PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Thomas, 2012 NSPC 117

Date: October 17, 2012

Docket: 2197368-2197395

Registry: Halifax

Between:

Her Majesty The Queen

v.

Thomas, Lorenzo, Williams, Timothy and Fraser, Brandon

Judge:	The Honourable Judge Theodore Tax
Heard:	October 17, 2012 in Dartmouth, Nova Scotia
Written decision:	January 17, 2013
Charges:	See Appendix 'A'
Counsel:	Roland Levesque, for the Crown
	Trevor McGuigan, for Lorenzo Thomas
	Patrick Atherton, for Timothy Williams
	Peter Planetta, for Brandon Fraser

By the Court:

INTRODUCTION:

[1] Shortly after 7 PM, on July 2, 2010, two Halifax Regional Police officers were parked near 95 Highfield Park Drive, Dartmouth, Nova Scotia to investigate drug activity in the area. At that time, a white BMW, bearing Ontario license plate number BDME 189 drove by them and they recognized Mr. Thomas, seated in the backseat of that car. Based upon source information that Mr. Thomas was in possession of a firearm, the police officers followed the BMW for a short distance and decided to stop it to investigate. Although the police officers were in an unmarked police car, their car was equipped with and they activated its emergency equipment - lights and sirens, to signal the BMW to pull over and stop. However, the BMW did not pull over and stop, but accelerated at a high rate of speed. The police officers pursued the BMW and radioed other officers to assist them in this high-speed pursuit. The pursuit of the BMW ended shortly thereafter when it went over a railway crossing at a high speed, became airborne for several feet, landed hard, spun out of control and flipped over on its passenger side on the grass several feet from the road.

[2] After the white BMW came to rest on its passenger side, two men were seen to exit the vehicle through its sunroof and run off in different directions. Several uniformed police officers and a police tracking dog were involved in the pursuit on foot of those two men. After a short pursuit on foot, those two men were arrested by police officers, who identified them as the accused, Mr. Brandon Fraser and Mr. Timothy Williams. The third accused, Lorenzo Thomas was arrested as he exited the vehicle through the BMW's sunroof. When the BMW was searched by the police, they found a loaded restricted handgun in a white plastic bag that was partially under the front passenger seat. The three accused were jointly charged with six weapons offences involving the Ruger 9mm firearm which was discovered in the white BMW.

[3] In addition to those charges, all three accused face charges of possessing a firearm while prohibited from doing so contrary to section 117.01(1) of the **Criminal Code** and resisting police officers in the lawful execution of their duties contrary to section 129(a) of

the **Criminal Code**. Mr. Fraser faces two charges of breach of probation contrary to section 733.1(1)(a) of the **Criminal Code**, while Mr. Williams faces three additional charges in relation to his alleged operation of the white BMW contrary to sections 249(1)(a), 249.1(1) and 252(1) of the **Criminal Code**.

[4] The Crown proceeded by indictment on all charges.

THE ISSUES:

1) In a case which is based wholly or substantially on circumstantial evidence, is the Court satisfied beyond a reasonable doubt that the only rational conclusion, arising from a consideration of the evidence as a whole, is the guilt of any one or more of the accused in relation to all of the firearms charges?
2) Has the Crown established, beyond a reasonable doubt, that any one or more of the accused were in "possession" of the firearm?
3) Has the Crown established, beyond a reasonable doubt, the identity of the driver of the BMW and the other essential elements of the driving charges?
4) Has the Crown established, beyond a reasonable doubt, all of the essential elements of the resisting police officers in the lawful execution of their duty charges?

POSITIONS OF THE PARTIES:

[5] The Crown submits that they have established beyond a reasonable doubt that all three accused were occupants of the white BMW and that Mr. Williams was the driver of that vehicle on the evening of July 2, 2010. Although there was no direct evidence that the firearm was in the actual possession of any of the accused, the position of the Crown is that Mr. Williams was the driver of the BMW and that the Court may infer from the circumstantial evidence that he was in possession of the vehicle, by virtue of that fact, he possessed all of its contents. The Crown also submits that Mr. Williams' flight from the police in the BMW and his attempt to flee from the police on foot after the BMW flipped over on its side established the substantive offences of the resisting peace officers in the lawful execution of their duties and the driving offences. Furthermore, it is the position of the Crown that Mr. Williams' actions constitute post-offence conduct from which the court may infer his guilt in terms of the firearms charges under sections 94(1), 95(1) and

117.01(1) of the **Criminal Code** because he had the knowledge of and control over the loaded firearm in the vehicle and that he was prohibited from possessing a firearm.

[6] In terms of Mr. Fraser and Mr. Thomas, the Crown submits that they were the passengers in the BMW and acknowledges that the evidence falls short of establishing that, as passengers of the motor vehicle, they had actual possession of the firearm. It is the position of the Crown, however, that it is reasonable to infer that they were aware that the firearm was in the car from the fact that a high-speed chase occurred after the police attempted to conduct a traffic stop. Therefore, the Crown submits that they have established beyond a reasonable doubt that Mr. Fraser and Mr. Thomas were occupants in the white BMW motor vehicle, both of them were prohibited from possessing a firearm and that they knew there was a firearm or prohibited weapon in that vehicle. It is the position of the Crown that Mr. Fraser should also be found guilty of breach of probation and that both Mr. Thomas and Mr. Fraser should be found guilty of resisting peace officers engaged in the lawful execution of their duties because they ran off or attempted to do so.

[7] It is the position of all three Defence counsel that there is no direct evidence of possession of the firearm and that there are no admissions or any forensic evidence to specifically link any of the three accused to the firearm found in the BMW on July 2, 2010. As such, they submit that this case is based wholly or substantially on circumstantial evidence and that the court must be satisfied beyond a reasonable doubt that the guilt of the accused is the only rational conclusion which may be inferred from the proven facts. They submit that there is no direct or circumstantial evidence from which the court could infer that the accused, either jointly or any one of the accused individually, had "possession" of the firearm which, by definition, includes the knowledge of and control over that weapon. Furthermore, it is the position of the Defence counsel that when a number of factors are examined relating to whether the accused had the knowledge and control of the firearm, either there are insufficient proven facts from which the Court may infer the guilt of the accused or that based on an analysis of the totality of the evidence or the lack thereof, the Court ought to be left in reasonable doubt with respect to all firearms offences.

[8] Counsel for Mr. Thomas also submits that the evidence did not establish that his client had resisted arrest.

[9] Counsel for Mr. Williams submits that while there is some evidence that Mr. Thomas was seated in the back seat of the BMW, that evidence cannot be combined with the statement of Mr. Fraser that he was not the driver of the BMW, which was taken approximately two years after the incident, and then used against any other co-accused in a joint trial. It is the position of counsel for Mr. Williams that there were two similarly dressed people in the white BMW and that there is reasonable doubt relating to the police officer's identification evidence of Mr. Williams as the driver of the white BMW.

[10] Counsel for Mr. Fraser submits that his client should be acquitted of all of the firearms charges as well as the breaches of probation. In terms of the charge of resisting a peace officer in the lawful execution of his duties, it is submitted that Mr. Fraser was not pursued by either Constable Jardine or Constable Travis as alleged in the Information, and therefore, his client should be acquitted of that charge as well.

TRIAL EVIDENCE:

[11] Detective Constable Sandy Johnston of the Halifax Regional Police Forensic Identification Section introduced Exhibit 1 which was a booklet of 58 photographs. The first 43 photos taken on the evening of July 2, 2010 depict Wright Avenue, the exterior and interior of a white BMW automobile bearing Ontario license plate number BDME 189 and the area around #11 Thornhill Dr. in Dartmouth, Nova Scotia. The final 15 pictures in Exhibit 1 are photographs of a Ruger 9 mm firearm and the ammunition found in the clip of that handgun.

[12] Det/Cst. Johnston pointed out that the firearm was in a plastic bag which was on the floor, where the front passenger's feet would be located, lying against the passenger side door of the flipped over BMW. In Exhibit 1, photos 26 and 27, the officer said that the front or muzzle of the firearm was visible outside of a white plastic bag, pointing towards the rear of the BMW. The officer seized the Ruger 9 mm firearm (Exhibit 2) from the BMW, removed the clip and saw that there were 10-9 mm bullets in the clip, but no bullets in the chamber. She also said that all 9 mm rounds were "live" and that six of them were hollow point bullets.

[13] Det/Cst. Johnston conducted a forensic examination of the Ruger 9 mm firearm and the ammunition at the police station. During this examination 9 (shown in photos 44 to 58), she looked for fingerprints on the firearm and the bullets as well as swabbing those items to check for the presence of DNA. While she did locate some friction ridges on the firearm, Det/Cst. Johnston said that the fingerprints were not identifiable or suitable to make a comparison. She also sent four different swabs of possible DNA found on the firearm for analysis, however, the laboratory report dated August 13, 2010 (Exhibit 4) confirmed that there was limited and mixed genetic data on the swabs. Therefore, the lab analysis could not identify any single DNA profile and was not able to make any comparisons.

[14] On cross examination, Det/Cst. Johnston agreed with Defence counsel that it was difficult to see the firearm in the photographs, as the car interior was black and so was the firearm. She also agreed that there were other several items leaning against the passenger side door of the BMW, which was the side of the car laying on the ground after the vehicle flipped over on its side. She confirmed that no other items found in the white BMW, except for the firearm, were seized by her or analyzed for the presence of fingerprints or DNA. She also agreed with Defence counsel that the windows of the BMW appeared to be "slightly tinted."

[15] The Crown introduced the next 12 Exhibits with the agreement of Defence counsel. Exhibits 5 and 6 were the curriculum vitae of Constable Roger Spriggs (K-9 unit) and the route taken by him in the pursuit of one of the accused who was arrested near #11 Thornhill Dr. Certificates of analysis (Exhibit 7 and 8) confirmed that the Ruger model P 89 semi-automatic pistol was a "firearm" and a "restricted firearm" and that the 10-9 mm Ruger caliber cartridges were "ammunition" within the meaning of section 84(1) of the **Criminal Code**. Exhibits 9, 11 and 13 were affidavits from the Chief Firearms Officer which confirmed that none of the three accused had any possession only licences or possession and acquisition licenses under the Firearms Act. Exhibits 10, 12 and 14 were affidavits of Terry Myers, the Refusal and Revocation Analyst at the Canadian Firearms Registry which confirmed that there were no records of any registrations in that registry for any of the three accused. A probation order dated March 31, 2009, was Exhibit 15 which required Mr. Brandon Fraser to be subject to the terms and conditions of probation for a period of 18 months after a term of imprisonment of 60 days as a result of a conviction for an assault contrary to section 266 of the **Code**. The final two exhibits (16 and 17) were orders of prohibition made under section 109 of the **Criminal Code**

which prohibited Mr. Williams from February 3, 2005 and Mr. Thomas from May 23, 2007 from possessing any firearm. prohibited firearm or restricted firearm for a period of 10 years.

[16] Det/Cst. Stewart Travis was a member of the Quick Response Unit in Dartmouth, Nova Scotia working with Cst. Jardine in plainclothes and in an unmarked police vehicle on Friday, July 2, 2010. They were parked at a bus stop near 95 Highfield Park Drive in Dartmouth to investigate drug activity in that area. At about 7:12 PM that evening, Det/Cst. Travis saw a white BMW pass in front of him going west on Highfield Park Drive. As the car passed his position, he noticed that the rear driver's side window was down about 1 to 2 inches and he was able to identify Mr. Thomas sitting in that seat. He had parked his car close to the street and he estimated that he was about 10 to 15 meters from the BMW. The officer also stated that the driver's window was a little over halfway down and that he was able to see a profile of the driver.

[17] Det/Cst. Travis stated that he was aware of source information that Mr. Thomas was in possession of a firearm, so he decided to follow the white BMW. Cst. Jardine advised dispatch that they were following the white BMW. They followed the car as it turned right onto the Victoria Road extension and proceeded to a red light at the corner of Victoria Road and Windmill Road. At this point, their car was right behind the white BMW and a marked police car was beside them. When the light turned green, the cars began to move forward and Det/Cst. Travis received a communication to conduct a "high risk" traffic stop. He activated the flashing emergency lights on their front window visors and the front grill of the car and turned on their siren. The white BMW did not pull over and stop, but rather, it sped off and the police car accelerated to pursue it.

[18] The white BMW went along Windmill Road and then made a right turn onto Wright Avenue. Det/Cst. Travis believed that there were other cars on the road at that time, but did not specifically note the volume of traffic in that area. After the BMW turned onto Wright Avenue, it began to pull away from the police car at speeds estimated to be over 120 km/h. Det/Cst. Travis said that the speed limit on Wright Avenue in that area is 50 km/h.

[19] Det/Cst. Travis saw that the BMW was approaching train tracks that cross Wright Avenue and knowing the nature of that crossing and the speed of the BMW, the officer believed that the BMW might bottom out and be damaged. After the white BMW went

over the train tracks, it became airborne, going about 3 to 4 feet in the air, went out of control, crossed the road, spun around and flipped over on its passenger side, facing back to the direction of the oncoming police cars. He estimated that he had pursued the white BMW for about 1 ½ to 2 km.

[20] Det/Cst. Travis was driving his police car and was about 30 metres from the train tracks when the white BMW came to "rest" on the grass in front of #71 Wright Avenue. As he was pulling up to the BMW, he saw two black males climb out of the sunroof and run off. When he saw that a third person was getting out of the sunroof, the officer had his service revolver out as he approached the car. Det/Cst. Travis was able to identify Mr. Thomas as the third person getting out of the car because he had prior dealings with him. When the officer saw that Mr. Thomas did not have a weapon in his hands, he returned his firearm to its holster. Mr. Thomas tried to "wiggle" away from Det/Cst. Travis, but the officer grabbed Mr. Thomas and took him to the ground. Det/Cst. Travis advised Mr. Thomas he was under arrest for weapons offences and ordered him to stop. The officer said that he had to put his arms on Mr. Thomas's arms and had to use a lot of force to hold him down by laying on top of him until another member arrived and assisted him. The officer believed that if he did not apply the force that he did, Mr. Thomas would have fled.

[21] Once Mr. Thomas was escorted away by other officers, Det/Cst. Travis noticed that there was a firearm on the floor of the passenger side of the white BMW, where the front seat passenger would put his or her feet. He believed this firearm to be a semi-automatic pistol. He asked for a Forensic Identification Unit officer to attend, take photographs and seize the firearm. He waited beside the white BMW until Det/Cst. Johnston took charge of the scene.

[22] After being advised that the other two males who had fled on foot from the BMW were apprehended, Det/Cst. Travis returned to the station. A short time later, during the evening of July 2, 2010, Det/Cst. Travis went into the booking area and saw one of the men seated in that area, who had fled on foot from the BMW; but was arrested by other officers. One of the other officers advised him that the name of the man seated in the booking area, was Timothy Williams. Det/Cst. Travis stated that Mr. Williams had the same profile as the driver of the white BMW and he identified Mr. Williams in court.

[23] Det/Cst. Travis also stated that he had been asked by the Crown to contact the registered owner of the white BMW bearing Ontario license plate number BDME 189. He believes that the registered owner of that BMW is Ms. Jennifer McIsaac of Scarborough, Ontario, but he is not 100 per cent sure. He was not able to make contact with her to obtain any additional information.

[24] On cross examination, Det/Cst. Travis confirmed that when he first saw the white BMW, it was proceeding at about 50 km/h and that it would have passed by his position in a few seconds. He confirmed that the police had not been following the white BMW prior to 7:12 PM on July 2, 2010. From where the police car was parked, Det/Cst. Travis could only see the driver's side of the white BMW, but added that he saw the profile of Mr. Thomas' face and his neck when he turned to look out the window. He could not see Mr. Thomas' hands and did not see him doing anything else in the car. The officer also confirmed that it was about five minutes in total from the time when he first saw the white BMW until Mr. Thomas was arrested by him.

[25] Det/Cst. Travis said that he was about 20 feet from the front of the BMW when he saw the first person get out of the sunroof and run off. Cst. Jardine chased after one of the two people who had fled on foot. Det/Cst. Travis arrested Mr. Thomas a few feet from the BMW. He grabbed Mr. Thomas from the side and behind to control his arms and body movements so that Mr. Thomas could not run off like the other two individuals who had been in the car.

[26] In response to questions posed by counsel for Mr. Williams, Det/Cst. Travis confirmed that the white BMW had tinted windows all around which are not legal in Nova Scotia. He confirmed that he did not previously know Mr. Williams. He added that the white BMW was going at the speed limit when it passed by his location which allowed him to catch a "glimpse" of the driver for a "second or so." He confirmed that he was about "85 to 100 per cent sure" that Mr. Williams was the driver of the white BMW. Det/Cst. Travis confirmed that he did not identify Mr. Williams in a lineup and that his identification of him as the driver was based on the one to two seconds when the white BMW passed his location. He added that a lineup could have been conducted, however it was not deemed necessary in this case.

[27] On further cross-examination, Det/Cst. Travis confirmed that the windows of the white BMW were not up when it drove by. His notes reflected that the rear window was

down, but he agreed that he had no notes regarding whether the front window was down or not. He agreed with Defence counsel that his identification of Mr. Williams as the driver was based on his profile and that he had not made any notes regarding the profile. The police officer agreed that if the window was up, because they were tinted, he could not have seen the driver. However, Det/Cst. Travis reiterated that the front driver's side window was partially down so that he was able to see the full side profile of the driver's face.

[28] On re-examination, Det/Cst. Travis said that while use of a lineup is a normal procedure, it was not deemed necessary in this case because he was "80% to 100 per cent sure" of the identity of the driver based upon the side profile of that person.

[29] Cst. Brad Jardine testified that on July 2, 2010 around 7 PM, he was working with Det/Cst. Travis and he was the passenger in their police car which was parked near 100 Highfield Park Drive. A short time later, a newer model "flashy" BMW, which he had not previously seen in the area, drove by their location at about 50 km/h , which is the posted speed limit for that area. The rear window on the driver's side was three quarters to all the way down and he recognized that Mr. Lorenzo Thomas was the passenger seated there. He and Mr. Thomas made eye contact, and in Cst. Jardine's opinion, Mr. Thomas looked "nervous." Cst. Jardine was able to identify Mr. Thomas because they had previous dealings and Mr. Thomas had a "distinctive look" with tattoos on his face.

[30] By way of narrative, Cst. Jardine explained that the police had received some source information that Mr. Thomas might have a firearm, so he and Det/Cst. Travis decided to conduct a traffic stop. They followed the white BMW on the Victoria Road extension and near Windmill Road. At that point, they turned on their emergency lights and siren and the white BMW sped off. The driver of the white BMW made a "quick" right turn onto Wright Avenue which caused the tires to squeal and then the BMW picked up speed to proceed at over 100 km/h in a 60 km/h zone. As the car went over the railway tracks crossing that street, all 4 wheels became airborne, the car fishtailed 180° and flipped over on its passenger side. When the BMW flipped onto its passenger side, Cst. Jardine estimated that their police car was about 35 feet away. Cst. Jardine estimated that the high-speed pursuit of the white BMW was about 1 kilometre in length and said that there were some cars approaching them in the other direction on Wright Avenue.

[31] Cst. Jardine saw that Mr. Thomas was still at the BMW and that another person, later identified as Mr. Williams had just run up Wright Avenue. When Det/Cst. Travis went over to deal with Mr. Thomas, Cst. Jardine decided to pursue the other black male through some buildings. As he was pursuing that man on foot, he yelled "police officer" and "stop, show me your hands." Cst. Jardine added that, during the chase on foot, the person who he was pursuing, looked back at him on occasion and they made eye contact as they were running. However, he lost sight of that person about 200 metres from the BMW. At this point, Cst. Jardine called the K-9 unit to assist him in locating that individual and since the K-9 unit was nearby, they arrived within a short time.

[32] Cst. Jardine advised the K-9 unit where he had last seen the black male who he was chasing and then the K-9 unit continued to track that person. Cst. Jardine went back to the white BMW and met with the Det/Cst. Travis. At that point, he noticed that there was handgun in the white BMW. Within a few minutes, Cst. Jardine was advised that a black male, named Timothy Williams had been located in a nearby dumpster. When Mr. Williams was brought back to a police car, the officer noted that Mr. Williams was wearing a red shirt with longer black shorts. Cst. Jardine was "100 per cent sure" that Mr. Williams was the person who he had pursued that evening and he also identified him in court.

[33] On cross examination, Cst. Jardine stated that the officers were parked at the Highfield Park bus terminal and the BMW drove in front of them from his right to left. This was the first time that he had ever seen Mr. Thomas in that car, and in fact, he had never seen that car before. He confirmed that the BMW was going the appropriate speed limit for that area. He also agreed that as the BMW drove by, he had approximately two seconds to observe the occupants of the car. Cst. Jardine stated that the back window was down and that he was able to see the head and the top of the shoulders of Mr. Thomas. When Mr. Thomas looked at the police officers, he did a "double take" and had a "surprised look" on his face which is why he had earlier said that Mr. Thomas "looked nervous." Cst. Jardine also confirmed that the back windows of the BMW were tinted, and as the police officers were pursuing it, he only saw silhouettes of heads in the car, but he could not see any movements.

[34] Cst. Matthew Veinotte was working with Cst. Brad Kincade in Dartmouth, Nova Scotia, as a patrol officer in a marked police car on the evening of July 2, 2010. Shortly after 7 PM, he was stopped at the lights near the intersection of Windmill Road and the

Victoria Road extension when a white BMW pulled up beside him. As the light turned green, Det/ Cst. Travis advised him that he was about to conduct a high risk traffic stop. When the other officers activated their emergency equipment, Cst. Veinotte also activated his emergency equipment. The white BMW accelerated up to an estimated speed of 100 km/h and went into the center median lane designated only for turns. The BMW then made a sharp right turn off Windmill Road and proceeded up Wright Avenue.

[35] Cst. Veinotte stated that there was traffic proceeding in both directions on Windmill Road at the intersection with Wright Avenue. At that location, he said that Windmill Road has two lanes going in a northerly direction towards Magazine Hill and that there are two lanes going in a southerly direction towards the Victoria Road extension. The officer also added that between the northbound and southbound lanes of traffic, there is a median lane which is utilized for left hand turns in either direction, off Windmill Road.

[36] On Wright Avenue, the white BMW pulled away from the police cruisers which were in pursuit, until it went out of control after crossing over the railway tracks on Wright Avenue and flipped over on its passenger side on the other side of the road. Cst. Veinotte indicated that the police pursued the white BMW up Wright Avenue for about 1½ kilometres for approximately 30 seconds going at speeds which he estimated to be between 120 and 140 km/h, in a posted 50 km/h zone.

[37] Cst. Veinotte saw three black males exit from the sunroof of the BMW and he chased after one of those males, who he later identified as Timothy Williams. He and Cst. Jardine chased a man who was wearing a red shirt and black shorts. As he was chasing that person, the officer yelled loud and clear commands: "stop police, you are under arrest for firearms charges", but the person did not stop. He lost sight of the person he was chasing when, for officer safety, he slowed as he approached the corner of a building. From there, the K-9 unit took over and Mr. Williams was located and arrested by Cst. Terry Poole. Cst. Veinotte was 100 per cent certain that the person located by the K-9 unit was the person who he had been chasing.

[38] Cst. Roger Spriggs is a Halifax Regional Police officer who has been in charge of a K-9 unit for seven years. He was qualified as an expert to give opinion evidence on the handling, observation, reading and interpretation of movements of tracking dogs. Cst. Spriggs indicated that on Friday, July 2, 2010 he was called at about 7:15 PM to assist Cst. Jardine, as individuals had fled from the police following an attempted traffic stop.

He detailed the route that he followed until his tracking dog indicated that there was a person in a dumpster located beside #11 Thornhill Dr. in Burnside. Cst. Poole, who was working with Cst. Spriggs, ordered the person in the dumpster to come out and he arrested Mr. Williams.

[39] Cst. Terry Poole was on patrol duty on July 2, 2010, in full uniform and operating a marked police car when Det/ Cst. Travis asked for assistance in a high risk takedown. Cst. Poole was Cst. Spriggs' cover officer and when the police dog indicated that there was someone in a dumpster, Cst. Poole opened the lid, looked inside and ordered a male to exit. He arrested an African Canadian male, later identified as Mr. Williams, and turned over custody of him to Cst. Goodwin.

[40] Cst. Judson Goodwin was on patrol duty in the Dartmouth area on July 2, 2010 and heard, over his radio, that police officers required assistance in pursuing a vehicle. When he arrived, he saw that the BMW was on its side and that two people had fled from it on foot. He followed the K-9 tracking dog and Cst. Spriggs, until they located a person wearing a red shirt and shorts in a dumpster. He arrested Mr. Williams at 7:37 PM. He noted that Mr. Williams said that he had trouble breathing and had a scrape on his back. Mr. Williams was taken to the hospital under police escort for observation, and then to the police station for booking.

[41] Cst. Goodwin described the clothing that Mr. Williams was wearing when he was arrested. The officer stated that Mr. Williams was wearing black shorts, a red T-shirt with no lettering and that he had white, high cut sneakers with some black markings on them as well as white ankle socks. He was also wearing a black belt with silver studs with his shorts.

[42] On July 2, 2010, shortly after 7 PM, Cst. Bradley Kincade was in full uniform, in a marked police car on general patrol duty, in Dartmouth, Nova Scotia. He was working that evening with Cst. Veinotte who was the driver of the police car. At about 7:16 PM that day, they were at the corner of Victoria Road and Windmill Road when they heard a radio request for assistance in a high risk takedown. They activated the emergency lights and siren, and then they pursued a silver BMW up Windmill Road, and followed it as it turned right onto Wright Avenue. He noted that the BMW flipped over on its passenger side when it went out of control after crossing railway tracks.

[43] Cst. Kincade saw three black males get out of the BMW and noted that one male was on the ground beside the car, and that the other two males had run off in opposite directions. At about 7:18 PM, he began to chase a black male, wearing black shorts with some red on them, a red T-shirt and black and white Nike sneakers. Cst. Kincade pursued the black male who ran eastbound on Wright Avenue until he saw that person laying in the bushes about 100 feet from number 71 Wright Avenue. He directed the person, to come out of the bushes and he arrested Mr. Brandon Fraser for flight from the police around 7:30 PM. Cst. Kincade stated that Mr. Fraser had complained about some injuries and as a result, Emergency Health Services were called to the scene to attend to him. Cst. Kincade identified Mr. Fraser in court and stated that he was also familiar with Mr. Fraser before this incident and that a check of CPIC by Cst. McCullough indicated that there had been warrants for his arrest.

[44] Cst. Ross Burt attended at the scene to conduct an accident investigation into the single vehicle collision of the BMW. He also checked the license plate of the white BMW in the police computer and learned that the registered owner of that car was Ms. Jennifer McIsaac of Scarborough, Ontario. There were no reports that the car was stolen. On cross examination, Cst. Burt confirmed that he searched Mr. Thomas after his arrest, and found what he believed to be marijuana in a pocket.

[45] In addition, before closing their case, the Crown Attorney sought to introduce a statement made by Mr. Brandon Fraser to the police on February 23, 2012. As a result of an agreement between counsel for Mr. Fraser and the Crown, it was determined that a voir dire would not be required and that the statement made by Mr. Fraser to the police on February 23, 2012 could be admitted as it was agreed that Mr. Fraser knew he was speaking with the police officer and did so voluntarily with an operating mind.

[46] Furthermore, it was agreed by the Crown Attorney and counsel for Mr. Fraser that the statements made by Mr. Fraser that "if he had been driving the vehicle, the police would never have caught them" and that "he was going to beat the charges as he did not own the car and was not driving it" would be admitted as agreed facts under section 655 of the **Criminal Code**. Counsel for Mr. Fraser and the Crown Attorney also agreed that a proven fact under section 655 of the **Code** was that, at the time of his arrest, there were two outstanding warrants for Mr. Fraser. Defence counsel pointed out that this admission

was only in relation to the fact that there were two outstanding warrants, and not for proof of any prior criminal conduct.

[47] Defence counsel advised that their clients had elected not to testify or call any other evidence during the trial.

ANALYSIS:

[48] At the outset of my analysis, it is important to note the general principles which apply in all criminal trials. First, in a criminal trial the burden is on the Crown to prove the charges against any accused beyond a reasonable doubt. Furthermore, the three Accused are presumed to be innocent of the charges before the court unless I conclude that the Crown has proved their guilt beyond a reasonable doubt. The effect of that presumption of innocence means that Mr. Thomas, Mr. Fraser and Mr. Williams do not have to testify, present any evidence or prove anything. The burden of proof is on the Crown and it never shifts to any one or more of the three Accused people.

[49] The presumption of innocence and the requisite standard of proof beyond a reasonable doubt are fundamental principles in our criminal law. The Supreme Court of Canada has established in cases such as **R. v. Lifchus,** [1997] 1 SCR 320 and **R. v. Starr**, [2000] 2 SCR 144 that, "reasonable doubt" does not require the Crown to prove the allegations to an absolute certainty. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.

[50] The Supreme Court of Canada has also pointed out in those decisions that a reasonable doubt is not based upon sympathy or prejudice, nor is it an imaginary or frivolous doubt. It is a doubt based upon reason and common sense which is logically connected to the evidence or the lack of evidence. Reasonable doubt may arise through the evidence presented by the Crown, if the court determines that the evidence was vague, inconsistent, improbable or lacking in cogency so as not to constitute proof beyond a reasonable doubt. Of course, reasonable doubt can also arise from testimony of an accused or any other evidence tendered by the Defence from any other sources.

Were the Firearms Charges Established Beyond a Reasonable Doubt?

[51] As mentioned previously, the decision on these charges requires an analysis of the direct evidence and the circumstantial evidence from which facts in issue may be inferred. For the firearms charges, the key issue to determine is whether the Crown has established beyond a reasonable doubt that Mr. Williams, Mr. Fraser and Mr. Thomas, individually or collectively, had actual, constructive or joint possession of the firearm. In order for the Crown to establish possession of the firearm, since there is no direct evidence of actual possession of the firearm, the Crown must establish, beyond a reasonable doubt through circumstantial evidence that one or more of the Accused had "possession" of the firearm by having knowledge of it and exercising some control over it prior to being seized by the police in the BMW.

[52] The definition of "possession" is found in subsection 4(3) of the **Criminal Code** which provides as follows:

> 4(3) For the purposes of this Act,
>
> (a) a person has anything in "possession" when he has it in his personal possession or knowingly.
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or another person; and
>
> b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and the possession of each and all of them.

[53] In effect, subsection 4(3) of the **Criminal Code** creates three types of possession: (A) personal possession as outlined in section 4(3)(a); (B) constructive possession as set out in section 4(3)(a)(i) or section 4(3)(a)(ii); and (C) joint possession as defined in Section 4(3)(b).

PERSONAL POSSESSION:

[54] In order to establish personal possession of the firearm, the Crown is required to prove that one of the accused physically possessed or controlled the firearm and had the requisite knowledge. Absent an explicit admission by an accused about the nature and existence of the contraband (in this case a firearm) alleged to be in his or her possession, knowledge must be inferred from the circumstantial evidence.

[55] In cases where the contraband or firearm is in the personal possession of an accused and in plain view, knowledge of its presence is an easy inference to draw. Where the contraband or firearm is not in plain view, inferences about knowledge, consent and control may pose a more difficult task. The requirement to establish control is often tied to the accused's manual or physical contact with the firearm. See **R v. LeBlanc**, 2009 NSSC 221, at paras. 25-26.

CONSTRUCTIVE POSSESSION:

[56] Constructive possession, which is sometimes referred to as "attributed possession," arises when an accused person has knowingly placed or kept the illicit substance or firearm in a location for his or her use or benefit or the use or benefit of another person. The accused must have intended to place the illicit item in a location for his use or benefit or the use or benefit of another person. In addition to having the knowledge that the illicit substance or firearm is in a location, the Crown must also establish that the accused person's knowledge extended beyond quiescent knowledge or inactive knowledge to disclose some measure of control, influence or authority or a right of control over the illicit substance or firearm. See: **R. v. Pham**, [2005] O.J. No.5127 (Ont.C.A.) at para.15.

JOINT POSSESSION:

[57] Joint possession occurs when one or more accused persons have possession of the illicit substance or firearm with the knowledge and consent of the others, and in those circumstances, then all of the accused are deemed to be in possession of the illicit substance or firearm. The elements of this offence are knowledge of the illicit substance or firearm by the accused person and his or her consent to the other person possessing it. Furthermore, in order for the accused person to be in a position to consent, he or she must also have some measure of control over the illicit substance or firearm. Once again, the Crown is required to prove beyond a reasonable doubt through either direct evidence or circumstantial evidence that the only reasonable inference that could be drawn was that the accused person or persons had the requisite knowledge and control over the illicit substance or firearm: See **R. v. Thomas**, [2005] O.J. No. 2104 (Ont.SCJ) at para. 22; **R. v. Iser**, [2012] BCPC 70, at para. 101 and
R. v. Pham, *supra*, at para. 16.

[58] In reviewing the Information, I find that the first nine charges against the three accused persons - Mr. Thomas, Mr. Williams and Mr. Fraser, all allege that they, either jointly or individually, had the knowledge of or the possession of a firearm, to wit, the Ruger 9 mm handgun. As I have indicated above, in cases where there is an issue whether there was actual, constructive or joint possession, the Crown must establish that the accused had knowledge of the firearm and exercised a measure of control beyond mere quiescent or inactive knowledge.

[59] In this case, there is no direct evidence or any inculpatory admission made by any one of the three accused that he or they had actual possession or personal possession of the firearm or that they knew that the firearm was in the BMW. In these circumstances, I find that the Crown must prove, beyond a reasonable doubt, through circumstantial evidence that the accused either individually or jointly had possession of the firearm, by having knowledge of and exercising some control or influence over it.

[60] At this point, it is important to instruct myself on the issue of circumstantial evidence, and in particular, the facts in issue which may be inferred from that evidence. As with direct evidence, a piece of circumstantial evidence should be considered, not in isolation, but along with all of the other evidence as a whole in reaching a verdict. It is a well-established principle that a conviction based upon circumstantial evidence requires the trier of fact to be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable or rational inference to be drawn from the proven facts: See **R. v. Griffin**, [2009] SCC 28, at para.33; **R. v. Liberatore**, [2010] NSCA 82, at para. 14; and **R. v. Cooper** (1977), 34 CCC (2nd) 18 [SCC] at page 33.

[61] In **R. v. Anderson-Wilson,** [2010] O.J. No. 377 (Ont. S.C.) which involved the issue of circumstantial evidence in the context of possession of firearms, Hill J. pointed out at para. 73 that the Crown may seek to establish the existence of a fact in issue by submitting that an inference may reasonably and circumstantially be drawn from the primary facts-where there exists an inferential gap between the primary fact and the fact to be proved. Whether the inference is a reasonable one to draw usually involves an application of "human experience and common sense." Circumstantial inferences are ones which "can be reasonably and logically drawn from a fact or group of facts established by the evidence." However, a trier of fact "cannot be invited to draw speculative or unreasonable inferences."

[62] Mr. Justice Hill noted in **Anderson-Wilson**, *supra*, at para. 74, that these types of possession cases are most often fact-driven inquiries. Where proof is dependent upon circumstantial evidence, some facts will have more probative value than others. It is the cumulative effect of relevant circumstances which must be assessed in determining whether proof beyond a reasonable doubt exists. After reviewing several weapons prosecutions, Hill J. summarized his conclusions by indicating that the following circumstances have been considered to be relevant:

> (1) The physical proximity of the firearm to the accused;
> (2) The degree of visibility of the firearm and whether the firearm could be easily concealed because of its reduced length;
> (3) The degree of communal use of the vehicle containing the firearm;
> (4) The size, nature and number of weapons in a particular space;
> (5) The nature of other items located proximate to the firearm capable of providing context for inferences of knowledge and control.

[63] Hill J. also pointed out in para. 75 of **Anderson-Wilson**, *supra*, that not everyone who drives or rides in a car containing concealed illegal objects necessarily knows the presence or nature of those objects. In unlawful possession cases, where the prohibited item is concealed and not readily visible in a vehicle driven by the accused, the courts have generally required more than simply evidence of the proximity between the accused and the item: see **R. v. Amado**, [1996] B.C.J. No. 1943 (BCSC) at para 33; **R. v. Green and Rollins**, [1993] O.J. No. 1346 (Ont. C.A.) and **R. v. Lincoln,** [2012] ONCA 542.

[64] Based upon the evidence presented at trial, I have no doubt that the 9 mm Ruger firearm was located in the white BMW, bearing Ontario license plate number BDME 189 on the evening of July 2, 2010. Furthermore, I have no doubt that the evidence established that when members of the Halifax Regional Police activated their sirens and emergency lights to conduct a traffic stop of the white BMW, the driver of that white BMW did not stop as he was required to do, but rather, he accelerated at a high rate of speed to elude the police officers who were pursuing that vehicle. After the police chase of the white BMW ended with the vehicle flipping over on its passenger side near 71 Wright Avenue, police officers located the 9 mm Ruger firearm wrapped in a plastic bag on the floor in front of the front passenger seat, lying against the passenger door. When the police officers searched the white BMW, they acknowledged that it was not easy to

see the firearm as it was black in color, lying against a black carpet, with the large majority of the firearm being covered by a white plastic bag, which was on the floor in front of the front passenger seat. Even in this location, I cannot conclude that the firearm was in plain view of the police officers, as the evidence established that only a small portion of the front or muzzle of the black firearm was visible outside the white plastic bag on the black carpet of the BMW.

[65] Given the location of the plastic bag containing the firearm, the baseball hat, the CD's and other articles which were found lying against the passenger door of the white BMW (see photos 24 to 28 of Exhibit 1), I find that it is highly unlikely that any of those items were in that location before the BMW flipped over on its passenger side in front of 71 Wright Avenue.

[66] Common sense tells me and I am prepared to infer that the white plastic bag containing the firearm moved from wherever it had been located prior to the crash of the BMW to where it was seen and photographed by police officers. I find that this inference that the bag containing the firearm moved is a reasonable one which may be logically drawn from the following proven facts: (1) the high rate of speed, estimated between 100 and140 km/h, at which the white BMW was traveling before the crash; (2) the BMW becoming airborne for several feet after hitting the railway tracks and landing hard on the road causing scratch marks in the pavement; (3) the car then going out of control and spinning around so that it was facing back in the same direction from which it had just come; and (4) after hitting the curb, the BMW flipping over onto its passenger side.

[67] Furthermore, considering where the firearm was located by the police, I find that it is more probable that the firearm was under one of the front seats. From my review of photographs 25, 26 and 30 in Exhibit 1, I find that the center console with the gear shift which is located between the front bucket seats of the BMW, appears to be solid and attached to the floor. From this fact, I find that it is unlikely that the plastic bag with the gun slid to the passenger side of the car from the driver's side. However, as I previously mentioned, based on the lack of any other proven facts from which reasonable inferences could be drawn, I have no way of being able to conclude whether the plastic bag containing the gun was in plain view beside one of the front seats or whether it was concealed under one of the front seats or moved from somewhere in the backseat to where it was located by the police officers.

[68] Being unable to draw any reasonable inferences as to the actual location of the plastic bag containing the firearm prior to the BMW flipping over on its side, and the fact that there was no DNA or fingerprint evidence on the firearm to connect any one or more of the accused persons to that gun, I cannot conclude that any one of them had actual physical possession of the firearm prior to the crash of the BMW. For the same reasons, since I have no evidence from which I could conclude that the firearm in the plastic bag was in plain view prior to the BMW flipping over on its side, I cannot find or infer that any one or more of the accused knew that the firearm was in the car.

[69] The Crown submits that the court may infer that Mr. Williams, as the driver, had constructive possession of the firearm and that Mr. Fraser and Mr. Thomas were occupants of a motor vehicle knowing that there was a firearm or prohibited weapon in that vehicle. The Crown submits that the court may infer that Mr. Williams was in possession of the firearm, by having knowledge of and control over that firearm and that the other two accused knew that there was a firearm in the BMW from the following proven facts:

a) The three accused were identified as the occupants of the white BMW bearing Ontario license plate BDME 189 at about 7:10 PM, on the evening of July 2, 2010;

b) When the police activated their emergency equipment to signal that the driver of the white BMW should pull over and stop, the driver accelerated at a high rate of speed in an effort to elude the police officers;

c) The 9 mm Ruger firearm or handgun was found in a white plastic bag in front of the front passenger seat, lying against the passenger door of the BMW;

d) Mr. Williams and Mr. Fraser were the first to people to exit the white BMW through its sunroof and then flee on foot. Both of them were arrested by the police after a brief foot pursuit in the vicinity of the white BMW;

e) The third accused, Mr. Thomas, was apprehended by police officers as he exited from the white BMW through its sunroof;

f) Mr. Williams and Mr. Thomas were prohibited from possessing any firearms and none of the accused had any legal authorization to possess any firearms or ammunition;

Post-Offence Conduct - Flight from the Police

[70] In addition to the facts referred to in the preceding paragraph, which I find to have been established beyond a reasonable doubt, the Crown also points to the flight of all three of the accused in the BMW and then, after the car overturned, the flight by two of the accused on foot. The Crown submits that this post-offence conduct constitutes additional circumstantial evidence, from which the court may infer that all three accused were guilty of particular firearms offences.

[71] In support of this proposition, the Crown Attorney refers to Justice Ewaschuk's **Criminal Pleadings and Practice in Canada**, second edition, November, 2011, at chapter 16:9030 dealing with flight or concealment from police. There, the author states that flight of an accused from the scene of a crime or the concealment of an accused from the police may constitute consciousness of guilt. The author also notes that the trial judge or jury should only infer guilt from flight or concealment if satisfied that the reason for the flight or concealment relates to the accused's guilt and not for any other rationally proffered excuse, for example, panic or fright. Moreover, the flight must relate to the particular crime charged and not to some other crime the accused may have committed.

[72] The issues relating to post-offence conduct were recently addressed by the Supreme Court of Canada in **R. v. White**, [2011] SCC 13 (CanLii) at paras.37-39, where the Court stated that the relevance or probative value of post-offence conduct will depend on the facts of each case. The Court held that there should be a jury instruction that this type of evidence should be excluded or if already on the record, be subject to a "no probative value" instruction by the trial judge where the accused's post-offence conduct is "equally explained by" or "equally consistent with" two or more offences. The Court also noted that in some cases an item of evidence may be probative of one live issue, but not another. For example, the Court says at para. 39 that flight per se may be relevant in determining the identity of the assailant, but may not be relevant in determining the accused's level of culpability as between offences, for example, murder and manslaughter.

[73] In this case, the three accused elected not to call any evidence and therefore, they did not directly put forward any other reasons for their flight from the police. However, there is evidence before the court that Mr. Fraser had two warrants outstanding for his arrest and that Mr. Thomas had possession of an unspecified amount of cannabis marijuana when he was arrested. There was no evidence of any outstanding warrants for Mr. Williams, but assuming for the moment that he was the driver of the BMW, it is

possible that he drove the BMW at high speeds to flee from the police in an effort to assist Mr. Fraser and Mr. Thomas, and having done so, his subsequent flight on foot is equally explained by the driving offences as much as the firearms offences. As such, evidence that two of the accused fled from the police after the BMW flipped over on its side, is simply another piece of circumstantial evidence which may or may not be relevant to a fact in issue. Thus the relevance of and the weight of that evidence must be assessed with all of the other direct and circumstantial evidence in this case.

[74] In **White**, *supra*, Rothstein J. noted, at para. 84, that for the purpose of proving identity and as part of the narrative; flight *per se* was clearly admissible. I find that the evidence of the flight of Mr. Williams and Mr. Fraser from the police after the BMW flipped over on its passenger side is admissible and relevant as that evidence does have some tendency, as a matter of logic and common sense, to establish the identity of the driver and the other occupants of the BMW. It is also relevant and material, and as such, it is properly admissible as part of the narrative of this case.

[75] In addition to the live issue of identifying the driver and the other occupants of the white BMW, the Crown also invited the court to infer from Mr. Williams' flight *per se* from the BMW that he was the driver of the vehicle and that circumstantial evidence could be used to establish his culpability for the driving offences. The Crown also submitted that the evidence of Mr. Thomas' attempt to flee and the flight *per se* of Mr. Fraser from the BMW support an inference that those two accused behaved as people who knew that there was a firearm in a car in which they were occupants, and as such, they are guilty of that firearms offence.

[76] In **White**, *supra*, Charron J. said at para. 106 in her reasons, concurring with the majority of the Supreme Court of Canada, that some evidence of post-offence conduct may seem quite suggestive of guilt though, in reality, the conduct is essentially equivocal in nature.

[77] On a similar note, Rothstein J. stated in **White**, *supra*, at para. 66, the mere fact that the accused fled from the scene did not provide any information as to whether he was guilty of the lesser or the greater charge. Justice Rothstein added, at para. 69, that a person may flee the scene for a host of reasons, such as to avoid arrest, to minimize evidence of that person's connection with the crime, to buy additional time or that flight is a response equally consistent with a wide range of much less serious charges.

[78] As a result, I find that, without delving into total speculation and conjecture, the three accused's actions in fleeing from the police in the BMW and then attempting to flee from the police on foot may be equally explained by two or more offences. As mentioned previously, the evidence established that there were two outstanding warrants for the arrest of Mr. Fraser and that Mr. Thomas possessed some cannabis marijuana. While I may have a strong suspicion that the driver accelerated and all three accused attempted to flee on foot because one or more of them had possession of the firearm in the vehicle and the others knew that the firearm was in the vehicle, I cannot convict Mr. Thomas, Mr. Williams and Mr. Fraser on those firearms offences on the basis of a strong suspicion and equivocal evidence in relation to the high-speed car chase and an attempt to flee or flight on foot from the BMW after it flipped over on its passenger-side.

Is the Driver of the BMW in Possession of the Firearm Found in the Car?

[79] In terms of the firearms charges facing Mr. Williams, it is the position of the Crown that, after a review of all of the direct and circumstantial evidence in this case, the court may conclude that he was the driver of the white BMW. If the court finds as a fact that Mr. Williams was the driver of the BMW, then the Crown Attorney submits that court may also reasonably infer that Mr. Williams, as the driver of the vehicle, was in possession of the BMW and all of its contents.

[80] In support of this submission, the Crown referred to Justice Ewaschuk's **Criminal Pleadings and Practice in Canada**, Canada Law Book, November 2011, chapter 16:10360 which states at page 16-135 that "the owner of a motor vehicle or a driver of a motor vehicle is, *prima facie*, in possession of the vehicle and its contents." Based on that authority, the Crown submits that Mr. Williams was in constructive possession of the firearm in the white BMW and therefore, he is guilty of the firearms charges contrary to s. 94(1) of the **Code** [being an occupant of a motor vehicle in which he knew there was a firearm or prohibited weapon], s. 95(1) of the **Code** [possessing a loaded restricted firearm and ammunition while not being the holder of an authorization or license to possess the firearm] and s. 117.01(1) of the Code [having possession of a firearm while he was prohibited to do so by an Order of Prohibition].

[81] The issue raised by the Crown's submissions has recently been addressed by the Ontario Court of Appeal, and in my view, their decision distinguishes the passage mentioned by the Crown. In **R. v. Lincoln**, [2012] ONCA 542, the accused was found

guilty of drug offences based upon evidence that he was the operator of a rental vehicle stopped by the police who then discovered a substantial amount of cocaine under the steering column and $800 Canadian in his wallet. The trial judge held that there was sufficient direct and circumstantial evidence of knowledge and control to justify a finding of possession. The trial judge's reasoning was that Mr. Lincoln was the operator of the vehicle and that anything found in that vehicle was in his *de facto* possession, *prima facie*, because as the operator, he had control of the vehicle and was considered to have control of its contents, unless there was evidence indicating otherwise.

[82] In their endorsement judgment in **Lincoln**, *supra*, the Ontario Court of Appeal said at para. 3 that the line of reasoning utilized by the trial judge constituted an error in law. In effect, the judge applied a presumption that, because Mr. Lincoln was the operator of the vehicle at the time, he is deemed to have knowledge and control of its contents, unless there is evidence to the contrary. The court went on to note in para. 3 that:

> "No rebuttable presumption of knowledge and control for purposes of determining possession, based solely on the fact that a person is the operator with control of the vehicle, exists in the common-law or under the **Controlled Drugs and Substances Act**. To give effect to such a premise would constitute an impermissible transfer of the Crown's burden of proof to the accused. While the fact that a person is the operator with control of the vehicle, together with other evidence, may enable a trial judge to infer knowledge and control in appropriate cases, it cannot, standing alone create such a rebuttable presumption." [the emphasis is mine]

[83] I agree with the reasoning of the Ontario Court of Appeal in **Lincoln** and conclude that evidence that a person is the operator of a car is but one piece of circumstantial evidence which must be considered together with all of the other evidence. In my opinion, even if I was to find that Mr. Williams was the driver of the BMW, that fact standing alone, cannot create a rebuttable presumption of his knowledge of and control over the BMW and all of its contents. For the reasons set out below, I find that there is insufficient other direct or circumstantial evidence from which I would be prepared to infer that on Williams, as the driver of the BMW had the requisite knowledge of and exercised some measure of control over the firearm which was found in the white BMW.

[84] Based upon my review of the totality of the evidence and the lack of cogent evidence, I find that there is insufficient evidence and I am left in reasonable doubt with respect to the issue of whether any of the three accused were, individually or collectively, in actual, constructive or joint possession of the firearm or that any one or more of them were occupants of the BMW knowing that the firearm was in that vehicle. In particular, I refer to the following facts and circumstances in the context of all other evidence in the case which I have found to be relevant in coming to my conclusion:

a) There is no direct evidence that any accused person knew that a firearm was wrapped in a white plastic bag, situated somewhere in the BMW;

b) Given the high speed police chase of the white BMW and the fact that it ultimately crashed and flipped over on its passenger side, I do not know, nor can I reasonably infer where the white plastic bag which covered the firearm was located in the BMW, before the crash. As a result, it is not possible to infer that the bag with the firearm was placed in a location where it was in plain view or was easily accessible to any one or more of the accused;

c) There was no identifiable DNA or fingerprint evidence obtained from the firearm which was suitable for comparison in order to determine whether any one of the three accused had ever physically handled that firearm;

d) The police had not been following or conducting any surveillance on the white BMW at any time prior to 7:10 PM on July 2, 2010. The police added that they had never seen that BMW before that evening;

e) The registered owner of the white BMW is Ms. Jennifer McIsaac, who resides in Scarborough, Ontario. There was no evidence before the court of any connection between Ms. McIsaac and any one or more of the three accused people;

f) The police were not able to make any contact with the registered owner, but they did confirm that they had no report that the BMW was stolen. As a result, there is no evidence as to whether one of the accused had just borrowed the car from Ms. McIsaac for the evening of July 2, 2010 to cruise around town or he had been operating it for an extended period of time;

g) There is no evidence that any of the three occupants of the white BMW had any significant connection to that car, either as a driver or as a passenger, at any time prior to July 2, 2010;

h) There is no evidence that the firearm was in "plain view". Even with the BMW flipped over on its side, the visibility of the Ruger 9 mm firearm, a small, black handgun (about 220 mm or 8.6 inches in length by 130 mm or 5.2 inches in height according to photos 44 and 46 in Exhibit 1) was largely obscured by the white plastic bag which was

wrapped around it, leaving only a small portion of the muzzle of the firearm being barely visible against the black carpet of the car;

i) No documents were seized from the BMW nor were any other items seized by the police from any of the compartments in the car or on or under the front or back seat of the car. Although an unspecified amount of marijuana was found during the search of Mr. Thomas, there were no gloves, other ammunition or any other items found on any accused or in the car from which inferences of knowledge and control of the firearm could have been made;

j) Police officers noted that the BMW's back window was tinted and that they could only see silhouettes of the heads of the people as they pursued that car. There was no evidence that any of the accused took any actions, such as leaning over to the side as if to reach for or place something under a seat, after the BMW passed by the police car on Highfield Park Drive or during the high speed chase.

[85] In my opinion, based upon the totality of evidence that I have accepted and the lack of cogent evidence, I find that there is insufficient direct or circumstantial evidence from which I could reasonably infer facts to establish that any one or more of the three accused possessed the 9 mm Ruger handgun by having the requisite knowledge of and control over that firearm. In these circumstances, I cannot conclude beyond a reasonable doubt that any one of the accused actually possessed the 9 mm Ruger handgun or that any of them, either individually or collectively, had constructive or joint possession of that firearm.

[86] Furthermore, while there was hearsay evidence upon which the officers relied in forming their grounds to conduct a traffic stop on the BMW and arrest the occupants of that vehicle for possession of a firearm, that evidence is not admissible for the truth of its contents. Therefore, the hearsay evidence that the police officers received from a confidential source that Mr. Thomas was in possession of a firearm, is only admissible for the limited purpose of being part of the information available to them to form the reasonable grounds for their decision to conduct a traffic stop in order to conduct an investigative detention of Mr. Thomas and the occupants of the BMW.

[87] In this case, I find that the established circumstances give rise to a high degree of suspicion that one or more of the accused had possession of the firearm and that the other accused were occupants of a motor vehicle knowing that someone else was in possession

of a firearm. While I am satisfied that none of the three accused had the requisite authority to legally have a firearm in their possession and in fact, two of the accused were actually prohibited from possessing firearms, I cannot convict the three accused on these firearms offences on the basis of a suspicion, even if I find that I have a high degree of suspicion. Given the facts which I have found and the lack of cogent evidence on other key issues, I cannot conclude from the proven facts that the only reasonable inference is that any one or more of the accused persons are guilty of the offences which directly or indirectly relate to the possession of the firearm pursuant to sections 86(2), 88(2), 92(1), 94(1), 95(1), 108(1)(b) and 117.01(1) of the Criminal Code. As a result, I hereby acquit the three accused of those charges which relate to the possession or knowledge of the firearm.

Was the Identity of the Driver of the BMW Established Beyond a Reasonable Doubt?

[88] Mr. Williams faces three driving offences in relation to the police pursuit of the white BMW that allege that he was the driver of that vehicle which accelerated to speeds estimated at 100 to 140 km/h, in order to evade the police. The specific charges relate to operating the motor vehicle in a manner dangerous to the public contrary to section 249(1)(a) of the **Code**, operating a motor vehicle while being pursued by a peace officer and failing, without reasonable excuse and in order to evade the peace officer, to stop as soon as reasonable in the circumstances, contrary to section 249.1(1) of the **Code**, and having care or control of a motor vehicle that was involved in an accident and unlawfully, with the intent to escape civil or criminal liability, fail to stop the vehicle contrary to section 252(1) of the **Code**.

[89] The key issue in relation to these driving charges is whether the Crown has established, beyond a reasonable doubt, the identification of Mr. Williams as the driver of the white BMW at all relevant times on July 2, 2010.

[90] Since this issue relates to eyewitness or visual identification evidence, it is important to instruct myself on the inherent frailties of this type of evidence along with the factors that the court should consider in evaluating the weight to be attributed to this evidence. The leading case which provides assistance and guidance to trial courts is the **Supreme Court of Canada** decision in **Mezzo v. The Queen**, [1986] 1 SCR 802 in which the Court adopted the reasoning of the English Court of Appeal in **R. v. Turnbull**, [1976] 1 All ER 549. Both of those cases pointed out the frailty of visual identification or

eyewitness evidence and gave directions for a court to keep in mind when assessing the "quality" or the weight of this evidence.

[91] The court in **Mezzo** stated that some of the factors which can clearly affect eyewitness evidence are the length of the observation, the distance at which the observations were made, lighting conditions, obstructions in the view, any prior or past recognition factors, time between the original observation and the subsequent description to the police and any discrepancies between the description and the accused's actual appearance. The Court acknowledged that there may also be many other factors, depending on the specific circumstances of the case. Other factors, for example, would be the degree of attention and awareness of the witness at the time of the observation, together with the consistency of descriptions by different witnesses. See also **R. v. Bigsky**, [2006] SKCA 145 at paras. 41 to 43.

[92] Although the Crown invites me to conclude that Mr. Williams was identified as the driver of the white BMW, I find that the following factors must be considered in assessing the weight that I am prepared to attribute to Det/Cst. Travis' evidence which identified Mr. Williams as the driver of the BMW:

a) While the lighting conditions were good on the evening of July 2, 2010 Det/Cst. Travis was only able to see a side profile of the driver's head as the white BMW passed by his police car;

b) Det/Cst. Travis and Cst. Jardine's observations of the driver were very brief, being only for a second or two as the white BMW went by their observation location at approximately 50 km/h;

c) Although Det/Cst. Travis' view of the driver of the BMW was at a relatively short distance estimated at about 10 to 15 meters, his view was partially obstructed because the driver's window tinted and only halfway down;

d) Neither Det/Cst. Travis nor Cst. Jardine had any previous dealings with or prior recognition factors to assist in identifying Mr. Williams and neither officer has previously conducted any surveillance on Mr. Williams or that white BMW;

e) In terms of their degree of attention and awareness at the time, the police officers had source information relating to Mr. Thomas, but no source information with respect to Mr. Williams. As a result, I find that it is reasonable to infer that when the police officers observed the driver's side of the BMW, their attention would have been divided between the rear seat passenger on the driver's side of the car who they recognized as Mr. Thomas and the driver;

f) Although Det/Cst. Travis stated that his identification of Mr. Williams as the driver was based on his side profile, he did not provide any specific details with respect to the side profile of the driver of the BMW;

g) Det/Cst. Travis stated that he was about 80% or 85% to 100% "certain" of the identification of the driver based upon his "glimpse" and initial observations;

h) A short time after the high-speed pursuit of the BMW had concluded, Mr. Williams was brought back to the booking area of the police station after being arrested by other officers. Det/Cst. Travis saw him there and confirmed that he had the "same profile" as the driver of the BMW. Det/Cst. Travis was advised by another officer that the name of the person, who he had identified as the driver of the BMW, was Timothy Williams.

[93] I find that several of the foregoing factors would limit the weight that I am prepared to accord to this eyewitness identification evidence in the absence of other confirmatory evidence. However, as this is admissible evidence, it must be considered with the totality of the other admissible evidence relating to the identification of the driver.

[94] Before determining whether there is other confirmatory evidence to support the eyewitness identification of Mr. Williams as the driver of the BMW, Defence Counsel for Mr. Williams also pointed out that there were two similarly dressed men who fled, on foot, from the BMW. Counsel submits that the similarity of the clothing worn by those two men and those factors which undermine the reliability of the eyewitness identification evidence ought to leave the court in reasonable doubt with respect to the identity of the driver.

[95] In relation to these submissions by Defence Counsel, I find that following a relatively brief foot pursuit, the two men who were arrested after they fled from the BMW, were identified as Mr. Williams and Mr. Fraser. I find that the evidence of the police officers involved in the foot pursuit of those two men established that they were wearing very similar clothing. Constables Jardine, Vienotte, Goodwin and Poole were involved in the arrest of Mr. Williams who was described as an African Canadian man wearing a red shirt and black shorts. Cst. Goodwin added that the red T-shirt worn by Mr. Williams did not have any lettering on it and that he was also wearing white high cut sneakers with some black markings on them and white ankle socks.

[96] Cst. Kincade chased after the black male who exited through the BMW's sunroof and ran off to the right. When he finally arrested that black male, the police officer confirmed that he had arrested Mr. Brandon Fraser. Cst. Kincade was familiar with Mr. Fraser and recognized him based upon the fact that he had previous involvements with him before this incident. Cst. Kincade's evidence was that Mr. Fraser was also wearing black shorts with some red on them and a red T-shirt as well as black and white Nike sneakers.

[97] While I have no doubt that the two accused who fled from the BMW on foot were wearing similarly colored T-shirts, shorts and running shoes, this evidence does not, in my opinion, undermine the eyewitness identification of the driver of the BMW because none of the officers involved in the high speed pursuit of the BMW made any observations of the clothing worn by the accused while they were seated in the BMW. In fact, the police officers, who pursued Mr. Fraser or Mr. Williams, made their first observations of the clothing worn by those two men once they were out of the BMW and as they ran off in different directions. As such, I find that the similar clothing worn by Mr. Williams and Mr. Fraser did not impact their identification as the first two occupants of the BMW to exit through the sun roof and flee as the police officers arrived in the vicinity of the BMW.

[98] From those proven facts, and the fact that Mr. Thomas was apprehended by Det/Cst. Travis as he was exiting from the BMW's sunroof, there is no doubt that Mr. Fraser and Mr. Williams were the first two people to exit the BMW through its sunroof. I also find from evidence of Det/Cst. Johnston and photographs 24 to 26, that the sunroof of the BMW is located directly over the front bucket seats of that vehicle. From those proven facts, I find that it is reasonable to infer that Mr. Williams and Mr. Fraser were the first two men to exit the BMW through the sunroof because they were seated in the front bucket seats of the BMW and the fact that the sunroof was directly above them.

[99] Furthermore, I find that it is also reasonable to infer that Mr. Fraser and Mr. Williams were the occupants of the front seats of the BMW from the proven fact that Mr. Thomas was the last of the three people to exit the BMW and the fact that there was other eyewitness identification evidence by both Det/Cst. Travis and Cst. Jardine which placed Mr. Thomas in the rear passenger seat on the driver's side of the BMW. From these proven facts, I find that it is reasonable to infer that Mr. Thomas was in the back seat of the car on the driver's side and that he had to wait until Mr. Williams and Mr.

Fraser exited through the sunroof of the BMW, before he could climb over the bucket seats and get to the sunroof himself.

[100] After two of the accused ran away from the BMW, Csts. Jardine and Veinotte began a foot pursuit of the person, who, following his arrest, was identified as Mr. Timothy Williams. Although Cst. Jardine did not offer any estimate as to the distance between himself and Mr. Williams during the pursuit on foot, I accept Cst. Jardine's evidence that on a few occasions Mr. Williams looked back and he made eye contact with him as they were running. Based upon these proven facts, I find that within seconds of the BMW flipping over on its passenger side, Cst. Jardine had a few occasions to view Mr. Williams' face at a relatively short distance.

[101] During the pursuit of Mr. Williams, both Cst. Jardine and Cst. Veinotte lost sight of the person who they were chasing as he went around the corner of a building and they slowed down for officer safety before going around the corner. At about 7:15 PM on July 2, 2010, Cst. Jardine called the K-9 unit for assistance in tracking and locating the person who he and Cst. Veinotte had been pursuing. I accept the evidence of Csts. Spriggs, Poole and Goodwin that Mr. Williams was located in a dumpster beside #11 Thornhill Drive, in Burnside and arrested at 7:37 PM. Furthermore, after Cst. Goodwin brought Mr. Williams back to the area where the police cars were located, both Csts. Jardine and Goodwin were able to get another look at that accused person. Cst. Jardine stated that he was "100 per cent sure" and Cst. Veinotte stated that he was "100 per cent certain" that they had pursued Mr. Williams on foot from the BMW. From all of these proven facts, I find that Mr. Williams was an occupant of the BMW and, as I previously indicated, I find that it is reasonable to infer that he was one of the two people who occupied one of the front seats of that car.

[102] With respect to Mr. Fraser, I find that the evidence of Cst. Kincade established that he began his foot pursuit of that accused person, within seconds after parking his police car near the white BMW. Unlike the foot pursuit of Mr. Williams which lasted for several minutes, Mr. Fraser was arrested by Cst. Kincade after being ordered to come out of the bushes approximately 100 feet from where the white BMW had flipped over on its passenger side. From these and other proven facts, I find that it is reasonable to infer that Mr. Fraser was one of the two occupants of the front seat of the BMW on July 2, 2010.

[103] In finding that Mr. Fraser was one of the occupants of the front seat of the BMW, I am mindful of the fact that neither Cst. Jardine nor Det/Cst. Travis had seen Mr. Fraser in the BMW before it flipped over on its passenger side, and the fact that the officers only had a view of the driver's side of the BMW as it passed by their vantage point on Highfield Park Drive. However, Det/Cst. Travis did provide evidence which identified Mr. Williams as the driver and both Det/Cst. Travis and Cst. Jardine provided evidence which identified Mr. Thomas as the rear seat passenger on the driver's side. Based upon these proven facts and the totality of the other evidence and inferences that I have made, I therefore find that it is reasonable to infer that Mr. Fraser was occupying the front passenger seat of the white BMW at all material times.

[104] Furthermore, there is the confirmatory evidence of the Det/Cst. Travis which identified Mr. Williams as the driver of the white BMW on the evening of July 2, 2010, based upon his view of Mr. Williams in the booking area of the police station. In this regard, I find that the evidence established that Cst. Goodwin, after arresting Mr. Williams at the dumpster beside #11 Thornhill Drive, first escorted Mr. Williams to the hospital for observation in relation to a scrape on his back and because Mr. Williams had reported that he had trouble breathing. Once those observations at the hospital had been completed, Mr. Williams was brought back to the police station and placed in the booking area. While seated in the booking area that same evening, a short time after the high-speed pursuit of the BMW, Det/Cst. Travis saw Mr. Williams, and confirmed that Mr. Williams had the "same" profile as the driver of the BMW.

[105] Although Det/Cst. Travis acknowledged that he did not make any notes of the driver's profile at that time, I find that the absence of notes to refresh his memory did not undermine the reliability of his identification evidence of Mr. Williams on July 2, 2010 or during the trial. In making this finding, I note that Det/Cst. Travis made his initial observations as the BMW passed by his location on Highfield Park Drive and that his subsequent observations of the profile of the person whom he identified as the driver, were made that same evening, within a short time after the high-speed pursuit of the BMW had ended, and Mr. Williams was transferred to the booking area of the police station.

[106] In addition, I also note that the evidence established that Det/Cst. Travis had no prior familiarity with Mr. Williams and that when Mr. Williams was seated in the booking area, another officer simply indicated that the name of the person seated there, was

Timothy Williams. I find that it was the officer's recognition that Mr. Williams had the "same" profile as the driver of the BMW within hours of the incident which was the significant factor in his identification of Mr. Williams as the driver of the BMW. I also find that, in reality, the knowledge of Mr. Williams' name did not influence his identification evidence, since it was established that neither Det/Cst. Travis nor Cst. Jardine had any familiarity or dealings with him, prior to the events of July 2, 2010.

[107] Finally, in identifying Mr. Williams as the driver, Det/Cst. Travis knew that the driver could only have been one of the three occupants of the white BMW. Since he had identified Mr. Thomas as being the passenger seated in the rear seat of the driver's side of the BMW and Mr. Thomas was the third person to exit the car, based upon the proven facts and reasonable inferences from those proven facts, I therefore find that the potential group of people who could possibly have been the driver of the BMW, was effectively reduced to a group of two, being either Mr. Williams or Mr. Fraser. In this context, I find that there is significant confirmatory evidence which, when taken together with all of the other direct and circumstantial evidence, establishes that Mr. Williams was the driver of the white BMW on the evening of July 2, 2010. Therefore, I find that the Crown has established, beyond a reasonable doubt, that Mr. Timothy Williams was the driver of the white BMW bearing Ontario license plate BDME 189 at all material times on the evening of July 2, 2010.

[108] In his submissions, the Crown Attorney also referred to admissions made between the Crown and Defence counsel for Mr. Fraser pursuant to section 655 of the **Criminal Code** which related to a statement made by Mr. Fraser to the police on February 23, 2012. In that statement, Mr. Fraser told the police that "if he had been driving the vehicle, the police would never have caught them" and that "he was going to beat the charges as he did not own the car and was not driving it." The Crown submitted that this statement may be used to establish that Mr. Fraser was not the driver of the BMW on July 2, 2010. The Crown also submits that by the process of elimination combined with the other direct and circumstantial identification evidence relating to Mr. Thomas establishing that he was a passenger in the rear seat on the driver's side, the court may conclude that Mr. Williams was the driver of the BMW.

[109] Defence Counsel for Mr. Williams pointed out that Mr. Fraser's statement was provided to the police almost 20 months after the incident in question and for that reason alone, should be accorded little weight. Counsel for Mr. Williams also submits that while

there is evidence that Mr. Thomas was seated in the back seat of the BMW, the statement of Mr. Fraser cannot be used, or combined with other evidence, against any other co-accused in a joint trial.

[110] With respect to this issue, I agree with Defence counsel for Mr. Williams that out-of-court statements by an accused can only be used against their maker, in a joint trial. As a result, I have not relied upon a statement made by Mr. Fraser to the police on February 23, 2012 in finding that Mr. Williams was the driver of the white BMW. The out-of-court statement by Mr. Fraser is hearsay in relation to a triable issue facing Mr. Williams and for that matter Mr. Thomas. In a joint trial of several co-accused people, I find that this type of hearsay evidence would not be admissible at the instance of the prosecution against a co-accused. On this point, the Supreme Court of Canada stated in **R. v. Rojas**, [2008] SCC 56 at para. 35 that:

> "This general exclusionary rule applies in regard to both inculpatory and exculpatory statements. Confessions, however, fall within a recognized exception to the hearsay rule, and the very rationale for the admissibility of admissions by an accused is that admissions against interest are likely to be true."

[111] In **Rojas**, *supra*, the Supreme Court of Canada went on to say, at para. 36, that as a general rule, statements made by an accused person outside of court, which are subject to a finding of voluntariness where the statement is made to a person in authority, are receivable against him, but not for him. The Court states that the policy rationale for this rule is that an accused person should not be free to make an unsworn statement and compel its admission into evidence through other witnesses and thus put his defence before the jury without being put on oath and being subject to cross examination.

[112] In view of the comments expressed by the Supreme Court of Canada in the **Rojas** case, I find that out-of-court statements by a co-accused are inadmissible in exculpation of an accused just as much as they are inadmissible to incriminate a co-accused. As indicated previously, the Crown and Mr. Fraser's counsel agreed to tender his statement as an admitted fact against him pursuant to S. 655 of the **Code**. However, I find that Mr. Fraser's statement has little probative value as it is not, in reality, an admission against his interest, and in any event, it is only admissible with respect to the issues facing him. Furthermore, I find that Mr. Fraser's statement is inadmissible hearsay relating to triable

issues which involve Mr. Williams and/or Mr. Thomas in this joint trial. As such, I have placed no reliance on his statements to the police on February 23, 2012 in reaching my conclusion that Mr. Williams was the driver of the white BMW on the evening of July 2, 2010.

Were the Essential Elements of the Driving Charges Established Beyond a Reasonable Doubt?

A. Operating a Motor Vehicle in a Manner Dangerous to the Public

[113] Mr. Williams also faces a charge which alleges that he committed the offence of driving a motor vehicle in a manner that was dangerous to the public contrary to section 249(1)(a) of the **Criminal Code**.

[114] The law in relation to this charge has recently been reviewed by the Supreme Court of Canada in **R. v. Roy**, [2012] SCC 26 (CanLii). In that case, decided in June 2012, the Court confirmed and clarified their earlier decisions in **R. v. Beatty**, [2008] SCC 5 (CanLii) and **R. v. Hundal**, [1993] 1 SCR 867 with respect to the analysis to be conducted by the trier of fact to determine if the *actus reus* and *mens rea* of this offence have been established beyond a reasonable doubt.

[115] In **Roy**, *supra*, Justice Cromwell delivered the decision for the court and stated at para. 34 that;

> " In considering whether the *actus reus* has been established, the question is whether the driving, viewed objectively, was dangerous to the public in all of the circumstances. The focus of this inquiry must be on the risks created by the accused's manner of driving, not the consequences, such as an accident in which he or she was involved."

As a result, there must be an objective inquiry into the risks created by the manner of driving in all of the circumstances of the case, without simply focusing on the consequences of the accused's driving.

[116] With respect to the *mens rea* analysis, the Court stated in **Roy**, *supra*, at para. 36, that the analysis will depend on whether the dangerous manner of driving was the result of a "marked departure from the standard of care which a reasonable person would have

exercised in the same circumstances." Cromwell, J. pointed out in para. 37, that simple carelessness does not represent a "marked departure" from the standard of care expected of reasonable person in the same circumstances and that "the marked departure" standard is a "modified objective standard," which is the minimum fault requirement for a criminal offence. Mr. Justice Cromwell added that if there was proof of subjective *mens rea*, that is, "deliberately dangerous driving," that would support a conviction for dangerous driving, but proof of that subjective *mens rea* is not necessarily required (at para. 38).

[117] Based upon those comments of the Supreme Court of Canada and the plain meaning of section 249(1)(a) of the **Criminal Code**, the court must have regard to all of the circumstances of the risks created by the manner in which the white BMW was operated, including the nature, condition and use of the place at which the motor vehicle was being operated and the amount of traffic that might reasonably expected to be at that place. Cst. Matthew Veinotte's evidence was that, at the corner of Windmill Road and Victoria Road, after he activated the emergency equipment of their marked police car and Det/Cst. Travis and Cst. Jardine activated the emergency equipment of their unmarked police car, the driver of the white BMW immediately accelerated to speeds of about 100 km/h instead of pulling over and stopping as he was required to do. The white BMW continued along Windmill Road at that speed, going into the center median lane which is dedicated for left-hand turns, in an effort to pull away from the two police cars which were pursuing the BMW. Cst. Brad Jardine provided evidence that the posted speed limit traveling on Windmill Road in the area of Wright Avenue is 60 km/h.

[118] Cst. Veinotte described the nature and use of Windmill Road, particularly at the intersection of Wright Avenue in saying that, at the time of the high-speed chase on July 2, 2010, there was traffic proceeding in both directions on Windmill Road. However, he did not estimate the volume of traffic that was present that evening. The officer stated that Windmill Road has two lanes going in a northerly direction towards Magazine Hill and two lanes going in a southerly direction. He also said that there is a fifth lane located between the two lanes going in each direction which is utilized for making left hand turns in either direction off Windmill Road. Although not mentioned by Cst. Veinotte or any other officers, I am prepared to take judicial notice of the fact that Windmill Road is a major artery connecting commuters from the Bedford and Sackville areas of the city directly to Dartmouth and to downtown Halifax via one of the two bridges over the harbour.

[119] In terms of Cst. Veinotte's evidence that there was traffic proceeding in both directions on Windmill Road, I find that this high-speed police chase of the white BMW commenced shortly after 7:10 PM on the evening of July 2, 2010. I am prepared to take judicial notice of the fact that July 2, 2010 was a Friday and therefore, the traffic volume at that time on Windmill Road would be significantly less than had this incident occurred between 4 PM and 6 PM. Furthermore, I am prepared to take judicial notice of the fact that there are primarily business and commercial properties located on both sides of the road as one approaches the intersection of Windmill Road and Wright Avenue as well as along Wright Avenue to the location where the BMW flipped over on its passenger side.

[120] With respect to the manner in which the BMW was driven along Windmill Road, Cst. Jardine said that it made a "quick right turn" onto Wright Avenue which caused the tires to squeal. Cst. Veinotte described the BMW's maneuver at the corner of Windmill Road and Wright Avenue as a "sharp right turn." It bears repeating here, and I find that uncontradicted evidence established that the driver of the white BMW was proceeding in the center median lane dedicated for left turns only, at speeds estimated to be almost twice the posted maximum speed limit in that area and then made a "sharp" or "quick" right hand turn, cutting across at least two lanes of traffic to turn onto Wright Avenue.

[121] Once the BMW made the turn onto Wright Avenue, it accelerated and went up Wright Avenue at speeds estimated to be over 100 km/h by Cst. Jardine. Det/Cst. Travis estimated that the speed of the BMW on Wright Avenue was over 120 km/h in an area. Cst. Veinotte estimated that the BMW's speed was between 120 and 140 km on Wright Avenue as the car approached the railway crossing on that road. I find that the evidence establishes that the BMW was proceeding at speeds of estimated to be at least two to almost three times the posted maximum speed limit for that road. I find that the evidence established that there were some vehicles traveling in the opposite direction on Wright Avenue to the direction of the white BMW and the two police cars that were pursuing it.

[122] I find that, after considering the totality of this driving evidence, that the risks created by the manner in which the BMW was driven by Mr. Williams was, viewed objectively, dangerous to the traveling public on Windmill Road and Wright Avenue on the evening of July 2, 2010. I find that, by Mr. Williams driving the white BMW at such high speeds, and taking several objectively very dangerous actions by proceeding at those high speeds in a center median lane dedicated for left-hand turns, and then suddenly turning right from that lane and cutting across at least two lanes of traffic at a high speed

to continue to evade the police as the BMW went up Wright Avenue, created a very serious risk of property damage or personal injury. I find that the evidence also established that there was traffic going in both directions on Windmill Road and traffic approaching the BMW during the high speed chase on Wright Avenue. I am satisfied beyond a reasonable doubt that the Crown has established the *actus reus* for the dangerous operation of a motor vehicle offence contrary to section 249(1)(a) of the **Criminal Code**.

[123] Furthermore, given the fact that the police cars pursuing the white BMW had activated their emergency lights and sirens to signal to Mr. Williams to pull over and stop as soon as reasonably possible, I find that all of these objectively dangerous driving maneuvers were done deliberately in an effort to evade the police officers. As such, after considering the totality of all of the evidence in relation to these driving charges, I am satisfied beyond a reasonable doubt that Mr. Williams had the subjective *mens rea*. In any event, I also find that Mr. Williams' actions as the driver of the BMW were a marked departure from the standard of care expected of a reasonable person and that the Crown has also established beyond reasonable doubt all of the essential elements of the charge contrary to section 249(1) (a) of the **Criminal Code**, and I find him guilty of that charge.

B. Flight by an Operator of a Motor Vehicle while being pursued by a Peace Officer Operating a Motor Vehicle

[124] Mr. Williams has also been charged with the offence of operating a motor vehicle while being pursued by a peace officer operating a motor vehicle and failing, without reasonable excuse to stop his vehicle, in order to evade a peace officer contrary to section 249.1(1) of the **Criminal Code**.

[125] In order to establish this charge, the Crown must prove beyond a reasonable doubt that the operator of a motor vehicle was being pursued by a peace officer in another motor vehicle and that the operator of the vehicle being pursued by the police failed to stop, without any reasonable excuse, as soon as reasonable in all the circumstances. I find that the Crown has established the *actus reus* of this offence, beyond a reasonable doubt, through the direct evidence of Det/Cst. Travis, Csts. Jardine, Veinotte and Kincade. I find that the direct and circumstantial evidence established that Mr. Williams was operating the white BMW and after being signaled to stop by police officers, he failed to pull over and stop the BMW as soon as reasonable in the circumstances. I also find that there is no

evidence of any reasonable excuse for Mr. Williams' failure to stop the BMW as soon as reasonable in all of the circumstances.

[126] In terms of the mental element or *mens rea* of this offence, the Crown must establish the intention to operate the motor vehicle while being pursued by the police and failing to stop as soon as reasonable in all of the circumstances. Based upon the proven facts which I have accepted, I find that it is reasonable to infer that Mr. Williams knew that he was being pursued by peace officers in their police cars given the fact that he accelerated the BMW as soon as the police officers activated their emergency equipment, that is, the car's sirens and flashing lights.

[127] In addition, I have found that, not only did Mr. Williams fail to stop as soon as it was reasonable to do so; he accelerated the BMW and then took other evasive actions, such as driving at high speeds and making sharp turns, in an effort to flee from the police and evade being stopped by them. From all of these proven facts and circumstances, I find that it is reasonable to infer that Mr. Williams deliberately intended to speed off, rather than pulling over to the side and stopping as soon as it was reasonable in the circumstances, and by those actions Mr. Williams precipitated the high-speed police pursuit of his car.

[128] Although the high speed police pursuit of the BMW ended within a couple of kilometers and within a relatively short time after it started, I find that the evidence clearly established that Mr. Williams drove the white BMW in a manner dangerous to the public. In doing so, I find that he created a very serious risk of property damage or personal injury to the peace officers involved in the high speed pursuit of the BMW and all members of the public who were traveling in that area on the roadways or any pedestrians walking alongside those roadways.

[129] Furthermore, I find that the evidence of the manner in which Mr. Williams drove the white BMW while he was being pursued by peace officers, established beyond a reasonable doubt that he failed, without reasonable excuse, and in order to evade the police officers, to stop his vehicle as soon as reasonable in all of the circumstances. In fact, I find that the evidence established that Mr. Williams did not, at any time, voluntarily stop the white BMW that he was driving on the evening of July 2, 2010. I find that the only reason this high-speed pursuit of the white BMW ended as quickly as it did, is

because Mr. Williams lost control of the car after it went airborne going over a railway crossing at a speed estimated to be over 120 km/h, landed hard on the road, spun around and ultimately flipped over on its passenger side.

[130] In terms of this charge of flight from the police contrary to section 249.1 of the **Criminal Code**, I find that the Crown has established both the external circumstances of the *actus reus* and the mental element or *mens rea* of this offence, beyond a reasonable doubt. As a result, I find Mr. Williams guilty of this section 249.1(1) **Criminal Code** charge.

C. Failure to Stop at the Scene of an Accident to Avoid Civil or Criminal Liability

[131] Mr. Williams has also been charged with the offence of having the care or control of a motor vehicle that is involved in an accident and that he did unlawfully, with the intent to escape civil or criminal liability, fail to stop his vehicle contrary to section 252(1) of the **Criminal Code**.

[132] For the purposes of the charge facing Mr. Williams, the relevant excerpt of section 252(1) of the **Criminal Code** provides as follows:

> "Every person commits an offence who has the care, charge or control of the vehicle… that is involved in an accident with (a) another person, (b) a vehicle…and with intent to escape civil or criminal liability fails to stop the vehicle…, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance."

[133] The external circumstances or *actus reus* of an offence under section 252(1) of the **Code** consist of a combination of acts and omissions. The accused must have care or control of a motor vehicle which must be involved in an accident with an object or person described in section 252(1) of the **Code**. The accused must fail to stop or fail to give his or her name or address to the other person or the police or if a person is injured or requires assistance, fail to offer assistance. The mental element or *mens rea* for this offence requires proof of the intentional causing of the *actus reus*, which requires proof that the accused had knowledge of his or her involvement in an accident and failed to perform the statutory duties with the intent of escaping civil or criminal liability.

[134] While section 252(1) of the **Criminal Code** appears to be relatively straightforward and clear, the interpretation of this provision has been a matter of some contention over the years. In those cases which have considered the statutory interpretation of this section, much of the debate has revolved around the meaning of the word "accident" which is not defined in the **Criminal Code**.

[135] The issue of the interpretation of this provision was recently canvassed by the Alberta Court of Appeal in the case of **R. v. McColl**, [2008] ABCA 287. In **McColl**, the majority of the Court of Appeal notes that section 252(1) of the **Code** was found to be applicable when a passenger was injured in a single vehicle accident: see **R. v. Mihalick**, [1990] 28 MVR (2nd) 114 [BCCA], leave to appeal to Supreme Court dismissed without reasons, [1991] SCCA No. 128. In that case, the British Columbia Court of Appeal held that an "accident" should be given its natural meaning and includes any incidents causing injury or damage (para.24). As a result, the British Columbia Court of Appeal held that provision applied when there was a single vehicle accident and a passenger was injured.

[136] The majority of the Alberta Court of Appeal also noted, in **McColl**, *supra*, that there was a conflicting line of authority which held that the essential elements of this provision were not established where there was a single vehicle accident. In a case where a driver had struck a pole, but no passengers were involved in that incident, the Ontario Superior Court held that "single car accidents were not covered by the section": see **R. v. Vellow** [1990], 27 MVR (2nd) 59 (Ont. Sup. Ct.), at para. 9.

[137] Given the fact that there were two plausible interpretations of section 252 (1)(a) of the **Criminal Code**, the Alberta Court of Appeal reviewed the legislative history of that provision and the Parliamentary debates and determined that the original enactment made it plain that Parliament's intention was to punish drivers for leaving an accident scene without tendering assistance to an injured person. In the final analysis, Hunt, J.A writing the majority decision in **McColl**, *supra*, held at para. 28 that:

> "Parliament intended to include single vehicle accidents when a passenger is injured and needs medical assistance. Use of the term 'another person' includes passengers in the same vehicle as the accused driver. This conclusion is bolstered by the clear language in subsection 1.2 and by other cases which have interpreted the provision contextually."

[138] The dissenting opinion in **McColl**, *supra*, was written by Conrad, J.A. who focused on the fact that the preamble to section 252(1) of the **Code** requires the court to interpret not only the meaning of the word "accident" but also the meaning of the preposition "with" as the provision requires a vehicle to be "involved in an accident with" (a) another person, (b) of vehicle, or (c) cattle in the charge of another person. After applying modern rules of interpretation and giving the grammatical and ordinary meaning of "with" as it is used in the context of section 252(1) of the **Code**, Conrad, J.A. held at para. 53 that:

> "Parliament intended that the preposition "with" would tie the driver's vehicle to the other object, be it a person, vehicle or cattle involved in the actual accident."

[139] Furthermore, Conrad J.A. pointed out at para. 65 that section 252(1) of the **Code**, does not require that every driver involved in an accident must stop and render assistance.

> "Rather, the provision has always proscribed the failure to stop, exchange information, and render assistance where necessary - only if in failing to do these things, the driver intends to escape civil and/or criminal responsibility." (Emphasis in the original text).

[140] In terms of the charge under section 252(1) of the **Code**, I find that, in the circumstances of this case, Mr. Williams was not involved in an "accident with" another person or vehicle. In this case, I find that the "accident" which resulted in the BMW flipping over onto its passenger side on the grass in front of #71 Wright Avenue, did not involve a collision with another vehicle, and as such, I find that it was a single vehicle "accident". If I was in agreement with cases such as **Vellow**, *supra*, then section 252(1) would not apply to this single vehicle "accident."

[141] However, since there were passengers in the BMW which I have previously determined was being driven by Mr. Williams, I adopt the reasoning of the courts of appeal in **McColl** and **Mihalick**, *supra*, that section 252(1) of the **Code** could apply to this single vehicle "accident" because the operator of the car was involved in a single vehicle "accident with" passengers or utilizing the wording of the section, there was "another person" or persons who were passengers in that vehicle.

[142] In this case, I have previously determined that the BMW coming to rest on its passenger side in front of #71 Wright Avenue was the result of a single vehicle accident. However, given my interpretation of section 252(1) (a) of the **Code**, unless I find that one of the passengers in the BMW was injured, the factual matrix of this case would not bring this alleged offence within the statutory requirement that the vehicle operated by Mr. Williams be "involved in an accident with (a) another person."

[143] While I have no doubt that Mr. Williams fled from the scene of the "accident" with the intent to escape civil or criminal liability, there was no evidence to indicate that Mr. Thomas, as the rear seat passenger on the driver's side suffered any injuries which required any observation, treatment or hospitalization. However, there was some evidence from Cst. Kincade, that Mr. Fraser had complained of injuries and that the Emergency Health Services attended at the scene of the accident. From this minimal amount of direct evidence, I cannot reasonably infer the nature or extent or for that matter the reality of any reported injuries by Mr. Fraser, who I have found to be the person seated in the front passenger seat of the BMW. Furthermore, I have no evidence that Mr. Fraser suffered any injuries that required any treatment or hospitalization.

[144] In fact, the only person who was taken to the hospital for a brief period of observation was Mr. Williams. In these circumstances, after having considered the foregoing authorities which provide insight on the statutory and judicial interpretations of section 252(1)(a) of the **Code**, as well as all of the direct and circumstantial evidence in this case, I find that the BMW going out of control and flipping over on its passenger side was a single vehicle "accident." However, I also find that, in this case, this single vehicle accident did not involve an "accident with another person." As such, I conclude that the Crown has not established all of the essential elements of the offence contrary to section 252(1) (a) of the **Criminal Code**, beyond a reasonable doubt.

[145] In view of the foregoing conclusion, I acquit Mr. Williams of the charge contrary to section 252(1) (a) of the **Criminal Code**.

Were the Charges of Resisting Peace Officers in Lawful Execution of their Duties Established Beyond a Reasonable Doubt?

[146] As a result of the events of July 2, 2010 at or near Dartmouth, Nova Scotia, Mr. Williams and Mr. Fraser were charged with unlawfully and willfully resisting Cst. Bradley Jardine and Cst. Stewart Travis, peace officers, while engaged in the lawful execution of

their duty, contrary to section 129(a) of the **Criminal Code**. Mr. Thomas faces the same charge contrary to section 129(a) of the **Code** as the other two accused, with the exception that only one peace officer was specifically named in that count of the Information, Cst. Stewart Travis.

[147] In order to determine the essential elements of the offence of resisting a peace officer in the lawful execution of his or her duty, it is important to note that the relevant excerpts of section 129(a) of the **Criminal Code** provide as follows:

> "Everyone who (a) resists or willfully obstructs a public officer or a peace officer in the execution of his duty or any person lawfully acting in aid of such an officer, … is guilty of ... (d) an indictable offence and liable to imprisonment for a term not exceeding two years, or (e) an offence punishable on summary conviction.

[148] Based on my review of the essential elements of an offence contrary to section 129(a) of the **Criminal Code**, the Crown must establish beyond a reasonable doubt the date, time and jurisdiction of the offence, that the accused knew the other person was a "peace officer," that the officer was in the lawful execution of his or her duties and that the accused's actions involved some form of resistance. In order to establish the mental element or *mens rea* of the charge of resisting a peace officer in the lawful execution of his duties, the Crown must establish, beyond a reasonable doubt that the accused intended to cause the external circumstances of this offence.

[149] In terms of this offence, I find that the evidence established that Det/Cst. Travis, Cst. Jardine, Cst. Kincade and Cst. Veinotte were all members of the Halifax Regional Police Department and as such, they are all included in the definition of "peace officers" pursuant to section 2 of the **Criminal Code**. Furthermore, I find that the date, time and jurisdiction in which these alleged offences occurred were established beyond a reasonable doubt as being on the evening of July 2, 2010, at approximately 7:15 PM at or near Dartmouth, in the Province of Nova Scotia.

[150] With respect to the issue of whether the three accused "knew" that the people who were involved in the high speed pursuit of the white BMW and their arrest were peace officers, I find that the direct evidence and circumstantial evidence establishes that the three accused "knew" that the other individuals were "peace officers." First, I find that

the high-speed chase of the white BMW involved one fully marked police car and an unmarked police car. However, both police cars were equipped with emergency lights and sirens which were activated to signal to the driver and the occupants of the white BMW that the police intended to conduct a traffic stop and to signal to the driver of the white BMW that he was required to pull over and stop. Second, I find that the evidence established that Cst. Kincade pursued Mr. Fraser on foot and that Cst. Veinotte pursued Mr. Williams on foot, while both of those officers were wearing their full police uniforms. Cst. Jardine was working in the unmarked police car in plainclothes but when he pursued Mr. Williams on foot, he identified himself as a police officer, directed Mr. Williams to stop and show his hands. Third, I find that the evidence established that Cst. Veinotte also identified himself as a police officer by yelling in loud and clear commands to Mr. Williams "stop police, you are under arrest for firearms charges." Fourth, Det/Cst. Travis was also in plainclothes, but I find that when he physically apprehended and arrested Mr. Thomas as he was exiting the BMW through its sunroof, Det/Cst. Travis identified himself as a police officer and then advised Mr. Thomas that he was under arrest for weapons offences.

[151] Insofar as the issue of whether these police officers were in the "lawful execution of their duties," Det/Cst. Travis and Cst. Jardine were aware of source information that Mr. Thomas was in possession of a firearm. After they identified Mr. Thomas as the passenger in the rear seat of the white BMW as it passed by their location on Highfield Park Drive, the officers followed that BMW for a short distance before they determined that they would conduct of "high risk" traffic stop.

[152] As I have indicated previously, the source information about Mr. Thomas was hearsay evidence in this trial, but can be introduced for the limited purpose of being part of the information available to the officers in forming their reasonable grounds to conduct the traffic stop in order to conduct an investigative detention of Mr. Thomas and the other occupants of the BMW. However, when the driver of the white BMW did not pull over and stop as soon as reasonably possible after the police signal to stop, but instead accelerated and took evasive actions to elude the police, I find that the flight from the police in the BMW and then the flight by two of the three accused from where the BMW flipped over on its passenger side could also be considered as facts available to the officers, in forming their reasonable grounds to arrest the driver of the BMW and the other individuals in that car: see **R. v. Cooper**, (2005) N.S.C.A. 47 at paras. 42 to 44.

[153] It is widely accepted that police officers are acting within the lawful execution of their duties when they are exercising powers conferred upon them by either a statute or the common-law. In addition, I find that the police officers general duties include the prevention and investigation of crime: see for example section 495 of the **Criminal Code** which authorizes a peace officer to arrest without warrant in certain circumstances. In this case, I accept the evidence of Det/Cst. Travis and Cst. Jardine that based on the source information, the officers believed that it was reasonably necessary to conduct the traffic stop based upon their reasonable grounds to believe that Mr. Thomas was involved in a recent or ongoing criminal offence.

[154] After making the decision to conduct that traffic stop and activating their emergency equipment, I find that the evidence established that no traffic stop was ever done because the driver of the white BMW failed to pull over and stop as he was required to do. Instead, the driver of the BMW took evasive action to elude the police by accelerating at a high rate of speed. As a result, I find that once the driver of the BMW took those actions and ignored the police officers' direction to pull over and stop, then, Det/Cst. Travis and Cst. Jardine and for that matter any other officers who were lawfully acting in aid of those two peace officers, would have had reasonable grounds to believe that the driver had committed an offence of the resisting a traffic stop. In resisting that signaled traffic stop and the manner in which the white BMW was being driven, I find that the police officers would have had reasonable grounds to believe that the driver had just committed an indictable offence or was about to commit an indictable offence and as such, there were reasonable grounds to arrest the driver of the white BMW, without warrant, pursuant to section 495(1) of the **Criminal Code**.

[155] Furthermore, I find that the reasonable grounds to arrest the driver without warrant pursuant to section 495(1) of the **Criminal Code** continued after the BMW flipped over on its passenger side and two of the three occupants in that vehicle fled from the scene of the accident on foot. On this point, Fichaud J.A. stated in **Cooper**, *supra*, at para. 44 that the driver had failed to pull over as he was required to do after the police had signaled the traffic stop pursuant to section 83(1) of the **Motor Vehicle Act** of Nova Scotia. If Mr. Cooper, who was a passenger in the car, had stayed by the car after the driver ran off to evade the police, there would have been no objective basis upon which an officer could infer reasonable grounds to detain Mr. Cooper. However, Fichaud J.A. agreed with the trial judge that Mr. Cooper's conduct in fleeing from the police after he "bailed out" of a car moving at 20 km/h, and then running through backyards to evade the police gave the

police an objective basis to suspect that he was connected or implicated in what the police reasonably believed to be the offence for which they had signaled the traffic stop.

[156] Like Mr. Cooper, in this case Mr. Fraser and Mr. Williams ran off almost immediately after the BMW flipped over on its passenger side. Mr. Thomas was apprehended as he was exiting from the BMW's sunroof. I find that these actions provided further objective basis to the police officers to believe that the actions of the three accused were suggestive of some sort of wrongdoing and warranted their detention in order to conduct further investigations. After some further investigation, the police officers verified that Mr. Fraser was subject to two warrants of arrest and they identified Mr. Williams as the driver of the white BMW and, as a result, it was alleged that he had committed three driving offences in the Information. Furthermore, a search of the white BMW incident to the arrest of all three accused resulted in the discovery of a loaded, restricted firearm which led to a series of firearms charges alleged to have been committed by the three accused in this case.

[157] For all of the foregoing reasons, I find that Det/Cst. Travis, Cst. Jardine, Cst. Kincade and Cst. Veinotte were, at all material times in this case, acting in the lawful execution of their duties under the **Criminal Code**, the **Motor Vehicle Act** of Nova Scotia and the common-law.

[158] Having concluded that the police officers were acting in the lawful execution of their duties, the final essential element to be determined is whether the accused person resisted that peace officer who was in the lawful execution of his duties.

[159] Prior to analyzing the facts to determine whether the accused person resisted a peace officer, it is important to remember that an arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. An arrest can also occur when by words or conduct the police officer makes it clear that he or she will, if necessary, use force to prevent the individual from going where he may want to go: see **R. v. Asante-Mensah**, [2003] SCC 38 at paras. 43 to 46 (per Binnie J. for the unanimous court)

[160] In analyzing the evidence on this charge, it is important to note that the word "resists" is not defined in the **Criminal Code** for the purposes of an offence contrary to section 129(a) of the **Code**. Therefore, it is left to the common-law to determine what

matrix of facts would constitute "resisting" a peace officer in the execution of his or her duties.

[161] According to the **Canadian Oxford Dictionary**, Oxford University Press Canada 2001, the transitive form of the verb "resist" means "to strive against; try to impede; refuse to comply with (resist arrest);" while the intransitive form means to "offer opposition; refuse to comply."

[162] Having determined the definition of "resists" in this context, it is possible to move on to analyze whether the accused "resisted" a peace officer in the execution of his duties. First, with respect to Mr. Thomas, I accept the evidence of Det/Cst. Travis that he physically touched Mr. Thomas and accompanied that action with words to convey clearly to Mr. Thomas that he was under arrest and would use force, if necessary, to restrain and detain him. I accept Det/Cst. Travis's evidence that he told Mr. Thomas to stop when he tried to "wiggle away" from the police officer and that he had to hold Mr. Thomas's arms and use force to hold him back from fleeing away from the BMW. In these circumstances, I find that the physical resistance of Mr. Thomas establishes that he intentionally strived against the actions of Det/Cst. Travis. In doing so, I find that he "resisted" the police officer which caused Det/Cst. Travis to exert additional force and require the assistance of another police officer to bring Mr. Thomas under his control and secure him for transportation to the police station. As a result, I find that the Crown has established all of the essential elements of the resisting charge contrary to section 129(a) of the **Criminal Code** in relation to Mr. Thomas, and I find him guilty of this offence.

[163] With respect to Mr. Williams, I have concluded that he was the driver of the BMW on the evening of July 2, 2010, and as such, starting from the moment that Det/Cst. Travis and Cst. Jardine activated their emergency lights and sirens to signal a traffic stop, Mr. Williams was subject to their ongoing direction to pull over and stop his vehicle. Rather than stop the white BMW that he was driving, I have previously found that Mr. Williams' intentional actions, in accelerating to drive the BMW speeds estimated to be between 100 km/h and 140 km/h as well as driving in an objectively dangerous manner, were taken to evade those two police officers' direction to stop his vehicle as soon as reasonable in all the circumstances. Once the BMW flipped over onto its passenger side, I find that Mr. Williams' intentional action of running away from the scene of the accident and continuing to run despite the fact that Cst. Jardine and Cst. Veinotte had identified themselves as police officers and on several occasions directed him to stop and that he

was under arrest, established beyond a reasonable doubt that he "resisted" those officers in the lawful execution of their duty by refusing to comply with their directions.

[164] In the case of Mr. Williams, the count in the Information specifies that he resisted Cst. Jardine and Det/Cst. Travis. As I have indicated in the preceding paragraph, I am satisfied beyond a reasonable doubt that Mr. Williams resisted Cst. Jardine and Det/Cst. Travis, during the high speed pursuit of the white BMW and he resisted Cst. Jardine and Cst. Veinotte during the shorter pursuit on foot. Although Det/Cst. Travis was not directly involved in the foot pursuit of Mr. Williams, I find that he and Cst. Jardine had radioed for assistance and based upon that request for the assistance, other police officers became involved in the high speed pursuit of the BMW and then the pursuit of two individuals on foot after the BMW ended up on its passenger side. Once those other officers became involved in the pursuit of the BMW at the request of Det/Cst. Travis and Cst. Jardine, I find that the other officers, in particular Cst. Veinotte who were "lawfully in acting in aid" of those two named peace officers in the Information. Therefore, I find that Mr. Williams directly "resisted" Cst. Jardine and indirectly "resisted" Det/Cst. Travis who had made a request for other officers to assist him. As a result, I am satisfied beyond a reasonable doubt that the Crown established all of the essential elements of this section 129(a) **Criminal Code** charge and I find Mr. Williams guilty of this charge.

[165] Finally, with respect to Mr. Fraser's charge contrary section 129(a) of the **Code**, his situation is in many respects similar to that of the accused in **Cooper**, *supra*, at para. 44. As I indicated previously, the source information with respect to the possession of a firearm related to Mr. Thomas and Mr. Williams' failure to pull over as soon as possible and stop after the signaled traffic stop provided objective bases for the police to detain and arrest those two individuals. I have found that Mr. Fraser was a passenger, he did not drive the car at high speeds, nor did he take the actions to evade the police vehicles. Mr. Fraser could have stayed beside the car as he did not have the same legal responsibilities to stop and provide details as the driver. However, when Mr. Fraser ran off, his conduct gave the police an objective basis to suspect that he was connected or implicated in what the police reasonably believed to be the main purpose for conducting the traffic stop for an investigative detention in respect of possession of a firearm.

[166] In terms of Brandon Fraser, I find that Mr. Fraser's intentional action of running away from the scene of the accident with Cst. Kincade in pursuit and then attempting to

conceal himself in the bushes in the vicinity of where the BMW had flipped over onto its passenger side, established how he "resisted" a peace officer in the lawful execution of his duties by striving against and impeding the officer's efforts to locate him and ultimately arrest him. With respect to this charge, I note that the allegation contained in the Information is not alleging that Mr. Fraser resisted arrest, but rather, he resisted a peace officer in the execution of his lawful duties. I find that Mr. Fraser's actions in fleeing from the scene of the accident and then attempting to conceal himself from Cst. Kincade who was pursuing him on foot constitutes "resistance" in that he impeded or tried to impede Cst. Kincade's efforts to locate and detain him.

[167] During the submissions of Defence counsel in relation to this charge, counsel submitted that Mr. Fraser should be acquitted of this charge because he did not resist Det/Cst. Travis or Cst. Jardine when he exited from the sunroof of the BMW and fled on foot. However, with respect to this charge, I find that the same circumstances exist as I concluded with respect to the section 129(a) charge against Mr. Williams. In these circumstances, I find that, as the traffic stop was about to be conducted and during the high speed chase, Det/Cst. Travis and Cst. Jardine contacted other officers in the area for assistance in the pursuit of the BMW. One of those other officers who responded to their request for assistance was Cst. Bradley Kincade who was in full uniform in a marked police car with his partner, Cst. Matthew Veinotte. Once those other officers became involved at the request of Det/Cst. Travis and Cst. Jardine, I find that the other officers, in particular with respect to this charge, Cst. Kincade was "lawfully in acting in aid" of those two named peace officers in the Information. As a result, I find that Mr. Fraser's actions in resisting the police officer's efforts to locate and detain him, were intentional and based in part on the fact that he knew there were two outstanding warrants for his arrest. I find that Mr. Fraser's actions directly "resisted" the lawful execution of the duties of Cst. Kincade and in so doing, he had also indirectly "resisted" Det/Cst Travis and Cst. Jardine who had radioed their request to other officers to assist them in the pursuit, location and detention of Mr. Fraser. As a result, I find that the Crown has satisfied beyond a reasonable doubt all of the essential elements of the charge contrary to section 129(a) of the **Code**, and I find Mr. Fraser guilty of this charge.

[168] In addition, with respect to Mr. Fraser, he was also charged with two other offences which alleged breaches of a probation order made on March 31, 2009 in that he failed to comply with two conditions in that order contrary to section 733.1(1)(a) of the **Criminal Code**. One of those charges relates to his failure to "keep the peace and be of

good behavior" while the other one alleged that he had failed to comply with the probation order which stipulated that he was "not to own, possess or carry a weapon, ammunition or explosive substance or any other weapon as defined by the **Criminal Code**". In view of my decisions involving the firearms charges facing Mr. Fraser, I hereby acquit Mr. Fraser of the charge that he failed to comply with his probation order by possessing or carrying any weapons, ammunition or explosives substances. However, in view of fact that I have found Mr. Fraser guilty of the charge contrary to section 129(a) of the **Criminal Code**, I am satisfied beyond a reasonable doubt that he did willfully fail, without reasonable excuse, to comply with the condition in the probation order dated March 31, 2009 which required him to "keep the peace and be of good behavior." As a result, I find him guilty of that breach of probation charge contrary to section 733.1(1) (a) of the **Criminal Code**.