NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Muise***, 2015 NSCA 54

Date: 20150603
Docket: CAC 416537
Registry: Halifax

Between:

Cody Alexander Muise

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Fichaud and Beveridge, JJ.A.
Appeal Heard:	May 14, 2015, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Fichaud, J.A.; Saunders and Beveridge, JJ.A. concurring
Counsel:	Roger A. Burrill, for the Appellant Mark Scott, for the Respondent

Reasons for judgment:

[1] Cody Muise and Brandon Hatcher had a history. They were in rival drug gangs. Dealing narcotics is a volatile avocation. Mr. Muise believed that Mr. Hatcher had twice tried to kill him. On December 3, 2010, they had a showdown outside Mr. Hatcher's home. Mr. Muise brought his loaded .30 calibre carbine semi-automatic rifle. Mr. Hatcher had a sawed-off pump-action shotgun. Mr. Hatcher fired first. But he missed. Mr. Muise shot back twice, killing Mr. Hatcher. Mr. Muise was tried for first degree murder. He claimed it was self-defence. The jury convicted Mr. Muise as charged.

[2] On appeal, Mr. Muise submits that the trial judge incorrectly charged the jury. He says that the judge's instruction on whether Mr. Muise's act was unlawful restricted or confused the jury's appreciation of self-defence. He requests a new trial.

Background

[3] On the evening of December 3, 2010, Brandon Hatcher bled out from a gunshot at his home in Spryfield.

[4] After a police investigation, Cody Muise was taken into custody. On March 16, 2011, Mr. Muise was charged with first degree murder contrary to s. 235(1) of the *Criminal Code*. He was remanded throughout the proceedings. After a preliminary inquiry in December, 2011, he was committed for trial. The Indictment, dated January 24, 2012, charged him with first degree murder.

[5] Justice Peter Rosinski of the Supreme Court of Nova Scotia was the trial judge.

[6] Over 22 days in April and May, 2013, Mr. Muise was tried before a jury in Halifax. Justice Rosinski conducted several *voir dires* on a hearsay exception, and *Corbett* and *Scopelliti* applications. The Crown called numerous witnesses, including Ryan MacDougall, an accomplice who participated in the shooting. The defence called Mr. Muise and Matthew Munroe. Mr. Munroe, another accomplice, had been tried as a youth, convicted of first degree murder, and sentenced as an adult.

[7] The accounts of Messrs. Muise, MacDougall and Munroe were largely consistent. I will cite the testimony of Mr. Muise.

[8] Mr. Muise was 21 years old in December 2010. He and Brandon Hatcher had known each other since junior high school.

[9] On cross-examination, Mr. Muise testified that he worked in the drug trade. He had two guns - a revolver and rifle. The rifle was the "good one". It could "do serious damage". He kept his weapons, bullet proof vest and cocaine at Mr. MacDougall's house.

[10] In October, 2010, someone shot Mr. Muise's girlfriend Sarah. Mr. Muise thought Mr. Hatcher had done it. He testified Mr. Hatcher "[c]alled me and bragged about it, so, yeah, I knew." On November 23, Messrs. Muise and Hatcher exchanged threatening texts.

[11] On December 3, 2010, at around 5 p.m., Mr. Muise was walking home on the Herring Cove Road. He received a mobile phone call from Mr. Munroe that their friend Colin Gillis had been shot. The shooting occurred on the premises where Mr. Muise had been shortly before. Mr. Muise testified, on cross-examination:

> **Q.** So it didn't disturb you at all that, you know, bullet or bullets, I don't know, just came through a house where you were shortly before that?
>
> **A.** Actually, it did. I believe that I was the target of the shooting.
>
> **Q.** Okay. Right. So you thought they were after you, whoever "they" were.
>
> **A.** Yeah.
>
> **Q.** And you thought they were after you when Sarah was shot on Spencer in October. Right?
>
> **A.** Yeah.
>
> **Q.** So two times you think someone is after you and has hit either a friend or girlfriend of yours. Right?
>
> **A.** Yes.

[12] After learning of Mr. Gillis' shooting, Mr. Muise met with Mr. Munroe and others. Mr. Muise testified, on direct:

> … One of us, I can't remember who, I think it might have been me, got a hold of Ryan MacDougall because he had one of my guns and a bullet proof vest at his house. Told him to bring it to me. And a short time later, he did. He did bring it.

On cross-examination, Mr. Muise testified:

> **Q.** So you're setting the wheels in motion. Right? You're making a plan. What am I going to do about this? No?
>
> **A.** If you say so.
>
> **Q.** That's funny? After Sarah was shot, did you call Ryan for your "good one" and your bullet proof vest?
>
> **A.** Actually, I got sent to jail.
>
> **Q.** Okay. So this is different. You are doing something about it. Right?
>
> **A.** Yeah. I was planning on scaring him, I guess.
>
> **Q.** Right.
>
> **A.** Give him a taste of his own medicine.

[13] Mr. Muise took his loaded rifle to Mr. Hatcher's neighbourhood. In his entourage were Mr. MacDougall with a shotgun and Mr. Munroe with a pistol. The mood was nonchalant. Mr. Muise said they were "walking, joking … [w]e did some cocaine … probably carrying on".

[14] Mr. Muise described the approach:

> **A.** … We walked up and down Regan Drive. I knew what area like his house was in, but I wasn't a hundred percent sure what house was his. None of us knew exactly what house. We kind of had an idea, so we were kind of just … we were just kind of floating around, looking around.
>
> …
>
> **Q.** And what was it that you were looking for?
>
> **A.** We were looking for Brandon Hatcher's house, well signs of his house if we could, you know, narrow it down, whatever.
>
> …
>
> **Q.** Okay. How long passes while you're walking around then?
>
> **A.** Probably about 20 minutes, roughly, give or take. About 20 minutes goes by. …

[15] Mr. Muise's phone rang. It was Mr. Hatcher. Then:

> **A.** I answered the phone. He said something stupid that pissed me off. Where are you at, you little goof, or something like that. And I said, I'm out back. I heard the phone hang up. And when he hung the phone up, I was … I just got the impression that he was coming out pretty fast, so I kind of … we were just … we were like standing there in the open. We were right on the street.
>
> So I'm kind of looking around and we see some rocks. There were some rocks on the gravel on the other … like on the other side of the road. And we kind of run … we all kind of run towards the rocks for like cover. And we just get to the rocks and I'm kind of like … I'm kind of looking down at the fence to see if he's coming. Right? And I see a figure … like a dark figure come … like kind of lean out from the fence … from the side of the fence. It was hard to see. It was dark. But I could see like … I could see the figure. Right? I could clearly see it. It was dark. It was just like a figure. Right?
>
> And Munroe … Munroe, I think, said, Get down. And as soon as he said that, I heard a loud … a very loud bang. I think it kind of echoed from ... between the two houses. And, yeah, the gunshot went off and I was kind of ducked under the rock and I just … I panicked. Instinct … my instinct took over and I just … I returned fire over the rock. I just squeezed the trigger. A burst of gunfire came out.
>
> I only squeezed the trigger once. It caught me off guard. It was like a long burst, probably like five or six shots. And I stopped for a second and then I squeezed one more as I was getting up and running, another burst. And then we all just … we all just ran.

[16] Mr. Hatcher was hit. He made his way back to his residence on Lavender Walk and collapsed.

[17] At 8:38 p.m. that evening, Cst. Brad Murray of the Halifax Regional Police responded to a call that there had been a shooting in the Greystone area in Halifax. He found Mr. Hatcher lying on his back in the upstairs hallway of 123 Lavender Walk. Mr. Hatcher was bleeding from a gunshot to his back, and died within an hour.

[18] At the trial, after the close of the evidence, counsel for the Crown and defence discussed with Justice Rosinski what should be left for the jury. The judge decided to leave first degree murder, second degree murder and manslaughter as included offences, and the defence of self-defence. He rejected the Crown's submission that self-defence had no air of reality.

[19] Later I will discuss the jury charge.

[20] On May 9, 2013, the jury returned with a verdict of guilty to first degree murder.

[21] Mr. Muise appealed.

Issues

[22] Mr. Muise's Amended Notice of Appeal says that the "trial judge erred in his instructions to the jury with respect to the elements of first degree murder, the included offence of manslaughter, and the application of self-defence thereto". His factum repeats that ground.

[23] The Crown disagrees and argues, in the alternative, that self-defence had no air of reality and, in any case, the proviso in s. 686(1)(b)(iii) applies.

Analysis

[24] Mr. Muise focusses on this sentence from the judge's charge:

> Now in the circumstances of this case, I can tell you that as a matter of law the manner in which Mr. Muise used his rifle on December 3rd, 2010 is an unlawful act. [Charge to jury, p. 66]

[25] Mr. Muise urges that the direction was wrong in law, or at best confusing, and the judge's earlier comments were too abstract and those later did not alleviate the confusion. Mr. Muise's counsel bolsters his submission with the judge's direction earlier in the charge:

> Your second duty is to accept all the rules of law that I tell you apply in this case. Even if you disagree with them or do not understand the reasons for the law, you are required to follow what I say about it. You are not allowed to pick and choose among my instructions on the law. [Charge to jury, pp. 5-6]

Mr. Muise submits that these passages directed the jury to find against him on the very point – unlawfulness – that underscored his claim of self-defence, and effectively took self-defence from the jury. He says the judge should have made it clear that, if Mr. Muise acted in self-defence, then his actions were not "unlawful".

[26] Mr. Muise's factum explains:

> **52** The trial judge, at this point, mentioned the concept of "justifiable" self-defence – but only after he had declared that the use of the rifle, as a matter of law, was an unlawful act. [Underlining in factum]
>
> …
>
> **57** The appellant submits that the charge, as so presented, was in error. And, when the decision tree questions were introduced, the jury could only have been left in considerable confusion as to the proper sequencing and consideration of the evidence. They were informed that they were required to find that the appellant had caused the death "unlawfully". Then, they were promptly informed that the discharge of the firearm in this case was, indeed, an "unlawful act". They were informed, in different portions of the charge, about the "justification" of self-defence. The trial judge did not properly explain the impact of a "justification" on the constituent element of unlawfully causing the death of Mr. Hatcher; which, the trial judge had clearly identified was, as a matter of law, an unlawful act. The two were not appropriately connected to inform the jury's decision-making. There was no meaningful discussion about how this discharge of the firearm could lose its deemed "unlawful act" status if "justified". …

[27] Mr. Muise's factum submits that the judge's instructions later in the charge were too little, too late:

> **88** … The horse had left the barn by his previous judicial determination of unlawfulness.
>
> …
>
> **92** The trial judge never clearly explained the linkage of a "justification" as it related to the unlawfulness of the act. To the untrained legal mind, the difference between a defence, a justification, and how an unlawful act could be impacted would be confusing at best. The jury may have come to the conclusion that the Crown had not satisfied them beyond a reasonable doubt that the justification did not apply, but given that the act was deemed "unlawful" anyway, on the direction of the judge, it could make no difference. The trial judge was obligated to ensure that there was no confusion in this regard.

[28] Mr. Muise cites *R. v. Baker* (1988), 45 C.C.C. (3d) 368 (B.C.C.A.), *R. v. Cinous* (2000), 143 C.C.C. (3d) 397 (Q.C.A.), appeal allowed on other grounds [2002] 2 S.C.R. 3, and the concurring reasons of Justice Deschênes in *R. v. O'Brien*, 2003 NBCA 28. These authorities support the principles that self-defence pertains to "unlawfulness", and the judge's instruction on "unlawfulness" should not neutralize or narrow the jury's scope to consider self-defence.

[29] In *Baker*, Justice Lambert for the Court said:

… where self-defence is raised in a homicide case it must be considered as part of the decision about whether the accused's act was unlawful and culpable and not as a separate matter following a conclusion that the accused's act was unlawful and culpable.

[30] In *Cinous*, Justice Biron for the Court of Appeal expanded:

> [44] I note immediately that in relation to the second condition, the judge said [original in English]:
>
> > May I tell you that, as a matter of law, to discharge a firearm at any person with intent to wound or to endanger the life of a person is an unlawful act.
>
> [45] The judge thereby completely eliminated self-defence, in a case where it was the only defence raised. With respect, he risked creating confusion in the minds of the jurors. As we will see, the jurors asked a question shortly after the beginning of the deliberations, wanting to know whether an act posed in self-defence constituted an unlawful act. After indicating that he was not certain that he understood the question, the judge fortunately accepted the suggestion of Crown counsel to tell the jurors that they were first to decide whether the appellant acted in self-defence and it was only in the event of a negative response to that question that they were to examine whether the constituent elements of the offence of first degree murder were proven beyond any reasonable doubt. He specified that a positive response to the question of whether self-defence was established must lead to an acquittal.
>
> …
>
> [63] … The judge clearly committed an error in providing them with the instruction that firing a gun at someone with the intention of injuring them or placing their life in danger constituted an illegal act, without immediately pointing out the exception which self-defence constituted. Fortunately, the question from the jury allowed the judge to clarify the point.

[31] In *O'Brien*, Justice Deschênes, concurring, wrote in a similar vein:

> **154** … To inform the jury that "in the circumstances, carrying a loaded firearm is an unlawful act" may well be correct. However, in the absence of instructions on the issue as to whether or not the use of the handgun could be justified under s. 34(1), the comment that the "carrying" of a loaded firearm is an unlawful act effectively means that self-defence was not available irrespective of the purpose for pulling it out. In view of such instructions, the jury might have wondered why the defense of self-defense was left for their consideration in the first place.
>
> **155** In such circumstances, it was incumbent upon the trial judge to instruct the jury, in clear and unambiguous language, that if they were satisfied (or had a reasonable doubt in that regard) that the use of the handgun by pulling it out in the circumstances was justified as an act of self-defense under s. 34(1), then Mr.

> O'Brien was not engaged in an unlawful act or conduct and that such a conclusion would lead to an acquittal. …

[32] From the other perspective, in *R. v. Laverty*, [1996] 3 S.C.R. 412, the Supreme Court endorsed the reasons of the majority in the British Columbia Court of Appeal – (1995), 60 B.C.A.C. 280. Justice Gonthier for the Court said:

> Substantially for the reasons of McEachern, C.J. and Hollinrake, J.A., we are all of the view that this appeal as of right should be dismissed.

The trial judge had instructed the jury that the verdict should be "not guilty, simply not guilty of everything, if self-defence succeeds". The Court of Appeal held that this allayed the concern in *Baker*, *supra*, that the judge's independent direction on "unlawfulness" had predetermined or restricted the scope of self-defence. Chief Justice McEachern and Justice Hollinrake wrote separate concurring reasons for the majority. Chief Justice McEachern said:

> **28** … At the beginning of his charge the trial judge instructed the jury that if the defence of self-defence succeeds, the appellant "…must be found not guilty, simply not guilty of everything…". I believe that is a correct statement of the law.
>
> …

As to unlawfulness and self-defence, Chief Justice McEachern added:

> **43** … This is always a problem when it is necessary to organize a jury instruction by starting with the ingredients of murder and to then proceed through the defences of provocation and self-defence. The concepts become almost circular when it is recognized that the murder provisions depend in part upon unlawful acts, and self-defence, if accepted by the jury, converts what would otherwise be an unlawful act into a justified act, and, therefore, not unlawful. In this respect I agree with what Mr. Justice Hollinrake has said in his Reasons for Judgment on this appeal.

Justice Hollinrake elaborated:

> **54** It is true that this charge did not set out the law as enunciated by Mr. Justice Lambert in *Baker*. However, in my opinion, while the charge in the *Baker* case led to the conclusion of Mr. Justice Lambert quoted above, I do not think, with respect, that there was error on this count in the charge before us. I say this because in my opinion there is a substantial difference in the charge before us and that in *Baker*.
>
> …

[Quoting the charge in *Baker*, and Justice Lambert's reasons]

58 It can be seen from this quote that the problem created by the charge in *Baker* was that the jury would approach "the self-defence question with their minds already made up that the accused's act was culpable,"

59 However, in the case before us, while dealing with s. 222(5) of the *Code* and manslaughter and second degree the judge said:

> Now, apart altogether from self-defence, and I will deal with that entirely separately, if the Crown proves these four steps, then the Crown has proved that Shawn Laverty is guilty of manslaughter. If the Crown, in addition to this, proves beyond a reasonable doubt certain specific intentions, then the Crown has proved that Laverty is guilty of second degree murder.

60 Having concluded that part of his charge the judge then said:

> In this trial you heard evidence that raises the defence of self-defence. If the defence of self-defence succeeds, Laverty must be found not guilty, simply not guilty of everything, if self-defence succeeds.

61 With these above quoted instructions before the jury I can see no confusion and in particular cannot see the deliberations of the jury on culpability in any way interfering with the deliberations on the self-defence sections of the *Code*. As I read *Baker* this was the concern of the Court in reaching the conclusion it did on the charge as it related to culpable homicide and justification under s. 34.

62 As I read the charge before us the jury was instructed to consider, in the absence of any possible justification by way of self-defence, whether the homicide could be said to be culpable. The judge then referred to s. 34 and told the jury that if the defence of self-defence succeeds there must be a verdict of "not guilty of everything".

63 In my opinion, putting the issue of justification by way of self-defence before the jury as he did, it would have been clear in their minds as to what the task before them was as a matter of law. I am unable to see in the charge before us any risk that it would have led to the jury in any way being confused on the issues of culpability and self-defence or in any way being led into error. That being so, I see no error in the charge on this count.

[33] As I will set out momentarily, Justice Rosinski's charge spoke of self-defence as "justification" for Mr. Muise's actions. The Crown cites authority that self-defence is properly termed a "justification" defence: *Perka v. The Queen*, [1984] 2 S.C.R. 232, pp. 241, 246-47; *R. v. Ryan*, [2013] 1 S.C.R. 14, para. 24; *R. v. Cinous, supra*, S.C.R., para. 124.

[34] All these authorities are helpful to assess the submissions. But ultimately Mr. Muise's appeal turns on the application of basic principles to the wording of Justice Rosinski's charge in the circumstances of Mr. Muise's trial.

[35] The trial judge "must set out in plain and understandable terms the law the jury must apply when assessing the facts": *R. v. Daley*, [2007] 3 S.C.R. 523, para. 32, per Bastarache, J. for the majority. Justice Bastarache described the appeal court's function:

> 30 When considering the adequacy of a trial judge's charge on these elements, it is important for appellate courts to keep in mind the following. The cardinal rule is that it is the general sense which the words used must have conveyed, in all probability, to the mind of the jury that matters, and not whether a particular formula was recited by the judge. The particular words used, or the sequence followed, is a matter within the discretion of the trial judge and will depend on the particular circumstances of the case.
>
> 31 In determining the general sense which the words used have likely conveyed to the jury, the appellate tribunal will consider the charge as a whole. The standard that a trial judge's instructions are to be held to is not perfection. The accused is entitled to a properly instructed jury, not a perfectly instructed jury: see *Jacquard* [*R. v. Jacquard*, [1997] 1 S.C.R. 314], at para. 2. It is the overall effect of the charge that matters.

[36] The succinct issue is whether, "in the context of the whole charge", there is a reasonable possibility that the jury may have been misled: *R. v. Brydon*, [1995] 4 S.C.R. 253, paras. 21 and 25, per Lamer, C.J.C. for the Court. See also *R. v. Gallie*, 2015 NSCA 50, paras. 54-55.

[37] Normally, unless there appears a reason to do otherwise, the appeal court credits the jury with the reasonable acuity to absorb the gist of the judge's directions and the good sense to follow them: *R. v. Corbett*, [1988] 1 S.C.R. 670, paras. 41-48, per Dickson, C.J.C.; *R. v. Ward*, 2011 NSCA 78, paras. 37-39, leave denied August 14, 2014 (S.C.C.); *R. v. Greenwood*, 2014 NSCA 80, para. 143; *R. v. Gallie*, *supra*, para. 38; *R. v. Elkins*, [1995] O.J. No. 3228 (C.A.), para. 27, per Doherty, J.A.; *R. v. Suzack*, [2000] O.J. No. 100 (QL) (C.A.), at para. 128, per Doherty, J.A.; *R. v. Carrière*, [2001] O.J. No. 4157 (C.A.), at para. 42, per Doherty, J.A..

[38] In Mr. Muise's trial, what did the "whole charge" say about the interplay of self-defence and unlawfulness? In the walk through the charge, I will bold the most pertinent instructions.

[39] Early on, Justice Rosinski discussed the requirements of a verdict. For self-defence, he directed:

> Similar considerations apply to **self-defence which is available for you to consider** in this case. Self-defence also has, if you will, essential elements.
>
> In this case, self-defence has the following essential elements:
>
> (1) Was Mr. Muise unlawfully assaulted by Brandon Hatcher, or did he reasonably believe that he was unlawfully assaulted by Brandon Hatcher?
>
> (2) Did Mr. Muise use force against Mr. Hatcher because he reasonably feared, both on a subjective and objective basis, that Mr. Hatcher would kill or seriously injure him?
>
> (3) Did Mr. Muise use force against Mr. Hatcher because he reasonably believed, both subjectively and objectively, that he could not otherwise save himself from being killed or seriously injured by Mr. Hatcher?
>
> In this case, the Crown has the onus to prove beyond a reasonable doubt that the answer to at least one of these essential elements of self-defence is "no". **If it does not satisfy you of that, then Mr. Muise is entitled to be acquitted**. Put another way, if you conclude unanimously that you have a reasonable doubt about each of these essential elements, then Mr. Muise can rely on self-defence in this case and **must be acquitted**.
>
> Therefore, for you to reject self-defence in this case, although you must all be unanimous ultimately in rejecting it, you do not all have to agree on which basis you reject self-defence. Some of you may find that you are satisfied beyond a reasonable doubt that the answer to question 1 is "no". Others may find that you are satisfied beyond a reasonable doubt that the answer to question 3 is "no".
>
> Self-defence is essentially **a legal justification to do an otherwise unlawful act.** As long as you are unanimous that the claimed self-defence has been proved beyond a reasonable doubt to not justify Mr. Muise's actions, then you can reject self-defence. That is, if you are satisfied beyond a reasonable doubt that the Crown has proved the answer is "no" for at least one of the essential elements of self-defence, then Mr. Muise's actions were not justified by self-defence. [Charge to jury, pp. 14-15] [bolding added]

[40] On the burden of proof, the charge included:

> As I indicated above, the Crown must prove the essential elements of the offence beyond a reasonable doubt and the Crown has also the burden to prove beyond a reasonable doubt at least one element of self-defence is missing to deny Mr. Muise the benefit of **the legal justification for his actions known as self-defence.** [Charge to jury, p. 16] [bolding added]

[41] After explaining the meaning of "reasonable doubt", the judge told the jury:

> Therefore, at the end of the case after considering all the evidence you are sure that Cody Muise committed on offence and was not justified in his claim of self-defence, you should find Mr. Muise guilty of it since you would have been satisfied of his guilt beyond a reasonable doubt.
>
> If at the end of the case based on all the evidence or the lack of evidence you are not sure that Mr. Muise committed the offence, or that **you are not satisfied beyond a reasonable doubt that he was not justified in his claim of self-defence, you should find him not guilty of it.** [Charge to jury, pp. 17-18] [bolding added]

[42] On the assessment of the evidence, the judge said:

> In assessing Mr. Muise's self-defence claim, Mr. Muise's personal experience with Mr. Hatcher is relevant when considering whether Mr. Muise had reasonable beliefs that he anticipated a risk of death or grievous bodily harm to himself as well as to whether Mr. Muise believed, reasonably believed that he could not otherwise preserve himself from death or grievous bodily harm at the time of the shooting of his M-1 rifle. However, do not let the anti-social aspects of Brandon Hatcher put you to thinking that he in some respects deserved what he got. **Except by a proper consideration of self-defence, no one's death should be seen as justifiable.** [Charge to jury, pp. 21-22] [bolding added]

[43] On Mr. Muise's testimony, the judge said:

> … if you believe Mr. Cody Muise's evidence that he did not commit the offence charged here, that is **you must find him not guilty** – that is, if there is no proof beyond a reasonable doubt of all the essential elements of the offence, **or no proof beyond a reasonable doubt that at least one element of self-defence is missing.**
>
> Even if you do not believe Cody Muise's evidence, if his evidence leaves you with a **reasonable doubt** about his guilt – that is, about an essential element of the offence as charged or the offence charged, pardon me … **or all the essential elements of self-defence, you must find him not guilty** of that offence. [Charge to jury, pp. 23-24] [bolding added]

[44] The judge summarized the elements of the offence:

> In summary, **the controversial essential elements** of the offence in this case are that Cody Muise:
>
> (1) caused the death of Brandon Hatcher;
>
> (2) that Cody Muise **caused the death of Brandon Hatcher unlawfully**;

(3) that Cody Muise had the state of mind required for murder; and

(4) that his murder of Brandon Hatcher was both planned and deliberate.

[Charge to jury, p. 37] [bolding added]

…

So regarding first-degree murder, **Crown counsel must prove beyond a reasonable doubt each of the following essential elements:** (1) that Cody Muise caused the death of Brandon Hatcher; (2) **that Cody Muise caused the death of Brandon Hatcher unlawfully**; (3) that Cody Muise had the state of mind required for murder. And I'll tell you at this point there are two possibilities. And fourthly, that Cody Muise's murder of Brandon Hatcher was both planned and deliberate.

If the Crown has not satisfied you beyond a reasonable doubt of each of these, then **Mr. Muise is not guilty** of first degree murder. If the Crown has satisfied you beyond a reasonable doubt of each of these essential elements, then you must find Mr. Muise guilty of first-degree murder. [Charge to jury, p. 64] [bolding added]

[45] The judge then elaborated on the four elements of the offence. On the second element – that Mr. Muise caused the death "unlawfully" – the charge included the pivotal sentence cited for Mr. Muise's submission on appeal (above, para. 24):

Second question. *Did Cody Muise cause Mr. Hatcher's death unlawfully?* [Italics in the Charge] It is not always a crime to cause another person's death. It is a crime, however, to cause the death of another person by an unlawful act.

Now in the circumstances of this case, **I can tell you that as a matter of law the manner in which Mr. Muise used his rifle on December 3rd, 2010 is an unlawful act. However, that is not the end of the matter as to whether he caused Mr. Hatcher's death unlawfully**. **His unlawful act may be legally justifiable if he acted in self-defence. And I will turn to that later.** [Charge to jury, p. 66] [bolding added]

[46] Before returning to self-defence, the judge completed his directions on the third and fourth elements of the offence – Mr. Muise's state of mind and whether he acted with planning and deliberation. Then the judge discussed the included offence of manslaughter. His directions on manslaughter re-introduced the topic of "unlawfulness":

… For you to find Mr. Muise guilty of manslaughter, **Crown counsel must prove** each of these essential elements beyond a reasonable doubt. Normally, the Crown would be required to prove **that Mr. Muise committed an unlawful act.**

> Now I can tell you **as a matter of law that the manner in which he used his firearm on December 3rd, 2010 – that is, by shooting toward the direction of Brandon Hatcher as he did – is sufficient to say in law that Mr. Muise did commit an unlawful act. So you need not consider yourself with that**. However, your attention will be focused on whether, in shooting towards the direction of Mr. Brandon Hatcher, did he – that is, Mr. Muise – do an act that any reasonable person in the circumstances would think likely to put Mr. Hatcher at risk of some harm or injury that is more than minor in nature. If Crown counsel has not satisfied you beyond a reasonable doubt of this element, then you must find Mr. Muise not guilty of manslaughter. [Charge to jury, p. 72] [bolding added]

[47] Then, as promised earlier, Justice Rosinski revisited self-defence. I will quote only some relevant extracts of a lengthy instruction on the topic:

> Now next I am going to turn to the **self-defence provision** [bolding in Charge] which is another major issue you have to consider. **Usually it is unlawful** for anyone to intentionally apply force to anyone else by any means without the other person's consent. **However, our law allows to use force in defending ourselves from attack. Anyone who applies force to another person to defend himself commits no crime when his conduct comes within the limits the law imposes.** Each of you may have your own idea of what self-defence includes. Under our law, however, self-defence is not a loose term. Quite the contrary, there are limits on when and how much force may be used to defend ourselves. Self-defence arises from the need for self-preservation. It must not be used to get revenge on or get even with someone else.
>
> In this case, there has been evidence that Cody Muise may have acted in self-defence. It is not Mr. Muise's responsibility to prove that he was justified in using the force. **It remains the Crown's responsibility to prove beyond a reasonable doubt that Cody Muise was not justified in using the force.** Later, I will give you a list of questions that relate to each basis of this defence. And this will be included in the decision tree that I mentioned.
>
> … An accused who intentionally kills or seriously injures their attacker in **lawful self-defence** if they reasonably feared death or serious injury from the violence of the original or continued assault, and reasonably believed that they could not otherwise save themselves from death or serious injury.
>
> An accused who intentionally kills or seriously injures someone in **lawful self-defence must be found not guilty because they have committed no crime**. An accused does not have to prove that they were acting in self-defence. Crown counsel must satisfy you beyond a reasonable doubt that the accused was not acting **in lawful self-defence**.

> To decide whether Mr. Muise was acting in **lawful self-defence**, you may have to consider as many as three issues. Each issue may be converted into a question for you to answer.
>
> (1) Was Cody Muise unlawfully assaulted by Brandon Hatcher or did he reasonably believe that he was being unlawfully assaulted by Brandon Hatcher?
>
> (2) Did Cody Muise use force against Brandon Hatcher because Cody Muise reasonably – and that is, subjectively and objectively viewed – feared that Mr. Hatcher would kill or seriously injure him?
>
> (3) Did Cody Muise use force against Mr. Hatcher because Mr. Muise reasonably – that is, viewed objectively and subjectively – believed that he could not otherwise save himself from being killed or seriously injured by Mr. Hatcher?
>
> [Charge to jury, pp. 73-75] [bolding added]

The judge then elaborated on those three questions. Seven times the judge termed the issue as whether Mr. Muise acted in "lawful self-defence". [Charge to jury, pp. 74-82]

[48] The judge then explained his "Decision Tree". On the issue of "unlawfulness", the judge said:

> Did Cody Muise cause Brandon Hatcher's death unlawfully?
>
> As I said to you, as a matter of law Mr. Muise's use of his firearm on December 3rd, 2010 in **the manner that he used it is an unlawful act. Therefore, you go on to consider self-defence**, and that is in the box immediately below that.
>
> **The question is: Does self-defence apply as a justification** for Mr. Muise's having caused the death of Brandon Hatcher? **If you find it is a justification, then the verdict, final verdict is not guilty.** If you find that it is not a justification, then you go on to consider the next question. [Charge to jury, pp. 85-86] [bolding added]

[49] The written "Decision Tree" for the jury included self-defence in question # 2 under the discussion of unlawfulness:

> 2. Did *Cody Muise* cause *Brandon Hatcher's* death "*unlawfully*"?
>
> **[As a matter of law, Mr. Muise's use of his firearm on December 3, 2010, in the manner that he used it is an "unlawful act". Therefore you should go onto consider self-defence]**
>
> **↓ Consider**

> **Does self-defence apply** as a justification for Mr. Muise's having caused the death of Brandon Hatcher? → **Yes Final Verdict: Not Guilty**
>
> [… discussion of the three "Essential Elements of Self Defence]
>
> **NB** – the Crown has the burden to satisfy you beyond a reasonable doubt that at least one of these essential elements should be answered "NO". If the Crown does this, then go on to question (3.). **If the Crown does not do this, then you must find Mr. Muise "NOT GUILTY"** [Exhibit J-3] [bolding added]

[50] In response to a question from the jury, the judge referred to the Decision Tree and elaborated on the included offence of second degree murder:

> And the reality is that second-degree murder is not broken down itself because it is an included offence within first-degree murder. So if you go through all these steps straight down – that he caused the death, **caused it unlawfully, self-defence is rejected,** has these states of mind in number 3 – the only difference between second-degree and first-degree is planning and deliberation at that stage. [bolding added]

[51] In the context of this whole charge, is there a reasonable possibility the jury may have been misled? In particular, is it reasonably possible that the jury was left with the impression that the judge had neutralized or narrowed self-defence by directing the jury that Mr. Muise had acted "unlawfully"?

[52] In my respectful view, the answer to both questions is No.

[53] The critical sentence upon which Mr. Muise relies (quoted above, para. 45) says "as a matter of law the manner in which Mr. Muise used his rifle on December 3rd, 2010 is an unlawful act". At the appeal hearing, Mr. Muise's counsel agreed that, had the judge inserted "unless Mr. Muise acted in self-defence" before "as a matter of law", then Mr. Muise's ground of appeal would be "defused". But, counsel urged, the judge's omission of such an adjectival clause left the problematic free-standing sentence that founds this appeal.

[54] If that free-standing sentence had been the only instruction, then I would agree with Mr. Muise. The judge effectively would have taken self-defence from the jury. But the judge's next two sentences continued:

> However, that is not the end of the matter as to whether he caused Mr. Hatcher's death unlawfully. His unlawful act may be legally justifiable if he acted in self-defence.

[55] Those sentences connect self-defence to unlawfulness. They communicate the same message as the hypothetical adjectival clause: if he acted in self-defence, then his otherwise unlawful act is legally justifiable.

[56] That message is prominent throughout the charge and the accompanying written "Decision Tree". In the passages bolded above, the judge repeatedly and clearly instructed that, unless the Crown disproved self-defence, Mr. Muise's actions were "legally justifiable", "lawful", not "unlawful", and the jury's verdict must be "Not Guilty". In the context of the whole charge, the instructions clearly connected self-defence to both "unlawfulness" and the ultimate verdict of Not Guilty. There is no reasonable possibility that the jury retired with any other impression.

[57] Mr. Muise's case more closely resembles *Laverty*, *supra*, than *Baker*, *supra* (above, paras. 32 and 29).

[58] Mr. Muise cites *R. v. Gunning*, [2005] 1 S.C.R. 627. The accused, a homeowner who hosted a party, maintained that during an argument with an uninvited guest, his gun discharged accidentally, killing the guest. The trial judge instructed the jury that the underlying offence (careless use of a firearm) had been proven, meaning there was an "unlawful act". The jury convicted of second degree murder. The Supreme Court of Canada overturned the verdict and ordered a new trial. Justice Charron said:

> 31 Hence, it is never the function of the judge in a jury trial to assess the evidence and make a determination that the Crown has proven one or more of the essential elements of the offence and to direct the jury accordingly. It does not matter how obvious the judge may believe the answer to be. Nor does it matter that the judge may be of the view that any other conclusion would be perverse. The trial judge may give an opinion on the matter when it is warranted, but never a direction.
>
> …
>
> 35 It follows from the foregoing analysis that the trial judge erred in instructing the jury that the fourth ingredient of the offence of murder, or alternatively of manslaughter, had been proven by the Crown. In making the finding of fact that Mr. Gunning's use of the firearm on the morning in question was careless within the meaning of s. 86 of the *Criminal Code*, and hence an unlawful act that caused the death of Mr. Charlie, the trial judge usurped the exclusive domain of the jury. Rather than deciding the issue himself, it was incumbent upon the trial judge to instruct the jury on the law in respect of the offence of careless use of a firearm, including any defences that arose on the

> evidence, and to leave for the jury the ultimate application of the law to the facts. That issue, together with the question of whether there was an intent to kill, were central in this trial. Mr. Gunning was entitled to have a jury of his peers, not the judge, determine whether his use of the shotgun was unlawful and constituted a marked departure from the standard of care of a reasonably prudent person in his circumstances on the morning in question.

[59] Mr. Muise submits that Justice Rosinski's direction – "as a matter of law the manner in which Mr. Muise used his rifle on December 3rd, 2010 is an unlawful act" – similarly usurped the jury's function.

[60] I respectfully disagree. Justice Charron's comment does not suit Mr. Muise's trial.

[61] In *Gunning*, there were disputed issues of fact whether the gun discharged accidentally and, if so, whether the discharge was a marked departure from the standard of a reasonably prudent person. By directing on "unlawfulness", the judge took those issues from the jury. He should have instructed on the law, and allowed the jury to find the facts and apply those findings to the legal principles.

[62] In Mr. Muise's case, that concern did not arise. There was no issue whether he fired the gun. There was no issue whether it discharged accidentally. Though self-defence clearly was alive, there was no other issue whether Mr. Muise lawfully could fire his rifle at Mr. Hatcher on Lavender Walk in Spryfield. The outstanding issues for murder were whether his discharge of the rifle caused Mr. Hatcher's death, was it self-defence, did Mr. Muise have the required intent, and was it planned and deliberate. For manslaughter, the issues were self-defence and whether firing the gun was an act that a reasonable person would think is likely to put Mr. Hatcher at risk of more than minor injury. The judge squarely left all those issues for the jury in his charge and Decision Tree.

[63] In Mr. Muise's case, the only outstanding issue on "unlawfulness" was self-defence. As I have discussed, the judge did not take self-defence from the jury. Rather, the judge clearly and repeatedly instructed the jury that unless the Crown satisfied its burden to disprove self-defence, an issue to be determined solely by the jury, then the verdict should be Not Guilty.

[64] In my view the judge's charge does not contain an appealable error.

Conclusion

[65] It is unnecessary to consider the Crown's submissions that self-defence had no air of reality and that s. 686(1)(b)(iii) cures any error.

[66] I would dismiss the appeal.

Fichaud, J.A.

Concurred: Saunders, J.A.

Beveridge, J.A.