollection that Crown counsel referred to both sections in his closing.

(e) Discussion

[54] Banwait submits that the trial judge's instructions failed to make it clear to the jury that even if they were satisfied Banwait murdered Malik, in order to return a verdict of first degree murder under ss. 231(2) and 229(a)(ii), they also had to be satisfied that he actually recognized, *in advance of the attack*, that Malik would likely die from his injuries.

[55] Put another way, Banwait contends that the trial judge failed to adequately caution the jury against jumping to a conclusion of first degree murder based on how the attack unfolded.

[56] In the particular circumstances of this case, I would accept this submission.

[57] The mental element for murder under s. 229(a)(ii) contains three components: (1) subjective intent to cause bodily harm; (2) subjective knowledge that the bodily harm is of such a nature that it is likely to result in death; and (3) recklessness as to whether death

ensues: *R. v. Nygaard*, [1989] 2 S.C.R. 1074, at pp. 1087-88; *R. v. Moo* (2010), 247 C.C.C. (3d) 34 (Ont. C.A.), at para. 45.

[58] That said, the central component of the mental element is "that of intending to cause bodily harm of such a grave and serious nature that the accused knew that it was likely to result in the death of the victim. The aspect of recklessness is almost an afterthought in so far as the basic intent is concerned": *Nygaard*, at p. 1088; see also *R. v. Cooper*, [1993] 1 S.C.R. 146, at pp. 154-55, which describes the mental element in s. 229(a)(ii) as having two aspects because of this statement in *Nygaard*.

[59] It is well-established that the intent described in s. 229(a)(ii) can form the basis for a planned and deliberate murder under s. 231(2): *Nygaard*.

[60] It follows that where the Crown alleges a planned and deliberate murder under s. 229(a)(ii), the requirement of planning and deliberation applies to all of the components of the mental element under s. 229(a)(ii). Accordingly, even though recklessness is essentially "an afterthought" in the mental element, in *Nygaard*, at p. 1088, Cory J. said "[t]he planning and deliberation to cause the bodily harm which is likely to be fatal must of necessity include the planning and deliberating to continue and to persist in that conduct despite the knowledge of the risk."

[61] In this case, even if the jury rejected the defence theory of a plan for a gang fight, it was open to them to conclude that Banwait planned and deliberated nothing more than ambushing Malik (and whatever supporters he managed to enlist) and beating him

severely, but that he did not plan and deliberate inflicting multiple blows to Malik's head with blunt instruments or turn his mind to the likelihood of Malik's death.

[62] Where it is not clear that events unfolded in the way that an accused planned, in addition to linking the requirement of planning and deliberation to the necessary mental element under s. 229(a)(ii), I think it is desirable that the trial judge explain to the jury how the requirement of planning and deliberation affects the components of the mental element. At a minimum, the trial judge should caution the jury against relying on findings that fall short of satisfying the requirements of a planned and deliberate first degree murder under ss. 231(2) and 229(a)(ii).

[63] This is because it is essential that the jury understand that the accused must plan and deliberate causing bodily harm *of a kind* the accused *knows* is *likely* to cause death and must be cautious not to jump to a conclusion that the accused planned that degree of harm and recognized the likelihood of death simply because the bodily harm the accused actually caused resulted in death.

[64] Such instructions might set out the following requirements for making a finding of first degree murder under ss. 231(2) and 229(a)(ii):

(i) the accused planned and deliberated causing bodily harm;

(ii) the accused *recognized*, while planning and deliberating, that *the bodily harm she was planning* was *likely* to cause the victim's death and proceeded with her plan not caring whether death ensued; and

(iii) the fact that the manner of carrying out a general plan to cause bodily harm results in the victim's death is not sufficient, in itself, to ground a finding of planned and deliberate first degree murder under s. 229(a)(ii).

[65] In this case, several features of the evidence suggested it was unlikely that Banwait knew that his plan would unfold in the way that it did. For example, the evidence that Malik tried to enlist supporters at the Rexdale house before going to the Albion Mall suggested that Banwait had no way of knowing that Malik would arrive essentially alone and unarmed. Further, it is apparent that Banwait had no way of controlling when or where Malik would arrive. Moreover, the fact that Banwait and Matharu went downstairs at the pool hall on their own to look for Malik undermines the suggestion of a well-organized plan to cause the injuries that were actually inflicted.

[66] Although I think that the trial judge's instructions went some distance towards addressing the points I have identified, I am not satisfied they went far enough.

[67] The trial judge linked the requirement of planning and deliberation to the mental element for murder through the following caution when discussing planning and deliberation:

> It is **murder** itself that must be both planned and deliberate, **not** something else that Mr. Banwait did or said. *The planning and deliberation must be for a "murder" and not merely for a fight*. [Bolding in original; italics added.]

[68] Although he did not do so at this point, the trial judge set out the two possible mental elements for murder repeatedly throughout his charge. In these circumstances, I reject Banwait's submission that the jurors would not understand that the term "murder" in this instruction referred to both possible mental elements.

[69] Nonetheless, in my opinion, the instruction that "[t]he planning and deliberation must be for a 'murder' and not merely for a fight" did not adequately caution the jury against jumping to a conclusion of first degree murder under s. 229(a)(ii) based on how the attack unfolded.

[70] The trial judge's caution directed the jury's attention to the distinction between planning and deliberating a gang fight and planning and deliberating a murder. But it did not capture the distinction between a general plan to ambush Malik and beat him severely and a more specific plan to ambush Malik and cause him bodily harm of such a kind that Banwait actually recognized in advance of the ambush was likely to cause Malik's death.

[71] If a juror rejected the defence theory of a planned gang fight and accepted the theory that Banwait planned to ambush Malik and cause him bodily harm, the juror still had to consider: i) whether Banwait planned and deliberated causing Malik bodily harm of a type he knew was likely to cause death and ii) whether Banwait actually recognized the likelihood of death *during the planning and deliberation process*.

[72] Absent more explicit instructions, if a juror was satisfied that Banwait planned to ambush Malik and cause him bodily harm, working up the ladder of the legal

instructions, it would be easy to conclude that Banwait recognized, during the course of the attack, that the bodily harm he and his group were actually causing was likely to cause death and to rely on that conclusion to support a verdict of first degree murder.

[73] Put another way, it would be easy to find that Banwait planned and deliberated an ambush that turned out to be a murder and to jump from that finding to a verdict of first degree murder.

[74] In the circumstances of this case, I do not think the failure to give more explicit instructions was a harmless error. I say that for three reasons.

[75] First, on my review of the record, although s. 229(a)(i), was an available route to first degree murder, the Crown's case for a planned and deliberate intentional killing was far from overwhelming. Given this, I think it a realistic possibility that at least some members of the jury harboured a doubt about whether Banwait planned to kill Malik and instead reached first degree murder under s. 229(a)(ii).

[76] There was no evidence that Banwait had a specific motive for murder or that he ever expressed any intention to kill Malik. Moreover, the verdicts demonstrate that the jury rejected the Crown's theory of a group plan to kill Malik.

[77] Further, counsel and the trial judge took different views of the relative strengths of the competing theories of liability.

[78] Crown counsel were clearly of the view that the evidence at trial demonstrated that the three accused concocted a plan to kill Malik by ambush. They went to the jury with that theory.

[79] On the other hand, the trial judge and at least one defence counsel at trial appeared to believe that the Crown's case for first degree murder rested most comfortably on ss. 231(2) and s. 229(a)(ii). Counsel for Sandhu and the trial judge both said as much in their pre-charge discussion on December 12, 2005; counsel for Matharu characterized the Crown's position that way in his closing address; and the trial judge described the Crown's position that way in his "Overview of the Case".

[80] The trial judge gave the jury standard instructions that although they were required to be unanimous in their verdict, they were not required to be unanimous in the factual route to their verdict: *R. v. Thatcher*, [1987] 1 S.C.R. 652, at pp. 697-99.

[81] In the circumstances, I consider it a realistic possibility that a least some members of the jury harboured a doubt about whether Banwait planned to kill Malik and instead reached first degree murder under s. 231(2) and s. 229(a)(ii).

[82] Second, because it is reasonable to conclude that at least some members of the jury harboured a doubt about whether the accused planned and deliberated killing the victim and yet reached a verdict of first degree murder relying on ss. 231(2) and 229(a)(ii), I think a real risk exists that at least some members of the jury jumped to a

conclusion of first degree murder without making all of the necessary findings. The distinction in mental states between s. 229(a)(i) and s. 229(a)(ii) is very subtle.

[83] As I have said, in *Nygaard* the Supreme Court of Canada noted that "[t]he aspect of recklessness is almost an afterthought in so far as the basic intent [under s. 229(a)(ii)] is concerned." In *Cooper*, the Court observed that, as compared to s. 229(a)(i), there is only a "slight relaxation" in the mental element required to prove murder under s. 229(a)(ii).

[84] Although it is easy to understand how a juror could have a reasonable doubt about whether Banwait planned to kill Malik, on a practical level, it is difficult to conceive how Banwait could plan and deliberate causing bodily harm to Malik that he *knew* was likely to cause death without also forming an intent to kill. His plan was not conceived immediately prior to the attack or with any apparent haste. If he recognized the likelihood of Malik's death based on what he planned, it is difficult to accept that he did not plan to kill him.

[85] Because the distinction in the mental states for a planned and deliberate murder under ss. 229(a)(i) and 229(a)(ii) is so subtle, and because it was possible that a juror could reach a verdict of first degree murder under s. 229(a)(ii) while harbouring a doubt under s. 229(a)(i), I think it was especially important that the trial judge tell the jury that the manner of carrying out a general plan to cause bodily harm that results in the victim's death is not sufficient, in itself, to ground a finding of a planned and deliberate first

degree murder. Without such a caution, a real concern exists that at least some members of the jury jumped to a conclusion of first degree murder based solely on how the attack unfolded.

[86] Third, as Banwait's counsel and the trial judge did not share the same understanding concerning whether the Crown was relying on both ss. 229(a)(i) and (ii), I think that an explicit caution against jumping to a conclusion of first degree murder was particularly important.

[87] Because of the confusion about which sections the Crown was relying on, trial counsel for Banwait did not address the jury on s. 229(a)(ii). However, the trial judge left both ss. 229(a)(i) and (ii) with the jury because he thought Crown counsel referred to both sections in their closing. On appeal, the Crown acknowledges the trial Crown did not refer to s. 229(a)(ii) in his closing.

[88] It is well settled that, as a general rule, the Crown is entitled to modify its position as a trial progresses and that a trial judge is entitled to instruct the jury on all available routes to liability even if the Crown chooses not to rely on a particular theory of liability: *R. v. Pickton,* 2010 SCC 32.

[89] However, in *R. v. Ranger* (2003), 67 O.R. (3d) 1, at para. 136, this Court explained that although it is open to a trial judge to leave a theory of liability not advanced by the Crown, failing to advise counsel of an intention to do so prior to the addresses can adversely affect trial fairness and require a new trial.

[90] Banwait did not rely on *Ranger* in his submissions on appeal. No doubt that was because both theories of liability were in play during the course of the trial. Nonetheless, the confusion about what sections the Crown was relying on affects the issue of the adequacy of the jury instructions. Where counsel did not address the jury on a theory of liability left with the jury by the trial judge because of a misunderstanding about what sections the Crown was relying on and without knowing what sections the trial judge planned to leave, it was essential that the trial judge's instructions on that theory be exacting.

[91] Although on appeal the Crown submitted that the trial judge's instructions were adequate, the Crown also made an alternate submission that the trial judge took s. 229(a)(ii) away from the jury as a route to first degree murder by confining his description of the Crown's position on first degree murder to s. 229(a)(i).

[92] I reject this submission. The trial judge repeatedly described the mental element necessary for murder in terms of both subsections and he linked the requirement of planning and deliberation to the mental element for murder generally. Further, in his "Overview of the Case", he described the Crown's position on planning and deliberation as relying on s. 229(a)(ii).

[93] In all the circumstances, I would give effect to this ground of appeal. However in fairness to the trial judge, I wish to acknowledge that this was a complex case involving many layers of legal issues. I consider it particularly unfortunate that Crown counsel did

not assist the trial judge by clarifying which section(s) they were relying on either during the pre-charge conference on December 12, 2005 or when counsel for Banwait objected to s. 229(a)(ii) being left following completion of the trial judge's charge to the jury.

[94] I will address the issue of remedy after dealing with Banwait's remaining ground of appeal.

(3) Did the trial judge err by failing to direct the jury about the negligible value of Banwait's post-incident conduct?

(a) Crown Counsel's Closing

[95] In his closing address to the jury, Crown counsel referred to the subject of post-offence conduct and said, "[t]here are several pieces of evidence about what the defendants did and said after the attack at the Albion mall that you should consider in assessing the evidence as a whole in this case."

[96] Crown counsel noted that all three defendants fled the scene immediately after the attack and that the weapons used in the attack were never discovered. He suggested it was a reasonable inference that the weapons were disposed of so the evidence they might provide would not be discovered and he reminded the jury that Banwait told his sister that their father was going to send him to India. He also discussed other aspects of the evidence relating to the other two defendants, including evidence that Matharu had lied in his statement to the police.

[97] Crown counsel concluded his discussion of this subject by saying, "[t]his evidence of the actions and statements by all three defendants after the attack is consistent with their knowledge that they had committed a crime on the night of June 6, 2003."

(b) The Trial Judge's Instructions

[98] The trial judge provided the jury with a general summary of the post-incident conduct evidence and said, "[t]hese circumstances may, or may not, depending upon your assessment of them, tend to incriminate a defendant in a crime, such as first degree murder, second degree murder or manslaughter."

[99] He then gave the jury specific instructions concerning their use of each aspect of the post-incident evidence relied on by the Crown. In doing so, he tied his instructions to the concept of whether any of the defendants was a "party" to the crime. For example, concerning flight, the trial judge said:

> Evidence that a defendant fled from the scene of a criminal (sic) may help you decide whether the defendant was a "party" to the crime.
>
> What a defendant did after a crime may indicate that he acted in a way which, according to human experience and logic, is consistent with the conduct of the person who was a "party" to the crime and inconsistent with the conduct of one who was not a "party" to it. On the other hand, there may be another explanation for flight from the scene of a crime, something unconnected with participation in it as a "party". …Be cautious. This process could lead to a finding of fact, either in favour of, or against, a defendant, to be considered with all of the other evidence in determining whether or not the Crown has proven beyond a reasonable doubt that the

> defendant was a "party" to the crime. Recall the definition of proof beyond a reasonable doubt.

[100] In relation to Matharu, the trial judge reminded the jury that Matharu's Counsel conceded in his closing address that, subject to an issue about honest consent by Malik to fight Banwait, Matharu was guilty of manslaughter. The trial judge instructed the jury that in the light of this concession they could only use any post-incident conduct of Matharu in determining his guilt or innocence on the charge of manslaughter.

(c) Banwait's Position on Appeal

[101] On appeal, Banwait points out that although he did not acknowledge at trial that he should be convicted of any offence, he did acknowledge through counsel that he was present at the attack and that he hit Malik once with a hammer. Further, counsel on appeal notes that the defences Banwait advanced at trial (lack of causation; Malik's consent to the fight) were so implausible as to be absurd. In these circumstances, the only real issue for the jury was whether he was guilty of first degree murder, second degree murder or manslaughter. Accordingly, he contends that the trial judge erred by failing to instruct the jury that the post-incident conduct evidence relevant to him had negligible probative value.

(d) Discussion

[102] Although I agree that it would have been preferable had the trial judge instructed the jury specifically that they could not use evidence of post-incident conduct in determining the level of culpability of any of the defendants as he did for Matharu, I am

not persuaded that Banwait has demonstrated reversible error in the trial judge's instructions.

[103] Whatever Banwait now says about the viability of the defences he raised at trial, the fact remains that he did not admit his guilt of any offence. Accordingly, he was not entitled to a no probative value instruction.

[104] Moreover, on the facts of this case, I fail to see any air of reality to the suggestion that the jury would somehow have used the evidence of Banwait's post-incident conduct to conclude that he was guilty of first degree murder as opposed to second degree murder or manslaughter, or to conclude that he was guilty of second degree murder as opposed to manslaughter. Neither the trial Crown nor the trial judge suggested to the jury that they could use the post-incident conduct evidence to determine Banwait’s level of culpability. Further, the post-incident conduct evidence in issue does not itself give rise to that chain of reasoning.

[105] Finally, I note that trial counsel for Banwait not only did not object to the trial judge's instructions on this issue, but he also saw a draft of the trial judge's instructions in advance and requested some minor changes in the language. Although not determinative of the issue, trial counsel's position goes some distance to confirming there was no realistic likelihood that the jury misunderstood the trial judge's instructions on this issue.

[106] I would not give effect to this ground of appeal.

(4) Conclusion Re: Banwait's Conviction Appeal

[107] Based on the foregoing reasons, I would accept Banwait's submission that the trial judge erred in his instructions to the jury on the relationship between planning and deliberation and murder as defined in s. 229(a)(ii) of the *Criminal Code* but I would dismiss his remaining grounds of appeal. As both the Crown and Banwait agree that the appropriate disposition in these circumstances is to substitute a conviction for second degree murder, I would set aside the conviction for first degree murder, substitute a conviction for second degree murder and remit the matter to the trial judge for sentencing: see s. 686(1)(b)(i) and s. 686(3) of the *Criminal Code*; *R. v. Maciel* (2007), 219 C.C.C. (3d) 516 (Ont. C.A.).

Matharu's Conviction Appeal

(1) Did the trial judge misdirect the jury concerning Matharu's position on the pathologist's evidence?

(a) The Pathologist's Evidence

[108] Following the attack, Malik remained hospitalized until his death on June 26, 2003. Dr. John Doucet conducted an autopsy and determined that the cause of death was pneumonia with complicating blunt force cranial-cerebral trauma.

[109] Dr. Doucet found three main injuries to Malik's head and face -- one to the back of his head (the occipital area), one to the right side of his head (the frontal-parietal area), and one to the right side of his jaw (the maxilla). He described two of these injuries as

being capable of causing death individually -- the injury to the back of the head and the injury to the right side of the head.

[110] Dr. Doucet was unable to say how many blows caused the injury to the back of the head or what form of object caused the injury. However, it could not have been caused by a fall. Rather, it was caused by "an object of reasonable mass applied with considerable force", such as a two-by-four piece of wood or some other object of similar mass. Alternatively, it could have been caused by a number of kicks with steel toed boots.

[111] As for the injury to the right side of the head, Dr. Doucet described it as a patterned injury, meaning it had a specific configuration (in this case a round fracture site), that would be consistent with the configuration of the instrument that caused it. Dr. Doucet opined that this fracture might have been caused by the head of a hammer or a mallet, or perhaps a solid lead pipe with a similar diameter.

[112] Both of these injuries caused lacerations to the surface of the brain and brain swelling, leaving Malik in a comatose state, intubated and susceptible to infection.

[113] The injury to the right side of the jaw involved significant force and could have been caused, for example, by the edge of a hammer head, by the edge of a rounded pipe or by the edge of a rounded boot applied with great force.

(b) The Trial Judge's Summary of the Defence Position on Causation

[114] In his charge to the jury, the trial judge indicated that all three defendants took the position that Dr. Doucet's evidence did not prove causation beyond a reasonable doubt because of alleged shortcomings in his approach to the autopsy:

> The position of the defence is that the evidence of Dr. Doucet does not prove "causation", as defined, beyond a reasonable doubt. Pneumonia was the immediate cause of death. The opinion of Dr. Doucet concerning the likelihood of death arising from the two main head injuries is not sufficient to prove causation beyond a reasonable doubt, in the defence submission. *He failed to act in a professional and scientific way, in that he did not read all of the medical records of the deceased. He acted as a puppet for the police. Return a verdict of "Not Guilty".* [Emphasis added.]

(c) Matharu's Position on Appeal

[115] On appeal, Matharu contends that the trial judge erred by misrepresenting to the jury his position on causation and on Dr. Doucet's credibility.

[116] According to Matharu, Dr. Doucet's evidence went a long way to advancing his defence -- it neutralized the evidence of eyewitnesses who exaggerated the extent and quantity of blows to Malik's head. Moreover, it established that Matharu could not have struck Malik with a pipe as each of the three injuries observed by Dr. Doucet was accounted for by other mechanisms.

[117] Matharu maintains that it was Sandhu who raised the issue of causation and attacked Dr. Doucet's credibility, and that Banwait ultimately adopted Sandhu's position.

[118] Matharu contends that the trial judge's description of his position on causation undermined his true position, namely, that Dr. Doucet's evidence undermined the credibility of various eyewitnesses, precluded a finding that Matharu struck Malik with the pipe and bolstered the credibility of Matharu's statement to the police. Moreover, he claims that he objected to these aspects of the trial judge's charge and that the trial judge erred by failing to correct his mischaracterizations.

(d) Discussion

[119] I would not accept these submissions for four reasons.

[120] First, on my review of the record, Matharu's position at trial was more complicated than he now acknowledges. Following cross-examination of Dr. Doucet, Crown counsel noted that defence counsel had previously indicated that causation was not an issue and said that it now appeared that it was. The trial judge agreed. Matharu's counsel did not disavow that suggestion.

[121] Second, in my opinion, it is far from clear that Matharu objected to anything other than the suggestion that the defence characterized Dr. Doucet as a puppet for the police:

> **Matharu's counsel**: When Your Honour is addressing Dr. Doucet's evidence pertaining to causation … Your Honour has stated, in terms of the position of the defence, that "he acted as a puppet for the police", and, in my respectful submission, that characterization of Dr. Doucet was never presented on behalf of Mr. Matharu either in submissions or in cross-examination, and I have concerns that the way experts are often—and medical doctors are somewhat treated reverentially by citizens and the jury, that such a negative

> comment may reflect poorly on Mr. Matharu. That was never my approach to Dr. Doucet. …
>
> **The Court**: You are right in making the observation. That was not your position on that issue. Your position, in my mind, was the wise one to take from the defence perspective, but leaving aside that, here's what happened in the trial.
>
> Matharu's counsel: Mm-hmm.
>
> **The Court**: Mr. Moon took leadership on the issue, and the other two defendants basically said Mr. Moon has made submissions on that and I'm not going to state anything else. So you kind of left it there, urging them, in effect, to give your client the benefit of anything that Mr. Moon might have achieved on the issue of causation, without taking expressly any position on the issue. So that's what got me to that draftsmanship.
>
> Matharu's counsel: Mm-hmm.
>
> **The Court**: I don't think it's a big issue, but if they come back with a question on that, I'll make sure you're accommodated on that point. I do not anticipate them coming back with a question on the issue of causation, but it's a strange world. Who knows what is going to happen.

[122] Third, contrary to Matharu's position on appeal, Dr. Doucet's evidence did not preclude a finding that Matharu struck Malik with the pipe he was carrying. Nor did it support the credibility of his statement to the police that he only kicked Matharu.

[123] As noted above, in his evidence, Dr. Doucet specifically allowed for the possibility that one or more of Malik's head injuries were caused by a blow with a pipe. Moreover, Dr. Doucet testified that if Malik had indeed been kicked hard in the body he would have expected to see some sign of it when he conducted the autopsy.

[124] Finally, in my opinion, the trial judge's summary of Matharu's position in relation to Dr. Doucet's evidence was extremely fair. He referred to Matharu's position that the eyewitness testimony concerning the attack was inconsistent and that Dr. Doucet's description of Malik's injuries proved the eyewitnesses unreliable.

(2) Did the trial judge err in finding that Matharu's statements to the police were voluntary?

(a) Matharu's arrest and statements to the police

[125] Evidence concerning Matharu's arrest and statements to the police was initially led on a blended *voir dire* addressing voluntariness and *Charter* issues. On the *voir dire*, the Crown called all of the officers who had contact with Matharu prior to him giving any statements. Matharu did not testify on the *voir dire*.

[126] Matharu was arrested in the afternoon on the day following the attack. After arresting Banwait, police received information that a second suspect, who had been armed with a pipe, was involved in the incident. Police also received a first name and telephone number for this person.

[127] At about 1 p.m. on June 7, 2003, Det. Robert Gallant called the telephone number and told Matharu that police were investigating a serious assault at the Albion Mall and wanted to talk to him as they had information he was involved. Matharu said he had family present and would not be available until after 3 p.m. On being asked, he gave his address to Gallant.

[128] After speaking to Matharu, Gallant asked Det. Brian Johnston, a member of the CIB day shift, to go to Matharu's home and arrest him for attempted murder. Gallant called Matharu and told him that police officers would be coming to his house and asked him to go to the front door to speak with them.

[129] When Matharu went to the front door he asked Johnston if they could speak outside as he did not "want [his] parents to know about this." He went to the officers' car and got into the backseat with detective Constable Ferguson. Johnston and Constable Paweska got into the front seat.

[130] Once inside the car, Johnston told Matharu they were there "about the incident at Albion Road last night." Matharu said, "I wasn't at Albion last night. I was in Mississauga all night." Johnston testified that he responded, "Well that's not what we heard. My information is that you were involved in a fight at the mall and that you were hitting the guy with the pipe, so I have to tell you you're under arrest for attempted murder and assault with a weapon." Matharu replied, "But sir, I only kicked the guy."

[131] Johnston testified that he then informed Matharu that before Matharu said anything further, Johnston would have to caution him. According to Johnston, he read Matharu his rights to counsel and the primary and secondary cautions and asked Matharu if he understood. Matharu said "yes" and answered "no" when asked if he wanted to speak to a lawyer "now". Johnston told Matharu they would let him give his side of the story at the police station.

[132] According to the officers, Matharu began speaking spontaneously several minutes into the trip. Paweska testified that he recorded the following statement in a steno pad he was using to keep running notes:

> Okay I'll tell you we were driving around. They call me, said go to Macs, Highway 10 and Eglinton. We got there and Aman... said let's go to Albion Mall. He got inside car and we drove. Aman called someone. Tells to meet him at Albion Mall. We get there. A gray Grand Am pulls up. A guy jumped out of car. That girl knew the guy. Jumped between him and Aman. Someone hit this guy in the back of the head with a cricket bat. Couple guys hit him. Lots of guys came out. Two to three guys hit him. Aman had a hammer. Kept hitting the guy. I had a pipe down my pants. I didn't hit them. I kicked him. We left, went to Country Style. This girl drank cleaner. We went to hospital. Aman left with other guys.

[133] Johnston asked Matharu a series of questions to identify who was with him, whose car they were in, where he and Aman had obtained their weapons and what he did with the pipe. After Matharu indicated he threw the pipe out the car window near Kennedy and Eglinton, the police headed to the location where the pipe was discarded and conducted a search. Police searched for about 25 minutes without success and then headed to the police station.

[134] Johnston did a pat down search on Matharu after he was booked. He then took Matharu to an interview room, where he and Paweska did a strip search. Johnson advised Matharu that he had basically told them everything that had happened but he could now provide his side of the story. Matharu said he only “kicked him” and that Aman hit him

with a hammer. He agreed to provide a video statement in which he essentially reiterated his earlier version of the events.

(b) The Statement *Voir Dire* at the Preliminary Inquiry

[135] The voluntariness of Matharu's statements was the subject of a *voir dire* at the preliminary inquiry. After hearing evidence from Johnston, Paweska and Ferguson, the preliminary inquiry judge drew adverse inferences concerning their credibility and ruled Matharu's statements involuntary.

(c) The Trial Judge's Reasons

[136] Matharu's trial counsel argued that the police officers' evidence on the *voir dire* was not credible and that their evidence raised issues about whether Matharu was arrested and cautioned before arriving at the police station and before making various statements to the police. Defence counsel relied, in part, on the officers' failure to audiotape or videotape their interactions with Matharu.

[137] After observing that there were some differences in the officers' notes concerning their interactions with Matharu and concerning the statements that he made, the trial judge concluded that the officers' notes constituted a reasonably accurate record of events and did not leave him with a reasonable doubt on the issue of voluntariness because of a lack of a sufficient record.

[138] Concerning certain omissions from Ferguson's notes, the trial judge accepted Ferguson's explanation that he was responsible for the safe custody of Matharu and

therefore did not pay much attention to the dialogue between Johnston and Matharu. Although the trial judge said it would have been preferable to at least audiotape all of the exchanges with Matharu, he found that Johnston's notes were a reliable record of those exchanges because Johnston made his notes as he spoke and took care to speak at a pace that permitted him to make accurate notes.

[139] As for the issue of when Matharu was arrested, the trial judge rejected defence counsel's argument that the police officers' failure to put handcuffs on or conduct a pat down search of Matharu when he was placed in the police car and their failure to keep Matharu in the police car while they searched for the pipe was inconsistent with their claim that they arrested Matharu at his house. In reaching his conclusion, the trial judge considered the evidence as a whole including the following factors: Gallant instructed Johnston to arrest Matharu; Johnston, Ferguson and Paweska went to Matharu's home for that purpose; the officer's positioning around Matharu's house suggested an arrest; Johnston did not believe that Matharu was likely armed when he emerged from his house because he was wearing a T-shirt and track pants; Matharu was cooperative with the police and Johnston testified that he exercised his discretion against handcuffing because he had no information that Matharu might be dangerous or take flight.

[140] Although the trial judge concluded that the initial strip search of Matharu in the interview room was unreasonable, he found that the strip search was not causally linked to Matharu's video statement and therefore did not raise a reasonable doubt on the issue of voluntariness. Finally, the trial judge rejected defence counsel's submissions that

Gallant and other officers engaged in tricks or deceit that would render Matharu's statements involuntary.

[141] In addition to voluntariness, defence counsel raised various *Charter* issues in relation to Matharu's statements. The trial judge's rulings on those issues are not the subject of this appeal.

(d) Discussion

[142] On appeal, Matharu argues that the trial judge made two critical errors in his voluntariness ruling. First, Matharu submits that the trial judge erred by failing to consider the importance of the preliminary hearing *voir dire* in his credibility findings. Matharu contends that the fact that the police officers had already been subject to extensive cross-examination, which resulted in adverse credibility findings against them, should have factored heavily in the trial judge's assessment of their evidence.

[143] Second, Matharu claims that the trial judge's credibility findings reveal a significant inconsistency in that the trial judge accepted Ferguson's explanation for failing to record important details because of concerns about officer safety, yet the trial judge also accepted Johnston's evidence that it was unnecessary to handcuff and search Matharu upon arrest. Matharu also contends that the trial judge ignored or failed to appreciate a variety of relevant evidence in arriving at his credibility findings.

[144] I would not accept these submissions.

[145] Concerning the first issue, the Supreme Court of Canada has repeatedly held that the doctrine of issue estoppel does not apply to statement *voir dires*: *R. v. Mahalingan*, [2008] 3 S.C.R. 316; *R. v. Duhamel*, [1984] 2 S.C.R. 555. Accordingly, the Crown is not barred from seeking to introduce a statement ruled inadmissible in a prior proceeding, and the duty of a trial judge presiding on a subsequent *voir dire* is to consider the admissibility issue afresh based on the evidence adduced in the subsequent proceeding. Moreover, the judge presiding at the subsequent hearing does not owe deference to factual or credibility findings made at an earlier hearing.

[146] In this case, it would have been readily apparent to the trial judge, based on the evidence and submissions on the *voir dire*, that the police officers had had some "practice" at the preliminary inquiry in testifying about the circumstances of Matharu's arrest and his statements. However, that was but one factor, among many, for the trial judge to consider in assessing the issues on the *voir dire*. In my opinion, it is clear from the trial judge's reasons that he was alive to the centrality of the police officers' credibility, that he gave careful consideration to that issue and that he came to his own conclusions for reasons that he explained. I reject as unfounded Matharu's argument that the fact of the police officer's prior testimony should have factored heavily in the trial judge's consideration.

[147] As for the second issue, I do not accept Matharu's submission that there was an inconsistency in the trial judge's credibility findings. Johnston testified that he did not view Matharu as a flight risk or a security risk and that, for that reason, he did not

consider it necessary to handcuff Matharu or search him before inviting him into the back of the police car and arresting him. Johnston testified that was his decision alone.

[148] On the other hand, Ferguson explained that he was sitting in the back of the police car, with his gun side to Matharu. He was concerned about safety because of the close quarters and potential consequences. Having regard to the circumstances, it was open to the trial judge to accept the evidence of both officers – they were faced with different decisions in different circumstances. I see no inconsistency in the trial judge's findings.

[149] Similarly, I do not accept Matharu's submission that the trial judge ignored or failed to appreciate a variety of relevant evidence in arriving at his credibility findings. The trial judge gave a detailed ruling in which he carefully explained why he rejected the defence submissions and accepted the evidence of the police officers in relation to the voluntariness issue. The fact that the trial judge did not find compelling items of evidence that Matharu submits could have led to a different conclusion does mean that the trial judge misapprehended or ignored relevant evidence. It simply means that the trial judge reached a different conclusion for the reasons that he explained.

(3) Was the verdict of second degree murder unreasonable?

(a) Matharu's Position on Appeal

[150] Matharu submits that the verdict of second degree murder was unreasonable.

[151] The trial judge left with the jury two routes to convict Matharu of second degree murder: i) as a principal on the basis that he struck Malik with the pipe, inflicting one of

the two significant injuries that caused Malik's death, and that he acted with one of the intents described in s. 229(a); and ii) as an aider or abettor on the basis that he assisted or encouraged the perpetrator in committing murder and that he did so with knowledge of the perpetrator's intention and an intention to assist the perpetrator.

[152] Concerning the availability of a finding that he was guilty of second degree murder as a principal, Matharu contends that the evidence of the only witnesses that could support a finding that he struck Malik with the pipe was so unreliable as to be unworthy of belief. In addition, he submits that the evidence of Dr. Doucet effectively eliminated him as a perpetrator.

[153] Concerning the availability of a finding that he was guilty of second degree murder as an aider or abettor, Matharu contends that there was a significant body of evidence suggesting that he was an unwilling participant in the attack on Malik and that he abandoned the assault at an early stage. Moreover, he submits that there was no evidence capable of establishing that he possessed the requisite intent for second degree murder.

(b) Discussion

[154] I would not accept these submissions.

[155] Concerning the availability of a finding that Matharu was guilty of second degree murder as a principal, I conclude that it was open to the jury to find that he struck Malik

in the head with a metal pipe. Moreover, I reject his submission that Dr. Doucet's evidence effectively eliminated the possibility that he struck one of the fatal blows.

[156] Three witnesses gave evidence capable of supporting a finding that Matharu struck Malik in the head with a pipe: Mutti-ur Rehman, Hammad Khan and Azzm Khan.

[157] In examination-in-chief, Rehman testified that after Banwait hit Malik with his hammer, Matharu hit Malik in the head with a metal pipe at least two or three times. Rehman acknowledged in cross-examination that he did not mention the pipe when he first spoke to the police on the night of the attack and that, in fact, he told police twice that he did not see "the red bandana guy" (that is, Matharu) hit Malik. However, in re-examination he confirmed that he told the police that he saw the red bandana guy hit Malik with his pipe. In addition, he confirmed that, at the preliminary inquiry, he testified that he saw the person with the red bandana swing his weapon at Malik but could not see where the blow landed.

[158] Hammad Khan testified that he saw the red bandana guy swing at Malik, though he did not see contact. Azzm Khan testified that Banwait or Matharu or both were the first to hit Malik. He could not tell which one hit him first, it could have been both hitting him at the same time. He was sure Malik was hit in the head two or three times with a hammer. When it was suggested that he did not see a pipe hit Malik, he responded: "I'm not sure about the second object.... Could have been anything, but it was a metal object

for sure. It could have been a hammer; could have been a pipe; could have been anything else made out of metal."

[159] Although Dr. Doucet's evidence suggested the likelihood that the lethal injury to the side of Malik's head was caused by a hammer with an oval shaped head, his evidence left it open to the jury to find that the lethal injury to the back of Malik's head was caused by a pipe or by multiple blows, possibly from different weapons.

[160] Particularly in the light of the evidence of multiple blows being administered to Malik's head with blunt force instruments, there was ample evidence to support a finding that the person(s) administering those blows had one of the requisite intents for murder.

[161] In the end, I conclude that there was a sufficient evidentiary basis to permit the jury to find Matharu guilty of second degree murder as a principal on the basis described by the trial judge. Moreover, like the Crown on appeal, I think it at least arguable that the trial judge's instructions on the issue of liability for second degree murder as a principal were overly favourable to the appellant.

[162] In any event, I am satisfied that there was ample evidence to permit the jury to find Matharu guilty of second degree murder as an aider and abettor. That evidence included the following:

- evidence that upon Malik's arrival at the Albion Mall, Matharu stepped towards him along with Banwait and called and gestured to the armed group assembled across the parking lot to " come, come";

- evidence that Matharu was armed with a metal pipe and pulled out a pipe on Malik's arrival;
- Matharu’s acknowledgement in his statement to the police that he was waving the pipe during the course of the attack and that after Malik was on the ground he kicked him hard in the side;
- evidence that during the course of the attack Malik was struck on the head several times with blunt force instruments.

[163] Considered in combination, at a minimum, the foregoing evidence was capable of supporting a conclusion that Matharu was present for the purpose of assisting in the attack on Malik. Further, it was capable of supporting a conclusion that, at least at some point during the course of the attack, both Matharu and the perpetrators would have inevitably realized that the injuries being inflicted were likely to cause death and that Matharu persisted in kicking Malik for the purpose of assisting in the attack.

[164] In my view, the evidence Matharu points to as suggesting that he was an unwilling participant in the attack and that he abandoned the assault at some stage does no more than demonstrate that it may have been open to the jury to reach a different conclusion depending on their view of the totality of the evidence.

[165] I would not give effect to this ground of appeal.

D. DISPOSITION

[166] Based on the foregoing reasons, I would allow Banwait's appeal in part, set aside his conviction for first degree murder, substitute a conviction for second degree murder and remit the matter to the trial judge for sentencing. I would dismiss Matharu's appeal.

Signed: "Janet Simmons J.A."

"I agree J. I. Laskin J.A."

MacPherson J.A. (Dissenting):

[167] I have read the draft reasons prepared by my colleague Simmons J.A. I agree with her that Mr. Mathuru's appeal from his conviction for second degree murder should be dismissed.

[168] I also agree with two of my colleague's conclusions with respect to Mr. Banwait's conviction for first degree murder – namely, the jury's verdict was not unreasonable and the trial judge did not err in failing to direct the jury on the negligible value of post-offence conduct.

[169] However, my colleague concludes that the trial judge did not properly instruct the jury on the relationship between planning and deliberation and murder as defined under s. 229(a)(ii) of the *Criminal Code*. Accordingly, she would allow the appeal and substitute a conviction for second degree murder. I respectfully disagree with her reasoning and conclusion on this issue. As my colleague has provided a full description of the facts and has set out the relevant portions of the trial judge's jury charge, I can state my reasons for disagreement in brief compass.

[170] I begin with four contextual points.

[171] First, when assessing the adequacy of a jury charge, a reviewing court must have regard to the context of the trial as a whole. A trial judge's instructions are not to be held to a standard of perfection. An accused is entitled to a properly instructed jury, not a

perfectly instructed jury. It is the overall effect of the charge that matters: see *R. v. Jacquard*, [1997] 1 S.C.R. 314, at paras. 1-2.

[172] Second, it is essential that a reviewing court bear in mind the audience to whom the charge is addressed – it is a jury consisting of 12 citizens listening carefully because they are aware that they, and they alone, will be called upon to make an important and difficult decision. Accordingly, the proper approach to be taken by an appellate court in assessing a jury charge is, as stated by Bastarache J. in *R. v. Daley*, [2007] 3. S.C.R. 523, at paras. 30-31:

> The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters.... In determining the general sense which the words used have likely conveyed to the jury, the appellate tribunal will consider the charge as a whole.

[173] Third, the experienced criminal trial judge in this case employed, almost word-for-word, the model final jury instructions for planned and deliberate murder as set out in David Watt, *Watt's Manual of Criminal Jury Instructions* (Toronto: Thomson Carswell, 2005) at 435 (the Watt Instructions) in his jury charge. These instructions are the product of the lengthy and focussed collaboration of many of the very best criminal law judges, lawyers and academics in Canada. If appellate courts conclude too easily or too often that these instructions are wrong or insufficient, charging a jury will become a perilous endeavour indeed.

[174] Fourth, all three trial counsel made no objection to the content of the jury charge on this issue.

[175] Against this backdrop, I turn to the issue of the sufficiency of the trial judge's charge on the relationship between planning and deliberation and murder as defined under s. 229(a) of the *Criminal Code*, which provides:

> 229. Culpable homicide is murder
>
> (a) where the person who causes the death of a human being
>
> (i) means to cause his death, or
>
> (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not

[176] The trial judge charged on both components of this provision. My colleague concludes that his charge on the second component was insufficient. The core of her reasoning is at paras. 61-63:

> In this case, even if the jury rejected the defence theory of a plan for a gang fight, it was open to them to conclude that Banwait planned and deliberated nothing more than ambushing Malik (and whatever supporters he managed to enlist) and beating him severely, but that he did not plan and deliberate inflicting multiple blows to Malik's head with blunt instruments or turn his mind to the likelihood of Malik's death.
>
> Where it is not clear that events unfolded in the way that an accused planned, in addition to linking the requirement of planning and deliberation to the necessary mental element under s. 229(a)(ii), I think it is desirable that the trial judge explain to the jury how the requirement of planning and deliberation affects the components of the mental element. At a minimum, the trial judge should caution the jury against relying on findings that fall short of satisfying the requirements of a planned and deliberate first degree murder under ss. 231(2) and 229(a)(ii).

> This is because it is essential that the jury understand that the accused must plan and deliberate causing bodily harm *of a kind* the accused *knows is likely* to cause death and must be cautious not to jump to a conclusion that the accused planned that degree of harm and recognized the likelihood of death simply because the bodily harm the accused actually caused resulted in death. [Emphasis in original.]

[177] For several reasons, I do not agree with this critique of the trial judge's charge.

[178] First, the trial judge explicitly linked the mental element relating to causing bodily harm and the mental element relating to the likelihood of causing death. He did this first in the *Overview* section of his charge, where he said:

> The case for the Crown is that Mr. Banwait, Mr. Matharu and Mr. Sandhu agreed to cause serious injuries to Raheel Malik that they knew would likely kill him....

[179] The trial judge instructed the jury in a similar fashion when he turned to the case against Mr. Banwait:

> Let me now deal with the fourth issue to be determined in the case against Mr. Banwait, namely, if the Crown has proven beyond a reasonable doubt that Mr. Banwait, as a principal offender who caused the death of Raheel Malik:
>
> ...
>
> - *intended* to cause serious injuries to Raheel Malik that *he knew* would likely kill him and went ahead anyway not caring if Raheel Malik died …. [Emphasis added.]

[180] In my view, these passages easily comply with Cory J.'s description of the mental elements of s. 229(a)(ii) of the *Code* in *R. v. Nygaard*, [1989] 2 S.C.R. 1074, at 1088:

> [T]he section requires the accused to *intend* to cause the gravest of bodily harm that is so dangerous and serious that *he knows* it is likely to cause death.... [Emphasis added.]

[181] Second, immediately after he charged the jury with respect to s. 229(a)(ii) – indeed beginning in the same sentence and continuing for several paragraphs – the trial judge explicitly linked the mental elements required under s. 229(a)(ii) with the s. 231(2) requirement that the murder be both planned and deliberate. The language of this component of the charge was the standard language from the Watt Instructions, coupled with an application to the relevant facts of the case:

> A planned murder is one that is committed as a result of a scheme or plan that has been *previously formulated or designed*. It is the implementation of that scheme or design. A "murder" committed on a sudden impulse and without prior consideration, even with an intention to kill is not a planned murder.
>
> "Deliberate" is not a word that we often use when speaking to other people. It means "considered, not impulsive", "carefully thought out, not hasty or rash", "slow in deciding", "cautious".
>
> A deliberate act is one that the actor has taken time to weigh the advantages and disadvantages of. *The deliberation must take place before the act of murder, that is, before the verbal confrontation with the deceased at the Albion Mall started.* A murder committed on a sudden impulse and without prior consideration, even with an intention to kill is not a deliberate murder. [Emphasis added.]

[182] I fail to see how these two components of the jury charge – relating to planning and deliberation and relating to intent to cause bodily harm with knowledge of a likelihood of causing death – are insufficient in this case. The trial judge employed the

language from the standard jury charge with respect to both ss. 231(2) and 229(a)(ii) of the *Code*. In my view, this language is clear and long-accepted (*Nygaard*). Moreover, he directly linked the two components and immediately applied them to the relevant facts of the case.

[183] In *Daley* at para. 30, Bastarache J. said that "[t]he cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters". Looking at the trial judge's definition of the phrases "planned and deliberate" and "means to cause him bodily harm that he knows is likely to cause his death" and the structure of his charge, I cannot see, as my colleague does, an insufficient linkage between his discussion of s. 231(2) and his discussion of s. 229(a)(ii).

[184] Third, the trial judge did provide precisely the warning my colleague proposes, namely that he "caution the jury against relying on findings that fall short of satisfying the requirements of a planned and deliberate first degree murder". He said:

> It is murder itself that must be both planned and deliberate, not something else that Mr. Banwait did or said. The planning and deliberation must be for a "murder" and not merely for a fight.

[185] In the end, my colleague thinks that "a real concern exists that at least some members of the jury jumped to a conclusion of first degree murder based solely on how the attack unfolded." In my view, the above passage (and other similar passages) from the trial judge's charge are a direct and sufficient response to this concern.

[186] Fourth, I return to the shared instruction from the Supreme Court of Canada's decisions in *Jacquard* and *Daley* – the jury charge must be considered in its entirety. In that vein, it is always important to consider not only the legal definition of criminal offences and legal concepts provided by the trial judge, but also the trial judge's treatment of the evidence relating to the offences and concepts. On that score, the trial judge's jury charge was, in my view, comprehensive and scrupulously fair.

[187] Crucially, the link between the concepts in ss. 231(2) and 229(a)(ii) of the *Code*, which I say the trial judge explained appropriately, was not lost when he reviewed the evidence. Indeed, the link was enhanced significantly by the amount of evidence the trial judge reviewed relating to the issues of planning and deliberation and intent to cause bodily harm with knowledge of a likelihood that it could cause death.

[188] I can illustrate this point with reference to one (of many) passages in the jury charge. On the issue of first degree murder, the trial judge comprehensively and even-handedly set out the positions of the Crown and the defence. He summarized the defence case under nine headings, explaining the ninth point in this fashion:

> Ninth, consider the evidence of the attack on the deceased. The incident occurred in a well-lit parking lot of a busy mall where security cameras existed and security guards were on duty. This is an unlikely location for a planned killing. Moreover, the weapons used by Mr. Banwait and the others, that is, a hammer, a pipe and a two by four, are not likely weapons of choice for a planned killing. Rather, they are likely weapons taken to be used if a fight got out of hand, to further verbal hostilities, or to sort out the "beef".

[189] Here, in a practical, plain-English way, the trial judge linked in a single point evidence that is relevant to the concepts in both ss. 231(2) and 229(a)(ii) of the *Criminal Code*. He made the same linkage in his review of the evidence in many other places throughout his charge.

[190] In summary, the trial judge's charge on planning and deliberation under s. 231(2) of the *Criminal Code* is unassailable. His charge on s. 229(a)(ii) of the *Code* is entirely consistent with Cory J.'s description of the mental elements of this provision in *Nygaard*. Finally, the structure and content of the jury charge, in relation to both the description of legal concepts in the relevant *Criminal Code* provisions and the review of the relevant evidence, provide an explicit and sufficient linkage between the two provisions.

[191] For these reasons, and for the reasons of my colleague on the other issues, I would dismiss both appeals.

Signed: "J. C. MacPherson J.A."

RELEASED: "JL" DECEMBER 17, 2010